November 28, 2024

Honourable Steven Guilbeault
Minister of Environment and Climate Change
House of Commons
Ottawa, ON K1A 0A6

VIA EMAIL: ministre-minister@ec.gc.ca

Dear Minister Guilbeault:

Re: Request for Designation under *Impact Assessment Act* ("IAA") of Pathways Alliance's Pathways CO_2 Transportation Network and Storage Hub Foundational Project in Alberta ("Pathways Project" or the "Project")

1. INTRODUCTION

We write on behalf of our eight communities, Beaver Lake Cree Nation, Cold Lake First Nations, Frog Lake First Nations, Heart Lake First Nation, Kehewin Cree Nation, Onion Lake Cree Nation, and Whitefish (Goodfish) Lake First Nation #128 (collectively the "Nations"),[1] to request that you exercise your discretion to designate the Pathways Project under section 9(1) of the *Impact Assessment Act* (the "IAA").[2]

This is a massive and unprecedented project. It engages multiple areas of Federal jurisdiction as contemplated by the *Impact Assessment Act,* SC 2019, c. 28, with real risks of non-negligible adverse effects, including:

[1] See Appendix A for Nations contact information.
[2] *Impact Assessment Act*, SC 2019, c 28, s 1 at s 9(1).

(a) changes to the environment that would occur on **Federal lands**, and in particular on and under the Reserve Lands of each of the Nations;

(b) changes to the **environment** within Canada, in particular on and under the Nations' respective traditional territories (referred to throughout as our "Homelands"), resulting in adverse impacts to the Indigenous peoples of Canada in respect of physical and cultural heritage, the current use of lands and resources for traditional purposes, and structures, sites or things that are of historic, archaeological, paleontological or architectural significance;

(c) changes occurring in Canada to **the health, social or economic conditions** of the Indigenous peoples of Canada; and

(d) changes caused by pollution to **interprovincial waters**, and particularly the Beaver River, North Saskatchewan River and the Athabasca watershed.

These threats to our communities are highly concerning on their own; however, our concerns are intensified by the absence of any real regulatory review of these areas. As set out further below, Alberta's regulatory system is insufficient to assess the impacts on areas of federal jurisdiction noted above, which deepens the need for Federal attention.

Our request is rooted in both the IAA and our government-to-government relationship with you. In this letter, we also discuss how Canada's fiduciary duties are engaged by this project, and how Canada's duty to consult in respect of the Pathways Project is triggered, particularly if Canada considers providing the Pathways Project with public funds.

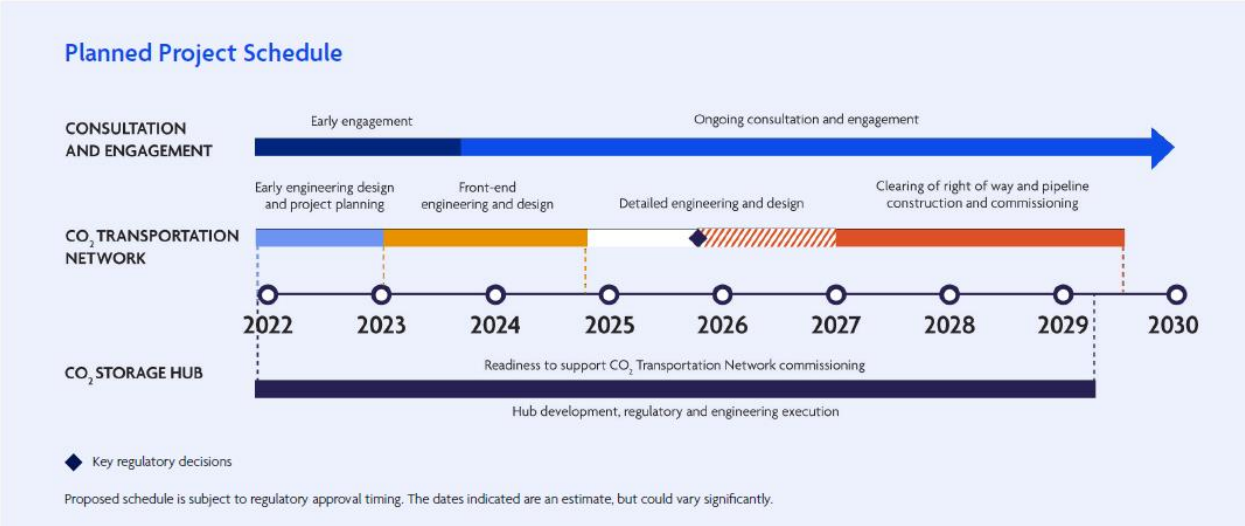
2. KEY FACTS: THE PROJECT AND OUR PEOPLE

A. PATHWAYS PROJECT

Pathways Alliance[3] is seeking to develop a Carbon Capture and Sequestration ("CCS") project that will capture, transport and store carbon from most of the major oil sands facilities in Alberta (the "Project"). The Project will capture and compress CO_2 emissions from the Fort McMurray

[3] Pathways Alliance consists of Canadian Natural, Cenovus Energy, ConocoPhillips Canada, Imperial, MEG Energy, and Suncor, and which together operate facilities accounting for approximately 95% of Canada's oil sands production. See Appendix B for Pathways Alliance Contact information.

and Cold Lake oil sands regions, transport CO_2 emissions through the Cold Lake Air Weapons Range via pipeline, and sequester vast amounts of CO_2 in the Storage Hub for permanent storage in the pore space under our Homelands and proximate to and beneath our Nations' Reserve Lands.[4] The Project is aimed at decreasing 10-12 Mt of $C0_2e$/yr by 2030. The latest information from Pathways provides the following information about their planned regulatory schedule:



The Pathways Project is new CCS technology not described in the *Physical Activities Regulations* (the "Project List")[5].

The Project is broadly made up of three components:

1. **Transportation Network**: CO_2 will be separated out from the emissions of 13 oil sands facilities in the Athabasca and Cold Lake oil sands regions, then compressed and converted to a fluid state. The CO2 will be transported from each of the facilities via lateral pipelines, to a central transportation line starting in Treaty 8 territory in the north, and ending in Treaty 6 territory in the south where it will tie into a hub distribution line; In total, the fluid CO_2 will be transported over 400km;
2. **Injection Well**: the CO_2 will then be injected 1-2 km underground via injection wells; and

[4] See Pathways map at Appendix "C".
[5] *Physical Activities Regulations*, SOR/2019-285.

3. **Storage Hub**: the CO_2 will then be stored permanently in a geological formation that is continuous with the geology of our Nations' traditional territories ("Homelands"), and our Reserve Lands.

Unprecedented in scope and scale, this Project is one of the largest CCS proposals in the world. The Project carries with it non-negligible, novel, and irreversible adverse impacts on the environment, our Homelands, our Reserve Lands, and our Aboriginal, Treaty, and Indigenous rights.[6] Critically, because this Project will result in the sequestration of carbon beneath our homes forever, Canada must fully understand the immediate, short term, and long-term implications of the Project.

B. THE NATIONS

Our Nations are all Indigenous peoples, federally recognized Indian bands with Reserve Lands, and signatories to Treaty No. 6, which protects our identity and relationship to our Homelands, and our rights to hunt, fish, trap, gather, reside in and carry out our way of life, livelihood, and economies in our Homelands after Treaty, as before. Our Nations share a collective understanding that the Creator placed us here to act as stewards of the lands, waters, and environment upon which we rely.

Our inherent rights to practice, protect, and preserve our respective cultural and spiritual practices, including the protection of historical resources, conservation and stewardship of our traditional lands and waters and locations of spiritual and cultural significance are also recognized and affirmed by section 35 of the *Constitution Act, 1982*, and the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").

On June 21, 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* ("UNDA") came into force adopting UNDRIP into Canadian law. UNDA aims to transform how Indigenous peoples participate in natural resource development, including ensuring that we are meaningfully involved in decisions that may adversely impact our communities. UNDRIP, through UNDA, imposes obligations on Canada in respect of development in our traditional territories, including:

[6] In this document, "Rights" refers to all Treaty, Aboriginal, and Indigenous Rights recognized and affirmed by s. 35 of the *Constitution Act*, 1982, our inherent rights, those rights which exist in international law, and those rights recognized in UNDRIP and incorporated into the domestic law of Canada through the *United Nations Declaration on the Rights of Indigenous Peoples Act*

1) where projects are contemplated that may affect our lands or territories, Canada "shall consult and cooperate in good faith with the Indigenous peoples concerned… in order to obtain their free and informed consent prior to the approval"[7],

2) Canada has an obligation "to ensure that no storage of disposal of hazardous materials shall take place in the lands or territories of Indigenous peoples without their free, prior and informed consent"[8],

3) Canada shall legally recognize and protect Indigenous peoples' lands, territories, and resources that they have traditionally owned, occupied, or otherwise used or acquired,[9]and

4) Canada must consult and cooperate in good faith with Indigenous peoples in order to obtain their free, prior, and informed consent before adopting administrative or legislative measures that may affect them.[10]

The Supreme Court of Canada has now twice affirmed that UNDRIP applies as binding, positive domestic law in Canada.[11]

Despite these protections, the ecological integrity of our Reserve Lands and our respective Homelands is threatened by the cumulative impacts of industrial development. In relation to the Pathways Project, our Reserve Lands are located within or in close proximity to the proposed Storage Hub, as depicted below in **Figure 1.**

Together, the Nations have over 21,000 members, many of whom live on our Reserve Lands and who use our Homelands to exercise their Rights. The proposed Project area for the Storage Hub completely overlaps our Homelands.

[7] United Nations Declaration on the Rights of Indigenous Peoples Act (S.C. 2021, c. 14), Schedule – United Nations Declaration on the Rights of Indigenous Peoples ("UNDA Schedule UNDRIP"), at Article 32
[8] UNDA Schedule UNDRIP, Article 29(2).
[9] UNDA Schedule UNDRIP, Article 26
[10] UNDA Schedule UNDRIP, Article 19.
[11] *Reference re An Act respecting First Nations, Inuit and Metis children, youth and families*, 2024 SCC 5 at para 4; *Dickson v. Vuntut Gwitchin First Nation* 2024 see 10 at paras 47, 117.

