

August 24, 2010

Energy Resources Conservation Board
640 – 5th Avenue SW
Calgary, Alberta T2P 3G4

Attn: Patricia M. Johnston, Q.C.
General Counsel

Dear Ms. Johnston:

Re: Syncrude Canada Ltd.
Mildred Lake
Approval of 2009 *Directive 074* Tailings Management Plan and Amended
Approval 8573H, April 23, 2010

Syncrude Canada Ltd.
Aurora North
Approval of 2009 *Directive 074* Tailings Management Plan and Amended
Approval 10781B, April 23, 2010

By this letter our clients, the Pembina Institute and Water Matters, apply to the Energy Resources Conservation Board (the “Board” or “ERCB”) for a review and variance of the above referenced approvals pursuant to section 39 of the *Energy Resources Conservation Act* R.S.A. 2000, c. E-10 (the “Act”). The reason for this application is the Board’s error in law in approving Syncrude Canada Ltd.’s tailings management plans despite the fact that the plans do not comply with the mandatory provisions of *Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes* (“*Directive 074*”, **Appendix A**) and ss. 24.1, 28.1 and 30 of the *Oil Sands Conservation Regulation* A.R. 76/88.

The Pembina Institute is an Alberta-based not-for-profit organization that provides policy research, leadership, and education on environmental issues. Water Matters is an Alberta-based non-governmental organization that provides policy research to protect Alberta’s watersheds.

By way of a letter dated April 23, 2010 (**Appendix B**), the Board approved Syncrude Canada Ltd.’s (“Syncrude”) 2009 *Directive 074* tailings plan submission for the Mildred Lake site (**Appendix C**) and approved an amended Approval 8573H (**Appendix D**).

By way of a letter dated April 23, 2010 (**Appendix E**), the Board approved Syncrude's 2009 *Directive 074* tailings plan submission for the Aurora North site (**Appendix F**) and approved an amended Approval 10781B (**Appendix G**).

Our clients allege that in issuing these approvals the Board made an error in law and that there is substantial doubt as to the correctness of the Board's decision to approve the Syncrude tailings management plans and the amendments to the approvals.

Application for Review and Variance

The Board has established a two step process for applications for review and variance. Prior to reviewing its decision, the Board must determine the preliminary question pursuant to subsection 48(6) of the Board's *Rules of Practice* A.R. 252/2007:

48(6) When determining the preliminary question, the Board shall grant an application for review,

(a) With respect to a review of an order, decision or direction other than a review under section 40 of the Act, if the Board determines that,

(i) in the case where the applicant has alleged an error of law or jurisdiction or an error of fact, the applicant has, in the Board's opinion, raised a substantial doubt as to the correctness of the Board's order, decision or direction.

In *Decision 2000-75 Canadian Western Natural Gas Company Limited Review and Variance of Decisions 2000-9 and 2000-16 by the Federation of Alberta Gas Co-ops Ltd. and Gas Alberta Inc.* (**Appendix H**), the Board clarified that substantial doubt as to the correctness of the Board's decision will be established where a decision is based on an error in law or in fact, if such error is either obvious or is shown on a balance of probabilities to exist, and if correction of such error would materially affect the decision (Appendix H at page 2).

Pursuant to section 39 of the Act, the Board has the power to review, rescind, change, alter or vary any order or direction made by it.

Our clients allege that the Board made an error in law in approving Syncrude's 2009 tailings management plans and the amended approvals when such plans and approvals were clearly contrary to the mandatory requirements of *Directive 074* and ss. 24.1, 28.1 and 30 of the *Oil Sands Conservation Regulation*. These approvals are contrary to law and correction of these errors would materially affect the approvals.

Facts

Section 4.1 of *Directive 074* requires a minimum mass of dry fines in the oil sands feed expressed as a percentage of the total fines in the feed that must be captured in dedicated disposal areas (“DDAs”). The *Directive* sets the minimum capture of dry fines as follows:

- 20 per cent from July 1, 2010, to June 30, 2011;
- 30 per cent from July 1, 2011, to June 30, 2012; and
- 50 per cent from July 1, 2012, to June 30, 2013, and annually thereafter.

