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**SUBMISSIONS TO THE OIL SANDS PANEL ON**
**DEVELOPING A FRAMEWORK FOR OIL SANDS DEVELOPMENT IN ALBERTA**
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## I. INTRODUCTION

The Environmental Law Centre is a charitable organization, incorporated in 1982, to provide Albertans with an objective source of information on environmental law and natural resources law. The Centre 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 Centre has been involved in providing assistance to the public and submissions to government on energy related issues since 1982. While our focus has traditionally been on the environmental impacts of conventional oil and gas development, the rapid pace and scale of oil sands development has necessitated that the Centre focus on the emerging environmental issues associated with the development of this resource.

It is the Centre's position that one of the major failings of the draft *Mineable Oil Sands Strategy*[1] was the lack of public involvement in the development of the strategy. In this vein, the Centre commends the formation of the Oil Sands Multi-Stakeholder Committee (MSC) and resulting public consultations, as a necessary first step in developing a responsible framework for oil sands development in the province. Accordingly, we have prepared submissions to assist the Oil Sands Panel (Panel) in creating an appropriate vision for oil sands development, and principles to maximize economic, environmental and social benefits and minimize negative impacts of this development.[2]

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[1] Government of Alberta, *Mineable Oil Sands Strategy*, draft for discussion (October 2005), online: Alberta Energy <http://www.energy.gov.ab.ca/docs/oilsands/pdfs/MOSS_Policy2005.pdf>.
[2] *Oil Sands Consultation Group Final Report and Recommendations* (31 March 2006) at 22.

## II. VISION

The Centre's vision for oil sands development in Alberta is that:

> **Sound laws and policies that are protective of the environment are implemented and effectively applied to current and future oil sands development.**

Our organization's expertise lies in environmental law and policy and this is reflected in our vision statement. It is submitted that the Panel consider the Centre's vision as part of a larger vision for oil sands development that also addresses the social and economic aspects of this development.

The crux of our submission is that environmental law and environmental law principles are essential tools for the responsible governance and management of oil sands development. Effective environmental laws provide the foundation for government policies and actions for the conservation of the environment and for ensuring that the use of natural resources, such as the oil sands, is both equitable and sustainable.

## III. PRINCIPLES

In order to help ensure that oil sands development proceeds in accordance with the above-mentioned vision, these three guiding principles must be applied:

1. the precautionary principle;

2. the polluter pays principle; and

3. enforcement.

Each of these principles will be described below, including how they may be applied in the context of oil sands development.



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## 1. The Precautionary Principle

The precautionary principle is one of the guiding principles of environmental law and is an essential component of the first part of the Centre's vision of "sound laws and policies that are protective of the environment."

Many common sense sayings such as "an ounce of prevention is worth a pound of cure," or "a stitch in time saves nine" capture the essence of the precautionary principle. In general terms, it means that it is much easier to take steps to prevent a problem than to deal with it after it has happened. In legal terms, the precautionary principle has been described as "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[3]

This principle has been articulated in numerous international environmental agreements,[4] as well as in federal and provincial environmental legislation.[5] The purpose provisions of the *Environmental Protection and Enhancement Act* (*EPEA*) also recognize "the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions" as well as the "need to integrate environmental protection and economic decisions in the earliest stages of planning."[6] In light of this principle's recognition in international, federal and provincial laws, it is imperative that the Panel include this principle in its framework for oil sands development.

There are a number of possible legal approaches to apply the precautionary principle to uncertain risks. The literal approach is, of course, to prescribe the elimination of risk. Commentators have also identified a number of indirect measures which "create a legal

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[3] *Rio Declaration on Environment and Development*, 14 June 1992, 31 I.L.M. 874, Principle 15 [*Rio Declaration*].
[4] See e.g. *Montreal Protocol on Substances that Deplete the Ozone Layer,* 16 September 1987, 26 I.L.M. 1541; *Framework Convention on Climate Change,* 9 May 1992, 31 I.L.M. 849; *Biodiversity Convention* 5 June 1992, 31 I.L.M. 818.
[5] See e.g. *Oceans Act,* S.C. 1996, .c. 31, preamble, s. 30; *Canadian Environmental Protection Act*, 1999, S.C. c.33, preamble, s. 2(1)(a) [*CEPA, 1999*]; *Canadian Environmental Assessment Act,* 1992, c. 37, s. 4(1)(a); *Environment Act,* S.N.S. 1994-1995, c. 1, s. 2(b)(ii) [*Environment Act*]; *Endangered Species Act*, S.N.S. 1998, c. 11, s. 2(h). The precautionary principle is included amongst a number of environmental principles, including the polluter pays principle, that were adopted by the Canadian Council of Ministers of the Environment in the *Canada-wide Accord on Environmental Harmonization* (29 January 1998), online: Canadian Council of Ministers of the Environment <http://www.ccme.ca/assets/pdf/accord_harmonization_e.pdf>.
[6] *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 2(b),(d) [*EPEA*].

