

Oil Sands Consultations: A Backgrounder

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Introduction

This issue of *News Brief* is entirely dedicated to oil sands issues and the consultation process that has occurred with respect to oil sands development. The oil sands are contained in three major areas beneath more than 140,000 km² of northeastern Alberta; collectively, this covers an area larger than the state of Florida.¹ Initial predictions were that the oil sands would be producing one million barrels of oil per day by 2020. This goal has already been surpassed. Current estimates predict that production could reach three million barrels per day by 2020 and five million barrels per day by 2030.²

The unprecedented pace of oil sands development has exacerbated many of the challenges associated with this type of mega-industrial expansion. Specifically, it has increased the potential for cumulative effects on environmental quality and biodiversity, and it has heightened land-use conflicts between different industries and stakeholder groups.

In order to deal with these challenges, the Alberta government appointed the Oil Sands Multi-Stakeholder Committee (the "MSC") to review how oil sands development has proceeded in Alberta and to make recommendations for how it should proceed in the future. This article outlines the creation of the MSC, what has occurred in the process thus far, and what the next steps are in the consultation process. The other articles in this edition of *News Brief* summarize the Environmental Law Centre's (the "ELC") submissions to the MSC on various oil sands issues.

Current framework and creation of the MSC

Oil sands development has been proceeding under the Regional Sustainable Development Strategy for the Athabasca Oil Sands Area (the "RSDS"). The RSDS was released in 1999 as a framework for managing cumulative environmental effects in the Athabasca oil sands region. The RSDS outlined activities and timelines for 14 different "themes" which represented regional environmental issues.

The Cumulative Environmental Management Association ("CEMA") was established in 2000 to implement the RSDS by collecting scientific information and making recommendations for how to best manage the cumulative environmental effects of industrial development in the region. CEMA was established as a consensus-based, multi-stakeholder organization that was tasked with setting ecological thresholds and designing management plans to guide oil sands development.

Unfortunately, CEMA has been far less effective than originally envisioned. CEMA has been unable to deliver management plans in a timely manner and has not kept pace with current development. These problems have been explicitly acknowledged in numerous oil sands hearing decisions.³

In 2005, the Alberta government released the draft *Mineable Oil Sands Strategy* (the "MOSS")⁴ which was a policy that directed plans and actions within the mineable oil sands area. The MOSS drew heavy criticism from environmental groups because it was developed without stakeholder input and was premised upon giving oil sands mining top priority over all other land uses and environmental protection in the Fort McMurray region.

In 2006, the Alberta government announced that it would cancel the feedback sessions on the MOSS and would instead create the Oil Sands Consultation Group, which was mandated to develop the process in which an oil sands policy could be developed. This group recommended that a hybrid process model be used involving both a MSC and a Panel. The MSC would be accountable for the overall consultation process, while the Panel, which is a sub-committee of the MSC, would hold public meetings and information sessions in order to collect public input on oil sands development.⁵

The MSC and Panel were established in June 2006 with members appointed by government to ensure representation and participation from industry, environmental groups, First Nations, Métis and various levels of government. The scope of the MSC consultations is very broad and includes reviewing social, economic, environmental, First Nation and Métis issues related to oil sands development.

The MSC

The MSC's work is being conducted in two phases. Phase one was focused on developing a high-level vision and principles for oil sands development. As part of this process, the Panel held meetings where members of the public could present their ideas through oral and written submissions. Phase one was completed with the release of the MSC's interim report in January 2007 which set out a vision and principles to guide oil sands development.⁶

The ELC made one submission to the Panel during Phase one. This submission is available on our website at <http://www.elc.ab.ca/ims/client/upload/Submissions%20to%20Oil%20Sands%20Panel%20-%20Sept%2026.pdf>.

Phase two is now underway. This phase is focused on developing strategies and actions to implement the MSC's vision and principles. In March 2007, the MSC released an "options paper" which set out proposed strategies and actions for discussion.⁷ The Panel returned to the same communities to hold a second round of meetings where members of the public could make oral and written submissions on which actions they agreed with, which actions they disagreed with, or any suggestions for alternative actions or strategies. The ELC made four submissions to the Panel relating to:

- a moratorium on development and greenhouse gas emissions;
- water issues;
- reclamation; and
- the role of government and "directly affected" status.