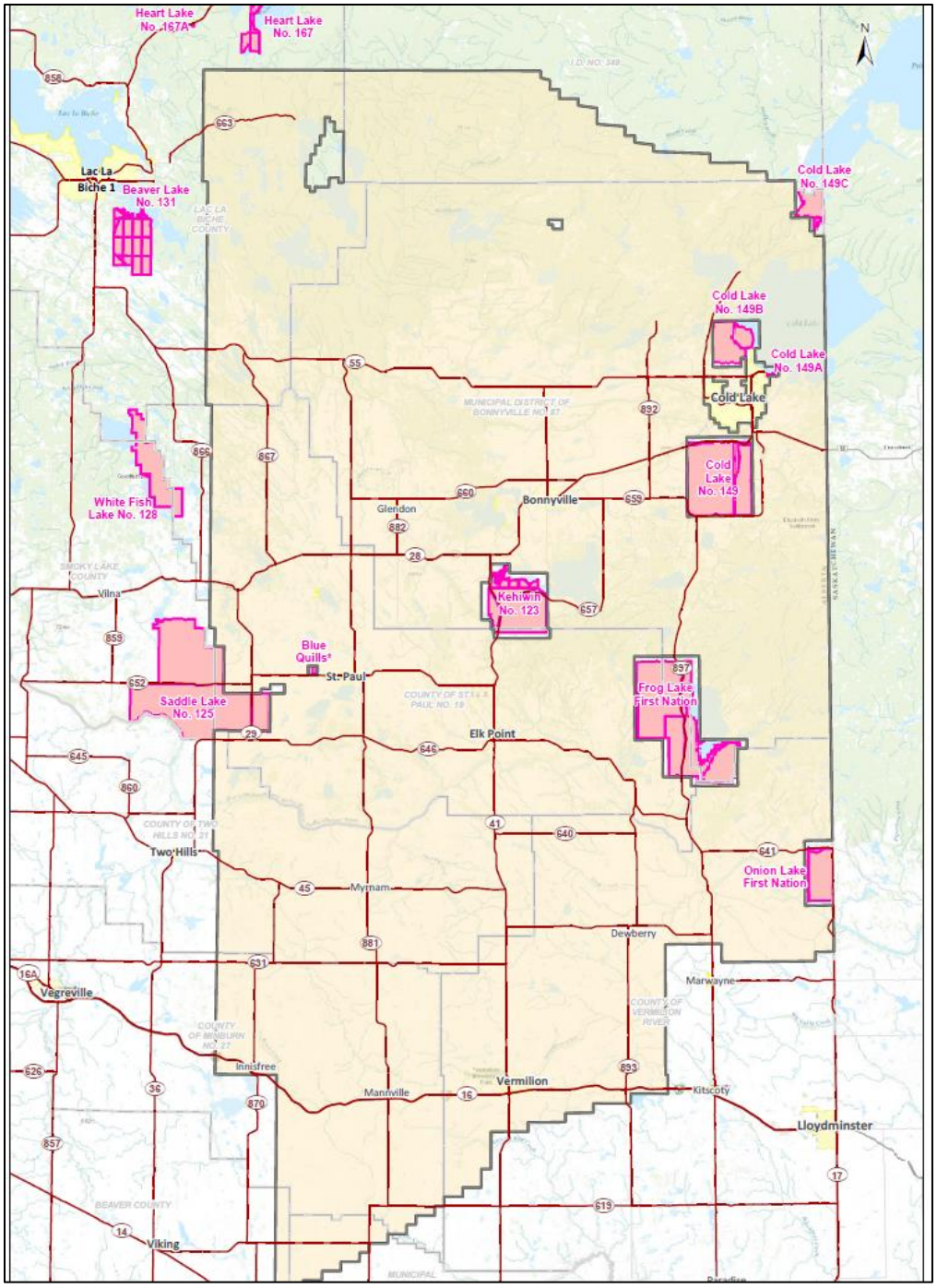


Figure 1: Map showing Pathways Alliance Storage Hub Application Area Overlapping with Nations' Reserve Lands

3. MINISTER SHOULD EXERCISE DISCRETION TO DESIGNATE THE PATHWAYS PROJECT

Our Nations respectfully request that the Minister exercise discretion pursuant to section 9(1) of the IAA to designate the Pathways Project for the following reasons.

A. ADVERSE EFFECTS WITHIN FEDERAL JURISDICTION

The Pathways Project has the potential to cause non-negligible adverse effects within Federal jurisdiction, as defined by section 2 of the IAA:

(I) Section 2(b) – The Project would result in a non-negligible adverse change to the environment on Federal Lands – i.e., Our Reserve Lands

First, the Pathways Project will result in non-negligible adverse changes to the environment on Federal lands by adversely impacting the environment of our Reserve Lands. Adverse impacts to our Reserve Lands and waters constitutes adverse impacts within Federal jurisdiction, thereby providing a foundation for designation under the IAA given the location of our Reserve Lands within the proposed Sequestration Hub area. In addition, these adverse environmental effects will have an outsized effect on Indigenous peoples in general, and our members in particular, because we live so close to the Project.

The Federal government has a fiduciary obligation to each of our Nations in respect of the care, control, and protection of our Reserve Lands for our use and benefit in perpetuity. The protection of our Reserve Lands is a fundamental term of Treaty No. 6. This is echoed in Article 21 of UNDRIP which confirms Indigenous peoples' "right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources."[12]

Our Treaty right to Reserve Lands and waters includes a promise that the Reserve lands and waters will retain a nature and quality that would permit Nation members to utilize the Reserve Lands and waters now and into the future. Our members rely on our Reserve Lands and waters. Our title to our Reserve Lands also includes the subsurface resources and reservoirs, including pore space, within their boundaries, and the right to develop those resources for the collective benefit of our people.

Contrary to those rights and promises, the Pathways Project is proposing permanent storage of millions of tonnes of CO_2 in an underground reservoir consisting of a subsurface geological

[12] Article 21, UNDRIP

formation that is contiguous with the subsurface geology of our Reserve Lands.[13] As a result, the Project will adversely impact our Reserve Land either directly, through the storage of carbon in our reserve pore space, or indirectly, through the displacement of brine into and/or increased pressure on the pore space under our Reserve Land.

In addition to these direct impacts, the Project will contribute to cumulative impacts to our Reserve Land through both the indirect pathways, as well as the implied authorization of continued industrial development within and near our Homelands, which contributes to the degradation of our lands, waters, and traditional resources.

Hazards and harms associated with the direct, indirect, and cumulative impacts on our Reserve Lands include:

- **Environmental harms** associated with the permanent storage of CO_2 underground on soil, water (surface and ground), wildlife, plant, and animal species, and on our Reserve Land. These harms also include displacement-related harm such as cap rock fracture, ground heave, induced seismicity, and water contamination by brines (as expanded below).

- Harms to our **economic development and sovereignty**, such as:
    - Damage to our ability to produce hydrocarbons or other minerals.
    - Damage to our ability to develop oil and gas resources, brine-hosted minerals, salt caverns and pore space within our reserve boundaries.
    - Impacts to soils affecting agricultural production on our Reserve Land.

- **Health, social and cultural harms**, such as:
    - CO_2 leakage into the atmosphere or shallow subsurface will result in suffocation of humans and animals, as well as effects on soil quality, plants health/viability, insects and burrowing animals.
    - Human health hazards including morbidity and mortality caused by inhalation of concentrated CO_2 that could be released from the transportation line or that could return to the surface from leaks in the Storage Hub.
    - Emergency response failures (e.g. vehicles cannot operate to evacuate in low oxygen environments in the event of a large-scale release).

[13] See **Figure 1**

- Impacts on Reserve housing and infrastructure as a result of induced seismicity or ground heave, which will result in expenses for their repair or replacement.

- **Harm to water**, such as:
  - CO_2 or brines leakages into shallow groundwater and/or surface waters, which would harm the drinking water relied on by our peoples, and aquatic life, including fish and fish habitat.
  - CO_2 dissolved in subsurface fluids will cause metals to mobilize within water systems, drinking water contamination (including drinking water relied on by Indigenous peoples) and interfere with deep-subsurface ecosystems.

(II) Section 2(d) – The Project will result in a non-negligible adverse change — that is caused by pollution — to interprovincial waters;

The Project's infrastructure will create non-negligible adverse changes to interprovincial waters, including the North Saskatchewan River, the Beaver River and the Lower Athabasca watershed. The proposed sequestration hub directly overlays the North Saskatchewan River, an interprovincial body of water. Any leakage of CO_2 or brines from the sequestration hub into shallow groundwater and/or surface waters will have impacts to drinking water and aquatic life. In addition, the Pathways CCS infrastructure requires large amounts of water to cool the equipment, which will be taken from the Lower Athabasca watershed. Such an uptake of water will negatively impact water quantity, navigability, and ecosystem health in the region. Canada must thoroughly assess the Project's impact on interprovincial waters and accordingly designate the project under the IAA.

(III) Section 2(e) – The Project will cause non-negligible adverse impacts on (i) physical and cultural heritage, (ii) current use of the lands and resources for traditional purposes, and (iii) structures, sites and things of historical, archaeological, paleontological, and architectural significance.

The transportation and storage of carbon in our Homelands at a scale never before seen in Canada raises significant concerns regarding non-negligible harm to our current and long-term use of our Homelands and resources for traditional purposes, and our cultural sites and heritage associated with our Homelands. The identified adverse impacts to date include those identified above in respect of our Reserve Lands plus the negative impacts arising from the location of the Transportation Network, as outlined below.

Unexpected Releases. When our members are out on the land practicing our Treaty Rights on our Reserve Lands and within our Homelands, they will be at risk for unexpected releases of CO_2. Important sites and cultural heritage associated with our Homelands is likewise at risk from unexpected CO_2 releases.

When compressed and transported in a pipeline, CO_2 is under high pressure and highly volatile, creating a high risk of dangerous explosions and leaks that could endanger nearby communities, other pipelines in a shared right of way, and the environment. The Nations have valid concerns with the risks associated with pipeline failure in the Transportation Network. There are instances of CCS pipelines failing with extremely harmful health impacts to humans. For example, in 2020 the Denbury Gulf Coast CO_2 Pipeline's transportation network in Sataria Mississippi ruptured releasing of 21,873 barrels of CO_2 in the air resulting in the evacuation of 200 people, and the hospitalization of 45 people due to excessive CO_2 exposure. The rupture was not human induced, rather it was due to unforeseen environmental conditions.

Taking Up of Lands / Cumulative Impacts. The proposed transportation infrastructure will contribute to the cumulative impacts of the taking up of lands which have already reduced the available area for our rights practices and has the potential to interfere with significant cultural heritage and sites of historical or other particular significance. For instance, the Transportation Network runs through our Homelands disrupting cultural and ceremonial sites. Once these sites are disrupted, they cannot be returned to their original state. Our Nations are currently developing site-specific traditional land use studies that highlight our Nation specific concerns related to the Pathways Project.

We are concerned that the approval of the Project will allow for the further expansion of industrial oil sands infrastructure within and near our Homelands, further contributing to the cumulative impacts on Rights in our Homelands. We are already on the brink of having no land left to practice our rights. In fact, some of the working group nations, have asserted that the Crown has already infringed and breached Treaty No. 6 by permitting the massive taking up of lands by industry. Beaver Lake Cree Nation filed a Treaty rights infringement action in 2008, with trial anticipated to begin in 2026.The Crown must also consider how this Project, if approved, will further contribute to the taking up of lands and the subsequent cumulative impacts on, and erosion of our Rights.

Further Erosion of Key Habitat for the Cold Lake Woodland Caribou Herd

The transportation network is planned for construction through the Cold Lake Air Weapons Range and the habitat of the Cold Lake Caribou Herd. The status and adequacy of sub-regional planning relating to the Cold Lake Caribou Herd remains unclear. The Nations are concerned that the taking up of more land for the transportation line will have a further negative impact on caribou recovery that needs to be specifically addressed by Canada under the *Species at Risk Act*.

