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**Canadian Institute of Resources Law
Institut canadien du droit des ressources**

**Water Stewardship in the Lower Athabasca River:
Is the Alberta Government Paying Attention
to Aboriginal Rights to Water?**

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Executive Summary

This paper examines the status of aboriginal rights to water in the Lower Athabasca River Basin. It starts from the premise that Aboriginal peoples living in the Athabasca oil sands region have constitutionally protected water rights, and inquires whether or not these rights are acknowledged and protected by the Alberta government.

In the first part of the paper, we discuss the impacts of oil sands developments on Aboriginal water rights. We first review the sources of negative impacts of development on water resources, as described in the scientific literature, we then outline the effects of such impacts on Aboriginal peoples living downstream from these developments. First Nations have many concerns about the impacts of industrial water use and pollution on water resources, notably on the fish and wildlife populations on which they depend, on their transportation needs and on their health. We identify some of the ways in which they have brought these concerns forward to government.

In the second part of the paper, we briefly address governments' obligations, both substantive and procedural, to ensure the protection of the water rights of Aboriginal peoples. We suggest that the promise of rights recognition and rights protection embodied in section 35 of the *Constitution Act, 1982* imposes an obligation on government to actively protect these rights, not only to refrain from infringing them.

In the third part of the paper, we examine how the Alberta government is meeting its obligations to First Nations as it allocates and manages the region's water resources in the Athabasca oil sands region while overseeing the development of oil sands resources. The issues are dealt with under the following headings: water management planning initiatives, approval of oil sands development and monitoring the impacts of industrial development on the Lower Athabasca River system. Of the various water management planning initiatives in the region, we review the following: the *Muskeg River Comprehensive Water Management Plan*, the *Water Management Framework for the Lower Athabasca River*, the *Athabasca River Watershed Management Plan* and the *Lower Athabasca Regional Plan*. We describe each initiative and assess whether they acknowledge the rights to water of First Nations, and whether they allow for adequate consultation with Aboriginal peoples and accommodation of their rights. Next, we discuss the approval process for oil sands development and ask whether it deals with potential impacts on aboriginal or treaty rights to water. These issues are examined more closely in a case study of the Kearl Oil Sands Project review and EUB decision. Finally, based on a review of the findings of several scientific reports released in the past two years, we briefly examine how government monitors the impacts of industrial development on the Lower Athabasca River system and on the water rights of Aboriginal peoples.

We conclude that the Alberta government is failing to meet its constitutional obligations towards Aboriginal peoples in the Athabasca oil sands region. It does not properly acknowledge the existence of their water rights nor does it adequately protect the exercise of these rights. It does not engage in meaningful consultations with First Nations nor does it accommodate their rights with a view to achieve reconciliation.

Acknowledgements

This paper is the second publication in a research project on Aboriginal Rights to Water: The Case of the Athabasca River Basin, which was funded by the Alberta Law Foundation. The generous support of the Foundation is gratefully acknowledged. The authors wish to thank the Fort McKay First Nation, the Athabasca Chipewyan First Nation and the Mikisew Cree First Nation and the various individuals who have provided copies of their submissions to the government of Alberta for reference in this paper. Our thanks also go to Sue Parsons for her expert editing and desktop publishing of this paper.

Table of Abbreviations

ACFN	Athabasca Chipewyan First Nation
ALSA	<i>Alberta Land Stewardship Act</i>
AWC	Athabasca Watershed Council
CEMA	Cumulative Environmental Management Association
CEAA	<i>Canadian Environmental Assessment Act</i>
DFO	Department of Fisheries and Oceans
EBF	ecological base flow
EIA	Environmental Impact Assessment
EPEA	<i>Environmental Protection and Enhancement Act</i>
EPLs	end pit lakes
ERCA	<i>Energy Resources Conservation Act</i>
ERCB	Energy Resources Conservation Board
EUB	Energy Utilities Board
IMF	<i>Interim Management Framework for Water Quantity and Quality</i>
LARP	Lower Athabasca Regional Plan
LUF	Land-use Framework
MCFN	Mikisew Cree First Nation
NA	naphthenic acids
OSCA	<i>Oil Sands Conservation Act</i>
P2FC	Phase 2 Framework Committee
PACs	polycyclic aromatic compounds
PAHs	polycyclic aromatic hydrocarbons
RAC	Regional Advisory Council
RAMP	Regional Aquatics Monitoring Program
RSDS	Regional Sustainable Development Strategy
RSC	The Royal Society of Canada
T8FNs	Treaty 8 First Nations of Alberta
WA	<i>Water Act</i>
WPACs	Watershed Planning and Advisory Councils

1.0. Introduction

Oil sands developments in the Athabasca Region use large quantities of water in the process of oil extraction and processing. In addition, they have substantial environmental impacts that affect aquatic ecosystems. What are the impacts of these developments on the rights of Aboriginal peoples living in the Athabasca oil sands region? How is the provincial government dealing with these impacts, as it develops water and land management plans in the Athabasca River Basin and as it approves an increasing number of oil sands projects?

Based on the conclusions reached in a previous publication, this paper starts from the premise that Aboriginal peoples living in the Athabasca oil sands region have constitutionally protected water rights.¹ At a minimum, these include treaty rights to hunt, fish, trap and gather *for food*, understood as rights to a livelihood or to subsistence. The right to subsist on the land necessarily implies a right to use water for domestic uses including drinking, for travel and navigation, and for cultural and ceremonial purposes. These rights exist not only on reserve lands, but on traditional lands to the extent that they are not “taken up” by government.² On reserve lands, the list of asserted water rights is more extensive. These rights include, in addition to riparian rights, rights to the use of water for agricultural, commercial and industrial purposes, as well as rights based on ownership of the waterbeds.

The water rights of Aboriginal peoples received constitutional protection pursuant to subsection 35(1) of the *Constitution Act, 1982*. They are prior rights, that is, they have precedence over the water rights of other users that do not have the same constitutional

¹ Monique Passelac-Ross & Christina M. Smith, *Defining Aboriginal Rights to Water in Alberta: Do They Still “Exist”? How Extensive are They?*, Occasional Paper #29 (Calgary: Canadian Institute of Resources Law, 2010). This paper argues that rights to water are an integral part of aboriginal title and aboriginal rights, that these rights have been modified, but not extinguished by treaty, and that it is unlikely that either federal water legislation such as *The North-west Irrigation Act* of 1894, or the federal transfer of lands and resources to the province of Alberta under the *Natural Resources Transfer Act* of 1930 (and subsequent provincial water legislation), had any impact on existing aboriginal rights to water. Neither *The North-west Irrigation Act* nor the *Natural Resources Transfer Act* manifest a clear and plain intention to extinguish existing Aboriginal or treaty rights to water, and both include provisions that protect existing legal interests. Aboriginal and treaty rights to water include rights both on reserve and off-reserve, on traditional lands.

² Two points need to be made with respect to the government’s power to “take up” lands: 1) since 1982, treaty rights cannot be *extinguished* by provincial legislation; 2) these rights may be *infringed*, but only if the infringement is justified by government. As noted in *Mikisew Cree*, if the time comes when the government has taken so much land that no meaningful treaty right (in that case, it was a right to hunt) can be exercised on traditional lands, then an action may be launched against the government for *infringement* of treaty rights: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69, at para. 48 [*Mikisew Cree*].

protection. These rights give rise to certain government's obligations: specifically obligations not to extinguish them and not to unjustifiably infringe them, as well as positive obligations to acknowledge and protect them. This paper draws the implications of such government's obligations for the allocation and management of water in the Athabasca oil sands region.

The first part of the paper discusses the impacts of oil sands developments on aboriginal and treaty rights to water. It first reviews the sources of negative impacts of developments on water resources, then it outlines the effects of such impacts on Aboriginal peoples living downstream from these developments. The second part briefly addresses the provincial government's obligations, both substantive and procedural, to ensure the protection of the water rights of Aboriginal peoples. The third part examines whether or not and to what extent Alberta is meeting its obligations to First Nations as it allocates and manages the region's water resources in the Athabasca oil sands region while overseeing the development of oil sands resources.

2.0. The Impacts of Oil Sands Developments on Aboriginal Water Rights

2.1. What are the Impacts of Oil Sands Developments on Water Resources in Northeastern Alberta?

Over the past few years, numerous independent studies and reports have documented the detrimental impacts of oil sands developments on aquatic ecosystems and fish populations in the Athabasca River Basin.³ These effects were discussed by several

³ See e.g. Dan Woynillowicz & Chris Severson-Baker, *Down to the Last Drop? The Athabasca River and Oil Sands* (Drayton Valley, AB: The Pembina Institute, 2006); Mary Griffiths, Amy Taylor & Dan Woynillowicz, *Troubled Waters, Troubling Trends: Technology and Policy Options to reduce Water Use in Oil and Oil Sands Development in Alberta* (Drayton Valley, AB: The Pembina Institute, 2006); D.W. Schindler *et al.*, *Running out of Steam? Oil Sands Development and Water Use in the Athabasca River-Watershed: Science and Market based Solutions* (Toronto: Munk Centre for International Studies, University of Toronto and Environmental Research and Studies Centre, University of Alberta, 2007) [Running out of Steam?]; Christopher Hatch & Matt Price, *Canada's Toxic Tar Sands: The Most Destructive Project on Earth* (Toronto: Environmental Defence, 2008); Matt Price, *11 Million Liters a Day: The Tar Sands' Leaking Legacy* (Toronto: Environmental Defence, December 2008), online: <<http://www.environmentaldefence.ca>>; Chris Severson-Baker, Jennifer Grant & Simon Dyer, *Taking the Wheel: Correcting the Course of Cumulative Environmental Management in the Athabasca Oil Sands* (Drayton Valley, AB: The Pembina Institute, 2008) [Taking the Wheel]; Mary Griffiths & Dan Woynillowicz, *Heating Up in Alberta: Climate Change, Energy Development and Water* (Drayton Valley, AB: The Pembina Institute, 2009) [Heating Up in Alberta]; Kevin P. Timoney & Peter Lee, "Does the Alberta Tar Sands Industry Pollute? The Scientific Evidence" (2009) 3 *The Open Conservation Biology* 65-81; Jeremy Moorhouse, Marc Huot & Simon Dyer, *Drilling Deeper: The In Situ Oil Sands Report Card* (Drayton Valley, AB: The Pembina Institute, 2010) [Drilling Deeper].

expert witnesses during hearings that the House of Commons Standing Committee on Environment and Sustainable Development held in Alberta in May 2009.⁴ Reversing persistent statements by governments and their experts that pollutants found in the Athabasca River resulted from naturally occurring formations, two scientific studies published in the prestigious Proceedings of the National Academy of Sciences stated that organic contaminants and heavy metals in the Lower Athabasca River Basin were in fact released by oil sands operations.⁵ Further, the scientists debunked government and industry's claims that these contaminants could not affect human health, and stated that long-term monitoring programs should be implemented to measure exposure and health of fish, wildlife and humans.

On the heels of the release of these studies, the federal and the provincial governments each appointed their own panel of scientists to review the apparent contradictions between government and industry-funded research and these independent studies.⁶ Both panels have validated the findings of Kelly *et al.* that contaminants are being introduced into the environment by oil sands operations and that the current monitoring system in place is inadequate to detect the impacts of oil sands mining. These reports, and their outcomes, are analyzed further in Section 4.3. of this paper.

Another comprehensive review of the environmental and health impacts of oil sands development was conducted by a Royal Society of Canada Expert Panel (RSC Expert Panel) of seven eminent scientists.⁷ Even though it did not find sufficient evidence that

⁴ The Committee was appointed to inquire into how the federal government is discharging its responsibilities in oil sands development. It was to prepare a statement on how the federal government could improve the protection and regulation of water resources in the oil sands region. The Committee held hearings in Fort Chipewyan, Fort McMurray, Edmonton and Calgary in early May 2009 and heard expert testimony from key witnesses. However, the Committee was unable to release a report endorsed by all members of the Committee. After a draft confidential report was destroyed in June 2010, the Liberal party released its own report in August 2010, and the NDP released its report in September 2010. See Section 4.3 of this paper for further discussion of these reports.

⁵ E.N. Kelly *et al.*, "Oil sands development contributes polycyclic aromatic compounds to the Athabasca River and its tributaries" (2009) 106: 52 P.N.A.S. pp. 22346-22351; E.N. Kelly *et al.*, "Oil sands development contributes elements toxic at low concentrations to the Athabasca River and its tributaries" (2010) 107:37 P.N.A.S. pp. 16178-16183.

⁶ Environment Canada, Oilsands Advisory Panel, *A Foundation for the Future: Building an Environmental Monitoring System for the Oil Sands – A Report submitted to the Minister of the Environment* (December 2010) at 10 [Oilsands Advisory Panel], online: <<http://www.ec.gc.ca/pollution/default.asp?lang=En&n=E9AB93B-1>>; Water Monitoring Data Review Committee, *Evaluation of Four Reports on Contamination of the Athabasca River System by Oil Sands Operations*, prepared for the Government of Alberta (7 March 2011), online: <http://www.environment.alberta.ca/documents/WMDRC_-_Final_Report_March_7_2011.pdf>.

⁷ The Royal Society of Canada (RSC), *The Royal Society of Canada Expert Panel: Environmental and Health Impacts of Canada's Oil Sands Industry*, Executive Summary (December 2010) [RSC Expert Panel], online: <<http://www.rsc-src.ca>>.

oilsands activities threaten the viability of the Athabasca River system or water quality, or cause health impacts on downstream residents, the Panel acknowledged that oil sands development pose major environmental challenges that need to be addressed by government. The RSC Expert Panel findings are discussed in Section 4.3. of this paper.

Currently approved oil sands expansion projects will increase production from 1.3 million barrels/day to 3.5 million barrels/day by 2025, and will consequently intensify the negative environmental impacts of these operations on aquatic ecosystems. These impacts, which relate to both water quality and water quantity concerns, derive from the following causes: licensed water withdrawals, removal or drainage of water bodies and wetlands, water pollution, and airborne deposition of contaminants on land and water. The following paragraphs briefly summarize the sources of impacts on water resources and their effects.

Licensed Water Withdrawals

Oil sands operators need to withdraw substantial volumes of fresh water to both extract and process the bitumen deposits: the number of barrels of water needed for every barrel of oil varies from 2 to 4.5 for surface mining, and averages 1.1 for *in situ* mining.⁸ Alberta Environment issues water licences for the use of both surface water and groundwater. Water used in the extraction and processing of bitumen is not released back into the Athabasca River, at least within the life cycle of the mine, because it is contaminated. It is impounded in tailings ponds, which as discussed below, are a source of water pollution.

In 2008, oil sands operators in the Athabasca Basin were licensed to divert up to 652 million m³/year, the majority of which (82%) came from the Athabasca River and the rest from its tributaries.⁹ The actual use of water is only a fraction of the allocated volumes (22%), however the potential is there for companies to start withdrawing their full water allocations, or assign their unused allocations to new operators, as the need arises. Even though these water allocations represent a small percentage of total annual flow, as pointed out by Water Matters, this is irrelevant because of the wide variations in water flows in the Athabasca River (from an average of 859 m³/sec in April-November to an average of 177 m³/sec in December-March). During the winter low flow period, water withdrawals have a much greater potential to affect aquatic species in the river. Scientists

⁸ Drilling Deeper, *supra* note 3 at 47.

⁹ Alberta Environment, "Water Diversion for Oilsands Mining Projects in 2008" (data received March 2010), cited in *Duty Calls: Federal responsibility in Canada's oil sands* (Toronto: Environmental Defence, The Pembina Institute and Équiterre, 2010) at 10, online: <http://environmentaldefence.ca/sites/default/files/report_files/Duty%20Calls%20ENG%20FINAL%20web2.pdf>. See also Heating up in Alberta, *supra* note 3 at 35. The actual volume diverted from the Athabasca River was 129 million m³.

have warned that due to declining river flows resulting from climate warming, drought, and upstream developments, water volumes in the Athabasca River may not be sufficient to support healthy aquatic ecosystems during the winter months, when river flows are at their lowest.

“Unless future water use is curtailed, oil-sands development will require $\approx 45 \text{ m}^3 \cdot \text{s}^{-1}$ of water supply by 2020, based on recent estimates. This is equivalent to nearly half of the Athabasca River’s low winter flow during eight of the years since 1980 and in every year since 1999.”¹⁰

In the case of *in situ* operations, much of the water used for the extraction process comes from groundwater. The Energy Resources Conservation Board (ERCB) promotes the use of saline or brackish water, as opposed to surface freshwaters or groundwater from freshwater aquifers, for *in situ* oil sands operations.¹¹ Conventional wisdom is that the groundwater used for *in situ* operations is mostly saline water. This, however, is not always the case. For example, Nexen has recently applied to Alberta Environment for its Long Lake steam assisted gravity drainage (SAGD) and upgrader operation south of Fort McMurray to withdraw 17,000 cubic meters of water per day from the Clearwater River (a designated Canadian Heritage River and a tributary to the Athabasca River) in order to “to meet current and long-term upgrader water requirements in a sustainable and environmentally responsible manner”.¹² In 2009, the consumption of freshwater from *in situ* operations was 16 million m^3/year .¹³ It is projected that freshwater use by *in situ* production will use between 25-45 million m^3/year by 2020 to produce an estimated 1.6 million barrels of oil per day.¹⁴

Drainage of Water Bodies and Wetlands

The mining of oil sands requires the removal, drainage or alteration of streams, creeks and lakes, as well as the clearing of boreal forest and the draining of a diversity of wetlands. This surface area must be drained to access the bitumen deposits. Timoney and Lee estimate that as of Spring 2008, the total footprint of oil sands operations, including

¹⁰ D.W. Schindler & W.F. Donahue, “An impending water crisis in Canada’s western prairie provinces” (2006) 103:19 P.N.A.S. at 7313, online: <<http://www.pnas.org/cgi/doi/10.1073/pnas.0601568103>>.

¹¹ See ERCB Draft Directive: Requirements for Water Measurement, Reporting, and Use for Thermal In Situ Oil Sands Schemes (18 February 2009).

¹² Nexen Inc., *Long Lake Source Water Project*, Application to Fisheries and Oceans Canada, Transport Canada and Alberta Environment (April 2010), cited in Julia Ko & Jeff Galius, “Nexen’s “bait and switch” means trouble for the Clearwater River” (28 June 2010) Water Matters, online: <<http://www.water-matters.org/story/383>>.

¹³ William Donahue, “In Situ oil sands – get ready for massive water demands in northern and central Alberta” (16 August 2010) Water Matters, online: <<http://water-matters.org/story/401>>.