Articles in this issue of *News Brief* summarize the ELC's submissions to the Panel made during Phase two of the consultation process. A compiled copy of all of our submissions is available on our website at <<http://www.elc.ab.ca/briefs/Category.cfm?code=DOC024>>.

Next steps

The MSC will review the submissions and use this input to develop a consensus-based report setting out recommendations to the Alberta government on strategies and actions it should pursue to guide the long-term development of the oil sands. If consensus cannot be reached on certain actions or strategies, these non-consensus items will be referred to the Panel to resolve. The Panel may produce its own non-consensus report setting out differing views on actions and strategies for oil sands development. These reports are expected to be completed in June 2007. It should be noted that the recommendations included in these reports will not be binding on government; they are only advisory recommendations and the government will ultimately decide whether or not to implement some or all of the MSC's and Panel's recommendations.

Other initiatives

Along with this consultation, there are a number of other government initiatives that focus on aspects of oil sands development. In February 2007, the Alberta government released a report by the Oil Sands Ministerial Strategy Committee, headed by former deputy Minister Doug Radke (the "Radke report").⁸ This Committee was directed by Cabinet to develop a short-term plan and recommendations to address current concerns in the oil sands region. This report was accompanied by a funding announcement that promised more than \$396 million over three years to help manage immediate growth pressures in northern Alberta brought on by rapid oil sands development. It is presumed that the main difference between the Radke report and the work of the MSC is that the Radke report was focused on immediate, short-term actions, whereas the MSC is focused on developing longer-term strategies and actions.

In April 2007, the Alberta government announced that it was establishing a Royalty Review Panel to examine the province's royalty structure to ensure Albertans are receiving a fair share from energy development through royalties, taxes and fees.⁹ Royalties in relation to oil sands activities are also being reviewed by the MSC.

Lastly, there is also the ongoing development of a provincial land-use framework. The land-use framework is intended to set out an overarching plan to manage land, resources, and the environment for all of Alberta.¹⁰ It involves three provincial ministries, Alberta Energy, Alberta Environment and Alberta Sustainable Resource Development, working under one office called Sustainable Resource and Environmental Management ("SREM"). The timelines for the release of the land-use framework have been repeatedly extended so it is not yet known when this initiative will be in place or what its specific contents will include.

The timing of these other initiatives raises a number of questions. For example, what if these initiatives provide conflicting recommendations? Will the recommendations from one committee trump the recommendations given by another committee? Will concrete actions result from all of this consultation? We suspect that the answers to these questions will only be forthcoming once these initiatives are completed and are considered by the government.

Why get involved?

The ELC sees this as a critical juncture in how the oil sands will be managed for this generation and for upcoming generations. We believe that public input in this process is an important element that will help determine the pace and scale of oil sands development in the future. The oil sands are a public resource and this development largely occurs on public land; accordingly the public should have a say in how development proceeds. The MSC has provided this opportunity to the public. The ELC responded by providing comprehensive written submissions to assist the MSC in crafting recommendations that protect the environment and ensure public participation in oil sands development.

¹ Alberta Energy, "Oil Sands," online: Alberta Energy <<http://www.energy.gov.ab.ca/89.asp>>.

² *Ibid.*

³ See e.g. Energy and Utilities Board, Decision 99-2, *Shell Canada Ltd. Muskeg River Mine Project*, 12 February 1999 (A.E.U.B.) at 39; Energy and Utilities Board, Decision 2002-089, *TrueNorth Energy Corporation Application to Construct and Operate an Oil Sands Mine and Cogeneration Plant in the Fort McMurray Area*, 22 October 2002 at 55; Energy and Utilities Board/Canadian Environmental Assessment Agency Joint Review Panel Report, Decision 2004-009, *Shell Canada Limited, Applications for an Oil Sands Mine, Bitumen Extraction Plant, Cogeneration Plant, and Water Pipeline in the Fort McMurray Area*, 5 February 2004 (A.E.U.B. and Government of Canada) at 78; Energy and Utilities Board and Canadian Environmental Assessment Agency Joint Review Panel Report, Decision 2007-013, *Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the Fort McMurray Area*, 27 February 2007 at 93.

⁴ Government of Alberta, *Mineable Oil Sands Strategy*, online: Alberta Energy <http://www.energy.gov.ab.ca/docs/oilsands/pdfs/MOSS_Policy2005.pdf>.

