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The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis

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Executive Summary

This paper provides a detailed review of the current provincial legislative and regulatory framework for oil sands development in Alberta. It does so by moving through the three key stages in the current process — the disposition of rights to develop oil sands; the disposition of rights to access the surface of public land; and the oil sands project review and approval stage. The paper identifies key issues and problem areas that arise at each stage. Many of these issues relate to the lack of clarity, certainty and transparency with respect to certain key decision-making points in the current development process.

The paper is in six parts. Part 1.0 introduces the paper and Part 2.0 provides an overview of the constitutional jurisdiction of the province with respect to oil sands development. A review of issues in regard to federal involvement in Alberta oil sands development is provided in Appendix A to this paper.

Part 3.0 of the paper reviews the three main stages in the current legislative and regulatory framework for oil sands development — the mineral rights disposition stage; the surface rights disposition stage (both with respect to oil sands exploration and oil sands production activities); and the project review and approval stage. Part 3.0 begins, however, with a discussion of what ideally should be a preliminary stage in the development process, that of oil sands policy-making and land-use planning. Such policies and plans should drive decision making in subsequent stages of the development process.

Part 4.0 of the paper summarizes three key deficiencies in the current legislative and regulatory oil sands development framework. First, the lack of comprehensive plans for oil sands development and for land use in the province means that decision making is proceeding without adequate guidance, and on a case-by-case basis without coordination of decision making across the disparate stages in the current framework. Without effective integration and coordination of decision making, the proper management of the cumulative effects of oil sands development will not be possible. Second, the current legislative and regulatory framework is at times characterized by significant complexity and uncertainty. This results in a lack of transparency at different points in the process. While some complexity is inherent given the subject matter, a legislative and regulatory framework that is unduly complex and difficult to follow is not an accessible and transparent system. It also raises concerns about accountability. Lastly, the lack of transparency at certain points in the current framework is exacerbated by issues around public participation. At some key points in the current process, public participation is entirely absent; at others, the opportunities available may not be sufficient to ensure that broad views from Albertans are represented in oil sands decision making.

Table of Abbreviations

<i>ADR</i>	<i>Activities Designation Regulation</i>
AENV	Alberta Environment
<i>CEAA</i>	<i>Canadian Environmental Assessment Act</i>
CMDRC	Crown Mineral Disposition Review Committee
<i>CRR</i>	<i>Conservation and Reclamation Regulation</i>
DFO	Department of Fisheries and Oceans
<i>DFR</i>	<i>Dispositions and Fees Regulation</i>
EIA	environmental impact assessment
<i>EPEA</i>	<i>Environmental Protection and Enhancement Act</i>
<i>ERCA</i>	<i>Energy Resources Conservation Act</i>
EUB	Alberta's Energy and Utilities Board
<i>FA</i>	<i>Fisheries Act</i>
LOC	licence of occupation
<i>MIMER</i>	<i>Metallic and Industrial Minerals Exploration Regulation</i>
MSL	mineral surface lease
<i>MMA</i>	<i>Mines and Minerals Act</i>
<i>MOU</i>	<i>EUB/AEP Memorandum of Understanding on the Regulation of Oil Sands Developments</i>
NEB	National Energy Board
<i>NWPA</i>	<i>Navigable Waters Protection Act</i>
<i>OSCA</i>	<i>Oil Sands Conservation Act</i>
<i>OSCR</i>	<i>Oil Sands Conservation Regulation</i>
<i>OSTR</i>	<i>Oil Sands Tenure Regulation</i>
<i>PLA</i>	<i>Public Lands Act</i>
RMWB	Regional Municipality of Wood Buffalo
<i>SRA</i>	<i>Surface Rights Act</i>
SRB	Surface Rights Board
SRD	Alberta Sustainable Resource Development
<i>WA</i>	<i>Water Act</i>
<i>WMR</i>	<i>Water (Ministerial) Regulation</i>

1.0. Introduction

Alberta's oil sands are sand deposits containing vast quantities of crude bitumen. They are located under the boreal forest in the northern part of the province. The deposits, defined as the Peace River, Athabasca and Cold Lake Oil Sands Areas, collectively underlie roughly six million hectares, an area comparable in size to the province of New Brunswick, or the countries of Scotland or Ireland.¹ Crude bitumen is produced by mining and extracting deposits located at or near the surface, and by *in situ* thermal or non-thermal recovery of deposits located deep below the surface. The bitumen contained in Alberta's oil sands is one of the largest known hydrocarbon deposits in the world. With established reserves estimated to be 28.3 billion cubic metres, it ranks second only to Saudi Arabia.²

Between 1995 and 2004, oil sands production in Alberta more than doubled to approximately 1.1 million barrels per day. By 2015, production is expected to increase to between 3 and 5 million barrels a day.³ Over the next decade it is expected that over \$60 billion could be invested in oil sands projects. These plans consist of more than 60 ventures, including mining and *in situ* projects, as well as supporting facilities and pipeline expansions.⁴ Within a span of four months, three major oil sands mining projects recently received regulatory approval.⁵ There is no doubt that the recent boom in oil sands development in Alberta has, at least in part, been facilitated by a stable and favourable regulatory framework.⁶

¹National Energy Board (NEB), *Canada's Oil Sands: Opportunities and Challenges to 2015* (Calgary: 2004). Alberta's three oil sands areas were established by EUB Informational Letter 84-7: *Declaration of Oil Sands Areas to Facilitate Orderly Leasing and Stable Regulation*.

²NEB, *ibid.*

³NEB, *Canada's Oil Sands: Opportunities and Challenges to 2015: An Update* (Calgary: 2006), and Alberta Government, "Backgrounder: Terms of Reference — Oil Sands Consultation Group" (20 December 2005), online: <<http://www.oilsandsconsultations.gov.ab.ca>>.

⁴NEB, *ibid.* For details, see: Strategy West Inc., *Existing and Proposed Canadian Commercial Oil Sands Projects* (Calgary: March 2007), online: <<http://www.strategywest.com>>; and Alberta Economic Development, *Inventory of Major Alberta Projects* (December 2005).

⁵These are: EUB Decision 2006-112: *Suncor Energy Inc., Application for Expansion of an Oil Sands Mine (North Steepbank Mine Extension) and a Bitumen Upgrading Facility (Voyageur Upgrader) in the Fort McMurray Area* (14 November 2006); EUB Decision 2006-128: *Albian Sands Energy Inc., Application to Expand the Oil Sands Mining and Processing Plant Facilities at the Muskeg River Mine, Joint Panel Report* (17 December 2006); and EUB Decision 2007-013: *Imperial Oil Resources Ventures Ltd., Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the Fort McMurray Area, Joint Panel Report* (27 February 2007).

⁶Other factors spurring the boom have included increased world demand for oil, high oil prices, and research and development support from governments. See NEB, *supra* note 1.

Oil sands development undoubtedly brings considerable economic benefits to local communities, to Alberta and to Canada as a whole.⁷ But the intense pace of development is raising questions about the ability of the current regulatory framework to cope with the increasing socio-economic and environmental challenges of large-scale development. In May 2006, the Alberta government impliedly acknowledged that change is needed when it instituted a public consultation process for the development of a vision and strategy for oil sands development in the province. The consultation process was a response to significant criticism the government had received when it proposed a strategy for the Athabasca mineable oil sands area without province-wide consultation.⁸ A multistakeholder committee was charged with carrying out the public consultation and reporting back with a vision for oil sands development, and with strategies to implement that vision. The committee's report was finalized on June 30, 2007.⁹

Any serious consideration of the future of oil sands development in Alberta must bear in mind the legislative and regulatory framework that underlies and supports it. If a vision and strategies to implement that vision are to be adopted, an assessment will be needed to ensure that the current legislative and regulatory framework supports that vision, or to determine whether changes are required. Further, as commentators question whether “maintaining the current structure is workable under a scenario where oil sands production more than doubles in the next 10 years”,¹⁰ an assessment of the problems and challenges within the current legislative and regulatory framework is required.

This paper provides a detailed review of the current legislative and regulatory framework for oil sands development in Alberta. Its focus is on provincial laws and regulations applicable to three key stages in the current development process — the disposition of rights to develop oil sands; the disposition of rights to access the surface of public land; and the oil sands project review and approval stage. Along with a review of the applicable legislation, regulations and policies for each stage in the process, the paper identifies the key issues and problem areas that arise at each stage. At the heart of most of these issues are concerns about clarity of process, certainty, transparency, and accountability.

The paper proceeds as follows. Part 2.0 presents a brief overview of constitutional jurisdiction in relation to Alberta oil sands development. While the province has primary

⁷See, for example, Canadian Energy Research Institute, *Spreading the Wealth Around: The Economic Impact of Alberta's Oil Sands* (Calgary: 2005).

⁸See Government of Alberta, News Release, “Government commits to comprehensive process for oil sands consultation” (17 May 2006), online: <<http://www.oilsandsconsultations.gov.ab.ca>>.

⁹*Oil Sands Consultations — Multistakeholder Committee Final Report* (30 June 2007), online: <<http://www.oilsandsconsultations.gov.ab.ca>>.

¹⁰J. Lowe, “Towards a New Policy Framework for Oil Sands Development” (Paper presented to the Canadian Bar Association Alberta Law Conference, Energy Regulatory Panel, 10 March 2006) at 8.

authority over oil sands, the federal government also has some jurisdiction, especially with respect to environmental impacts. A review of key issues around federal involvement in Alberta oil sands development is provided in Appendix A to this paper.

Part 3.0 of the paper considers the three main stages in the current legislative and regulatory framework — the mineral rights disposition stage, the surface rights disposition stage (both with respect to oil sands exploration and production activities), and the project review and approval stage. This part begins, however, with a discussion of a preliminary stage that ideally should drive the other points in the development process — the adoption of a comprehensive oil sands (or energy) policy complemented by a detailed land-use framework for the province. As will be noted, the current lack of a plan or plans for both oil sands development and for land use in the province adversely affects decision making at each stage in the current process.

Part 4.0 of the paper concludes with a synopsis of three key deficiencies in the current legislative and regulatory oil sands development framework as identified throughout the paper. First, the lack of comprehensive plans for oil sands development and for land use in the province means that decision making is proceeding at each stage in the development process without adequate guidance, and in isolation from subsequent stages in the development process. Without adequate integration and coordination of decision making in regard to oil sands development, effective cumulative effects management will not be possible. Second, the current legislative and regulatory framework is characterized by significant complexity and uncertainty which often results in a lack of transparency at different points in the development process. While complexity is not in and of itself problematic, a legislative and regulatory framework that is unduly complex and difficult to follow is not an accessible and transparent system. Such a framework also raises concerns about accountability. Third, contributing to the lack of transparency in the current regulatory framework are issues in regard to public participation. At certain critical points in the current oil sands development process, public participation is entirely absent. At other points, the opportunities available may not be sufficient to ensure that broad views from Albertans are represented in oil sands decision making.

Before proceeding, a note about the scope of this paper is required. The legislative and regulatory framework addressed in this paper is defined by the key provincial environmental and natural resource statutes, and regulations and administrative processes pursuant to those statutes, in relation to upstream oil sands production in Alberta. Other potentially relevant laws and processes are mentioned only briefly, while still others are not discussed at all. For example, the paper does not discuss applicable international law, taxation law or corporate law.¹¹ Similarly, the law relating to treaty and aboriginal rights of Aboriginal peoples in the oil sands areas is beyond the scope of this paper.¹²

¹¹For a summary of the taxation regime applicable to Alberta's oil sands, see: Blakes, Cassels & Graydon LLP, *Doing Business in Alberta: Overview of Canadian Legal System Related to Oil Sands*

It should also be noted that, with respect to its review of current provincial processes and policies, the paper relies exclusively on publicly-available and accessible materials. Such an approach accords with the overall goal of assessing the level of transparency and accessibility in the current regulatory framework.¹³

2.0. Constitutional Division of Powers

Supporting the laws and regulations reviewed in this paper are constitutional powers. Both levels of government, federal and provincial, have constitutional powers in relation to natural resource, including oil sands, development. By far the largest scope of powers falls to the province of Alberta, but the federal government also has considerable jurisdiction over a number of matters related to oil sands development. The constitutional jurisdiction of the federal government and issues related to this jurisdiction are set out in Appendix A to this paper.

For the province of Alberta, several constitutional provisions grant it broad authority over the regulation and management of oil sands development. Section 109 grants the province proprietary rights over the lands and minerals it owns. The vast majority of oil sands in Alberta, as well as the land under which the resource sits, are owned by the province of Alberta. Implicit within the ownership rights protected by section 109 is the general authority to manage and dispose of provincial lands and minerals, subject to legislative or constitutional constraints.¹⁴

Several heads of legislative power also grant Alberta exclusive powers to legislate in relation to oil sands development. Subsection 92(5) of the constitution grants provinces exclusive jurisdiction over the management and sale of public lands. Subsection 92(A) confers exclusive jurisdiction on the provinces to make laws respecting the exploration for non-renewable natural resources in the province, and the development, conservation and management of non-renewable natural resources in the province. Further, subsection

Activities (January 2006), online: <<http://www.blakes.ca/english/publications/referenceguides/DoingBusinessInAlberta.pdf>>. The report also contains a detailed list of possible permits, licences, and approvals that may be required for any given oil sands operation. It does not, however, review the legislative and regulatory framework for oil sands development in any detail; nor does it identify key issues and challenges.

¹²On this, see M. Passelac-Ross, *Aboriginal Peoples and Resource Development in Northern Alberta*, Occasional Paper #12 (Calgary: Canadian Institute of Resources Law, 2003). On the duty of government to consult with Aboriginal peoples on oil sands development, see: M. Passelac-Ross & V. Potes, *Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Legal, Is it Adequate?*, Occasional Paper #19 (Calgary: Canadian Institute of Resources Law, 2007).

¹³In any event, efforts to obtain clarification from government sources were unsuccessful.

¹⁴S. Kennett, ed., *Canada Energy Law Service (Alberta)* (Toronto: Thomson/Carswell, 2005) at 30-3105.

92(10) gives provinces legislative authority over “local works and undertakings” (other than those connecting two provinces, or those extending beyond provincial boundaries). Subsection 92(13) grants powers in relation to “property and civil rights in the province”, and subsection 92(16) provides a residual category of exclusive provincial jurisdiction generally over “all matters of a merely local or private nature in the province”. Taken together, these provisions grant Alberta extensive legislative and regulatory jurisdiction regarding the management and development of Alberta’s oil sands, as well as the commercial, environmental and other aspects of oil sands operations.¹⁵

3.0. Alberta’s Legislative and Regulatory Framework

This Part reviews Alberta’s legislative and regulatory framework for oil sands development by moving through the key stages in the current development process. It begins, however, with a discussion of the need for an overall oil sands (or energy) policy and a comprehensive land-use planning strategy for the province to guide each subsequent stage in the current development process. These stages are the disposition of oil sands rights, the granting of access to public lands for oil sands exploration, the disposition of rights to access the surface of public lands for oil sands production, and oil sands project reviews and approvals. Issues and challenges arising at each stage of the development process are identified.

3.1. Oil Sands Policy and Land-Use Planning in Alberta

Ideally, the legislative and regulatory framework for oil sands development should fit within, and be driven by, an overall resource and environmental management policy and planning structure. Among other things, such a structure would assist with individual project decision making. This is particularly significant given the minimal policy direction provided by Alberta’s current legislation and regulations.

As noted, a recent attempt by the government to outline a plan for at least one oil sands area, the Athabasca mineable oil sands area, was put on hold after intense criticism on the need for more broad-based public consultation on oil sands development generally. In response, the government struck a committee to consult with Albertans and report back on a vision for oil sands development for the province, and with recommendations on how to implement that vision. Final recommendations, completed

¹⁵*Ibid.* at 30-3105 to 30-3106. See also A.R. Lucas, “Natural Resource and Environmental Management: A Jurisdictional Primer” in *Environmental Protection and the Canadian Constitution* (Edmonton: Environmental Law Centre, 1987).

by the committee in June, await government consideration.¹⁶ In the meantime, existing government policies applicable generally to natural resource development in the province have been criticized for being inconsistent, lacking in specifics, and prioritizing development over environmental protection.¹⁷ Albertans await the development of a “comprehensive energy strategy” which will, presumably, provide the context for future oil sands policy.¹⁸

Along with, or as part of, a comprehensive policy to guide oil sands development in the province, commentators agree that a comprehensive land-use planning framework for the oil sands areas is required. In recent years, integrated landscape (or resource) management has garnered broad support as the best way to properly address the ecological, social and economic costs of multiple and incremental developments on land. The idea is that decision making must be integrated across the full range of sectors and activities (existing or proposed) on the landscape, and also among the various stages of decision making with respect to these sectors and activities. A fundamental feature of integrated landscape management is comprehensive land-use planning. Without land-use plans that set thresholds and limits to cumulative environmental disturbances, the cumulative effects of development cannot be properly assessed and proactively managed.¹⁹

Although the Alberta government has in principle stated its commitment to integrated resource and environmental management, to date government initiatives have failed to

¹⁶See *supra* note 9.

¹⁷See, for example, M. Wenig & W.A. Ross, “Making Progress Toward a Truly Integrated Energy Policy” (2007) 31:4 *LawNow*; A. Nikiforuk, “Plan? What Plan? Alberta’s Energy Future” *Canadian Business Magazine* (5-18 June 2006); E. Malterre & M. Lowey, “Alberta’s New Energy Vision Faces Huge Challenges” (2006) 16:19-20 *EnviroLine Online*; and M. Wenig, “Federal Policy and Alberta’s Oil and Gas: The Challenge of Biodiversity Conservation” in G.B. Doern, ed., *How Ottawa Spends 2004-2005: Mandate Change in the Martin Era* (Montreal: McGill-Queen’s Press, 2004).

¹⁸The Alberta government has committed to the development of a “comprehensive energy strategy” for the province. See Premier Ed Stelmach, “Government Priorities”, online: <<http://premier.alberta.ca/news/news-2006-dec-13-Priorities.cfm>>. See also M. Wenig & M. Moore, *Is “Conservation” Worth Conserving? The Implications of Alberta’s “Energy Resource Conservation” Mandate for Renewable Energy*, Occasional Paper #20 (Calgary: Canadian Institute of Resources Law, 2007).

¹⁹See, for example: S. Kennett *et al.*, *Managing Alberta’s Energy Futures at the Landscape Scale*, Paper No. 18 of the Alberta Energy Future’s Project (Calgary: Institute of Sustainable Energy, Environment and Economy, University of Calgary, 2006), online: <<http://www.iseee.ca>>; S. Kennett, *Integrated Landscape Management in Canada: Getting from Here to There*, Occasional Paper #17 (Calgary: Canadian Institute of Resources Law, 2006); S. Kennett, *Towards a New Paradigm for Cumulative Effects Management*, Occasional Paper #8 (Calgary: Canadian Institute of Resources Law, 1999); and R. Lang, ed., *Integrated Approaches to Resource Planning and Management* (Calgary: University of Calgary Press, 1986).

yield satisfactory results.²⁰ There are currently no comprehensive province-wide land-use plans; nor are there regional plans for all areas of the province. In the oil sands areas, existing plans include the *Fort McMurray-Athabasca Oil Sands Subregional Integrated Resource Plan (1996)* and the *Cold Lake Subregional Integrated Resource Plan (1996)*.²¹ These plans are generally considered to be outdated and provide broad management objectives only. They fail to provide useful guidance on, or to set, ecological limits or thresholds, as well as deal with other key issues related to managing cumulative effects in the oil sands regions.²²

Several commentators have assessed the current and projected cumulative effects of oil sands development on the landscape and on the environment generally in the affected areas.²³ Others have outlined the slow progress of initiatives that were intended to manage cumulative effects from oil sands development.²⁴ Since 1997, Alberta's Energy and Utilities Board (EUB) has repeatedly called for an effective regional development

²⁰The government's commitment was made in Government of Alberta, *Alberta's Commitment to Sustainable Resource and Environmental Management* (Edmonton: March 1999).

²¹It was proposed revisions to the Fort McMurray IRP that prompted the government to initiate the oil sands public consultation process discussed earlier.

²²For critiques of the planning initiatives to date, see: Kennett *et al.*, *supra* note 19; Wenig, "Federal Policy and Alberta's Oil and Gas", *supra* note 17; Kennett, *Integrated Landscape Management in Canada* *supra* note 19; M. Wenig & M. Quinn, "Integrating the Alberta Oil and Gas Tenure Regime with Landscape Objectives: One Step Toward Managing Cumulative Effects" in H. Epp, ed., *Access Management: Policy to Practice* (Proceedings of a conference presented by the Alberta Society of Professional Biologists, Calgary, AB, 18-19 March 2003) (Edmonton: ASPB, 2004); D. Farr *et al.*, *Al-Pac Case Study Report — Part 2: Regulatory Barriers and Options* (Ottawa: National Round Table on the Environment and the Economy, 2004); S. Kennett & M. Ross, *In Search of Public Land Law in Alberta*, Occasional Paper #5 (Calgary: Canadian Institute of Resources Law, 1998); S. Kennett, *Integrated Resource Management in Alberta: Past, Present and Benchmarks for the Future*, Occasional Paper #11 (Calgary: Canadian Institute of Resources Law, 2002); M. Ross, *Legal and Institutional Responses to Conflicts Involving the Oil and Gas and Forestry Sectors*, Occasional Paper #10 (Calgary: Canadian Institute of Resources Law, 2002); and Environmental Law Centre, *Legal and Institutional Responses to Conflicts Involving Petroleum Operations and the Agricultural Sector* (Edmonton: 2003).

²³See, for example: R. Schneider & S. Dyer, *Death by a Thousand Cuts: Impacts of In Situ Oil Sands Development on Alberta's Boreal Forest* (Edmonton: The Pembina Institute and the Canadian Parks and Wilderness Society, 2006); D. Woynilowicz, C. Severson-Baker & M. Reynolds, *Oil Sands Fever: The Environmental Implications of Canada's Oil Sands Rush* (Drayton Valley: The Pembina Institute, 2005); and G. MacCrimmon & T. Marr-Laing, *Patchwork Policy, Fragmented Forests: In-situ oil sands, industrial development, and the ecological integrity of Alberta's boreal forest* (Drayton Valley: The Pembina Institute, 2000).

²⁴See S. 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, 2007). See also *supra* note 22.

strategy for the oil sands areas.²⁵ The Board has also repeatedly expressed concern over its inability to properly assess proposed oil sands projects without a regional strategy that includes cumulative effects limits and thresholds.²⁶

Recently, the government of Alberta has committed to “develop and deliver a land use framework” for the entire province. The goal is for the framework to provide “overall policy direction” on land use in Alberta and to define “processes, roles and responsibilities” to enable governments, stakeholders and the public to address land issues at provincial, regional and local levels.²⁷ Public consultations towards the development of this framework are ongoing. At present, it is unclear whether the outcome of this process will yield a framework with sufficient detail to assist in cumulative effects management for the province, and for the oil sands areas in particular. It is also unclear whether, and how, this framework will relate to the vision and implementation recommendations that have been delivered from the oil sands public consultation process.