Further, section 4.3 of *Directive 074* sets standards for the formation of trafficable deposits in the DDAs as follows:

DDAs must be formed in a manner that ensures trafficable deposits. The performance criteria are based on the strength of the deposit. The following criteria must be achieved annually:

- minimum undrained shear strength of 5 kilopascals (kPa) for the material deposited in the previous year;
- removal or remediation of material deposited in the previous year that does not meet the 5 kPa requirement; and
- ready for reclamation within five years after active deposition has ceased. The deposit will have the strength, stability, and structure necessary to establish a trafficable surface. The trafficable surface layer must have a minimum undrained shear strength of 10 kPa.

The Syncrude tailings management plans, as approved by the Board by way of the letters dated April 23, 2010, and the related amended approvals, fail to meet the purpose and requirements of *Directive 074*.

Section 12 of amended Approval No. 8573H for the Mildred Lake site does not meet the *Directive*’s requirements for the capture of dry fine tailings or the creation of trafficable surfaces over fluid tailings external disposal areas. The chart below shows the non-compliance for the capture of dry fine tailings:

Year	Minimum Dry Fines Capture Required by <i>Directive 074</i> (%)	Minimum Dry Fines Capture Approved by Board for Mildred Lake Site (%)
2010-2011	20	9.3
2011-2012	30	14.6
2012-2013	50	14.8
2013-2014	50	34.6

According to the Mildred Lake tailings management plan, the 50 percent dry fines capture rate will not be achieved until 2015 with the first phase implementation of a centrifuging commercial plant (Appendix C at pages 4-5 and Table 3.3, page 17). This is two years later than required by *Directive 074*. Furthermore, in section 2.1 of the Mildred Lake tailings management plan emphasis is placed on two end pit lakes as a form of reclamation of mature fines tailings, when the purpose of the *Directive* is to establish trafficable surfaces instead of external liquid disposal. Trafficable surfaces are mentioned generally with no specific timelines, and no method is discussed on how the DDAs will be turned into the necessary trafficable landscape (Appendix C at page 4).

By way of the letter dated April 23, 2010 and amended Approval No. 8573H, the Board has approved the Mildred Lake tailings management plan despite the plan failing to meet the *Directive*'s requirements.

Section 10 of amended Approval No. 10781B for the Aurora North site provides only that dry fines capture for the Aurora North site shall meet or exceed 10.9 percent for the year 2012/13 despite *Directive 074* requiring a capture of 50 percent by that date. According to the Aurora North tailings plan, the capture of fine tailings will not begin until 2012-2013, two years later than required by *Directive 074* (Appendix F at page 14, and Table 3.3 at page 15). Also, once the 50 percent capture rate has been reached with the assistance of supplemental technology in 2018, the 50 percent capture rate cannot be maintained for all of the remaining years of the project. Moreover, the Aurora North site will continue to increase the production of the mature fine tailings until roughly 2039 as shown in Chart 2.3 (Appendix F, page 8) and Table 3.3 (Appendix F, page 15) in the Aurora North tailings management plan.

This is contrary to the intent of *Directive 074* as it requires trafficable surfaces rather than end pit lakes, leading to more expedient reclamation. Additionally, the Aurora North tailings management plan does not identify sites suitable for reclamation. The plan only mentions trafficable surfaces in the same general manner as the Mildred Lake tailings management plan (Appendix F, pages 4,6).

A Tailings Plan Review (Terra Simieritsch, Joe Obad & Simon Dyer, *Tailings Plan Review - An Assessment of Oil Sands Companies Submissions for Compliance with ERCB Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes*, (Calgary: Pembina Foundation and Water Matters, 2009) (**Appendix I**)) prepared by the Pembina Institute provides a further review of these deficiencies.

Purpose and Enforceability of Directive 074

Section 20 of the *Oils Sands Conservation Act* R.S.A. 2000, c. O-7 enables the Board to make regulations with respect to oil sands operations:

20(1) The Board may make regulations...

(l) respecting the construction, operation and abandonment of oil sands sites.

Section 24 of the *Oil Sands Conservation Act* provides the power to enforce the regulations:

24. A person who

(a) whether as a principal or otherwise, contravenes or fails to comply with this Act or the regulations or with a term or condition of an authorization, approval or permit, as the case may be,

...is guilty of an offence.

The *Oil Sands Conservation Regulation* A.R. 76/88 specifically references *Directive 074* in three sections:

24.1 An operator shall apply for and obtain the approval of the Board for the management of tailings and **shall manage the tailings in accordance with Directive 074.**

28.1 Before constructing a dedicated disposal area, an operator shall submit a dedicated disposal area plan to the Board **in accordance with Directive 074** and shall obtain the Board's approval of the plan.