¹⁴ Oilsands Advisory Panel, *supra* note 6.

tailings ponds and mine pits, facilities and infrastructure, was 65,040 hectares (650 km²).¹⁵ The largest losses (60%) were to forested land, while loss of wetlands (fens, bogs, shrublands) represented 37.54% of the total. For their part, Schindler and Donahue have stated that:

“The total area to be stripped by oil-sands mining in northern Alberta will be ~2,000 km² by 2020. An estimated 22-60% of this area is peatlands that will be destroyed by strip mining, and reclamation of peatlands has so far proven impossible.”¹⁶

Entire watersheds are being affected by mining operations. An example is the McClelland Lake watershed, an area initially protected by the Alberta government in a regional Integrated Resource Plan, which was subsequently amended by Cabinet and approved by the Energy Utilities Board (EUB) for oil sands mining.¹⁷ As stated in a recent study, watershed features such as forests, riparian areas or wetlands “are very significant for maintaining water quality as an ecosystem service and water supply as an ecosystem good.”¹⁸

In the Athabasca oil sands region, wetlands cover 50% of the natural area, and 90% of these wetlands are peat forming.¹⁹ Scientists explain that the vast peatland and wetland complex that overlays much of the oilsands area “serves an important hydrological function, absorbing snowmelt and large run-off events, and allowing the water to trickle slowly into the Athabasca River throughout the year”.²⁰ The impacts of surface disturbances on surface flows, water quality, as well as on groundwater, are therefore of concern.

The integrity of the Peace-Athabasca Delta, which has already been diminished by dam construction on the Peace River, will be further compromised:

“The Athabasca and Peace rivers are critical for ecological sustenance of the Peace-Athabasca Delta World Heritage Site at the rivers’ confluence, which is home to several thousand aboriginal people. The vast Delta wetlands are already exhibiting negative effects of declining water supply from climate change and the Bennett Dam on the Peace, but large industrial oil-sands projects in

¹⁵ Timoney & Lee, *supra* note 3 at 71. The RSC Expert Panel cites a figure of 602 km² as of March 2009: *supra* note 7 at 11.

¹⁶ Schindler & Donihue, *supra* note 10 at 4.

¹⁷ Joyce Hildebrand, “McClelland Lake Watershed: “Make hay while the sun shines!” says Petro-Canada” (2006) 14:6 Wild Lands Advocate at 19. See also Carolyn Campbell, “McClelland Wetlands proposed as Alberta’s first Conservation Directive” (2009) 1:6 Wild Lands Advocate at 4.

¹⁸ Meghan Beveridge & Danielle Droitsch, *Making the Connection: Water and Land in Alberta* (Canmore: Water Matters Society of Alberta, 2010) at 8.

¹⁹ Carolyn Campbell, “Tar Sands Lobby: 1 – Wetlands Policy: 0?” (2010) 18:4 Wild Lands Advocate at 13.

²⁰ Running out of Steam?, *supra* note 3 at 9.

the Athabasca drainage and reservoirs on the Peace River continue to be proposed and approved.”²¹

Adding to these concerns is the fact that reclamation of wetlands is highly doubtful. Dr. Schindler states that, based on studies of internationally-renowned wetland scientists, it is “generally agreed that the area cannot be reclaimed to its original condition and it is unlikely to be restored to any condition with equivalent hydrological function”.²² His views are shared by the RSC Expert Panel members, who note that while “reclamation of uplands landscapes is clearly feasible based on extensive research”, “reclamation of wetlands landscapes is less certain”:

“Modifications to groundwater regimes which are feeding regional wetlands, such as dewatering before landscape clearing and mining, have potential to reduce the proportion of wetlands that will occur in a fully reclaimed regional landscape.

The unresolved challenge of demonstrating long-term reclamation success of wetland landscapes poses a concern for groundwater regimes.”²³

As noted in the 2011 Report of the Joint Review Panel on the Joslyn North Mine Project, the French oilsands company Total E&P Joslyn Ltd. itself admits that reclamation of peat lands has not been successful to date: “Total noted that peat-accumulating wetlands have not been demonstrated to be successfully reclaimed using current technology; therefore, the loss of peat lands may be irreversible.”²⁴

Water Pollution

Another negative impact of oil sands development on aquatic ecosystems and fish populations is water pollution. Timoney and Lee have documented the cumulative impacts of oil sands development on concentrations of polycyclic aromatic hydrocarbons (PAHs) in the Muskeg River and Lower Athabasca River, and noted elevated levels of mercury and arsenic in local fish.²⁵ Water pollution can result from several sources including seepage from tailings ponds, leaks from pipelines, spills of bitumen, oil and wastewater, surface-water runoff from land disturbed during strip mining operations and airborne deposition of contaminants.²⁶ The issue of water pollution is directly linked to

²¹ Schindler & Donahue, *supra* note 10 at 4.

²² Running out of Steam?, *supra* note 3 at 9.

²³ RSC Expert Panel, *supra* note 7 at 6-7 and 10.

²⁴ ERCB Decision 2011-005: TOTAL E&P Joslyn Ltd. – Application for the Joslyn North Mine Project (27 January 2011) at 49.

²⁵ Timoney & Lee, *supra* note 3.

²⁶ *Ibid.* They identify 11 sources of pollution from oil sands activities, including air and land, in addition to water pollution: at 65.

the impacts of water withdrawals by the companies: lower water levels mean that there is less water to dilute heavy metals and other toxins that make their way into the river. Contaminants become more concentrated in the water.

Prominent scientists, including Dr. Schindler, have also found that oil sands development contributes both polycyclic aromatic compounds (PACs) and heavy metals such as arsenic, mercury, lead, copper, cadmium, nickel, silver and zinc (these elements are considered priority pollutants under the U.S. Environmental Protection Agency's *Clean Water Act*) to the Athabasca River and its tributaries.²⁷ A first study by Kelly *et al.*, including Dr. Schindler, found that PACs are present naturally in the Athabasca River, but that their concentrations are much greater downstream from oil sands development when compared to upstream developments. A second study by the same group of scientists confirmed these findings for trace metals. Both studies found that the contaminants were released to the river and its watershed via air and water. For its part, Environment Canada has just released a study showing that levels of toxic mercury in the eggs of water birds downstream from oil sands operations appear to have increased by 50% over the last three decades. The study suggests that the Athabasca River is the source of that mercury.²⁸

The existence of extremely toxic large tailings ponds in close proximity to the Athabasca River has raised persistent concerns of water pollution among scientists and experts.²⁹ Tailing ponds currently cover 170 km² of land containing millions of cubic meters of toxic waste such as metals, PAHs and naphthenic acids (NAs) and solvents. The dangers of both continuous seepage and a catastrophic release of toxics as a result of a breakage of a pond's enclosure cannot be overestimated. As already acknowledged by the Mackenzie River Basin Board in 2003, "an accident related to the failure of one of the oil sands tailings ponds could have catastrophic impact on the aquatic ecosystem of the MacKenzie River Basin due to the size of these ponds and their proximity to the Athabasca River."³⁰ The National Energy Board has also warned that seepage through the groundwater system and risk of leaks to surrounding soil and surface water are the principal environmental threats from tailings ponds. As noted by the RSC Expert Panel, "only a few published studies present seepage measurements and track groundwater contamination from tailings ponds. These studies indicate seepage rates highly depend on

²⁷ Kelly *et al.*, *supra* note 5.

²⁸ "Mercury increases in bird eggs downstream from oil sands" *The Globe and Mail* (2 October 2010) A5.

²⁹ Jennifer Grant, *Fact or Fiction: Oil Sands Reclamation* (Drayton Valley, AB: The Pembina Institute, 2008) at 41 and 36.

³⁰ Mackenzie River Basin Board, *State of the Aquatic Ecosystem Report 2003* (Fort Smith, NT: June 2004) at iv, cited in Hatch & Price, *supra* note 3 at 5.

local geological materials, including those underlying dykes, and transport of NAs in groundwater is poorly characterized.”³¹

The report of the federally appointed Oilsands Advisory Panel sums up the environmental concerns in relation to tailings pond management as follows:

“whether the tailing ponds (many of the historical ponds are located adjacent to the Athabasca River) and their perimeter seepage recovery systems are adequately protecting the local and regional surface and groundwater quality; whether there is any seepage and associated impact of contaminated water in deep aquifers; whether tailings pond remediation strategies including end-pit lakes can produce water of appropriate quality to be discharged back into the Athabasca River system; and whether contaminant loads in fish are changing.”³²

A proposed long-term solution for disposing of tailings is for mining companies to dump tailings waste into old mine pits and cap them with fresh water. At least 27 of these end pit lakes (EPLs) are planned for the Athabasca Boreal region within the next 60 years.³³ However, doubts have been expressed as to whether these EPLs will eventually support aquatic life. The RSC Expert Panel states that:

“... the feasibility of the EPL option for reclamation of tailings-filled mined out areas remains to be demonstrated despite having been approved-in-principle in 1993.”³⁴

The Joint Review Panel Report for the Total Joslyn Mine notes that the ERCB has “requested that the efficacy of end pit lakes be proven within 15 years following 2003”, but concludes that “to date, there is not any sound evidence to indicate that end pit lakes work as functional self-sustaining aquatic ecosystems”.³⁵

The ERCB has issued Directive 074 requiring companies to submit reclamation plans for their tailing ponds by 30 September 2009.³⁶ According to the Pembina Institute and Water Matters, of the nine tailings management plans submitted by the six companies active in oil sands mining, only two “indicate that their operations will be in full compliance with Directive 074”.³⁷ Suncor Energy Inc. is the first oil sands company

³¹ RSC Expert Panel, *supra* note 7 at 10.

³² Oilsands Advisory Panel, *supra* note 6 at 9.

³³ Jennifer Grant *et al.*, *Northern Lifeblood – Empowering Northern Leaders to Protect the Mackenzie River Basin from Oil Sands Risks* (Drayton Valley, AB: The Pembina Institute, 2010) at 18.

³⁴ RSC Expert Panel, *supra* note 7 at 6.

³⁵ *Supra* note 24 at 136-137.

³⁶ ERCB Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes, 3 February 2009, online: <<http://www.ercb.ca/docs/documents/directives/Directive074.pdf>>.

³⁷ Terra Simieritsch, Joe Obad & Simon Dyer, *Tailings Plan Review – An Assessment of Oil Sands Company Submissions for Compliance with ERCB Directive 074: Tailings Performance Criteria and*

whose reclamation plans comply with that Directive. The company announced in September 2010 it had completed surface reclamation of the first tailings structure in Alberta, known as Pond 1. Started in 1967, it is a 220-hectare impoundment area for tailings surrounded by a dike 100 meters high. The pond has not been certified as reclaimed and a self-sustaining ecosystem on the former pond has not been established yet.³⁸ Suncor has also announced that it is developing new dry tailings technology to reduce reclamation time by decades. However, as stated by Marlo Reynolds from the Pembina Institute, “the problem posed by toxic tailings waste continues to grow for the industry as a whole”.³⁹ Based on the fact that companies submitted non-compliant plans to the ERCB, it has been suggested that “the cumulative amount of liquid tailings being stored on the landscape north of Fort McMurray is set to increase by about 30 per cent between 2010 and 2030” and “will reach a staggering 1.1 billion cubic meters of liquid tailings over the decade.”⁴⁰

Air Pollution

In recent years, many reports and articles have discussed the impacts of oil sands development on climate change. Alberta’s fossil fuel industries and power generation release 32.5% of Canada’s greenhouse gas emissions. Environment Canada indicates that under a business-as-usual scenario, the development of oilsands is expected to be the fastest growing source of greenhouse gas emissions in Canada (12% of national emissions).⁴¹

But in addition to contributing to climate change, emissions from oil sands operations are deposited on lands and waters, resulting in negative impacts on aquatic ecosystems. Timoney and Lee mention stack emissions, coke dust, dry tailings, tar sands dust, and outgassing from mine faces as sources of air pollution.⁴² Kelly *et al.* state that plant stacks and dusty oilsands mine sites release toxic chemicals (PACs) and heavy metals

Requirements for Oil Sands Mining Schemes (Drayton Valley, AB: The Pembina Foundation and Water Matters, 2009), online: <<http://www.pembina.org>>.

³⁸ Nathan Vanderklippe, “Suncor scores an industry first” *The Globe & Mail* (24 September 2010); Dave Cooper, “Suncor reclaims tailings ‘Pond 1’” *Calgary Herald* (24 September 2010) C1. This surface “reclamation” involved transferring some of the unreclaimed fine tailings to another pond and infilling with coarse sand: The Pembina Institute, “Pond 1 Backgrounder” (22 September 2010).

³⁹ (2011) 18:8-9 *EnviroLine* at 2, online: <<http://www.envirolinenews.ca>>.

⁴⁰ The Pembina Institute, Media Release, “Only two oil sands operations set to meet rules to deal with liquid tailings” (1 December 2009).

⁴¹ Heating Up in Alberta, *supra* note 3 at 5.

⁴² Timoney & Lee, *supra* note 3.

into the air on airborne particles.⁴³ The contaminants likely enter the Athabasca River and its tributaries through snow melt and air deposition.

The Oilsands Advisory Panel identifies contaminant issues in relation to air emissions as including:

“the general air quality in the region, including potential impacts of acidifying emissions; possible deposition/influx of pollutants arising from open-pit mining operations including the movement of heavy equipment (e.g. particulates, dust) or from upgrader stack emissions; and uncertainties related to the influx of pollutants to the aquatic and terrestrial environments through contaminated snowpacks in both the immediate oil sands regions and further a field including in other jurisdictions like acid sensitive lakes in northern Saskatchewan.”⁴⁴

A recent special issue of a scientific journal investigated the impacts of sulphur and nitrogen deposition on aquatic and terrestrial ecosystems in western Canada, notably in the Athabasca Oil Sands region. Curtis *et al.* found that one of 12 lakes investigated showed strong evidence of acidification, and also found evidence of widespread nutrient enrichment in the region’s lakes.⁴⁵ The authors recommended further assessment of lake vulnerability to eutrophication caused by nitrogen deposition.

2.2. How Do the Impacts of Oil Sands Development on Water Resources Affect Aboriginal Peoples and Their Rights to Water?

Currently, over 13,000 Aboriginal people live in nine First Nation and four Métis communities within or immediately adjacent to the Lower Athabasca region. According to Marc Stevenson “this number is expected to double with each passing generation”.⁴⁶ The Profile of the Lower Athabasca Region released by the government in 2009 in connection with the proposed development of the Lower Athabasca regional land-use plan, contains little information on these Aboriginal communities.⁴⁷ The extent of their traditional territories, and their continued reliance on the lands and waters of the region for their economic, cultural and spiritual needs, are not acknowledged. Neither are their Treaty rights, including the right to make a living from the exercise of these rights.

⁴³ Kelly *et al.*, *supra* note 5.

⁴⁴ Oilsands Advisory Panel, *supra* note 6 at 11.

⁴⁵ See Curtis *et al.*, “Palaeolimnological assessment of lake acidification and environmental change in the Athabasca Oil Sands Region, Alberta” (2010) Vol. 69, Suppl. 1 Journal of Limnology pp. 92-104 online: <http://www.jlimnol.it/JL_69_supl1/09_curtis.pdf>.

⁴⁶ Marc G. Stevenson, “Trust Us Again, Just One More Time: Alberta’s Land Use Framework and First Nations” in Marc. G Stevenson & David C. Natcher, eds., *Planning Co-Existence – Aboriginal Issues in Forest and Land Use Planning* (Edmonton: CCI Press, University of Alberta, 2010) at 51.

⁴⁷ Government of Alberta, *Profile of the Lower Athabasca Region* (July 2009) at 10.

In 1996, the Northern River Basins Study had already noted the concerns expressed by the public in relation to the cumulative impacts of industrial development, including massive oil sand complexes, on the Lower Athabasca River. They included “safety of tailing ponds and leachates, presence of carcinogens and linkages to human health, fish health and quality, drinking water quality, turbidity, taste and odour, hydrocarbon seeps, and uncertainty in cumulative impacts and reliability of industry data”.⁴⁸

First Nations’ concerns about the impacts of industrial water use and pollution on water resources, notably on the fish and wildlife populations on which they depend, on their transportation needs, and on their health, have increased with the pace and rate of oil sands development. On many occasions over the past years, First Nations have made submissions to the ERCB or to joint panels reviewing oil sands development applications in relation to the negative impacts of these proposals.⁴⁹ The majority of the concerns identified by Aboriginal communities have centered on the environmental and socio-economic effects of the proposed projects on their traditional lands and ways of life. Impacts on groundwater and surface water, land, fish and wildlife, and traditional land-use patterns have been foremost in the minds of Aboriginal peoples. The Mikisew Cree First Nation (MCFN), the Athabasca Chipewyan First Nation (ACFN) and the Fort McKay First Nation in particular have expressed their concerns about the impacts of proposed development on the quantity and quality of water in the Athabasca River and its tributaries. The First Nations have stated that their traditional way of life is dependent on adequate flow of water in the Athabasca River, as their members depend on the river for food and transportation, amongst other things, and low flows could limit access to medicinal plants/herbs, spiritual and cultural sites and trapping and hunting areas. These communities have asked the government to limit water withdrawals from the Athabasca River, and have been concerned about the lack of progress towards defining Instream

⁴⁸ Canada, Northern River Basins Study Board, *Northern Rivers Basins Study: Report to the Ministers* (Edmonton: Alberta Environmental Protection, 1996) at 142.

⁴⁹ See for example EUB Decision 2002-089: TrueNorth Energy Corporation application to construct and operate an oil sands mine and cogeneration plant in the Fort McMurray area (Amendment) (30 October 2002); EUB Decision 2003-13: Canadian Natural Resources Limited (Lindbergh) Application for New and Amended Recovery Schemes and Well Licences, Lindbergh Sector, Cold Lake Oil Sands Area (11 February 2003); EUB Decision 2004-005: Canadian Natural Resources Limited, Application for an Oil Sands Mine, Bitumen Extraction Plant, and Bitumen Upgrading Plant in the Fort McMurray Area (27 January 2004); EUB 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); EUB Decision 2006-112: Suncor Energy Inc., Application for Expansion of an Oil Sands and a Bitumen Upgrading Facility in the Fort McMurray Area (14 November 2006); EUB Decision 2006-128: Albion Sands Energy Inc. Application to Expand the Oil Sands Mining and Processing Plant Facilities at the Muskeg River Mine Fort McMurray (21 December 2006); EUB Decision 2007-013: Imperial Oil Resources Ventures Limited Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) Fort McMurray (27 February 2007) at 61-68.

Flow Needs for the Athabasca River and other thresholds and limits to mitigate the environmental impacts of industrial development.

The Fort McKay Specific Assessment, submitted in March 2010 by the Fort McKay First Nation with funding from Shell Canada Ltd., in connection with the company's proposed Jackpine Expansion and Pierre Mines, assesses the cumulative impacts of oils sands development within a Forty Township Area around the community.⁵⁰ This report includes the following findings:

- Muskeg (peatlands) is a dominate feature of the boreal forest in Northern Alberta and is integral to Fort McKay's culture, supporting many valued traditional resources such as traditional plants and wildlife habitat. As of 2007, there has been a 26% reduction in wetlands since oil sands mining first began. Most of this loss has occurred in the last ten years.
- Biodiversity is critical because it reflects the integrity of the landscape and ecosystems that support traditional activities. Lands with high biodiversity potential (predominately wetlands) will continue to decrease, to a total 38% based on existing, approved and planned development. After reclamation, lands with low biodiversity potential will increase by 46%. This is because most reclamations planning is for the creation of upland forest, several decades after mining commences, rather than for restoring predisturbance conditions.⁵¹
- The intensely used ecosystems within Fort McKay's traditional lands and high quality wildlife habitat are concentrated in the Athabasca River Valley and Muskeg River Basin, for several species. Oil sands development is concentrated in the same areas, resulting in a significant loss of traditional land use. For example, fisher, marten and moose habitat will decline by 35% in the Forty Township Area if all approved and planned development proceeds, and the majority of this loss will be in Fort McKay's intensively used areas. Moose is the only animal for which recent populations surveys have been done, and these show a 60% decline in population in the area surveyed between 1994 and 2009.⁵²

⁵⁰ The Forty Township Study Area comprises 379,641 hectares, includes the community of Fort McKay, and most of the mineable oil sands area, and is bounded by Townships 93 to 100, Ranges 8 to 12. It was selected because it incorporates a significant portion of the community's high value and used traditional lands, the proposed Shell mines, and because of the availability of baseline environmental data. Fort McKay Industry Relations Corp., the Fort McKay Specific Assessment (March 2010), Chapter 1 at 13.