Ultimately, any deliverables from either public consultation process are recommendations only. The government may choose to implement some or none at all. Moreover, if implemented at the level of policy only, they will lack legal enforceability and will be subject to change internally by the government as it sees fit. The ability to amend current integrated resource plans without public notice or consultation was highlighted in 2002 when the government amended the Fort McMurray IRP to allow for oil sands development in a previously-protected wetland complex. At the project review hearing, stakeholders criticized the amendment and the way it was made. The EUB concluded that neither the amendment nor the IRP itself had any real effect on its review of the project. The EUB noted that the IRP has no legal status and is subject to revisions or review at the discretion of the Minister. According to the Board, while it may have regard for such plans, the Board’s authority is not fettered by them.²⁸

To effectively manage cumulative effects from resource development, critics are calling for legally-mandated planning processes and land-use plans that are legally binding. Without legal status, such plans and any ecological limits and thresholds that they set, could be modified at the will of government, or simply ignored by regulators when making decisions on individual projects. Consequently, it has been suggested that

²⁵The EUB’s first such call was made in EUB Decision 97-13: *Application by Syncrude for the Aurora Mine* (October 1997).

²⁶See *supra* note 24.

²⁷Government of Alberta, “Land-use Framework”, online: <<http://www.landuse.gov.ab.ca/index.html>>.

²⁸The amendment to the Fort McMurray IRP to allow for oil sands mining in the McLelland Lake Wetland Complex is discussed in EUB Decision 2002-089: *TrueNorth Energy Corporation Application to Construct and Operate an Oil Sands Mine and Cogeneration Plant in the Fort McMurray Area* (22 October 2002) at 38.

the establishment of a land-use planning process and land-use plans for the oil sands areas will not be sufficient to adequately manage cumulative effects. Rather, what is required are policy goals that are entrenched in legislation, mandatory duties on responsible departments and agencies to engage in the planning process, and mandatory land-use and resource-management plans.²⁹

The current lack of a comprehensive oil sands policy and land-use planning framework for the oil sands areas in Alberta is a fundamental problem that cuts across all stages in the oil sands development process. Critics have called for a pause on further project approvals until a comprehensive policy and planning framework is in place.³⁰ In each stage in the development process discussed below, the lack of such policy and plans is the most glaring deficiency.

3.2. The Disposition of Oil Sands Rights in Alberta

The province of Alberta owns approximately 97 percent of Alberta's oil sands.³¹ As of August 2006, the province had entered into 3116 agreements granting oil sands rights covering approximately 48,973 square kilometres of Alberta's oil sands areas. At that time, about 67 percent of potential oil sands resources were still available for leasing. Since 2002, the Province has issued an average of 220 oil sands agreements per year.³² In 2005-06, the sale of oil sands rights hit record levels with companies buying rights for hundreds of millions of dollars.³³

The legislation governing the disposition (or sale) of the province's oil sands is administered by Alberta Energy. Oil sands rights are disposed of pursuant to a tenure regime established by the *Mines and Minerals Act (MMA)*, the *Oil Sands Tenure*

²⁹See, for example: J. Hierlmeier & D. Watt, *Submissions to the Oil Sands Panel on Developing a Framework for Oil Sands Development in Alberta* (Edmonton: 26 September 2006), online: <<http://www.oilsandsconsultations.gov.ab.ca>>; and Kennett & Ross, *supra* note 22.

³⁰See, for example, CPAWS, Pembina Institute *et al.*, *Managing Oil Sands Development for the Long Term: A Declaration by Canada's Environmental Community* (1 December 2005), online: <http://www.pembina.org/pdf/publications/OS_declar_Full.pdf> at 2.

³¹The remaining 3 percent, which will not be discussed here, are held privately or by the federal Crown. See Alberta Energy, *Alberta's Oil Sands 2005* (December 2006) at 3, online: <<http://www.energy.gov.ab.ca/docs/oilsands/pdfs/osgenbrf.pdf>>.

³²*Alberta Oil Sands Consultation Fact Sheet*, "Oil Sands Tenure", online: <<http://www.oilsandsconsultations.gov.ab.ca>>.

³³In 2005, Royal Dutch Shell Ltd. purchased rights located 100 kilometres northwest of Fort McMurray for \$465 million. See *Oil Sands Industry Update* (Edmonton: Alberta Employment, Immigration and Industry, December 2006) at iv.

Regulation (OSTR), and the *Mines and Minerals Administration Regulation*.³⁴ The rights are granted through agreements in the form of permits or leases that convey exclusive rights to drill for, win, work, recover and remove oil sands owned by the province.³⁵

Section 16 of the *MMA* authorizes Alberta's Minister of Energy to dispose of oil sands rights as follows:

16. Subject to this Act and the regulations, the Minister may issue an agreement in respect of a mineral³⁶

- (a) on application, if the Minister considers the issuance of the agreement warranted in the circumstances,
- (b) by way of sale by public tender conducted in a manner determined by the Minister, or
- (c) pursuant to any other procedure determined by the Minister.

In practice, the majority of oil sands rights are disposed of through the second method of a sale by public tender. Although direct purchases under subsection 16(a) are possible in two circumstances, a number of criteria must be met to bypass the tender process.³⁷

The public tender process for oil sands is the same as for conventional petroleum and natural gas. Public offerings are scheduled to be held every 2 weeks and notices of the rights to be offered are published on Alberta Energy's website and in paper copy, 8 weeks prior to the sale. Interested parties submit confidential bids electronically by noon on the day of the sale, and the highest bidder is awarded the oil sands rights. In exchange for the rights, the company must pay a bonus payment, a fee, an annual rental, and ultimately, a royalty on recovered minerals. After each sale, the name of the successful bidder and the bonus amount paid for each parcel are published on Alberta Energy's website. The posting cycle for a public offering normally takes about 17 weeks.³⁸

Oil sands rights are offered for tender only if requested by industry. Alberta Energy examines the requested rights to ensure they are still available, and then refers the request to the Crown Mineral Disposition Review Committee (CMDRC). According to a

³⁴R.S.A. 2000, c. M-17; A.R. 50/2000; A.R. 262/97, respectively.

³⁵*OSTR*, s. 4.

³⁶A "mineral" includes oil, bituminous sands, and oil sands: *MMA*, s. 1(1)(p).

³⁷For example, in direct purchases, the minimum bid amount is fixed and is not negotiable. The two circumstances in which Alberta Energy will consider direct purchases are: (a) to facilitate a company to acquire oil sands rights in a drilling spacing unit; and (b) to facilitate common ownership of oil sands rights and natural gas rights. See Alberta Energy, *Alberta Oil Sands Tenure Guidelines: Principles and Procedures* (Edmonton: 15 June 2006), online: <<http://www.energy.gov.ab.ca/187.asp>>.

³⁸See Alberta Energy, *ibid.*

provincial website, the CMDRC is an interdepartmental committee with representatives from the Departments of Sustainable Resource Development, Environment, and Community Development, as well as from the EUB and the Municipal Affairs Special Areas Board.³⁹ According to Alberta Energy, the Committee's responsibility is to identify any surface access restrictions (as required by current law or policy) capable of affecting mineral exploration and development activities, and to provide the Department with full information on the nature of the restrictions. For example, seasonal access restrictions for the protection of wildlife habitats should be identified and referred back to Alberta Energy. The requesting company is advised of any access restrictions that will be attached to the rights when they are posted and issued. If the company wishes to proceed, a notice of public offering for the rights is posted. The party that requested the posting is expected to bid when the requested rights are made available at the public offering.⁴⁰

3.2.1. *Permits and Leases*

Agreements granting oil sands rights take the form of either permits or leases. Alberta Energy typically allows applicants to choose whether they wish a permit or a lease agreement to be posted.⁴¹

Permits are issued for 5-year terms.⁴² During its term, the holder can apply to convert the permit into a primary lease of oil sands rights.⁴³ To do so, a number of criteria must be met, especially proof of the minimum level of evaluation required under the regulation. This requires the drilling of evaluation wells for the purposes of assessing the oil sands zones in the permit.⁴⁴

Alternatively, oil sands rights may be offered by way of a primary lease. These are issued for terms of 15 years.⁴⁵ A primary lease may be continued through an application brought within the last year of the lease's term, or earlier with the Minister's consent. Two criteria are used to determine whether a primary lease will be approved for

³⁹ Alberta Sustainable Resource Development (SRD), "Crown Mineral Disposition Review Committee", online: <<http://www.srd.gov.ab.ca/lands/usingpublicland/oilgasmineralexploration/cmdrc.aspx>>.

⁴⁰ If not, a penalty is charged for each parcel requested that is not sold: Alberta Energy, *supra* note 37.

⁴¹ Alberta Energy, *supra* note 37 at 3-3. For a discussion of earlier types of disposition agreements, see: Alberta Energy, *Alberta's Oil and Gas Tenure 2005*, online: <http://www.energy.gov.ab.ca/docs/tenure/pdfs/tenure_brochure.pdf>.

⁴² *OSTR*, s. 7.

⁴³ *OSTR*, s. 8(1).

⁴⁴ *OSTR*, ss. 8(1), 9 and 3. For details on the required minimum level of evaluation, see: "Chapter 4 – Evaluation Leases and Permits" in Alberta Energy, *supra* note 37.

⁴⁵ *OSTR*, s. 12.

continuation: (a) the extent to which the lessee has evaluated the oil sands covered by the lease; and (b) whether or not the lease is producing.⁴⁶ When the required minimum level of evaluation is achieved, continuations are granted for an indefinite period.⁴⁷

Where a lease is continued, it is classified as producing or non-producing. A producing lease is one in which oil sands, in the opinion of the Minister, are being produced from a zone or zones in the location of the lease.⁴⁸ Alberta Energy has developed guidelines for the minimum level of production that must be achieved to allow for the assignment of producing status.⁴⁹ If the required level is not attained, a lease is subject to escalating rent under the *OSTR*. If it has reason to question the producing status of a lease, Alberta Energy may give notice to the lessee of a change to non-producing status. Lessees are also entitled to apply to have their leases reclassified from non-producing to producing.⁵⁰

3.2.2. Bonus Bid Amounts, Annual Rentals and Royalties

In exchange for receiving oil sands rights, tenure holders owe bonus bid payments, annual rentals, and royalties to the province. The bonus bid amount is the amount the province obtains from the highest bidder when the oil sands rights are sold through the public auction process. Annual rent is payable on all oil sands agreements.⁵¹ For non-producing continued leases, an additional charge in the form of escalating rental is payable annually under section 15 of the *OSTR*.⁵² Escalating rent can be reduced, or offset, by specified research, exploration and development costs or upgrader credits as set out in the regulation.⁵³

The royalty regime for oil sands is administered by Alberta Energy under the *MMA* and the *Oil Sands Royalty Regulation, 1997*.⁵⁴ Section 33 of the *MMA* provides for a royalty to be reserved to the province on any mineral recovered pursuant to an agreement

⁴⁶*OSTR*, s. 13.

⁴⁷ Alberta Energy, *supra* note 37. See also *OSTR*, s. 3.

⁴⁸*OSTR*, s. 1(1)(q).

⁴⁹See “Chapter 5: Assessing Production” in Alberta Energy, *supra* note 37.

⁵⁰*OSTR*, ss. 21 and 22.

⁵¹The rate is currently set at \$3.50 per year for each hectare in the area of the location of the agreement, subject to a minimum of \$50 per year: *Mines and Minerals Administration Regulation*, s. 20.

⁵²See also s. 6 of the *OSTR*.

⁵³*OSTR*, ss. 16 to 20.

⁵⁴A.R. 185/97.

disposing of mineral rights under the Act. In 1997, a generic royalty regime was established for oil sands operations based on recommendations from a joint industry/government task force. Previously, unique royalties were negotiated on a project by project basis. The generic royalty regime is based on a revenue-less-cost calculation. In the early years of a project, the royalty rate is lower than the rate that is applied after capital investment and other costs are recovered. Prior to a project's "payout" (the point at which the developer has recovered all allowable costs plus a return allowance), the applicable royalty is one percent of the project's gross revenue. Following the project's payout, the applicable royalty rate is the greater of 25 percent project net revenue, or one percent of gross revenue. According to the government, the generic oil sands royalty was specifically designed to encourage development of Alberta's oil sands resource, because it takes into account technological risks and capital costs faced by oil sands developers.⁵⁵

3.2.3. Issues with the Current Process for Disposing of Alberta's Oil Sands Rights

Increasingly, stakeholders are viewing the sale of rights to develop provincially-owned natural resources as a critical first step in the development process. Although there is no guarantee that development will ultimately occur, it has been noted that the tenure process is a critical decision point in terms of directing the timing, location and intensity of development. The rate at which oil sands rights are sold inevitably drives the pace at which exploration and development will take place. Numerous commentators have argued that the granting of the rights "kick-starts" the exploration and development activities of the company holding the rights, and creates legal and political pressures to allow the company to exercise its property rights.⁵⁶ As stated by S. Kennett and M. Wenig, "the granting of mineral rights creates a snowballing effect that leaves regulators like the EUB hard pressed to adopt any kind of limitations that would effectively preclude the exercise of those rights."⁵⁷

⁵⁵See: Alberta Energy, *supra* note 31; and *Alberta Oil Sands Consultation Fact Sheet*, "Oil Sands Royalties", online: <<http://www.oilsandsconsultations.gov.ab.ca>>. For details on the generic regime as well as royalty rates for projects not subject to this regime, see: Alberta Energy, *Alberta Oil Sands Royalty Guidelines: Principles and Procedures* (Edmonton: 1 June 2006).

⁵⁶See generally: J.P. Holroyd, S. Dyer & D. Woynillowicz, *Haste Makes Waste: The Need for a New Oil Sands Tenure Regime* (Drayton Valley: Pembina Institute, 2007); S. Kennett & M. Wenig, "Alberta's Oil and Gas Boom Fuels Land-Use Conflicts — But Should the EUB Be Taking the Heat?" (2005) 91 *Resources* 1; Wenig & Quinn, *supra* note 22; M. Wenig, "Who Really Owns Alberta's Natural Resources?" (2004) 28 *LawNow* 39; R. Williams, "The Conflict Between the Oil and Gas Industry and Agricultural Landowners — the Major Issues and Some Legal Recommendations to Resolve It" (2002) 17:2 *News Brief* (Edmonton: Environmental Law Centre); and Farr *et al.*, *supra* note 22.

⁵⁷Kennett & Wenig, *ibid.* at 5.

The fact that the rights disposition process creates legally-enforceable property rights is highlighted every time the EUB, at the project approval stage, relies on their existence to justify the need for the proposed project. In the Board's view, a company's ability to exercise oil and gas rights it has purchased from the government is a "compelling component" in the Board's determination of need.⁵⁸ At the end of the day, all other factors being equal, commentators have noted that this "need" can tilt the EUB's public interest calculation in favour of approving a project.⁵⁹ Similarly, the existence of rights to subsurface minerals can influence decision making with respect to allowing access to the surface of public lands to exercise those rights as well.

Given the importance of the mineral rights disposition stage to oil sands development, a number of concerns about the current regime have been raised. By far the most widespread criticism relates to the lack of any public participation in the mineral rights disposition process. The entire process occurs without public participation and outside of public scrutiny. Alberta Energy's current notices of public offering are highly technical, and largely inaccessible by a non-industry audience. Neither Alberta Energy nor the CMDRC allow for public representations to be made prior to dispositions. The membership of the CMDRC does not include representatives of the general public or non-governmental representation and there is no readily-accessible public record of the Committee's deliberations and decisions.⁶⁰ Recent requests made to Alberta Energy by conservation groups to allow for input into rights disposition decisions with respect to a protected natural area of the province were denied.⁶¹

Commentators argue that the lack of public consultation in the rights disposition process is inconsistent with the public nature of Alberta's oil and gas resources. It is also inconsistent with the public nature of Alberta's air, water and land that is impacted by oil and gas development. They argue for greater openness and transparency, and an increase in public participation in the disposition granting process, both for affected landowners but also for the public at large. This would ensure that public concerns about the economic, social and environmental impacts of development could be heard early on in the development process.⁶²

⁵⁸See, for example, EUB Decision 99-16: *Canadian 88 Energy Corp. Application to Drill a Level 4 Critical Sour Gas Well Lochend Field* (7 July 1999).

⁵⁹Kennett & Wenig, *supra* note 56.

⁶⁰See generally *supra* note 56. See also N. Vlavianos, "Public Participation and the Disposition of Oil and Gas Rights in Alberta" (2007) 17 J.E.L.P. 205.

⁶¹See "CBM Drilling in Natural Area Ignores Public Interests, Conservation Groups Say" (2007) 17:17-8 EnviroLine Online at 6.

⁶²See generally *supra* note 56.

An information letter recently issued by Alberta Energy suggests that the department may be responding to some public consultation concerns.⁶³ The letter cautions prospective purchasers of all oil and gas (including oil sands) rights to assess fully their opportunities for surface access when formulating bonus bids. To this end, it states that “consultation with the relevant municipal government, provincial department, reclamation officer, and landowner and occupant is also strongly recommended.” No specific guidance is provided on this consultation, however; nor is there any reference to a need for some type of public participation in the actual mineral rights disposition process.

The lack of adequate guidance for resource development in the province from a comprehensive oil sands (or energy) policy and from land-use plans was noted above. There is also insufficient legislative and regulatory guidance on what, if any, factors Alberta Energy must consider in deciding whether and when to issue oil sands tenures. There are no guidelines, factors or purposes set out in the relevant legislation and regulations to guide oil sands tenure decision making. The *MMA* simply grants wide discretion to the Minister to dispose of the province’s oil sands rights without guidance on how that discretion is to be exercised.

Alberta Energy has said that, when making decisions about the development and management of the Alberta’s oil sands, it is guided by the principles of sustainability and integrated resource management.⁶⁴ It is difficult to delineate, however, whether and how these broad statements of principle translate into specific factors that the Minister considers when disposing of oil sands rights. Other than price and possible surface restrictions identified by the CMDRC, there are no factors mentioned in the guidelines Alberta Energy has developed for the oil sands tenure process.⁶⁵ One of the goals of *Alberta’s Commitment to Sustainable Resource and Environmental Management* is for government to ensure that “[e]nvironmental decisions will take into account economic impacts and economic decisions will reflect environmental impacts.”⁶⁶ With the exception of the limited restrictions identified by the CMDRC, there is no indication that Alberta Energy consults with other provincial departments with environmental and natural resource mandates in the province, or considers these factors on its own accord.

As noted, the only coordination that occurs is through the interdepartmental representatives who sit on the CMDRC. But both the nature and mandate of this Committee have been seriously questioned. Given the lack of any public record of the

⁶³ Alberta Energy, Information Letter 2007-21: *Crown Mineral Rights; Identification of Major Surface Concerns in Public Offering Notices* (27 June 2007).

⁶⁴ See Alberta Energy, *supra* note 37 at 1-6, where it is stated that the principles outlined in Government of Alberta, *supra* note 20 are used to guide disposition decisions.

⁶⁵ Alberta Energy, *ibid.*

⁶⁶ Government of Alberta, *supra* note 20 at 4.

Committee's deliberations or its final recommendations, or even the identity of its members, commentators have noted that there is no way to verify whether the Committee in fact meets to review each and every request for rights prior to postings being made by Alberta Energy.⁶⁷ As well, the short time available for the Committee's review, its lack of human resources, the inadequate information base available for it to evaluate proposed offerings, and its purely advisory function have all been identified as significant problems.⁶⁸ Finally, as noted, the CMDRC's environmental review is limited to a general assessment of surface access restrictions that are identified in current law or policy which relate to the land under which the subsurface rights are to be sold. The Committee does not consider broad environmental or social impacts, much less cumulative impacts; nor is there proper integration with the disposition processes for other natural resources (forestry, for example) in the affected area.⁶⁹ At the end of the day, critics agree that the current lack of both a transparent environmental management framework and up-to-date land-use plans for the oil sands areas means that tenure decisions are being made in a vacuum without any guidance on where, when and how quickly oil sands development will (or should) take place.

Still other criticisms of the current oil sands tenure regime relate to the built-in incentives that encourage aggressive exploration and development even in the absence of a plan, and in the absence of adequate management of cumulative environmental and social impacts.⁷⁰ As noted, the permits and leases granted to oil sands companies have specific requirements and timelines attached with respect to minimum levels of exploration. If the minimum level is not met, a permit will not be converted to a lease, and a primary lease will not be continued. Further, a non-producing continued lease is subject to penalties by way of annual escalating rentals. The incentives to explore and to produce are clear. Indeed, Alberta Energy has acknowledged that "[o]ne of the goals of Alberta's oil sands tenure system is to ensure that oil sands agreements are in the hands of those who are committed to develop them."⁷¹

Critics also point to the generic royalty regime as a built-in incentive that is promoting rapid and intense development. Specifically created to stimulate the development of Alberta's oil sands, commentators are questioning the current validity of the royalty regime's goal. They question the appropriateness of promoting development on a massive scale given the significant environmental, social and infrastructure challenges currently facing the oil sands regions in the province.⁷² Finally, it has been

⁶⁷See Wenig & Quinn, *supra* note 22 and Wenig, *supra* note 56.

⁶⁸See in particular, Farr *et al.*, *supra* note 22, and generally *supra* note 56.

⁶⁹See especially Ross, *supra* note 22, and generally *supra* note 56.

⁷⁰See in particular, Holroyd, Dyer & Woynillowicz, *supra* note 56.

⁷¹Alberta Energy, *supra* note 37 at 6-1.

⁷²See especially Holroyd, Dyer & Woynillowicz, *supra* note 56.

argued that the favourable royalty regime for oil sands development has resulted in the owners of the resource (*i.e.*, the Alberta public) not receiving their fair share from the disposition of this natural resource.⁷³

Recently, the Alberta government has agreed to review the province's oil and gas royalty system, including rates applicable to oil sands production. A committee has been struck to consult with Albertans and provide recommendations to the government.⁷⁴

3.3. Access to the Surface of the Land under the *Public Lands Act*

Most of the land under which oil sands are located in Alberta is provincially-owned public land which is managed under the *Public Lands Act (PLA)*.⁷⁵ Under this Act, authorization to access public lands for oil sands development is required for both oil sands exploration activities and subsequent production operations. The legislative and regulatory regime for each set of activities is discussed below.

3.3.1. Oil Sands Exploration

Companies wishing to conduct exploration to assess the nature and extent of the oil sands in a particular location of public lands are required to obtain an approval from Alberta Sustainable Resource Development (SRD), the department responsible for administering the *PLA*. Ownership of oil sands rights is not a prerequisite to obtaining surface access to public lands for exploration purposes.