⁵ Oil Sands Consultation Group, *Final Report and Recommendations*, online: Alberta Environment <<http://www.environment.gov.ab.ca/info/library/7645.pdf>>.

⁶ Government of Alberta, *Oil Sands Consultation Multi-stakeholder Committee Interim Report*, online: Oil Sands Consultations <http://www.oilsandsconsultations.gov.ab.ca/docs/Interim_Report.pdf>.

⁷ Government of Alberta, *Multi-stakeholder Committee Phase II Proposed Options for Strategies and Actions for Discussion/Feedback*, online: Oil Sands Consultations <<http://www.oilsandsconsultations.gov.ab.ca/docs/MS%20Proposed%20Options%20for%20Strategies%20and%20Actions%20March%207%202007.pdf>>.

⁸ Government of Alberta, *Investing In Our Future: Responding To the Rapid Growth of Oil Sands Development* (Edmonton: Government of Alberta, 2006) online: Government of Alberta <<http://www.gov.ab.ca/home/index.cfm?page=1551>>.

⁹ See online: Alberta Royalty Review <<http://www.albertaroyaltyreview.ca/>>.

¹⁰ See online: Sustainable Resource and Environmental Management <<http://www.srem.gov.ab.ca/luf.html>>.

Making A Plan For Oil Sands Development

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At the Oil Sands Panel hearings in Edmonton, the Environmental Law Centre (the "ELC") focused its submission on two main points:

- First, is the need for a moratorium on further oil sands development until an effective planning regime is in place; and
- Second, is the requirement that greenhouse gas ("GHG") emission reductions be consistent with Canada's international climate change obligations.

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

Moratorium and planning

In order to properly implement an effective plan to guide oil sands development, it is necessary to temporarily suspend the issuance of further mineral leases and project approvals until the planning process has had a chance to "catch up" to the pace of development. A pause in development is needed in order to ensure that the government has the planning tools in place (such as ecological thresholds) to provide that oil sands development takes place in a responsible manner.

The reason why a moratorium is needed is because the current processes are not working. In 1999, the Alberta government created the Regional Sustainable Development Strategy for the Athabasca Oil Sands Area (the "RSDS"). A key component of the RSDS was the collection of scientific data to identify environmental thresholds that would limit impacts in order to protect the region's ecosystems. This work was to be done by a multi-stakeholder group called the Cumulative Environmental Management Association ("CEMA"). Eight years have passed and ecological thresholds have not yet been established. CEMA has become a parking lot where major issues are parked, and then not resolved. In the interim, mega oil sands projects continued to be approved.

Another failing in the current approach is that it is based on project-by-project approvals. This type of approach fails to address the problem of cumulative impacts. Cumulative impacts occur when a number of individual decisions result in a significant combined impact on the surrounding environment. This phenomenon is also known as "death by a thousand cuts."¹ There are planning strategies that can more effectively deal with cumulative impacts, such as a provincial land-use strategy which sets priorities for land use, and the setting of ecological thresholds for regions or ecosystems.² However, these processes are not yet in place.

A moratorium is necessary because, to date, the province has not been able to set ecological thresholds at the same time as allowing oil sands projects to be approved. We are also still awaiting completion of the provincial land-use strategy. That is why it

is time to take a pause and to catch up to current development and plan for future development. A temporary moratorium will also serve as a catalyst for CEMA to set ecological limits in a timely manner.

Greenhouse gas (GHG) emissions

Internationally, Canada has committed to reducing its GHG emissions to 6 percent below 1990 levels by 2012 under the Kyoto Protocol. In order to prevent the adverse effects of climate change in the longer term, research has shown that Canada must reduce its annual GHG emissions to 25 percent below 1990 levels by 2020 and to reduce emissions to 80 percent below 1990 levels by 2050.³ Meeting these obligations will require deep emission reductions. However, to date Canada's and, more specifically, Alberta's energy strategies have supported the rapid expansion of highly GHG intensive activities such as oil sands production. These strategies are contrary to a responsible climate change policy that is consistent with the need for deep, long-term GHG reductions.

The ELC supports GHG targets that will cap emissions for industry and that will lead to real reductions that are consistent with Canada's international obligations under the Kyoto Protocol. At the time of writing, the federal government has failed to regulate the release of GHGs. It is the ELC's position that the Alberta government's legislative scheme to require a 12 percent intensity-based emissions target for "established" large final emitters (those operating before the year 2000) will be totally ineffective in reducing total GHG emissions.⁴

It is important to recognize that the failure to regulate GHGs at the federal level or the inadequacies of GHG regulation at the provincial level has not relieved Canada from meeting its international obligations under the Kyoto Protocol. It just means that Canada will have more rigorous emission targets to meet in the future.

