

Determining the Public Interest and What Constitutes Sustainability In the Development of Canada's Oil Sands

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by

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INTRODUCTION

Oil sands are deposits of bitumen, a molasses-like viscous oil that requires heating or dilution with lighter hydrocarbons to enable it to flow. While conventional crude oil flows naturally or is pumped from the ground, oil sands must be mined or recovered in situ - meaning 'in place.' Oil sands recovery processes include extraction and separation systems to remove the bitumen from sand and water. Bitumen requires rigorous treatment to convert it into an upgraded crude oil useful for refineries for the production of gasoline and diesel fuels.

Oil sands deposits are contained in three major areas - the Athabasca, Peace River and Cold Lake regions - beneath 140,200 square kilometres in north-eastern Alberta - an area larger than the state of Florida. These areas contain Boreal forests and are traditional lands used by aboriginal groups. Only about two percent of the initial established resource has been produced to date. Current oil sands production is approximately 1.5 million barrels per day, with annual capital investment reaching a high of \$20 billion in 2008.

Production from oil sands is of interest to a variety of groups. Mining and in situ operations have impacts on the environment and affect the landscape of traditional lands of aboriginal peoples. Aboriginal groups, however, also have an economic interest in oil sands development, which brings employment, contracts for services and increased social programming to local communities. Changes to the landscape also create concerns, however, for environmental groups. These groups are generally less interested in the economic development benefits associated with the oil sands. Finally, different branches of government are involved in oil sands development in order to protect the interests in their area of responsibility. All of these groups have an interest in oil sands development projects proposed by oil companies. Public hearings of oil sands applications can therefore be long and contentious processes.

CONCERNS WITH THE HEARING PROCESS

The Alberta Energy Resources Conservation Act creates the Alberta Energy Resources Conservation Board (the "ERCB", or "Board", formerly the Alberta Energy Utility Board "AEUB") and makes it responsible for ensuring that Alberta's energy resources are developed in the public interest. The ERCB's broad purpose is to ensure the orderly, efficient and economic development Alberta's energy resources. In fulfilling this mandate, the ERCB is required to

conduct public hearing processes if the development of energy projects could potentially directly and adversely affect the rights of individuals or groups. Regarding oil sands development, aboriginal groups with treaty rights covering public lands in oil sands areas are often affected by proposed developments, especially for new projects. If issues cannot be resolved through discussions between industry and these groups, hearings are required.

Production of Canadian oil sands commenced in the late 1960s. By the 1970s, oil sands development started raising concerns from local aboriginal communities. In 1983, Canada's largest oil sands producer applied to the ERCB to extend the approved life of its original oil sands project and to increase production. The local aboriginal community most affected by the project, intervened on the application resulting in a contentious hearing.

The aboriginal community was concerned about a variety of health, environmental and socio-economic issues. The community believed it was ill-equipped, however, to address the effects of the oil sands industry other than through general observations. They contended that adequate environmental monitoring and studies on current and future impacts and cumulative effects were needed. The ERCB agreed that more effort should be put into long-term environmental impact studies.

The project was approved. The ERCB was satisfied that the expansion program was generally appropriate in that it would provide benefits in resource conservation and environmental impact mitigation, as well as generating economic benefits. However, the Board noted an apparent lack of communication between those conducting the studies and the affected community. The Board commented that if the community is not aware of a study, does not have input into it, and is not aware of or does not understand the results, it is not surprising that it is not influenced by such a study.

The Board found all of these matters required serious consideration. The Board wanted to establish a more effective liason and communication between the local people, oil sands plant operators and the government departments and agencies responsible for oil sands development. The Board noted that it would explore the potential for alternative approaches to the relevant decision-making processes.

A DIFFERENT APPROACH

The next two oil sands applications were dealt with using an entirely different method. A 1986 project was divided into two phases. The first phase identified areas of the application where there were no objections. These aspects of the application were approved. The second phase of the application process was designed to address areas of concern. The Syncrude Application Review Group or "SARG" was formed to review this phase of the application.