Additional key concerns identified to date in respect of adverse effects on the current use of lands and resources in our Homelands for the exercise of Treaty rights and traditional purposes, include:

- CO_2 leakage into the atmosphere or shallow subsurface will result in suffocation of humans and animals, as well as effects on soil quality, plants health/viability, insects and burrowing animals.
- CO_2 or brine leakages into shallow groundwater and/or surface waters will have impacts to drinking water relied on by Indigenous peoples, and aquatic life, including fish and fish habitat.
- CO_2 dissolved in subsurface fluids will cause metals to mobilize within water systems, potable water contamination, and interference with deep-subsurface ecosystems.
- Displacement-related harm such as cap rock fracture, ground heave, induced seismicity, water contamination by brines and damage to hydrocarbon or other mineral resources.
- Ground disturbance associated with construction of 400 kilometers of pipeline.
- Harms associated with transporting compressed, liquefied carbon through our Homelands.
- Harms associated with infinite storage of CO_2 underground on soil, water (surface and ground), wildlife, plant, and animal species.
- Human health hazards including morbidity and mortality caused by inhalation of concentrated CO_2 that could be released from the transportation line or that could return to the surface from leaks in the sequestration hub.

- The transportation and storage of CO_2 within our Homelands and Reserve Land will also have a significant impact on the confidence our members have in the resources that they rely upon for their current use of lands and resources for traditional purposes.

Additionally, the Beaver River and North Saskatchewan River are valuable resources for our Nations as they are directly located within our traditional territories. Any disturbance resulting from permanent CO_2 storage from the Pathways Project on the Beaver River and its watershed and on the North Saskatchewan River will gravely impact our Rights to fish, sustain our way of life, and preserve the environmental condition of the river. Any impact to our water resources in our Homelands is taken highly seriously by our Nations, and the sheer scale and scope of the Pathways Project only magnifies these concerns.

(IV) Section 2(f) – The Project would cause a non-negligible adverse change to the health, social or economic conditions of the Indigenous peoples of Canada

The health, social and economic conditions of our members would be seriously adversely impacted by the Project, as detailed below.

Health and Social Conditions. The health and social conditions of our Nations includes consideration of the non-negligible harm and safety of our members and our future generations, along with the serious negative consequences to the psychological and social wellbeing of our communities. We, as Indigenous peoples, have been asked to live with and suffer the consequences of industrial oil and gas and other resource development for decades without having a voice at the table and without receiving a fair share of the benefits of development – all taking place within our Homelands. This is a significant impact of colonization causing inter-generational trauma within our communities.

We are again being forced to take on the risk of significant and as yet still undefined harm. This has already created a substantial non-negligible harm to the psychological and social health of our communities, which should be assessed and addressed in a meaningful way.

Inhalation of concentrated CO_2 from leaks in the Pathways Project's Underground Reservoir would cause morbidity and mortality. Additionally, CO_2 or brine effects on drinking water, soil, and wildlife habitat can also be considered human health hazards. Further, as CCS projects cause induced seismicity or ground heave, our Nations will be forced to deal with the aftermath of damage and destruction of homes, built infrastructure, and associated human health and safety risks and expenses. These risks and impacts will exacerbate the already often deficient

experiences of our Nations in respect of housing and other infrastructure. These health and social impacts would be further compounded by the Nations having to address contamination from CO_2 and brine in our drinking water, soil and wildlife habitats.

Economic Conditions. The Project will cause significant non-negligible harm to the economic conditions of our Nations. Our Reserve Lands include ownership of the subsurface resources, including pore space, and the right for us to develop those resources for the collective benefit of our people. The Pathways Project will adversely impact our rights to develop our subsurface resources including oil and gas resources, brine-hosted minerals, salt caverns, and pore space. As noted above, some further examples of the adverse economic impacts to our Nations from the Project include:

- Damage to production, or ability to produce, hydrocarbons or other minerals from our reserve lands, which impacts our economic development.

- Displacement of CO2 or brine into the pore space under Reserve Lands could impact the viability and use of that pore space for the First Nations' future economic development.

- Impacts to built infrastructure because of induced seismicity or ground heave will result in expenses for their repair or replacement, which are economic impacts to our Nations.

- Impacts to soils can affect agricultural production, which will affect our economic development on reserve lands.

No Consideration of these Issues. To date, neither Pathways nor Alberta has considered these adverse impacts of the Project on the pore space beneath our Reserve Lands. Currently, Canada does not even have a regulatory system to protect pore space beneath Reserve Lands. The absence of any consideration to date, coupled with these serious non-negligible adverse impacts to our Nations' health, social and economic conditions, provides a further impetus for this Project to be designated pursuant to the IAA.

B. PROVINCIAL ASSESSMENT AND REGULATORY PROCESS INADEQUATE

Under s. 9 of the IAA, the Minister may consider whether there is another means other than an impact assessment that would permit a jurisdiction to address the adverse effects within federal

jurisdiction. In this case, there is not. As set out below, Alberta's regulatory process cannot consider and address the impacts of this Project on areas of federal jurisdiction including the impacts on our Nations' lands (including reserve land), resources, health, and wellbeing. Federal assessment is required; without federal assessment, this massive Project will proceed without any regulatory scrutiny of the issues identified above.

(I) Alberta's Regulatory Process

This Project is subject to regulation and approval by the Alberta Energy Regulator (the "AER"). Alberta's Regulatory Process, comprised of the AER and the Alberta Aboriginal Consultation Office (the "ACO") (collectively, "Alberta's Regulatory Process") is inadequate to identify and assess the risks of the Project as those risks relate to matters within Federal jurisdiction. Moreover, Alberta's Regulatory Process fails to consider or protect our Rights and interests. Alberta's Regulatory Process lacks the transparency and inclusivity needed to address the unique needs of First Nations.

The AER is a public agency that acts as the regulator of energy development in Alberta under the *Responsible Energy Development Act* ("REDA") and related energy and environmental legislation. While the AER is charged with the responsibility of ensuring the public interest, it has taken an extremely narrow view of its jurisdiction and mandate as it relates to the understanding, assessment, and protection of Indigenous rights and interests.[14]

Alberta, through the ACO and its consultation policies and guidelines, delegates the "procedural aspects" of consultation to project proponents and has left the consideration of appropriate accommodations arising out of that consultation to the AER.[15] Inexplicably, the ACO determines the adequacy of consultation *before* the AER is charged with considering whether any mitigation or accommodation, in the nature of conditions and approvals, is formally required. Moreover, as discussed below, despite being charged with the responsibility for identifying mechanisms to mitigate or accommodate project impacts, the AER's statutory authority is effectively neutered in that it cannot or will not impose enforceable conditions on project proponents that require the ongoing involvement of First Nations post-approval.

In practice, under Alberta's consultation policy and guidelines, proponents are advised if a project (or in this case a component of a project) triggers the Crown's duty to consult. Alberta's

[14] See for example, *Fort McKay v Prosper Petroleum* 2020 ABCA 163
[15] *Fort McKay* para 48 to 50

definition of what constitutes a “trigger” is extremely narrow—being a site-specific impact to the right to hunt, fish or trap on unoccupied Crown land. This project is illustrative given the ACO is only consulting on the Transportation Network and has confirmed that any Crown decisions relating to the Storage Hub are outside of its policy mandate.

If proponents are directed to engage in consultation, the process involves nothing more than the exchange of information. The ACO does not employ individuals with technical expertise or knowledge about how to evaluate whether responses from proponents are complete or meaningful. The ACO merely confirms whether the proponent responded to a concern or question – they do not engage in any assessment of the adequacy of the responses or the engagement. When the proponent decides they have built a sufficient record of communication, regardless of whether that communication was meaningful or even resulted in responses from the Nation, with a First Nation, then they submit a “Record of Consultation” to the ACO for a consultation adequacy decision. The ACO invariably determines the proponent has fulfilled the procedural aspects of consultation—regardless of whether any substantive steps were taken to mitigate project impacts or alter the project in any way. The ACO adequacy decision report, which is provided by the ACO to the AER, rarely acknowledges or identifies specific commitments that the proponent may make with respect to mitigation of impacts identified by the First Nation.

Throughout the entire process, proponents, the ACO and the AER assume that ‘standard conditions’ (i.e., requirements under the existing regulatory framework) will mitigate impacts to Indigenous land use and exercise of Section 35 rights. Contrary to the Federal Court of Appeal decision in respect of Canada’s consultation on the Transmountain Pipeline Project[16], within Alberta’s Regulatory Process there are no requirements to “test” the assumption that standard conditions mitigate impact to Indigenous land use and exercise of rights and the AER does not require the proponent to incorporate Indigenous Knowledge and Land Use in a meaningful way into their environmental assessments or subsequent management plans. The AER repeatedly refuses to incorporate conditions requested by First Nations to help mitigate impacts to our Rights. Even when we have negotiated such conditions directly with proponents, the AER, if made aware of the agreed-upon conditions, refuses to incorporate those conditions into their approvals or to assist in the enforcement of these mitigation measures.

[16] *Tsleil-Waututh Nation v Canada (AG) 2018 FCA 153* para 564, 599, 602, 603 and 651 to 653 for example.

(II) Additional Concerns with Alberta Regulatory Processes

As set out above and detailed further below, Alberta's regulatory system is set up to fail, and cannot properly assess or respond to the impacts of the Project. Many of our concerns with the Alberta Regulatory Process were detailed in our letter addressed to Natural Resources Canada on April 8, 2024. A copy of this letter is attached to this request as Appendix "B".[17] The letter explains how the Pathways Project will create adverse impacts on our Reserve Lands and related Rights triggering Canada's duty to consult in a meaningful way, how it would be inappropriate for Canada to rely on Alberta's Regulatory Process, how Alberta's Regulatory Process is insufficient for discharging Canada's duty to consult, Alberta's lack of clarity of who is responsible for discharging the Crown's consultation obligations, and Alberta's significant departure from federal and modern jurisprudential standards on the duty to consult. Some of the key concerns raised in the April 8, 2024 letter to Natural Resources Canada included:

- **No legal notification requirements.** The AER does not require any direct notifications of project applications to be sent directly to First Nations.

- **Project splitting obscures understanding impacts.** Because the AER is not treating the Project as a single project, but rather is permitting Pathways to apply for this project by way of 142 separate AER applications, the process is extremely complicated and piecemealed. The administrative burden is overwhelming on First Nations who are always in the position of having to react on short notice to potentially complicated applications.

- **No comprehensive environmental impact assessment has been directed for the Pathways Project.** Despite having the power to require this Project to undergo an environmental assessment, Alberta has so far refused to exercise this discretion. Alberta's assumption is that the current regulatory standards are sufficient to mitigate the environmental impacts. We have outlined in this request why this is not the case.

- **No requirement to allow First Nations to participate.** The AER only permits Indigenous communities to participate in the regulatory process where they can establish that they will be "directly and adversely" affected by the Project. If that test is not met there are no further opportunities to participate in the AER's process. Despite

[17] See April 8, 2024 letter to NRCan at Appendix "D".

Alberta's reliance on the AER process for fulfilling the duty to consult, the directly and adversely affected standard is much higher than what is required to trigger the duty to consult.

- **AER makes decisions without hearings.** Even when the AER accepts that a First Nation may be directly and adversely impacted by a project, the AER is not required to hold a hearing prior to making its decision.[18] Appeals from the AER decision to the Alberta Court of Appeal can only be made on questions of law, and with leave from the court.[19]

- **AER's ability to mitigate limited to project modifications.** The AER has no legislative authority to impose mitigation or accommodation measures beyond the approval conditions that are directly tied to the project.

