I. INTRODUCTION

1. These Submissions constitute the Reply of Quicksilver Resources Canada Inc. ("QRCI or Quicksilver") to the written Final Argument of Carbon Development Partnership ("CDP") and EnCana Corporation ("EnCana").

2. In these Submissions, we will first (in Part II) provide Quicksilver's Reply to the Final Argument of CDP. We will then (in Part III) provide Quicksilver's Reply to EnCana's Final Argument. Finally (in Part IV), Quicksilver will suggest some key points for the Board to consider as it begins its deliberations.

3. In addition, Quicksilver has participated in the preparation of the Joint Reply Argument of the Natural Gas Rights Holders which deal with technical and scientific issues and are being filed concurrently with Quicksilver's Reply. Quicksilver expressly adopts and concurs with the Joint Reply Argument.

II. REPLY TO FINAL ARGUMENT OF CDP

Issues Previously Addressed

4. Quicksilver notes, firstly, that much of CDP's Final Argument is a reiteration of positions taken by CDP and its Pre-Hearing Written Submissions [Ex. 03-036-2006-09-50].

5. For example, Part II of CDP's Final Argument deals with the nature of a Section 40 Hearing. This issue was previously raised by CDP in its September 15, 2006 Written Submissions.

6. Also, paras. 124-133 of CDP's Final Argument addresses the issue of the "meaning of entitlement". This issues was extensively addressed in CDP's September 15, 2006 Written Submissions.

7. With respect to these and other issues addressed by CDP in its Final Argument which were previously addressed in its September 15, 2006 Written Submissions, Quicksilver does not intend to provide any further response. Rather, to the extent necessary, Quicksilver requests that the Board refer to our Reply Submissions of September 29, 2006 [Exhibit 14-009-2006-09-29] in which Quicksilver's response to those issues can be found.

The "Alternative Approaches" Open to the Board

8. The first substantive point in CDP's Final Argument which Quicksilver would like to respond to is Part VI, "Alternative Approaches Open to the Board".

9. In response, Quicksilver submits that the proposition that there are five different alternative approaches open to the Board is clearly an attempt to drive the Board towards the "approach" that best suits CDP. In fact, the Board has complete discretion to follow whatever approach it deems appropriate, so long as that approach is not so unreasonable

as to constitute an abuse of discretion and thus an error of law. In other words, the Board need not restrict itself to the approaches suggested by CDP but, rather, should follow whatever approach it deems appropriate.

Matters that CDP says are not Relevant

10. Quicksilver will next respond to Part VII of CDP's Final Argument, "Matters that are not Relevant Issues". Specifically, Quicksilver takes issue with CDP's assertion that the issue of whether CBM is natural gas is not relevant to this proceeding.

11. As will be addressed more fully in Quicksilver's Reply to EnCana's Final Argument, in our Submission this issue is highly relevant because if CBM is not natural gas, the Board's jurisdiction to regulate its development under the *Oil and Gas Conservation Act* is in serious question. The distinction repeatedly drawn by CDP and EnCana between CBM *in situ* (where it is allegedly an inherent constituent of coal and not natural gas) and CBM in the wellbore and at the surface (where they acknowledge it is natural gas) is not only wrong in fact it is administratively unworkable. As stated above, the submission will be developed more fully in QRCI's response to EnCana's Final Argument.

CDP's Review of the Legal Evidence

12. Quicksilver will now briefly address Part IX of CDP's Final Argument, "Review of the Legal Evidence".

13. In para. 142 of it Final Argument (on p. 50), CDP states that it does not believe "that it is necessary or desirable for the Board" to embark on an extensive review and analysis of underlying property and ownership rights, similar to the process that would be used by courts in determining ownership issues. Yet, in Part IX of its Final Argument, CDP spends 18 pages (paras. 45-82) discussing decisions of courts in cases where they have decided ownership issues. With respect, Quicksilver submits this entire discussion is irrelevant because neither Quicksilver nor, we believe, any of the other Gas Producers

have asked the Board to carry out a *Borys*-type analysis in this case. And EnCana has most definitely not.