SARG was formed to identify and resolve concerns without a public hearing. The intent was to promote good dialogue between the aboriginal community, the oil sands developer, and government departments. The Board agreed to fund the retention and reasonable expenses of legal counsel and environmental consultants to assist the community, as well as honoraria for certain community members attending SARG meetings. SARG noted in its report that "the time frame of five to six months and the informal 'give and take' nature of the process, allowed the aboriginal community to take a more comprehensive and detailed review approach in interaction with the government agencies and the proponent, and also allowed the community to have internal consultation."

By identifying questions and concerns and exchanging information the group was able to either resolve concerns or come to consensus on a method to address outstanding issues without a hearing. SARG met a number of times and published a final report recommending conditional project approval. The group agreed that this review process provided a positive mechanism for the processing of the application and offered a viable alternative to contentious public hearings.

In 1987, the Board again supplemented its normal regulatory review of an expansion proposal by an oil sands developer by establishing a consultative review group called the Syncrude Expansion Review Group "SERG". SERG was comprised of representatives from the local aboriginal community, the oil sands developer, Alberta Environment, Alberta Forestry, Lands and Wildlife, and ERCB staff. The group was chaired by an ERCB board member and was charged with identifying the major issues and problems associated with the application, identifying and resolving concerns where possible outside the context of a public hearing, and promoting dialogue among the Aboriginal community, the oil sands developer and government departments.

SERG convened a number of issue focused meetings and, as with SARG, consultants were retained to aid the community. The consultative process allowed SERG to determine what type of additional information or studies were needed, allowed it to commission work and review it, all within the same process. For example, technology and emissions were studied further and reports were provided to SERG for review. This allowed all parties to understand the technology and facilitated agreement on issues. A final report of the SERG was submitted to the Board. The report commented on the success of the process:

SERG was successful in bringing the Band leadership and Syncrude management together, identifying issues requiring resolution and documenting areas of agreement or disagreement. As a result this report, which focuses on the issues successfully resolved among the parties, was produced.

The processes employed by these two early attempts at ADR were successful, in part, because they involved local groups who were open to accepting oil sands development, but needed a common understanding of potential impacts and benefits.

MULTISTAKEHOLDER PROCESSES

In 1995, Canada's federal government passed the Canadian Environmental Assessment Act ("CEAA"). Unlike Alberta's provincial laws, *CEAA* can require public hearings called joint review panels even if all potentially adversely affected parties do not require a hearing to resolve their issues or concerns. *CEAA* allows general public participation in joint panel reviews. This has permitted environmental groups to engage in the regulatory review of some oil sands projects. Prior to *CEAA* such groups would have to join with an affected local individual or group in order to be assured the opportunity of participating in the regulatory review process.

CEAA does not apply to all oil sands developments. Only those that affect an area of federal jurisdiction like fisheries or navigable waters engage *CEAA*. Even when *CEAA* is engaged, there is administrative discretion applied to the determination of whether a public review is required. The bounds of this discretion have been frequently litigated in the Courts. *CEAA* has, however, made environmental and other interest groups potential stakeholders regarding oil sands development. Public interest groups, environmentalists and regional (rather than local) aboriginal communities started asserting interests in oil sands development. Alberta

Environment, with input of the AEUB, led an initiative as part of a new Regional Sustainable Development Strategy ("RSDS"). The forum created under the RSDS to reach resolution on issues was the Cumulative Effects Management Association ("CEMA").

CEMA was established as a registered not-for-profit, non-governmental organization with a mandate "to study the cumulative environmental effects of industrial development in the region and produce guidelines and management frameworks." CEMA is a multi-stakeholder body which, at its peak, had 44 members representing all levels of government, industry, regulatory bodies, environmental groups, Aboriginal groups, and the local health authority.

Environmental issues and concerns were prioritized by CEMA. There were 72 areas of concern identified to be addressed. CEMA had some early success on air emission issues. However, the issues and concerns to be addressed became numerous and limited the ability of CEMA to resolve them to the satisfaction of many in its diverse membership. In the earlier SARG and SERG processes, all of the parties involved were open to oil sands development and were willing to see it move forward, but needed a forum to reach consensus on how development would occur. In contrast, with increasingly diverse interests in oil sands, CEMA members included environmental groups, some of which had little or no interest in oil sands development expanding, or even continuing for that matter.