- **AER cannot impose conditions requiring ongoing involvement of First Nations or Canada.** The AER does not have the legislative or policy capacity to impose conditions on approvals requiring or permitting First Nations to be involved on an ongoing basis. Once a project is approved there is no legal requirement for the AER to notify First Nations or Canada about issues, concerns, risks, or project modifications.

- **No testing of the effectiveness of the Project.** Pathways Alliance claims that it will help Canada achieve its goals of a "large absolute reduction in GHG emission by 2030, and the goal of achieving net zero emissions by 2050",[20] but has provided no evidence to support this assertion. The Alberta Regulatory Process offers no mechanism to determine if Pathways Alliance's claims are accurate. However, in response to complaints related to Pathway's alleged false or misleading claims about the Project's environmental benefits to the Canadian public, in 2023, the Competition Bureau initiated a formal inquiry to determine if Pathways Alliance has contravened the *Competition Act*.[21] We also know that other CCS projects, like Shell Quest, grossly underperform.

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[18] REDA section 33 and 34.

[19] REDA, section 45 and 56; *Stoney Nakoda Nations v His Majesty the King in Right of Alberta As Represented by the Minister of Aboriginal Relations (Aboriginal Consultation Office)*, 2023 ABKB 700, which held judicial review is not available under REDA.

[20] Pathways Alliance Submission to the 2023 Federal Budget Consultation Process, October 2022, online: https://www.ourcommons.ca/Content/Committee/441/FINA/Brief/BR11979980/br-external/PathwaysAlliance-e.pdf

[21] The Toronto Star, "Canada's largest oilsands companies being investigated over allegations they made false environmental claims" (May 11, 2023), online: https://www.thestar.com/business/canada-s-largest-

(III) Examples of Our Experiences with the AER's Deficient Process

Based on our experiences to date, our Nations do not trust the AER to carry out its responsibilities, and the Minister should be equally concerned about relying on the AER.

This is not our first time dealing with the AER. In the past, we have all been repeatedly told by the AER, proponents, and the Government of Alberta that they were regulating the oil and gas industry to protect our health and safety. We have been repeatedly told that Alberta has a "world-class" regulatory system and that it is dealing with the cumulative effects of development.

All these statements were inconsistent with our experience. Here are a few examples:

- **2013 CNRL "Flow to Surface Event"** CLFN elders and traditional knowledge keepers raised concerns about the risk of steam assisted gravity drainage (SAGD) projects within *Denne Ni Nenne*. We were told by CNRL and the AER that there was no risk that the caprock could be fractured or negatively impacted by injecting steam below the ground. The AER's modeling and predictions for safe levels of steam injection proved to be wrong when we discovered in 2013 that one of CNRL's projects suffered a major blowout resulting in nearly one million litres of bitumen and water leaking from CNRL's site. At the conclusion of its investigation, the AER found that CNRL's extraction method used too much steam pressure (though CNRL had been operating within its licence requirements) but gave permission to the company to continue its operations as long as it used a different approach with lower steam pressure going forwards.

- **2022-2023 Imperial Kearl Tailings Pond Leaks:** In May 2022, a tailings pond on the edge of Imperial Oil ("Imperial")'s Kearl oil sands mine began to leak tailings fluid and other industrial wastewater. Imperial first reported its discovery of the potential leak on May 19 and confirmed that surface waters both on and off the site were contaminated on June 3. At the time the leaks were reported, the AER issued Imperial non-compliance notices but did not post these notices publicly. In fact, AER did not provide any public information about the leak until February 6, 2023, when it issued an Environmental Protection Order ("EPO") two days after Imperial reported a second, significantly larger tailings spill of 5.3

oilsands-companies-being-investigated-over-allegations-they-made-false-environmental-claims/article_f18fd58a-c928-505a-90c0-568415fff163.html

million liters. A report from Imperial noted that the storage pond overflowed on January 31, 2023, meaning it took them four days to detect the spill, and two days beyond that to issue the EPO and notify the public about the contamination in the area, on top of the nine months between the initial leak and the second spill that triggered the EPO.[22] The locally impacted First Nations were not notified for nine months. As of April 2022, fluid from the initial leak has continued to seep out of Imperial's tailings ponds.[23]

- **2022 Peace River Earthquakes:** In late November 2022, the Peace River area in Alberta experienced a series of three earthquakes, which went on record as being the largest ever recorded in Alberta. The AER's initial investigation into the incident indicated that the earthquakes were brought about by natural causes. However, a later study from the University of Alberta and Stanford University (The "Earthquake Study") concluded that the earthquakes were triggered by oil and gas activity in the region, in direct opposition to the AER's first announcement.[24] In March 2023, three more earthquakes followed in the same region, which the AER announced it would investigate to determine any possible connections to the November earthquakes.[25] The AER did not comment further on the November or March earthquakes until the day of the of the Earthquake Study's public release, where it confirmed the findings and issued an EPO against Obsidian Energy Ltd., the company whose operations were found to have triggered the earthquakes. The Earthquake Study noted that carbon capture and storage technology could cause similar earthquakes.[26]

- **2021 Fossil Fuel Spill Study:** In October 2021, ecologist Kevin Timoney released the results of a six-year study which examined data from over 100,000

[22] Gillian Chow-Fraser and Nicole Doll, "Everything you need to know about the Kearl Mine tailings silent leak and then sudden spill" (May 16, 2023), online: *Canadian Parks and Wilderness Society Northern Alberta Chapter*.
[23] Wallis Snowdon, "Head of Alberta's energy regulator apologizes for handling of Imperial Oil's Kearl tailings leak" (April 24, 2023), online: *CBC News*.
[24] Mrinali Anchan, "Oil and gas activity was catalyst for Peace River earthquakes in 2022, study finds" (March 23, 2023), online: *CBC News*.
[25] Luke Ettinger, "3 mild earthquakes in Alberta's Peace River region felt as far away as Edmonton" (Match 16,2023), online: *CBC News*.
[26] Bob Weber, "Alberta Energy Regulator cites oil company for causing seismic events in Peace River area" (March 23, 2023), online: *The Canadian Press via Global News*.

> fossil fuel spills, approximately 75% of which occurred in Alberta. His investigation revealed that the AER often provided unreliable and fabricated regulatory data, including unreported and misreported spills, failures to assess environmental impacts, and a consistent overall failure to provide the public with timely and accurate information.[27]

For these reasons, our leaders and many of our members have a legitimate mistrust of the AER and Alberta's ability to effectively regulate industry. When spills, blowouts, earthquakes, and other damaging events occur, we are not informed, and we are not involved.

We cannot be expected to live on top of this carbon storage project forever without a fair regulatory assessment that is focused on understanding, mitigating, and accommodating impacts to our Rights and our Reserve Lands.

In short, it would be unreasonable for Canada to rely on Alberta's Regulatory Process to adequately assess and address the non-negligible adverse impacts of the Pathways Project on matters within Federal Jurisdiction.

C. CONCLUSION

We look forward to your immediate confirmation that Canada will be designating the Project under section 9(1) of the IAA. We expect to be fully involved in all aspects of the assessment process, including scoping and timelines. Ideally, Pathways, Canada, Alberta, and the impacted or potentially impacted Nations work together to delineate a clear process that will: identify, investigate, and address all project related impacts on our Rights.

While we view the Impact Assessment as an essential step in the completion of Canada's statutory duties under the IAA, we note that Canada has further duties, including the fiduciary duty to obtain our consent to the use of pore space beneath our Reserve lands, and further, Canada has promised the immediate implementation of UNDRIP including the obligation that Canada "shall consult and cooperate in good faith with the Indigenous peoples concerned…in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories". Canada's duties may be informed by the impact assessment but will not be

[27] Kevin Timoney, "Opinion: Leaks are only part of the problem of tailings ponds" (April 6, 2023), online: *Edmonton Journal*; "Hidden Scourge: Exposing the Truth about Fossil Fuel Industry Spills" (October 2021), online: *McGill-Queen's University Press*.

fulfilled unless our Nation provides consent to the impact on the pore space beneath our Reserve Lands.

Further, Canada has a duty to consult with our Nations in respect of any decision it makes in respect of financial support to the Pathways Project. Recent news reports indicate that Canada is considering providing significant financial support for the Pathways Project. While Canada's duty to consult may be informed by the Impact Assessment, depending on the scope and content of the assessment, more may be required to fulfill the Honour of the Crown.

We look forward to hearing from you as soon as possible.

BEAVER LAKE CREE NATION

<original signed by>

By:_____
Okimaw Gary Lameman

COLD LAKE FIRST NATIONS

<original signed by>

By:_____
Chief Kelsey Jacko

FROG LAKE FIRST NATIONS #121 & #122

<original signed by>

By:_____
Chief Greg Desjarlais

HEART LAKE FIRST NATION

<original signed by>

By:_____
Chief Curtis Monias

KEHEWIN CREE NATION

<original signed by>

By:_____
Okimaw Vernon Watchmaker

ONION LAKE CREE NATION

<original signed by>

By:_____
Okimaw Henry Lewis

WHITEFISH LAKE FIRST NATION #128

<original signed by>

By:_____
Chief Herb Jackson

cc: Assessment Agency (via email information@iaac-aelc.gc.ca)

APPENDIX "A"

Requestors Contact information

First Nation	Contact (name, address, email address, and telephone number)	Legal Counsel
Beaver Lake Cree Nation	Attn: Okimaw Gary Lameman Box 960 Lac La Biche, AB T0A 2C0 <personal information removed> <email address removed>	JFK Law 260 – 200 Granville Street Vancouver, BC V6C 1S4 Attn: Louise Kyle/ Aria Laskin <email address removed>
Cold Lake First Nations	Attn: Chief Kelsey Jacko PO Box 389 Cold Lake, AB T9M 1P1 <personal information removed> <email address removed>	Witten LLP 2500, 10303 Jasper Avenue Edmonton, AB T5J 3N6 Attn: Keltie L. Lambert <email address removed>
Frog Lake First Nations	Attn: Chief Gregory Desjarlais General Delivery Frog Lake, AB T0A 1M0 <personal information removed> <email address removed>	JFK Law 260 – 200 Granville Street Vancouver, BC V6C 1S4 Attn: Nathan Surkan <email address removed>
Heart Lake First Nation	Attn: Chief Curtis Monias 9809 – 99 Avenue Lac La Biche, AB T0A 2C0 <personal information removed> <email address removed>	
Kehewin Cree Nation	Attn: Okimaw Watchmaker Box 220 Kehewin, AB T0A 1C0 <personal information removed> Email <email address removed>	

Whitefish Lake First Nation	Attn: Chief Herb Jackson General Delivery Atikameg, AB T0G 0C0 <personal information removed> <email address removed>	JFK Law 260 – 200 Granville Street Vancouver, BC V6C 1S4 Attn: Blair Feltmate <email address removed>
Onion Lake Cree Nation	Attn: Chief Henry Lewis Box 100 Onion Lake, SK S0M 2E0 <personal information removed> <email address removed>	Rana Law #102, 620 – 12th Avenue SW Calgary, AB T2R 0H5 Attn: Allisun Rana <email address removed>