14. If all of the parties agree that it is not the role of the EUB to undertake an extensive review and analysis for the purpose of determining the objective intent of the parties to grants and reservations made at the beginning of the 20th Century, discussing in great detail the cases in which the courts have done just that is simply not helpful to the Board. Accordingly, the lengthy discussion of the common law in Part IX if CDP's Final Argument is not relevant and will not assist the Board in making the determination it is required to make in this Proceeding.

What should the Board do with the Expert Evidence?

15. Quicksilver will next respond to Part XI of CDP's Final Argument, "Mr. Mavor's Evidence and Dr. Levine's Evidence".

16. Paragraph 85 of CDP's Final Argument contains the rather startling assertion that it is not enough for the Board to "prefer" the evidence of Mr. Mavor over that of Dr. Levine. According to CDP, "a simple preference is insufficient". Instead, the Board must "unreservedly accept the evidence of Mr. Mavor" and "unequivocally reject the evidence of Dr. Levine", in order for the Gas Producers to succeed.

17. In response, Quicksilver asks, why? Moreover, on what authority is this assertion based? Certainly, none is cited. With respect, this assertion has no basis in law or EUB precedent and should be rejected by the Board.

18. As an experienced quasi-judicial tribunal, the Board routinely hears evidence from experts that conflicts and is sometimes required to accept the evidence of one such expert in preference to the evidence of the other expert. That is all it means to "prefer" the evidence of one expert over another. There is absolutely no reason why the Board's normal procedure should be any different in this case then it is for any other case.

19. For reasons that are, by now, well known to the Board, Quicksilver submits that the Board should “prefer” the evidence of Mr. Mavor over that of Dr. Levine and that doing so is sufficient to find in the Gas Producers’ favour and dismiss the Coal Owners’ review and variance requests.

New Evidence

20. Quicksilver will next respond to an issue raised in Part XII of CDP’s Final Argument, “Review of the Scientific Evidence”.

21. Specifically, QRCI will here state for the record our formal objection to CDP introducing in its Final Argument new evidence. We refer to paras. 90-94, where CDP refers to two documents. The first is Chapter 4 of a Gas Research Institute report titled “A Guide to Coalbed Methane Reservoir Engineering”. The second is the “Sequestration Patent”. These documents are attached to CDP’s Final Argument as Appendix A and Appendix B, respectively.

22. Quicksilver submits that there can be no doubt but that these two documents constitute evidence. They are not authorities, legal or otherwise, such as would be appropriate to be filed as part of argument. Rather, they are documents used for the express purpose of trying to impeach Mr. Mavor’s credibility by asserting that information contained in the documents contradicts testimony given by Mr. Mavor at the hearing.

23. Basic rules of fairness and evidence require that these documents should have been introduced as exhibits at the hearing. Further, the proper procedure would have been to put the documents to Mr. Mavor on cross-examination with the suggestion that they contradict his testimony so as provide Mr. Mavor the opportunity to address the alleged conflict or inconsistency.

24. Accordingly, Quicksilver respectfully requests that the Board rule that Appendix A and Appendix B to CDP's Final Argument are not admissible at this point in the Proceeding and will not be accepted as evidence and will not be relied upon any way by the Board in rendering its decision in this Proceeding.

Quieting Title

25. Lastly, Quicksilver will respond to CDP's submissions on "quieting title" set out in Part XV of its Final Argument, "Responses to Specific Matters Raised by the Gas Producers".

26. In para. 143, CDP attempts to explain away the damaging (to the Coal Owners) testimony of Dr. Percy that there have been many cases where the Board has issued well licences in circumstances in which ownership is in dispute. CDP argues that the difference in this case is that this is the first time the dispute was raised prior to the well licence being granted.

27. In response, Quicksilver submits that the time at which the dispute is raised cannot affect the Board's jurisdiction. Either the Board has jurisdiction to issue well licences notwithstanding the existence of a dispute, or it does not. Timing is irrelevant to the question of jurisdiction. This also demonstrates the fallacy of EnCana's position that the moment a "*bona fide*" dispute as to ownership is raised, the Board loses jurisdiction to determine entitlement under s.16 of the OGCA. EnCana's position presupposes that the Board had the jurisdiction, only to lose it upon the assertion of the "competing proprietary claim". This is just wrong.