or political environment of incentives or disincentives which will tend to generate behavioural adherence to the principle." These indirect measures include:[7]

- environmental impact assessments (EIAs) covering not only projects but also proposed government programs, plans and policies;
- increased public participation in decision-making processes;
- insurance funds created by parties deemed to be the cause of environmental degradation; and
- paying for ecological debts through strict liability or absolute liability regimes.

Many of these provisions are in place already. However, the mere presence of one or more potentially precautionary measures does not ensure an effective precautionary strategy exists. For instance, as discussed in the next section, the Auditor General of Alberta has noted that the Ministry of Environment has made unsatisfactory progress in obtaining sufficient financial security for oil sands reclamation.[8] There have also been shortcomings noted of the EIA process. Although EIAs are done for individual oil sands projects, these projects are permitted to proceed if they meet standard industry practices, and no projects have been substantially modified to reflect conservation concerns.[9] There have also been questions raised whether the EIA process adequately addresses cumulative impacts.[10]

In the context of oil sands development, it is submitted that the precautionary principle could better be implemented through the following measures:

- the development of a policy and planning framework for the oil sands region that sets land use priorities and environmental limits or "thresholds" for land and resource uses in order to better assesses the cumulative impacts of such development;[11]

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[7] John Moffet, "Legislative Options for Implementing the Precautionary Principle" (1997) 7 J.E.L.P. 157 at 166-167.

[8] Further discussion of this topic is found under II.2 "Polluter Pays Principle" and note 20.

[9] Richard Schneider & Simon Dyer, *Death By A Thousand Cuts* (Edmonton: The Pembina Institute and the Canadian Parks and Wilderness Society, Edmonton, 2006) at 9 [Schneider & Dyer].

[10] Steven A. Kennett, "Towards a New Paradigm for Cumulative Effects Management," Occasional Paper #8 (Calgary: Canadian Institute of Resources Law, 1999) [Kennett].

[11] This approach is supported in a number of other publications, see Kennett, *ibid.*; Schneider & Dyer, *supra* note 9; Dan Woynillowicz *et al.*, *Oil Sands Fever: The Environmental Implications of Canada's Oil Sands*

- providing for public input and transparency in developing the planning framework and in the mineral tenure regime. It is noted that public input into the framework has started with the creation of the MSC. However, the tenure process is a critical decision point in directing the timing, location and intensity of development on a broad scale.[12] There is currently no public input or strategic landscape level planning at the mineral tenure stage;[13]

- delaying the issuance of further tenure allocations or oil sands approvals until a policy and planning framework is in place. This would ensure that planning can catch up to current oil sands development;

- developing a financial security model for obtaining sufficient financial security for reclamation; and

- establishing a regulatory regime that ensures that the policy and planning framework is accorded due weight by those charged with decision-making, and ensures compliance with and enforcement of the established thresholds.

In light of the measures outlined above, it is submitted that the Panel include the precautionary principle in its framework for oils sands development in Alberta.

**2. The Polluter Pays Principle**

The polluter pays principle is another guiding principle of environmental law and it is another essential component of the first part of the Centre's vision of "sound laws and policies that are protective of the environment."

The polluter pays principle emphasizes the responsibility of those who engage in environmentally harmful conduct for the costs associated with their activity.[14] This principle, widely adopted as an international environmental law principle[15], has been

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*Rush* (Drayton Valley: The Pembina Institute, 2005) [Woynillowicz *et al*.]; *Managing Oil Sands Development For the Long Term: A Declaration By Canada's Environmental Community* (1 December 2005).

[12] Schneider & Dyer, *supra* note 9 at 23.

[13] The only review that occurs prior to tenure allocation is by the multi-departmental crown Mineral Disposition Review Committee, which is expected to highlight any environmental restrictions associated with individual land parcels. This process is closed to the public and does not solicit stakeholder input.

[14] J. Benidickson, *Environmental Law,* 2nd ed. (Toronto: Irwin Law Inc., 2002) at 21.

[15] *Rio Declaration, supra* note 3, Principle 16.



