Governed the Oil Sands

By Cindy Chiasson

Executive Director

Environmental Law Centre

The Environmental Law Centre’s (the “ELC”) final submission to the Oil Sands Panel, at its hearings in Calgary, addressed the Multi-Stakeholder Committee’s (“MSC”) proposed vision that oil sands development will demonstrate leadership through world class governance. The ELC’s focus was on three main points:

- The public’s role and participation in oil sands development;
- The role of government in oil sands development; and
- Improvement of the cumulative effects management system, as embodied in the Cumulative Environmental Management Association (“CEMA”).

The Calgary submission and the ELC’s full submission are available on our website at <http://www.elc.ab.ca/briefs/Category.cfm?code=DOC024>.

Public involvement

Currently, public involvement in oil sands development arises in opportunities available before the Energy and Utilities Board (the “EUB”), which reviews proposed oil sands projects under the Oil Sands Conservation Act\(^1\) and the Energy Resources Conservation Act\(^2\), and Alberta Environment, which regulates the environmental aspects of oil sands plants under the Environmental Protection and Enhancement Act.\(^3\) However, participation before both the EUB and Alberta Environment is limited to those who are “directly affected”, which has been interpreted to relate predominantly to ownership or occupation of the land slated for development or land immediately adjacent to the proposed development.\(^4\) Much of Alberta’s oil sands lie under public land, and this acts as a further limitation on public participation in the regulatory processes due to the “directly affected” restriction. Additionally, by the time that oil sands projects reach these regulatory points, industry operators have invested heavily in project development, and practically there has been minimal opportunity for the public to effect much change through the regulatory processes.

The ELC proposes that the public’s role should be increased and clearly defined, and should apply throughout the life cycle of oil sands development, including policy creation, regulatory processes, monitoring and enforcement, and post-reclamation oversight. This expanded role must be accompanied by broad access to information, written reasons for regulatory decisions, and the ability of the public to seek administrative and judicial review at key regulatory decision-making points.

More specifically, the ELC suggests that the “directly affected” restriction be eliminated from Alberta legislation, as it has significantly limited public participation in environmental regulatory processes and has been the long-term root of extensive litigation in the province.\(^5\) This restriction should be replaced by a threshold that would
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.

Additionally, the ELC proposes reform of the mineral disposition process, in which Crown mineral rights, including oil sands rights, are leased to operators for exploration and recovery. The current system is subject to a minimum of public scrutiny, with limited posting of public offerings, and no means for the public to provide input on matters such as land use, surface access and environmental concerns. This stage of the oil sands development process should be one of the earliest points for public involvement, at a time before industry has invested significant time and resources and where input can more easily be built into the planning and development of oil sands rights. The ELC suggests that the mineral disposition process be revised to provide broad public notice of proposed mineral offerings, access to information about those offerings, and opportunity for the public to provide input and concerns, with the ability to pursue administrative and judicial review of disposition decisions.

**Government’s role**

Provincial and federal government involvement and accountability are key elements of sustainable oil sands development in Alberta. While both levels of government have been inclined to defer standard setting and other roles to bodies such as CEMA, they must recognize and fulfill their ultimate roles as the legal authorities responsible for the constitutional powers assigned to them under the *Constitution Act, 1867*. These constitutional responsibilities bind both levels of government and their ultimate accountability applies regardless of “shared governance” or other arrangements that either level of government might make. This has been echoed in a recent oil sands decision which stated “The Joint Panel believes that the ultimate responsibility for regulating the cumulative effects from oil sands development lies with government.”

To fulfill these duties, all government departments and agencies with regulatory and legal responsibilities related to the oil sands must actively and fully undertake those roles. This must include the provincial and federal governments taking on and completing those matters that cannot be resolved in a timely manner by CEMA, and ensuring sufficient commitment of financial and staffing resources to CEMA participation. Additionally, both levels of government must ensure that all relevant departments and agencies are adequately resourced (budgets and staffing) and given an effective and persuasive voice at the Cabinet tables.

**Improve cumulative effects management**

As mentioned in the article on planning in this issue of *News Brief*, CEMA was created by the Alberta government in 1999 to serve as a multi-stakeholder group that would identify environmental thresholds in the oil sands areas to limit impacts and protect area ecosystems. Progress by CEMA has been slow, with few thresholds established, while major oil sands projects have been approved in the interim. Joint Panels have expressed increasing concerns in successive oil sands decisions about CEMA’s limited effectiveness and lack of progress, stating:

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.

To ensure that approval of oil sands development does not continue without guidance from relevant environmental standards, a temporary moratorium on new oil sands development should be imposed until such time as environmental limits have been identified and binding protective standards put in place. With nearly 70 percent of the oil sands areas still available for exploration and leasing, there exists the opportunity to take a pause and ensure that future oil sands development proceeds in a sustainable manner.

As mentioned in relation to the role of government, the provincial and federal governments should take responsibility for those matters that cannot be resolved in a timely manner through the CEMA process. Additionally, both levels of government must take steps to clarify the role and expectations of CEMA, including setting clear timelines and expectations and providing additional financial and staffing resources.

**Conclusion**
The ELC’s submission on oil sands governance was based on 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.” For effective governance and sustainable development of the oil sands, this vision should be applied in tandem with the overarching process criteria of transparency, public participation and enforceability. 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.

---

4. The EUB provides standing for those who may be “directly and adversely affected” by its decision on a matter before it, and specifically links this status to land ownership or occupation in relation to eligibility for costs; see *Energy Resources Conservation Act, supra* note 2, ss. 26(2) and 28. Alberta Environment’s approach to determining “directly affected” status is set out in a policy document; see Alberta Environment, Environmental Sciences Division, *Acceptance and Acknowledgement of Statements of Concern*, Policy No. ES-99-PP3 (Edmonton: Alberta Environment, February 2000).


11 In its submission, the Environmental Law Centre adopted recommendations regarding CEMA as set out by the Pembina Institute; see Dan Woynillowicz, Chris Severson-Baker & Marlo Raynolds, *Oil Sands Fever: The Environmental Implications of Canada’s Oil Sands Rush* (Drayton Valley: The Pembina Institute, 2005) at 66-67.

Comments on this article may be sent to the editor at elc@elc.ab.ca.