30 An operator shall submit to the Board for its approval, by September 30 each year, details of its annual mine plan for the next calendar year of operation which shall include, where applicable,...

(f) a tailings management plan prepared **in accordance with Directive 074.**

(Emphasis added.)

The purpose of *Directive 074* is to provide specific performance criteria for the reduction of fluid tailings and the formation of trafficable deposits. The *Directive* allows the Board to meet the long-term goals of creating trafficable landscapes to encourage reclamation and to reduce or eliminate fluid tailings in external disposal areas. *Directive 074* creates a clear framework for tailings management in order that an industry-wide standard can be set that meets the objectives of the Government of Alberta.

Directive 074 contains specific mandatory language. Section 4.1 of *Directive 074* details the exact phase-in sequence to reduce fluid tailings by 50 percent over a three

year period beginning on July 1, 2010. The section states that whether the operator is using dykes, beaches, or neither it “must achieve the equivalent overall fines capture.”

Section 4.2 of *Directive 074* states that “DDAs must be formed in a manner that ensures trafficable deposits,” and provides a list of criteria that “must be achieved annually.”

Section 4.5.1 of *Directive 074* obliges the operator to submit annual tailings plans and pond status reports to demonstrate the development of trafficable surfaces. Appendix E of *Directive 074* describes the information that the operator must include in the annual reports to allow the Board to determine that the operator is meeting the objectives of *Directive 074*, namely, the reduction in fluid tailings and the creation of trafficable surfaces.

Lastly, sections 5.1 and 5.3 of *Directive 074* provide accountability and enforcement through compliance assessments of an operator’s performance, and when the performance is lacking the Board may take enforcement actions in accordance with *Directive 19: ERCB Compliance Assurance – Enforcement*.

The mandatory nature of the requirements of *Directive 074* is reflected in other Board and Government of Alberta documents.

In *EnerFAQs 12 – Oil Sands* (**Appendix J** at page 5), the Board states:

Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes provides performance criteria for fine tailings consolidation operations and sets out requirements for consolidated tailings ponds and for reporting on performance against the criteria. The directive also requires that detailed tailings plans be filed as part of future annual mine plan submissions.

As with all other aspects of oil sands operations, the ERCB takes very seriously the management of tailings and **is rigorous in its enforcement of tailings regulations. Tailings directive requirements are enforced in accordance with *Directive 019: ERCB Compliance Assurance—Enforcement*.**

(Emphasis added.)

Similarly, in “Tailings Performance Criteria Initiative – FAQs” (**Appendix K** at pages 2,4), posted on the Board’s website, the Board states:

The directive specifies performance criteria for the reduction of fluid tailings and the formation of trafficable deposits.

Operators are required to submit to the ERCB plans for dedicated disposal areas (DDAs), annual compliance reports for DDAs, annual tailings plans, and pond status reports...

Tailings directive **requirements will be enforced** in accordance with Directive 019: ERCB Compliance Assurance – Enforcement.

(Bold emphasis added. Underlining in original.)

A Government of Alberta document titled “Alberta’s Oil Sands: Facts About Tailings Management” (**Appendix L** at page 1) states:

The Energy Resources Conservation Board outlines aggressive tailings management criteria.

- Companies are required to reduce tailings and provide target dates for closure and reclamation of ponds.
- Between 2012 and 2016, companies must implement plans that virtually eliminate growth in fluid tailings.
- After 2016, industry will have to process fluid tailings at the same rate they produce them.

In a workshop presentation given by Stephen Smith on behalf of the Board on September 24, 2008 (**Appendix M** at page 11), one slides states:

- **Public is concerned that once specific criteria are set forth through regulatory limitations, would there be any consequences to industry if they don’t comply?**
 - Criteria for the directive: fluid tailings consumption and trafficability
 - In case of noncompliance: ERCB Compliance Assurance Directive 019
 - Example: Suncor’s North Steepbank Mine Extension condition of approval

(Emphasis in original.)

Further, the Government of Alberta’s Quarterly Update for the Alberta Oil Sands Industry, Winter 2009-2010 (**Appendix N** at page 5) states:

The Energy Resources Conservation Board (ERCB) has received plans with dates for construction, use and closure of fluid tailings ponds from six Alberta oil sands operators as required by Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes, accessible at www.ercb.ca/docs/documents/directives/directive074.pdf.