Several CEMA members have left the group. Reviews have been commissioned to assess CEMA's efficiency and effectiveness. The reviews questioned how CEMA represents its stakeholders, and whether aboriginal groups, industry, government and environmental groups, the four pillars of CEMA, are equally balanced. Although efforts are being made to revitalize CEMA, those leaving the group appear intent on taking their issues to different forums, including back into administrative hearing processes and to the courts.

The success of ADR initiatives represented by the SARG and SERG processes and the AEUB's formalized ADR program was largely due to the fact that local groups had at least one mutual interest: the development and expansion of the oil sands development to the mutual benefit of all concerned. ADR allowed the groups to exchange information, raise questions and concerns and reach consensus about how development would progress and how resources would be allocated. In contrast, there was no such mutual interest among CEMA members to serve as a starting point

for discussion. Some of the CEMA members, for example, objected to oil sands development outright. In addition, the number of interested parties made it very difficult to reach consensus. Currently, the use of a single ADR mechanism to resolve multi-party concerns regarding oil sands development remains uncertain.

ALBERTA LAND STEWARDSHIP ACT (“*ALSA*”)

Last year Alberta created a new comprehensive land use planning regime with the passage of the *ALSA*. The *ALSA* provides for the establishment of regional plans. The *ALSA* does not mandate specific planning regions, but the current government’s intention is to divide the province into regions along the geographic boundaries of Alberta’s seven watersheds. Sub-regional plans and issue-specific plans can then be adopted for each planning region. Responsibility for designating planning regions, adopting plans, and all other significant powers, rests with the Lieutenant Governor in Council (i.e., Cabinet).

Each planning region must describe a vision and state at least one planning objective. Regional plans are likely to set thresholds for the achievement of objectives. Issues such as the pace of development, its density, water use, cumulative impacts, disturbance areas and wildlife populations could all be addressed in regional, sub-regional or issue-specific plans.

The *ALSA* creates a new Land Use Secretariat (“Secretariat”), headed by the Stewardship Commissioner, as part of the provincial civil service -- ostensibly independent from any government department. A new ministerial portfolio of Stewardship Minister is created and is given some control over the Secretariat.

The Secretariat is responsible for the initiation and administration of planning processes leading to the preparation of regional plans for submission to the Lieutenant Governor in Council. Either the Lieutenant Governor in Council or the Stewardship Minister can appoint Regional Advisory Councils (“RAC”) for planning regions. The Secretariat would then incorporate RACs into the planning and consultation process for the purposes of providing advice to the Lieutenant Governor in Council regarding proposed regional plans. However, the approval and amendment of regional plans fall within the absolute and unfettered discretion of the Lieutenant Governor in Council. The Lieutenant Governor in Council has no obligation to appoint RACs and, if appointed, no obligation to follow, or even consider, the advice they provide. The intent of the

ALSA is to make regional planning a purely legislative function in order to avoid any obligations of administrative fairness that could subject regional planning to review by the Courts.

In the event of conflict between the provisions of the *ALSA* and other provincial legislation, the *ALSA* prevails. Regional plans are given the status of regulations under the *ALSA* and all regulations under it prevail if inconsistent with other provincial regulations. Further, all statutory consents (e.g., approvals, licences, permits, etc.) of local governments, provincial departments, agencies and administrative bodies or tribunals must be reviewed and made to conform with the *ALSA* and its regulations. In the event of alleged non-compliance, enforcement is left to the sole discretion of the Stewardship Commissioner who can, among other things, apply to the Courts to compel compliance. Individual rights to initiate enforcement proceedings are expressly precluded. All that individuals can do is register complaints with the Stewardship Commissioner, who has no obligation to pursue them.

