

## **SUBMISSIONS TO THE OIL SANDS PANEL ON PHASE II PROPOSED OPTIONS FOR STRATEGIES AND ACTIONS FOR OIL SANDS DEVELOPMENT IN ALBERTA**

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### **I. Introduction**

The Environmental Law Centre (the “ELC”) is a charitable organization, incorporated in 1982, to provide Albertans with an objective source of information on environmental law and natural resources law. The ELC provides services in legal education, assistance, research and law reform to achieve its mission to ensure that laws, policies and legal processes protect the environment.

The ELC has provided assistance to the public and submissions to government on energy related issues since 1982. We provided written and oral submissions to the Oil Sands Panel (the “Panel”) on a vision and principles for oil sands development in September 2006. Accordingly, we have prepared submissions to assist the Panel in choosing strategies and actions to guide the long-term development of the oil sands.

This submission will deal with governance matters under Vision 9, focusing on the public’s role and participation in oil sands development, improvement of the cumulative effects management system, and the role of government. The ELC has also made submissions to the Panel in Edmonton, Bonnyville, and Peace River on strategies and actions relating to land-use planning, regulation of greenhouse gas emissions, water issues, and reclamation, and will be providing a comprehensive written submission covering all of these issues.

For ease of reference, we have appended a chart which summarizes our positions on the strategies and actions outlined in this submission. As instructed by the Multi-Stakeholder Committee (the “MSC”), this chart summarizes which actions we agree with, what we do not agree with, and any gaps, additions or alternatives we have proposed.

## **II. Vision 9: Demonstrates Leadership Through World Class Governance**

Vision 9 relates directly to the process for overseeing oil sands development in Alberta, including the legal, regulatory and policy frameworks within which such development will proceed in the future. Our Phase I submission to the Panel included our vision for oil sands development, that: “Sound laws and policies that are protective of the environment are implemented and effectively applied to current and future oil sands development.” We urge the Panel to continue to apply this vision as a guide in further refining the strategies and actions applicable to oil sands development, and particularly in relation to governance matters. Additionally, we propose the following overarching process criteria that should be applied to all aspects of oil sands development: transparency, public participation and enforceability.

## **III. The Public’s Role and Participation**

For sound development of Alberta’s oil sands, there must be an increased and clearly defined role for the public throughout the life cycle of oil sands development, from policy development such as this consultation initiative, through tenure disposition, regulatory approvals and operational oversight, to post-reclamation surveillance. To be effective, this role must be accompanied by transparency of processes. This includes broad access to information and written reasons for regulatory decisions, and the ability of the public to seek administrative and judicial review at key regulatory decision-making points, such as mineral disposition, and authorizations granted by provincial and federal authorities.

A reason supporting the importance of public participation in regulatory decision-making, which may be particularly relevant to Alberta and the current state of affairs in relation to oil sands development, is the notion of “agency capture” by regulated interests, where the loudest and most consistent voice heard and generally heeded by regulators is that of the parties that they regulate.<sup>1</sup> Agency capture is seen to arise out of three factors, all of which currently exist in Alberta. The first is that the limited resources of administrative and regulatory agencies lead to close cooperation between the regulator and the regulated industry, creating dependence by the agency on the industry as a source of information. The second is dependence of regulatory agencies on the regulated industries for political support. The third factor is agency deference to industry positions, which arises because open-ended agency mandates do not clearly define the public interest in any particular context, while industries have the capacity and involvement in the regulatory process to “consistently and coherently” provide their views to the regulatory agency. It is important to note that the notion of agency capture does not presuppose any actual or alleged bias on the part of public officials.

In relation to agency capture, there are benefits that flow to regulatory and administrative processes from increased public participation.<sup>2</sup> Public participation gives decision-makers a greater range of ideas and information to consider in making decisions, by bringing forward important facts and submissions and presenting perspectives not otherwise available to the decision-makers. It can also enhance public acceptance of agency decisions and provide broader bases of political support for regulatory agencies.