⁵¹ *Ibid.*, Chapter 8 at 25 to 29.

⁵² *Ibid.*, Chapter 6 – Alberta has only surveyed populations of moose recently and only in Wildlife Management Area 531.

- The Muskeg River Basin is considered ‘endangered’ by the level of development that has been approved and applied for in this area in terms of surface water, with the fishery significantly and adversely affected.⁵³
- Fort McKay is experiencing significant cultural stress and loss of traditional values from the loss of land, land access, pollution, fear of pollution, increased competition for natural resources and other changes from oil sands development. The community perceptions of impacts are consistent with those documented in the scientific assessment, such as the impacts listed above.⁵⁴

In November 2010, the ACFN and the MCFN jointly released a report documenting “how reductions in the quantity and quality of the Athabasca River’s flow are having adverse effects on the ability of ACFN and MCFN members to access territories, and to practice their aboriginal and treaty rights, including hunting, trapping, fishing and related activities.”⁵⁵ Adverse impacts on health associated with pollution are also of increasing concern to the First Nations. Recently, First Nations have expressed deep concerns about the high incidence of unusual cancers in Fort Chipewyan.

As noted by Stevenson, “the cumulative effects of a host of industrial activities ... in the Lower Athabasca region has so fragmented Crown land and so degraded the environmental integrity and biodiversity of the region as to render the promises made under treaty virtually ‘meaningless’ and without effect in many areas”, and there will come a time when it will be impossible to keep the treaty promises.⁵⁶

In addition to making submissions at regulatory hearings for the review and approval of oil sands projects, Aboriginal peoples have used several avenues (including the petition process, submissions to federal committees, the filing of law suits) to bring their concerns forward to government. Concerns with respect to water contamination were brought to the attention of the Commissioner of the Environment and Sustainable Development on two occasions in recent years.

In December 2006, the Treaty 8 First Nations of Alberta (T8FNs) submitted a petition outlining their concern that oil sands development was proceeding at a pace that

⁵³ *Ibid.*, Chapter 4 at 20 and Chapter 5 at 20.

⁵⁴ *Ibid.*, Cultural Heritage Assessment, Chapter 11.

⁵⁵ Craig Candler, Rachel Olson, Steven DeRoy and the Firelight Group Research Cooperative with the ACFN and the MCFN, *As Long as the Rivers Flow: Athabasca River Knowledge, Use and Change* (Edmonton: Parkland Institute, University of Alberta, 2010).

⁵⁶ Stevenson, *supra* note 46 at 52.

threatened the environment on which First Nations rely to exercise their Treaty rights.⁵⁷ The T8FNs requested that government conduct a regional assessment of these developments involving all jurisdictions to assess their cumulative effects. While Environment Canada promised to explore the potential for regionally based approaches to environmental assessment to better address cumulative effects, this has remained an unfulfilled promise.

In January 2008, Peter Cyprien, a member of the Keepers of the Athabasca Alliance, submitted a petition requesting that the Minister of the Department of Fisheries and Oceans investigate if the *Fisheries Act* had been contravened by the contamination of water, aquatic species and sediments in the Athabasca River.⁵⁸ He also requested that the Minister of Health conduct a thorough toxicology test of human exposure to contaminants to determine if the high incidence of disease and illness in the community of Fort Chipewyan was the result of drinking surface water and consuming fish and wildlife caught in the surrounding water systems. Environment Canada, in a response prepared in consultation with Fisheries and Oceans and Health Canada, “found no evidence that the *Fisheries Act* has been contravened with respect to contamination from tar sands tailings ponds”.⁵⁹ Health Canada, for its part, found “no evidence to date to substantiate an elevated incidence of disease and autoimmune illness in the community of Fort Chipewyan”.⁶⁰

In May 2009, several Aboriginal leaders were invited to testify in front of the House of Commons Standing Committee on Environment and Sustainable Development. The Committee had been tasked by the federal government to inquire into the impacts of oil sands development on water resources and to examine how the federal government was discharging its obligations. The Aboriginal leaders outlined the negative impacts of oil sands development on their ability to exercise their treaty rights. Chief Jim Boucher of the Fort McKay First Nation, stated:

“My members have lost approximately 60% of their traplines to oil sands development, and 75% of our lands within 20 kilometers of our communities have been mined or approved for mining. Oil sands leases cover almost our traditional territory and have effectively extinguished the exercise of our treaty right to hunt, fish, trap, and gather ... there is presently no cohesive federal or provincial economic, environmental, or regulatory framework or blue print to address not only

⁵⁷ Office of the Auditor General of Canada, Petition No. 188, “The impact of resource development in Northern Alberta on First Nations” (28 December 2006), online: <http://www.oag-bvg.gc.ca/internet/English/pet_188_e_28924.html>.

⁵⁸ Office of the Auditor General of Canada, Petition No. 238, “Water and sediment contamination of the Athabasca River due to oilsands production” (4 January 2008), online: <http://www.oag-bvg.gc.ca/internet/English/pet_238_e_30190.html>.

⁵⁹ *Ibid.* Minister’s Response: Environment Canada (15 May 2008).

⁶⁰ *Ibid.* Health Canada Response to Petition No. 238 (April 2008).

the sustainability of oil sands production, but also its cumulative and long term environmental impacts on water, land, air and aboriginal rights.”⁶¹

3.0. What are Government’s Obligations with Respect to Aboriginal Water Rights?

In Canada, subsection 35(1) of the *Constitution Act, 1982* embodies a substantive promise of rights recognition and rights protection, as stated by the Supreme Court in *R. v. Sparrow*.⁶² *Sparrow* announced a new era of inter-societal understanding where rights would be taken seriously. The Court stated that Canada’s legislative power must be reconciled with federal duty. To fulfill this duty, the government has an obligation to not only refrain from infringing aboriginal and treaty rights, but also to actively protect them.⁶³

The promise of rights protection requires that measures be taken to give effect to these rights, to allow their exercise. These are positive obligations. These obligations are particularly onerous in the context of resource development, notably oil sands development, given its far-reaching impacts on lands and waters as documented in Section 2.0. of this paper. In order to protect the rights guaranteed by Treaty, not only specific hunting, fishing and trapping rights, but also the more comprehensive right to live of the land, to practice a culture and a way of life on the land, government must ensure that water is of a sufficient quality and quantity to maintain fish populations and fish habitat, wildlife and fur-bearing populations and their habitat, and also that Aboriginal peoples have access to water for transportation, domestic uses, cultural and ceremonial purposes, and so on.⁶⁴

In a recent court case launched by the Beaver Lake Cree Nation against the provincial and the federal governments in Alberta, the governments’ obligations have been described as follows:

⁶¹ Testimony of Chief Jim Boucher (12 May 2009), cited in *Missing in Action: The Federal Government and protection of water in the oil sands*, New Democrat Report on the Standing Committee Review of the Impacts of Oil Sands Development on Water Resources (24 September 2010) at 38 [Missing in Action], online: <<http://electlindaduncan.ca.s123635.gridserver.com/wp-content/uploads/2011/03/Missing-in-Action.pdf>>.

⁶² *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].

⁶³ For an analysis of these obligations, see Monique Passelac-Ross & Verónica Potes, “Treaty 8 Land-Based Rights: A Legal and Ethical Analysis” in Marc G. Stevenson & David C. Natcher, eds., *Changing the Culture of Forestry in Canada*, vol. 1 (Edmonton: CCI Press and Sustainable Forest Management Network, 2009) at 181-196.

⁶⁴ See Passelac-Ross & Smith, *supra* note 1 at 21-32.

- To manage wildlife habitats to ensure the continuation of the Treaty rights
- To manage water resources to ensure sufficient levels of water quantity (flows) and quality for the continuation of treaty rights
- To manage wildlife and water resources to ensure a harvestable surplus of each wildlife species
- To manage wildlife habitats and water resources to ensure that the abundance and diversity of wildlife species remains available to provide the Beneficiaries with sufficient supplies to feed themselves and to provide a livelihood.⁶⁵

Canadian jurisprudence has focused more on governments' obligation to consult Aboriginal peoples and to accommodate their rights when these may be infringed by resource development, than on the more proactive obligations associated with upholding and protecting these rights. Nevertheless, the courts have firmly established that adequate or meaningful consultation and accommodation with Aboriginal peoples is essential to the fulfillment of government obligations to protect their rights. The Supreme Court of Canada first articulated the duty to consult and accommodate in the *Sparrow* case, in the context of the justification test.⁶⁶ The court found that any government regulation that infringes upon or denies aboriginal rights must be justified: absent consultation with the affected Aboriginal group, the Crown may not be able to justify the infringement.⁶⁷ The duty to consult and accommodate has since become a component of government decision-making, in particular with respect to resource development that has the potential to adversely affect Aboriginal or treaty rights. The "honour of the Crown" is now invoked as the constitutional foundation of the obligation.

A disturbing development in recent Canadian jurisprudence with respect to the outcome of the consultation process is the finding in several court cases that consultation does not have to result in an agreement with the affected First Nation, that the aboriginal rights must be "balanced" with the interests of society at large.⁶⁸ Put another way, the duty to accommodate (the substantive component of the consultation process) does not

⁶⁵ See *Alphonse Lameman and Beaver Lake Cree Nation v. Alberta*, Statement of Claim (14 May 2008) at 5-6.

⁶⁶ *Sparrow*, *supra* note 62.

⁶⁷ *Ibid.* at 1119: aside from consultation, the court outlined other questions that may be addressed in the justification analysis, including whether "there has been as little infringement as possible in order to effect the desired result", and whether "in a situation of expropriation, fair compensation is available."

⁶⁸ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; [2005] 1 C.N.L.R. 366 at para. 2: "Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process."

give Aboriginal peoples a “veto” over decision-making. However most of the courts’ findings with respect to accommodation are made in the context of cases dealing with unproven aboriginal rights and title claims rather than established rights. A case in point is *Haida*, a case dealing with unproven aboriginal rights and title claims, where the Supreme Court of Canada stated:

“This process does not give Aboriginal groups a veto over what can be done with land *pending final proof of the claim*. The Aboriginal “consent” spoken of in *Delgamuukw* is *appropriate only in cases of established rights*, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.”⁶⁹ [emphasis added]

The court leaves open the possibility that consent on the part of Aboriginal peoples may be appropriate in cases of *established* rights, as opposed to *asserted* rights. The rights to hunt, trap and fish confirmed by treaties are established rights. In the *Ka’a’Gee Tu* case, the Federal Court characterized the applicants’ rights to hunt, trap and fish under Treaty 11 as *established* rights, as opposed to their claim to Aboriginal title which was an *asserted* right.⁷⁰ Further, as noted in *Mikisew Cree*, the Crown as a party to the treaty always has knowledge of its contents, therefore of the rights confirmed by the treaty.⁷¹ This view was confirmed most recently by Justice Finch of the B.C. Court of Appeal in the *West Moberly* case. In his discussion of whether judicial review was the appropriate procedure in which to examine the Crown’s failure to consult and accommodate, a question raised by both B.C. and Alberta as an intervenor, Justice Finch stated:

“In my respectful view, Alberta’s reliance on *Haida* and *Taku* is misplaced. Those were both cases about the existence of Aboriginal rights asserted by First Nations, but as yet unproven. There is no such question in this case, because Treaty 8 declares the rights. While there remain issues as to the scope of the right, that is to be largely decided by interpreting the Treaty, in its historical context, as a matter of law.”⁷²

The duty to consult and accommodate has come to be viewed and implemented by government mostly as a procedural obligation, devoid of substantive meaning. Some governments now argue in court that the process of consultation is separate from its outcome, that as long as the consultation process is reasonable, the Crown has fulfilled its duty.⁷³ The Alberta government routinely asserts its view that it must “strike a balance”

⁶⁹ *Haida Nation v. British Columbia (Ministry of Forests)*, [2005] 3 S.C.R. 511; [2005] 1 C.N.L.R. 72 at para. 48.

⁷⁰ *Ka’a’Gee Tu First Nation v. Canada (Attorney General)*, [2007] 4 C.N.L.R. 102 (F.C.T.D.) at para. 101.

⁷¹ *Mikisew Cree*, *supra* note 2 at para 34.

⁷² *West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, 2011 BCCA 247 at para. 98. See also para. 129: “Here the right relied on is an existing right agreed to by the Crown and recorded in a Treaty.”

⁷³ See e.g. *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359, Revised Factum of the Appellants the Province of British Columbia, filed 18 November 2010. The

between the constitutionally protected rights of Aboriginal people and the interests of society at large, as if the two were to be equally weighed.⁷⁴ This undermines the constitutional nature of the aboriginal rights and the promise of section 35. In *Van der Peet*, Justice McLachlin (dissenting) warned against what she considered the “undetermined variety of considerations” that may justify infringements of rights protected by section 35:

“The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-Aboriginal fishers, by contrast, would negate the very Aboriginal right to fish itself, on the ground that this is required for the reconciliation of Aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-Aboriginals.”⁷⁵

In addition, the government’s “balancing act” is often performed unilaterally, without meaningful negotiation with the affected First Nations and a real attempt to reconcile their respective positions, as is apparent in the following analysis of water management planning initiatives and oil sands projects approvals.

4.0. Is Alberta Meeting Its Obligations *Vis-à-vis* Aboriginal Water Rights in the Athabasca Oil Sands Region?

Alberta does not recognize the existence of Aboriginal or treaty rights to water.⁷⁶ Alberta’s official position is that these rights, “if they ever existed, have been extinguished by competent legislation of, and executive action by, the Crown in right of Canada,” and further that “by the provisions of the Constitution Act, 1930 and the Alberta Natural Resources Amendment Act, 1938, the water rights and rights to river beds passed to Alberta along with the constitutional jurisdiction over such rights.”⁷⁷

Opening Statement reads: “It is not the necessity of a specific result but the reasonableness of the process that is critical to the determination of whether or not the Crown has fulfilled its duty to consult.” Alberta made a similar argument: “Alberta says the focus should be on the reasonableness of the consultation process, rather than on its outcome”: *West Moberly*, supra note 72 at para. 71.

⁷⁴ See e.g. Alberta’s Land Use Framework at 21: see *infra* the discussion under Section 4.1.4. of this paper.

⁷⁵ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 306.

⁷⁶ Passelac-Ross & Smith, supra note 1 at 40.

⁷⁷ Alberta Environment, *Water Management in Alberta: Challenges for the Future*, Background Paper, Volume 3: Aboriginal Water Issues (Edmonton: 1991).

Nevertheless, Alberta does acknowledge that First Nations have constitutionally protected treaty rights to hunt, trap and fish. As stated in Alberta's 2005 *First Nations Consultation Policy on Land Management and Resource Development*, when activities on provincial Crown lands "affect existing treaty rights and other interests of First Nations", the government is under an obligation to consult with these First Nations.⁷⁸ This is a procedural obligation. The purpose of the consultation process, as described in Alberta's Policy, is to avoid infringing First Nations' rights and traditional uses, and if infringement cannot be avoided, to mitigate the infringement.⁷⁹ These are substantive obligations. These obligations are framed in a negative way (obligation not to do something) rather than in a positive way (obligation to do something, ie. ensure that the lands and waters that support the exercise of the rights of Aboriginal peoples remain healthy enough to allow the exercise of these rights).

As discussed above, the development of oil sands deposits in the Athabasca region has significant negative impacts on water resources, resulting in potential infringement of the aboriginal and treaty rights of Aboriginal peoples living in that region. Is the provincial government acknowledging these impacts? Is it taking steps to protect the exercise of aboriginal and treaty rights? Is it consulting the local First Nations in order to avoid infringing their rights and to mitigate the infringement? Is it offering adequate accommodation measures when the rights may be infringed or may even be *de facto* extinguished?

In the following paragraphs, we examine the extent to which Alberta is actually discharging its obligations, and its commitment to consultation with Aboriginal peoples and accommodation of their rights, in the Athabasca oil sands area. The issues are dealt with under the following headings: water management planning initiatives, approval of oil sands development, and monitoring of the impacts of industrial development on the Lower Athabasca River system.

4.1. Water Management Planning Initiatives

Water management planning in the Athabasca oil sands area appears to proceed by leaps and bounds in a seemingly uncoordinated fashion. Other commentators have discussed the byzantine way in which water legislation and water policies interact in Alberta, and the uncertainties and "mixed messages" that result from highly discretionary language in

⁷⁸ *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (16 May 2005) at 2, online: <http://www.aand.gov.ab.ca/PDFs/ConsultationPolicy_May16.pdf>.

⁷⁹ *Ibid.* at 4.

both legislation and policy documents.⁸⁰ Further, as discussed below, the relationship between provincial water and land use management and planning initiatives is uncertain.

Some explanation of Alberta's policy and legislative framework for water management planning is needed to provide a context for the following discussion of water management planning initiatives. There are two types of water plans that may be adopted in Alberta: water management plans, and watershed management plans.⁸¹ The first may be adopted under the *Water Act*, the second under Alberta's water management strategy, *Water for Life*.

Alberta's main water legislation, the *Water Act*, envisions the development of water management plans.⁸² A water management plan is defined as a "plan with respect to conservation and management of water developed under Part 2" of the Act.⁸³ The Act allows the Environment Minister to establish water management planning areas for the purpose of developing a water management plan or an approved water management plan, implying that not all such plans will be approved.⁸⁴ It is up to the Environment Minister to require the Director or another person to develop a water management plan, and the plan may be developed in cooperation with other persons, local authorities or government agencies.⁸⁵ Approval of a water management plan is by Cabinet or the Environment Minister.⁸⁶ The Act includes a list of mandatory and discretionary provisions in an approved water management plan. An approved plan must include the following: a) a summary of the issues considered in the plan; b) a description of the area to which the plan applies; c) a summary of the recommendations of the Minister; and d) the matters or factors that must be considered in issuing an approval or licence, and in approving a transfer of a water licence. Discretionary components of the plan include: a) the number of households permitted on a parcel of land to divert water for household purposes; b) authorizations for transfer of water licences; c) authorizations of water conservation

⁸⁰ Michael M. Wenig, Arlene J. Kwasniak & Michael S. Quinn, "Water Under the Bridge? The Role of Instream Flow Needs (IFNs) Determinations in Alberta's River Management" in H. Epp & D. Ealey, eds., *Water: Science and Politics*, Proceedings of the Conference held by the Alberta Society of Professional Biologists, 25-28 March 2006, Calgary, Alberta (Edmonton: Alberta Society of Professional Biologists); Mike Wenig, *Understanding Local Albertans' Roles in Watershed Planning – Will the Real Blueprint Please Step Forward?*, Occasional Paper #28 (Calgary: Canadian Institute of Resources Law, 2010).