The directive requires operators to prepare tailings plans and report on tailings ponds annually, reduce fluid tailings through fines captured in dedicated disposal areas, and convert fines into trafficable deposits that are ready for reclamation five years after deposits have ceased.

Albian Sands Energy Inc., Canadian Natural Resources Limited, Imperial Oil Resources Ventures Limited, Shell Canada Inc., Suncor Energy Ltd., and Syncrude have submitted tailings plans under Directive 074. The ERCB will now conduct a detailed and comprehensive technical review of the plans. **The plans will not be approved until the ERCB is satisfied that they comply with ERCB requirements.**

(Emphasis added.)

Clearly, there is a reasonable expectation that the requirements of *Directive 074* are mandatory and that they will be enforced.

Directive 074 does grant the Board some discretion in its approval of the tailings management plans. Section 3 of *Directive 074* states:

This directive applies to all mineable oil sands operations and requires the reduction of fluid tailings and their conversion into trafficable deposits. Operators must satisfy the ERCB that their tailings management systems will achieve compliance with the directive. Operators are required to make submissions to the ERCB on how they will meet the new requirements and identify any project-specific constraints that may have a bearing on meeting the requirements. Requirements will be phased in and adapted, as approved by the Board, to take account of particular mining and tailings plans, facilities, and the status of a project.

The ERCB recognizes that fluid tailings management is developing and that operators may need flexibility to apply technologies and techniques that best suit the circumstances of particular projects. The ERCB will consider submissions of operators and will determine project-specific requirements related to the directive.

Section 3 provides operators with flexibility as to how they will meet the requirements of *Directive 074*. This section also provides the Board with discretion to take into account the particular mining and tailings plans, facilities, and status of the project. It does not, however, grant the Board the discretion to change the requirements of the *Directive*. The latter power would render *Directive 074*, as well as the Board's public statements that the requirements of *Directive 074* will be enforced, meaningless and ineffective.

Further, section 1.1 of *Directive 074* states that the *Directive* is intended to “address tailings management issues through the establishment of industry-wide performance criteria”. A question of fairness arises if the same standards are not applied to all oil sands operators.

The “Tailings Performance Criteria Initiative – FAQs” (Appendix K at page 3) further clarifies the intention that the Board’s discretion applies only to the means by which the operators’ meet the requirements of *Directive 074* and not to the altering the standards themselves:

Question: Is the directive fair across the industry?

Answer: Yes. The directive states the end objective, while allowing the operator to choose the technology to achieve the performance criteria. The goal is to minimize fluid tailings and their long-term storage.

The ERCB recognizes that fluid tailings management is developing and that operators may need flexibility to apply technologies and techniques that best suit the circumstances of particular projects.

(Emphasis in original.)

Directive 074 was developed in response to a growing public concern regarding tailings and the failure of oil sands operators to reduce the amount of fluid tailings. The *Directive*’s purpose is to establish trafficable landscapes to facilitate progressive reclamation. The *Directive* clearly states that the Board is to hold mineable oil sands operators accountable for tailings management.

Section 3 of *Directive 074* reiterates that operators have to satisfy the Board that the management system will comply with the *Directive*. Section 3 further lays out the limitations to the Board’s discretionary powers in approving the operators’ plans. Approving plans that are not in compliance with the mandatory requirements of the *Directive* would be contrary to law. The Board must act in accordance with the law and in the best interest of the public as determined by the enacted regulation.

Applicable Legal Principles

It is an error of law for an administrative body to approve plans that are contrary to law.

In *Seaview Land Estates Ltd. v. South*, (1981) 28 B.C.L.R. 288, 15 M.P.L.R. 14, 124 D.L.R. (3d) 610 (B.C.C.A.) (**Appendix O**), a subdivision developer applied for permission to build 5 acre lots, despite the by-law fixing the minimum size at 10 acres. The court held that a public servant must exercise his discretion in accordance with the law, and thus did not have the authority to grant approval for a development that was contrary to the enacted rule. The Court stated:

[47] Apart from the exceptions mentioned above, it appears that where the legislature intended to give a power to depart from the requirements of the statute or by-laws, it did so in explicit and limited terms. In the case of highway access the approving officer was given explicit and limited exempting or relieving powers. In the case of zoning and subdivision by-laws, the board of variance was given explicit and limited exempting or relieving powers. In the case of "frontage", municipal councils were given exempting powers and the right to delegate such exempting power. It follows, in my opinion, that when the provisions of the Land Title Act and the Municipal Act relating to zoning and subdivisions are examined as a whole, there can be no departure from any statute or by-law unless such departure is sanctioned by statute.