The current legislative and regulatory framework for oil sands exploration approvals is not easy to track. Several acts, regulations and an AENV code of practice are involved. In contrast to exploration activities for conventional oil and gas exploration, no detailed legislative or regulatory scheme for approvals for oil sands exploration exists. While

⁷³See: A. Taylor & M. Reynolds, *Thinking Like an Owner: Overhauling the Royalty and Tax Treatment of Alberta's Oil Sands*, Oil Sands Issue Paper No. 3 (Drayton Valley: Pembina Institute, 2006); and A. Taylor, *Blueprint for Conducting Sound Royalty Reform in Alberta* (Drayton Valley: Pembina Institute, 2007).

⁷⁴Alberta Government, "Expert panel to examine Alberta's royalty regime", News Release, 16 February 2007.

⁷⁵R.S.A. 2000, c. P-40. Other legislation regulating activities on specific types of public land might also be applicable to oil sands operations. See, for example, the *Provincial Parks Act*, R.S.A. 2000, c. P-35, the *Historical Resources Act*, R.S.A. 2000, c. H-9, and the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, R.S.A. 2000, c. W-9. Although some other types of ownership exist in the oil sands areas, notably some private lands (in the Peace River and Cold Lake areas) and some federal lands, they will not be discussed here.

conventional oil and gas exploration is subject to Part 8 of the *MMA* and the *Exploration Regulation*⁷⁶ (which sets out a licensing and approval process), oil sands exploration activities are exempted from this framework. Rather obscurely, the exemption for oil sands exploration is located in the *Metallic and Industrial Minerals Exploration Regulation (MIMER)*,⁷⁷ a regulation which applies to minerals such as gold, silver, uranium, but not to petroleum, bituminous sands, or oil sands.⁷⁸ Subsection 2(c) of the *MIMER* says that any operation conducted to determine or evaluate the presence, extent, nature or quality of oil sands is exempted from Part 8 of the *MMA*, and thus, from the *Exploration Regulation*.

According to SRD's website, oil sands exploration activities on public lands are approved under the *PLA* and SRD provides a "one-window" application process for these approvals.⁷⁹ SRD's authority to issue oil sands exploration approvals is probably found in subsection 20(1)(a) of the *PLA* which empowers the Minister (of SRD) to authorize any person to "enter on and occupy public land for a stated period" in order to conduct "appraisals, inspections, analyses, inventories and other investigations of the natural resources that may exist on the land". The Minister may also authorize any person to enter on and occupy public land "for a stated purpose" pursuant to subsection 20(1)(c) of the Act. No regulations have to date been enacted under the *PLA* with respect to the requirements and application process for oil sands exploration approvals. The only regulation applicable to oil sands exploration approvals appears to be the *Exploration Dispute Resolution Regulation*⁸⁰ which outlines a dispute resolution procedure for land-use concerns that arise between exploration approval holders and agricultural leaseholders of public lands. Subsection 1(h) of the *Exploration Dispute Resolution Regulation* defines an "exploration approval" as either an approval issued pursuant to Part 8 of the *MMA* [which is, as noted, not applicable to oil sands exploration activities], or an authorization for the purposes of exploration issued under section 20 of the *PLA* [*i.e.*, the likely source for SRD's issuance of oil sands exploration approvals].

SRD has drafted a Handbook to serve as a guide for "all industrial and commercial ventures on public lands".⁸¹ The Handbook stresses the importance of planning to

⁷⁶ A.R. 28/2006.

⁷⁷ A.R. 213/98.

⁷⁸ For a definition of "metallic and industrial minerals", one must go to s. 1(j) of a different regulation, the *Metallic and Industrial Minerals Tenure Regulation*, A.R. 145/2005. The definition for "metallic and industrial minerals" in the *MIMER* refers to a definition in a regulation — the *Metallic and Industrial Minerals Regulation*, A.R. 66/93 — which is no longer in force.

⁷⁹ SRD, "Major Industrial Projects", online: <<http://www.srd.gov.ab.ca/lands/usingpublicland/oilgasmineral/exploration/majorindustrialprojects.aspx>>.

⁸⁰ A.R. 227/2003.

⁸¹ SRD, *Public Lands Operational Handbook* (December 2004) (SRD's Handbook), online: <http://www.srd.gov.ab.ca/lands/formspublications/managingpublicland/pdf/PL_Handbook.pdf>.

mitigate environmental and other impacts, and refers proponents to numerous policy documents and statutes/regulations that must be consulted when planning industrial activities on public lands. It provides guidelines on a number of planning matters, including excavation and site disturbance, soil management, vegetation management, water management, waste management and reclamation. Although the Handbook's primary focus is to assist with applications for surface dispositions under the *PLA* for production operations (discussed in Part 3.3.2 of this paper), the Handbook also refers to exploration activities on public lands. One of the Handbook's guiding principles is to ensure that proponents conduct “*exploration, development and reclamation operations*” in a “manner consistent with established departmental objectives, standards, policies and guidelines for public lands.”⁸² The Handbook also says that the *PLA* approval in respect of oil sands exploration programs “includes a set of administrative and operating conditions to ensure the acceptable use of lands.”⁸³ Such exploration approvals are issued for one year with time extensions and amendments being approved “as appropriate.”⁸⁴ Thus, it appears that SRD's Handbook outlines the factors and criteria SRD will consider when issuing oil sands exploration approvals.

But the Handbook also states that “exploration program approvals” for oil sands exploration programs are issued by SRD on public lands “under the *Code of Practice for Exploration Operations*, pursuant to *EPEA (Environmental Protection and Enhancement Act)*.”⁸⁵ And the Handbook confusingly lists “oil sands exploration programs” under the heading of “Authorities under other Acts and their regulations” and not under the category relating to *PLA* approvals.⁸⁶ The suggestion is that oil sands exploration approvals are not issued pursuant to the *PLA*, but rather pursuant to the *EPEA*. This directly contradicts a prior reference in the same paragraph that refers to an oil sands exploration approval as a “*PLA* approval”.

The *Code of Practice* referenced in SRD's Handbook is administered by AENV, not SRD, and is issued pursuant to the *EPEA*, also administered by AENV. AENV's jurisdiction in the context of oil sands exploration is engaged because the “conduct or reclamation of an exploration operation” is an activity in respect of which notice must be given to AENV pursuant to the *EPEA*.⁸⁷ An “exploration activity” is defined in the relevant regulation as including “any investigation, work or act to determine the presence

⁸² *Ibid.* at 3 [emphasis added].

⁸³ *Ibid.* at 75.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* at 75. AENV, *Code of Practice for Exploration Operations* (September 2005) (*Code of Practice*). The *EPEA* is the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, Alberta's main environmental protection legislation. It is discussed in Part 3.4.2 below.

⁸⁶ *Supra* note 81 at 69 and 75.

⁸⁷ *EPEA*, s. 87.

of (...) oil sands by test drilling, excavation or other means that results in surface disturbance or that may cause an adverse effect”.⁸⁸ Thus, notice of impending oil sands exploration activities must be given to AENV under the *EPEA*. Since SRD provides a “one window” process for exploration approval applications, presumably the notice to AENV is given by SRD.

The *Code of Practice* is adopted by reference under the *Conservation and Reclamation Regulation (CRR)*,⁸⁹ whose own legal authority stems from section 38 of the *EPEA*. Section 38 authorizes the incorporation by reference into a regulation of AENV guidelines, codes of practice, and standards. Subsection 3.1(2) of the *CRR* states that a person who, pursuant to a notice required under the *EPEA*, conducts or reclaims an oil sands exploration operation must comply with the requirements set out in the *Code of Practice*. The *Code of Practice* includes operating guidelines and outlines the application information requirements. This information must be submitted to AENV a minimum of two weeks before commencing the exploration operation. As part of the application, the *Code of Practice* requires the preparation of an activities plan, including information about the land such as its boundaries, its ownership, its current land use (including a summary of any land-use planning policies, municipal plans and land-use bylaws, integrated resource plans, and wildlife management plans in effect in the area), the location of areas where exploration will be conducted, and the areas disturbed to date. The activities plan must also describe the proposed exploration operation, including information about the proposed time schedule, the type of drilling and support equipment to be used, procedures to be used to contain and dispose of drilling fluids and cuttings, to salvage topsoil, and proposed reclamation procedures and time lines.

3.3.1.1. *Issues with the Current Oil Sands Exploration Approval Process*

To delineate the current process for the approval of oil sands exploration activities on public lands in the province a number of statutes (*PLA*, *MMA*, the *EPEA*), regulations (*ADR*, *CRR*, *MIMER*, *Code of Practice*) and policy documents (SRD’s Handbook) must be consulted. Even after doing so, uncertainty remains with respect to the division of labour between SRD and AENV and with respect to what criteria or factors are guiding decision making in the oil sands exploration context.

Based on the information available, four different scenarios are possible. First, it may be that SRD approves of oil sands exploration activities pursuant to the *PLA* and the guidelines and factors set out in SRD’s Handbook. Second, SRD may issue the approvals pursuant to the *PLA* but use the criteria and requirements set out in AENV’s *Code of*

⁸⁸ *Activities Designation Regulation (ADR)*, A.R. 276/2003, s. 4(a.1).

⁸⁹ A.R. 115/93, s. 3.1(1).

Practice. Third, it is possible that SRD uses both the Handbook and the *Code of Practice* as guidance in its exploration approval decision-making process. Lastly, it is possible that SRD and AENV are engaged in two distinct review processes, one under the *PLA* with guidance from SRD’s Handbook, and the other pursuant to the *EPEA* with guidance from the *Code of Practice*.

In any of these scenarios, the division of labour as between SRD and AENV is not obvious. If SRD uses only its Handbook, how is that process coordinated with the requirement to give AENV notice and to follow the *Code of Practice* under the *EPEA*? If SRD follows the *Code of Practice*, does this mean that AENV has delegated to SRD its own “notice review” function pursuant to the *EPEA*? If SRD uses both its Handbook and the *Code of Practice*, how is this process coordinated with AENV’s “notice reviews” under the *EPEA*? Is SRD’s approval contingent on a favourable review by AENV, for example? Finally, if there are two distinct processes for reviews of oil sands exploration activities, one conducted by SRD and the other by AENV, what happens in the case of disagreement between the departments? Does one department’s decision trump that of the other?

While in principle there is nothing wrong with one government department (*i.e.*, SRD) relying on the guidance of another (*i.e.*, AENV’s *Code of Practice*), such a process should be a clear and transparent one. The roles of each department and how their functions relate to each other in this process should be apparent. Where they are not, questions will inevitably arise about how the process is actually working in practice, its effectiveness, and the accountability of the departments involved.

Adding to the lack of transparency in the current oil sands exploration approval process is the fact that there does not appear to be any public involvement or representation of any kind in the current decision-making process. Whatever review takes place is clearly an interdepartmental one between SRD and AENV. There is no readily accessible information available about such a review, but if it occurs, it does so informally. There are no legal requirements for such an interdepartmental review, nor is a coordinated review spelled out in SRD’s Handbook, AENV’s *Code of Practice*, or any other materials posted on either department’s website. There is also a lack of available information about coordination with other departments or local governments whose mandates might be affected by oil sands exploration activities.⁹⁰

Finally, the lack of general land-use plans for the oil sands areas discussed in Part 3.1 above undoubtedly impacts the exploration stage in the current oil sands development process. As with the sale of the mineral rights to produce oil sands, approvals to access the surface of public lands for oil sands exploration activities are currently being issued in

⁹⁰Requests were made to SRD and AENV to discuss the current process for oil sands exploration approvals. No response was received.

the absence of a comprehensive and integrated framework that includes details about acceptable uses of land, and ecological limits and thresholds. Indeed, a review of both SRD's Handbook and AENV's *Code of Practice* leaves a strong impression that, as long as the informational requirements have been fulfilled, and the required mitigative measures are (or will be) in place, the exploration program will be approved. There is no discussion about guidelines or grounds upon which an exploration approval can or will be refused. As long as the required technical requirements are met, it appears that exploration approvals will be granted, subject to any terms and conditions SRD (and perhaps AENV) may attach.

3.3.2. The Disposition of Surface Rights for Oil Sands Production on Public Lands

As with access to public lands for oil sands exploration activities, the disposition of surface rights for oil sands production operations is administered by SRD. When oil sands tenures are granted, Alberta Energy cautions bidders that there is no guarantee that SRD will grant surface access.⁹¹ Since most of Alberta's oil sands are located under public lands that are covered by forest management agreements or timber quotas, consent from forest management agreement and quota holders is also required.⁹²

3.3.2.1. Public Lands Act (PLA)

According to section 47 of the *PLA*, anyone who occupies public land is deemed to be a trespasser unless that person is authorized to do so pursuant to the Act or regulations. Companies wishing to access public lands for oil sands production purposes must obtain a "disposition" from SRD under the *PLA*. The *PLA* defines a "disposition" as essentially any instrument that grants an interest in public land, or a right or privilege in respect of public land. These include leases, licences, permits, and other agreements.⁹³ The Act empowers the Cabinet to make regulations authorizing and governing "dispositions" of public land.⁹⁴ Pursuant to this legislative authority, the *Dispositions and Fees Regulation*

⁹¹ Alberta Energy, *supra* note 37 at 2-3.

⁹² *Dispositions and Fees Regulation (DFR)*, A.R. 54/2000, s. 7(2). As part of its consent, the forest management agreement holder may require special operating conditions, and is entitled to reasonable compensation for loss or damage to timber or improvements: see *supra* note 81 at 74. Forest companies are directed to harvest the land prior to oil sands development. The surface of the land required for development is removed from the land base contributing to the annual allowable cut in the province, to which about 40 percent of the lands in northern Alberta contribute. Once reclaimed, the land will be included again in the land base to determine annual allowable cut levels: see *Alberta Oil Sands Consultation Fact Sheet*, "Forest Management", online: <<http://www.oilsandsconsultations.gov.ab.ca>>.

⁹³ *PLA*, s. 1(e).

⁹⁴ *Ibid.*, s. 8(1).

(*DFR*) allows the SRD Minister to issue leases, permits or other kinds of instruments in respect of public land “for any other purpose for which no disposition is specifically provided” in the *PLA* or in the regulation.⁹⁵

The *PLA* grants the SRD Minister broad authority to subject dispositions to terms and conditions, and empowers the Minister to determine whether these terms and conditions are being performed or complied with.⁹⁶ The Minister may cancel a disposition when the holder fails to comply with its terms and conditions, with the *PLA*, or with the regulations.⁹⁷ The Act further authorizes the Minister to restrict a disposition or withdraw from any disposition any public land in any specified area “in any manner the Minister considers warranted”. The Minister may also prescribe, as to any specified public land or as to public land in any area, when and on what conditions applications for dispositions may be made.⁹⁸

Three types of dispositions are specified under the *DFR* which are relevant to oil sands production operations. These are: a licence of occupation (LOC), a mineral surface lease (MSL), and a pipeline agreement. Of these, the MSL is the most critical, but the other two may be required for certain operations as well.

An LOC authorizes the holder “to use the licensed area for the purpose specified in the licence”.⁹⁹ SRD’s Handbook (discussed above) clarifies that an LOC grants the right to occupy public lands for an approved purpose only, and may be subject to other dispositions granted for the same area. LOCs are used primarily for industrial access roads, but may also be issued for other purposes (for example, water intake/outfall sites, pier sites, airstrips, reservoirs). Where a licence is issued for a commercial roadway, the licence holder must give permission for another commercial user to use the road. If the holder does not grant such permission, SRD may grant a similar licence to another commercial user for that road. The term of the LOC varies depending on the purpose for which it was granted.¹⁰⁰

Depending on the nature of the oil sands project, a pipeline agreement may be required. Subsection 99(1) of the *DFR* authorizes the SRD Minister to enter into an agreement with an operator who requires public land “for the purposes of a pipeline that the operator is authorized to construct” and “for the purposes of a right of way

⁹⁵*DFR*, s. 123.

⁹⁶*PLA*, s. 15(2), s. 44(1).

⁹⁷*PLA*, s. 26.

⁹⁸*PLA*, s. 14(a), (b).

⁹⁹*DFR*, s. 67(1).

¹⁰⁰*Supra* note 81 at 72.

installation that is incidental to the pipeline”.¹⁰¹ An operator must have obtained provincial or federal approval to construct or operate the pipeline prior to applying for a pipeline agreement.¹⁰² A pipeline agreement authorizes the construction of a pipeline or flowline within the right-of-way, and construction of right-of-way installations incidental to the pipeline. The agreement may remain in effect for as long as required. If needed, a pipeline installation lease may also be issued by SRD. This lease grants exclusive surface rights for surface right-of-way installations (generally off the right-of-way) that are incidental to pipeline operations (for example, pumping stations, compressor sites, metering facilities). The maximum term for pipeline installation leases is 25 years, but they are renewable.¹⁰³

The most important public lands disposition in the case of oil sands production operations is the MSL. Section 76 of the *DFR* authorizes the Minister to issue MSLs of public land to “mineral producers” who require the land “for purposes in connection with or incidental to the recovery and production of mines and minerals”. Section 75 defines a “mineral producer” as a person who “has the right to, or the right to work, minerals in or under land in Alberta.” An MSL may not be issued for a term that is greater than 25 years,¹⁰⁴ but this term is renewable according to SRD.¹⁰⁵ According to SRD, MSLs grant “exclusive surface rights” for oil sands mining and *in situ* operations.¹⁰⁶ The MSL includes guidelines to control activities and to protect the environment and may, for example, stipulate requirements such as specific setbacks from rivers or nesting areas. It also may restrict access at specified times of the year. An MSL may include authorization for access roads, eliminating the need to obtain a separate LOC.¹⁰⁷

¹⁰¹ *DFR*, s. 99(1).

¹⁰² *DFR*, s. 98(c).

¹⁰³ *Supra* note 81 at 73.

¹⁰⁴ *DFR*, s. 77.

¹⁰⁵ *Supra* note 81 at 72.

¹⁰⁶ *Ibid.* at 72. Although SRD says that MSLs grant exclusive surface rights to MSL holders, commentators have noted the lack of a specific statutory or regulatory provision to this effect. While the matter may fall within the broad discretion granted to SRD under the *PLA*, the issue is an important one because exclusive surface rights could be an impediment to the sharing of access corridors and infrastructure by industrial users. This could result in an undesirable proliferation of linear corridors and disturbances on public land. See S. Kennett & M. Wenig, *The Legal and Policy Framework for Managing Public Access to Oil and Gas Corridors on Public Lands in Alberta, Saskatchewan and British Columbia* (Calgary: Canadian Association of Petroleum Producers, May 2004) at 25.

¹⁰⁷ There is a lack of explicit regulatory guidance on whether an MSL or an LOC is the preferred legal instrument for oil and gas access roads. Since SRD says it grants exclusive rights through MSLs, the distinction may be important, again from the point of view of the proliferation of corridors on public land. See *ibid.*

A further type of disposition not specified in the *DFR* may be relevant in the oil sands context. SRD's practice has been to use a "miscellaneous lease agreement" for a variety of purposes including commercial sites, refineries, processing plants, mills and plant sites.¹⁰⁸ Miscellaneous leases are normally issued for 10 years, with the maximum term being 25 years (but renewable).¹⁰⁹ In the oil sands context, SRD approves oil sands mine developments and heavy oil/*in situ* oil sands projects under MSLs, but plant sites, if separate from the production operations, may be issued under a miscellaneous lease agreement.¹¹⁰

All surface rights dispositions issued by SRD will include "a set of administrative and operating conditions to ensure acceptable use of the land".¹¹¹ For example, there may be specified setbacks from rivers and nesting areas, and access may be restricted during certain times of the year. Access restrictions identified at the mineral rights disposition stage by the Crown Mineral Disposition Review Committee (and attached to the mineral rights disposition) should also be included in the surface disposition instrument.¹¹² In addition, the land may include historical sites and areas that are protected under the *Historical Resources Act*.¹¹³ Where an activity is likely to alter, damage or destroy a historical resource, the governmental department that administers that Act (currently Alberta Community Department) may require the preparation of a historical resources impact assessment and the acquisition of a clearance letter to proceed with development.

3.3.2.2. *Surface Rights Act (SRA)*

As noted, the Minister of SRD has broad discretionary powers to dispose of surface rights on public lands. In the context of oil and gas development, however, those powers are significantly circumscribed by the *Surface Rights Act (SRA)*.¹¹⁴ As relevant here, the *SRA* prohibits the holders of mineral rights — termed "operators" under the Act — from entering on land surfaces for purposes of exercising those rights without first obtaining the "consent" of the owner or occupier of that land or, if such consent is denied, pursuant

¹⁰⁸*Supra* note 81 at 72.

¹⁰⁹*Ibid.*

¹¹⁰See SRD, "Major Industrial Projects", online: <<http://www.srd.gov.ab.ca/lands/usingpublicland/oilgasmineral/exploration/majorindustrialprojects.aspx>>.

¹¹¹*Supra* note 81 at 69.

¹¹²See Ross, *supra* note 22 and Environmental Law Centre, *supra* note 22.

¹¹³R.S.A. 2000, c. H-9.

¹¹⁴R.S.A. 2000, c. S-24. The *SRA* applies to all public and private lands in the province, except land within a Métis Settlement: s. 2(1).

to a “right of entry order” issued by the Alberta Surface Rights Board (SRB). The *SRA* includes a similar prohibition for pipeline owners or operators.¹¹⁵

The *SRA* empowers the SRB to make orders granting rights of entry “in respect of the surface of the land in which the operator has the right to the mineral or the right to work a mineral”. The Board may also make orders respecting any other land that is necessary for: (a) a road to connect the operator’s mining or drilling operations located on adjacent land and to permit the operations to be operated jointly, and for the tanks, stations and structures to be used in operations; and (b) to give the operator access to its mining and drilling operations from a public roadway or other public way, and egress from the operations to the public roadway or other public way. For oil sands operations, a specific provision allows rights of entry to be granted for roads to give the operator additional access to and egress from the operations, for the disposal of overburden incidental to the operations, and for the disposal of tailings and other materials resulting from the operations. This is irrespective of whether the owner or occupant of the other land is the owner or occupant of the surface of the land in which the operator has the right to the mineral or the right to work the mineral.¹¹⁶

Where the SRB receives an application for a right of entry order relating to operations that require a licence or approval from the EUB, the SRB may request the EUB to provide it with a copy of the licence or approval and any other information that is relevant to the right of entry.¹¹⁷ Although the SRB may subject a right of entry order to “any conditions it considers appropriate”, subsection 15(6) creates a critical limitation on the powers of the SRB in the case of EUB licences and approvals. The closing words of subsection 15(6) state that “where the activity the operator proposes to engage in is the subject of a licence, permit or other approval granted by the [EUB], and that board has provided the [SRB] with a copy of the licence, permit or other approval, the SRB shall ensure that the right of entry order is not inconsistent with the licence, permit or other approval.”. In short, where the EUB has issued a licence or approval, the SRB cannot refuse to issue a right of entry order. It must issue a right of entry order that is consistent with the EUB licence or approval.

The effect of this legislative scheme means that SRD is limited in its ability to refuse consent to access public lands in the case of oil and gas, including oil sands,

¹¹⁵*SRA*, ss. 1(h), 12 and 15(1).