The *ALSA* was, in part, a response to criticism that the project environmental assessment process in Canada inadequately accounted for cumulative effects, leading to the issuance of approvals prior to the establishment of regional environmental thresholds. The first priority for the new *ALSA* is to establish a regional plan for the oil sands area. The Lower Athabasca Regional Plan is scheduled to be completed and approved by Cabinet before the end of 2010. The Terms of Reference for the Lower Athabasca RAC direct consideration of three development scenarios which are described as follows:

Current State Scenario

Energy prices remain moderate. Existing production levels continue, with some new investments made. Current environmental management systems and technology continue to be employed. Production levels are approximately 1.5 to 2.0 mbd.

Mid-range Scenario

Increased average energy prices. Production levels grow with new investments. Technological advancements and innovations are employed, aimed at achieving environmental objectives. Production grows to meet a mid-range level of

demand, and to a point of cost constraints. Production levels are approximately 4.0 to 4.5 mbd.

High-end Scenario

Robust and sustained energy prices. Production levels increase in response to increased energy demand. Technological advancements and innovations are employed, aimed at achieving environmental objectives. Project and compliance costs remain moderate, with limited cost constraints. Production levels are 6.0 mbd or more.

The mid-range scenario is achievable based on bitumen production increasing at a rate of 20 per cent each year. Government has set an aspiration goal of one-third (i.e., 1.3 to 1.5 mbd) bitumen production for bitumen sales, one-third for synthetic crude sales (i.e., upgraded), and one-third for value-added products and petrochemicals. Based on the stated goal, a bitumen production rate of approximately 4.0 to 4.5 mbd would be required. Market analysis is to be undertaken by the Government of Alberta to determine if this goal is economically achievable.

The RAC will explore these three developments scenarios within the context of desired cumulative environmental management objectives for the Lower Athabasca.

The TOR's appear to be biased towards the development of the oil sands as a priority. Direction is given to the RAC as follows:

In exploring each of these scenarios, the advice provided by the RAC should be consistent with the following guidelines:

- resource development in the Lower Athabasca Region will remain a key economic driver for Alberta. Accordingly, the land base should be managed to support economic development opportunities as the primary but not sole priority; and

- the three development scenarios are to be explored within the context of desired cumulative environmental thresholds for the region, as outlined below.

Land conservation objectives are set at a minimum of preserving twenty percent of the region's boreal forest. It is noted that six percent of this objective is already achieved through the existence of Wood Buffalo National Park. An additional ten percent can be achieved without conflicting with any existing crown dispositions. This leaves four percent which could conflict with existing dispositions, including possibly oil sands.

The other potential limitation on oil sands production relates to cumulative effects thresholds. With respect to these thresholds the terms of reference state as follows:

Thresholds will consider cumulative environmental impacts (e.g. acidification of soil and lakes, etc.) on key condition indicators and may be adjusted accordingly.

The management of cumulative effects on watershed and airsheds will be important aspects of regional planning. Given the importance of future resource developments in the Lower Athabasca, the regional plan will need to consider how air and water thresholds can be monitored and achieved.

The RAC will use the established watershed and airshed thresholds in developing the regional plan, and will provide advice consistent with the following guidelines:

- The three development scenarios to be explored (i.e., current state, mid-range and high-end) should be assessed with reference to the specified regional cumulative environmental thresholds for air and water.

If both economic and environmental objectives cannot both be satisfied in each scenario, then options should be assessed and recommended.

CONCLUSION

There are a number of regulatory processes that apply to oil sands development in Canada. The primary processes are those established by the Province of Alberta which owns the underlying

oil sands resources. Alberta has historically charged the ERCB with ensuring that all of its energy resources are developed in an orderly, efficient and economic matter. This has always involved taking a broad perspective of the public interest, which has included ensuring conservation of the resource and protection of the environment. It has also involved balancing public and private interests, where development of the resource has the potential to directly and adversely affect the rights of others, such as aboriginal groups.

The ERCB's process is well-suited to resolving discreet disputes between affected parties. It was never intended, however, to determine broader policy. The questions of what constitutes sustainable development involves questions beyond those who maybe directly affected. Other processes have been developed. Consensus based initiatives such as CEMA have faced challenges. The ALSA process seems designed to come to conclusions. It is, however, more of a political process than a regulatory or administrative one. Ultimately the question of what constitutes sustainable development of Canada's oil sands is likely to be a political determination.