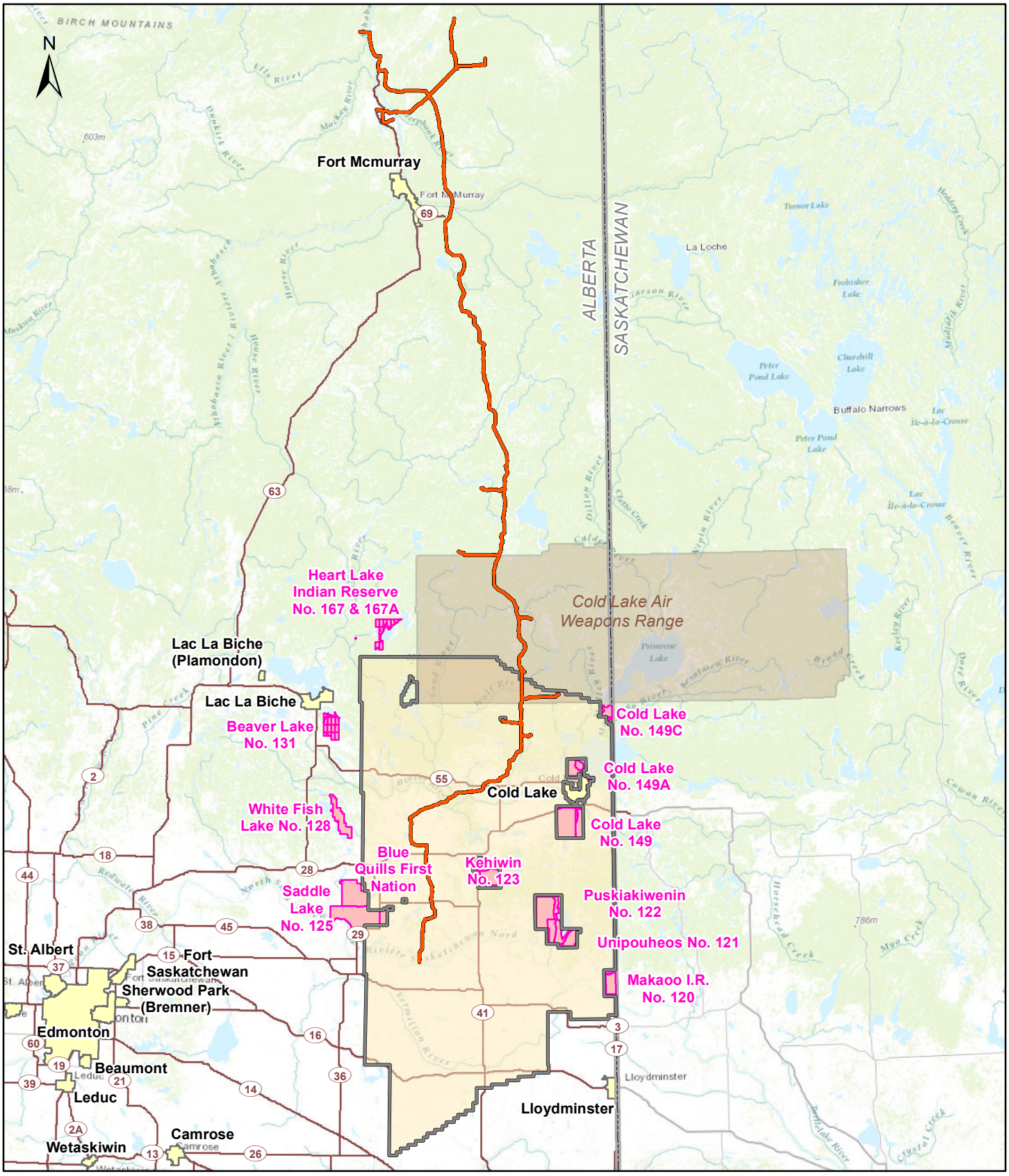
APPENDIX "B"

Pathways Alliance Contact information

Membership	**Contact** (name, address, email address, and telephone number)
Canadian Natural	Attn: Scott Stauth, President Attn: Murray Edwards, Executive Chairman 855 – 2nd Street SW #2100 Calgary, AB T2P 4J8 (<personal information removed> <email address removed>
Cenovus Energy	Attn: Jon McKenzie, President & CEO 225 – 6th Avenue SW Calgary, AB T2P 0M5 <personal information removed> <email address removed>
ConocoPhillips Canada	Attn: Bijan Agarwal, President 401 – 9th Avenue SW Calgary, AB T2P 3C5 <personal information removed> <email address removed>
Imperial	Attn: Brad Corson, President & CEO 505 Quarry Park Blvd. SE Calgary, AB T2C 5N1 <personal information removed> <email address removed>
MEG Energy	Attn: Darlene Gates, President & CEO 600 – 3rd Avenue SW, 25th Floor Calgary, AB T2P 0G5 <personal information removed> <email address removed>

Suncor	Attn: Richard Kruger, President & CEO 111 – 5th Avenue SW Calgary, AB T2P 3Y6 <personal information removed> <email address removed>

APPENDIX C



DECEMBER 2024	
NAD 1983 UTM ZONE 12N	
SCALE: 1:2,250,000	
0 25 50 75 Kilometers (ALL LOCATIONS APPROXIMATE)	

Pathways Project Area

Pathways Route Rev 1.4

Indian Reserve

Major Highway

* Blue Quills First Nation is an Indian reserve shared by the Beaver Lake Cree, Cold Lake, Puskiakiwenin, Heart Lake, Kehewin Cree, and Saddle Lake Cree First Nations.

PATHWAYS STORAGE HUB AND PIPELINE PROJECT

Data Sources: Canvec, 2023, Altalis, 2024. Sources: Esri, HERE, Garmin, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), (c) OpenStreetMap contributors, and the GIS User Community.

April 8, 2024

VIA EMAIL
Jeff.Labonte@NRCan-RNCan.gc.ca

Natural Resources Canada
580 Booth Street, 21st Floor
Ottawa, ON K1A 0E4

Attention: Jeff Labonté, Associate Deputy Minister

Dear: Mr. Labonté

Re: Consultation on the Pathways Carbon Sequestration Project

We write in response to your correspondence of March 25, 2024, to each of our Nations (the Cooperating Nations), in respect of the proposal by the Pathways Alliance to develop a carbon capture and storage project (the "Project" or the "Pathways Project") which would see the capture and storage of millions of tonnes of carbon beneath our traditional territory, and very likely our reserve lands.

A. Pathways Project

As you are aware, the Pathways Project is broadly made up of three components:

1. **Capture**: CO_2 will be separated out from the emissions of 13 oil sands facilities in the Athabasca and Cold Lake oil sands regions, then compressed and converted to a fluid state.
2. **Transportation Network**: the fluid CO_2 will be gathered from each of the 13 oil sands facilities by pipelines to a central transportation line starting in Treaty 8

territory in the north, and ending in Treaty 6 territory in the south where it ties into a hub distribution line; In total, the fluid CO_2 will be transported over 400km; and

3. **Storage Hub**: the emissions will then be injected 1-2 km underground, where the intention is to store it permanently in a geological formation that is continuous with the geology of the reserve lands of the Cooperating Nations.[1] This component of the Project includes injection wells and monitoring wells (the "Wells"), associated surface infrastructure ("Hub Infrastructure"), and the storage of carbon underground in geological formations which remain to be delineated (the "Underground Reservoir").

Comprehensive assessment of the Project in its entirety, including the review of impacts that may arise in relation to its scope and scale is not required under Alberta's regulatory regime. Instead, Alberta's regulatory process allows for the splitting of the Project into even smaller independent components each of which will require multiple applications, many of which, under Alberta's *Consultation Policy and Guidelines*, do not trigger the duty to consult.

In the case of the Pathways Project, the three main components are split into smaller subcomponents each of which may be applied for separately.

1. **Capture.** Each carbon capture facility (approximately 13) will be applied for independently by the individual oil sands proponent responsible for the plant that will be tying into the Pathways project. We are not aware of any of these capture facilities being applied for yet and the Cooperating Nations have no assurance that they will be notified or consulted in respect of those facilities.
2. **Transportation.** The transportation network has been split into eighteen independent pipelines: a main transportation line, 16 lateral pipelines, and a hub distribution line. Each of the main transportation lines, the lateral pipelines and the hub distribution line will entail multiple independent applications under various enactments (e.g., Public Lands Act, Water Act, Environmental and Protection Act, Pipeline Act).
3. **Storage.** Licenses for CO_2 disposal wells, and associated piping, will be applied for independently as per Directive 56 requirements before the rights for sequestration are granted. Following that, an AER application for a sequestration scheme approval under D-65 will be applied for after Alberta Energy grants the right to a Sequestration Agreement.

To date, we are aware that Canadian Natural has filed its first application in support of the Project: the Public Lands Act application (Application No. 32576398) for the Primrose North lateral section of the Transportation Network including:

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[1] Appendix A: map depicting the area over which CNRL expects to obtain a Sequestration Agreement with the Province of Alberta

- a new AER Pipeline Agreement for the purpose of Pipeline, PNG/OS Pipeline (AER Activity ID: 32576403)
- a new AER Temporary Field Authorization for the purpose of Incidental Activity, Temporary Workspace (AER Activity ID: 32576404)
- a new AER Temporary Field Authorization for the purpose of Incidental Activity, Log Deck (AER Activity ID: 32576405)

At this stage we do not know how many separate applications Pathways intends on filing, although we do know that the number will be in the hundreds, or when it intends on filing the rest of its applications.

B. Canada's Duty to Consult is Triggered

We understand that Canada is still determining what role it plays with respect to this Project, and particularly, whether Canada owes a duty to consult and accommodate the Cooperating Nations. As you know, the duty to consult is triggered when (1) the Crown has knowledge of a potential claim to Treaty or Aboriginal rights, (2) the Crown is contemplating conduct that engages a potential Treaty or Aboriginal right, and (3) the conduct has the potential to impact the Treaty or Aboriginal right.[2]

Canada's duty to consult is triggered in respect of this Project, for the following reasons.

i. Project has the potential to impact reserve land and related rights

Pathways is proposing permanent storage of millions of tonnes of carbon, in an Underground Reservoir consisting of a subsurface geological formation that is continuous with the subsurface geology of our reserve lands. Although Pathways takes the position that it will not be storing carbon under our reserve land, it has provided no explanation as to how it plans on avoiding the pore space under our reserve lands nor any information to substantiate this position. Pathways' initial "Consultation Package" does not mention, consider, or plan for assessing impacts arising from carbon storage. Despite this, the Cooperating Nations have identified the potential for impacts that could arise from displacement of CO_2 or brine into the pore space under the reserve lands of the Cooperating Nations:

a. Leakage of CO_2 of into the atmosphere or shallow subsurface can result in suffocation of humans and animals, as well as effects on soil quality, plant health/viability, insects and burrowing animals.

b. Leakage of CO_2 and/or displaced brines and/or groundwater into shallow groundwater and/or surface waters can have impacts to drinking water and aquatic life.