⁸¹ Note that the terminology used by government officials is very fluid. Alberta Environment's website lists water management plans under the general rubric of "river management frameworks", online: <<http://environment.alberta.ca/02814.html>>.

⁸² *Water Act*, R.S.A. 2000, c. W-3 [WA].

⁸³ WA, *ibid.*, s. 1(1)(jjj).

⁸⁴ WA, *ibid.*, s. 10.

⁸⁵ WA, *ibid.*, s. 9.

⁸⁶ WA, *ibid.*, ss. 11(1)-(2).

holdbacks under section 83; d) the maximum amount of water that can be diverted under a registration. An example of an approved water management plan is the *Approved Water Management Plan for the South Saskatchewan River Basin* (SSRB Plan).⁸⁷

The *Water Act* further authorizes the Director to establish “water conservation objectives”.⁸⁸ These are defined as the amount and quality of water necessary for the protection of a natural water body or its aquatic environment, for the protection of tourism, recreational, transportation or waste assimilation uses, or for management of fish or wildlife, and they may include water necessary for the rate of flow of water or water level requirements.⁸⁹ A water management plan may include water conservation objectives.

For its part, Alberta’s water management strategy, entitled *Water for Life: Alberta’s Strategy for Sustainability*, envisions the development of watershed management plans for each of the province’s major watersheds.⁹⁰ The Strategy promotes a watershed approach to water management and has three stated goals: 1) a safe, secure drinking water supply; 2) healthy aquatic ecosystems; and 3) reliable, quality water supplies for a sustainable economy.⁹¹ One of the ways in which these goals will be achieved is by establishing water management objectives and priorities for sustaining aquatic ecosystems through the development of watershed management plans.⁹² A *Water for Life Action Plan* released by the government in November 2009 calls for the development of watershed management plans for nine river basins by 2015 and the completion of such plans for all major watersheds in Alberta by 2019.⁹³

Under *Water for Life*, “partnerships” are integral to achieving stewardship of water resources. Watershed Planning and Advisory Councils (WPACs), which are multi-stakeholder, non-profit organizations, are described by government as “leaders in watershed assessment and planning”.⁹⁴ Since the Strategy was first developed, the government has established eleven WPACs in various provincial watersheds. The most

⁸⁷ Alberta Environment, *Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)* (August 2006) [SSRB Plan].

⁸⁸ WA, *supra* note 82, s. 15.

⁸⁹ WA, *ibid.*, s. 1(1)(hhh).

⁹⁰ Government of Alberta, *Water for Life – Alberta’s Strategy for Sustainability* (November 2003). The Strategy was renewed in November 2008: Government of Alberta, *Water for Life – A Renewal* (November 2008), online: <<http://www.waterforlife.alberta.ca>>.

⁹¹ *Ibid.* at 7.

⁹² *Ibid.* at 7 and 17-19.

⁹³ Government of Alberta, *Water for Life – Action Plan* (November 2009) at 19, online: <<http://waterforlife.alberta.ca/542.html>>.

⁹⁴ Online: <<http://waterforlife.alberta.ca/01261.html>>.

important of the “actions” listed by each of the existing Watershed Councils or WPACs is the development of a watershed management plan.

However, the scope and content of watershed management plans, and the role and responsibilities of the WPACs in developing and implementing these plans, are far from clear. As explained by Wenig, government documents do not clearly define what the plans are to achieve. The *Enabling Partnerships* document includes statements such as: these plans “are comprehensive documents that may address many issues in a watershed”, they may “identify issues and examine the best course of action to address them”, or they “may address a number of areas including water, land use, and information needs.”⁹⁵ As to the difference between water management and watershed management, the document states that watershed management, because it also addresses land use activities that affect ground and surface water quality and quantity, is a “more comprehensive approach than water management”.⁹⁶ This interpretation appears to be confirmed by this statement in the SSRB Plan: “The Watershed Planning and Advisory Councils (WPACs) are encouraged to consider the priorities in their watersheds and undertake future watershed management planning with this water management plan serving as a foundation.”⁹⁷

In a report criticizing the lack of integration of provincial strategic initiatives, the Pembina Institute identified the “governance vacuum” as a key challenge in water planning initiatives:

“Watershed planning by WPACs through the ‘shared governance’ model is emerging without adequate legal foundations, procedural requirements and linkages with decision-making. The potential for confusion and frustration is enormous.”⁹⁸

Among the various water management planning initiatives in the Athabasca oil sands region, the following have been reviewed: the *Muskeg River Comprehensive Water Management Plan*, the *Water Management Framework for the Lower Athabasca River*, the *Athabasca River Watershed Management Plan* and the *Lower Athabasca Regional Plan*.⁹⁹ We describe each and assess whether they acknowledge the rights to water of

⁹⁵ Wenig, *supra* note 80 at 14. See Government of Alberta, *Enabling Partnerships – A Framework in Support of Water for Life: Alberta’s Strategy for Sustainability* (2005).

⁹⁶ Wenig, *ibid.* at 13.

⁹⁷ SSRB Plan, *supra* note 87, Highlights at 7.

⁹⁸ Danielle Droitsch, Steven A. Kennett & Dan Woynillowicz, *Curing Environmental Dis-integration: A Prescription for Integrating the Government of Alberta’s Strategic Initiatives*, Issue Paper (Drayton Valley, AB: The Pembina Institute and The Water Matters Society of Alberta, 2008) at 16.

⁹⁹ Two of these initiatives, the *Water Management Framework for the Lower Athabasca River* and the proposed *Muskeg River Comprehensive Water Management Plan*, could be adopted as water management plans under the *Water Act*.

First Nations, and whether they allow for adequate consultation with Aboriginal peoples and accommodation of their rights.

4.1.1. The Muskeg River Comprehensive Water Management Plan

The Muskeg River is a tributary of the Athabasca River and drains an extensive area of boreal forest wetlands. It has several major tributaries, including the Jackpine, Muskeg and Wapasu Creeks, with Kears Lake being the largest lake within the watershed. The watershed covers an area of 1,480 km². It provides important fish habitat for both resident and migrant species.

The watershed is underlain by oil sands deposits and has already undergone extensive development. Even though the Alberta government stated its objective to protect the ecological integrity of the Muskeg River Watershed as early as 1999, it was not until June 2008, and after several additional oil sands operations had been approved, that an *Interim Management Framework for Water Quantity and Quality* (IMF) was developed for the Muskeg River Watershed.¹⁰⁰ Severson-Baker *et al.* document the steps taken since the late 1990s to develop a management framework to protect the integrity of the Muskeg River Watershed, and the ultimate failure of these initiatives to lead to protection of the watershed.¹⁰¹

In 1998, Shell Canada Ltd applied for approval of a second mine¹⁰² in the Muskeg River Basin, at a time when Environment Canada, and environmental groups were raising concerns about the potential for significant cumulative effects from oil sands development and the lack of regulatory system to address these effects.¹⁰³ Alberta announced its policy to manage these cumulative effects, the Regional Sustainable Development Strategy (RSDS), designed to develop management frameworks, standards and thresholds for cumulative impacts.¹⁰⁴ The government delegated the implementation of the policy to a multi-stakeholder organization, the Cumulative Environmental Management Association (CEMA). CEMA was established in June 2000 as a voluntary partnership of stakeholder groups to “provide a multi-stakeholder consensus-based forum

¹⁰⁰ Alberta Environment, *Muskeg River Interim Management Framework for Water Quantity and Quality*, Management Guidance for Aquatic Components of the Muskeg River Watershed (June 2008) at 6 [IMF].

¹⁰¹ Taking the Wheel, *supra* note 3 at 13.

¹⁰² The first mine in the basin was Syncrude Canada’s Aurora North Mine, approved in 1997.

¹⁰³ EUB Decision 99-02: Shell Canada Limited Application to Construct and Operate an Oil Sands Mine in the Fort McMurray Area (12 February 1999).

¹⁰⁴ Alberta Environment, *Regional Sustainable Development Strategy for the Athabasca Oil Sands Area* (July 1999).

for managing cumulative effects of oil sands development in the Athabasca region”.¹⁰⁵ Its function is advisory only; it makes recommendations to government on management tools and strategies. CEMA’s membership is made up of federal, provincial, and local government representatives, aboriginal groups and First Nations, environmental groups and industry, primarily oil sands developers. The latter constitute the majority of members and provide the majority of funding.¹⁰⁶

One of the objectives of the RSDS was to protect the water quality and hydrological integrity of regional watersheds, including the Muskeg River Basin. To that end, in 2000 CEMA established a working group “to establish environmental criteria and management system to define and maintain watershed integrity in the Muskeg River drainage basin”.¹⁰⁷ The group planned to complete its work in 2002-2003. However, when Shell proposed yet another mine in the Muskeg watershed in 2004, no management plan had been recommended by CEMA or developed by Alberta. Environment Canada advised the Joint Review Panel assessing Shell’s proposed Jackpine mine of the potential for irreversible effects on the watershed from the multiple mines that were being planned.¹⁰⁸ The Fort McKay First Nation requested that a management system be in place before the Jackpine mine began operations; the Joint Panel urged CEMA to accelerate its work, and recommended that Alberta develop its own management plans and objectives if CEMA did not complete its work by 2005.¹⁰⁹

In 2006, when regulatory approval was sought by Albion Sands Energy Inc. (now Shell Canada) for an expansion of the Muskeg River Mine, and by Imperial Oil Ltd for a new mine on the Muskeg River (the Kearl Oil Sands Mine), these mines were approved even though no watershed management plan was in place.¹¹⁰ The Joint Panel for the proposed Kearl Oil Sands Mine concluded that if operators in the basin implemented their proposed mitigation *and a watershed plan was implemented by 2008* by either CEMA or Alberta Environment, mining could proceed in the basin without causing significant adverse effects.¹¹¹ CEMA was unable to develop a watershed management

¹⁰⁵ Spaling *et al.*, cited in Steven A. Kennett, *Closing the Performance Gap: The Challenge for Cumulative Effects Management in Alberta’s Athabasca Oil sands Region*, Occasional Paper #18 (Calgary: Canadian Institute of Resources Law, May 2007) at 13, online: <<http://dspace.ucalgary.ca/bitstream/1880/47191/1/OP18Athabasca.pdf>>.

¹⁰⁶ For a critical review of the RSDS and CEMA, see Kennett, *ibid.*; see also Taking the Wheel, *supra* note 3.

¹⁰⁷ CEMA, *2000/2001 Annual Report* at 15.

¹⁰⁸ EUB Decision 2004-009, *supra* note 49 at 67.

¹⁰⁹ *Ibid.* at 66-68.

¹¹⁰ EUB Decision 2006-128, *supra* note 49; EUB Decision 2007-013, *supra* note 49.

¹¹¹ EUB Decision 2007-013, *ibid.* at 78. See Section 4.2.2 of this paper, Case Study of the Kearl Oil Sands Project, for a further analysis of the plan development.

plan and in June 2008, Alberta Environment released an Interim Management Framework (“IMF”) for the Muskeg River Watershed.¹¹²

By the time the IMF was released, the watershed had two producing oil sands mines and one limestone quarry; another oil sands mine was under development; four additional mine expansions and new mines had been approved; and yet another mine was planned.¹¹³ The IMF acknowledged that mining activities had “the potential to disturb approximately 50 to 60% of the Muskeg River watershed area,” leading to “concerns that the cumulative effects of these large-scale and long-term developments could compromise the ecological integrity of the Muskeg River” without careful planning and appropriate regulations.¹¹⁴ Indeed, with its current Jackpine Mine Expansion project, Shell proposes to mine 22 km of the main stem of the Muskeg River and divert this section of the river through a pipeline, eventually discharging it downstream through an end pit lake containing process-affected (contaminated) water.¹¹⁵

Rather than a true management plan, the IMF simply offers “management guidelines” for aquatic components of the watershed. These consist of water quantity objectives and water quality limits and targets. The IMF also proposes the development of a monitoring program to evaluate the impacts of development and manage or reduce these impacts.¹¹⁶ As Alberta acknowledges, it “is a starting point in the development of a long-term strategy effective management plan”.¹¹⁷ The objectives and targets used as a ‘starting point’ are not based on a study or an assessment of the water flows required for survival of the ecology of the basin, the requirements of the fishery, transportation or traditional land use needs. No planning or guidance is provided for phasing mine drainage plans or integrating reclamation.

¹¹² IMF, *supra* note 100.

¹¹³ *Ibid.*, Table 2.1 at 8. Existing developments were: Syncrude’s Aurora North Mine (1997), Albion Sands’ Muskeg River Mine (1999) and Birch Mountains’ Muskeg River Valley Quarry (2005). Shell’s Jackpine Mine Phase 1 (approved in 2004) was under development. Approved projects included: Syncrude’s Aurora Mine South (1997), Albion Sands’ Muskeg River Mine Expansion (2006), Husky Energy’s Sunrise Thermal Project (2007) and Imperial’s Kearl Oil Sands Mine (2007). Shell’s Jackpine Mine Expansion was planned (2007).

¹¹⁴ *Ibid.* at 6.

¹¹⁵ Shell Canada Limited, *Application for the Approval of the Jackpine Mine Expansion Project*, vol. 1 Project Description (December 2007), online: <https://www3.eub.gov.ab.ca/eub/dds/iar_query/ApplicationAttachments.aspx?AppNumber=1554396>.

¹¹⁶ Alberta Environment, *Muskeg River Watershed Integrated Water Quality Monitoring Program – Annual Report* (September 2009).

¹¹⁷ “This interim management plan for the Muskeg River is a starting point in the development of a long-term strategy to address the impacts oil sands mining activities have on the watershed”, see online: <<http://environment.alberta.ca/01245.html>>.

The IMF was intended “to guide regulatory decisions until the end of 2009” – until a comprehensive management plan was implemented.¹¹⁸ First Nations have called for a comprehensive management plan because the IMF “does little to address social, cultural and economic values of the Muskeg River Watershed”.¹¹⁹ In late 2010, the IMF was extended indefinitely beyond its original lapse date of the end of 2009, although no comprehensive management plan has been developed.

If ever completed, the comprehensive plan that Alberta has promised to develop for the Muskeg River Watershed could be a water management plan, since the IMF indicates that the final plan will be submitted to Alberta Environment for approval under the *Water Act*.¹²⁰

Analysis: Consultation with affected Aboriginal communities and accommodation of their rights?

Along with “other stakeholders”, First Nations in the region were invited to provide submissions on the IMF, and Alberta Environment acknowledged that it had a duty to consult with those First Nations whose rights had the potential to be adversely affected.¹²¹ The issues raised, according to Alberta, were more appropriately addressed in connection with the development of a comprehensive management plan. First Nations specifically requested that no major management decisions be taken or new development be approved, in particular with respect to rerouting or diversions on the main stem of the Muskeg River, until a revised plan was in place.¹²² However, First Nations have not yet been involved in the development of such a plan, and approval of more mining in the basin (Shell Canada’s Jackpine Mine Expansion Project) is currently under consideration by Alberta.¹²³ The federal and the provincial governments are in the process of appointing a Joint Review Panel to assess this mine.

¹¹⁸ IMF, *supra* note 100 at 2.

¹¹⁹ *Ibid.* at 45.

¹²⁰ *Ibid.* at 46

¹²¹ *Ibid.* at 18.

¹²² *Ibid.* at 55.

¹²³ The Environmental Impact Assessment for this project was deemed complete by Alberta Environment on 14 October 2010; per Letter from Dallas Johnson, Environmental Assessment Team Leader, Northern Region, Alberta Environment to Terry Abel (14 October 2010), online: <<http://environment.alberta.ca/documents/Jackpine-Pierre-River-Project-EIA-Comp-Letter-Oct14-2010.pdf>>.

4.1.2. The Water Management Framework for the Lower Athabasca River

The development of a *Water Management Framework for the Lower Athabasca River* is the result of mounting concerns about the negative impacts of industrial water withdrawals on the Athabasca River system.

A wave of expansions and proposals for new oil sands project, beginning in the late 1990's, led to concerns over the cumulative impact of large amount of water withdrawals from the Athabasca River required by oil sands operations, the lack of knowledge of the amount of water required to sustain the ecology of the Athabasca River and the lack of a regulatory threshold setting a minimum water level to protect the River. At regulatory hearings in 2003 to review applications for oil sands mines, the federal Department of Fisheries and Oceans (DFO) testified that water withdrawals, combined with successive loss of tributaries to the River from mining, would adversely affect regional fish populations.¹²⁴ The Joint Review Panel agreed with the submissions of DFO, the local First Nations and environmental groups, that a management framework was required for the River, and that it was critical for the regulators to establish the River's instream flow needs – the scientific recommendation for water requirements to achieve ecological protection of the river.¹²⁵ If CEMA did not develop one by December 2005, the Panel recommended that Alberta Environment and DFO develop one independently.

CEMA did not meet the 2005 deadline. DFO conducted a scientific review of flow levels in the Athabasca River and prepared a draft water management regime for the river that included an ecological base flow (EBF).¹²⁶ An EBF essentially sets a minimum amount of water required to avoid significant threat to the fishery. The DFO framework prohibited water withdrawals below the EBF level, except by the three existing oil sands operators, whose water allocations were protected under Alberta's *Water Act*. In January 2006, Alberta independently released its own draft water management framework that allowed greater water withdrawals during low flow conditions, but included an equivalent to an EBF.¹²⁷ At a CEMA meeting in April 2006, Alberta and DFO presented to First Nations and other members a proposed Framework that allowed greater withdrawals than those recommended by DFO scientists but still included an EBF that would be

¹²⁴ EUB Decision 2004-005, *supra* note 49 at 41.

¹²⁵ Alberta Environment and DFO, *Water Management Framework: Instream Flow Needs and Water Management System for the Lower Athabasca River* (February 2007) at 6, online: <http://www.dfo-mpo.gc.ca/regions/central/pub/water-eau/pdf/water-eau_e.pdf>.

¹²⁶ DFO, Centre for Science Advice, *Lower Athabasca River In-Stream Flow Needs (IFN)* (16 February 2006); DFO, *Lower Athabasca River Instream Flow Needs (IFN) Recommendation, Fisheries Act Implementation Plan and Rationale*, draft (20 March 2006).

¹²⁷ Alberta Environment, *Interim Framework: Instream Flow Needs and Water Management Systems for Specified Reaches of the Lower Athabasca River*, draft (25 January 2006).

implemented after industry had an opportunity to construct the required 4 to 5 months of off-stream storage necessary to maintain their operations during low flow conditions. The First Nations supported this Framework as a compromise. However, it was opposed by Suncor Energy and Syncrude Canada, claiming that off-stream storage to accommodate the proposed EBF would impose additional costs on oil sands operations. Operators also pointed out that there are potential environmental costs associated with creating a large reservoir.