¹¹⁶*SRA*, ss. 12(3)(a)-(b).

¹¹⁷*SRA*, s. 15(3). Where the right of entry application pertains to an oil and gas well site, a battery site, or a pipeline, regulations specify that the applicable EUB licence or approval must accompany the application: *Surface Rights Act General Regulation*, A.R. 189/2001, s. 4(1). In applications before it the EUB typically requires proof of surface access approval, but this cannot be the case where surface access has not yet been obtained. In such cases, the EUB approval would precede the acquisition of surface rights and the proponent would then seek a right of entry order from the SRB.

development. Even though the *PLA* says that SRD may refuse an application for a disposition of public land, and that the Minister may restrict a disposition or “withdraw from disposition any public land in any specified area in any manner the Minister considers warranted”,¹¹⁸ the effect of the *SRA* is that SRD’s refusal to allow access would be overruled by a SRB right of entry order in cases where the EUB has issued a licence or approval for the proposed project. A cynic might say that this explains why surface dispositions “are ordinarily granted” by SRD in the context of oil sands production operations.¹¹⁹ Although it is unclear whether SRB would in practice interfere with SRD’s authority to manage Alberta’s public lands, the potential limitations on SRD’s powers under the current statutory regime are troublesome.

3.3.2.3. *Issues with the Current Surface Rights Disposition Process*

The legislative scheme set out in the *SRA* outlined above has the potential to significantly restrict SRD’s ability to refuse to allow surface access for oil sands operations, or to place restrictions that would effectively impede such operations. Consequently, SRD’s role in this context may be limited to granting access to the surface as required for the operations and placing certain terms and conditions on that access. An interesting question arises as to what the effect of such terms and conditions would be if they severely affected an operator’s ability to carry out its proposed operations as approved by the EUB. The ability of operators to obtain right of entry orders from the SRB upon obtaining EUB approval means that, practically-speaking, the EUB, and not SRD, is the ultimate arbiter over surface access for oil and gas development on public lands in Alberta. Consequently, the role and powers of SRD in the context of oil sands development are not as straightforward as they may initially appear to be under the *PLA*.

There are other reasons for the lack of clarity (and therefore, transparency) with the current surface rights disposition process as well. Like the mineral rights disposition stage and the oil sands exploration approval stage, there is no formal process for public participation or consultation at the surface rights disposition stage. Although SRD has issued a statement about public involvement in the use of public lands, it reveals a highly informal and discretionary process. The document grants land managers broad discretion to “assess the need for public involvement” based on a number of factors, including the degree of change to the use of the land, and the amount of public interest that is likely to result from the land-use decision.¹²⁰ Consequently, public consultation may or may not occur in any given case. Further, the level and type of consultation that may occur is

¹¹⁸*PLA*, ss. 16(1) and 14.

¹¹⁹Blake, Cassels & Graydon LLP, *supra* note 11 at 17.

¹²⁰SRD, *Public Involvement in Local Land Use Decision-Making* (July 1997), online: <http://www.srd.gov.ab.ca/lands/formspublications/aboutpublicland/pdf/Public_Involvement_Local_Land_Use_Decision_Making.pdf>.

entirely discretionary. From the information available, there is no indication that public consultation is a regular feature of surface rights disposition decision making in the context of oil sands development on provincial public lands.

The actual decision-making process for granting surface rights dispositions is also highly discretionary. As noted, the *PLA* grants SRD broad authority to dispose of surface rights on public lands. There is, however, little statutory guidance provided for the exercise of these powers. Neither the *PLA* nor the *DFR* offer specific guidance as to the purposes or objectives to be pursued in the allocation of surface rights, nor do they set out any factors the Minister must take into account when making surface rights dispositions. For the key disposition instrument used, the *MSL*, only five very general legislative provisions exist.¹²¹ Moreover, the lack of an integrated land-use planning framework in Alberta and land-use plans for the oil sands areas means that these are not available to guide individual decisions about acceptable and appropriate uses of public lands. In the result, decisions about surface access for oil sands development are being made without an assessment of overall cumulative environmental impacts.¹²²

As noted, some guidance for SRD's decision making can be gleaned from the Handbook it has prepared to assist applicants for surface rights dispositions. The key message of this Handbook is that planning is required as part of the approval process. On the one hand, it specifies a number of guidelines and objectives designed to minimize and manage impacts on public land and the environment. The Handbook outlines the information, including environmental field reports, which must be submitted with disposition applications. In the environmental field report, applicants are to identify environmental issues and describe acceptable methods for addressing them. On the other hand, SRD's Handbook mostly contains permissive statements of what proponents should do, rather than what they must do. For example, with respect to planning for minimal disturbance to wildlife and their habitat, the Handbook states that the "development of new access in an area *should* be minimized where possible."¹²³ The Handbook directs applicants to legislation, regulations and other policy documents/guidelines that should be consulted in the planning and conduct of their operations. Clearly, the obligation is on the applicant to provide the information requested and to ensure that the directions set out in the Handbook are followed. There is no mention of how monitoring or auditing might take place. There is also no mention of circumstances in which SRD might refuse surface access. Again, the impression left by

¹²¹*DFR*, ss. 75-79.

¹²²See generally *supra* note 19.

¹²³*Supra* note 81 at 22 [Emphasis added].

the document is that as long as the proponent says it has plans in place to mitigate concerns, a surface disposition will be granted.¹²⁴

Another concern with the current process is that it is not entirely clear who is involved in reviewing the application prior to SRD making a surface disposition decision. Some commentators state that applications are reviewed by “various government departments” and that, “unless deficiencies are noted, approvals are provided within 15 working days.”¹²⁵ Currently, neither SRD’s Handbook nor its website discusses this interdepartmental review. It is certainly not set out in the applicable legislation or the regulations. Whatever review occurs is an informal one, and it is not clear that the review occurs each and every time a surface rights disposition application is brought. To the contrary, SRD’s Handbook refers only to an internal review of applications, involving resource and land managers and land administrators within SRD.¹²⁶ What is mentioned with respect to other departments is that proponents should be aware that their operations may require other approvals. For example, the Handbook notes that an approval from AENV is required if the proposed activity will involve disturbing the bed and shore of a water body.¹²⁷ Another document refers to SRD consulting with local municipalities on “most applications” for surface rights disposition applications before making a decision.¹²⁸ The document does not, however, provide any information about how or when this consultation occurs. The result is an unclear and non-transparent process.

Critics have noted the lack of a statutorily-mandated interdepartmental review process for surface rights dispositions which would ensure integration among decision makers in relation to public lands. The result has been a process that is “incremental, fragmented, uncoordinated”, and which does not “factor in the cumulative impacts of multiple developments on the same land base and the issue of the long-term loss and degradation

¹²⁴Indeed, commentators have noted that Alberta’s general approach to land and resource management has to date been one of mitigation rather than harm prevention. See, for example, R. Schneider, *The Oil and Gas Industry in Alberta: Practices, Regulations, and Environmental Impact* (Edmonton: Alberta Centre for Boreal Research, 2001).

¹²⁵Schneider, *ibid.* at 16. See also J.R. Creasey, *Cumulative Effects and the Wellsite Approval Process* (M.Sc. Thesis, Faculty of Graduate Studies, University of Calgary, 1998) at 66, where the author states that the surface rights application “typically goes through an internal government review process in which the responsible agencies review the application. It is during this stage that the specific conditions are appended to the lease conditions.”

¹²⁶*Supra* note 81 at 7.

¹²⁷*Ibid.* at 8.

¹²⁸SRD, *Co-ordinating Land Use Planning on Public Lands with Municipalities* (Edmonton: 7 September 2006), online: <<http://www.srd.gov.ab.ca>>.

of productive land.”¹²⁹ Because each disposition application is reviewed on an individual basis, the site by site assessment that occurs is conducted “without consideration of the cumulative effects of the activities”.¹³⁰ This missed opportunity is particularly significant given that, at the project approval stage, the EUB typically accepts that surface issues have been resolved through the surface rights disposition process, and that appropriate conditions have been placed on the disposition.¹³¹

3.4. Oil Sands Project Review and Approval

A myriad of legislation and regulations can apply to oil sands production operations at the project approval stage. The key ones in terms of overall project review and approval are discussed here. Administering these key statutes and regulations is the responsibility of two actors, the EUB and AENV. Their roles and mandates are examined below.

3.4.1. Alberta’s Energy and Utilities Board (EUB)

As with all oil and gas development in Alberta, the key regulator of oil sands development is the EUB.¹³² The EUB issues the main approvals for oil sands mining and *in situ* production operations, including approvals for bitumen upgraders, associated facilities and pipelines.¹³³ Terms and conditions specified in project approvals regulate how production will proceed and the way on-going operations will be conducted. After project approval, the EUB has ongoing regulatory authority over oil sands production operations.

The starting point for EUB oversight of oil sands development is the *Oil Sands Conservation Act (OSCA)*.¹³⁴ Pursuant to section 10, no person shall construct any

¹²⁹Ross, *supra* note 22 at 22. See also: R. Schneider, *Alternative Futures: Alberta’s Boreal Forest at the Crossroads* (Edmonton: Federation of Alberta Naturalists and Alberta Centre for Boreal Research, 2002).

¹³⁰Creasey, *supra* note 125. Of course if regional initiatives, especially the Cumulative Environmental Management Association, were to finish their work on the cumulative landscape-level effects from oil sands development, this would provide SRD with valuable information for making its surface disposition decisions.

¹³¹Environmental Law Centre, *supra* note 22 at 31.

¹³²For details on the EUB, see: Kennett, ed., *supra* note 14.

¹³³The construction and operation of cogeneration facilities for oil sands projects are also regulated by the EUB under the *Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16.

¹³⁴R.S.A. 2000, c. O-7. For a history of the *OSCA*, see: E. Alade, *An Appraisal of the Legal Issues in the Management of Alberta Oil Sands as a Model for the Development of Nigeria Oil Sands* (LL.M. Thesis, Faculty of Graduate Studies, University of Alberta, 2001).

facility for a “scheme” or “operation” (or commence or continue a scheme or operation) for the recovery of oil sands or crude bitumen, unless the Board has granted an “approval”.¹³⁵ Section 11 creates a similar prohibition and requirement for EUB approval for oil sands processing plants. These include bitumen extraction, upgrading, refining and sulphur recovery facilities.¹³⁶

The *OSCA* empowers the Board to make any inquiries or investigations and to “hold any hearings it considers necessary or desirable” in connection with an application. Subsections 10(3) and 11(3) allow the EUB to grant an approval on any terms and conditions it considers appropriate if the Board believes it is in the “public interest” to do so”. For most projects, the Board’s decision to issue an approval must be authorized by Cabinet. The Board can also refuse to grant an approval, defer consideration of the application on terms and conditions, or make any other disposition the Board considers appropriate. Section 5 of the *OSCA* grants the Board “exclusive jurisdiction” to examine and determine all matters or questions arising under the Act, and section 20 grants the Board the power to make regulations respecting applications for approvals and the conduct of operations under the Act. As discussed further below, section 3 of the *Energy Resources Conservation Act (ERCA)* requires the EUB to consider whether a project is in the public interest by having regard to the social, economic and environmental effects of the project.¹³⁷

3.4.1.1. Oil Sands Conservation Regulation (OSCR)¹³⁸

The *OSCR* reiterates the need for EUB approval to commence, suspend or abandon an oil sands site, an oil sands experimental scheme, an *in situ* operation, a mining operation or a processing plant.¹³⁹ EUB approval is also required to commence any substantial modification for any of these operations.¹⁴⁰ In addition, the regulation clarifies that operators of oil sands sites must apply for EUB licences for most wells associated with their operations. These include evaluation wells, experimental wells, wells associated with *in situ* operations, water supply wells that exceed 150 metres in depth, and wells that

¹³⁵The terms “scheme” or “operation” are not defined in the *OSCA*.

¹³⁶See EUB Directive 023: *Guidelines Respecting an Application for a Commercial Crude Bitumen Recovery and Upgrading Project* (September 1991) at 20. Subsection 1(1)(r) of the *OSCA* defines a “processing plant” broadly as a facility for obtaining crude bitumen from oil sands that have been recovered, or for obtaining oil sands products from oil sands, crude bitumen or derivatives of crude bitumen that have been recovered.

¹³⁷R.S.A 2000, c. E-10, s. 3.

¹³⁸A.R. 76/88.

¹³⁹*OSCR*, s. 3(1).

¹⁴⁰*OSCR*, s. 3(2).

produce crude bitumen that will flow to a well.¹⁴¹ The regulation sets out specifics for how oil sands operations are to be carried out. It contains provisions on handling sour gas, developing emergency response plans, preventing loss, injury and damage, preventing waste, reporting spills and other incidents, and retaining records of operations. The *OSCR* frequently refers to, and adopts, EUB requirements for conventional oil and gas wells set out in the *Oil and Gas Conservation Regulations*.¹⁴²

The *OSCR* contains provisions specific to mining and to *in situ* operations. For oil sands mining, section 24 clarifies that operators must obtain EUB approval “for the storage or disposal of any oil sands or discard accumulated during mining or overburden removal”. The mine site plan and any changes made annually that would reduce the amount of oil sands recovered must also receive Board approval.¹⁴³ Section 27 specifies that, unless the Board otherwise approves, an operator shall carry out a mining operation in a manner that does not render more difficult the recovery of other oil sands, that maximizes the recovery of all oil sands within the mine site, and that ensures public safety.

For *in situ* operations, section 36 of the *OSCR* specifies that, unless the EUB approves otherwise, an operator must conduct its operations in a way that under normal conditions, will:

- (a) maximize the recovery of the crude bitumen;
- (b) maximize the gathering and utilization of oil sands products produced from the scheme;
- (c) minimize the use of fresh make-up water;
- (d) minimize the disposal of water;
- (e) maximize the recycling of produced water; and
- (f) maximize the recovery from all oil sands zones within the approval area.

Finally, Part 5 of the *OSCR* contains specific provisions for oil sands processing plants. Under section 48, an operator shall, for the purpose of energy resource conservation, obtain Board approval for the storage or disposal of any oil sands, coke, sulphur, precipitator ash, or other hydrocarbon effluent or discard associated with the processing plant. Unless otherwise approved, section 49 requires operators to carry out operations in a manner that, under normal operating conditions, will: maximize the processing of all oil sands and crude bitumen; maximize the yield of oil sands products; minimize the discard of coke, sulphur or other by-products; maximize the recovery of gas and gaseous

¹⁴¹*OSCR*, s. 4.

¹⁴²A.R. 151/71.

¹⁴³*OSCR*, s. 26.

mixtures; minimize the use of fresh make-up water and the disposal of waste water; and maximize the recycling of produced water. A number of directives issued by the Board supplement the operational requirements set out in the *OSCR*.¹⁴⁴

3.4.1.2. *The Public Interest*

The provisions from the *OGCR* noted above reveal the conservation, public safety and environmental aspects of oil sands regulation in the province. All of these must be considered by the EUB in its consideration of whether or not to approve a particular oil sands project. As noted, in making its decision, the Board must consider “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.”¹⁴⁵ Some guidance for the application of this public interest test can be found in the purposes section of the *OSCA*. Section 3 outlines some of the Act’s purposes as follows:

- (a) to effect conservation and prevent waste of the oil sands resources in Alberta;
- (b) to ensure orderly, efficient and economical development in the public interest of the oil sands resources in Alberta;
- (c) to assist the government in controlling pollution in the development and production of the oil sands resources of Alberta;
- (d) to provide for the appraisal of Alberta’s oil sands resources; and
- (e) to ensure the observance, in the public interest, of safe and efficient practices in the exploration for and the recovery, storing, processing and transporting of oil sands, discard, crude bitumen, derivatives of crude bitumen and oil sands products.

In several decisions, the EUB has set out the broad categories of matters it considers to be relevant to its determination of whether an oil sands development is in the public interest. A recent decision concerned an application for an oil sands mine and bitumen processing facility in the Athabasca oil sands area. The matters considered by the Board included: the purposes, need, and available alternatives to the proposed project; stakeholder and public consultation; social and economic effects (including project benefits and impacts on health services, public infrastructure, municipal services, and housing); mine plan and resource conservation (including the location of facilities, external tailings areas, and

¹⁴⁴See, for example: EUB Interim Directive 2002-03: *Performance Presentations for In Situ Oil Sands Schemes* (20 December 2002); EUB Interim Directive 2001-7, *Operating Criteria — Resource Recovery Requirements for Oil Sands Mine and Processing Plant Sites* (9 October 2001); and EUB Informational Letter 89-5: *Water Recycle Guidelines and Water Use Information — Reporting for In Situ Oil Sands Facilities in Alberta* (11 May 1989).

¹⁴⁵*ERCA*, s. 3.

overburden disposal areas); tailings management and reclamation issues (including liability issues and coordination of mine plans across lease boundaries); air emissions; surface water impacts; integrated watershed planning; water quality; aquatic resources; cumulative environmental management; traditional land-use and ecological knowledge; human health impacts; and the capacity of renewable resources to meet the needs of present and future generations.¹⁴⁶ The breadth of the Board's mandate over resource conservation, and the social, economic and environmental aspects of oil sands development is clear.

3.4.1.3. *Public Consultation*

Prior to submitting an approval application to the EUB, oil sands project proponents must engage in satisfactory public consultation. A 1991 EUB Directive (#023) states that applicants for oil sands operations are “encouraged” to conduct a “suitable program to make the public aware of the proposed development, to obtain and incorporate, where feasible, the reaction of interested or affected persons,” and to provide the EUB with documentation as to the “nature and extent of the communication”.¹⁴⁷ However, the EUB now *requires* rather than simply “encourages” this consultation process. Recently, the EUB has said that the minimum standards for public consultation applicable to conventional oil and gas development and to *in situ* oil sands projects, also apply to oil sands mining operations.¹⁴⁸ These minimums are set out in EUB Directive 056.¹⁴⁹

EUB Directive 056 sets out application requirements for oil and gas operations, including facilities, pipelines, and wells. It sets out minimum requirements and expectations for participant involvement programs prior to the filing of applications. The directive distinguishes between direct personal consultation (for parties whose “rights may be directly and adversely affected by the nature and extent of the proposed application”) and notification (via written correspondence) in the case of other interested parties. The directive sets out minimum requirements according to the type of development. Projects are categorized on the basis of sulphur inlet rates, hydrogen sulphide release volumes, and hydrogen sulphide release rates. For example, where a facilities application involves a multiwell bitumen battery with minimal presence of hydrogen sulphide, EUB Directive 056 requires personal consultation with landowners, occupants, and residents located within 0.5 km of the proposed battery. In addition, notification of the application must be given to Crown disposition holders, the local

¹⁴⁶EUB Decision 2007-013, *supra* note 5.

¹⁴⁷*Supra* note 136 at 3.

¹⁴⁸EUB Decision 2006-112, *supra* note 5 at 19.

¹⁴⁹EUB Directive 056: *Energy Development Applications and Schedules, revised edition* (1 May 2007).

authority, as well as landowners, occupants and urban authorities located within 1.5 km of the site.¹⁵⁰ For certain facilities, including some oil and bitumen production facilities, EUB Directive 056 requires notification to licensees of existing similar facilities within a recommend radius.¹⁵¹

In the case of public lands, SRD is “considered the landowner” and must be consulted pursuant to EUB Directive 056.¹⁵² SRD takes the position, however, that the approval process under the *PLA* for required surface dispositions “covers the necessary notification and consultation procedure” and thus it is “not necessary for the applicant to notify the local SRD Land Manager again”.¹⁵³ Nonetheless, other public land disposition holders must be notified as set out in EUB Directive 056.

EUB Directive 056 advises proponents that, depending on the nature of the application, it may be necessary “to include public interest groups or others who have expressed an interest in development in the area”.¹⁵⁴ For major oil sands projects in the province, participant involvement has to date typically included consultation with, or notification to, nongovernmental environmental groups which have been, and continue to be, active in the oil sands areas.

Where concerns or objections received by the applicant during the participant involvement program (or anytime prior to filing the application) remain unresolved, the applicant must file a non-routine application. This is the case whether or not the objection comes from a party inside or outside the distances outlined in the directive.¹⁵⁵ A non-routine application may or may not go to a full public hearing. Stakeholder concerns may be resolved through negotiation or mediation. Where a hearing will occur, the EUB considers input from stakeholders to determine whether the hearing will be oral or written.¹⁵⁶ Given the size and scope of mineable oil sands projects, most of these

¹⁵⁰*Ibid.* at 41.

¹⁵¹*Ibid.* at 46.

¹⁵²See SRD Information Letter 2004-01: *EUB Guide 56 and the Notification Requirement on Public Land* (16 January 2004).

¹⁵³*Ibid.*

¹⁵⁴*Supra* note 149 at 6.

¹⁵⁵*Ibid.* at 21. An applicant must also file a non-routine application for technical reasons if a relaxation of an EUB requirement is being sought, or if so directed by the Board. Certain critical sour gas wells and gas processing plants are also deemed non-routine. See *ibid.* at 23.

¹⁵⁶“Appendix 12: Understanding the Participant Involvement (PI) Process”, *ibid.* at 293.

applications have gone before a Board panel. *In situ* oil sands applications have gone to a Board hearing less frequently.¹⁵⁷

Only parties who can establish that their “rights may be directly and adversely affected by the proposed development” have standing to trigger a hearing before the EUB.¹⁵⁸ Parties that do not have standing may participate in a hearing if one is held, but they do not qualify for reimbursement of their costs. They also typically are not granted full participation rights to, for example, lead evidence and cross-examine witnesses. If the party that triggered the hearing withdraws and no other party has standing, the Board may grant the application and cancel the hearing.¹⁵⁹

3.4.1.4. *Project Review*

Whether or not a public hearing is held, the nature of oil sands projects means that EUB approvals will typically be subject to several terms and conditions. A recent approval for a mineable oil sands project was subject to 17 conditions. These related to resource conservation, public safety and environmental matters. For example, the company was directed to: work with the EUB to determine the economic resource potential and resource plans for adjacent oil sands leases; finalize agreements with adjacent oil sands lease holders regarding all resource and land-use related concerns arising from the impact of its project; submit a mining and SAGD impact report to the EUB by a certain date; provide reporting of its efforts to coordinate mine and closure plans with other operators; submit detailed geotechnical designs for all external overburden areas prior to conducting field preparation in these areas; not discharge untreated froth treatments to the tailings disposal area; submit quarterly reports of actual tailings performance; and submit annual reports describing the company’s end pit lakes research and development efforts.¹⁶⁰

The Board also expects companies to fulfill any commitments made during the public hearing or public consultation process. For example, in several decisions approving oil sands projects, the EUB refers to undertakings made by applicants to participate in the myriad of committees and working groups that are grappling with specific issues, especially environmental ones, in the oil sands areas. Although not of the same legal

¹⁵⁷J. Ludwick, “The Regulatory Path” (June 2007) Air, Water, Land: An Environmental Supplement to Oil Sands Review at 12.