Oil sands producers have an opportunity to become leaders in showing that they can become a part of deep GHG emissions. The Pembina Institute has published a report that sets out how the oil sands can become carbon neutral by the year 2020.⁵ The ELC agrees that this is an action that should be adopted with respect to oil sands development.

Conclusion

Oil sands decisions are either largely or completely irreversible in the short-term with respect to their environmental effects. The decisions that we make today cannot easily be undone if they are later found to be based on faulty assumptions or incomplete information. It is imperative that we make the correct decisions now so as not to adversely affect future generations. This requires the province to establish an effective plan for oil sands development, and pausing development until such a plan is in place. It also requires regulation that ensures that oil sands operators comply with GHG targets that are consistent with Canada's global obligations.

¹ Richard Schneider & Simon Dyer, *Death By a Thousand Cuts: Impacts of In Situ Oil Sands Development on Alberta's Boreal Forest* (Edmonton: The Pembina Institute and the Canadian Parks and Wilderness Society, 2006).

² The Environmental Law Centre's full submission sets out options for the planning process in more detail.

³ Matthew Bramley, *The Case for Deep Reductions: Canada's Role In Preventing Dangerous Climate Change* (Drayton Valley: The David Suzuki Foundation and the Pembina Institute, 2005) at 5.

⁴ Intensity-based targets means that targets for emissions levels are set relative to the economic output of various industries. Under intensity-based targets, individual emission limits per barrel of oil will be lowered, but if production increases, the overall amount of GHG emissions can grow.

⁵ Matthew McCulloch, Marlo Reynolds & Rich Wong, *Carbon Neutral 2020: A Leadership Opportunity in Canada's Oil Sands* (Drayton Valley: The Pembina Institute, 2006).

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Comments on the articles in this issue may be sent to the editor at elc@elc.ab.ca.

Oil Sands Development and Water: Further Diversions Should Have Upstream Paddle

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The Environmental Law Centre's (the "ELC") submission to the Oil Sands Panel in Bonnyville addressed water issues related to oil sands development. The Bonnyville submission and the ELC's full submission are available on our website at <<http://www.elc.ab.ca/briefs/Category.cfm?code=DOC024>>.

Introduction

Water management policy has largely evolved under pressure in southern Alberta. While water shortages and degradation of aquatic ecosystem health continue in the south, concerns about water diversions and their impacts on the aquatic environment have also recently moved north, to oil sands country. Significantly, it is water more than anything else that may alter how oil sands are developed in the future. Laws and policies around water use for oil sands development will be a central concern for many Albertans in the foreseeable future.

The water

Water use in oil sands production varies depending on the process. Open pit mining requires between two and four and a half barrels of water per barrel of oil produced whereas steam assisted gravity drainage ("SAGD"), a technique for the recovery of in-situ oil sands, uses less water.¹ Water recycling is common and recycled water constitutes a large portion of water used by operators; nevertheless, total diversions continue to grow. The availability of water therefore is clearly going to remain an issue for the long-term sustainability of oil sands development and the aquatic ecosystem.

Resolution of the issue of water supply in the oil sands region is both a complex and urgent problem. The volume of water available varies through the year and from year to year due to climatic variations and global warming. Water supply forecasting is required to deal with this uncertainty. Water use forecasting also occurs, but it is not always accurate. Actual water use has greatly exceeded forecasts both in terms of fresh surface water and groundwater, and saline groundwater.² Notwithstanding these issues, it appears that continuous increases to water diversions from both surface and ground sources may not be economically or environmentally sustainable.

Proposed water policy directions

As part of Phase two of the consultation process, the Oil Sands Multi-Stakeholder Committee (the "MSC") proposed strategies and actions in relation to various aspects of oil sands development. Strategy 6 under the vision "ensuring a healthy environment" was premised upon "managing oil sands development and growth within the capacity of individual watersheds".³ The proposed actions under this strategy, which have yet to be agreed to by the MSC, include:⁴

- 6.1 Establish a buffer zone along the Athabasca River to protect the integrity of the river valley.