During a hearing by a Joint Review Panel of a mine expansion proposed by Suncor in July 2006, a revised management framework for the Athabasca River was jointly released by Alberta and DFO. This framework permitted more water withdrawals during low flow conditions than the one presented to CEMA two months earlier, and did not contain an EBF.¹²⁸ All three downstream First Nations objected. To address these conflicting views, and scientific uncertainty, a two-step system for developing a Water Management Framework was adopted by Alberta and DFO. An interim Framework (Phase 1) was established, and the issue of an ecological base flow was deferred to the development of a second, or Phase 2, Water Management Framework. The Phase 1 Framework identifies three river flow conditions (green, yellow, and red) for each week of the year which require different management actions by the water licence holders. It sets weekly maximum instantaneous withdrawal rate for each oil sands operator to meet the maximum cumulative diversion rate for low flow periods. The Framework has been implemented by a voluntary agreement between government and oil sands operators, which has been criticized by environmental groups as lacking a legal basis.¹²⁹ Several of these groups have requested the provincial government to clarify how it intends to monitor and enforce this agreement.¹³⁰

A multi-stakeholder group, the Phase 2 Framework Committee (P2FC) was established to develop recommendations to the provincial and federal government on how to improve on the Phase 1 Framework. In January 2010, the Committee completed a *Phase 2 Framework Committee Report* (P2FC Report), including recommendations for a water management framework “that will prescribe when, and how much, water can be withdrawn from the Lower Athabasca River for cumulative oil sands mining water use”.¹³¹ The Committee members were unable to reach consensus on a set of rules to govern water withdrawals from the Athabasca River. The Committee “agreed on an EBF

¹²⁸ The Framework was revised and published in final form in February 2007: *supra* note 125.

¹²⁹ Water Matters, Press Release, “Voluntary agreement between Alberta government and oil sands operators lacks teeth” (27 January 2009), online: <<http://www.water-matters.org/node/258>>.

¹³⁰ *Ibid.* See also Water Matters, eNews Archive, “Oil sands diversions and the Lower Athabasca River” (4 February 2009), online: <<http://www.water-matters.org/node/266>>.

¹³¹ Dahn Ohlson, Graham Long, Compass Resource Management, Tom Hatfield, Solander Ecological Research, *Phase 2 Framework Committee Report* (January 2010) at 1 [P2FC Report], online: <<http://cema.online.ca/cema-recommendations/phase-ii-water-management-framework.html>>.

in principle but reached an impasse over how to implement it in an effective and meaningful way.”¹³² The nub of the impasse was over the rights of the senior license holders (Synchrude and Suncor) to continue to withdraw water during extreme low flow conditions. These companies volunteered to reduce their withdrawal to 50% of their licensed allocation, but could not agree to zero withdrawals at extreme low flows.¹³³ It is possible for Alberta to eliminate the companies’ right to withdraw water under these conditions, if the senior licensees were compensated.

Despite the lack of consensus, the Committee has recommended that the Phase 2 Framework Flow/Withdrawal Rules be adopted as an *Approved Water Management Plan* under section 11 of the *Water Act* and that key IFN provisions in the Framework be declared as “water conservation objectives” under section 15 of the Act.¹³⁴

Analysis: Consultation with affected Aboriginal communities and accommodation of their rights?

Both the MCFN and the ACFN objected to the multi-stakeholder process established to develop the Phase 2 Framework, as the process diluted their consultation rights to another set of interests of equal or less weight than that of government and industry. These two First Nations did not participate in the process. The Fort McKay First Nation participated, but requested changes to the final recommendations made by the Phase 2 Committee, specifically:

- that in very low flow conditions, (historically, a 1 in 200 year condition), Synchrude and Suncor also be required to stop their withdrawals, and be prohibited from transferring their allocation to another operator during these conditions; and
- that all operators be prohibited from filling their end pits lakes from tributaries of the Athabasca River (which would circumvent flow restrictions on the Athabasca River).¹³⁵

¹³² Mathieu Lebel, Tony Maas & Robert Powell, *Securing Environmental Flows in the Athabasca River*, Report 2010 (Toronto: WWF-Canada, 2011), online: <http://assets.wwf.ca/downloads/wwf-canada_athabasca_report.pdf>.

¹³³ Dan Healing, “Oilsands reject halt to river water use” *Calgary Herald* (4 February 2010) D1; Dan Healing, “Minister vows action on oilsands water” *Calgary Herald* (6 February 2010).

¹³⁴ P2FC Report, *supra* note 131 at 119.

¹³⁵ Personal communication with Ron Bothe, Fort McKay representative on the Phase 2 Committee.

As stated in the P2FC Report, the two departments responsible for developing a Final Phase 2 Water Management Framework (DFO and Alberta Environment) have the responsibility to “consult with First Nations and the public in the process”.¹³⁶ In July 2010, the ACFN and the MCFN jointly submitted their review of the P2FC Recommendations to these two departments.¹³⁷ The First Nations state that “after careful consideration, the science, and resulting recommendations regarding Option H are found to be insufficient for protecting the ability of ACFN and MCFN to sustain the exercise of Treaty and aboriginal rights”.¹³⁸ Accordingly, they recommend that Canada and Alberta do not adopt the Committee’s recommendations, but rather meaningfully engage with them to establish the necessary ecological criteria, thresholds and measures necessary to protect the exercise of their constitutional rights. The First Nations identify their own Aboriginal Base Flow and Aboriginal Extreme Flow thresholds. Further, they suggest that a tripartite table involving federal, First Nation and provincial representatives be established to negotiate a Phase 2 consultation and accommodation framework as a companion to the Phase 2 Water Management Framework.

Alberta and Canada are still reviewing the P2FC Report. Alberta’s response to the Committee’s recommendations has languished since it was made. A Final Phase 2 Water Management Framework was to be completed by December 2010.¹³⁹ The Draft Lower Athabasca Integrated Regional Plan released by Alberta on 5 April 2011, 14 months after the Committee’s recommendations, states that the government’s strategy for protecting water levels is to update the Phase 1 *Water Management Framework for the Lower Athabasca River* by 2012.¹⁴⁰ This suggests Alberta may not intend to accept the Committee’s proposed plan. Consultation with Aboriginal communities on a final framework has not begun.

Alberta’s difficulty in establishing a regulatory system for water quantity is puzzling, considering that it is possible to protect both the aboriginal fishery and oil sands operations, even with the establishment of an ecological base flow. Because the water levels in the Athabasca River are relatively high in summer, oil sands operators can establish individual or shared water reservoirs to store water for winter use, when water levels drop to levels that cause risk to the ecology of the River. The initial draft

¹³⁶ P2FC Report, *supra* note 131 at 123.

¹³⁷ *Athabasca Chipewyan First Nation and Mikisew Cree First Nation Review of the Phase 2 Framework Committee Recommendations: Synthesis Report* (July 2010) [Synthesis Report], online: <http://www.ceaa.gc.ca/050/documents_staticpost/cearef_37519/44815/A07.pdf>.

¹³⁸ *Ibid.* at iii.

¹³⁹ P2FC Report, *supra* note 131 at 123.

¹⁴⁰ Government of Alberta, *Draft Lower Athabasca Integrated Regional Plan 2011-2021* (5 April 2011) at 17 and 33 [Draft LARP], online: <<http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/Default.aspx>>.

framework prepared by DFO in 2006 was premised on this option, permitting greater withdrawals during high flows in summer, to allow for storage. The P2FC Report recommends 100 days of storage for each license holder, except for the two senior licensees.

4.1.3. The Athabasca River Watershed Management Plan

Under Alberta's water management strategy, *Water for Life*, the Athabasca River has been identified as one of the watershed areas requiring a watershed management plan. The watershed covers most of the Athabasca River basin, from its headwaters in Jasper National Park, through north-central Alberta to Lake Athabasca. The Athabasca Watershed Council (AWC) was established in late 2009.¹⁴¹ It has been officially recognized by Alberta Environment as a WPAC since February 2010 (AWC-WPAC). The AWC-WPAC is working on a State of the Watershed Report and completed a Phase 1 Report in March 2011.¹⁴² The anticipated date of completion for the *Athabasca River Watershed Management Plan* is 2019.

The 2008 *Renewal of Water for Life* calls for integration of watershed planning with the Land-use Framework regional planning and cumulative effects management system.¹⁴³ One of the key actions in the *Water for life Action Plan* is to "integrate priority water management frameworks into watershed management plans (e.g. Industrial Heartland and mineable oil sands)."¹⁴⁴ Wenig asks whether WPACs roles in watershed planning have been pre-empted by the new land-use framework.¹⁴⁵ How is the *Athabasca River Watershed Management Plan* going to be integrated with the regional land-use plans that are currently being developed under the LUF? As far as the lower reach of the Athabasca River is concerned, the answer is far from clear. The *Lower Athabasca Regional Plan* (discussed below) has already been drafted and is to be finalized in 2011. The draft plan includes or anticipates the completion of environmental management frameworks, notably for surface quantity, surface quality and groundwater. These will set limits on certain impacts and identify thresholds that will trigger management responses. It is difficult to imagine what a watershed management plan could contribute to a land-use plan that purports to be integrated and to manage for the cumulative effects of development on land, water and air.

¹⁴¹ Watershed Planning and Advisory Councils, Athabasca Watershed Council, online: <<http://www.waterforlife.alberta.ca/03342.html>>.

¹⁴² "Athabasca State of the Water-shed – Phase 1 Report" (March 2011) 2:1 The Athabasca Dispatch: Newsletter of the Athabasca Watershed Council at 2.

¹⁴³ *Water for Life – A Renewal*, *supra* note 90 at 7.

¹⁴⁴ *Water for Life – Action Plan*, *supra* note 93 at 11.

¹⁴⁵ Wenig, *supra* note 80 at 28.

Analysis: Consultation with affected Aboriginal communities and accommodation of their rights?

One of the three key directions of the 2003 *Water for Life* Strategy is entitled “partnerships”. None of the three types of partnerships listed makes any mention of Aboriginal peoples as potential partners in water and watershed management. Aboriginal peoples are mentioned in the 2008 *Renewal* Strategy under the first goal of “safe, secure drinking water supply”.¹⁴⁶ One of the key actions under that goal is to: “[w]ork collaboratively with First Nations, Métis communities and the federal government to ensure safe drinking water in Aboriginal communities in Alberta.”

According to the Alberta government website, “WPACs typically include representatives of key stakeholders in the watershed, including provincial, municipal and federal governments, important industrial sectors, conservation groups, and aboriginal communities.”¹⁴⁷ The Board of the AWC-WPAC currently includes four members from Aboriginal communities, including one First Nation and three Métis. The Board intends to include Aboriginal knowledge, views and concerns into its State of the Watershed Report, however it is unclear as to how the government will define any contacts established with and information collected from Aboriginal peoples.¹⁴⁸ Absent clarity as to whether the final watershed management plan will acknowledge and respect their rights, and a clear understanding of their role in the AWC-PWAC process, Aboriginal peoples may well be reluctant to participate in this process. Further, their involvement with the other land and water management planning processes discussed in this chapter has resulted in few gains from their perspective.

4.1.4. Land Use Planning: The Lower Athabasca Regional Plan

The final initiative reviewed in this paper relates to land-use planning rather than strictly water management planning. This is because the land-use planning process established by Alberta purports to be integrated and to manage the cumulative effects of human activities on watersheds, air sheds and landscapes. It proposes to identify appropriate thresholds, measurable management objectives, indicators and targets for the

¹⁴⁶ *Water for Life – A Renewal*, supra note 90 at 9.

¹⁴⁷ Watershed Planning and Advisory Councils (WPACs), online: <<http://www.waterforlife.alberta.ca/01261.html>>.

¹⁴⁸ Personal communication with Connie Simmons and Janice Pitman, AWC-WPAC board members (8 June 2011).

environment, including air, land, water and biodiversity, and thus has obvious implications for the water management planning initiatives described earlier.

Land-use Framework and Alberta Land Stewardship Act

Alberta's Land-use Framework (LUF) was initiated to address the lack of a coherent provincial system to ensure that the province's rapid growth and development was coordinated and managed within the limits of what the environment and land could absorb, without permanent damage. It also responded to widespread criticism that the project-by-project environmental assessment and management approach was inadequate to address the cumulative impacts of development. The new approach is to develop land use plans for seven regions in Alberta that define how land will be used and managed to achieve the province's economic, social and environmental goals, with strategies and objectives specific to each region.¹⁴⁹

The LUF was given the force of law in 2009 with the enactment of the *Alberta Land Stewardship Act (ALSA)*.¹⁵⁰ It requires provincial regulators and tribunals, including the ERCB, and municipalities to ensure their decisions are consistent with the regional plans.¹⁵¹ The key features of regional plans will be enacted as regulations under *ALSA*.

The Lower Athabasca Regional Plan

Acknowledging that "Northeast Alberta has been the epicentre for economic growth in Alberta and Canada through the development of the oil sands," and that "the environment

¹⁴⁹ Government of Alberta, Alberta Land Use Secretariat, *Land-use Framework* (December 2008) [LUF], online: <<http://www.landuse.alberta.ca/AboutLanduseFramework/LUFProgress/documents/LanduseFramework-FINAL-Dec3-2008.pdf>>. The LUF "sets out an approach to manage public and private lands and natural resources to achieve Alberta's long-term economic, environmental and social goals. It provides a blueprint for land-use management and decision-making that addresses Alberta's growth pressures". The LUF identifies ten guiding principles for land-use planning and seven basic strategies to guide decision-makers. The first is that regional land-use plans will be developed for each of the seven land-use regions to be created, based on major watersheds. Two other key strategies are the use of cumulative effects management, and the use of a strategy for conservation and stewardship on private and public lands: see at 7, 16 and 31.

¹⁵⁰ *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8. *ALSA* received Royal Assent on 1 October 2009 [*ALSA*]. It gives land-use plans legal effect as legislative instruments and establishes their precedence over other Alberta regulations; *ALSA* trumps all other Alberta statutes, in the event of a conflict or inconsistency. Decision-making authority regarding land use, including approval of regional land-use plans and environmental, social and economic objectives is concentrated in the Lieutenant Governor in Council (Cabinet).

¹⁵¹ *Ibid.*, s. 15(1).

and communities are under immense pressure from a variety of stakeholders, often with competing interests”,¹⁵² Alberta identified the development of the *Lower Athabasca Regional Plan* (LARP) as one of the immediate priorities for land use planning. At the same time as the LUF was released in December 2008, the government appointed a 15-member Regional Advisory Council (RAC) comprised of “a cross-section of interests, including municipal and provincial bodies, industry, Aboriginal groups and environmental concerns” to provide advice on the contents of a plan for the Lower Athabasca Region (which includes the Athabasca oil sands area but also extends south to the Cold Lake area).¹⁵³

The government sought guidance from the RAC on how to balance development and environment in four key areas: economic growth and development scenarios, land conservation objectives, regional air and water thresholds, and human development considerations.¹⁵⁴ However, the government specified that oil sands development would be primary in any land use plan for the region: “resource development in the Lower Athabasca Region will remain a key economic driver for Alberta”, and accordingly “the land base should be managed to support economic development opportunities as the primary but not sole priority.”¹⁵⁵

With respect to First Nations and Métis, the terms of reference acknowledged that “traditional use lands encompass much of the Lower Athabasca” and stated that “it will be important that continued opportunities exist for Aboriginal traditional uses to be in close proximity to First Nations and Métis communities”.¹⁵⁶ The RAC was instructed to “provide advice on impacts to Aboriginal communities as well as treaty and other constitutional rights exercised by members of those communities”.¹⁵⁷

RAC’s advice was published by the government in August 2010 in a document entitled *Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region* (Vision Document), the content of which “will inform the development of the LARP”.¹⁵⁸ RAC’s vision for the region is “sustainable economic,

¹⁵² LUF, *supra* note 149 at 45.

¹⁵³ Government of Alberta, News Release, “Revised Lower Athabasca Regional Advisory Council announced” (19 December 2008).

¹⁵⁴ Government of Alberta, Alberta Land Use Secretariat, *Terms of Reference for Developing the Lower Athabasca Regional Plan* (July 2009) [Terms of Reference], online: <<http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/Default.aspx>>.

¹⁵⁵ *Ibid.* at 12-13.

¹⁵⁶ *Ibid.* at 18.

¹⁵⁷ *Ibid.* at 19.

¹⁵⁸ Lower Athabasca Regional Advisory Council, *Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region* (August 2010) at 3 [Vision Document], online: <<http://landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/LARP-VisionForLowerAthabascaRegion-Aug2010.pdf>>.

social and environmental outcomes are balanced through the use of aboriginal, traditional and community knowledge, sound science, innovative thinking, and accommodation of rights and interests of all Albertans” (emphasis added). The Vision Document includes strategies and objectives to achieve eight outcomes and a land classification system. The first is to grow and diversify the regional economy, with optimization of oil sands development as the primary objective. The seventh outcome is: “Aboriginal People’s Rights, Traditional Uses and Values are Respected and Reflected in Planning”, although strategies and objectives intended to address impacts on Aboriginal communities are identified throughout the document.

A draft land use plan was released by Alberta for public comment in April 2011, along with proposed regulations to implement the plan.¹⁵⁹ Stripped to its essence, the Draft LARP is an industrial development plan for the oil sands. Optimization of oil sands production is the priority land use in most of the region, except in newly designated conservation areas. Protecting biodiversity is a priority in these conservation areas, which will constitute approximately 16% of the region’s 93,260 square kilometres, in addition to the 6% of the region that is already under some form of conservation designation. These new conservation areas are generally located along the outer edges of the region’s boundaries and outside of the mineable oil sands zone – where the resource is close enough to the surface to be economically developed. Except for the conservation areas and 1.5% of the land designated for new recreational and tourism areas, the remainder of the region is available for oil sands projects, as well as other resource, industrial, commercial, and urban development.

The Draft LARP envisions that a healthy environment will be maintained through monitoring and management frameworks. The environmental management frameworks, which are intended to help manage the cumulative effects of development at the regional level, will set general limits on some impacts and thresholds that will trigger management responses. These frameworks are either not yet developed or are preliminary, pending further research and study. Management frameworks for air, surface water quality and groundwater were published along with the draft plan. Over the next couple of years, Alberta intends to develop or finalize frameworks for water quantity, biodiversity, land disturbance, and management of liquid tailings. A key strategy of the plan to manage the impacts of oil sands development is “progressive reclamation” which is undefined.

All of the management frameworks include, or it is stated they will eventually include, a monitoring program to determine if changes occur to historical levels of certain environmental parameters. Values are specified (or are planned to be specified) for indicators that will trigger management responses and limits. The goal is to prevent limits from being exceeded by implementing management responses to specified degrees of change or levels of pollution. The proposed regulation says that a statutory consent will

¹⁵⁹ Draft LARP, *supra* note 140.

not be given for a new activity if the relevant Minister is of the opinion that the activity will result in a limit being exceeded or that a limit has already been exceeded.¹⁶⁰

Analysis: Consultation with affected Aboriginal communities and accommodation of their rights?