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Additionally, increased public participation enables the presentation of alternate views, leading to more thorough analysis and clearer reasons in agency decisions.

The ELC agrees with and strongly supports Action 1.10 (eliminate “directly affected”), as the “directly affected” restriction has significantly limited public participation in regulatory processes and has been the long-term root of extensive litigation in Alberta.<sup>3</sup> We would only agree with Action 1.11 (review “directly affected”) if Action 1.10 could not be implemented; in such a case, the ELC’s position is that Action 1.11 should go beyond review of the limitation to commit to action to expand the scope of standing.

In any event, the ELC suggests that a more appropriate threshold is to grant participation to any person or group who has a legitimate interest that ought to be represented in the proceeding or process, or has an established record of legitimate concern for the interest they seek to represent. This position is consistent with the test for public interest standing developed by the Supreme Court of Canada, and similar to a test recommended sixteen years ago by the Environmental Legislation Review Panel in relation to an early draft version of the *Environmental Protection and Enhancement Act*, but not adopted by the provincial government.<sup>4</sup>

The ELC agrees with Action 1.13 (consult prior to making land available for oil sands development) and Action 1.14 (ensure the mineral disposition process is clear and transparent). The current system of distributing Crown mineral dispositions is subject to a minimum of public scrutiny, with limited posting of public offerings, and no means for the public to provide input on land use, surface access and environmental concerns.<sup>5</sup> The mineral disposition should be one of the earliest opportunities for the public to provide input on oil sands development, at a stage before industry operators have invested significant time and resources and where a range of ideas can more easily be gathered and incorporated into future planning and development of the oil sands rights. The mineral disposition process should be revised to provide broad public notice of intended offerings, access to information about the intended offerings, and opportunity for the public to provide input and concerns. Alberta Energy should be legislatively required to take into account all such input in determining ultimately whether to offer mineral rights for sale and in placing explicit conditions on grants of those rights, and to provide written reasons for its decisions. Parties to the process should also be given the ability to pursue administrative and judicial review of these decisions.<sup>6</sup>

While the ELC has consistently contended that public involvement in resource development and environmental regulation must be expanded, oil sands development is particularly amenable and appropriate for such expansion. The sheer scope of current and potential oil sands development, based on area, time span and financial considerations, demands a broad and comprehensive inclusion of perspectives. Decisions will be made in relation to a large proportion of Alberta’s land base, for a time period far exceeding most current industrial operations in the province, involving large financial investments and potential liabilities, with significant and far-reaching environmental impacts. A great deal of oil sands development takes place on public lands. Past application of the “directly affected” limitation has largely restricted participation to those who own and occupy land on which energy recovery and industrial activity take

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place or land immediately adjacent to such activities, which results in few or no voices qualifying as “directly affected” in relation to activities on public land.

For many years, Alberta Environment in particular has involved the public and interested stakeholders in policy development initiatives, stressing the importance and value of such participation. Recently, the province has sought to encompass this in a broader fashion through the concept of “shared governance”. However, members of the public who have participated in these initiatives have found themselves frustrated and questioning the true value that government puts on their input when they are effectively prevented from participating in regulatory decision-making processes due to the “directly affected” limitation found in Alberta legislation. The provincial government must value Albertans’ opinions and expertise throughout the regulatory and policy spectrum by allowing involvement and meaningful participation at all stages.

The strains and pressures on provincial government agencies in dealing with current oil sands activities, including capacity concerns, has been a topic of much discussion during these consultations, as well as in various regulatory decisions and the Radke report. These pressures and demands make it more difficult for the regulatory agencies to effectively deal with the broad public interest and more likely to be subject to agency capture, as discussed earlier in this submission, highlighting the importance of increased public participation and the enhanced value in decision-making that would ensue. To ensure world class governance in oil sands development, the Alberta government must pursue the best and most informed decision-making processes possible, of which broad and effective public participation must be an integral element.