- 6.2 Determine the extent of protection that should be provided to rivers in oil sands areas.
- 6.3 Expedite and complete water quality and quantity agreements currently being negotiated between neighboring provinces/territories.
- 6.4 Develop a watershed management plan, based on science, which appropriately balances economic and environmental considerations.
- 6.5 Within two years, establish in-stream flow needs for the Athabasca and other rivers in oil sands areas that will ensure healthy aquatic ecosystems.
- 6.6 Prohibit further water withdrawals until in-stream flow needs have been established.
- 6.7 Implement the Federal/Provincial interim in-stream flow needs framework.
- 6.8 Investigate establishment of common off-stream water storage areas.
- 6.9 Complete mapping and inventory of groundwater aquifers in order to establish sustainable yield.
- 6.10 Undertake regular water quality and quantity monitoring throughout the oil sands regions to ensure appropriate levels are maintained.

Gaps in policy and need for actions

The ELC's submission focused on operating within watershed capacity as described in Strategy 6. The ELC found that most actions that were proposed were worth pursuing. The ELC did not support action 6.2 regarding the extent of protection to be given to rivers. This action was too general and left too many questions unanswered in terms of who would determine the extent of the protection and whether this meant that no protection might be given to certain water bodies.

In addition to the support given to the remaining actions, the ELC recommended some further actions be taken when pursuing water management in the oil sands. These recommendations were:

- Review and develop legislative and policy tools regarding in-stream flow needs ("IFN") to outline how they will be determined and implemented as a tool for protecting the aquatic environment. Currently, there is a lack of clarity regarding how and when IFN will be assessed and how it will be used to manage water withdrawals in a manner that sustains the aquatic ecosystem.
- Review and amend legislative and policy tools to ensure watershed management plans in the oil sands are legally feasible and enforceable. The value of watershed management plans relies heavily on their timely production and implementation. There may be legal gaps or barriers to ensuring that watershed management plans are fairly produced and implemented.

- Develop policies and plans for promotion of demand side management prior to relying on supply side (storage) water management. In other words, water management solutions should move away from assuring supply to managing demand. There should be a significant policy focus placed on managing demand for water, through promotion of conservation and use of alternatives to production. Supply and storage solutions must be viewed in light of their impacts on the environment and on downstream users.

Conclusion

Water management in Alberta, as with other types of management, is being pursued under the rubric of sustainable development. This, in turn, raises the three laudable, albeit often disparate goals: strong economic growth, healthy environment, and social sustainability. Oil sands development poses a significant challenge in this regard, in terms of its impacts on the environment, both terrestrial and aquatic, and on the social infrastructure that is needed to keep up with development. Applying current approaches, it is hard to discern how any semblance of “sustainable development” is possible in developing this massive oil resource. Should we fail to adequately manage water resources in the oil sands region it will represent a broader failure, that of relegating sustainable development to mere rhetoric. With innovation and prudence these failures can be avoided.

¹ Mary Griffiths, Amy Taylor & Dan Woynillowicz, *Troubling Waters, Troubling Trends, Summary Report* (Drayton Valley: The Pembina Institute, 2006) [Griffiths et al.]. Syncrude indicates that its water use for 2005 was 2.28 cubic metres of water per cubic metre of oil produced and that this is the height of efficiency among oil sands operations, see Syncrude Canada, Ltd. *2005 Sustainability Report* at 59, online: Syncrude Canada Ltd. <<http://sustainability.syncrude.ca/sustainability2005/download/SyncrudeSD2005.pdf>>.

² Griffiths et al., *ibid.* at Figure 5.

³ Government of Alberta, *Multi-stakeholder Committee Phase II Proposed Options for Strategies and Actions for Discussion/Feedback*, online: Oil Sands Consultations <<http://www.oilsandsconsultations.gov.ab.ca/docs/MSC%20Proposed%20Options%20for%20Strategies%20and%20Actions%20March%207%202007.pdf>>.

⁴ *Ibid.* at 7.

Oil Sands: Reclamation

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This article summarizes the submissions of the Environmental Law Centre (the "ELC") to the Oil Sands Panel in Peace River as they relate to reclamation planning, reclamation standards and enforcement of reclamation policy. Also discussed are the need for continued research into reclamation and the issue of financial responsibility for reclamation costs. The Peace River submission and ELC's full submission are available on our website at <<http://www.elc.ab.ca/briefs/Category.cfm?code=DOC024>>.