The input of the First Nations in the oil sands region was solicited, and they provided detailed briefs and presentations in relation to the LUF, the Vision Document and the development of the draft land-use plan for the Lower Athabasca Region. Consultation has recently begun on the Draft LARP. The degree of involvement by the downstream First Nations, including the First Nation and Métis of Fort McKay, attests to the importance they ascribe to the potential of land use planning to address and manage, or alternatively exacerbate, the impacts of oil sands development on their rights and communities.¹⁶¹

The First Nations and Métis submissions on the proposed LUF requested that land-use planning respect their aboriginal and treaty rights by preserving and protecting sufficient land and resources to support traditional pursuits and protect the health and culture of their communities, by collaborative decision making, and by effective consultation policies.¹⁶² The response of government to these initial submissions included the statement that “aboriginal and treaty rights are outside of the authority of the LUF.”¹⁶³ The final version of the LUF included as one of its guiding principles that land-use

¹⁶⁰ Alberta Land Use Secretariat, *Proposed Lower Athabasca Integrated Regional Plan Regulations* (March 2011) ss. 22, 29, 34 and 39, online: <[http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/DLARP%20Regs Document FINAL March 29 2011 1%2045pm.pdf](http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/DLARP%20Regs%20Document%20FINAL%20March%2029%202011%2045pm.pdf)>.

¹⁶¹ Alberta, Sustainable Resource Development, “Athabasca Tribal Council Input into the Land-use Framework” (response to Athabasca Tribal Council’s presentation to Minister Morton, December 2007) (17 September 2008); MCFN & ACFN, “Joint Submission on the Alberta’s Land Use Framework” (2009); Letter from Fort McKay Industry Relations Corp. to Alberta Environment submitting comments on Alberta Draft Air Quality, Groundwater and Water Quality Frameworks for the LARP (20 August 2010); ACFN & MCFN, “Proposal to Develop ... Traditional Land and Resources Use Management Plans” (September 2010); ACFN, MCFN & Chipewyan Prairie Dene First Nation, “Joint Submission ... on the Lower Athabasca Regional Advisory Council’s Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region” (19 October 2010); Fort McKay Industry Relations Corp., “Review of the Lower Athabasca Regional Advisory Council Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region” (November 2010) [Review of the Lower Athabasca Regional Advisory Council Advice]; ACFN, “Advice to the Government of Alberta Regarding the Lower Athabasca Regional Plan” (22 November 2010).

¹⁶² “Athabasca Tribal Council Input into the Land-use Framework”, *ibid.*

¹⁶³ *Ibid.* at 2.

decisions will be “respectful of the constitutionally protected rights of aboriginal communities” through further consultation:

“The government of Alberta recognizes that consultation should take place on matters that impact treaty or constitutionally protected rights of First Nations and Métis peoples.”¹⁶⁴

In order to implement this objective, the LUF stated that Aboriginal peoples will be “encouraged” to participate in the development of the regional plans and that the government “will strive for a meaningful balance that respects the constitutionally protected rights of aboriginal communities and the interests of all Albertans”.¹⁶⁵ The recommendations and requests made by the First Nations were not incorporated in the LUF.

In 2009, the government released a *First Nation Consultation Plan for the Lower Athabasca Region*, which promised that each First Nation having a reserve or traditional land uses within the region would be consulted on the LARP.¹⁶⁶ The plan defines an approach to consultation involving several steps designed to obtain input from First Nations on the development of the draft plan, as well as feedback on the draft plan once it has been released for review. The final steps of consultation include preparation by government of a report summarizing the input received from First Nations. A draft of the report will be sent to the First Nations for validation and submitted to Cabinet along with documentation on how the LARP accommodates the First Nations’ concerns. However, feedback to First Nations on their input, including reasons for not including it in the LARP, will not occur until after the final plan is approved by Cabinet, and will consist of a single summary report to all First Nations.

The terms of reference for developing the LARP acknowledge that Aboriginal communities have “serious concerns about the state of their traditional areas”, that they are concerned that if effective thresholds are not set soon, air, water, land and biodiversity will be compromised, and that some First Nations seek the creation of “preserved” areas to ensure the exercise of their rights in future. One of the criteria identified for establishing conservation areas is “areas that support Aboriginal traditional uses”.¹⁶⁷

Consultation with Aboriginal peoples on the development of the Draft LARP has occurred in two ways:

¹⁶⁴ LUF, *supra* note 149 at 16 and 17.

¹⁶⁵ *Ibid.* at 4 and 41.

¹⁶⁶ Government of Alberta, *First Nation Consultation Plan – Lower Athabasca Region* (Edmonton: Alberta Land Use Secretariat, June 2009). Eighteen First Nations are listed as being included in the consultation process: at 3.

¹⁶⁷ Terms of Reference, *supra* note 154 at 9, 14 and 18.

- 1) two of the seats on the RAC were assigned to Treaty 6 and Treaty 8, and one to the Métis. Even though the seats were assigned to the Aboriginal community, the RAC members were instructed that they were not expected to represent the perspective of the company or organization they were affiliated with, but to “provide a perspective based on their own experience and expertise”.¹⁶⁸ Further, the RAC members were prevented from sharing information about their debates with their constituency.
- 2) a government-appointed Aboriginal Consultation Team led by the Land-Use Secretariat received information and recommendations from, and held meetings with, individual First Nations at their request.¹⁶⁹

Has the First Nations input found its way into the Vision Document and the Draft LARP? Does the Draft LARP address the concerns of Aboriginal peoples and incorporate their recommendations on how land use management can protect their rights and land uses, and moderate the negative environmental impacts of development?

The Vision Document falls short of offering an actual assessment of the implications of its recommended land uses for the exercise of treaty and aboriginal rights. Aside from aboriginal consultation, it includes a number of other objectives and strategies related to Aboriginal communities.¹⁷⁰ One strategy is to collaborate with Aboriginal peoples to address compensation matters and concerns relating to the infringement of treaty and other rights – an implicit acknowledgement that these rights are one of the trade-offs being made to optimize oil sands production.¹⁷¹ RAC also recommends that fish and wildlife resource allocations that may affect aboriginal rights be effectively managed, opportunities for traditional land uses be preserved, traditional knowledge be incorporated into environmental thresholds, monitoring and resource management, and Aboriginal communities have formal roles in land use planning.¹⁷² However, the nub of the Vision is the recommended land classification system, which does not include the First Nations’ requests for protected areas for traditional land use, or buffers around communities and important waterways and water resources. Traditional land use is not an identified priority in any of the land-use classifications, including conservation areas. The most impacted First Nations sought to have 40% of lands conserved in their traditional

¹⁶⁸ Government of Alberta, News Release, “Revised Lower Athabasca Regional Advisory Council announced” (19 December 2008), online: <<http://alberta.ca/home/NewsFrame.cfm?ReleaseID=acn/200812/250325077DCA0-9DBB-B78C-62D8CB4065D98526.html>>.

¹⁶⁹ For instance, Fort McKay met monthly with the Aboriginal Consultation Team throughout development of the LARP Vision Document: see Review of the Lower Athabasca Regional Advisory Council Advice, *supra* note 161 at 4.

¹⁷⁰ Vision Document, *supra* note 158 at 23.

¹⁷¹ *Ibid.* at 11.

¹⁷² *Ibid.* at 16 and 22-24.

areas and identified preferred cultural land use areas for protection.¹⁷³ RAC recommends 20% in conservation areas, and classifies 95% of the conservation areas sought by Fort McKay as “mixed use resource,” and therefore available for mining.

The Draft LARP reflects very little of the input provided by the First Nations and Métis. RAC’s proposal that most of the region be available for oil sands and other industrial development is reflected in the Draft LARP, but its various recommendations for addressing adverse impacts of development on Aboriginal communities are not.¹⁷⁴

The “inclusion of aboriginal communities in land use planning” is identified as both a strategic outcome and an objective – however, this is not an outcome or end point, but a commitment to a process. Under this general objective, one specific strategy is to invite First Nations to be involved in a “stewardship and tourism initiative” in relation to the Richardson Backcountry, an identified conservation area.¹⁷⁵ There is also a plan to conduct a health risk assessment at Fort McKay and Fort Chipewyan.¹⁷⁶

Protection of aboriginal land uses or treaty rights is not included in any of the outcomes, objectives, strategies or management frameworks. The draft plan does not address how continued opportunities for traditional land use activities in close proximity to First Nations and Métis communities (or at all) will be assured – although this was identified as important in the terms of reference for the plan. The nearest conservation area to Fort McKay is approximately 80 kilometres away, although in the far north of the region, some conservation areas are located closer to the communities.¹⁷⁷ Setbacks or buffer zones to protect rivers and lakes important to traditional land uses are not included. No analysis or information is provided on how the amount of proposed conservation areas or their location will meet the objective of healthy and sustainable ecosystems.

A common theme in the First Nations’ recommendations for the management of cumulative effects was the need for the assessment and management, including setting thresholds, of resources necessary to the exercise of their rights and cultural practices. Strong, integrated regulatory frameworks were identified as essential. The proposed plan and management frameworks do not address these requests.

¹⁷³ See Review of the Lower Athabasca Regional Advisory Council Advice, *supra* note 161 at 9.

¹⁷⁴ Melody Lepine, Director of Government and Industry Relations for the MCFN, is quoted in reaction to the Draft LARP: “... did they [Alberta] not get anything we were telling them?” *Fort McMurray Today* (7 April 2011).

¹⁷⁵ Draft LARP, *supra* note 140 at 35.

¹⁷⁶ *Ibid.* at 10.

¹⁷⁷ ACFN Advice to the Government of Alberta regarding the LARP, *supra* note 161, s. 4 – Cultural Protection Areas.

The proposed frameworks to manage cumulative effects are not “integrated” or “comprehensive”. The draft Surface Water Quality Management Framework for the Lower Athabasca River notes that comprehensive management, including integrated management of water quality, quantity and the aquatic environment is required, but it is a future goal.¹⁷⁸ This framework lists water quality parameters for the Lower Athabasca River with limits and trigger amounts for most of them (some are to be developed), which generally reflect the water quality guidelines that currently apply in Alberta. Further risk based limits are contemplated. No limits have been developed for substances related to oil sands mining that are of concern, such as NAs and PAHs, although these may be included in the future.¹⁷⁹ The framework only applies to one of the four reaches of the lower Athabasca River and it does not apply to other rivers in the region. Compliance with the triggers and limits will be based on measurements taken at one location on the River, the Old Fort monitoring station, not far from where it enters Lake Athabasca. At some future time water quality will be monitored closer to the oil sands mines.¹⁸⁰

For surface water quantity, the draft plan states that the existing Phase 1 *Water Management Framework for the Lower Athabasca River* will be completed and updated by 2012. Curiously, the draft makes no mention of the P2FC Report, completed in January 2010 and accepted by government, which was extensively reviewed and commented upon by First Nations.¹⁸¹ Further, the Draft LARP does not mention that management frameworks for water quality or quantity will be developed for other regional rivers, such as the Muskeg River.

For groundwater, the skeletal draft plan acknowledges that there is a lack of information regarding the nature and status of groundwater in the region.¹⁸² It sets interim trigger amounts on some water quality parameters; no limits are identified for groundwater quality or quantity. The development of a regional monitoring network is planned, as is the development of further regional triggers and limits.

No framework is proposed which would constitute an integrated watershed management plan for the Athabasca River or for sub-basins that are important for

¹⁷⁸ Alberta Environment, *Draft Surface Water Quality Management Framework for the Lower Athabasca River Downstream of Grand Rapids to the Athabasca River Delta* (31 March 2011) at 4, online: <http://environment.alberta.ca/documents/LAR_SWMF_Mar_31_Final_Draft.pdf>.

¹⁷⁹ *Ibid.* at 13. See the discussion of these substances in Section 2.1 of this paper under Water Pollution.

¹⁸⁰ *Ibid.* at 12.

¹⁸¹ Synthesis Report, *supra* note 137. See Section 4.1.2. of this paper for a discussion of the Lower Athabasca Water Management Framework and the P2FC.

¹⁸² Alberta Environment, *Draft Lower Athabasca Region: Groundwater Management Plan* (31 March 2011), online: <http://environment.alberta.ca/documents/Groundwater_Management_Framework_April_1_-Final.pdf>.

Aboriginal communities and will be heavily impacted by oil sands projects, such as the Muskeg River Watershed. No framework is proposed for the management of wetlands – a key source of traditional plants and other cultural “keystone species”.¹⁸³ No assessment of fish populations or health is proposed or a framework for monitoring and managing this resource.

After three years of consultation on this important initiative to manage land use and the cumulative impacts of development, the Draft LARP reflects almost none of the input provided by the affected First Nations. Alberta plans to consult First Nations on the draft plan, but has imposed a deadline of 6 June 2011 for written submissions with the goal of submitting the plan to Cabinet for approval by the end of June.¹⁸⁴ Considering the short time period provided for consultation on the draft plan, it would be surprising if the final LARP set out which aboriginal needs were considered and met by the plan, and how.

The consultation process with Aboriginal peoples has focused on explaining the initiative and receiving feedback, with the goal of summarizing the feedback in a report to be submitted to Cabinet, as an adjunct to the recommendations made by the Land Use Secretariat for the content of the final plan. Because feedback to the First Nations will not formally occur until after the LARP is approved by Cabinet, there is no opportunity for First Nations to know how their input is being used, or to understand and address the reasons why their input is not being incorporated, before the plan is passed into law. This precludes them from adapting their submissions or recommendations to try to work out a compromise or an accommodation of their rights and interests with the government.

4.2. Approval of Oil Sands Developments

4.2.1. The Approval Process

Because bitumen extraction and processing releases pollutants, creates waste, drains and diverts surface water, and withdraws large amounts of ground and surface water, project developers require environmental assessments and various permits and approvals from the provincial government (in addition to federal authorizations, usually required as a result of the destruction of fish habitat).

Under the *Water Act*,¹⁸⁵ Alberta issues both approvals and industrial water licences to oil sands operators. Oil sands activities that may disturb ground or surface water and

¹⁸³ Ann Garibaldi, “Moving from Model to Application: Cultural Keystone Species and Reclamation in Fort McKay, Alberta” (2009) 29:2 *Journal of Ethnobiology* 323-338.

¹⁸⁴ Personal communication of Dave Bartesko to representatives of the Fort McKay First Nation, including Karin Buss (11 May 2011).

¹⁸⁵ *WA*, *supra* note 82.

aquatic ecosystems must be approved by the Director.¹⁸⁶ In addition, operators must obtain a water licence for the “diversion of water”.¹⁸⁷ In issuing a water licence, the Director must consider certain factors, including any applicable water guidelines and “water conservation objectives”.¹⁸⁸ Most licences for diversions of water for oil sands operations are issued for terms of 10 years. However, older licences were issued without expiry dates. These licences have been continued and under the “first in time, first in right” or prior allocation principle, they have priority over newer licences. In the government’s own assessment, the issuance of further licences may endanger the Athabasca River’s instream flow needs: “Over the long term, the Athabasca River may not have sufficient flows to meet the needs of all the planned mining operations and maintain adequate instream flows.”¹⁸⁹

The *Environmental Protection and Enhancement Act (EPEA)* also applies to oil sands developments.¹⁹⁰ Part 5, Division 1, of the Act prohibits the release of harmful substances into the environment, except as allowed by an Approval issued under the Act.¹⁹¹ Under Part 2 of the Act, the construction, operation and reclamation of oil sands mines, extraction and processing plants are subject to an environmental assessment.¹⁹² Proponents must prepare an Environmental Impact Assessment (EIA) report. When Alberta Environment considers that the EIA report is complete, it advises the ERCB. The EIA is then submitted to the ERCB as part of the application for approvals and permits required under the *Oil Sands Conservation Act (OSCA)*¹⁹³ and the *Energy Resources Conservation Act (ERCA)*.¹⁹⁴

The ERCB is the primary regulatory agency for energy projects in Alberta. Projects are reviewed by this quasi-judicial board to determine if they are in the “public interest” having regard to their economic, social and environmental impacts.¹⁹⁵ While the ERCB’s mandate includes “assisting the Government in controlling pollution in the development and production of the oil sands resources of Alberta” and ensuring the “orderly, efficient

¹⁸⁶ WA, *ibid.*, s. 36. See also *Water (Ministerial) Regulation*, A.R. 205/98.

¹⁸⁷ WA, *ibid.*, s. 49.

¹⁸⁸ WA, *ibid.*, s. 51(4).

¹⁸⁹ Government of Alberta, Oil Sands Ministerial Strategy Committee, *Investing in our Future: Responding to the Rapid Growth of the Oil Sands Development – Final Report* (29 December 2006) at 112.

¹⁹⁰ R.S.A. 2000, c. E-12 [*EPEA*].

¹⁹¹ *EPEA*, ss. 108-109.

¹⁹² *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, A.R. 111/1993.

¹⁹³ R.S.A. 2000, c. O-7, ss. 10-11 [*OSCA*].

¹⁹⁴ R.S.A. 2000, c. E-10 [*ERCA*].

¹⁹⁵ *ERCA*, s. 3.

and economical development in the public interest of the oil sands resources”,¹⁹⁶ the ERCB is not the primary environmental regulator in Alberta. It sees itself as having a limited role; it appears that the ERCB will not exercise its overriding jurisdiction to approve or recommend denial of projects for environmentally related reasons, unless Alberta Environment expresses the view that the impacts are too significant to issue an approval for the project under *EPEA*. When Alberta has presented witnesses to ERCB hearings, they have been questioned by Panel members if they see any “show stoppers” in relation to the project’s environmental effect – which Alberta has not to date. After the Kearl Oil Sands Project discussed below, Alberta has declined to participate in ERCB or Joint Panel Review hearings into oil sands extraction or upgrading projects.

Public hearings are normally held by the ERCB to consider whether proposed oil sands projects should be approved and if so, what conditions should apply. If a project also requires a federal permit or approval and therefore an environmental assessment under federal law,¹⁹⁷ the ERCB may hold public hearings jointly with the Canadian Environmental Assessment Agency. The ERCB has appointed two members, and Canada one member, to each of the Joint Review Panels that have been established to review oil sands projects.¹⁹⁸

The *Canadian Environmental Assessment Act (CEAA)* provides that certain projects, including oil sands mines that require a federal approval or permit, must undergo an assessment, led by the ‘federal authority’ who is responsible for issuing the required approval – typically DFO for oil sands mines.¹⁹⁹ If the Minister of Environment is of the opinion that a project may cause a significant adverse effect or public concerns warrant it, he or she may refer the assessment to a Review Panel. The Panel must ensure that the information required for the assessment is obtained, hold hearings to allow the public to participate in the assessment, prepare a report including recommendations for mitigation and a follow-up program and submit the report to the Minister and federal authority.²⁰⁰ The federal authority must consider the report in making the decision to grant the approval or authorization sought in connection with the project.²⁰¹

¹⁹⁶ *OSCA*, *supra* note 193, s. 3.

¹⁹⁷ E.g. the *Fisheries Act*, R.S.C. 1985, c. F-14, ss. 35-36, or the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, s. 5.

¹⁹⁸ These Joint Review Panels are enabled by the *Canada-Alberta Agreement for Environmental Assessment Cooperation* (2005), online: <<http://www.ceaa.gc.ca/default.asp?lang=En&n=F93B8BF6-1>>, the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 [CEAA], and the *EPEA*, *supra* note 191, s. 57(b).

¹⁹⁹ *CEAA*, s. 5(1)(d).