#### **IV. Improvement of the Cumulative Effects Management System**

Vision 9, Strategy 2 seeks to improve the cumulative effects management system for oil sands. The Energy and Utilities Board (EUB), on its own and as part of joint panels with the federal government, has expressed increasing concerns in successive oil sands decisions about the limited effectiveness and slow progress of the Cumulative Effects Management Association (CEMA), particularly given the significance of the responsibilities that have been given to CEMA.<sup>7</sup> A joint panel recently stated:<sup>8</sup>

The Joint Panel views the work of CEMA as vital in addressing the cumulative impacts of oil sands development on the region and notes that CEMA has been assigned responsibility to address most of the critical cumulative effects challenges. The existence of regulatory standards and thresholds is an important element in determining whether a project is in the public interest from a cumulative impacts perspective and whether the impacts need further mitigation if the project is to proceed. The work of CEMA in developing management frameworks for addressing cumulative effects is central to the sustainable development of the mineable oil sands over the longer term.

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Given the importance of CEMA's work, the ELC agrees with Action 1.18 (moratorium on new oil sands development until environmental limits have been identified), to avoid continued regulatory decision-making without relevant environmental standards.

The ELC also agrees with Actions 2.1 (clarify the role of CEMA) and 2.2 (enhance CEMA) and suggests that recommendations formulated by the Pembina Institute, as set out below, be adopted by the Panel:<sup>9</sup>

We recommend that the governments of Alberta and Canada

- Create the conditions for CEMA to successfully refine environmental limits and develop regional environmental management systems to guide decisions about future oil sands development. This will require the development of specific memoranda of understanding between government and CEMA that include clear deliverables and a firm schedule, the provision of additional human and financial resources, and clear statements of political expectations and support for meaningful outcomes.
- Assume responsibility for those issues that will not or cannot be addressed through the CEMA process in a timely fashion. Commit to a process to consult with stakeholders and a schedule to implement new standards and systems to manage these issues.

The ELC conditionally agrees with Action 2.3 (consider cumulative effects management organizations for other oil sands areas). Conditions that must exist for this action to proceed are:

- CEMA must be reviewed and revised before any steps to create new cumulative effects management organizations are taken. It makes little sense to replicate those elements of a system that are not working; and
- Steps must be taken to distinguish between cumulative effects matters common to all three oil sands areas and those matters unique to a specific oil sands area. A revised CEMA should take responsibility for dealing with those matters common to all oil sands areas, to avoid duplication of effort and resources, with unique issues dealt with by the appropriate area-specific cumulative effects management organization.

The ELC agrees with Action 2.4 (review and upgrade the RSDS and modify CEMA's role). We further suggest that an upgraded RSDS be given legal status to ensure it has binding, enforceable effect. Such a step would further reinforce the province's accountability for fulfilling the strategy by enabling judicial review to be sought in instances of non-action or minimal action by the province.

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## V. The Role of Government

Government accountability, at both the provincial and federal levels, is an integral element of effective, sustainable oil sands development in Alberta. Both Alberta and Canada must recognize and fulfill their ultimate roles as the legal authorities responsible for those legislative powers assigned to them under the Constitution.<sup>10</sup> In the instance of the province, this includes matters such as natural resources and public lands, with the federal government having responsibility for matters such as fisheries, transboundary issues, and First Nations. Both levels share responsibility for environmental matters. Constitutional responsibilities bind both levels of government and apply regardless of any “shared governance” or other arrangement that either level of government might make.

In this vein, all government departments and agencies with regulatory and legal responsibilities related to the oil sands must actively and fully undertake these roles. Governments cannot and should not be using mechanisms such as CEMA as an excuse or shield to deflect their constitutional responsibilities. Alberta and Canada must, within their fields of constitutional power, actively take on and complete those matters that cannot be resolved in a timely manner by CEMA, and ensure sufficient commitment of financial and staffing resources. The ELC agrees with Actions 1.2 (review role and accountability of EUB), 1.3 (role of Alberta Environment), 1.5 (coordinated work of all levels of government), and 1.7 (active engagement of other jurisdictions).