Introduction

The development of Alberta's oil sands resource either through surface mining or through in-situ recovery techniques has a long lasting environmental impact on vast quantities of public lands. Oil sands operators are required, under existing laws and regulations and under specific project approvals, to reclaim the impacted lands. However, reclamation techniques currently in use and those proposed for future projects are unproven. As a result, successful reclamation of oil sands impacted lands is far from guaranteed. While oil sands development has occurred in Alberta for more than 40 years, no reclamation certificates have been issued in respect of oil sands impacted lands.¹

Reclamation planning

Oil sands mining activities drastically alter the landscape; however, this alteration, and the subsequent reclamation is done by individual operators on a lease-by-lease basis. This has the potential to result in inconsistent landforms, poorly functioning watersheds and inappropriate wildlife habitat. Consistent with a land use planning decision-making process that respects integrated landscape management, reclamation must be planned on a wide scale, across lease boundaries. While each lease operator is and should be legally responsible for reclamation within that operator's lease, a joint plan should be required and enforced by regulators to ensure continuity of landforms, drainage and vegetation.

Operators should be required to provide, at the outset of development, comprehensive reclamation and mitigation plans for progressive reclamation with clear and enforceable multi-step reclamation stages, mandatory timelines and schedules for reclamation of lands. These plans should identify what reclamation activities are to be carried out and when. All reclamation activities should be directed at achieving long-term, landscape-scale land use objectives identified by regulators with input from the public.

Progressive reclamation recognizes that some areas of a mining project will be exploited and will be able to be reclaimed before others. Because oil sands mining development schedules are measured in decades, the use of progressive reclamation may lead to more timely reclamation and should be required. The ELC considers timely reclamation to be consistent with good environmental practices and supports the requirement for timely reclamation as well as for specific enforceable timelines for different stages of reclamation. However, once Alberta Environment issues a reclamation certificate in respect of oil sands mining lands, the *Conservation and Reclamation Regulation*² ("C&R

Regulation) provides for no ongoing conservation and reclamation liability for operators for the environmental condition of those lands; for this reason, the ELC submitted that caution be exercised by regulators in issuing reclamation certificates.

Reclamation standards

The ELC submitted that reclamation of oil sands impacted lands should be to the level of a self-sustaining boreal forest ecosystem. Currently under the *Environmental Protection and Enhancement Act*³ ("*EPEA*") and the *C&R Regulation*, operators are required to restore impacted lands to an equivalent land capacity. This requirement means that the ability of the land to support various land uses after reclamation must be similar to the ability that existed prior to the activity (such as oil sands development) being conducted on the land. This does not require that the land will be restored to its pre-disturbance state. Encouragingly, the members of the Multi-Stakeholder Committee (the "*MSC*") agree on the strategy of restoring disturbed areas to a natural state. Achieving this strategy requires the development of clear and enforceable reclamation standards and quantitative thresholds that are given legal status so that they are binding on government regulators and operators and, thus, cannot be easily modified by the exercise of administrative discretion.

Reclamation challenges and the need for further research

Reclamation of oil sands impacted lands presents many challenges. The boreal forest ecosystem within which the Athabasca oil sands deposit is located is a complex, interconnected system of forests and wetlands. Wetlands, once destroyed, cannot be simply replaced. Reclamation challenges also arise out of the particular damage caused by oil sands development. For example, the process used to separate bitumen from mined oil sands generates huge volumes of oil sands tailings. These tailings, which are a mixture of water, sand, clay, silt, and residual bitumen, fill large ponds on oil sands mining sites, can be toxic to wildlife and are a potential hazard to ground and surface water. So far, no proven technique has been developed to handle these tailings.⁴

The ELC supports further research to improve reclamation techniques and considers that the province, through its regulators, should take the lead to ensure that this research is carried out and that operators are required to continually improve the reclamation techniques they employ.

Financial responsibility for reclamation

EPEA is premised on the recognition that those who engage in environmentally harmful conduct be responsible for the costs associated with their activity. Accordingly, the ELC submitted that Alberta taxpayers must be protected from financial liability for reclamation of oil sands impacted lands.