¹⁵⁸*Supra* note 149 at 295. See also *ERCA*, s. 26(2).

¹⁵⁹*Supra* note 149 at 295. See also EUB Directive 029: *Energy and Utility Development Applications and the Hearing Process* (January 2003).

¹⁶⁰EUB Decision 2007-013, *supra* note 5.

force as conditions, the Board has said that stakeholders may request a review of approvals if these commitments are not fulfilled.¹⁶¹

As part of its review of proposed projects, the EUB's broad mandate to consider the public interest in approving oil sands development requires it to consider relevant social, economic and environmental effects, including cumulative effects. The Board has considered a wide range of environmental issues in oil sands applications, including matters relating to air emissions, aquatic resources (including water quality and quantity, fisheries and fish habitat), aquifer protection, wildlife, public health and safety, waste storage and containment, noise, dust, traffic, impacts on farming, subsurface disposal of produced water, weeds, reclamation, and cumulative effects.¹⁶² As regards public health and safety, the Board has said that in considering whether a project is in the public interest, it must be convinced that there are no adverse health effects to humans or animals.¹⁶³ In addition, despite some early reluctance, the Board has discussed social and community impacts from oil sands development as part of its public interest calculation.¹⁶⁴

3.4.1.5. *Issues with respect to the EUB*

Issues relating to the overall project review and approval of oil sands production operations are dealt with in Part 3.4.4 below. In this section, a discussion of a number of issues about the EUB itself and its processes is provided. These issues relate to concerns about the constitution of the Board, its independence, its mandate, and opportunities for public participation within its processes.

Board Membership, Independence and Mandate

As noted, current legislation grants the EUB broad powers and broad discretion over approvals and ongoing oil and gas, including oil sands, production operations in the province. This is most notable in the test the Board must apply to determine whether or not to approve a particular project. As noted, the Board must consider whether a project is in the public interest, having regard to its social, economic and environmental effects.

¹⁶¹The prior authorization of Cabinet is, however, required for most significant amendments to oil sands project approvals. See *OSCA*, s. 13.

¹⁶²See Kennett, ed., *supra* note 14 at 30-3302.

¹⁶³EUB Decision 99-7: *Application by Suncor Energy Inc. for Amendment of Approval No. 8101 for the Proposed Project Millennium Development, Addendum B* (23 July 1999).

¹⁶⁴See, for example, EUB Decision 2002-089: *True North Energy Corporation Application to Construct and Operate an Oil Sands Mine and Cogeneration Plant in the Fort McMurray Area* (22 October 2002); and *supra* note 5.

Impacts on human and animal health and public safety are included in this calculation. Given the broad scope of this test, questions are sometimes raised about whether the EUB, whose appointed members are for the most part chosen for their engineering and oil and gas expertise, has the ability to deal with the myriad of complex issues its public interest mandate requires. Where a public hearing occurs, the Board's expertise can, of course, be supplemented with that of others, but public hearings do not occur for the vast majority of oil and gas, including oil sands, projects in the province. Thus, it has been argued that representation on the Board from a variety of relevant disciplines should be required. Perhaps Board membership should also reflect representation from interested stakeholder groups, like landowners, non-governmental organizations, municipalities, etc.¹⁶⁵ Additionally, to ensure broad representation, it may be that public hearings should be required for all major oil sands projects (mining or *in situ*) regardless of the breadth of the Board members' expertise.

Related to the concern about the Board's membership are concerns about the level of independence of the Board from the industry it regulates. The phrase "captive regulator" has been used by critics to describe the EUB. These critics point to the fact that Board members are appointed by government and drawn mostly from the oil and gas industry, and that about 60 percent of the Board's funding comes from the same industry it regulates.¹⁶⁶ It has been suggested that appearances of institutional bias could be answered through a system of limited-term appointments that are reviewable on the basis of merit, or through an elected board (or boards) with regional mandates, similar to health or school boards for example.¹⁶⁷

It has also been argued that the Board's mandate of ensuring the "orderly, efficient and economical development" of the province's oil and gas resources means the Board has no choice but to approve projects as long as they meet its technical requirements.¹⁶⁸ As evidence, commentators often cite the Board's record of approving the vast majority of applications. The Board has been criticized for functioning as a 'rubber stamp' for oil and gas development.¹⁶⁹ Statements from Board representatives may also contribute to this view. In 2005, an EUB manager said that, as a regulatory body, the EUB is not in a position to decide if development is (inherently) good and whether or not it should be

¹⁶⁵See, for example, "EUB Denies Legal Standing on New Eastern Slopes Gas Well; Triggers Horseback Protest" (2006) 16:17-18 EnviroLine Online at 7.

¹⁶⁶See, for example, Environmental Law Centre, *supra* note 22 at 16-18. The Board continues to work with government to increase the ratio of funding to 50 percent on the part of government. See Kennett, ed., *supra* note 14 at 30-3104.

¹⁶⁷See, for example, B. Janusz, "Reforms Urged for Alberta's Energy and Utilities Board" (2006) 16:19-20 EnviroLine Online at 10.

¹⁶⁸See *OSCA*, s. 3(b) and *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6, s. 4(c).

¹⁶⁹See, for example: E. Malterre, "Lack of Energy Policy Puts Energy, Environment on a 'Collision Course'" (2007) 17:3-4 EnviroLine Online at 8; and Janusz, *supra* note 167.

deferred.¹⁷⁰ Elsewhere, an EUB spokesperson was quoted as saying that the EUB’s role is “to ensure that orderly and responsible development occurs, not if development should occur — very big distinction there”.¹⁷¹

With respect to the public interest test applied by the Board to approve projects, numerous commentators have questioned both the nature and application of this test. Although Alberta’s legislation sets out three factors to be considered in this test (*i.e.*, social, economic and environmental effects), the legislation fails to assign any priority among them. It also fails to provide any meaningful guidance on how the test will or should be applied in practice. As noted by S. Kennett & M. Wenig, the legislation lacks “meaningful guidance on how the Board must weigh conflicting values in its considerations.”¹⁷²

The Board itself has acknowledged the difficulties in interpreting and applying the public interest test. According to the Board, “[i]t is difficult to define concretely what is meant by the public interest and how the board will apply consideration of this interest in any given situation”.¹⁷³ It has noted that concepts such as “social”, “economic” and “environmental” impacts are “fluid” and are “not easily resolved through the application of fixed principles.”¹⁷⁴ In practice, the Board applies the public interest test by weighing the benefits of a specific project with any risks or costs associated with that project. The challenge, according to the Board, is to ensure that “any site-specific or local impacts are mitigated to an appropriate and acceptable level.”¹⁷⁵ Commentators have suggested that, although hard to defined, the “public interest” ultimately amounts to “an aggregation of a project’s public costs and benefits or, more broadly, its pros and cons.”¹⁷⁶ But, according to some critics, such a cost/benefit approach adopted by the EUB hides a critical assumption that measurable quantities form the only basis of knowledge. In short, the approach may exclude or discount non-measurable socio-ecological information.¹⁷⁷ The

¹⁷⁰See M. Lowey, “Land-use Conflicts Escalating, Solutions Urgently Needed” (2005) 16:4-5 EnviroLine Online.

¹⁷¹As cited in S. Kennett & M. Wenig, “EUB is Failing to Address Cumulative Impacts of Energy Development” (2007) 17:3-4 EnviroLine Online at 4.

¹⁷²Kennett & Wenig, *supra* note 56 at 4.

¹⁷³EUB Decision 2005-060: *Compton Petroleum Corporation Applications for Licences to Drill Six Critical Sour Natural Gas Wells, Reduced Emergency Planning Zone, Special Well Spacing, and Production Facilities, Okotoks Field (Southeast Calgary Area)* (22 June 2005) at 12.

¹⁷⁴*Ibid.*

¹⁷⁵*Ibid.* at 13.

¹⁷⁶M. Wenig & P. Sutherland, “Considering the Upstream/Downstream Effects of the MacKenzie Pipeline: Rough Paddling for the National Energy Board” (Spring 2004) 86 Resources at 3.

¹⁷⁷See, for example: S. Fluker, “The Jurisdiction of Alberta’s Energy and Utilities Board to Consider Broad Socio-Ecological Concerns Associated with Energy Projects” (2005) 42 Alta. L. Rev. 1085; and N.

approach also seems to mean that, as long as technical requirements are met and mitigation of impacts planned, approvals are likely. In approving an application for an *in situ* oil sands project, the Board stated its conclusion on the public interest test as follows: “[t]he Board finds approval of the application to be in the public interest *on the basis of* the application meeting the legislative requirements, the conditions that have been imposed by the EUB, and the commitments made by Black Rock.”¹⁷⁸

Public Participation — Consultation, Hearings, Intervenor Costs

As noted, the Board requires and expects consultation to occur as set out in EUB Directive 056. To date, the Board has rarely rejected applications on grounds of deficient consultation.¹⁷⁹ More typically, the Board will note deficiencies that occurred, and direct companies to do better as the project proceeds. For instance, in one decision the Board noted that several landowners had moved into the area after the company had already held open houses about the proposed project. These landowners had failed to receive timely notice about the project. The Board found as follows:

While the Board believes that the applicant made good efforts to consult with the local area stakeholders, it notes that all parties could have been more attentive to the dynamic nature of changing land ownership and land use occurring in the areas immediately adjacent to themselves.¹⁸⁰

Nonetheless, the Board approved the application and directed the company and all affected parties to improve consultation efforts throughout the life of the project.

An approach that does not take consultation requirements seriously risks trivializing these requirements, and creating a sense of disenfranchisement amongst affected stakeholders. Compounding the problem are a number of ambiguities inherent in the Board’s consultation requirements as set out in EUB Directive 056. As noted, EUB Directive 056 distinguishes between requirements and expectations. It also distinguishes

Brennan, “Private Rights and Public Concerns: The “Public Interest” in Alberta’s Environmental Management Regime” (1997) 7 J.E.L.P. 243.

¹⁷⁸EUB Decision 2004-089: *BlackRock Ventures Inc. Application for a Steam-Assisted Gravity Drainage Project for the Recovery of Bitumen, Cold Lake Oil Sands Area* (19 October 2004) at 1 [emphasis added]. For the challenges in interpreting and applying the public interest generally, see: M. Feintuck, *The Public Interest’ in Regulation* (New York: Oxford University Press, 2004); and G. Schubert, Jr., “The Public Interest in Administrative Decision-Making: Theorem, Theosophy or Theory?” (1957) 51:2 Am. Pol. Sci. Rev. 346.

¹⁷⁹A notable exception is: EUB Decision 2003-101: *Polaris Resources Ltd., Applications for a Well Licence, Special Gas Well Spacing, Compulsory Pooling, and Flaring Permit, Livingstone Field* (16 December 2003).

¹⁸⁰EUB Decision 2004-089, *supra* note 178 at 13.

between personal face-to-face communication and written notice only. Moreover, the directive sets minimum requirements only which may need to be increased in certain circumstances. All of these variables can cause uncertainties for both industry and the public. For example, although EUB Directive 056 suggests a need for consultation with interested public interest groups, a well licence for drilling in a protected area of the province was recently granted without consultation of two conservation groups with long-standing interests in the area. Although these groups had been dealing with government agencies, the EUB, and industry on management issues in the area for more than 30 years, neither group was contacted prior to the Board approving the application; nor was a hearing held.¹⁸¹ Litigation involving consultation requirements pursuant to EUB Directive 056 is on-going.¹⁸²

It may be that, in some cases, inadequate consultation can be remedied through a hearing before the Board. Concerns that were not communicated to, or resolved by, the company can then be dealt with by the Board. But this solution is unlikely to occur in most cases because the consultation net cast by EUB Directive 056 seems to be broader than the test the Board applies to determine whether someone has standing to trigger a hearing, or to participate fully in a hearing.¹⁸³

The whole area of public participation in EUB hearings is not as straightforward as it may, at first blush, appear. As noted, only someone who has standing pursuant to the statutory test of “rights” that are “directly and adversely affected” can trigger a hearing before the Board. Such persons are entitled to full participation rights such as leading evidence, cross-examining witnesses, etc. Although typically called “intervenor”, they may or may not be entitled to costs for their participation. As discussed below, the statutory test for “intervenor costs” is narrower than that for “standing”. In practice it may be that most persons who are granted standing (and full participation rights) by the EUB will be eligible for costs, but this is not invariably so. As will be seen, full participation rights may be granted by the Board, but not intervenor costs. Further complicating public participation before the EUB is the fact that, as noted, the EUB will typically hear from other interested stakeholders, even if they do not meet the test for standing. It is not always clear, however, whether such persons will be restricted to reading oral statements only, or whether they will be granted partial, or full, participation rights at the hearing.

¹⁸¹See *supra* note 61.

¹⁸²See *Graff v. Alberta Energy and Utilities Board*, [2007] A.B.C.A. 20.

¹⁸³On the other hand, the EUB’s decision relating to *ibid.* appears to have taken the view that only those persons with “standing” are entitled to consultation pursuant to EUB Directive 056.

The EUB's interpretation and application of the statutory test for standing for a hearing has been the subject of several leave to appeal decisions.¹⁸⁴ As noted, subsection 26(2) of the *ERCA* provides for a discretionary test for standing as follows: "if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person", that person is entitled to a hearing (written or oral) before the Board. Although the word "rights" in this provision is capable of broader meaning, the Board has generally interpreted the word to mean legally-recognized property or economic interests with respect to the land affected by the proposed development.¹⁸⁵ In recent decisions, however, the Board appears to be broadening its view by accepting that "a right may arise regarding the protection of an individual's health or safety."¹⁸⁶ Just how close someone must be to the land in question is not always clear, however. The Board considers each request for standing on a case-by-case basis, taking into account the facts of each application.¹⁸⁷

In the case of public lands, those holding surface dispositions likely qualify for standing under the EUB's economic interest test, as would those living and working on or near the land affected by the development. As noted by one commentator, however, the public "at large" does not have standing to trigger a hearing to, for example, "question the merits of energy development on public lands".¹⁸⁸ Recreational users of public lands are also typically denied standing if they do not live on the land, or have a licence to use the area for commercial purposes.¹⁸⁹ Thus, environmental or conservation groups can face significant challenges in triggering a hearing (or gaining full participation rights in a hearing) if no group member has affected property or economic rights. Board spokespersons have bluntly concluded that "organizations do not get standing in our process. They cannot trigger a hearing."¹⁹⁰ Even local authorities (*i.e.*, municipalities)

¹⁸⁴Recent ones have included *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, [2005] A.B.C.A. 68 and *supra* note 182.

¹⁸⁵See, for example, EUB Decision 2006-052: *Decision on Requests for Consideration of Standing Respecting a Well Licence, Application by Compton Petroleum Corporation, Eastern Slopes Area* (8 June 2006). For a broad view of "rights" in s. 26(2), see: N. Vlavianos, *The Potential Application of Human Rights Law to Oil and Gas Development in Alberta: A Synopsis* (Calgary: Canadian Institute of Resources Law, 2006).

¹⁸⁶EUB Decision 2007-053: *Shell Canada Ltd., Prehearing Meeting Applications for a Well and Associated Pipeline Licences, Waterton Field* (29 June 2007) at 5.

¹⁸⁷EUB Directive 029, *supra* note 159.

¹⁸⁸Malterre, *supra* note 169 at 10.

¹⁸⁹See, for example, *supra* note 186.

¹⁹⁰As quoted in *supra* note 61 at 6. But this view directly contradicts EUB Directive 029 which expressly contemplates a group or association requesting standing from the Board. A description of how the organization or its members may be directly and adversely affected by the project is required. See *supra* note 159 at 8.

who must be notified pursuant to EUB Directive 056 have been denied standing by the Board.¹⁹¹

In the case of oil sands project applications, environmental groups have participated fully in public hearings, but they have also been denied standing to trigger a hearing in some cases.¹⁹² The Board considers whether the group's members have "a legally recognized right or interest with respect to the land on or adjacent to the proposed project that may be directly and adversely affected by the Board's decision on the application."¹⁹³ Most recently, the Board denied standing to the Oil Sands Environmental Coalition, a group that has actively participated in several oil sands hearings. The application was for an approval to construct, operate and reclaim a primary bitumen extraction facility within the company's existing oil sands operation. The Oil Sands Environmental Coalition argued that one of the organizations in its coalition had an interest in lands in close proximity to the operations in the form of a licence to occupy lands for recreational purposes. Without deciding whether a licence for recreational purposes constitutes "rights" under subsection 26(2) of the *ERCA*, the Board found that the recreational activities were not taking place within sufficient proximity to the proposed expansion plant to be directly and adversely affected by the plant. The Coalition was thus unable to trigger a hearing.¹⁹⁴

Even though Board practice allows non-parties to participate (although not always fully) in hearings triggered by parties, those non-parties typically will not be entitled to costs. Subsection 28(1) of the *ERCA* expressly narrows the availability of intervenor costs to persons, groups, or associations who, in the Board's opinion, have an interest in, are in actual occupation of, or are legally-entitled to occupy, land that is or may be directly and adversely affected by a Board decision. Although allowed to participate fully in hearings on three recent oil sands mining applications, both the Regional Municipality of Wood Buffalo (RMWB) and the Northern Lights Regional Health Authority were denied intervenor costs by the Board. The Board held that subsection 28(1) was intended to benefit persons with legally recognized interests in specific lands who choose to participate in a Board proceeding "in order to safeguard the benefits they are entitled to enjoy by virtue of their ownership of those interests".¹⁹⁵ In the Board's view, the

¹⁹¹See, for example, EUB Decision 2006-052, *supra* note 185.

¹⁹²It may be that full participation in some of these public hearings was granted to these groups not by the *ERCA*, but by the applicable federal legislation where a joint federal/provincial review of a project was undertaken. This federal/provincial joint review process is discussed in Appendix A to this paper.

¹⁹³EUB Decision 2006-069: *Suncor Energy Inc., Application for an Oil Sands Primary Extraction Facility, Fort McMurray Area* (30 June 2006) at 2.

¹⁹⁴*Ibid.*

¹⁹⁵EUB Energy Cost Order 2007-003: *Albian Sands Energy Inc., Application to Expand the Oil Sands Mining and Processing Plant Facilities at the Muskeg River Mine, Cost Award*, at 7.

interventions by the RMWB and the Northern Lights Regional Health Authority were undertaken pursuant to legislative mandates to defend and advance the collective interests of the residents in the area, and were not the type of intervention contemplated by subsection 28(1) of the *ERCA*. Although the Board found their participation valuable on the regional socioeconomic issues raised at the hearing, the Board noted that their interventions focused on regional socioeconomic issues arising from the pace and scale of development in the area generally, as opposed to more site specific issues arising directly from the applications. This was not, in the Board's view, the type of intervention entitled to costs under subsection 28(1).¹⁹⁶

Without the availability of costs, one wonders how likely it will be that municipalities and regional health authorities will participate as fully in future oil sands applications. The same is true for environmental, social or other organizations that cannot establish that one of its members has an interest in the public land that may be affected by the proposed development.

3.4.2. Alberta Environment (AENV)

Along with the EUB, AENV issues key approvals required for oil sands operations in the province. As noted, the *EPEA* is Alberta's main environmental legislation and it is administered by AENV. The purpose of the *EPEA* is to "support and promote the protection, enhancement and wise use of the environment" while recognizing a number of principles, including those of sustainable development and polluter pays.¹⁹⁷ Oil and gas activities in the province may be subject to a number of the *EPEA*'s provisions, including those relating to required approvals, registrations, and notices, as well as environmental impact assessments, releases of substances, contaminated sites, and conservation and reclamation. Broadly-speaking, the *EPEA* grants AENV authority to ensure that operators take effective measures to minimize and mitigate the environmental impacts of their activities. Not all oil and gas activities are subject to the same level of oversight by AENV, however. For example, while all oil and gas operations must comply with reclamation requirements under the *EPEA*, not all are subject to the Act's environmental assessment process.

Given their environmental impacts, both *in situ* and mineable oil sands projects tend to trigger a key role for AENV under the *EPEA*. Several commentators have delineated

¹⁹⁶*Ibid.* The Board reached the same conclusion in EUB Energy Cost Order 2007-001: *Suncor Energy Inc., Application for Expansion of an Oil Sands Mine (North Steepbank Mine Extension) and a Bitumen Upgrading Facility (Voyageur Upgrader) in the Fort McMurray Area, Cost Awards*. Leave to appeal both cost orders was denied by the Court of Appeal in *Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board)*, [2007] A.B.C.A. 192.

¹⁹⁷*EPEA*, s. 2.

the potential and actual environmental impacts from both types of oil sands production operations. These include: air emissions, including greenhouse gases and contaminants; contamination of water supplies; disposal of process water to deep aquifers; use of fresh and ground water supplies; disposal of waste water; liquid waste disposal, including tailings from mining operations; surface disturbance and its resulting impacts on forests, soil, wetlands, wildlife, fisheries, aquatic systems, etc.; soil contamination; and site reclamation issues. Added to these are the cumulative environmental effects from other projects in the area, whether oil sands or not.¹⁹⁸

Given these environmental impacts, AENV is mandated to play a key role in the project approval process for oil sands projects, as well as in the ongoing monitoring of existing oil sands production operations. This role is authorized pursuant to the *EPEA*, but also under specific legislation with respect to water in the province, the *Water Act* (WA).¹⁹⁹ Both are discussed below.²⁰⁰

3.4.2.1. *The Environmental Protection and Enhancement Act (EPEA)*

Under the *EPEA*, oil sands operators are required to conduct environmental assessments of their proposed projects as well as obtain authorizations from AENV. The *EPEA* also enables the adoption of regulations, standards, practices, codes of practice, and guidelines for preventing and managing pollution, such as air, water and soil emissions, and for managing waste.²⁰¹ Through the adoption and enforcement of these various requirements, AENV attempts to manage the environmental impacts of oil sands operations. These include air emissions, soil emissions, water emissions, the use and storage of hazardous

¹⁹⁸See generally *supra* note 23. See also: E. Reason *et al.*, *Water Use & Policy Challenges in Alberta (Within the Context of Energy Development and Environmental Regulation)* (Edmonton: University of Alberta, School of Business, 2007); J.A. Veil & M.G. Puder, *Potential Ground Water and Surface Water Impacts from Oil Shale and Tar Sands Energy-Production Operations* (Argonne, IL: Argonne National Laboratory, October 2006); M. Griffiths, A. Taylor & D. Woynillowicz, *Troubled Waters, Troubling Trends: Technology and Policy Options to Reduce Water Use in Oil and Oil Sands Development in Alberta* (Drayton Valley: Pembina Institute, 2006); D. Woynillowicz & C. Severson-Baker, *Down to the Last Drop: The Athabasca River and Oil Sands* (Drayton Valley: Pembina Institute, 2006); M. Griffiths & D. Woynillowicz, *Oil and Troubled Waters: Reducing the Impact of the Oil and Gas Industry on Alberta's Water Resources* (Drayton Valley: Pembina Institute, 2003); and H. Spaling & J. Zwier, "Managing Regional Cumulative Effects of Oil Sands Development in Alberta, Canada" (2000) 2 J. of Env'tl. Assessment Pol. & Mgmt. 501.