III. REPLY TO FINAL ARGUMENT OF ENCANA CORPORATION

The Board does not have Jurisdiction to Decide "Competing Proprietary Claims"

28. EnCana's primary, over-arching argument is that the Board does not have jurisdiction to decide competing claims to ownership of CBM. This argument is made repeatedly in Parts II and III of EnCana's Final Argument (pp. 2-12). Quicksilver notes that the phrases "competing proprietary claims" or "competing ownership claims", or variants thereof, appear in paras. 13, 14, 16, 19, 21, 26, 33, 34, 36, 38, 40 and 64 of EnCana's Final Argument.

29. Quicksilver submits that all of this is completely unnecessary. Neither Quicksilver nor, we believe, any of the other Gas Producers have ever asserted or advocated that the Board has the jurisdiction to finally determine proprietary disputes. We had thought it was common ground between the Gas Producers and EnCana that this is the case. Where we differ is in our position that the Board has jurisdiction under s.16 of the *Oil and Gas Conservation Act* ("OGCA") to determine entitlement to produce, which we say is something different from a final legal determination of property rights. Accordingly, in our submission, EnCana has expended much effort and not a little righteous indignation advancing a position that Quicksilver and the other Gas Producers do not disagree with.

The Board does have Jurisdiction to Determine Entitlement under Section 16 of the OGCA

30. EnCana uses its primary argument that the Board does not have jurisdiction to decide competing claims to ownership of CBM to assert that the Board cannot determine entitlement to produce under s.16 of the OGCA in these circumstances. With respect, this is simply wrong, for the following reasons.

31. In para. 10 of its Final Argument, EnCana cites a passage from the decision of the Alberta Court of Appeal in the *Goodwell* case to the effect that s.16 of the OGCA will be contravened "if the person who holds the well licence does not possess the right to produce the hydrocarbon authorized by the well licence".

32. Since the Court of Appeal in *Goodwell* uses the phrase "hydrocarbon", it is useful to ask what hydrocarbons can be authorized to be produced by a well licence, per s.16 of the OGCA?

33. The answer is clear. Section 16 is very specific. It states that no person shall apply for or hold a licence for a well for the recovery "of oil, gas or crude bitumen" unless that person is entitled to the right to produce the oil, gas or crude bitumen from the well. Although s.16 also speaks of holding a licence for a well "for any other authorized purpose", the use of the word "purpose" suggests that it is not intended to apply to a different substance (than oil, gas or crude bitumen) but rather to a different purpose or function (e.g., injection).

34. The significance of this is that s.16 and, we would submit, the entirety of the OGCA, is predicated on the Board having jurisdiction under the Act to regulate the exploration, development and production of these three substances: oil, gas and crude bitumen. The exploration, development and production of other substances (e.g., coal) is governed by different statutes (e.g., the *Coal Conservation Act*).

35. If a well is not drilled for the purpose of recovering and producing oil, gas or bitumen then s.16 does not even apply. Therefore, one of the basic questions before the Board under s.16 is simple: Is this an application for an oil well, a gas well or a bitumen well?

36. It is obvious that CBM is not oil and is not crude bitumen. Therefore, it must be gas. If it is not, then s.16 does not even apply to applications for licences for CBM wells. Indeed, if CBM is not natural gas, it follows that not only would s.16 not apply to CBM well licence applications but the OGCA as a whole would not apply to CBM development.

37. That is why Quicksilver submits that the issue of whether CBM is natural gas is highly relevant in this Proceeding. We reiterate: if CBM really is (as asserted by EnCana and CDP) something other than gas, the Board needs to ask itself how does s.16 even apply in this Proceeding and how does the OGCA as a whole apply to regulate the development of CBM?

38. That is also why one of EnCana's and CDP's foundational arguments – that CBM is natural gas, but only for production purposes, not ownership purposes – is nonsense. CBM is either gas or it isn't.

39. The leases relied on by the Gas Producers in support of the well licence applications permit them – on their face – to produce natural gas. If CBM, properly understood, is natural gas then the requirements of s.16 have been met. In other words, in the context of CBM development all the Board can do under s.16 is ask itself: who is entitled to produce gas from the lands in question? The answer is whoever holds a valid and subsisting natural gas lease, since the lease is *prima facie* proof of that entitlement.