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recognized in federal and provincial legislation[16] and has been appropriately recognized among the purposes of *EPEA*.[17] Similar to the precautionary principle, the recognition of "polluter pays" in federal and provincial laws and as an international environmental law principle, should persuade the Panel to include this principle in its framework for oil sands development.

In the context of oil sands development, the application of the polluter pays principle requires that environmental costs arising out of oil sands development be accurately assessed and also that they be appropriately attributed to operators, and by extension, to consumers of the resource. An oil sands development strategy that rests the financial burden of reclamation upon the shoulders of the public either through the need for direct public expenditures or through the public subsidization of oil sands operators is inconsistent with the polluter pays principle and runs contrary to the interest of Albertans.

Under *EPEA*, the Director is prohibited from issuing an approval unless required financial security for reclamation is provided.[18] Unfortunately, the taking of financial security for reclamation does not currently ensure that the public will not be ultimately responsible for reclamation costs associated with oil sands production. While security for reclamation is required to be submitted to Alberta Environment prior to the granting of an approval in respect of an oil sands mining operation, no such security is required to be submitted to Alberta Environment in respect of an application for an approval to construct, operate or reclaim field production facilities used to recover oil sands by drilling or other in situ recovery methods.[19]

Furthermore, with respect to security for reclamation of oil sands mining projects, the Auditor General of Alberta noted in its *Annual Report 2004-2005* that Alberta Environment has made "unsatisfactory progress" on some security issues which were identified in earlier reports from 1998-1999 and 2000-2001, and noted "inconsistencies" in the manner in which reclamation security for oil sands has been taken. The Auditor

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[16] See *CEPA, 1999, supra* note 5, preamble, s. 95; *Environment Act, supra* note 5 s. 2(c); *Contaminated Sites Remediation Act,* C.C.S.M., c. 205, ss. 1(1)(c)(i), 21(a).

[17] *Supra* note 6, s. 2(i).

[18] *Supra* note 6, s. 84(1); *Approvals and Registrations Procedure Regulation,* Alta Reg. 113/93, s. 9.

[19] *Conservation and Reclamation Regulation*, Alta Reg. 115/93, s. 17.1. However, the Alberta Energy and Utilities Board ("EUB") *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process* enables the EUB to require that bitumen well operators whose deemed liabilities exceed their deemed assets to submit to the EUB a security deposit equal to the difference between the deemed liabilities and the deemed assets. The security deposit is intended to minimize the potential that costs related to abandonment or reclamation of the well would be borne by the Orphan Fund.



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General's Report states:[20]

> **Background**
> Financial security is to cover the cost of reclamation that an operator is unable to complete. It is returned to the operator when the site is reclaimed or forfeited if the operator fails to meet his obligations.
>
> …
>
> **Our audit findings** [2004-2005 *Annual Report*]
>
> …
>
> For oilsands and coal mines, for which the Ministry is legislatively responsible to collect reclamation security, there are still many inconsistencies. Some sites posted security under prior legislation and that security has been continued under existing legislation, with the result that some sites have security based on production. Some sites use outdated information to determine their estimated full cost of reclamation. Some estimates do not include all required costs. As a result of these inconsistencies, the sufficiency of security for the completion of reclamation is not ensured.
>
> **Implications and risks if recommendation not implemented**
> With the passage of time, the Ministry continues to be exposed to the risk of obtaining inadequate security resulting in additional costs to the province.

The concern is that after more than 30 years of oil sands development, a reclamation certificate has never been issued by Alberta Environment which confirms that an area has been reclaimed to government standards.[21] If security deposits for reclamation prove to be inadequate, it is likely that the oil sands will become a public liability.

For this reason, the Centre reiterates the need to develop a financial security model for obtaining sufficient security for reclamation and for the Panel to include the polluter pays principle in its framework for oil sands development in Alberta.

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[20] Auditor General of Alberta, *Annual Report of the Auditor General 2004/2005* (22 September 2005) at 180-182, online: Auditor General of Alberta <http://www.oag.ab.ca/pdf/ar2004-05.pdf>.

[21] Woynillowicz *et al., supra* note 11 at 38.



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## 3. Enforcement

The second part of the Centre's vision for oil sands development deals with laws "…implemented and effectively applied to current and future oil sands development." This part of the Centre's vision is based upon the ability of Albertans to be confident that the regulatory bodies overseeing the development of the oil sands have the tools to enforce laws and regulations to protect the environment and, in fact, enforce such laws and regulations.