[2] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 40-45.

c. CO_2 dissolved in subsurface fluids can cause mobilization of metals, contamination of potable water and interfere with deep-subsurface ecosystems.

d. Displacement related risks such as ground heave, induced seismicity, water contamination by brines and damage to hydrocarbon or other mineral resources.

e. Potential human health hazards including occupational or public morbidity and mortality caused by inhalation of concentrated CO_2 that could be that could return to surface from leaks in the Underground Reservoir.

f. Damage to, or destruction of, built infrastructure from induced seismicity or ground heave, with associated human health and safety risks, and expenses.

g. Damage to production, or ability to produce, hydrocarbons or other minerals.

h. Displacement of CO_2 or brine into the pore space under First Nations reserve lands could impact the viability and use of that pore space for the First Nations' economic development.

i. Impacts to soils on reserve lands could affect agricultural production.

The creation and protection of our reserve lands is a fundamental term of Treaty No. 6. Our title to our reserve lands includes the subsurface resources and reservoirs, including pore space, within their boundaries. Any decisions that could enable a Project which could impact our rights in respect of our reserve lands clearly trigger the duty to consult at the highest end of the spectrum and require our consent.

In addition to any consultation obligation Canada has in respect of potential impacts to our reserve land, Canada also has a fiduciary obligation to each of our Nations in respect of the care, control, and protection of our reserve lands for our use and benefit in perpetuity. This fiduciary obligation extends to all subsurface resources under our reserve lands, including our pore space.

ii. Canada is contemplating providing significant funding

A decision by Canada to provide funding is a decision that requires consultation because it is Crown conduct that enables a project to proceed.[3]

Canada has already provided $7 million in funding for a study to inform decisions made on the proposed Pathways project[4], and we understand that the Pathways Alliance

[3] Crown-Indigenous Relations and Northern Affairs Canada, Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (March 2011) at p 36 (the "Federal Guidelines"); Nova Scotia (Aboriginal Affairs) v. Pictou Landing First Nation, 2019 NSCA 75

[4] Government of Canada, Natural Resources Canada: Current Investments, "Oil Sands CCUS: Pathways Alliance", online: https://natural-resources.canada.ca/science-and-data/funding-partnerships/opportunities/current-investments/oil-sands-ccus-pathways-alliance/25237

anticipates a huge amount of "co-funding" support from the Government of Canada.[5] While Canada has not yet announced its level of co-funding, the Canada Growth Fund was announced in Budget 2022 and offers $15 billion toward clean growth projects and securing further private investments. Budget 2023 proposes a further $500 million over 10 years through the Strategic Innovation Fund to support the development and application of clean technologies in Canada.[6]

We remind Canada that consultation must commence as early as possible, such that momentum on a project does not render consultation meaningless.[7] Guideline 3 of Canada's Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (the "Federal Guidelines") expressly states that:

> Early consultations will assist the Government of Canada in seeking to identify and address Aboriginal concerns, avoid or minimize any adverse impacts on potential or established Aboriginal or Treaty rights as a result of federal activity and assess and implement mechanisms that seek to address their elated interests, where appropriate.[8]

As such, we request that Canada not lag in commencing a meaningful consultation process.

C. Canada Cannot Rely on Alberta's Consultation and/or Regulatory Process

We also understand that Canada is in the process of determining whether it can rely on Alberta's consultation framework and/or regulatory process to fulfill Canada's duty to consult. While we acknowledge the Crown can rely on another body's regulatory process to fulfill the duty to consult, it can only do so "so long as it affords an appropriate level of consultation to the affected Indigenous group."[9]

In Alberta, consultation is managed by the Aboriginal Consultation Office (the "ACO") primarily through the supervision of communications and actions undertaken by the Project Proponent. The Alberta Energy Regulator (the "AER") also plays a role in Alberta's consultation process, as set out in the Ministerial Order (Energy 105/2014 and ESRD 53/2014), as well as the Joint Operating Procedures for First Nations

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[5] Pathways Alliance, Q and A: Progress on the Pathways Alliance net zero goal, March 9, 2023, online: https://pathwaysalliance.ca/news/q-and-a-progress-on-the-pathways-alliance-net-zero-goal/

[6] Department of Finance Canada, "A Made-in-Canada Plan: Affordable Energy, Good Jobs, and a Growing Clean Economy", March 28, 2023, online: https://www.canada.ca/en/department-finance/news/2023/03/a-made-in-canada-plan-affordable-energy-good-jobs-and-a-growing-clean-economy.html

[7] *Musqueam Indian Band v. British Columbia*, 2005 BCCA 128, at para. 95

[8] Crown-Indigenous Relations and Northern Affairs Canada, Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (March 2011) at p 12 (Link) (the "Federal Guidelines").

[9] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*., 2017 SCC 40 (Clyde River") at para 31.

Consultation on Energy Resource Activities. Unfortunately, both the ACO and the AER processes contain significant flaws that undermine their effectiveness altogether.

We are confident after consideration of the significant inconsistencies between Canada's consultation process and Alberta's process, as described below, that Canada will conclude it would be imprudent and inconsistent with the honour of the Crown, for Canada to rely exclusively on Alberta's process.

D. ACO Process Insufficient for Discharging Canada's Duty to Consult

i. ACO only requires consultation in respect of the Transportation Network

The ACO has confirmed, via correspondence, that it has only directed consultation in respect of certain applications associated with the Transportation Network component of the Project. The ACO has confirmed that it does not anticipate directing consultation on the Wells and Hub Infrastructure unless they are located on public lands, and that it has not directed consultation in respect of the Underground Reservoir. In other words, no consultation on the subsurface storage of CO_2 is required.[10]

That the ACO has directed consultation in respect of only one aspect of this Project (the Transportation Network) illustrates a significant gap in Alberta's consultation process. The intent of the Storage component is to hold CO_2 from 13 major oil sands projects in an underground geological formation that is continuous throughout our reserve lands, for an infinite period, in a manner that has not been done before at this scale. All of this is to occur on Treaty 6 territory and, in many places, within immediate proximity to, if not within, the boundaries of our reserve lands. The contemplation of the storage of millions of tonnes of CO2 within our traditional territories, and possibly under our reserve lands and home communities, is extremely fear inducing for many of the community members of the Cooperating Nations. To date, we have heard significant concerns from them about the uncertainties and risks associated with the Project, such as:

- how the storage of CO_2 underground will impact soil, water (surface and ground), wildlife, plant and animal species. This will in turn impact the communities' sense of place and confidence in the safety of the lands resources they depend upon;
- how subsurface leaks will impact soil, water (surface and ground), wildlife, plant and animal species, and the human health and well-being of adjacent communities and reserve lands;
- how the storage of carbon underground will impact subsurface aquifers and drinking water;
- the potential for the project to increase seismic activities (i.e. higher likelihood of earthquakes);

[10] Appendix B: correspondence from the ACO to working group dated December 8, 2023

- risks, including potentially catastrophic risks, associated with unexpected surface releases of carbon dioxide

In short, our communities fear for the safety and well-being of themselves and future generations. These types of concerns fall outside of Alberta's consultation process under its Policy and Guidelines. The ACO's correspondence confirms it will not be engaged in any consultation regarding these concerns, as is required to discharge the duty to consult.

ii. ACO Only Directs Consultation in Respect of "Site Specific" Impacts

Even if the ACO were to direct consultation in respect of all aspects of the Project, the ACO's consultation process, guided by Alberta's Consultation Policy and Guidelines administrated, are so inherently flawed that it would still be imprudent for Canada to rely on this process for discharging its own consultation obligations.

Critically, the ACO has a rigid policy and practice of only consulting in respect of narrowly defined "site specific concerns".[11] Site-specific concerns must meet all of the following criteria:

- directly related to a First Nation Treaty rights and traditional use activities, Metis Settlement/CAMC members' harvesting and traditional use activities, or both (as defined in the applicable consultation policies);
- can be spatially defined (it pertains to a defined location within the specified project area);
- is identified as adversely impacted by the proposed project; and,
- may be avoided or mitigated by the proponent.

In the experience of the Cooperating Nations, in the vast majority of cases the ACO does not characterize the information we provide them as a site-specific concern. For example, in a recent consultation, Cold Lake First Nations identified that CLFN members exercise their treaty right to hunt within specific ATS locations in the project footprint and that right would be impacted during the construction period. The project proponent clarified that construction would avoid the prime hunting season (a mitigation). The ACO Report stated:

> Based on the review, the ACO advises that the Cold Lake First Nation did not provide any site-specific concerns or comments regarding any potential adverse impacts of the proposed project on the Cold Lake First Nation members' Treaty rights and traditional uses.

[11] The Government of Alberta's Consultation Guide For First Nations, Metis Settlements and Credibly Asserted Métis Communities, p 20, https://open.alberta.ca/dataset/f90d6513-04de-4787-b9ad-8dbd688a3b05/resource/c678920d-6b11-4b5f-aca2-01a1c8947289/download/ir-goa-consultation-guide-for-first-nations-metis-settlements-and-credibly-asserted-metis.pdf

> The comments or concerns provided by the Cold Lake First Nation were generalized non-site-specific concerns such as cumulative effects, wildlife population and habitat, human health and wellbeing, and socio-economic concerns that are better addressed outside of this project specific consultation.

This is a pattern that is realized again and again in almost every consultation carried out under Alberta's Policy and Guidelines that is reviewed by the ACO for adequacy. Typically, the only types of impacts that are considered to be site-specific are those pertaining to immovable cultural heritage sites (for example impacts to a burial ground) that the proponent agrees exist within the project footprint.

Additionally, that impacts have to be those that can either be avoided or mitigated by the proponent necessarily limits the types of impacts considered by the ACO. The ACO is effectively saying that if the impact can't be mitigated or avoided by changes to the Project, then it is outside of the scope of consultation.

Only "site specific concerns" that the ACO recognizes are documented in the final ACO Report. Even if site specific concerns make it into the final ACO Report, they are not referenced in the final AER authorization for the application.

iii. <u>ACO Considers Cumulative Effects Outside the Scope of Consultation under its Policy and Guidelines</u>

The ACO does not consider information about existing levels of adverse cumulative effects on Treaty rights to be relevant within the scope of its Policy and Guidelines. Cumulative effects concerns are concerned "broad concerns" which Alberta defines as:

> generalized non–site-specific concerns about the continued exercise of First Nation Treaty rights and traditional uses [i.e., impacts to cultural continuity] … or substantive environmental concerns extending beyond the project. As such, they are either better addressed outside of the project-specific consultation or outside the scope of Government of Alberta's consultation policies and guidelines.[12]

Not only are cumulative effects concerns directly relevant to the consultation process, but the reality is that that Alberta has no other processes or mechanisms for addressing cumulative effects concerns. According to Alberta "the ACO strives to advise the appropriate Crown decision-maker on" broad concerns in the consultation record and that "Crown decision-maker may follow up with Indigenous communities as appropriate to clarify what process may be followed and to discuss those concerns." Importantly,

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[12] https://open.alberta.ca/dataset/f90d6513-04de-4787-b9ad-8dbd688a3b05/resource/c678920d-6b11-4b5f-aca2-01a1c8947289/download/ir-goa-consultation-guide-for-first-nations-metis-settlements-and-credibly-asserted-metis.pdf p.g 20

there is no obligation to follow up on those concerns, and even where follow does happen, no transparency as to what process is followed. In our Cooperating Nations' experience, we have never been contacted by a Crown decision maker following up on "broad concerns" that arose during a specific consultation.