40. Therefore, contrary to what is asserted by CDP and EnCana, the issue of whether CBM is natural gas is in fact an essential question before the Board in this Proceeding. That is why CDP and EnCana – the parties who requested this Review and Variance Proceeding – retained Dr. Levine to provide expert opinion evidence. Clearly, it is also why the Gas Producers retained Mr. Mavor to provide expert opinion evidence on the same issue.

41. In closing on this issue, Quicksilver reiterates that the Board needs to ask itself whether, if CDP and EnCana are right that CBM *in situ* is not natural gas but rather part of the coal, the Board has any jurisdiction at all under the OGCA to regulate CBM development in this Province.

The Allegation that the Gas Producers are Trying to "Compel" Development

42. In paras. 30, 33 and 48 of its Final Argument, EnCana makes the somewhat peculiar suggestion that the natural Gas Producers are somehow trying to "compel" or "force" development and that this is improper. In response, Quicksilver submits that neither it nor any of the Gas Producers have ever said this. What we have said is that the Gas Producers have acquired natural gas leases and, based on those leases, submitted well licence applications. Having submitted those applications, they believe they are entitled to have them processed in an orderly way by the EUB.

The *Goodwell Petroleum* Case

43. At paras. 52 and 53 of its Final Argument, EnCana addresses the *Goodwell* case. In para. 53, EnCana suggests that the rights in *Goodwell* "overlapped but were not inconsistent". With respect, EnCana's attempt to distinguish the *Goodwell* case fails.

44. In fact, the rights in *Goodwell* were inconsistent, at least to a certain extent, otherwise *Goodwell* would not have applied in the first place to shut in AEC's bitumen wells. The rights were inconsistent because, as ultimately found by the Court of Appeal, AEC's right to produce bitumen under its leases included the rights to produce overlying gas, which Goodwell had acquired separately by lease. Goodwell argued AEC was, in effect, trespassing on and converting to its own use property (the gas) that belonged to Goodwell.

45. The Court of Appeal found that the Board's decision ordering AEC to "quiet title" with Goodwell (by forcing AEC to obtain through negotiation Goodwell's consent to produce gas) amounted to giving Goodwell a veto over bitumen development. There is no meaningful distinction to be made between *Goodwell* and this case in this regard: requiring the holders of valid and subsisting natural gas leases to "quiet title" with the Coal Owners (e.g., by negotiating "coal certainty agreements") would give to the Coal Owners a veto over development.

The *Continental Resources of Illinois* Case

46. Beginning at para. 78 of its Final Argument, EnCana refers extensively to the recent decision of the Appellate Court of Illinois in *Continental Resources of Illinois Inc. v. Illinois Methane LLC*, 87 NE 2d 897 (III App. 5 Dist. 2006). Quicksilver submits that the *Continental Resources* case is entirely distinguishable from the facts of this case. Moreover, this case arguably helps the Gas Producers more than it does the Coal Owners.

47. The *Continental Resources* case is distinguishable from the facts in this Proceeding based on the peculiar language contained in the leases that were in issue in that case. As noted by the Appellate Court of Illinois, the leases in question "specifically require the lessee to permanently case and cement all holes drilled through coal seams or mine workings".[1] Based on that peculiar language, the court concluded that the lessee was not granted the right to produce CBM. It is difficult to see how the court could have concluded otherwise.

48. The *Continental Resources* case can be distinguished on another basis. In the State of Illinois, it is apparently the law that oil and gas are incapable of ownership until actually found and produced.[2] This is not the law in Alberta. Indeed, no single theory of ownership of oil and gas has ever been adopted by any court in Canada.

49. Finally, Quicksilver submits that the *Continental Resources* case is a classic example of either side to a dispute being able to find statements that support its position. For example, the case states:

> There are three states of coalbed methane gas: (1) free gas within the cleats and matrixes of the coal, (2) gas dissolved in water in the coal pores, and (3) gas adsorbed onto the solid surface of the coal. When the pressure on the coal is reduced, the forces that hold the

1 Page 7 of 11 of on-line version: www.state.il-us/Court/Opinions/AppellateCourt/2006/5thDistrict/April/Html/5030784.htm.

2 Ibid, p. 6 of 11.

> coalbed methane to the coal are reduced and coalbed methane is released from the coal.[3]

50. Quicksilver submits that this statement is hardly consistent with Dr. Levine's theory that CBM is an inherent constituent of the coal. Rather, it clearly suggests that, even when adsorbed, the CBM that is being held to the surface of the coal is a different substance from the coal itself.