²⁰⁰ *CEAA*, s. 34.

²⁰¹ *CEAA*, s. 37.

Analysis: Consultation with affected Aboriginal communities and accommodation of their rights?

How is government dealing with First Nations concerns regarding the adverse impacts of oil sands operations on their use of lands and waters and on the exercise of their constitutionally protected rights?

First Nations and other aboriginal groups have intervened at most of the ERCB and Joint Review Panel hearings convened to review proposed oil sands mines, on the premise that the “public interest” includes the public’s interest in ensuring that the constitutional rights of Aboriginal peoples are protected. Tribunals, such as the ERCB, that have a public interest mandate and the power to decide questions of law, also have the constitutional jurisdiction to consider impacts on aboriginal and treaty rights, including the adequacy of Crown consultation in relation to the matters before it.²⁰² However, neither the ERCB nor the Joint Panels have directly addressed this issue to date.

In determining whether a project is in the public interest, the ERCB is required to consider the project’s potential environmental, social and economic impacts.²⁰³ The primary evidence relied upon by the ERCB is the detailed application filed by the project developer for ERCB approval, and the EIA report that the developer is required to prepare to obtain approvals under *EPEA*. The EIA is also used to supply the information needed for a federal environmental assessment, if one is required under *CEAA*.

There is no legislative or administrative requirement for a proponent to assess its project’s potential impact on aboriginal and treaty rights, although both the ERCB and Alberta Environment have discretionary power to require from a proponent any information they determine necessary, including the potential impacts of a project on aboriginal rights.²⁰⁴ The standardized terms of reference for EIAs for oil sands mines do

²⁰² *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 at para. 72.

²⁰³ *ERCA*, *supra* note 194, s. 3: Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project or carbon capture and storage project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.

²⁰⁴ Pursuant to *Alberta’s First Nations Consultation Guidelines on Land Management and Resource Development*, Part 3 – Alberta Environment (14 November 2007), Alberta Environment may require a proponent to develop a First Nations Consultation Plan. The plan must contain information regarding the potential adverse impacts of the project to First Nations’ rights and traditional uses, online: <[http://www.aboriginal.alberta.ca/documents/First Nations and Metis Relations/First Nations Consultation Guidelines LM RD](http://www.aboriginal.alberta.ca/documents/First_Nations_and_Metis_Relations/First_Nations_Consultation_Guidelines_LM_RD)>.

require a description of any aboriginal consultation undertaken or planned, a description of traditional land use in the area, and a determination of the impact of the project on traditional uses and possible mitigation strategies.²⁰⁵ They do not, however, require proponents to address potential impacts on aboriginal or treaty rights.

CEAA requires a Review Panel to assess environmental effects and changes from these effects on matters closely related to treaty and aboriginal rights. Specifically: “physical and cultural heritage”, structures or sites of historical or archaeological significance, and the “current use of lands and resources for traditional purposes”.²⁰⁶ A federal assessment may include consideration of community and traditional knowledge.²⁰⁷

The Federal – ERCB agreements used to establish Joint Review Panels for oil sands hearings include terms of reference for the assessment by the Panel. Typically these incorporate and repeat the requirements of *CEAA*. Prior to March of 2011, no terms of reference for Joint Review Panels established to review oil sands mines had included impacts on aboriginal and treaty rights as one of the factors for the Panel to consider, although such impacts have been included in the last two years in the terms of reference for Joint Panels in other provinces.²⁰⁸ Consequently, neither Joint Panels nor the ERCB, in their weighting of social, economic and environmental considerations, have had to squarely address a project’s impacts on Aboriginal or treaty rights. Alberta has objected to a Joint Panel or the EUB/ERCB considering whether proposed mines would adversely affect or infringe the First Nations’ ability to exercise their constitutionally protected rights, and whether the Crown’s duty to consult has been adequately met, whenever these groups have raised the issues at past hearings.²⁰⁹ The Aboriginal communities have not pressed this issue to date. In some cases the Aboriginal communities’ claims have not been considered due to failure to comply with the technical requirements of filing a

pdf>. Note that the ERCB requires project proponents to consult with directly affected parties, including First Nations and comply with Alberta’s *First Nations Consultation Policy*: ERCB Directive 056: Energy Development Applications and Schedules (24 November 2009) at 2-1 and 2-2.

²⁰⁵ Alberta Environment, *Environmental Assessment Program: Standardized Terms of Reference* (February 2011), online: <<http://environment.gov.ab.ca/info/library/8126.pdf>>.

²⁰⁶ *CEAA*, *supra* note 198, s. 1(a).

²⁰⁷ *Ibid.*, s. 16.1.

²⁰⁸ See for example, Joint Panel Agreement for the Lower Churchill Hydroelectric Generation Project (Newfoundland) (8 January 2009), online: <<http://www.ceaa.gc.ca/050/documents/31023/31023E.pdf>>; for the Northern Gateway Pipeline Project (B.C.) (4 December 2009), online: <<http://www.ceaa.gc.ca/050/documents/40851/40851E.pdf>>; for the Deep Geological Repository (Ontario) (26 January 2009), online: <<http://www.ceaa.gc.ca/050/documents/37943/37943E.pdf>>.

²⁰⁹ See for example, submissions filed by Alberta for the ERCB-Canada Joint Review Panel Hearing of the Joslyn North Mine (17 September 2010), online: <http://www.ceaa.gc.ca/050/documents_staticpost/cearref_37519/45217/submission.pdf>.

constitutional notice, or their claims were held invalid by the Panel because they were not legally recognized by Canada as a “band” within the meaning of the Indian Act.²¹⁰ To date, the First Nations have typically entered into impact benefit agreements with the project developer and withdrawn their objections.

However, the recent Draft Agreement to establish a Joint Panel for the Jackpine Mine Expansion and Pierre River Mine Project does include provisions with respect to the projects’ impacts on aboriginal rights and interests.²¹¹ Specifically, the Panel is allowed to receive information related to the scope and nature of potential or established Aboriginal or treaty rights and the potential implications of the projects on these rights, and to use this information to make recommendations and in its assessment of the project. The Panel is also required to document any asserted aboriginal and treaty rights presented; but the terms of reference specify that the Panel is not required to determine the validity of any asserted rights, the scope of the Crown’s consultation duties, or whether these duties have been fulfilled. These are ambiguous provisions, which need to be clarified if the Panel is to adequately deal with the potential impacts of the projects on Aboriginal or treaty rights.

4.2.2. Case Study: Kearl Oil Sands Project Joint Review Panel Hearing

As stated in Section 4.1.1. of this paper, in 2006 Imperial Oil Ltd. proposed to build the Kearl Oil Sands Mine in the Muskeg River Watershed. A Joint Review Panel was appointed to review the proposed mine. The public hearing record and the Panel’s Report and recommendations,²¹² provide an example of how Aboriginal communities’ concerns and their rights are dealt with in the oil sands project approval process.

Several aboriginal groups participated in the review of Imperial Oil’s plan to develop a large 300,000 bpd mine in the Muskeg River Basin, located about 70 kilometers north of Fort McMurray. Three downstream Aboriginal communities, the ACFN, Fort McKay (on behalf of the First Nation and Fort McKay Métis residents), and the MCFN intervened on the issues related to the cumulative impacts of the mine on their traditional land use, including their reliance on the Muskeg and Athabasca Rivers. Each had reached partial mitigation agreements with Imperial Oil, but had unresolved concerns, particularly about the risks to the Athabasca River and the adequacy of the proposed Instream Flow

²¹⁰ E.g. the Clearwater Band and Wood Buffalo First Nation and Elder’s Society: see the EUB Decision 2007-013, *supra* note 49 at 13.

²¹¹ *Draft Agreement to Establish a Joint Panel for the Jackpine Mine Expansion Project between the Minister of the Environment, Canada and the Energy Resources Conservation Board* (28 November 2007) under s. 6, online: <<http://www.ceaa.gc.ca/050/documents/48347/48347E.pdf>>.

²¹² EUB Decision 2007-013, *supra* note 49 at 70.

Needs Framework that Alberta had publicly released for consultation three months earlier.²¹³ Each First Nation declined to ask the Joint Review Panel to make any rulings regarding their constitutional aboriginal and treaty rights, preserving their rights to raise these issues in court, if they chose, by entering into non-assertion agreements with Alberta.

The following paragraphs outline the First Nations' concerns and the Panel's findings with respect to the Athabasca River, the Muskeg River, and Traditional Land Use.

Athabasca River

Alberta's representatives assured the Panel that the draft Phase 1 of the proposed *Water Management Framework for the Lower Athabasca River* would be finalized soon, having regard to the fact that 2 previous Joint Review Panels convened in 2004 strongly recommended that Alberta Environment finalize an IFN for the Athabasca River by the end of 2005.²¹⁴ As stated earlier, the draft Phase 1 Framework did not include an EBF, to which the First Nations objected. Alberta's witnesses testified that an EBF was unnecessary because the risks to the River were not yet significant, but the "concept as an EBF" would be considered for the contemplated Phase 2 Framework. Both Imperial Oil and Alberta submitted that the draft Phase 1 Framework struck a reasonable balance between economic development and environmental protection. Alberta did not directly explain why the initial drafts and proposals for a water management framework contained an EBF, but the one presented at the hearing did not.

The First Nations gave evidence on the importance of the River and the health of its aquatic ecosystem to their culture and way of life. The River supports their aboriginal fishery, hunting and gathering take place on its banks and tributaries, and the River is necessary for navigation to access some of their reserves and important traditional land use areas. According to the First Nations, there were already noticeable effects of oil sands development on the River, including difficulty with navigation at times and a decrease in berries, birds, fish and other wildlife along the Athabasca River.

The scientific experts called by the First Nations opined that the draft Phase 1 Framework was not precautionary, and the omission of an EBF created risk because it did not prevent water withdrawals even in very low flow conditions. The Framework did not take into account the trend towards declining water levels due to climate change, in combination with increasing withdrawals for oil sands projects, and withdrawals by municipalities and other upstream users. All three experts emphasized that an EBF was essential. Fort McKay's expert testified that it was not necessary to immediately set the

²¹³ See Section 4.1.2 of this paper.

²¹⁴ See *ibid.*

EBF, but that a commitment should be made by Alberta to set one by a specified time, so that the oil sands industry could put in place the technology and infrastructure necessary to accommodate restricted water withdrawals during low flow conditions.

The ACFN and Fort McKay requested that if the Kearl Project was approved, Imperial Oil not be permitted to withdraw water at the rates it requested, that it be required to re-engineer its water supply pipeline to enable it to shut down its water intake during low flow periods, and that it be required to develop a contingency water supply plan to fully meet its operational needs for periods of four to five months when water may not be available from the Athabasca River due to flow restrictions. All of the First Nations advocated for an EBF, either immediately, or by a date certain. Without an EBF, they pointed out, water could continue to be withdrawn, regardless of how low the flow in the River and regardless of the risk to fishery and navigation.

DFO also testified that an EBF was a necessity, but it believed that it could be dealt with in the Phase 2 Framework. In DFO's opinion, the fish habitat loss caused by the water withdrawals permitted by the Phase 1 Framework (which incorporated all of the existing and planned mines) was acceptable over the short term and would end with the implementation of the Phase 2 Framework. The draft Framework did not provide full protection of the aquatic ecosystem but took into account economics, public interest values, social values, industry water needs and mitigation options available to industry.²¹⁵

The Joint Panel's Report acknowledged the importance of the River to the First Nations' way of life and that maintaining a certain flow regime was essential to the integrity of the river. However, it believed that the Phase 1 Framework was sufficiently precautionary and protective of the river in the short term, and that an appropriate EBF could not be established on the information available. It "expected" Alberta Environment and DFO to implement the Phase 2 Water Management Framework by 1 January 2011 and "strongly" recommended that it incorporate an EBF. It also recommended that industry take measures to decrease their water use. If its recommendations were implemented, the Panel concluded there would be no significant adverse effects from water withdrawals as a result of the Kearl Project.²¹⁶

The ERCB did not impose any enforceable conditions on Imperial Oil to address the First Nations concerns, apart from requiring Imperial Oil to fulfill its commitment to engineer its water intake structure to enable it to be shut down, if necessary. The ERCB approval was not made conditional on the finalization of the Phase 1 Framework nor on completion of the Phase 2 Framework by 1 January 2011 or the implementation of an EBF. As the Panel's Report documents, recommendations by the ERCB or Joint Panel's are not necessarily implemented by Alberta. As of May 2011 no EBF has been set by

²¹⁵ EUB Decision 2007-013, *supra* note 49 at 70.

²¹⁶ *Ibid.* at 74.

Alberta, and according to the Draft LARP, the date of completion of a surface water quantity management framework for the Lower Athabasca River is now 2012.²¹⁷

The Muskeg River Basin

Imperial Oil's proposal included mining areas of the head waters of the Muskeg River and eventually diverting these head waters through an end pit lake which would contain contaminated fine tailings and waters from its operations. The Panel heard evidence that between 50 and 60% of the Muskeg River Watershed would eventually be mined as a result of existing and planned oil sands development, which would destroy nearly 1,300,000 m² of fish habitat.²¹⁸ The ACFN was particularly concerned about these impacts and the location of the mine, because these changes would also affect Kearn Lake, a regionally significant environmentally sensitive area and an important traditional land use area. ACFN wanted more information on how the changes in the basin would affect its traditional way of life in the area and how the various mines planned for the basin would be integrated and their operations coordinated to protect the integrity of the lake. It asked that any approval of Imperial Oil's application be conditional upon an assessment being conducted of the combined effects of mines on the entire Muskeg River Basin and on the development of a comprehensive plan for mitigation and reclamation of the watershed. It was also concerned that a previous Joint Review Panel had recommended, and CEMA had undertaken, to produce a Watershed Management Plan for the basin by 2005, but it had not yet been done. It requested that Alberta develop a regulatory management plan for the basin.

Imperial Oil supported the development of a Watershed Management Plan for the basin and agreed that it was important for all of the mine operators to integrate their mine plans, and their closure reclamation and drainage plans for the basin, but it preferred that industry do so through CEMA, rather than having Alberta develop a management plan for the area.

Alberta testified that until CEMA developed a Watershed Management Framework, it would consider putting in place interim water quality and quantity criteria which it considered a minimum backstop.²¹⁹ Alberta said it would also require Imperial Oil to participate in meetings to consider water management options.

The Joint Panel had "considerable concern" that CEMA had not delivered a Watershed Management Plan for the Muskeg basin and Alberta Environment had not issued a regulatory backstop. It recommended that Alberta take immediate steps to ensure

²¹⁷ Draft LARP, *supra* note 140 at 41.

²¹⁸ EUB Decision 2007-013, *supra* note 49 at 76.

²¹⁹ *Ibid.* at 76.

that CEMA completed and approved on a priority basis a Muskeg River Watershed Management Plan no later than September 2008, failing which Alberta Environment needed to implement a full backstop by the end of 2008. It recommended that Imperial Oil continue discussions with the ACFN to address the latter's concerns about potential impacts to the Kears Lake watershed.

The ERCB did not impose any enforceable conditions on Imperial Oil to address the First Nations concerns regarding impacts to the Muskeg River Basin or to Kears Lake.

Traditional Land Use

The traditional land use study prepared by Imperial oil was consistent with those submitted by proponents at previous hearings.²²⁰ It was a descriptive level study, summarizing the comments of the members of three First Nations who attended a meeting. Some members also went on a site tour. Also summarized were a couple of previous studies done for the project site.

Concerns and any specific requests or recommendations were summarized in a table with Imperial Oil's response. For example, a concern regarding "removal of medicinal plants" was identified and the recorded response to this concern was: "Imperial Oil will provide an opportunity for Aboriginal Groups to harvest medicinal plants before development".²²¹ Another concern from a community meeting at Fort McKay was summarized as "Participants generally agree that not only are the locations of special sites important, but that the environmental landscape and cultural contexts of these sites are equally important. The participants' belief is that the integrity of the landscape depends on its context, and that integrity cannot necessarily be restored through reclamation."²²² In response, Imperial Oil noted that it "recognizes that it might not be possible to preserve certain traditional land use sites because they are in the area to be mined. However, Imperial Oil agrees to work with Fort McKay First Nation to identify and record the significance of these sites and to preserve this information by submitting it to Fort McKay First Nation's confidential traditional land use and traditional ecological knowledge database."²²³ A commitment to continued dialogue and consultation with affected Aboriginal communities is an oft repeated mitigation method identified to address impacts on these communities, in this study (and others).

²²⁰ Imperial Oil Resources, *Environmental Impact Statement*, vol. 9 (Ottawa: Canadian Environmental Assessment Agency, July 2005), s. 6 – Traditional Land Use Study, online: <http://www.ceaa.gc.ca/050/documents_staticpost/cearef_16237/KR-0007-9.pdf>.

²²¹ *Ibid.* at 6-26.

²²² *Ibid.* at 6-15 and 6-25.

²²³ *Ibid.* at 6-25.

The study focused on the lands Imperial Oil intended to be mined. It did not address the cumulative impacts of the Kearl project, combined with other developments, on each community's ability to maintain its cultural heritage and aboriginal and treaty rights. It did not integrate the environmental impact assessment with the traditional land use study. Rather, it identified "linkages" in other sections, such as impacts on fishing and hunting generally. For fishing, impacts on sport fishing only were assessed, with the conclusion that there would be no loss of sport fishing opportunities, because the portion of the Muskeg River that would be mined would be replaced by compensation lake habitat.²²⁴

Although hunting and trapping impacts are identified as linked to traditional land use, the assessment concludes that existing and approved projects, plus the Kearl project will directly disturb only 5% of the regional study area and therefore no substantial loss of hunting opportunities will occur. Lost opportunities will 'gradually' return as reclamation occurs, and there will be some decrease in availability of habitat for some species after reclamation.²²⁵

As with other impacts associated with aboriginal and treaty rights, there is no substantive assessment of the loss of hunting opportunities specific to each aboriginal community, their culturally important or frequently used or preferred sites, no assessment of the combined effects of direct and indirect disturbance, or indirect effect such as habitat fragmentation, noise, loss of access, loss of adjacent waterways and so on. Reclamation is the primary mitigation offered, and the time period of the loss is glossed over, with little reference to "several decades" before a mature landscape is returned (which is about 100 plus years for old growth forest) and the effect this might have on the intergenerational transfer of traditional environmental knowledge necessary to support traditional land use and cultural practices.

The Panel was satisfied that Imperial Oil had identified the concerns of the First Nations regarding the impacts of its project on traditional land uses and made appropriate commitments to work with First Nations and other aboriginal groups to address their needs and concerns. It noted that Imperial Oil assessed impacts on water quality, water flows and air quality on local communities, including Aboriginal communities. It conducted a human health risk assessment (as a result of chemical exposures) and concluded that there would be negligible effects on aboriginal and other communities in the region.

²²⁴ *Ibid.* at 3-45.

²²⁵ *Ibid.* at 3-77.

Analysis: Consultation with affected Aboriginal communities and accommodation of their rights?