¹⁹⁹R.S.A. 2000, c. W-3.

²⁰⁰In light of increasing oil sands production activities, AENV has recently established a new unit that will be dedicated to oil sands operations. See "Growing Oil and Gas Activity Demands Regulatory, Policy Clarity, Experts Say" (2007) 17:5-6 EnviroLine Online at 8.

²⁰¹See in particular, *EPEA*, s. 14.

substances, waste management, the management of operational and reclamation waste water, and land reclamation.

Environmental Impact Assessment (EIA)

The *EPEA* sets out an environmental assessment process that varies in the required level of assessment depending on the size and nature of industrial projects. Regulations list “mandatory activities” which are always subject to the most rigorous form of assessment under the Act — the preparation of an environmental impact assessment (EIA) report. Regulations also list activities which are generally exempted from the environmental assessment process altogether.²⁰² For non-mandatory, non-exempt activities, the *EPEA* grants the Director responsible for environmental assessments broad discretion to determine the rigour of assessment that will be required in any given case. This could range from an initial review only, to the preparation of a screening report by the Director only, or the preparation of the more rigorous EIA report by the proponent. In determining the level of assessment required, the Director must consider the following: the location, size and nature of the proposed activity; the complexity of the proposed activity and the technology to be employed in it; any concerns in respect of the proposed activity that have been expressed by the public of which the Director is aware; the presence of other similar activities in the same general area; any other criteria established in the regulations; and any other factors the Director considers relevant.²⁰³ Once the appropriate level of assessment is completed, AENV will direct the proponent to apply for any required approvals. Generally, according to AENV:

Where environmental consequences and mitigative measures are known, as with routine, familiar or readily predictable types of projects, assessments will have a lesser contribution to public understanding or decision-making for the project. The environmental reviews conducted in environmental approval application review processes or the guidance of codes of practice and monitoring/enforcement systems are appropriate regulatory tools to ensure routine activities achieve environmental protection and resource management goals.²⁰⁴

Given the size and nature of oil sands operations, the preparation of an EIA report appears to be typically required. The EIA report usually “considers the activities in the area around the project as well as the project itself and a combination of economic, environmental and social issues, as well as resource sustainability.”²⁰⁵ Thus, both project-specific and cumulative impacts of the project are to be considered. AENV defines

²⁰² *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, A.R. 111/93.

²⁰³ *EPEA*, s. 44(3).

²⁰⁴ AENV, *Alberta's Environmental Assessment Process* (Edmonton: September 2004) at 4, online: <<http://www3.gov.ab.ca/env/protenf/assessment/pub/EAProcessGuide.pdf>>.

²⁰⁵ *Ibid.* at 2.

“cumulative effects” as “the combined effects of the proposed project and other activities that are occurring or may be reasonably expect to occur in the subject area.”²⁰⁶

The construction, operation or reclamation of an oil sands mine, as well as the construction, operation or reclamation of a commercial oil sands, heavy oil extraction, upgrading or processing plant producing more than 2000 cubic metres of crude bitumen or its derivatives per day are “mandatory activities” that require full-blown EIA reports.²⁰⁷ By contrast, *in situ* oil sands projects are not *per se* “mandatory activities”. That said, *in situ* projects involving specified processing plants do require an EIA report. And other components of *in situ* projects might also trigger a mandatory EIA report. Examples of these components include: water diversion structures and canals with a capacity of greater than 15 cubic metres per second; and water reservoirs with a capacity greater than 30 million cubic metres. Both of these are mandatory activities requiring the preparation of an EIA report. On the other hand, the regulation specifically exempts the drilling, construction, operation or reclamation of oil and gas wells, and the construction, operation or reclamation of specified pipelines.²⁰⁸ Where an *in situ* operation is not captured by the mandatory list of activities, the Director has discretion to determine the level of assessment required. Any person who is “directly affected” by a proposed activity may submit a written statement of concern about the proposed activity.²⁰⁹

Where an EIA report is required, section 48 of the *EPEA* requires proponents to draft proposed terms of reference. These are made available for public comment pursuant to the regulations.²¹⁰ After receiving comments from the public and other interested government departments (provincial and federal), AENV sets the final terms of reference for the EIA report.²¹¹ The proponent uses these to prepare the report, and the terms of reference are made available to the public.²¹²

Section 49 of the *EPEA* outlines the information to be contained in the EIA report. This includes: a detailed description of the project, including the nature and scale of specific activities involved; the location and environmental setting for the project, along

²⁰⁶*Ibid.* at 7. AENV has prepared a guide to assist proponents and others in understanding the scope and content of cumulative effects assessment in EIA reports. See AENV, EUB, NRCB, *Cumulative Effects Assessment in Environmental Impact Assessment Reports Required under the Alberta EPEA*, online: <<http://www3.gov.ab.ca/env/protenf/documents/cea.pdf>>.

²⁰⁷*Supra* note 202, Schedule 1.

²⁰⁸*Ibid.*, Schedule 2.

²⁰⁹*EPEA*, s. 44(6).

²¹⁰See *Environmental Assessment Regulation*, A.R. 112/93.

²¹¹*Supra* note 204 at 6.

²¹²Publication occurs through local newspapers and a register of environmental assessment information maintained by AENV. See *supra* note 210.

with baseline environmental, social and culture information; a description of potential positive and negative environmental, social, health, economic, and cultural impacts of the proposed activity, including cumulative, regional, temporal and spatial considerations; plans to mitigate potential adverse impacts and respond to emergencies; information on public consultation programs undertaken with respect to the proposed activity and actions taken by the proponent to resolve public concerns; and plans that have been (or will be) developed to monitor environmental impacts predicted to occur, and the plans that have been (or will be) developed to monitor proposed mitigation measures.²¹³ Within 10 days of submitting the EIA report to AENV, the proponent must publish a notice in a local newspaper stating that the report (or a summary of the report) is available for inspection at a specified address.²¹⁴

Once the Director is of the view that the EIA report is complete, the Director must so advise the EUB in cases where the activity is one which requires an EUB approval. Where the activity is one in respect of which an authorization is required under the *EPEA* or under the *WA*, the Minister may advise the proponent that it may apply for the appropriate authorization.²¹⁵ AENV considers the EIA report not only in deciding whether to issue an *EPEA* or *WA* approval, but also in setting approval terms and conditions, including emission limits, monitoring requirements, research needs, siting and operating criteria, as well as decommissioning and reclamation requirements.²¹⁶ The EIA report is also used by the EUB in its determination of whether the project is in the public interest and in setting its own approval terms and conditions.

Authorizations under the *EPEA*

Along with environmental assessments, the *EPEA* requires oil sands proponents to obtain a number of authorizations from AENV regarding proposed oil sands production operations. The *EPEA* distinguishes between two types of authorizations — “approvals” and “registrations”. Sections 60 and 61 prohibit anyone from commencing specified industrial activities without required approvals or registrations. Certain other specified industrial activities do not require either an approval or a registration, but simply require the operator to give notice to AENV and conduct the activity in accordance with any applicable code of practice. As noted earlier, oil sands exploration activities are currently subject to this notice and code of practice scheme.

²¹³ *EPEA*, s. 49. See also *supra* note 204 at 6-7.

²¹⁴ *Supra* note 210, s. 8.

²¹⁵ *EPEA*, s. 54(1).

²¹⁶ *Supra* note 204 at 9.

With respect to the production of oil sands, certain projects must obtain a number of authorizations pursuant to the *EPEA*. These projects, and the type of authorization required, are not listed in the legislation, but rather in the *Activities Designation Regulation (ADR)*.²¹⁷ The *EPEA* empowers Cabinet to add to the list of specified activities or to delete activities from the list.²¹⁸ Under the *ADR*, approvals are currently required for several activities that are part of oil sands operations, or associated with them. These include the construction, operation or reclamation of an oil sands processing plant, or an enhanced recovery *in situ* oil sands or heavy oil processing plant. An approval is also required for the construction, operation or reclamation of: a mine; an oil production site (defined as specified field production facilities for recovering oil sands by drilling or other *in situ* methods, including any injection or pumping facilities and associated infrastructure); certain pipelines; and transmission lines.²¹⁹ A registration under the *EPEA* may also be required for waste management facilities, compressor and pumping stations, and other activities associated with oil sands projects.²²⁰

Applications for approvals and registrations must contain particular information. This includes: the location, capacity and size of the activity to which the application relates; the nature of the activity; in cases where the applicant requires an EUB approval, the date of the written EUB decision; an indication of whether an EIA report has been required; a list of substances, the sources of the substances and the amount of each that will be released into the environment as a result of the activity; the method by which the substances will be released and the steps taken to reduce the amount of the substances released; the measures that will be implemented to minimize the amount of waste produced, including a list of wastes that will or may be produced and methods of final disposition; any impact, including surface disturbance, that may or will result from the activity; the conservation and reclamation plan for the activity; and a description of public consultation undertaken or proposed by the applicant.²²¹

AENV's review of the application must determine whether the impact on the environment of the activity is "in accordance with" the *EPEA* and the regulations.²²² The review may address a number of matters, including the following: proposed methods of minimizing the generation, use and release of substances and any available alternative technologies; design plans and specifications for the activity; site suitability, including soils, air and water quality, groundwater conditions, site drainage, water supply quantity and wastewater disposal alternatives; the proposed monitoring programs to determine

²¹⁷ A.R. 276/2003.

²¹⁸ *EPEA*, s. 37(1)(a).

²¹⁹ *ADR*, s. 5(1) and Schedule 1.

²²⁰ *Ibid.*, Schedule 2.

²²¹ *Approvals and Registrations Procedure Regulation*, A.R. 113/93, s. 3.

²²² *Ibid.*, s. 6(1).

emissions and their effect on the environment; proposed methods of management of the storage, treatment and disposal of substances; and the proposed plans to complete the conservation and reclamation required in connection with the activity.²²³

In deciding whether to issue an approval or a registration, subsection 68(4)(a) of the *EPEA* requires the Director to consider “any applicable written decision” of the EUB “in respect of the subject-matter of the approval or registration”. At least one court has interpreted this phrase as meaning that AENV must defer making its decision until the EUB has decided whether, in its view, the project is in the public interest.²²⁴ AENV also cannot grant an approval or registration unless the required level of environmental assessment under the *EPEA* has been completed.²²⁵ Finally, the *EPEA* gives ultimate authority over the issuance of an approval or registration to the Minister of AENV. Pursuant to subsection 64(1), where the Minister is of the opinion that a proposed activity should not proceed because it “is not in the public interest having regard to the purposes of” the Act, the Minister may order that no approval or registration be issued by the Director in respect of the proposed activity.

Unless waived by the Director, both the application for an approval or a registration, and the approval itself are subject to public notice requirements as set out in the regulations.²²⁶ Persons who are “directly affected” by an application for an approval or a registration may submit written statements of concern.²²⁷ Only those who have filed such statements of concern are entitled to appeal an approval if granted.²²⁸

Approvals under the *EPEA* are granted for terms of 10 years, unless the Director considers it appropriate to set a different term.²²⁹ If required by the regulations, applicants for an approval or registration under the Act may have to provide financial or

²²³*Ibid.*, s. 6(2).

²²⁴*Environmental Resource Centre v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1937.

²²⁵*EPEA*, s. 63.

²²⁶*EPEA*, ss. 72, 74. See also *Environmental Protection and Enhancement (Miscellaneous) Regulation*, A.R. 118/93.

²²⁷*EPEA*, s. 73(1).

²²⁸*EPEA*, s. 91(1)(a)(i). Generally, demonstration of a person’s “directly affected” status requires proof that the proposed project will harm a natural resource (e.g., air, water, wildlife) which is used by the person, or that the project will harm the person’s use of a natural resource. The greater the proximity between the use of the natural resource at issue and the project, the more likely the person will be able to establish the requisite factual nexus of being “directly affected”. See *Re Bildson*, [1998] A.E.A.B.D. No. 33.

²²⁹*Environmental Protection and Enhancement (Miscellaneous) Regulation*, s. 7.

other security and carry insurance in respect of the activity to which the application relates.²³⁰

Along with any applicable regulations, standards or guidelines, approvals required under the *EPEA* are key tools for imposing environmental requirements on industrial operators. Subsection 68(2) of the Act allows the Director to issue an approval subject to any terms and conditions the Director considers appropriate. The terms may be more, but not less, stringent than any applicable terms and conditions provided for in the regulations. In practice, where more than one authorization is required by the *EPEA*, AENV typically issues one “integrated, single environmental approval” referred to as a “construction, operation and reclamation approval”.²³¹ The approval covers all phases of the industrial operation, from construction to reclamation. It addresses all environmental aspects of the operation, including air, industrial wastewater, hazardous and solid wastes, groundwater, soils, sanitary sewage/waterworks, and reclamation and decommissioning of facilities.²³²

Construction, operation and reclamation approvals issued for oil sands production operations have dealt with several environmental matters. For instance, they typically set mandatory emission limits of toxins and contaminants, including nitrogen oxides, sulphur and its components, volatile organic compounds, as well as emissions of particulate matter. These emissions relate to water, air, or soil quality, and limits are normally based on best use of available emission reduction technologies.²³³ Operating approvals will also outline source emissions monitoring and reporting requirements.²³⁴

Reclamation

Pursuant to section 137 of the *EPEA*, an operator must conserve and reclaim “specified land” and obtain a certificate indicating that the reclamation complied with all applicable requirements. Subsection 1(t) of the *CRR*²³⁵ defines “specified land” as including land that has been used or held in connection with the construction, operation or reclamation

²³⁰ *EPEA*, s. 84.

²³¹ See AENV, “Approvals, Inspections, Abatement, and Enforcement” (Edmonton: 2 September 2004), online: <<http://www3.gov.ab.ca/env/air/AAQMS/approvals.html>>.

²³² *Ibid.*

²³³ AENV has developed guidelines (such as the *Alberta Ambient Air Quality Guidelines* and the *Surface Water Quality Guidelines for Use in Alberta, 1999*) to assist it in setting release limits for industrial facilities. See AENV, *Industrial Release Limits Policy* (Edmonton: November 2000).

²³⁴ A number of stakeholder associations have been established in the oil sands areas to monitor emissions levels. For instance, the Wood Buffalo Environmental Association monitors air quality in the RMWB. See online: <<http://www.wbea.org>>.

²³⁵ A.R. 115/93.

of: a mine, a plant, a well, an industrial pipeline, a battery, and an oil production site (which includes field production facilities used to recover oil and oil sands by drilling or other *in situ* recovery methods, and includes injection or pumping facilities and associated infrastructure). The objective is to return specified land to “an equivalent land capability”.²³⁶

SRD issues reclamation certificates for public lands in the province, but it follows reclamation standards, criteria and guidelines established by AENV. Consideration will also be given to whether the land has been reclaimed in accordance with the terms and conditions in any applicable approval or code of practice. Surface leases or right of entry orders cannot be surrendered until an operator has obtained a reclamation certificate.²³⁷ Even after receiving a reclamation certificate, operators remain liable under the *EPEA* for certain environmental damage for varying periods of time.²³⁸

Reclamation raises very difficult issues for oil sands development. To date, no reclamation certificate has been issued for an oil sands project. Many project approvals have been issued without a clear sense that reclamation is currently feasible but in the hopes that new technology will be developed that will someday allow for proper reclamation of the sites, especially the large tailings ponds associated with mineable oil sands projects. Although research and development continues, there is currently no proven technology available to reclaim tailings ponds.²³⁹ The EUB has increasingly expressed concerns about how tailings ponds will be reclaimed. AENV has said that reclamation guidelines and a land capability evaluation system for reclaimed oil sands landscapes are currently under development and review.²⁴⁰

3.4.2.2. *Water Act (WA)*

Most freshwater in Alberta is owned by the province, and managed by AENV. The oil and gas industry’s use of water is regulated through a licensing and monitoring system pursuant to the *WA*, its regulations, and policies and guidelines adopted by AENV under that Act.

Oil sands operators may require two types of *WA* authorizations — an “approval” or a “licence” — from AENV. All “activities” not exempted by the regulations must obtain

²³⁶*CRR*, s. 2.

²³⁷*EPEA*, s. 144(1).

²³⁸See *CRR*, s. 15.

²³⁹See: NEB, *supra* note 1; and M. Collision, “Tailings Technology” (June 2007) Air, Water, Land: An Environmental Supplement to Oil Sands Review at 23-25.

²⁴⁰R. Gandia, “Reclaiming the Land” (June 2007) Air, Water, Land: An Environmental Supplement to Oil Sands Review at 31-33.

“approvals” under the WA.²⁴¹ The Act defines “activities” broadly as any undertaking that: alters or may alter the flows or levels of water; changes or may change the location of water or the direction of flows; causes or may cause the siltation of water or the erosion of beds or shores of water bodies; or causes or may cause an effect on the aquatic environment. Also included is any other activity specified in the regulations.²⁴² In short, oil sands operators must obtain an approval from AENV prior to undertaking any activity that may disturb ground or surface water and aquatic ecosystems.

In making an approval decision, the Director must consider any applicable approved water management plan for the applicable area of the province, and may consider a number of factors including: any existing, potential or cumulative effects on the aquatic environment; hydraulic, hydrological and hydrogeological effects; effects on other users and licensees; and effects on public safety. An approval may be issued subject to any terms and conditions that the Director considers appropriate, but must include an expiry date. An approval may be issued authorizing the temporary diversion of water associated with the carrying out of an activity.²⁴³

In order to take or remove water to use for oil sands development, operators must also obtain a license under the WA. More specifically, the Act requires a licence for the “diversion of water” and the operation of a “works” for the diversion of water.²⁴⁴ A “diversion of water” is defined broadly as the impoundment, storage, taking or removal of water for any purpose, and “works” means any structure, device or contrivance made by persons, or part of it, including a dam or canal.²⁴⁵ A number of licensing exemptions are set out in the Act and regulations, including for a person who commences or continues a diversion of water or operates a works pursuant to an approval.²⁴⁶ The regulations set out a number of purposes, including industrial purposes, for which licences may be issued.²⁴⁷ Among other things, applicants for water licences must provide a hydrogeological assessment to estimate the impact that a planned drawdown will have on aquifers and other users.

The factors to be considered by the Director in considering applications for licences are similar to those for approvals outlined above, and also include any applicable water guidelines and “water conservation objectives”.²⁴⁸ The WA grants the Director discretion

²⁴¹ WA, s. 36. See also *Water (Ministerial) Regulation (WMR)*, A.R. 205/98.

²⁴² WA, s. 1(1)(b)(i) and (iv).

²⁴³ WA, ss. 38(2), 38(3), 38(4) and 38(6).

²⁴⁴ WA, s. 49.

²⁴⁵ WA, ss. 1(1)(m) and 1(1)(mmm).

²⁴⁶ WA, s. 49(2).

²⁴⁷ WMR, s. 11.

²⁴⁸ WA, s. 51(4).

to refuse to grant water allocations in an area or from a water body.²⁴⁹ Most licences for diversions of water for oil sands operations are currently issued for terms of 10 years.²⁵⁰ Licences are granted for a volume of water that will sustain routine operations, with temporary licenses issued for the initial start-up period when more water is typically required.²⁵¹

Neither an approval nor a licence under the *WA* can be issued until the environmental assessment provisions in the *EPEA*, if applicable, have been satisfied. The Act also grants the Minister of Environment overall discretion to order that no approval or license be issued if the Minister is of the opinion that a proposed activity, diversion of water, or operation of a works for the diversion of water is not in the public interest.²⁵²

To manage the province's water resources, the *WA* empowers AENV to develop water management plans, water management planning areas, water guidelines and water conservation objectives.²⁵³ A number of policy initiatives have been adopted in an effort to deal with the growing demands for water use by oil and gas, including oil sands, operations in the province. For example, current guidelines require the oil sands industry to evaluate the combined effects of their proposed water use and other water diversions and to make maximum efforts to reduce or eliminate (on a case-by-case basis) freshwater use in water shortage areas.²⁵⁴ Applicants for water licences must evaluate alternative sources of water before applying for a fresh water licence.²⁵⁵ Current AENV water recycling guidelines also require oil sands operators to maximize the recycling of produced water. As regards the key water source for oil sands operations, the Athabasca River, a water management framework has been developed, and some limits on

²⁴⁹ *WA*, s. 53.

²⁵⁰ *WMR*, s. 12.

²⁵¹ Under previous legislation water licences were issued without expiry dates and for volumes set at the full start-up requirements. These licences have been continued under the current system and have priority over newer licences regardless of the amount of water requested and its use. See Blake, Cassels & Graydon LLP, *supra* note 11.

²⁵² *WA*, ss. 16, 34.

²⁵³ *WA*, ss. 9, 10, 14, 15.

²⁵⁴ See *Oil Sands Consultation Fact Sheet*, "Water Use of Alberta's Oil and Gas Industry", online: <<http://www.oilsandsconsultations.ab.ca>>.

²⁵⁵ AENV, *Alberta's Water Conservation and Allocation Policy for Oilfield Injection* (Edmonton: 2006), online: <http://www.waterforlife.gov.ab.ca/docs/Oilfield_Injection_Policy.pdf>.

withdrawals have been imposed. However, the framework is an interim measure while long term planning continues.²⁵⁶

3.4.3. EUB/AENV Memorandum of Understanding

Oil sands projects that require approvals from the EUB under the *OSCA* and from AENV under the *EPEA* and the *WA* are subject to a coordinated approval process set out in a 1996 agreement.²⁵⁷ Since both agencies must consider environmental effects in issuing approvals and monitoring oil sands operations, the *MOU* was intended to harmonize approval and monitoring activities and to ensure consistent decision making. It outlines areas of primary EUB and AENV responsibility, as well as areas of shared or joint responsibility.

For *approvals* of oil sands operations, the *MOU* clarifies that the EUB has primary decision-making authority over: the determination of whether a project is in the public interest; the conservation of energy resources; the location of the development and layout of facilities; the design of produced water recycle system for *in situ* developments; the storage and disposal of oilfield wastes resulting from *in situ* developments; and the sub-surface disposal of produced fluids and solids. AENV has primary approval decision-making authority in regard to the following: the EIA process; conservation and reclamation requirements for all surface disturbances; pollution prevention, pollution control, and waste management systems; water resource allocations; and potable water systems.

