

# APPLICATION FOR REVIEW OF THE LOWER ATHABASCA REGIONAL PLAN

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Submitted to The Honourable Diane McQueen

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**FORT MCKAY FIRST NATION AND  
FORT MCKAY MÉTIS COMMUNITY ASSOCIATION**

AUGUST 28 2013

## Contents

|   |               |
|---|---------------|
| <b>I. INTRODUCTION</b> .....  | <b>- 2 -</b>  |
| A. Synopsis.....  | - 2 -         |
| B. Terminology .....  | - 3 -         |
| C. Legislative Framework .....  | - 3 -         |
| <b>II. SPECIFIC PROVISIONS OF THE REGIONAL PLAN THAT DIRECTLY AND ADVERSELY AFFECT FORT MCKAY</b> .....                             | <b>- 5 -</b>  |
| A. Schedule F: LARP Land Uses and Schedule G LARP Digital Map.....  | - 5 -         |
| B. Effective Date and subsection 7(3) of the Regulatory Details Plan.....   | - 6 -         |
| C. Omissions from LARP .....  | - 9 -         |
| <b>III. HOW THE PROVISIONS OF LARP ARE, OR WILL, DIRECTLY AND ADVERSELY AFFECT THE APPLICANTS AND EXPLANATION OF IMPACTS.</b> ..... | <b>- 11 -</b> |
| A. Fort McKay’s Land Rights and Impacts .....   | - 11 -        |
| B. Health Impacts .....   | - 19 -        |
| <b>IV. AMENDMENTS REQUESTED</b> .....   | <b>- 23 -</b> |
| <b>V. CONCLUSION</b> .....  | <b>- 24 -</b> |
| <b>VI. CONTACT INFORMATION</b> .....  | <b>- 24 -</b> |
| <b>VII. LIST OF ATTACHMENTS</b> .....   | <b>- 25 -</b> |

## I. INTRODUCTION

### A. Synopsis

1. This is an application for a review and amendment of the Lower Athabasca Regional Plan (“LARP”) pursuant to section 19.2 of the *Alberta Land Stewardship Act* (“ALSA”). The Fort McKay First Nation and Fort McKay Métis Community Association (“Fort McKay”) are directly adversely affected by the LARP.
2. The Fort McKay First Nation and Fort McKay Métis Community Association make this application on their own behalf and on behalf of their individual members, including members who hold Registered Fur Management Areas (trapping areas) pursuant to the *Wildlife Regulation*, Alta Reg. 143/1997. Schedule A sets out the names of the individual applicants.
3. Fort McKay is already directly and adversely affected by the scale, intensity, and proximity of regional development. These effects include loss of land and natural resources necessary to support the exercise of treaty and aboriginal rights both within its traditional territory and on its own lands. They also include impacts to lands owned and occupied by Fort McKay, such as noise, odours, air pollution, and decreased personal safety.
4. Schedule F of LARP designates the majority of Fort McKay’s traditional territory, including land up to the borders of its Reserves and leased lands, for development. But the remainder of the LARP is largely undeveloped, resulting in approval of more oil sands projects, even on the borders of Fort McKay’s Reserves, without regard to the lack of a corresponding effective or comprehensive system for managing the cumulative effect of such development.
5. The purpose of the LARP, according to *ALSA*, is to manage land use to “meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples” and create policy that enables sustainable development while taking into account and responding to cumulative effects. The LARP, in its current form, does not contain objectives for biodiversity or land disturbance or sufficient conserved areas that meet the reasonably foreseeable needs of current and future generations of the people of Fort McKay. There are no objectives, Strategic Plan or Implementation Plan for traditional land use or treaty and aboriginal rights.
6. Section 1 of *ALSA* requires that a regional plan must respect the property and rights of individuals. The LARP does not do so. The many objectives and frameworks that are missing from LARP, combined with LARP’s authorization of more than 65% of the region for oil sands development, infringes the rights of Fort McKay to a healthy environment, the use and enjoyment of their lands and

homes, and their constitutional rights to meaningful opportunities to hunt, fish, trap and pursue their culture.