Alberta has often pointed to its land use planning framework as the place where larger landscape level cumulative effects are addressed. The Pathways Project is located in the Lower Athabasca Regional Plan ("LARP") area. When the LARP was established, a number of Treaty No. 6 and Treaty No. 8 First Nations, including Onion Lake Cree Nation and Cold Lake First Nations applied for an independent review of the plan, because it fundamentally failed to address cumulative impacts of development on First Nations' Treaty and Indigenous Rights. The independent review panel concluded:

- "It was evident to the Review Panel that the Traditional Lands described in the submissions of each First Nation Application were being, for the most part, encroached upon by rapid industrial development of the Lower Athabasca Region."[13]
- More directly when considering whether Alberta actually included Indigenous perspectives in its land use planning: "To be frank, what Alberta said it would do and what it actually did are very different things."[14]

The Review Panel made a number of recommendations to the Alberta Minister. None of those recommendations were implemented in the Treaty No. 6 region. The unfortunate result being that the most significant and impactful effects from projects are never meaningfully addressed in Alberta's consultation process or in other processes they supposedly get referred to.

iv. Consultation Regime Precludes Effective Accommodation

Despite being the entity responsible for administering consultation in respect of project applications, the ACO has no legal authority to make commitments relating to mitigation or accommodation measures on behalf of the government of Alberta or to require proponents to make project changes. Additionally, ACO does not undertake, nor require the proponent to undertake, evaluation of the potential efficacy of mitigation measures proposed by the proponent or require the identification of residual impacts that will remain after the application of such mitigation. In practice, the role of ACO staff is to review the exchange of communications between the project proponent and First Nations to ensure compliance with timelines, sequencing of steps, documentation requirements, and other such procedural aspects of the process.

[13] Appendix C: LARP Review Panel Report, 2015, p 6
[14] Appendix C: LARP Review Panel Report, 2015 p. 183

In effect, Alberta has limited the possible outcomes of consultation to project conditions developed and imposed by the AER, which, for Public Lands Act applications, are a generated list of applicable items from the Master Schedule of Standards and Conditions.

E. Alberta Energy Regulator Process Insufficient for Discharging Consultation

Likewise, it would not be appropriate or effective in the case of the Pathways Project for the Crown to solely rely on the AER. The AER does not have a statutory mandate, effective process, or the necessary expertise in working with Indigenous peoples to investigate, assess and mitigate the impacts of the Pathways Project on the Treaty and Indigenous Rights of First Nations.

i. The AER's Mandate is Expressly Different from the Impact Assessment Agency

The AER is a quasi-independent body whose mandate is to:

(a) To provide for the efficient, safe, orderly and environmentally responsible development of energy resources and mineral resources in Alberta through the Regulator's regulatory activities, and

(b) In respect of energy resource activities, to regulate

a. The disposition and management of public lands

b. The protection of the environment and the conservation and management of water, including the wise allocation and use of water,

In accordance with energy resource enactments and, pursuant to this Act and the regulations, in accordance with specified enactments.[15]

The AER's legislative mandate does not expressly include any consideration of the impacts of projects or applications on the Treaty or Aboriginal rights of Indigenous peoples. The only mention of Indigenous peoples in REDA is found in section 21, which expressly excludes from the AER's jurisdiction any ability to assess the adequacy of Crown consultation with Indigenous peoples.

The AER has long resisted any examination of the impacts of projects on the rights of Indigenous peoples, claiming it had no legislative mandate or requirement to do so.

This is a key distinction from the Impact Assessment Agency who has an express mandate to:

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[15] REDA s 2(1)

Lead Crown engagement and serve as a single point of contact for consultation and engagement with Indigenous peoples

Indigenous peoples are discussed throughout the Impact Assessment Act. The Agency's mandate expressly includes consideration of impacts to Indigenous peoples, including physical and cultural heritage, the current use of lands and resources for traditional purposes, or structures of historic and archaeological significance.[16] This is not the case for the AER.

It was only in 2020 that the Alberta Court of Appeal confirmed that the AER, as a statutory decision maker, is required to consider the potential impacts of a project on Treaty and aboriginal rights, as part of its requirement to make decisions in the "public interest". The Court found the AER has "a broad implied jurisdiction to consider issues of constitutional law, including the honour of the Crown."[17] Even with the Court's confirmation of the AER's "implied jurisdiction", it is clear consideration of impacts to Treaty and aboriginal rights by the AER is a much narrower focus than contemplated by Canada's regulatory system.

ii. AER Regulatory Process Contains Significant Gaps

Further, because the AER's express legislative mandate, processes and procedures are not designed to or focused on the assessment of impacts to Treaty and Aboriginal rights at any stage of its process, there are many practical and legal impediments to using the AER process to meaningfully address the Crown's duty to consult and accommodate. These include:

1. **No legal notification requirements**: Applications specific to the Project's storage hub are excluded from the ACO process (see above). While the AER states these applications will be subject to the D56 public notification process (for surface applications) and the D65 public notification process (for subsurface applications)[18] neither D56 nor D65 require any direct notifications be sent to local First Nations.[19] This means, in the normal course, Pathways can file its applications with the AER and the AER will publish a public notice on its website. The result is First Nations are required to check the AER website daily to try to determine whether any applications were filed and if so, which applications pertain to the Pathways Project. However, the applications are not necessarily described on the website as being related to Pathways. They are applications

[16] IAA section 2
[17] Fort McKay First Nation v. Alberta, *2020 ABCA 163* para 37 to 44
[18] Appendix D: letter from AER dated March 19, 2024
[19] With the exception that D56 would require a notification to a First Nation if the surface facility for a wellsite or pipeline is within a certain distance (dependent on facility type) of the boundary of that Nation's reserve lands.

filed by CNRL, which we must then sort through and try to determine from their location whether they are a part of the Pathways Project.[20]

Notwithstanding months of initial discussions with Pathways in which it promised to provide early notification of its AER applications to the First Nations, Pathways submitted its first applications under the Public Lands Act on Friday March 22, 2024, without warning. It was only after making a request to Pathways that they provided copies of their applications and indicated the deadline for filing Statements of Concern would be April 22, 2024. Significant risk remains that an untold number of applications may be processed by the AER without any notification to impacted First Nations.

2. **Project Splitting Obscures Understanding of Impacts:** Because Alberta and the AER are not treating Pathways, or even the Transportation Network component, as a single project, the regulatory process is extremely complicated and piecemeal. For example, we know there will be at least 126 applications, most of which will be under the Public Lands Act, with others under the Water Act, and the Environmental Enhancement and Protection Act. There will also be applications pursuant to the Pipelines Act, facility license applications pursuant to D56, and sequestration applications pursuant to D65. However, we do not know exactly how many applications Pathways will file, or when. Assuming we learn about each application to the AER on an ad hoc basis, we will then have 30 days to file a Statement of Concern (SOC). However, expedited applications may be approved by the AER even before the SOC deadline expires. The administrative burden is overwhelming, and First Nations are always in the position of having to react on short notice to potentially complicated applications.

3. **No fulsome environmental impact assessment has been directed for the Pathways Project.** As noted, because Pathways is submitting separate applications for different portions of the project, the Project as a whole will not be required to undergo any type of comprehensive impact assessment. Alberta's assumption is that current regulatory standards are sufficient to mitigate environmental impacts. We find this very troubling, considering this is the largest CCS project proposed in Canada, and one which bisects several boreal caribou herd ranges. Importantly, the Pathways Project is magnitudes larger than the Shell Quest Project, which was required to undergo a joint Federal and Provincial EIA in 2010.[21]

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[20] Appendix E: Screenshot from AER Website of Applications filed on March 22, 2024

[21] Alberta Environment (2010) Final Terms of Reference – Environmental Assessment Report for the proposed Shell Quest Carbon Capture and Storage Project, accessed online; Alberta (2010) *EIA Required Letter - D.Johnson (ABEV) to K.Penney (Shell Canada)*, accessed online

4. **No Requirement to Allow First Nations to Participate** If we receive notice of an Application and wish to participate in the AER process we have to file an SOC. The AER then has the authority to determine whether to even consider the Statement of Concern. The AER only considers Statements of Concern if it determines the First Nation has established it will be *directly and adversely affected* by the project. Th legal and evidentiary threshold for "directly and adversely affected" is much higher than the test for triggering the Crown's duty to consult—which is triggered when a Crown decision may adversely affect a proven or asserted right. If the AER determines a First Nation is not "directly and adversely affected", then there are no further opportunities to participate in the AER's process.

   It should be noted that the deadline for an SOC is usually at an early stage, often before the proponent has submitted sufficient information for the First Nation to understand the project and typically before the First Nation has had an opportunity to gather evidence regarding potential impacts. That is certainly the case with the application filed for the Primrose North lateral.

   The consistent experience of First Nations is that the AER uses the directly and adversely affected test to gate keep. The AER does not err on the side of caution to include First Nations—rather, it does the opposite. The AER consistently excludes and limits First Nations participation.

5. **AER Makes Decisions Without Hearings:** Even when the AER accepts that a First Nation may be directly and adversely impacted by a project, the AER is not required to hold a hearing prior to making its decision.[22]

   AER decisions are nearly always final. Appeals from AER decisions to the Alberta Court of Appeal can only be made on questions of law, and with leave from the Court of Appeal.[23]

   The AER frequently dismisses Statements of Concern, in particular, when the application appears to be limited in scope. This is one of the reasons why Pathway's strategy of splitting the project into multiple applications under various enactments creates a significant risk that no one will be looking at the impacts of the Project as a whole. It is the experience of our First Nations that it is difficult to establish direct and adverse impacts from smaller project components. It is only when the project is considered as a whole that the full impacts are understandable.

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[22] REDA section 33 and 34

[23] REDA, section 45 and 56; see also *Stoney Nakoda Nations v His Majesty the King In Right of Alberta As Represented by the Minister of Aboriginal Relations (Aboriginal Consultation Office)*, 2023 ABKB 700, which held that judicial review is not available under REDA

6. **AER's Ability to Mitigate Limited to Project Modifications** If the AER accepts an SOC and if the AER considers impacts to a First Nation's Treaty and Aboriginal rights, then this does not mean the AER will be in a position to arrive at effective or meaningful conditions to mitigate or accommodate for adverse impacts. For example, as a starting point, the AER has no legislative capacity to impose mitigation or accommodation measures beyond the approval conditions that are directly tied to the project. It is likely that with a unique project of this magnitude the Crown's duty to mitigate and accommodate impacts must extend beyond simple reliance on standard regulatory conditions or tinkering around the edges of the project approvals.

7. **AER Cannot Impose Conditions Requiring Ongoing Involvement of First Nations or Canada**

   Most critically, unlike Canadian regulators, the AER does not have the legislative or policy capacity to impose conditions on approvals requiring the ongoing involvement of First Nations.

   This is a fundamental problem for a project like Pathways. For example, the sequestration scheme for the Storage Component will be approved on the basis of its Measurement, Monitoring and Verification Plan (the "MMV").[24]. The requirements for the MMV do not expressly include any consideration of the impacts of carbon sequestration on Treaty and Indigenous Rights. The MMV does not require the ongoing, direct involvement of First Nations in monitoring or modifying the Project in light of the information learned. In fact, no part of the AER's legislative or policy mandate requires or permits the AER to impose conditions that expressly depend upon First Nations involvement.