To achieve these responsibilities, relevant government departments and agencies must be adequately resourced and given an effective and persuasive voice at the Cabinet table. The ELC agrees with Action 1.6 (increased capacity for government departments), and also urges the Panel to adopt recommendation 10 of the Radke Report, which recommends substantial staffing increases for both Alberta Environment and Sustainable Resource Development to deal with cumulative effects, environmental impact assessments, research, policy development, monitoring and enforcement in the oil sands areas.<sup>11</sup>

Government must also commit to undertake legislative and process reform necessary to ensure effective, sustainable oil sands development. In that vein, the ELC agrees with Action 1.4 (review legislation and policy and fill gaps), particularly in relation to our comments and recommendations earlier in this submission on directly affected status and mineral dispositions. We suggest that Action 1.2 also include a commitment to take action to ensure increased accountability and a broadened mandate of the EUB.

## VI. Conclusion

The ELC’s submission on Vision 9 is based on our vision for oil sands development in Alberta, that “Sound laws and policies that are protective of the environment are implemented and effectively applied to current and future oil sands development.” We urge the Panel to link our vision and the overarching process criteria of transparency, public participation and enforceability with the vision and principles developed by the MSC.

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To ensure effective and sustainable development of Alberta's oil sands resources through a system of world-class governance, the following actions must be taken:

- There must be an increased and clearly defined role for the public throughout the life cycle of oil sands development, including the mineral disposition process. This must include elimination of the “directly affected” restriction and its replacement with a standard that grants participation to any person or group who has a legitimate interest that ought to be represented in the proceeding or process, or has an established record of legitimate concern for the interest they seek to represent.
- Steps must be taken to improve and strengthen CEMA, to achieve sound environmental standards for application to oil sands development. A moratorium on new oil sands development will provide the opportunity to take these steps and ensure future regulatory decision-making is based on fully developed environmental standards.
- The provincial and federal governments must fully and actively undertake their legislative responsibilities as allocated to them in the division of powers under the *Constitution Act, 1867*, regardless of mechanisms such as CEMA or any other “shared governance” steps that may be pursued. This must include adequate resourcing of relevant government departments and agencies and an effective voice for those bodies in overall government decision-making.

The unique scope of Alberta's oil sands and the broad-ranging and long-term effects that will result from their development demand that we take the necessary steps to protect our environment for the benefit of future generations.

The ELC thanks the Panel for the opportunity to provide its submissions throughout this round of consultations.

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<sup>1</sup> Raj Anand & Ian G. Scott, Q.C., “Financing Public Participation in Environmental Decision-Making” (1982) 60 Can. Bar Rev. 81 at 91-92.

<sup>2</sup> *Ibid.*, 93-94.

<sup>3</sup> See Cindy Chiasson & Jodie Hierlmeier, *Public Access to Environmental Appeals: A Review and Assessment of Alberta's Environmental Appeals Board* (Edmonton: Environmental Law Centre, 2006), for a discussion of “directly affected” in the context of the Environmental Appeals Board.

<sup>4</sup> *Report of the Environmental Legislation Review Panel* (Edmonton: 1991) at 37.

<sup>5</sup> Michael M. Wenig & Michael S. Quinn, “Integrating the Alberta Oil and Gas Tenure Regime with Landscape Objectives: One Step Toward Management of Cumulative Effects”, in Henry Epp, ed., *Access Management: Policy to Practice. Proceedings of a Conference Presented by the Alberta Society of Professional Biologists in Calgary, March 18-19, 2003* (Calgary: Alberta Society of Professional Biologists, 2004).

<sup>6</sup> *Ibid.* at 36.