For the *regulation* of oil sands operations, the *MOU* outlines the EUB's primary responsibility over several matters including: ensuring the stability of overburden dumps and mine pit walls; specifying requirements for the abandonment of wells and removal of surface facilities; specifying and monitoring the recovery efficiencies for oil sands, bitumen, sulphur, and other products and by-products; specifying and monitoring the efficiency of produced water recycle systems; and specifying the requirements for the

²⁵⁶See Alberta Environment & Fisheries and Oceans Canada, *Water Management Framework: Instream Flow Needs and Water Management System for the Lower Athabasca River* (February 2007), online: <http://www3.gov.ab.ca/env/water/Management/Athabasca_RWMF/index.html>. For discussion on water use by the oil sands industry, see: V. Adamowicz & D. Schindler, *Running Out of Steam? Oil Sands Development and Water Use in the Athabasca River-Watershed: Science and Market-Based Solutions* (Toronto: Monk Centre for International Studies, 2007); Griffiths, Taylor & Woynillowicz, *supra* note 198; Woynillowicz & Severson-Baker, *supra* note 198; M. Wenig, A. Kwasniak & M. 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 a conference presented by the Alberta Society of Professional Biologists, Calgary, AB, 25-28 March 2006) (Edmonton: ASPB, 2007).

²⁵⁷EUB Informational Letter 96-7: *EUB/AEP Memorandum of Understanding on the Regulation of Oil Sands Developments (MOU)* (18 April 1996).

management of oilfield waste produced at *in situ* operations. AENV has primary responsibility over the following: specifying the acceptable levels of emissions to air, water, and land based on appropriate pollution control technology; specifying the ambient environmental quality in the zone of influence of emission; specifying the efficiency and monitoring the performance of pollution control and waste management systems; specifying the required ambient and environmental effects monitoring; and specifying monitoring and reporting of water use.²⁵⁸

As for shared responsibilities, the list begins by delineating a coordinated application process whereby applicants for oil sands projects file concurrent applications to the EUB and AENV. Where appropriate, a single, integrated document will be prepared which includes all information required under both the *OSCA* and the *EPEA* (including any required EIA report). The application must also include any information required under the *WA*. Although it predates both the *MOU* and the *EPEA*, EUB Directive 023 remains the key document that outlines the information required in an application for EUB approval of an oil sands scheme under the *OSCA*. The directive states that its guidelines are intended to meet AENV's informational needs as well.²⁵⁹

Once an application is filed, the EUB and AENV appoint lead coordinators to consult with the applicant and other stakeholders as the application proceeds. Where the EUB decides to hold a public hearing, AENV may decide to take an active role in the proceedings. The *MOU* contemplates AENV's role as varying depending on the nature of its concerns. AENV may decide to cross-examine witnesses only, to cross-examine and submit argument, or to present evidence, cross-examine, and submit argument. Where AENV has evidence it believes the EUB should have when making a decision, the *MOU* directs AENV to provide a witness panel who will present this evidence at the hearing. As appropriate, this panel will also present information regarding the applications for the *EPEA* and *WA* approvals. According to the *MOU*, this approach "should assist the EUB and help ensure that there is a common understanding of the information before the EUB. This should also ensure consistency between the EUB and [AENV] decisions."²⁶⁰ After its review of the project, the EUB often makes recommendations to AENV on various matters the latter should consider when attaching terms and conditions to approvals under the *EPEA* or the *WA*.

Along with a coordinated application procedure, the *MOU* lists a number of matters as areas of shared responsibility with respect to the approval of oil sands operations. These relate to land reclamation, water use, tailings ponds/dam safety, coke and sulphur storage, the storage, disposal and handling of oily wastes, and sulphur recovery and control of sulphur dioxide emissions. In all of these areas, the *MOU* requires the two

²⁵⁸*Ibid.* at 1-3.

²⁵⁹*Supra* note 136 at 1.

²⁶⁰*Supra* note 257 at 5.

agencies to “work cooperatively” to ensure that the objectives of both agencies are met.²⁶¹ Along with approvals, the *MOU* lists the ongoing regulation of oil sands operations as an area of shared EUB/AENV responsibility. Generally, the EUB has primary responsibility for operating issues related to resource recovery, energy efficiency and product disposition matters. AENV has primary responsibility for monitoring overall environmental performance, environmental impacts, emissions, and compliance with approvals. The *MOU* also sketches coordination of efforts in relation to emergency response, odour complaints/response, liquid spills, flaring, and continuous emissions monitoring.²⁶²

3.4.4. Issues with the Current Project Review and Approval Process

3.4.4.1. Overlapping Mandates

The legislative mandates of the EUB and AENV undoubtedly overlap in many ways in regard to the environmental impacts of oil sands development. For example, although AENV is responsible for the environmental assessment process under the *EPEA*, the EUB must also consider environmental impacts in its review of a proposed project.

In the face of such legislative overlaps, the *MOU* attempts to clarify the agencies’ responsibilities. Although it goes some way in this regard, confusion remains. The *MOU* itself is not an entirely clear and understandable document. Especially in regard to matters of “shared responsibility”, the *MOU* provides little detail and typically concludes with an appeal for the two agencies to “work cooperatively” in recognition of overlapping and joint mandates. For example, the *MOU* states that aspects of land reclamation of all oil sands development are regulated under the *EPEA* and therefore subject to AENV jurisdiction. Specifically, AENV is responsible for site inspections prior to construction, reviewing lease construction practices, setting reclamation certification criteria and issuing reclamation certificates. On the other hand, the *MOU* notes that, at the same time, “reclamation planning and final landscape objectives are important components of the EUB’s obligation to consider whether an oil sands development is in the public interest.”²⁶³ The *MOU* then calls upon both agencies to cooperate in seeking to “ensure that, without fettering the discretion of any statutory decision maker, the decisions rendered by the EUB and [AENV] regarding land reclamation matters, are

²⁶¹*Ibid.* at 6-7. For tailings ponds/dam safety, a separate EUB/AENV agreement also applies. *The Dam Safety Accord* (1994) describes a coordinated process for the review and approval of impoundment facilities (e.g., tailings, sediment settling, water storage ponds), and drainage diversion structures in oil sands mining projects. See EUB Informational Letter 94-19: *Dam Safety Accord* (19 October 1994).

²⁶²*Supra* note 257 at 10.

²⁶³*Ibid.* at 6.

consistent with each other.”²⁶⁴ In several oil sands decisions, the EUB has considered reclamation matters and often makes recommendation to AENV with respect to reclamation.

Where cooperation is strong and there is little disagreement, the type of arrangement contemplated by the *MOU* may work well in practice. But the *MOU* provides no guidance on what happens in circumstances where either cooperation is not working, or where the opinions of the two agencies diverge. It was noted earlier that in a public hearing before the EUB, AENV is an intervenor only. AENV does not sit on the review panel alongside the Board. Moreover, the *EPEA* requires AENV to take EUB decisions into account when making its own approval decisions. Such a process may work well when there is agreement on what is needed to mitigate risks and impacts, but it is not at all clear how the process would work if AENV, at the end of the day, refused to issue an approval in the face of an EUB approval. It is also not at all clear what the legal effect is of EUB recommendations to AENV. Especially after a public hearing has been held, AENV may be hard-pressed to refuse to follow the decision and recommendations of the Board. Ultimately, despite the *MOU*, there are important outstanding issues around the extent to which, or whether, one regulatory body must defer to the judgments of another on matters of overlapping jurisdiction.

The *MOU* also does not address the possibility that one agency could sidestep dealing with a particular matter because it believes the matter is within the primary jurisdiction of the other. For example, although the *MOU* states that acceptable air emission levels are within AENV’s primary jurisdiction, the EUB’s mandate to assist in controlling pollution and ensuring safe practices in the development of oil sands resources may grant it significant responsibilities over air emissions under the *OSCA*. Ultimately, the relationship between the EUB and AENV in the oil sands development context lacks clarity and is in need of further refinement. As it now stands, the ambiguities inherent in their overlapping mandates adds a critical element of complexity and non-transparency to the legislative and regulatory framework.

The statement in the *MOU* that the EUB has primary responsibility over whether or not a project is in the public interest is also troublesome. Is an approval decision by AENV not an implicit “public interest” calculation? If AENV did not have to weigh the economic and other benefits of the proposed project against its environmental impacts, it is probably fair to say that AENV would never have reason to grant an approval. In other words, if the project’s benefits were not considered, no environmental impacts or risks would be worth accepting. Consequently, if it is true that AENV has an inexorable public

²⁶⁴ *Ibid.*

interest mandate, why should the EUB have primary responsibility over the “public interest” with respect to oil sands development?²⁶⁵

3.4.4.2. *Complexity of Legislation, Regulations and Decision-Making Processes*

The nature of oil sands production operations and the impacts associated with them, environmental and otherwise, means that complexity is likely an inevitable fact of any legislative and regulatory system designed to regulate this type of resource development. That said, the system should not be so unduly complex that even answers to basic questions are difficult to find. Such complexity likely reveals a number of uncertainties and ambiguities around the roles and mandates of the decision makers and the processes used in their decision making.

As the review above indicates, the maze of legislation and regulations that apply to EUB and AENV approvals and ongoing monitoring of oil sands operations is difficult to navigate. It is often not easy trying to find answers to fundamental questions. Especially in regard to AENV’s jurisdiction, determining which approvals are required for which types of projects, for example, is not always straightforward. Oil sands mines are listed in the regulations as always requiring construction and operation approvals, but *in situ* operations are less clearly listed. It is difficult to determine, without knowing all the details of a particular *in situ* operation, whether an AENV approval will be required in any given case. Similarly, the provisions in regard to EIA reports are less straightforward for *in situ* operations than for mineable operations. Although the regulations expressly require the preparation of an EIA report for an oil sands mine, *in situ* oil sands projects are not so listed. To determine whether an EIA report is required, one is led through several regulations that refer to the type and nature of the particular operation. Without such information, it is impossible to determine whether an EIA report will be required in any given case. Moreover, where a report is not mandatory, there is much discretion involved in a decision by AENV to require an EIA report in the case of *in situ* oil sands operations. As noted by one commentator, “for non-mandatory activities the extent or rigour of the environmental assessment process turns on case-by-case discretionary decisions.”²⁶⁶ In the result, it is difficult to predict whether an EIA report will be required and in what circumstances.

Understanding the different legal and policy frameworks for how the various environmental impacts from oil sands development are being managed is also difficult.

²⁶⁵Thanks to my colleague Michael Wenig for bringing this interesting argument to my attention.

²⁶⁶M. Wenig *et al.*, *Legal and Policy Frameworks for Renewable Energy in Alberta*, Paper No. 12 of the Alberta Energy Futures Project Paper (Calgary: Institute of Sustainable Energy, Environment and Economy, 2007) at 17.

Along with complex legislative and regulatory provisions are a myriad of policies, directives and guidelines. Available government documents and websites typically contain general information only, with few details, and information is often out of date or inconsistent. Moreover, many policy frameworks for environmental impacts relating to oil sands development (and energy development generally) in the province are in their infancy and have yet to be finalized. To cite but one example, that of water, in addition to a complex water management framework provided by the WA and its regulations, there is a host of policy documents, frameworks, and guidelines that have either been established, or are in the process of being established.²⁶⁷ At the end of the day, it is very difficult for Albertans to feel confident in their ability to understand adequately how water is being managed in the context of oil sands development.

3.4.4.3. *Broad Discretion*

The key feature characterizing the regulatory mandates of the EUB and AENV in the oil sands project review and approval process is broad discretion. As noted, both agencies are granted significant discretion in terms of approving projects and in deciding what terms and conditions to include in their approvals. The challenges of the EUB's broad discretion under its public interest test have already been discussed. Especially from the point of view of the general public, such broad discretion can give the impression of an uncertain, unpredictable and non-transparent process.

Similarly, the process through which AENV issues approvals pursuant to the *EPEA* for oil sands developments is characterized by broad discretion. Other than having a kitchen sink-type list of broad purposes, the statute provides little guidance on factors AENV must consider in its decision making. It also provides no guidance on which factor if any will trump in cases of conflict. Other than a direction that AENV must consider any applicable written decision of the EUB, the *EPEA* generally grants AENV broad discretion, subject to any applicable regulations, to make approval decisions. As noted Wenig *et al.*:

[t]he Act gives [AENV] considerably broad discretion (subject to any regulation) in deciding: the scope of information to be submitted as part of an application for either kind of authorization; whether to issue the required authorization; the terms and conditions to include in any such authorization; and whether to grant a variance from any such terms and conditions or from generic requirements imposed by regulation.²⁶⁸

At the end of the day, the upside of a system that grants such broad discretion is that government agencies have the ability to deal with numerous issues as they arise in particular cases, and the flexibility to develop *ad hoc* solutions to specific problems. The

²⁶⁷See *ibid.*

²⁶⁸*Ibid.* at 14.

downside of course is that it is a system that can be characterized as unpredictable, uncertain and non-transparent.

3.4.4.4. *Individual Project Approval Process, Lack of Plans and Cumulative Effects*

Numerous commentators have highlighted the problems inherent with an approval process that reviews projects on an individual basis. Dealing with each project in isolation precludes a proper assessment of cumulative effects of both the particular project in question, but also of the effects of that project in conjunction with other industrial projects in the area.²⁶⁹ As noted earlier, the EUB itself has, on several occasions, acknowledged the current lack of cumulative effects management especially in the Athabasca oil sands area.

In several decisions, the Board has commented on the need for broad-based regional approaches to oil sands development in the province. The Board has acknowledged that numerous benefits, especially relating to environmental protection, can result from cooperation amongst operators and coordination of activities.²⁷⁰ To this end, a number of regional multi-stakeholder initiatives, including the Cumulative Effects Management Association, have been undertaken to create and promote regional approaches on key issues. The slow progress of some of these initiatives has, however, increasingly led to the EUB to recommend to government that it must step in if results are not attained in a timely fashion.²⁷¹ Recently, the EUB has suggested that it may move away from individual approvals to a regional project review process for energy development, including oil sands development. EUB hearings would focus on regional development, with operators consolidating their plans prior to submitting applications. The Board might hold annual hearings into oil sands development, for example.²⁷²

Such a move to a regional application process will require the adoption of clear policies in regard to oil sands development, as well as regional land-use plans. These policies and plans will have to set clear objectives as well as acceptable environmental limits and thresholds for impacts on air, land, water, and on ecosystems generally. They

²⁶⁹See especially Creasey, *supra* note 125, and *supra* note 22.

²⁷⁰See, for example, EUB Decision 1994-009: *Shell Canada Ltd. Applications for an Oil Sands Mine, Bitumen Extraction Plant, Cogeneration Plant and Water Pipeline, Fort McMurray Area, Joint Review Panel* (5 February 2004).

²⁷¹*Supra* note 24.

²⁷²EUB, “Future Could See Regional Hearings: Outgoing EUB Chairman Neil McCrank Foresees Changes in the Way Alberta’s Energy Industry is Regulated” (March 2007) *Across the Board*. See also Government of Alberta, *Investing in our Future: Responding to the Rapid Growth of Oil Sands Development — Final Report* (29 December 2006) at 149.

should include a network of protected areas and wildlife corridors within the boreal forest, and provide for the management of surface water and groundwater on a watershed basis.²⁷³ Along with environmental effects, regional development plans should also address cumulative health and social effects of development. To this end, operators could be required to submit comprehensive development plans for a region.²⁷⁴

Given the lack of such plans to date, neither the EUB nor AENV has been able to manage adequately the cumulative environmental and other impacts of increasing oil sands development. As with the other stages in the development process reviewed in this paper, there is currently no comprehensive oil sands policy or integrated land management framework to drive the project review and approval stage. In the result, neither the EUB nor AENV has the ability to manage the cumulative effects of oil sands development within a process that currently considers development on a project-by-project basis.

Critics argue that the EUB and AENV ought to refuse approvals on individual projects until an adequate policy and planning framework is in place. By failing to hold up projects, it is argued that both agencies are tacitly allowing a system without a plan to continue. As noted by S. Kennett & M. Wenig, the EUB's refusal "to hold up project approvals until cumulative effects are adequately addressed provides a strong disincentive for other agencies to take responsibility for developing timely solutions."²⁷⁵

In three recent hearings for proposed mineable oil sands projects, the RMWB and the Northern Lights Health Region asked the EUB (or the joint federal/provincial review panel) to delay further approvals until plans and funding were in place to deal with the growing socioeconomic and health resource pressures in the Athabasca oil sands region.²⁷⁶ The EUB disagreed that approval delays were warranted. Rather, recommendations were made to all levels of government to work with the RMWB and Northern Lights Health Region to address the growing socioeconomic problems in the region. It was concluded that the project reviewer does not have the mandate to resolve these issues, but rather "must rely on government bodies, including the RMWB and Northern Lights Health Region, to address public infrastructure and public service impacts in a meaningful and timely manner".²⁷⁷

²⁷³See, for example, Pembina Institute, *Presentation to the Oil Sands Multi-stakeholder Committee*, Bonnyville, AB, 13 September 2006, online: <<http://www.oilsandsconsultations.gov.ab.ca>>.

²⁷⁴See, for example, Environmental Law Centre, *supra* note 22 at 34.

²⁷⁵Kennett & Wenig, *supra* note 171.

²⁷⁶See EUB Decisions 2006-112, 2006-128 and 2007-013, *supra* note 5.

²⁷⁷EUB Decision 2006-112, *ibid.* at 9.

4.0. Conclusion: Three Key Deficiencies

From this review of the current provincial legislative and regulatory framework for oil sands development in Alberta, three key shortcomings stand out. First, as noted throughout this paper, there is no comprehensive oil sands (or energy) policy in place to guide decision making on oil sands development. There are also no comprehensive land-use plans for the oil sands areas. Without such policies and plans, effective cumulative effects management is not be possible. Second, the current regulatory framework is at times unduly complicated and lacking in transparency. Even answers to basic questions are sometimes difficult to find. Third, there are significant issues around public participation, or the lack of it, at different points in the current regulatory framework.

4.1. Lack of Plans

Throughout this paper the current lack of a comprehensive oil sands strategy as well as comprehensive land-use plans for the province has been noted. This lack affects decision making at every stage of the current oil sands development process. Without plans to guide decision makers, it is difficult to coordinate decisions and ensure consistency in decision making.

Currently, decisions are being made at various stages in the development process on a case-by-case basis with little formal integration across the stages. Different departments seem to be working on different aspects of the same development in isolation from one another. Whatever integration occurs across departments and agencies, and across the three stages in the current process, is not legally mandated and is thus subject to change. There are currently no legal requirements mandating integration or coordination of decision making. The only formal written arrangement considered in this paper that tries to coordinate decision making is the *MOU* between the EUB and AENV in the context of the review of proposed oil sands production projects. At other stages in the development process, the details of any integration and coordination of decision making that may occur is unclear. For example, the uncertainties regarding possible coordination between SRD and AENV on oil sands exploration decision making has been highlighted.

The government has promised both a comprehensive energy strategy and a comprehensive land-use framework for the province. It has acknowledged that a land-use framework is required to ensure better integration amongst decision making. The government has said that: “[r]esource management approval processes need to be better integrated to address natural resource developments, fish and wildlife habitat, watershed impacts and other factors.”²⁷⁸ As noted throughout this paper, to be effective, such a

²⁷⁸Government of Alberta, *Understanding Land Use in Alberta* (Edmonton: April 2007) at 15, online: <<http://www.landuse.gov.ab.ca>>.

framework will need specific land-use plans for all areas of the province, including the oil sands areas, which contain detailed objectives and set ecological limits or thresholds.

The process towards establishing a land-use framework is still underway. Public consultations are on-going. But the process is, at the end of the day, another *ad hoc* one, lacking in legislative force. There is no legal requirement for the government to ensure the completion of this process; nor are there any legal requirements for the government to actually adopt and implement any recommendations it brings forth.

Similarly, there are no legal requirements for the government to adopt and implement the recommendations that have emerged from the public consultation process on oil sands development in the province. As noted, the final report on a vision for oil sands development and on strategies for implementing that vision was completed in June 2007. Although consensus was not reached on all issues, the committee did make a number of significant recommendations, including some related to improving the transparency of the current regulatory framework and the accountability of decision makers.²⁷⁹ Albertans will have to wait and see what, if any, recommendations from this process are adopted and implemented.

4.2. Undue Complexity and Transparency

Oil sands projects are huge industrial projects that involve considerable environmental and other impacts. To suggest that a regulatory framework for oil sands development should be “simple” is naïve and likely imprudent. A fair amount of regulatory complexity is inherent given the nature and impacts of oil sands operations. That said, regulatory frameworks should not be *unduly* complex. The government has said that its goal is to “improve the transparency and accountability of government agencies (and) boards”.²⁸⁰ Especially where the subject matter is inherently complex, legislatures and governments must work hard to identify and resolve ambiguities in decision-making mandates and in divisions of labour. Decision-making processes should be as transparent as possible.

A constant theme throughout this paper has been that certain points in the current legislative and regulatory oil sands development framework are unduly complicated, and thus lacking in transparency. As noted, sometimes even answers to basic questions are difficult to find. For example, on what basis does SRD issue exploration approvals? Does SRD conduct its own review or does it rely on one conducted by AENV? In the context of oil sands project reviews, what happens if AENV disagrees with the EUB about whether a particular project is in the public interest given the environmental impacts?

²⁷⁹See *supra* note 9.

²⁸⁰Alberta Government, *Government Priorities* (13 December 2006), online: <<http://www.premier.alberta.ca/news/news-2006-dec-13-Priorities.cfm>>.

What if AENV believes the impacts cannot be mitigated and the EUB believes that they can be? Who has the final say on whether a project will proceed?

Overlapping and ambiguous mandates of the responsible decision makers are of course a large part of the complexity in the current regulatory framework. Where more than one government department or agency is involved at any given stage in the process, the division of labour amongst them is often unclear. Despite the *MOU*, the uncertainties between the roles and responsibilities of the EUB and AENV are palpable. The relationship between SRD and AENV, especially in the context of oil sands exploration approvals, is not obvious. With respect to Alberta Energy's dispositions of the province's oil sands rights, the precise role, mandate and authority of SRD, AENV and other departments through their representation on the CMDRC is not evident. Neither is the role and authority of the CMDRC *vis-à-vis* Alberta Energy unproblematic.

In response to such uncertainties, one suggestion has been the adoption of a single regulator for oil sands project approvals. A 2002 report recommended that a single regulator be responsible for all assessments, hearings, appeals, operations, and abandonment and reclamation activities of oil sands projects.²⁸¹ It has been said that such an approach would streamline and clarify a cumbersome and confusing process.²⁸² While such an approach may go some way towards achieving this objective, it may raise other challenges, particularly in regard to ensuring oversight, accountability and transparency with respect to a single all-powerful regulator. Moreover, as currently proposed, it is unclear whether such a regulator would have responsibilities in regard to mineral and surface rights disposition decision making. If not, a detailed plan or framework, preferably with legal effect, would be needed to ensure effective integration between decision making at those stages in the development process and the subsequent project approval stage.²⁸³

4.3. Public Participation

Increasingly, commentators agree that public participation in natural resource development leads to better decisions and provides legitimacy for those decisions.²⁸⁴ As noted throughout this paper, certain key stages in the oil sands development process in

²⁸¹ Alberta Energy, *A Proposal For Regulating Resource Development* (December 2002).