51. Similarly, elsewhere in the judgment, the court observes that "coalbed gas is similar to and migrates in the same manner as other natural gas".[4] Again, this statement supports the position of the natural Gas Producers, not the Coal Owners.

52. Accordingly, Quicksilver is confident that when the Board reviews the *Continental Resources* case, it will agree that the case does not in fact support the Coal Owners' position and arguably supports the position of the Gas Producers.

The Language of the Leases in Question

53. In para. 87 of its Final Argument, EnCana suggests that because the leases "require cementing to prevent flow substances from stratum to another, this suggests that CBM was reserved as coal". With respect, this is ridiculous.

54. The lease provision in question is a clause from the standard-form "Operations of Lessee" section of an oil and gas lease. This is the provision that states that the lessee "shall conduct all its operations on the leased lands in a diligent, careful and workmanlike manner", including that it will "properly plug or cement any wells drilled or being drilled upon the leased lands so as to prevent any flow of water into any porous strata or to prevent flow of any substances from one stratum to another". To suggest that this standard clause somehow supports the argument that CBM was reserved as coal is certainly creative but hardly persuasive.

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3 Ibid, p. 4 of 11

4 Ibid, p. 6 of 11.

***In Situ* Gasification**

55. In para. 88 of its Final Argument, EnCana asks how *in situ* gasification of coals will be dealt with if CBM does not belong to the coal owner. The answer, it is submitted, is that in a properly functioning regulatory system production of CBM would occur first, before the coals were consumed by *in situ* gasification.

The "Policy" of Quieting Title

56. In para. 116 of its Final Argument, EnCana criticizes the Gas Producers for characterizing EnCana's position as being that the Board should adopt a "policy" of quieting title. With all due respect, Mr. Welsh in his opening statement clearly said that EnCana's position was that the Board "should adopt a policy of 'quiet title – then drill'" [Ex. 20-040, p.3]. The Gas Producers did not make this up. EnCana did.

EnCana's Changed Position on Jurisdiction

57. Beginning at para. 119 of its Final Argument, EnCana attempts to refute the submission that it has changed its position and argues that if it did so, this would not be enough to "disentitle it to relief".

58. In response, Quicksilver submits firstly that the fact that EnCana has changed its position with respect to the EUB's jurisdiction is clear on the face of the record. EnCana's attempt to confuse matters by suggesting it is the Gas Producers who have changed their position – not EnCana – should be seen for what it is: a transparent attempt to deflect attention from the fact that it cannot substantively address the issue.

59. Secondly, Quicksilver submits that neither it nor any of the Gas Producers have suggested that the fact that EnCana has changed its position on jurisdiction disentitles it to relief. What we have suggested is that it sheds doubt on the "*bona fides*" of EnCana's position in the review hearing. In that regard, during cross-examination Mr. Welsh

agreed that this was a factor which the Board could consider in determining the outcome of the Review and Variance Proceeding.

EnCana's Position with Respect to the CAPP Recommendations

60. In para. 136(b) of its Final Argument, EnCana says that it did not accept the majority recommendation of CAPP on split title ownership issues for CBM and supported a resolution that CBM not be legislated to be "natural gas". Reference is made to Exhibit 20-066.

61. In response, Quicksilver urges the Board to look closely at Exhibit 20-066. If it does so, it will see that one of the "Consensus Recommendations" (meaning EnCana approved of it) was that Bill 18 "should be amended to declare that NGC is natural gas and should explicitly state that it is retroactive". Therefore, while it is true that EnCana did not accept the majority recommendation of CAPP with respect to freehold split title issues, it is not correct to say that EnCana supported a resolution that CBM not be legislated to mean natural gas. Perhaps this was simply a typographical error but the record shows that the opposite is true: EnCana in fact supported CAPP's resolution that CBM be legislatively defined as being natural gas.

EnCana's Position at the January 24-25, 2006 Oil and Gas Law Conference

62. In para. 136(d) of its Final Argument, EnCana makes reference to statements contained in Exhibit 20-052, the split title presentation made to the Oil and Gas Law Conference.