<sup>7</sup> See Decision 2006-112, *Suncor Energy Inc. Application for Expansion of an Oil Sands Mine (North Steepbank Mine Extension) and a Bitumen Upgrading Facility (Voyageur Upgrader) in the Fort McMurray Area*, 14 November 2006 (A.E.U.B); Decision 2006-128, *Albian Sands Energy Inc. Application to Expand the Oil Sands Mining and Processing Plant Facilities at the Muskeg River Mine*, 17 December 2006

(A.E.U.B and Government of Canada); and Decision 2007-013, *Imperial Oil Resources Ventures Limited Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the Fort McMurray Area*, 27 February 2007 (A.E.U.B. and Government of Canada).

<sup>8</sup> *Ibid.*, *Kearl Oil Sands* at 92.

<sup>9</sup> Dan Woynillowicz, Chris Severson-Baker & Marlo Reynolds, *Oil Sands Fever: The Environmental Implications of Canada's Oil Sands Rush* (Drayton Valley, AB: Pembina Institute, 2005) at 66-67.

<sup>10</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, ss. 91-92A.

<sup>11</sup> *Investing in Our Future: Responding to the Rapid Growth of Oil Sands Development* (Edmonton: Government of Alberta, 2006) at 133.



## Appendix I: Summary of Strategies and Actions

<b>Vision 9: Demonstrates leadership through world class governance</b>		
<b>Strategy 1. Establish an effective governance structure for oil sands development</b>		
<b>Actions ELC agrees with</b>	<b>Actions ELC disagrees with</b>	<b>Gaps/alternatives/additions in actions</b>
<p>1.2 Review the role and accountability of the EUB</p> <p>1.3 Alberta Environment should lead development of environmental management system for oil sands areas</p> <p>1.4 Review legislation, policies and institutions and address gaps</p> <p>1.5 Coordinated work of all levels of government</p> <p>1.6 Increased capacity for government departments and agencies</p> <p>1.7 Active engagement of other jurisdictions</p> <p>1.10 Eliminate “directly affected”</p> <p>1.13 Consult prior to making land available for oil sands development</p> <p>1.14 Ensure clear and transparent mineral disposition process</p> <p>1.18 Moratorium on new oil sands development until environmental limits have been identified</p>	<p>1.11 Review “directly affected” – this is acceptable only if Action 1.10 cannot be implemented and must include a commitment to act to expand standing</p>	<p>Action 1.2 should also include a commitment to act to ensure increased accountability and a broadened mandate of the EUB.</p> <p>In conjunction with Action 1.6, the MSC should adopt recommendation 10 of the Radke Report, dealing with substantial staffing increases for Alberta Environment and Sustainable Resource Development.</p> <p>Actions 1.13 and 1.14 should include a commitment to revise the mineral disposition process to provide for public scrutiny and participation, including rights of administrative and judicial review.</p>

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<b>Vision 9: Demonstrates leadership through world class governance</b>		
<b>Strategy 2. Improve the cumulative effects management system for oil sands</b>		
<b>Actions ELC agrees with</b>	<b>Actions ELC disagrees with</b>	<b>Gaps/alternatives/additions in actions</b>
<p>2.1 Clarify CEMA's role</p> <p>2.2 Enhance CEMA</p> <p>2.4 Review and upgrade the RSDS and modify CEMA's role.</p>	<p>2.3 Consider cumulative effects management organizations for other oil sands areas. Conditions for agreement are: (1) review and revise CEMA before moving to create new cumulative effects management organizations; and (2) distinguish between cumulative effects matters common to all oil sands areas (which should be dealt with by CEMA) and those unique to a specific oil sands area (which should be dealt with by an area-specific cumulative effects management organization)</p>	<p>In conjunction with Actions 2.1 and 2.2, the MSC should adopt the recommendations related to CEMA as set out by the Pembina Institute in its report <i>Oil Sands Fever: The Environmental Implications of Canada's Oil Sands Rush</i> (pp. 66-67).</p> <p>To supplement Action 2.4, an upgraded RSDS should be given legal status to ensure binding, enforceable effect.</p>