²⁸² See *supra* note 272, and M. Lowey, "Alberta Moving to 'Single-Regulator' System for Natural Resources Development" (2004) 15:16-17 *EnviroLine* Online.

²⁸³ See, for example, Farr *et al.*, *supra* note 22.

²⁸⁴ See B. Barton, "Underlying Concepts and Theoretical Issues in Public Participation in Resources Development" in D. Zillman *et al.*, eds., *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (New York: Oxford University Press, 2002).

Alberta currently lack public participation of any kind. Specifically, the disposition of oil sands rights and the disposition of rights to access the surface of public lands (for oil sands exploration and production activities) occur without public participation. Critics argue that this is inconsistent with the public nature of both Alberta's oil sands resource and the lands, air, and water affected by oil sands development.

At the oil sands project approval stage, there is, as noted, provision for public participation both before the EUB and through the EIA and environmental approval processes under the *EPEA*. Although the EUB's test of "directly and adversely affected" is narrower than the "directly affected" test in the *EPEA*, both have the potential to exclude public interest groups and other stakeholders with clear interests and mandates related to the impacts of oil sands development. In the result, certain aspects of the public interest may not be represented in the decision-making process.

Along with standing to participate fully, the issue of costs is equally important. Ever since the affected municipality and health authority were denied costs for their involvement in three recent oil sands mining applications, one wonders whether these parties will have the resources to become as involved in any future applications. The same is undoubtedly true for environmental, social or other groups and organizations.

Public participation is also important at the level of policy making. Currently, there are no legislative requirements for the government to consult with Albertans when setting government policies and guidelines with respect to oil sands development. While the government has chosen to do so in the current oil sands and land-use framework consultation processes, as noted, these are *ad hoc* processes only without legislative direction. Ultimately, there is no legal requirement for the government to adopt and implement any recommendations that emerge from either process.²⁸⁵

²⁸⁵On the importance of legally-mandated public participation processes in policy making, see: A. Woolley, *Legitimizing Public Policy, Paper No. 3 of the Alberta Energy Futures Project* (Calgary: Institute of Sustainable Energy, Environment and Economy, 2007).

Appendix A: Federal Involvement in Alberta Oil Sands Development

As discussed in Part 2.0 of this paper, the primary regulator of oil sands development in Alberta is the province of Alberta. Nonetheless, oil sands projects “almost invariably” affect areas of federal jurisdiction as well.²⁸⁶ While a detailed review of actual and potential federal jurisdiction in oil sands development is beyond the scope of this paper, some key features and issues are noted. Even this brief examination highlights the fact that Canada’s federal system adds multiple additional layers of complexity and uncertainty to the legislative and regulatory framework for Alberta oil sands development. Although intergovernmental agreements have tried to provide practical solutions to inherent jurisdictional overlaps, questions about the federal role in oil sands development remain.

Constitutional Jurisdiction

A number of constitutional provisions engage federal government jurisdiction in the context of oil sands development. Subsection 91(2) grants the federal Parliament exclusive jurisdiction over the regulation of trade and commerce, allowing for the regulation of inter-provincial and international trade, including the export of crude oil from Alberta. It also authorizes federal regulation of oil and gas pipelines and other modes of transportation that cross provincial and international boundaries. Subsections 91(10) and 91(12) grant exclusive jurisdiction over navigation (or navigable waters) and inland fisheries to the federal government. Given the impacts of oil sands operations on water sources, these two powers are particularly important for oil sands development in Alberta. They likely include federal authority to protect fish stocks and fish habitat and to compel the maintenance of river flows to facilitate navigation.²⁸⁷

The federal government also has other sources of regulatory power in relation to the environmental impacts from oil sands development. Courts have, for example, upheld federal legislation regulating emissions of toxic substances under the federal criminal law power.²⁸⁸ Another source of environmental jurisdiction is the “peace, order, and good

²⁸⁶J. Courtright & S. Denstedt, “Oil Sands Mining in Northern Alberta” in *Proceedings of the Rocky Mountain Mineral Law Fiftieth Annual Institute* (Westminster, CO: Rocky Mountain Mineral Law Foundation, 2004) at 9-16.

²⁸⁷See M. Wenig, A. Kwasniak & M. Quinn, “Water Under the Bridge? The Role of Instream Flow Needs (IFNs) in Federal and Interjurisdictional Management of Alberta’s Rivers” in H. Epp & D. Ealey, eds., *Water: Science and Politics* (Proceedings of a conference presented by the Alberta Society of Professional Biologists, Calgary, AB, 25-28 March 2006) (Edmonton: ASPB, 2007).

²⁸⁸See *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.

government” provision in subsection 91(29). This power allows the federal government to legislate on matters that are of national concern, which include problems that affect more than one province or cannot be adequately addressed by a single province. Such matters may include transboundary air and water pollution, including greenhouse gas emissions, and wildlife. Although the exact source of the federal power in relation to migratory birds lies elsewhere, the national concern branch of subsection 91(29) supports it as well.²⁸⁹

Given the nature of, and environmental impacts from, oil sands operations, and the nature of the constitutional division of federal and provincial legislative powers, there is likely considerable overlapping jurisdiction. Many oil sands operations impact fisheries or navigable waters or have interprovincial impacts that could trigger federal jurisdiction. The actual and potential overlaps in federal and provincial jurisdiction add a layer of complexity and uncertainty to an already complicated provincial legislative and regulatory framework. As outlined below, the federal government’s role in Alberta oil sands development is, in many respects, unclear and lacking in predictability.

Federal Approvals

Federal involvement in oil sands operations is most straightforward where approvals are required under existing federal legislation. The most common federal approvals required are those relating to inland fisheries and navigable waters, as discussed below. A permit may also be required to disturb or destroy nests or nest shelters of migratory birds.²⁹⁰

The federal fisheries regime consists primarily of the *Fisheries Act (FA)*²⁹¹ and associated regulations, as administered by the Department of Fisheries and Oceans (DFO). Sections 23 to 43 of the *FA* are the key provisions for fish habitat protection and pollution protection. Section 32 prohibits anyone from destroying fish unless authorized by the Minister of DFO or by the regulations. Section 35 prohibits the carrying on of any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat unless authorized. Prior to authorization, proponents must compensate for the loss of fish habitat, and approval of the compensation plan is required. Subsection 36(3) of the *FA* also prohibits the deposit of any deleterious substance in or near water frequented by

²⁸⁹See Lucas, *supra* note 15. As greenhouse gas issues continue to gain in prominence, constitutional uncertainties over their regulation may well become the key issue for oil sands development. On the constitutional uncertainties, see A.R. Lucas & N.D. Bankes, “Kyoto, Constitutional Law and Alberta’s Proposals” (2004) 42 Alta. L. Rev. 355.

²⁹⁰These permits are granted by Environment Canada pursuant to the *Migratory Birds Regulations*, C.R.C., c. 1035. See also *Migratory Birds Convention Act*, S.C. 1994, c. 22.

²⁹¹R.S.C. 1985, c. F-14.

fish or in any place where the deleterious substance may enter any water frequented by fish.

Where an oil sands operator proposes to carry on any work or undertaking that is likely to result in the alteration, disruption or destruction of fish habitat, or in the deposit of a deleterious substance in water frequented by fish, the operator must provide DFO with plans and specifications of the proposed project. After its review, DFO may require modifications or additions to the work or undertaking or to any of the plans, or specifications, or it may restrict the operation of the work or undertaking. With the approval of Cabinet, DFO may direct the closing of the work or undertaking for such period as is considered necessary.²⁹² Given the large volumes of water used by oil sands operations, and the contaminated water (tailings) that result from the bitumen extraction process, the provisions in the *FA* are often triggered in the context of oil sands development.

The *Navigable Waters Protection Act (NWPA)*²⁹³ and its regulations may impose further federal requirements on oil sands operators. Section 5 prohibits any “work” to be built or placed in, on, over, under, through or across any navigable water unless the work and site plans have been approved by the Minister (in this case, of Transport Canada) on any terms and conditions the Minister deems fit. “Work” is defined in section 3 as including a bridge, dam, wharf, dock, pier, tunnel and pipe. Also included is any dumping of fill or excavation of materials from the bed of a navigable water, and any other any structure, device or thing that may interfere with navigation. Except in the case of a bridge, boom, dam or causeway, an approval is not required for any work that, in the opinion of the Minister, does not interfere substantially with navigation.²⁹⁴ For oil sands projects, these provisions mean that any water body crossing, like a pipeline or bridge, or any other structure necessary to, for example, divert water for the operations will require federal approval under the *NWPA*.

Oil sands development may require other federal approvals as well. For instance, where an oil sands project includes an interprovincial or international pipeline, or a company wishes to export products derived from its oil sands operations outside of Canada, federal approvals are required from the NEB under the *National Energy Board Act*.²⁹⁵

Federal involvement in oil sands development is less straightforward in cases where federal jurisdiction may exist, but a federal approval is not required. For example, through the *Canadian Environmental Protection Act, 1999*,²⁹⁶ the federal government has

²⁹²*FA*, s. 37.

²⁹³R.S.C. 1985, c. N-22.

²⁹⁴*NWPA*, s. 5(2).

²⁹⁵R.S.C. 1985, c. N-7.

²⁹⁶S.C. 1999, c. 33.

exercised its jurisdiction in regard to regulating some harmful and toxic emissions. Both Environment Canada and Health Canada are responsible for administering this Act. But the toxic substances provisions are largely prohibitory in nature and may not require federal approvals or permits in the case of oil sands operations. Consequently, Environment Canada and Health Canada may be interested in emissions from oil sands operations, but may not be decision-making bodies (with the ability to compel action) on par with DFO or Transport Canada, for example. Environment Canada and Health Canada may also be interested because of transboundary pollution and greenhouse gas emissions associated with oil sands operations. To date, though, the federal government has yet to exercise its full legislative power in these areas.²⁹⁷

Canadian Environmental Assessment Act (CEAA)²⁹⁸

Where a federal approval is required, another federal statute may be applicable to oil sands operations. The *CEAA* and its regulations require environmental assessments to be conducted for projects that require federal approvals under a number of regulatory regimes as specified in the regulations.²⁹⁹ Included in these regulations are approvals required under the *FA* and the *NWPA*.³⁰⁰ To date, these have been the most common triggers for the application of the *CEAA* to Alberta oil sands projects.

Assessments under the *CEAA* begin with either a screening report or the more rigorous comprehensive study report. If a project triggers the Act's application and is not exempted, a basic environmental assessment through a screening report must occur. Regulations set out projects, which include large oil sands mines and oil sands processing facilities, for which a comprehensive study is required.³⁰¹ The *CEAA* sets out the factors to be considered in the assessment and details public consultation requirements. Mitigation measures must be considered in the assessment and these may include measures that the responsible authority is satisfied will be implemented by another body (such as Alberta's EUB or AENV, for example).³⁰² If, after the assessment, it is found that the project is likely to cause "significant adverse environmental effects that cannot be

²⁹⁷See House of Commons, *The Oil Sands: Towards Sustainable Development, Report of the Standing Committee on Natural Resources* (Ottawa: March 2007) at 13-15.

²⁹⁸S.C. 1992, c. 37.

²⁹⁹*CEAA*, s. 5(d).

³⁰⁰See *Law List Regulations*, SOR/94-636, *Inclusion List Regulations*, SOR/94-637, *Exclusion List Regulations*, SOR/94-639.

³⁰¹*Comprehensive Study List Regulations*, SOR/94-638.

³⁰²*CEAA*, s. 20(1.1).

justified in the circumstances”, the Act prohibits the granting of the required federal approval that triggered the assessment.³⁰³

Pursuant to section 15 of the *CEAA*, the scope of the project for which the environmental assessment is to be conducted is determined by the responsible federal authority (namely, the authority who will grant the triggering approval).³⁰⁴ If, after an initial review, the responsible authority determines that a project is likely to require an environmental assessment, written notice must be given to other federal authorities that are likely to “exercise a power in respect of the project”, or “be in possession of specialist or expert information or knowledge that is necessary to conduct the environmental assessment of the project”.³⁰⁵ After consulting with these authorities, the responsible authority determines the scope of the project, the factors to be considered in the assessment, and the scope of those factors.³⁰⁶

Regulations outline the procedure to be followed in cases where there are two or more responsible federal authorities in relation to a project. In the case of oil sands operations, the responsible authority under the *CEAA* is mainly the DFO or Transport Canada, with other authorities being consulted “as experts to contribute to the analysis process”.³⁰⁷ These can include Environment Canada, Natural Resources Canada, Parks Canada, Health Canada, and the Department of Indian and Northern Affairs.³⁰⁸

Given that Alberta’s *EPEA* requires the environmental assessment of oil sands projects, a parallel assessment under *CEAA* could result in a duplication of efforts and inconsistent decision making. Consequently, the federal government and Alberta have signed an agreement under which a single cooperative assessment can occur allowing both authorities to discharge their environmental assessment obligations. The agreement sets out provisions for the exchange of information and for procedures to be followed where a

³⁰³ *CEAA*, ss. 29(1)(b) and 37(1)(b).

³⁰⁴ Alternatively, the responsible authority may decide to refer the assessment to a mediator or review panel. If so, the scope of review will be determined by the federal Environment Minister (in consultation with the responsible authority). See *CEAA*, s. 15.

³⁰⁵ *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181, s. 5.

³⁰⁶ *Ibid.*, s. 8. On the powers of the responsible authority to determine scope, see *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)* (2006), 21 C.E.L.R. (3d) 175 (Fed. C.A.), leave to appeal to S.C.C. dismissed, [2006] S.C.C.A. No. 197.

³⁰⁷ *Supra* note 297 at 34.

³⁰⁸ See, for example, *Environmental Resource Centre v. Canada (Minister of the Environment)* (2001), 40 Admin. L.R. (3d) 217 (Fed. T.D.) and *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)* (2004), C.E.L.R. (3d) 55 (Fed. T.D.).

single assessment will occur.³⁰⁹ Included are provisions for the establishment of a joint advisory team that will set the terms of reference for the assessment. Where both levels of government determine that a public hearing is required, the agreement provides for the establishment of a joint panel to conduct the review. Where only one level of government decides a public hearing is necessary, the other will complete any remaining analysis and provide its conclusions and recommendations to the other party prior to the date for the public hearing.³¹⁰

Even where a joint hearing does not take place, federal departments may intervene in EUB hearings to express their views about the effects of proposed oil sands projects on their respective areas of jurisdiction. In particular, Environment Canada and DFO have appeared in EUB hearings to lead evidence, cross-examine witnesses and make submissions.³¹¹

Issues with Respect to Federal Involvement in Alberta Oil Sands Development

The role and responsibilities of the federal government in the context of Alberta oil sands development are difficult for a number of reasons. As noted, constitutional jurisdiction over the environment (and thus over the environmental impacts of oil sands development) is not subject to clear division between the two governments. To cite but one example, the protection of aquatic ecosystems in Alberta's Athabasca river falls within the constitutional mandates of both Ottawa and Alberta.³¹² The resulting constitutional overlaps can lead to uncertainties and confusion about respective jurisdictions.³¹³ These uncertainties are perhaps partly responsible for the federal government's reluctance to exercise greater powers in relation to the environmental impacts of oil sands projects.³¹⁴

³⁰⁹ *Canada-Alberta Agreement on Environmental Assessment Cooperation* (2005), online: <http://www.ceaa.gc.ca/010/0001/0003/0001/0001/index_e.htm>.

³¹⁰ *Ibid.* at 11. To date, four joint review panels have held public hearings for proposed oil sands projects. See: EUB Decisions 2007-128 & 2007-013, *supra* note 5; EUB Decision 2004-005: *Canadian Natural Resources Ltd., Application for an Oil Sands Mine, Bitumen Extraction Plant, and Bitumen Upgrading Plant in the Fort McMurray Area, Joint Panel Report* (27 January 2004); and EUB Decision 2004-009: *Shell Canada Ltd., Applications for an Oil Sands Mine, Bitumen Extraction Plant, Cogeneration Plant, and Water Pipeline in the Fort McMurray Area, Joint Panel Report* (5 February 2004).

³¹¹ See, for example: EUB Decision D97-13: *Application by Syncrude for the Aurora Mine* (24 October 1997); EUB Decision D99-2: *Shell Canada Ltd., Muskeg River Project* (12 February 1999).

³¹² See: Wenig, Kwasniak & Quinn, *supra* note 256; and Wenig, Kwasniak & Quinn, *supra* note 287.

³¹³ See, for example: Wenig, "Federal Policy and Alberta's Oil and Gas", *supra* note 17; Lucas, *supra* note 15; and W.R. McKay, "Canadian Federalism and the Environment: The Literature" (2004) 17:25 *Geo. Int'l Envtl L. Rev.* 25.

³¹⁴ Commentators have delineated the broad powers the federal government could exercise in relation to the environment, including the protection of biodiversity generally. See, for example, Wenig, *ibid.*

The thorny history of federal-Alberta relations in the context of natural resource development is another factor.³¹⁵ A parliamentary committee examining the role of the federal government in oil sands development found that “[w]hile it was argued that the Government of Canada has the authority to undertake broad environmental assessments of oil sands projects, in practice the federal government is generally very careful to respect Alberta’s jurisdiction.”³¹⁶

Although political tensions and constitutional uncertainties have been somewhat alleviated by cooperative agreements in the environmental field, this approach has been criticized for blurring the lines of government accountability and responsibility.³¹⁷ This may be partly responsible for the current failure to adequately assess and manage the cumulative environmental impacts of oil sands development in Alberta. The parliamentary committee examining oil sands development concluded that both the federal and provincial governments have legislative responsibilities “with respect to the assessment of cumulative impacts.”³¹⁸ The committee recommended that the federal government work with Alberta to “undertake a comprehensive assessment of the cumulative impacts of oil sands development projects already underway and planned for the future.”³¹⁹

Demystifying the role of the federal government in oil sands development is also difficult because of uncertainties regarding the role and responsibilities of federal departments themselves. As noted, some federal departments have greater decision-making powers in the context of oil sands development than others. Some can compel action through terms and conditions on approvals, or even ultimately refuse to issue an approval, whereas others have oversight or consultative roles only. In the case of disagreement, it is not always clear what effect recommendations from a non-approving department will have. It is also not always evident where one department’s powers end and another’s begins. In a recent case, confusion over the relationship between DFO and Environment Canada in the context of the environmental assessment of oil sands operations was obvious. Environment Canada had recommended a much more rigorous environmental assessment than had been adopted by DFO, and an appeal was launched on the question of who had the final say over the scope of the assessment under the *CEAA*. Based on the provisions of the *CEAA*, the court determined the issue in favour of DFO, holding that it, and not Environment Canada, was the responsible authority for purposes of determining the

³¹⁵See Wenig, *ibid.* and S. Blackman *et al.*, “The Evolution of Federal/Provincial Relations in Natural Resources Management” (1994) 32 *Alta. L. Rev.* 511.

³¹⁶*Supra* note 297 at 14.

³¹⁷See *supra* note 312 and McKay, *supra* note 313.

³¹⁸*Supra* note 297 at 36.

³¹⁹*Ibid.*

scope of the assessment. It was an approval required from DFO, not AENV, which triggered the application of the *CEAA*.³²⁰

It is also difficult to delineate the federal government's role in Alberta oil sands development because of the broad discretion it has over whether, and to what extent, it will involve itself in any particular oil sands operation. Even where a federal approval is required under the *FA* or the *NWPA*, the role the federal government will actually play in any given application is uncertain. Both Acts, and the *CEAA* that they trigger, have high levels of discretion built into them, making it extremely difficult to determine if, and to what extent, the federal government will be involved in a particular oil sands operation. Although it is likely that pressure from environmental groups has increased federal involvement in recent years, federal involvement remains unpredictable. Most notably, in a recent EUB hearing on a major expansion of an oil sands mine and bitumen upgrading facility, the federal government broke with what seemed to be an emerging practice when it failed to appear at the hearing to make submissions and cross-examine witnesses.³²¹

With respect to the *CEAA* in particular, discretion plays a critical role in, among other things, the extent to which a federal environmental assessment will be required, the scope of the project that will be assessed, and whether a comprehensive report will be required. The *Prairie Acid Rain Coalition* case mentioned above demonstrates the limited role the federal government may actually decide to assume in the environmental assessment of oil sands projects. The narrow scoping of the project by DFO as the destruction of a fish-bearing watercourse (and not the entire oil sands mine) meant that the federal assessment could occur at the screening level only, and no comprehensive study was required. The limited role to be played by the federal government was clear.

In upholding DFO's discretion to so narrowly scope the project, the court relied in part upon the discretionary provisions of the *CEAA*. But the court also made some additional remarks that further confuse the role of the federal government in the environmental assessment of oil sands projects. According to the court, in deciding how to scope the project for purposes of the *CEAA*, DFO was entitled to take into account the fact that the entire oil sands project had been subject to an environmental assessment by the province of Alberta. The court concluded that, as matter of policy, it was sensible to subject projects to a single environmental assessment. No mention was made about what this might mean for the future of the *CEAA*. In the result, the future role of the federal

³²⁰*Prairie Acid Rain Coalition*, *supra* note 306.

³²¹See Pembina Institute, "Media Release: Federal Government a No-Show at Crucial Oil Sands Expansion Hearing" (July 13, 2006), online: <<http://www.oilsandswatch.org/media-release/1257>>.

government in the environmental assessment of oil sands projects remains critically uncertain.³²²

At the end of the day, the applicability of the *CEAA* in any given case is unclear and unpredictable. The parliamentary committee reviewing oil sands development stated as follows about the current federal and Alberta environmental assessment processes: “hearings held by the Committee revealed a degree of perplexity among several stakeholders both about the role of each government authority and the comprehensiveness of this stage of the assessment process.”³²³

Determining the level of federal involvement is also difficult in regard to whether or not a joint review panel will be struck under the *CEAA* and the *Canada-Alberta Subagreement* noted above. Although some oil sands operations that have resulted in the destruction of fish habitat have been assessed under a joint review panel process, not all have.³²⁴ A review of the decisions does not reveal any factors, or provide guidance, as to when the federal government will initiate a joint review public hearing process. This adds yet another dimension to the lack of clarity and transparency which characterizes the federal role in Alberta oil sands development.

³²²Curiously, DFO’s decision on the scope of the project under the *CEAA* was made *after* the EUB hearing, and *after* the provincial EIA had occurred. This begs the question of how a cooperative federal/provincial assessment could have taken place while DFO waited until the provincial process was complete before making its decision. The EUB had also issued its decision approving the oil sands project prior to DFO’s final decision on the scope of the project for the purposes of the *CEAA*. See *supra* note 307.

³²³*Supra* note 297 at 35.

³²⁴See, 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* (22 October 2002) (Amendment released 2002-10-30), and EUB Decision 2006-112: *Suncor Energy Inc., Application for Expansion of an Oil Sands Mine (North Steepbank Mine Extension) and a Bitumen Upgrading Facility (Voyageur Upgrader) in the Fort McMurray Area* (14 November 2006). See *supra* note 311 for the joint review panel decisions.

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