   According to past AER rulings:

   > conditions are generally requirements in addition to or expanding upon existing regulations and guidelines. An applicant must comply with conditions or it is in breach of its approval and subject to enforcement action by the [AER].
   >
   > These are distinct from "undertakings, promises, and commitments" made by companies to First Nations or other parties (including Canada or Alberta) which are not "conditions.

[24] Directive 065 Appendix P

Astoundingly, the AER gives weight to these "commitments" and expects applicants to comply with commitments, but the AER **will not enforce them**.[25]

What this means is the project proponent gets the benefit of saying it will mitigate and accommodate impacts to First Nations and the AER gets the benefit of saying it relies on those mitigation and accommodation commitments—but at the end of the day they are not enforceable. If, and when, the company decides it does not have to fulfill the commitment, or it interprets its commitment differently from the First Nation, there is no remedy and no recourse.

Canadians were universally shocked when these failures in the AER's regulatory system were exposed with Imperial Oil's tailings pond leaks. For years IOR's tailings ponds leaked into the Athabasca watershed upstream from a number of Indigenous communities who rely on that watershed for their drinking water and to support the exercise of their Treaty and Indigenous Rights. Imperial Oil did not notify the communities. The AER did not notify the communities. No one notified Canada, despite the fact that Canada had been involved in the joint review and approval of Imperial's Kearl oil sands mine. Why not? Because neither Imperial Oils' approvals nor AER regulations or policies required any such notification. An independent review confirmed the AER did not breach any laws, regulations, or policies. To our knowledge there have been no changes to the AER's laws, regulations, or policies to rectify this gap.

What this means is once the AER approves this project, there will be no legal requirement for anyone to notify First Nations or Canada about issues, concerns, risks, or project modifications. In other words, once the project is approved, it will be operating on and under First Nations lands for hundreds of years with absolutely no requirement on the part of Pathways or the AER to keep First Nations or Canada informed of unexpected or evolving impacts to the Nations' health, safety, Treaty Rights or Reserve lands.

With a technology as new as carbon capture and storage, and with approvals that will depend upon adaptive management principles through the MMV plan it is essential that First Nations and Canada be legally entitled to continuing involvement throughout the life of the project. This will not be achieved if Canada relies solely on the AER's regulatory process.

iii. Other uncertainties

We understand as part of the regulatory process CNRL will be required to obtain a Carbon Sequestration Agreement from the Province of Alberta, pursuant to section 116

[25] Appendix F: See for example the detailed explanation provided by the AER in its 2016 Decision, 2016 ABAER 004 at Appendix 2

of the *Mines and Minerals Act*. We have been informed by Pathways that its application for a sequestration agreement will be part of its D65 application process to the AER, but it is not clear whether the AER is responsible for making this decision or whether this is a different decision made by the Minister of Energy. The AER's own guidance materials indicate that the D65 application for a CO_2 sequestration scheme can only be made once "there is [evidence of] an appropriate right from Alberta Energy and Minerals".[26]

Earlier this year, we wrote to the Alberta Ministers of Energy and Indigenous Relations[27] to ask them to confirm if Alberta plans to consult in respect of the decision to enter into the sequestration agreement. We have received no response. We wrote to the AER and the ACO[28] to inquire how Alberta intends to fulfill its duty to consult in respect of the Project as a whole. We received answers from the ACO and the AER that referred us back to their existing policies and legislation. The ACO and the AER failed to address in any meaningful way how its policies and processes would fulfill the Alberta Crown's duty to consult.

F. Lack of Clarity in Respect of who is Responsible for Consultation

Within Alberta's own bureaucracy, there is significant uncertainty with respect to who is responsible for different aspects of the consultation process and how that consultation will play out. For instance, in a recent decision of the Alberta Energy Regulator relating to an application by Saturn Oil & Gas Inc. and Westbrick Energy for a well license in proximity to the Brazeau Dam,[29] the ACO, the AER, Alberta's Minister of Indigenous Relations, and Alberta Justice could not agree upon who was responsible for undertaking consultation in respect of the Project.

The ACO took the position that the relevant applications were under the *Oil and Gas Conservation Act*, and thus outside of the ACO's role established under Energy Ministerial Order 105/2014 and Environment and Sustainable Resource Development Ministerial Order 53/2014. Importantly, this is the exact same position that the ACO is taking with respect to certain aspects of the Pathways Project.[30] The AER, conversely, took the position that because it does not have the authority to assess the adequacy of Crown consultation, it was not responsible for fulfilling this duty, and that the ACO was responsible. The AER wrote to the Minister of Indigenous Relations to seek advice on the situation, and the Minister responded effectively stating that it had no advice to provide. Meanwhile, Alberta Justice took the position that it would be relying on the

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[26] AER. 2023. Summary of AER's CO2 Sequestration Application Process. Carbon Capture Regulation and Responsibilities. October 2023. https://static.aer.ca/prd/documents/by-topic/CarbonCaptureRnR.pdf, pg. 3
[27] Appendix G: letters from Frog Lake dated Jan 30, 2024, and from Cold Lake, dated February 8, 2024.
[28] Appendix D: letter from the AER dated March 19, 2024.
[29] 1922830-20240119.pdf (aer.ca)
[30] Appendix B: letter from ACO to working group chairs dated December 8, 2023

AER's regulatory process to fulfill the Crown's duty to consult, despite the AER denying responsibility.

O'Chiese First Nation was seeking clarity with respect to these issues by way of a Notice of Constitutional Question. The AER however, determined that answering these questions was pre-mature, and declined to issue an order clarifying the consultation process in respect of the Project prior to a hearing on the merits.

In a follow up application, O'Chiese requested that the AER implement a formal consultation process leading up to the hearing on the merits.[31] However the AER declined to do so.

If Alberta's own structures are unable to determine who is responsible for carrying out consultation, and how that consultation will be carried out, it would be imprudent and irresponsible for the federal government to rely on this process.

G. Departure from federal standards on the duty to consult

By relying on Alberta's consultation process, the Government of Canada is at significant risk of departing from its own guidelines and commitments.

The Federal Guidelines lay out certain obligations of federal officials in performing the functions of the duty to consult and describes a meaningful consultation process as one which is:

- carried out in a timely, efficient and responsive manner;
- transparent and predictable;
- accessible, reasonable, flexible and fair;
- founded in the principles of good faith, respect and reciprocal responsibility;
- respectful of the uniqueness of First Nation, Métis, and Inuit communities; and,
- includes accommodation (e.g. changing of timelines, project parameters), where appropriate.[32]

To describe this process, the Federal Guidelines identify that Federal officials "must reasonably ensure that Aboriginal groups have an opportunity to express their interests and concerns, and that they are seriously considered …".[33]

Our position is that the ACO and AER process do not meet this requirement. For the reasons outlined above, the ACO and AER process is not transparent and predictable, it is not respectful of the uniqueness of our communities, meaningful mitigation and accommodation are not possible to achieve, and there are no opportunities for our interests to be seriously considered.

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[31] 1922830_20240312.pdf (aer.ca)
[32] Federal Guidelines at p 13.
[33] Federal Guidelines at p 13.

Further, Guiding Principle No. 8 requires the Government of Canada to "carry out its activities and related consultation processes in accordance with its commitments and processes involving Aboriginal groups". This means that the "Government of Canada, in carrying out consultation processes, must act in accordance with its existing commitments and processes".[34] This includes the United Nations Declaration on the Rights of Indigenous People ("UNDRIP" or the "UN Declaration"), as adopted into Canadian law through the *United Nations Declaration on the Rights of Indigenous Peoples Act* ("UNDA") and its recently tabled Action Plan.[35] The Supreme Court of Canada has now twice affirmed that UNDRIP applies as binding, positive domestic law in Canada.[36]

Notable commitments in the Action Plan include:

- Action Plan Measure ("APM") 68: Strengthen Indigenous peoples' participation in decision-making through an improved whole-of-government approach to consultation and accommodation which is aligned with the UN Declaration by:
    - Co-developing consultation arrangements with Indigenous partners that establish agreed-upon duty to consult and engagement processes, in a manner that is consistent with self-determination objectives and free, prior, and informed consent[37]

Relying on an insufficient ACO and AER process is certainly not aligned with the UN Declaration nor is it consistent with self-determination objectives and free, prior and informed consent.

We also remind Canada of Article 32(2) of UNDRIP which states:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

This Project is slated to use the pore space under our Nations' traditional territories and, until shown otherwise, we anticipate it will use the pore space under our reserve lands. If any Project gives rise to free, prior, and informed consent it is this one. The Government of Canada has an opportunity to follow its own principles and undertake meaningful consultation and seek the free, prior, and informed consent of our Nations. Relying on the Alberta processes is a substantial departure from these principles that

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[34] Federal Guidelines at p 13.
[35] Government of Canada, United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan 2023-2028 (Link) (the "Action Plan"); *United Nations Declaration on the Rights of Indigenous Peoples Act* S.C. 2021, c. 14 ss. 2 and 5.
[36] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para. 4; *Dickson v. Vuntut Gwitchin First Nation* 2024 SCC 10 at paras 47, 117.
[37] Action Plan, Measure No. 68, at p 41.

weakens our view of Canada's true commitment to UNDRIP, the Action Plan, and reconciliation more generally.

H. Closing

Moving forward, we remind you that where Canada is going to rely on a regulatory process to discharge all, or part, of its consultation obligations, it must make clear to the Indigenous groups that it plans on doing so.[38] While your letter "encourages" each of our Nations to fully engage in the Government of Alberta's processes, including the Alberta Energy Regulator processes, as applicable, it does not explicitly state whether you plan on relying on Alberta's regulatory processes to fulfill the duty to consult. Should Canada decide that, in spite of the concerns we have raised here to date, it still plans on relying on Alberta's regulatory process, it must provide us with explicit direction that it plans on doing so. However, for the reasons set out below, we strongly discourage reliance on Alberta's consultation process. Such reliance will undermine Canada's ability to discharge the duty to consult and will ultimately jeopardize the future of this Project.

Our preference, which we have been communicating to Pathways, Canada, and Alberta for nearly a year now is for all parties to sit down and delineate a clear process that will: identify, investigate, and address all project related impacts on our Treaty and Indigenous Rights.

We would appreciate the opportunity to discuss this matter with you further. We will reach out to Ms. Dawe to schedule a mutually convenient time to meet.

Sincerely,

TRIBAL CHIEFS VENTURES PATHWAYS WORKING GROUP

Per:

<original signed by>

Heather Bishop, Co-Chair

<original signed by>

Darryl Steinhauer, Co-Chair

cc: Chief Gary Lameman, Beaver Lake Cree Nation
Chief Kelsey Jacko, Cold Lake First Nations
Chief Gregory Desjarlais, Frog Lake First Nation
Chief Curtis Monias, Heart Lake First Nation
Chief Trevor John, Kehewin Cree Nation
Chief Henry Lewis, Onion Lake Cree Nation
Chief Terry Cardinal, Saddle Lake Cree Nation
Chief Stan Houle, Whitefish Lake First Nation #128
Jay Gerritsen, Natural Resources Canada
Shirley Dawe, Natural Resources Canad

[38] Clyde River at para 23.