

August, 2013

Joint Review Panel Releases Report & Decision on Oil Sands Jackpine Mine Expansion

Shell Canada Energy Application to Amend Approval 9756/2013 ABAER 011/AER Application No. 1554388/CEAA Reference No. 59540

Introduction and Overview

The Joint Review Panel (“Panel”) for the Jackpine Mine Expansion issued its lengthy report and decision, (spanning more than 400 pages), on July 9, 2013. It addresses Shell Canada Energy’s (“Shell”) application to increase bitumen production at the existing Jackpine Mine (the “Project”) located 70 kilometres north of Fort McMurray by 15,900 cubic metres per day.

Legal Framework

During the Panel’s assessment, the *Canadian Environmental Assessment Act* was repealed and replaced by the *Canadian Environmental Assessment Act, 2012* (“CEAA, 2012”). As a result, this was the first review dealing with the requirements of the CEAA, 2012.

Section 3 of the Alberta *Energy Resources Conservation Act* required the Panel to consider whether the Project was in the public interest. Alberta’s new *Responsible Energy Development Act* requires consideration of the social and economic effects of the Project and of the effects of the Project on the environment.

Decision

The Panel noted that the Project (which is an expansion of an existing oil sands mine) would be located in an area that is virtually surrounded by other oil sands mines and that the government of Alberta has identified the extraction of bitumen as a priority use. The Panel went on to conclude as follows:

“The Project would provide significant economic benefits for the region, Alberta and Canada. Although the Panel finds that there would be significant adverse project effects on certain wildlife and vegetation, under its authority as the [Alberta Energy Regulator (“AER”)], the Panel considers these effects to be justified and that the Project is in the public interest”.

The Panel found that the proposed diversion of the Muskeg River would be in the public interest since approximately 23 to 65 million cubic metres of bitumen would be unavailable if the River was not diverted. This decision was made taking into account the predicted minimal environmental effects on water quality and quantity.

With these findings, the Panel approved the Alberta portion of the application (AER Application No. 1554388 & AER Approval 9756) subject to Shell complying with 22 conditions set out in the report.

Environmental Effects

The Panel found it difficult to assess the significance of Project effects because Shell: (i) used coarse-scale Landsat imagery to estimate land cover type; (ii) failed to establish sufficient thresholds to determine significance; and (iii) as a result of (i) and (ii), needed to rely extensively on professional judgment. As a result, and on the basis of the evidence presented by other parties, the Panel used a 20% loss threshold to determine the significance of Project effects. The Panel concluded that the Project “would have significant adverse environmental [Project] effects on wetlands, traditional plant potential areas wetland-reliant species at risk, migratory birds that are wetland-reliant or species at risk, and biodiversity”.

In coming to this conclusion, the Panel noted that a large loss of wetlands (over 10,000 hectares) would result and that 85 per cent of those wetlands would be peat lands that could not be subsequently reclaimed or restored. These wetlands provide important habitat for many migratory birds and species at risk. Based on the evidence presented, the Panel could not conclude that the remaining wetlands in the regional study area would be sufficient to alleviate the wetland habitat loss in the local study area comprising the Project.

While acknowledging Shell’s plans to reclaim the Project footprint, the Panel determined that such reclamation would not mitigate all of the significant effects and, moreover, reclamation would not occur or be complete for many years (e.g. 2165). The Panel recommended that before other provincial and federal Project approvals are issued, the government of Canada and Alberta should identify and implement conservation offsets as a way of mitigating some of the Project’s effects. No evidence was presented at the hearing on the possible location or locations of suitable conservation offsets.

Cumulative Effects

In assessing the significance of cumulative effects for several key indicator resources and species at risk, the Panel found that the Project itself would only contribute incrementally to some of these effects and that “most of these effects [would] result from projects and disturbances that either currently exist or have already been approved”. The Project, in combination with past, present and reasonably foreseeable future projects, will likely result in significant adverse cumulative effects on “wetlands; old-growth forests; traditional plant potential areas; wetland-reliant species at risk and migratory birds; old-growth forest-reliant species at risk and migratory birds, caribou; biodiversity; and Aboriginal [traditional land use], rights and culture”.

Aboriginal Traditional Land Use, Rights and Culture

The Panel determined that Project effects alone would be unlikely to destroy or fundamentally alter the ability of Aboriginal groups to practice traditional land use activities. Therefore Project effects, while adverse, would not likely be significant.

But, according to the Panel, the Project effects, in combination with the effects of other existing, approved and planned developments in the region, would likely result in significant adverse cumulative effects on Aboriginal traditional land use, rights and culture.

The over-arching conclusion was that cumulative effects assessments are best done on a regional basis:

“The Panel agrees with Shell and the Aboriginal groups participating in this review that completing cumulative effects assessments on a regional basis, rather than on a project-by-project basis, would be more effective and would reduce the potential for individual project cumulative effects assessments to produce inconsistent results”.

Next Steps

The report contains 88 recommendations (in addition to the 22 conditions) that the Panel believes are important for the successful implementation of the Project and “for the future development of the oil sands area”.

Taking account of the Panel’s report, the federal Minister of the Environment must now decide whether the Project is likely to cause significant adverse environmental effects referred to subsections 5(1) and (2) of CEAA, 2012.

In addition, (and again taking account of the Panel’s report) Canada and Alberta must assess the adequacy of Crown consultation with Aboriginal groups and determine what is needed in order to complete their respective consultation obligations.

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