Enforcement is generally recognized as any action or intervention taken to determine or respond to non-compliance. The role of enforcement in achieving environmental protection is recognized in international law[22] and is a common component in federal and provincial legislation.[23] However, it should be recognized that enforcement is more than punishment or prosecution. Enforcement includes:[24]

- the process of creating binding standards or imposing liability;
- accountability for ensuring compliance;
- the duty to enforce laws; and
- the rights and responsibilities associated with exercising enforcement powers.

In the context of oil sands development, enforcement and compliance should include:[25]

- the imposition of legally binding standards to provide a clear, consistent definition of compliance. This means that land use plans and quantitative thresholds must be 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 or ignored in subsequent decision-making;
- the mandatory duty of those departments and agencies responsible for managing the resource (the Alberta Energy and Utilities Board, Alberta Environment and

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[22] *Agenda 21,* Report of the United Nations Conference on Environment and Development, UN Doc.A/CONF. 151/26/Rev.1 (1992) 31 I.L.M. 874, Ch. 8.21; *North American Free Trade Agreement on Environmental Cooperation,* (1 January 19940 32 I.L.M. 1480, Article 5.

[23] See generally *CEPA, 1999, supra* note 5; *EPEA, supra* note 6, Part 10.

[24] Linda F. Duncan, "Enforcement and Compliance" in *Environmental Law and Policy* 2nd ed., (Toronto: Edmond Montgomery Publications Ltd., 1998) 321 at 326 [Duncan].

[25] Duncan, *ibid.* at 329.

Sustainable Resource Development) to consider and engage in the planning process;

- an array of sanctions and penalties as well as mechanisms to promote voluntary compliance; and

- a political and institutional commitment to enforcement.

The oil sands framework arising from this consultative process will embrace a number of policy goals in the public interest of Albertans. However, the mere adoption of these policy goals will not suffice to adequately protect the environment. 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. Policy goals must be appropriately implemented into legislation and regulation that is enforced.

Where voluntary targets or initiatives are used as a means of environmental protection, such initiatives must be developed in a transparent process, one that allows for the public participation by all stakeholders.[26] The establishment of voluntary initiatives or targets must be based on up-to-date scientific data and must encourage performance beyond the minimum baseline thresholds needed to ensure the sustainability of threatened resources, such as aquatic ecosystems in the Athabasca River or the boreal forest ecosystem, at which minimum thresholds mandatory restrictions must be enforced.[27] Strict compliance verification and ongoing monitoring must be used in conjunction with voluntary initiatives to ensure that the policy goal of environmental protection is being achieved.

Enforcement in the context of oil sands development also requires the recognition of Canada's international commitments on climate change. The federal government ratified the *Kyoto Protocol,* legally binding Canada to reduce its greenhouse gas emissions (GHG) to six per cent below 1990 levels between 2008 and 2012.[28] Despite this obligation, Canada's and Alberta's energy strategy has remained focused on accelerating growth in the oil sands, which is the most GHG intensive form of oil production.[29]

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[26] K. Webb, "Voluntary Initiatives and the Law," in R. Gibson, ed., *Voluntary Initiatives: The New Politics of Corporate Greening* (Peterborough: Broadview Press, 1999) 32 at 43.
[27] A. Lucas, "Voluntary Initiatives for Greenhouse Gas Reduction" (2000) 10 J.E.L.P. 89 at 95.
[28] *Kyoto Protocol to the United Nations Framework Convention on Climate Change,* 11 December 1997, UNFCCC COP, 3d Sess., UN doc. FCCC/CP/1977/L.7/Add.1.
[29] Woynillowicz *et al., supra* note 11 at 19.



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Without enforcement, it will be difficult to implement the other principles of precaution and polluter pays, or any other plans and policies associated with an environmentally protective vision for oil sands development. On this basis, it is submitted that the Panel consider enforcement as a central component to its framework on oil sands development.

## IV. CONCLUSION

It is the Centre's hope that the vision and principles developed by the MSC and the Panel will be reflective of an intent to ensure that oil sands development occurs at a staged and deliberate manner, at a pace and scale that recognizes that the natural environment has a threshold limit beyond which impacts arising out of development may be irreversible, and at a pace and scale that does not exceed the ability of oil sands operators to properly assess and properly manage environmental impacts.

While oil sands development may generate significant economic benefits for Alberta and for Canada, the environmental impacts and risks are also considerable and must be considered in developing a framework. It is hoped that the Centre's submission will help guide the Panel's recommendations on developing an appropriate framework for this development.



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