63. In response, Quicksilver notes that EnCana conveniently shows one excerpt from the document that supports its position that CBM is coal. However, as was pointed out on cross-examination, the document contains many other statements by EnCana to the effect that, depending on which test is applied, and which type of severance you are dealing with, CBM is gas (see, for example, p. 22 of Exhibit 20-052).

64. Exhibit 20-052 was authored by an in-house counsel for EnCana and a contract lawyer retained by EnCana. It is therefore not surprising that it contains the statement excerpted by EnCana at para. 136(d) of its Final Argument. What is surprising is that the document contains so many other statements that, depending on the facts and the test used, CBM is gas. That is the real significance of Exhibit 20-052.

Pooling and Reduced Spacing

65. Finally, in paras. 143 and 144 of its Final Argument, EnCana deals with pooling and reduced DSU's. Quicksilver would simply observe that no substantive response is made by EnCana to the many criticisms made by the Gas Producers of EnCana's pooling and reduced DSU proposals. In effect, EnCana appears to have abandoned its attempts to justify the use of vertical pooling and reduced spacing as means by which CBM production could take place pending final judicial determination of legal ownership.

IV. CONCLUSION

66. Quicksilver would like to thank the Board for conducting a thorough and fair hearing into the issues raised in this Proceeding. Those issues are difficult and complex and Quicksilver appreciates the effort made by the Board and its staff to ensure they issues were properly reviewed and addressed.

67. As the Board begins its deliberations, Quicksilver would like to suggest by way of summary that the Board focus on the following key points.

EnCana and CDP initiated this Review and Variance Proceeding

68. Although Devon, Fairborne and Bearspaw have been characterized as the "applicants" in this Proceeding (because they were the original well licence applicants), there would not have been any Proceeding had not CDP and EnCana requested it.

69. Although CDP has gone so far in its Final Argument as to describe itself as an "Intervener", the fact is CDP and EnCana are the "review applicants". It is them – not Devon, Fairborne or Bearspaw nor any of the other Gas Producers – that asked for a review hearing.

The EUB has Jurisdiction under s.16 of the OGCA to Determine Entitlement

70. Clearly, the Board's jurisdiction to determine entitlement under s.16 of the OGCA emerged as one of the critical issues in this Proceeding.

71. Given that EnCana and CDP asked for this review hearing, their positions on jurisdiction are, with all due respect, pretty extraordinary: i.e., the Board does not have the jurisdiction to determine entitlement.

72. In this regard, EnCana has been explicit: the Board has no jurisdiction to determine entitlement under s.16 of the OGCA in the face of a *bona fide* dispute as to ownership. In these circumstances, the jurisdiction of the Board is restricted to determining the existence of the dispute.

73. CDP's position on this issue is stated differently but is the same in the result. CDP says that the Board does have some jurisdiction under s.16 (though it never says what that jurisdiction is), but that in the face of a dispute over ownership it is "impossible" for the Board to determine entitlement. Quicksilver submits this amounts to the same thing; namely, the Board does not have jurisdiction to determine entitlement.

74. Therefore, the Board has been confronted with the following situation:

(a) EnCana and CDP request a review hearing;

(b) The Board grants a review hearing. In so doing, it issues a Notice of Hearing in which it clearly states that the Board will consider "the issue of legal entitlement of coalbed methane". Neither EnCana nor CDP objected to the terms of the Notice of Hearing;

(c) Yet once the review proceeding commenced, their position was that the EUB does not have jurisdiction to determine entitlement under s.16 of the OGCA.

75. Quicksilver submits that the Board should be asking EnCana and CDP why they believed it was necessary to have a hearing before the Board in order to, in effect, tell the Board that it does not have jurisdiction to make a determination of the issue before it. One would have thought that if this were the position of EnCana and CDP, it would be advanced before a court, not the EUB.

76. By contrast, Quicksilver has maintained throughout this Proceeding that the EUB does have express jurisdiction to determine entitlement under s.16 of the OGCA and that the

real issue is: what must a well licence applicant do to establish to the Board's satisfaction that is entitled to the right to produce (i.e., what is the issue is standard of proof)?