The lack of an integrated, community specific impact assessment in the materials filed by Imperial Oil, and the fact that the First Nations and some other aboriginal groups reached partial or full mitigation agreements with the company, were likely significant factors in the Panel's approach to the First Nations' rights and concerns. As in past ERCB decisions, either singularly or as part of a Joint Review Panel, the ERCB did not substantively address the First Nation's concerns or the impacts of the project on their traditional land uses, preferring to make unenforceable recommendations regarding some issues. The Board approved the project, and imposed conditions primarily related to the technical aspects of mine plans and optimizing bitumen recovery.

The Joint Panel did not view cumulative impacts, or the lack of management of these impacts, as a reason to recommend denial or conditional approval of the project, stating: "It is clear that the critical issues surrounding oil sands development are increasingly not project specific, and successful management of these issues is often not the responsibility of the applicant alone".²²⁶ The Panel implicitly acknowledged the possibility that, if clear and weighty evidence was presented regarding "unacceptable impacts", it may not be able to find that a specific project was in the public interest.²²⁷ It is uncertain what the ERCB would consider unacceptable, especially if the Alberta regulators did not object to the project. The management of cumulative impacts is primarily the responsibility of Alberta, and this responsibility has been largely delegated by Alberta to CEMA and other voluntary groups, as the Panel noted in the Kearl and other decisions. However, there has been consistent evidence before each successive Joint Review Panel that both Alberta and CEMA have been unable to develop comprehensive systems and policies necessary to manage the increasingly negative effects of oils sands development on water or any other resource.

Joint Panels have made statements in several reports similar to this one: "The Joint Panel is deeply concerned by the inability to establish and maintain priority for critical items such as the Water Management Framework for the Athabasca River, the Muskeg River Watershed Integrated Management Plan, and the Regional Terrestrial and Wildlife Management Framework."²²⁸ The expression of this concern has not had a detectable impact; the first two of these frameworks have yet to be completed in their final, complete form and implemented. The third framework was completed by CEMA in 2008, but Alberta has declined to implement it.

²²⁶ EUB Decision 2007-013, *supra* note 49 at 4.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

To cite the Report of the Royal Society of Canada's Expert Panel:

“In view of the growing international, national and local attention oil sands development is attracting, the public interest determination required of the ERCB in judging the next round of oil sands project approvals is becoming more challenging. Based on the specific deficiencies that we have identified and the important lack of cumulative analysis on many environmental and social issues, the ERCB faces difficult public interest determinations on future projects unless these information deficiencies, especially on cumulative impacts, are corrected.”²²⁹

As to the Joint Panel's consideration of the project's potential impacts on constitutionally protected aboriginal or treaty rights, it is entirely absent from the Report. As stated earlier, the three First Nations had signed non-assertion of rights agreements with Alberta, removing the need for the Panel to expressly consider issues of impacts on constitutional rights. Nevertheless, as a statutory delegate, the ERCB “must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including subsection 35(1) of the *Constitution Act, 1982*.²³⁰ This means that as a decision-maker, the Board must take into account aboriginal and treaty rights that are protected under section 35, if its decision may have the effect of infringing these rights.

The upcoming review of the Jackpine Mine Expansion and the Pierre River Mine Projects, which allows a Joint Panel for the first time to consider the potential impacts of proposed oil sands projects on aboriginal rights and interests, and to build these impacts in its overall assessment of the projects, may well be a test case of how the ERCB or a Joint Panel deals with these impacts and the potential infringement of the rights claimed by First Nations.

4.3. Monitoring the Impacts of Industrial Development on the Lower Athabasca River System

In the fall of 2010, the federal Commissioner of the Environment and Sustainable Development published a report which included a chapter on Monitoring Water Resources.²³¹ This chapter examined how Environment Canada managed its two main programs to monitor the long-term quality and quantity of surface fresh water resources in Canada. The Commissioner found that the Department was not adequately monitoring the quality and quantity of our fresh water resources, nor was it fulfilling its reporting obligations under the *Canada Water Act*. In particular, the Fresh Water Quality

²²⁹ RSC Expert Panel, *supra* note 7 at 17.

²³⁰ In *Quebec v. Canada (NEB)*, [1994] 1 S.C.R. 159 at 185.

²³¹ Auditor General of Canada Office, *Report of the Commissioner of the Environment and Sustainable Development* (December 2010) c. 2 – Monitoring Water Resources, online: <http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201012_02_e_34425.html>.

Monitoring program had not established water quality monitoring arrangements with most of the provinces and was not monitoring on most federal lands.²³² One of the three case studies in the chapter deals specifically with how Environment Canada monitors oil sands development. It notes that the Department only has one monitoring station in Wood Buffalo National Park, located 150 km downstream from the oil sands, and that the station was designed to monitor nutrients associated with pulp mills in the basin. The findings are as follows:

“... the Department’s Fresh Water Quality Monitoring program has no baseline measures or long-term data to track changes in water quality and aquatic ecosystems health in the river associated with oil sands development.

With regard to water quantity, the Department has not determined whether it currently has an adequate number of stations to monitor water flow related to oil sands development.”²³³

The overall conclusion of the Commissioner is that “there may be significant risks to the quality and quantity of fresh water that have not been assessed and are not being monitored in areas of federal jurisdiction. Water management decisions may be made without long-term data and information on the quantity and quality of water resources.”²³⁴

In the Lower Athabasca region, monitoring of surface water quality has been largely delegated by both levels of government to a multi-stakeholder body called the Regional Aquatics Monitoring Program (RAMP). RAMP was “established in 1997 to determine, evaluate and communicate the state of the aquatic environment and any changes that may result from cumulative resource development within the Regional Municipality of Wood Buffalo”.²³⁵ The majority of RAMP members are oil sands operators who provide the funding for the program. RAMP has been criticized by scientists for its inadequacy to collect the right information and the credibility of its research methods and findings.²³⁶ Most First Nations and environmental organizations have distanced themselves from the organization due to concerns over impartiality and competence. A 2010 independent scientific review of the program by a government agency reiterated concerns with

²³² *Ibid.* at 2.27 and 2.31.

²³³ *Ibid.* Case Study 2.2 at 14-15.

²³⁴ *Ibid.*

²³⁵ Alberta Innovates Technology Futures, *2010 Regional Aquatics Monitoring Program (RAMP) Scientific Review* (6 January 2011) at 1 [2010 RAMP Scientific Review].

²³⁶ E.g. Kelly *et al.*, 2010, *supra* note 5 at 5: “This increase confirms the serious defects of RAMP, which has not detected such patterns in the AR watershed. ... A robust monitoring program to measure exposure and health of fish, wildlife, and humans should be implemented in the region affected by oil sands development.” See Graham Thomson, “Schindler’s report attacks government misinformation, secrecy on oilsands industry” *Edmonton Journal* (31 August 2010).

scientific leadership and effective design which had already been expressed in 2004.²³⁷ The review found that the existing program was not successful in detecting changes if they occur nor the source of these changes, and that not all the appropriate questions were asked and appropriate criteria were being monitored to answer those questions. Despite the repeated criticisms of RAMP, as pointed out by Simon Dyer of the Pembina Institute, the Joint Panel reviewing Total's proposed Joslyn Mine in the fall of 2010 still relied on RAMP data to conclude that it had no reason to believe that the cumulative effects downstream from mineable oilsands operations were significant.²³⁸

The concerns generally expressed by scientific reviews about RAMP and the inadequacy of baseline data and monitoring programs in the Lower Athabasca River Basin were also highlighted in two reports issued by the Liberals and the New Democrats, following the 2009 hearings of the House of Commons Standing Committee on Environment and Sustainable Development on the impacts of oil sands development on water resources.²³⁹

The Liberal report, issued in August 2010, states:

"... the federal government appears so far to have been conveniently hiding behind its administrative arrangement with the Alberta government for enforcement of federal anti-pollution laws (namely, section 36 of the *Fisheries Act*). The agreement provides cover to Ottawa by allowing it to transfer, in the spirit of bureaucratic efficiency and cooperative federalism, day-to-day responsibility for the monitoring and inspection of the oil sands industry's freshwater impacts to the province. ... In essence, Ottawa has used the agreement to create the illusion that the federal government is overseeing the environmental impacts – in this case, freshwater impacts – of oil sands activity.

... the federal government has been satisfied with subordinating its *Fisheries Act* powers to multi-stakeholder initiatives like the Regional Aquatics Monitoring Program (RAMP) and the Cumulative Environmental Management Association (CEMA), both of whose purported aims are to monitor and manage the environmental consequences of oil sands development."²⁴⁰

The report concludes:

"Whether it is lack of rigorous monitoring of pollutants and water levels in the Athabasca River, or the absence of baseline data on fish habitat, or gaps in understanding the dynamics of

²³⁷ 2010 RAMP Scientific Review, *supra* note 235 at 2.

²³⁸ Simon Dyer, quoted in Hanneke Brooymans, "Water-monitoring criticized: Oilsands may impact quality" *Calgary Herald* (1 February 2011). ERCB Decision 2011-005, *supra* note 24 at 102.

²³⁹ See *supra* note 4.

²⁴⁰ *The Hidden Dimension: Water and the Oil Sands*, Liberal Report from the Study of the Standing Committee on Environment and Sustainable Development on the Impacts of Oil Sands Development on Canada's Freshwater (August 2010) at 10-12, online: <http://francisscarpaleggia.liberal.ca/files/2010/08/The-Hidden-Dimension_Water-and-the-Oil-Sands.pdf>.

groundwater systems and how they interact with surface water, one thing is clear: the oil sands are being developed without the necessary scientific data to draw accurate conclusions about industry impacts on freshwater supplies. Not only is this lack of information an obstacle to the effective regulation of current oil sands operations, it also undermines sound environmental assessment of future projects.”²⁴¹

For its part, the New Democrats report, released in September 2010, notes that:

“The vast majority of witnesses decried the decline in contribution by federal government in monitoring impacts on water sources. Concerns raised at previous federal and provincial reviews were reiterated regarding over reliance on industry gathered monitoring data. These concerns echo those raised by the federal Natural Resources Committee in 2007 who recommended ending reliance on industry monitoring in favour of stepped up federal investment and engagement.”²⁴²

One of the report’s recommendations was that “all federal authorities should cease any reliance on RAMP monitoring data until such time as the deficiencies identified by the peer review are adequately addressed.”²⁴³

In the wake of the publication of scientific reports critical of government performance, in the fall of 2010 the federal and the provincial governments each appointed its own scientific panel to review scientific research and monitoring in the Athabasca River system.

But even before the federal and provincial scientific panels had published their findings, yet another report on the environmental and health impacts of the oil sands industry was published in December 2010 by an Expert Panel appointed by the RSC Expert Panel.²⁴⁴ The Panel found that the regional cumulative impact of oil sands development on groundwater quantity and quality had not been assessed, raised concerns about the RAMP, recommended enhanced surveillance of surface water quality, and asked for more monitoring of human contaminant exposures to address First Nations concerns.²⁴⁵ The RSC Expert Panel stated that despite over 30 years of water quality monitoring in the region, the assessment of water quality impacts has been controversial as a result of:

“... recently published studies which, albeit based on sparse data and showing very little measurable impact on water quality for industrial developments of this scale, do support a hypothesis of measurable impact arising from oil sands developments on river water

²⁴¹ *Ibid.* at 45.

²⁴² Missing in Action , *supra* note 61 at 16.

²⁴³ *Ibid.* at 47.

²⁴⁴ RSC Expert Panel, *supra* note 7.

²⁴⁵ *Ibid.* at 2 and 6.

concentrations of polycyclic aromatic compounds (PAC), including polycyclic aromatic hydrocarbons (PAH) and various trace metals.”²⁴⁶

The federally appointed Oilsands Advisory Panel reported its findings to the Minister of Environment in December 2010.²⁴⁷ The Panel discusses the real and perceived impacts of oil sands development, notably on aquatic ecosystems, and the failure of government to adequately monitor them. The Panel identifies environmental and monitoring concerns related in particular to surface and groundwater contamination, water quality and tailings pond management, water quantity and air pollutant emission, and observes that monitoring and research activity “carried out to date has not led to a consensus on the degree of impacts”.²⁴⁸ In the view of the Panel:

“Collectively the monitoring efforts by provincial and federal governments and other stakeholder groups including industry, lack a coherent data management framework where information can be uploaded, organized, and accessed in a standardized and coordinated manner.”²⁴⁹

The Panel was particularly critical of RAMP which “is not producing world-class scientific output in a transparent, peer-reviewed format and it is not adequately communicating its results to the scientific community or the public”.²⁵⁰

The provincially appointed Water Monitoring Data Review Committee released its findings in March 2011.²⁵¹ The panel of scientists was specifically asked to evaluate four reports on contamination of the Athabasca River System by oil sands operations, including the two reports by Drs. Kelly and Schindler noted above,²⁵² a report by Alberta Environment and a RAMP report. The authors note that “there are several reasons for the apparent differences of opinion about whether oil sands contaminants are derived from natural sources or the oil sands industry”.²⁵³ Nevertheless, they conclude:

Taking into consideration all data and critiques, we generally agree with the conclusions of Kelly *et al.* that PACs and trace metals are being introduced into the environment by oil sands operations. ...

We think Kelly *et al.*'s study, in spite of some uncertain statements on loadings and risks, has been important in pointing out deficiencies in current monitoring program in the oil sands area. We

²⁴⁶ *Ibid.* at 7.

²⁴⁷ Oilsands Advisory Panel, *supra* note 6.

²⁴⁸ *Ibid.* at 19.

²⁴⁹ *Ibid.* at 20.

²⁵⁰ *Ibid.* at 21.

²⁵¹ Water Monitoring Data Review Committee, *supra* note 6.

²⁵² See Kelly *et al.*, *supra* note 5.

²⁵³ Water Monitoring Data Review Committee, *supra* note 6 at iv.

believe it is in the best interests of the public and the oil sands industry to make sure all monitoring programs are conducted with scientific rigor and oversight.²⁵⁴

Both the federal and the provincial governments have now responded to the findings of their scientific panels. In January 2011, Alberta announced the appointment of a group of independent experts to provide recommendations to the provincial government for the development of a world-class environmental monitoring evaluation and reporting system for the entire province. The initial focus of the Provincial Monitoring Panel is to pilot the system in the Lower Athabasca River Basin.²⁵⁵ The Panel is expected to report back to the Minister of Environment by June 2011. Meanwhile, in March 2011, the federal Minister of the Environment released a Phase 1 Water Quality Monitoring Plan for the Lower Athabasca which deals with the main stem of the Athabasca River and its major tributaries.²⁵⁶ The plan outlines a strategy to take measurements more frequently, in more places, to ensure sufficient data is available to track changes in water quality, and proposes to assess cumulative effects. This plan “is a first step towards a comprehensive integrated monitoring program for the oil sands region”.²⁵⁷

To date, there have been no proposals or plans by either level of government to monitor the impact of changes to water quality or flow on the ability of Aboriginal communities in the region to exercise their treaty and aboriginal rights or obtain clean water for domestic purposes.

5.0. Conclusion

Our initial query was: is the Alberta government paying attention to Aboriginal water rights as it plans and manages land and resource use in the Lower Athabasca River? Is it fulfilling its constitutional obligations by: a) acknowledging the existence of these rights and protecting their exercise?; b) consulting meaningfully with First Nations and accommodating their rights with a view to achieve reconciliation?

The answer is no.

²⁵⁴ *Ibid.* at iv and v.

²⁵⁵ Government of Alberta, News Release, “Experts selected to lead oil sands monitoring” (27 January 2011), online: <<http://alberta.ca/home/NewsFrame.cfm?ReleaseID=/acn/201101/29823C869CE65-032D-6D48-ACC948527B28EBAD.html>>.

²⁵⁶ Environment Canada, *Lower Athabasca Water Quality Monitoring Plan – Phase 1 – Athabasca River Mainstem and Major Tributaries* (22 March 2011), online: <http://www.ec.gc.ca/Content/8/A/1/8A1AB11A-1AA6-4E12-9373-60CF8CF98C76/WQMP_ENG.pdf>.

²⁵⁷ *Ibid.* at v.

There is no specific acknowledgement of the water rights of Aboriginal peoples in any of the processes that we have analyzed. Alberta's water management system is not coherent or integrated. And the system is not designed to deal with the impacts of development on what matters to First Nations for the exercise of their rights: fish health, fish populations, species of fish that are culturally important, access and transportation needs, etc. The government acknowledges the existence of Treaty rights to hunt, trap and fish and the Crown's duty to consult, but does not draw the implications of such recognition. There is no agreement on the nature and scope of the rights asserted by First Nations, nor on the process or the outcome of consultation.

A statutory decision maker has a duty, before making a decision, "based on the honour of the Crown *and* procedural fairness to be informed about the nature and severity of such impacts before he [made] a decision to determine (amongst other things) whether accommodation [was] necessary or appropriate."²⁵⁸

However consultation, as conducted by Alberta, focuses on the initial procedural elements of the process outlined by the Supreme Court (in *Delgamuuk, Mikisew Cree, Beckman* and other cases) and does not appear to extend to assessing the nature and severity of impacts and determining if accommodation is required. It is essentially a one way process with First Nations submitting to government information on potential impacts on their land uses and the exercise of their rights and offering detailed recommendations, and receiving virtually no response – except a copy of the ultimate decision. There is no dialogue, such as discussion of alternatives or information regarding Alberta's assessment of the potential impacts of its decisions on aboriginal and treaty rights, and its reasons for rejecting First Nations proposals and requests for mitigation of potential impacts or accommodation of the rights they assert. For instance, the consultation plan released by government for development of the LARP states that First Nations will not receive any feedback from government on their input until after the plan has been finalized and approved by Cabinet, thus preventing any meaningful dialogue about accommodation measures between the parties. Implicit in Alberta's approach is a decision that the nature and severity of potential impacts from its decisions and plans do not require an accommodation of aboriginal or treaty rights. However, this decision and its rationale are not communicated to the communities being consulted.

As noted by Justice Finch in *West Moberly*:

"To be considered reasonable, I think the consultation process, and hence the "Rationale", would have to provide an explanation to the petitioners that, not only had their position been fully considered, but that there were persuasive reasons why the course of action the petitioners proposed was either not necessary, was impractical, or was otherwise unreasonable. Without a reasoned basis for rejecting the petitioners' position, there cannot be said to have been a meaningful consultation.

²⁵⁸ *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53 at para. 73.

... The consultation process does not mandate success for the First Nations interest. It should, however, provide a satisfactory, reasoned explanation as to why their position was not accepted.”²⁵⁹

The lack of proper understanding by Alberta or agreement between the parties as to the nature and scope of the Treaty rights at stake may explain, in part, why the consultation process has proven to be so inadequate. Justice Finch sums up the issue in *West Moberly* as follows:

“Effectively, MEMPR regarded the petitioners’ Treaty 8 rights to hunt as subject to, or inferior to, the Crown’s right to take up land for mining or other purposes. ...

When MEMPR entered into the consultation process without a full and clear understanding of what the Treaty meant, the process could not be either reasonable or meaningful. A consultation that proceeds on a misunderstanding of the Treaty, or a mischaracterization of the rights that the Treaty protects, is a consultation based on an error of law, and cannot therefore be considered reasonable.”²⁶⁰

²⁵⁹ *West Moberly*, *supra* note 72 at paras. 144 and 148.

²⁶⁰ *Ibid.*, paras. 150-151.

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