[48] There are additional reasons for holding that the words "may refuse" do not give power to the approving officer to approve a subdivision that does not comply with municipal or regional district by-laws. It is presumed that the regional district by-laws fixing the minimum size of lots at five acres were enacted in the public interest, and s. 87 of the Land Title Act cannot be construed as giving the approving officer the power to act against the public interest. I refer to the judgment of McRuer, C.J.H.C, in *R. v. Can. Breweries Ltd.*, [1960] O.R. 601, 33 C.R. 1, 126 C.C.C. 133 at 167, 34 C.P.R. 179 (H.C.), as follows:

When a Provincial Legislature has conferred on a Commission or Board the power to regulate an industry and fix prices, and the power has been exercised, the Court must assume that the power is exercised in the public interest.

[49] By analogy, when the legislature has conferred on a regional district the power to regulate the subdivision of land by the enactment of by-laws, the court will assume that the power has been exercised in the public interest.

In the current matter, *Directive 074* was developed in the public interest to address increasing concerns over the expansion of tailings ponds. Neither the Act, the *Oil Sands Conservation Act* nor the *Oil Sands Conservation Regulation* explicitly grants the Board the discretion to approve a tailings management plan that is contrary to the requirements of the *Directive*. Furthermore, the Board must exercise the discretion that it does have in the public interest in rigorously enforcing the requirements of the *Directive*.

Similarly, in *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425 (**Appendix P**) the respondent coal company applied for authorization for the development of an open pit mine that would destroy migratory bird habitat through

large rock excavation. The Court stated, at paragraph 97, that the principle objective of the statutory interpretation was to determine the intention of Parliament. The Court found that the purpose of the *Migratory Birds Convention Act* was to protect migratory birds and their nests. The Court found therefore, at paragraphs 105-106, that the Minister of the Environment could not issue a permit under the *Fisheries Act* that permitted an activity that was contrary to the *Migratory Birds Regulations* and to do so was contrary to law.

Similarly, in the current matter, the intention of *Directive 074* is clear – to set specific performance criteria for the reduction of fluid tailings and the formation of trafficable deposits. For the Board to approve tailings management plans that are not in accordance with those specific performance requirements is contrary to law.

Reasons to Grant the Request for Review and Variance

1. Sections 24.1, 28.1 and 30 of the *Oil Sands Conservation Regulation* require that tailings be managed in accordance with *Directive 074*.
2. *Directive 074* sets enforceable, mandatory standards for the capture of dry fine tailings and the formation of trafficable deposits.
3. The 2009 tailings management plans submitted by Syncrude for the Mildred Lake and Aurora North sites do not meet the requirements of *Directive 074*.
4. The Board approved the 2009 tailings management plans for the Mildred Lake and Aurora North sites and issued the related amended approvals despite the fact that the tailings management plans did not meet the requirements of *Directive 074*.
5. It is an error of law for the Board to approve tailings management plans and issue approvals that are not in compliance with *Directive 074*.
6. There is substantial doubt as to the correctness of the Board's decision to approve the tailings management plans for the Mildred Lake and Aurora North sites and to issue the related amended approvals.
7. The error of law, when corrected, will materially affect the decision to approve the tailings management plans for the Mildred Lake and Aurora North sites and the related approvals.

Conclusion

The Pembina Institute and Water Matters therefore respectfully request that the Board review and rescind its decision to approve the tailings management plans for the Mildred Lake and Aurora North sites and review and rescind Approvals No. 8573H and 10781B, and further that the Board require that Syncrude submit tailings management plans for these sites that are in accordance with the requirements of *Directive 074*.

Sincerely,

A handwritten signature in cursive script, appearing to read "Barry Robinson".

Barry Robinson
Staff Lawyer

Enclosure: Appendices

Cc: Ray Hansen, General Counsel, Syncrude Canada Ltd.
Simon Dyer, Pembina Institute
Joe Obad, Water Matters