CBM is Natural Gas

77. Both CDP and EnCana acknowledged several times during the Proceeding that CBM is natural gas in the wellbore and at the surface and for all purposes of production and operations. Therefore, the only debate is whether CBM is gas *in situ*. In other words, the challenge faced by CDP and EnCana in this Proceeding has been to persuade the Board that notwithstanding that CBM is gas in the wellbore and at the surface, it is <u>not</u> gas *in situ*. They have failed to meet this challenge.

78. The Coal Owners and the Gas Producers both adduced expert evidence on this issue. Dr. Levine gave expert testimony on behalf of the Coal Owners and Mr. Mavor gave expert testimony on behalf of the Gas Producers. Without belabouring the point any further, it is the position of Quicksilver that Mr. Mavor was clearly the more credible expert and the Board should prefer his evidence to that of Dr. Levine.

Standard of Proof and Onus

79. CDP has argued strongly that the onus is on the well licence applicants (the Gas Producers) to prove entitlement. Further, CDP says that the standard of proof is certainty, which in effect means unless the Gas Producers obtain a judicial determination that they are entitled to the right to produce, it is "impossible" for the Board to accept that they have proven entitlement.

80. Quicksilver submits that, in fact, the proper way to analyze this issue is as follows:

(a) CBM has, since 1991 (with the publication of IL 91-1), been regulated as though it is in fact natural gas.

(b) Devon, Fairborne and Bearspaw acquired valid natural gas leases on the lands in question.

(c) They submitted well licence applications to the Board.

(d) Under s. 16 of the OGCA, a well licence applicant is required to establish entitlement to the right to produce oil, gas or crude bitumen.

(e) With respect to their obligation under s.16, the well licence applicants relied on their natural gas leases as proof that they are entitled to the right to produce gas.

(f) The Coal Owners objected to these well licence applications on the basis that they own the CBM; i.e., that CBM *in situ* is coal, not gas.

(g) The Coal Owners freely acknowledge that CBM is gas in the wellbore and at the surface and for all production and operations purposes.

(h) Given that the substance sought to be produced is CBM, the question under s.16 of the OGCA is whether the well licence applicants have demonstrated that they are entitled to the right to produce gas (as opposed to oil or crude bitumen).

(i) Clearly, possessing a valid natural gas lease establishes an entitlement to produce gas on a *prima facie* basis. Therefore, the onus on the well licence applicants was met.

(j) The onus then shifted to the Coal Owners to prove that, notwithstanding that CBM is gas in the wellbore and at the surface, it is something different *in situ*.

(k) Given that no court has ruled on this (i.e., there has been no final judicial determination on the ownership of CBM), the Coal Owners have no more than an unproved claim and therefore have failed to establish on a balance of probabilities that the well licence applicants are not entitled to the right to produce.

Disposition

81. If the Board agrees with the position of the Gas Producers, then it must:

(a) Dismiss the review and variance applications;

(b) Rescind Bulletin 2006-019;

(c) In doing so, make it clear to all stakeholders that henceforth the Board will be again accepting and processing well licence applications on freehold, split-title lands in accordance with the outcome of this Proceeding; and

(d) Make it clear to all stakeholders that while the EUB is obligated to carefully review and assess all objections to energy development applications, should the Coal Owners continue to submit "blanket objections" to applications filed by Gas Producers on freehold, split-title lands, those objections will be dealt with a manner consistent with the outcome of the Proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Calgary, in the Province of Alberta, this 13th day of December, 2007.

McLENNAN ROSS LLP

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Per: Gavin S. Fitch
Solicitor for Quicksilver Resources Canada Inc.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. REPLY TO FINAL ARGUMENT OF CDP 2

III. REPLY TO FINAL ARGUMENT OF ENCANA CORPORATION 7

IV. CONCLUSION 16

ALBERTA ENERGY AND UTILITIES BOARD

IN THE MATTER OF THE *ENERGY RESOURCES CONSERVATION ACT*, R.S.A. 2000, C. E-10; AND THE *OIL AND GAS CONSERVATION ACT*, R.S.A. 2000, C. 0-6.

AND IN THE MATTER OF PART II OF PROCEEDING NO. 1457147, COALBED METHANE (CBM) REVIEW HEARING

REPLY OF QUICKSILVER RESOURCES CANADA INC. TO THE WRITTEN FINAL ARGUMENT OF CARBON DEVELOPMENT PARTNERSHIP AND ENCANA CORPORATION

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