Under *EPEA* and the *C&R Regulation*, operators are required to provide financial security for reclamation costs. This financial security must be provided before Alberta Environment can issue an approval for an oil sands mining project. The Alberta Auditor General has expressed concerns about potential under-funding of reclamation security funds arising out of inconsistencies in the manner that reclamation securities are calculated.⁵

Currently, there are no regulations that ensure consistency in cost estimation processes. The Director of Alberta Environment is required to determine the sufficiency of

reclamation security submitted by approval holders. However, this determination is based upon reclamation cost estimates provided by the operator for each project. The cost estimates are not prepared by the regulator or by independent third parties.

Reclamation security for oil sands is provided in the form of irrevocable letters of credit, not cash. Each year, the amount of security required is reviewed. The amount increases to reflect new disturbances planned and is reduced to reflect reclamation completed in the past year.⁶

Reclamation security cost estimates are not open for public review or comment. Further, the notional "return" of security during the annual review of the security amount occurs without public review or input respecting the adequacy of reclamation. The ELC considers that this is inappropriate given that Alberta taxpayers are at risk if insufficient financial security is taken or if security is returned before all necessary reclamation work is completed.

The ELC submitted that provincial regulators should establish in regulations and enforce a reclamation security regime that requires formal, consistent and transparent reclamation security cost estimates that will result in full cost coverage of reclamation costs by operators. The ELC also recommended that public participation be included at all decision-making steps including the setting of appropriate security amounts, annual reviews of security amounts and the return of security upon final reclamation.

Effective enforcement

The provision of reclamation plans, the setting of timelines and the development of reclamation standards cannot achieve successful reclamation in the desired time frame without effective enforcement. Protection of the environment cannot be ensured through the establishment of voluntary targets or non-binding guidelines alone; an appropriate mix of regulatory tools and voluntary initiatives must be used. Regulators must ensure that reclamation standards and timelines are incorporated into mandatory regulations and are enforced consistently.

Conclusion

There are many unresolved questions about whether, to what degree and at what cost environmental impacts from oil sands development can be mitigated and impacted lands reclaimed. Yet regulatory decisions approving oil sands projects continue to be issued. The ELC considers that oil sands operators ought to be required to reclaim these lands to a standard of excellence and that regulators have a responsibility to establish clear and enforceable reclamation standards and timelines to effect such reclamation. The ELC believes that all regulatory decisions relating to the reclamation of oil sands impacted lands ought to involve meaningful public participation.

¹ Alberta Environment, online: <www3.gov.ab.ca/env/soe/land_indicators/41_oilsands_reclamation.html>.

² Alta. Reg. 115/93.

³ R.S.A. 2000, c. E-12.

⁴ Dan Woynillowicz, Chris Severson-Baker & Marlo Reynolds, *Oil Sands Fever: The Environmental Implications of Canada's Oil Sands Rush* (Drayton Valley, The Pembina Institute, 2005) at 38.

⁵ Auditor General of Alberta, *Annual Report of the Auditor General of Alberta 2004-2005*, at 182.

⁶ Energy and Utilities Board/Canadian Environmental Assessment Agency Joint Review Panel Report, 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) at 52.

Governing the Oil Sands

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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.⁶ 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 legislative powers assigned to them under the *Constitution Act, 1867*.⁷ 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."⁸

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:⁹

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,¹⁰ 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.¹¹

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.

¹ R.S.A. 2000, c. O-7.

² R.S.A. 2000, c. E-10.

³ R.S.A. 2000, c. E-12.

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).

⁵ 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 discussion of the effects of the "directly affected" limitation in relation to proceedings before Alberta Environment and the Environmental Appeals Board.

⁶ 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).

⁷ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, ss. 91-92A.

⁸ Energy and Utilities Board/Canadian Environmental Assessment Agency Joint Review Panel Report, 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) at 78.

⁹ Energy and Utilities Board/Canadian Environmental Assessment Agency Joint Review Panel Report, 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) at 92.

¹⁰ Government of Alberta, "Oil Sands Tenure" (Edmonton: Government of Alberta, 2007); available online at: Alberta Oil Sands Consultations <[http://www.oilsandsconsultations.gov.ab.ca/docs/FACT_Oil_Sands_Tenure\(4\).pdf](http://www.oilsandsconsultations.gov.ab.ca/docs/FACT_Oil_Sands_Tenure(4).pdf)>.

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 Reynolds, *Oil Sands Fever: The Environmental Implications of Canada's Oil Sands Rush* (Drayton Valley: The Pembina Institute, 2005) at 66-67.