## **B. Terminology**

7. In this submission “Lands” denotes land to which either the Fort McKay First Nation or the Fort McKay Métis Community Association owns either through legal title or through beneficial ownership (Reserve lands).
8. “LARP” or the “Plan” means the Lower Athabasca Regional Plan.
9. “Moose Lake Reserves” means Indian Reserves 174a and 174b.
10. “Region” means the Lower Athabasca Region to which the Lower Athabasca Regional Plan applies.
11. “Traditional Territory” means the lands depicted on the map in attached to this submission.

## **C. Legislative Framework**

12. The *Alberta Land Stewardship Act*, S.A. 2009, c.A-26.8 (“ALSA”) establishes the legislative authority and parameters for the creation of regional plans. Regional Plans are subservient to the Act and must be created to further the purposes of the Act which are set out in s.2:
  - a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;
  - b) to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;
  - c) to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;
  - d) to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.
13. ALSA also specifies that “in carrying out the purposes of this Act...the Government must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the overall greater public interest ”(ALSA at s.1(1)).

14. A regional plan is an expression of public policy of the Government, pursuant to s. 11(1) of *ALSA*.
15. The LARP was made effective September 1, 2012. Pursuant to section 15 of *ALSA*, a regional plan binds the Crown, local government bodies, statutory decision makers and all other persons subject to section 15.1 of *ALSA*. Section 2(1) of the Regulatory Details Plan of LARP states that the Regulatory Details Plan applies to the Crown, decision-makers, local governments bodies, and subject to s. 15.1 of the Act, all other persons, “in respect to land, activities, effects, the environment, species and thresholds in the planning region.” Section 15.1 of *ALSA* permits variances to be granted to persons affected by the Plan.
16. The LARP Strategic Plan and Implementation Plan are statements of provincial policy, pursuant to sections 4 and 5 of the Regulatory Details Plan. Decision makers are required by section 7(1) of the Regulatory Details Plan to consider the LARP Strategic Plan and LARP Implementation Plan.
17. A regional plan must include a vision and at least one objective for the planning region (s.7 of *ALSA*). The LARP contains this Vision:

The Lower Athabasca Region is a vibrant and dynamic region of Alberta. People, industry and government partner to support development of the region and its oil sands reserves. Economic opportunities abound in forestry, minerals, agriculture, infrastructure development, the service industry and tourism. The region’s air, water, land and biodiversity support healthy ecosystems and world class conservation areas. Growing communities can enjoy a wide array of recreation and cultural opportunities.

18. Pursuant to section 19.2 of *ALSA*:

(1) A person who is directly and adversely affected by a regional plan or an amendment to a regional plan may, within 12 months from the date the regional plan or amendment affecting the person comes into force, request a review of the regional plan or amendment affecting the person in accordance with the regulations.

(2) On receiving a request under subsection (1), the Stewardship Minister must establish a panel to conduct a review of the regional plan or amendment and report the results of the review and any recommendations to the Stewardship Minister.

(3) On receiving a report and any recommendations under subsection (2), the Stewardship Minister must present the report and recommendations to the Executive Council.

19. According to the *Alberta Land Stewardship Regulation*, Alta. Reg. 179/2011 at s.5(1)(c) [ALSR], “directly and adversely affected” means “... reasonable probability that a person’s health, property, income or quiet enjoyment of property, or some combination of them, is being or will be more than minimally harmed by the regional plan”.

20. Section 2 of ALSA defines “effect” as including:

- (i) any effect on the economy, the environment, a community, human health or safety, a species or an objective in a regional plan, regardless of the scale, nature, intensity, duration, frequency, probability or potential of the effect, and
- (ii) a cumulative effect that arises over time or in combination with other effects.

## **II. SPECIFIC PROVISIONS OF THE REGIONAL PLAN THAT DIRECTLY AND ADVERSELY AFFECT FORT MCKAY**

### **A. Schedule F: LARP Land Uses and Schedule G LARP Digital Map**

21. Schedule F and Schedule G of the LARP designate 5,415,345 ha or 58.10% of the Region’s Green Area (public lands) for oil sands and other energy development, surface materials extraction, grazing, tourism and recreation, motorized access, hunting, fishing and trapping, and multi-use corridors. In the White Area, the same land uses are designated for the 672,220 ha of public lands in this area which comprises 7.21%. The total area in which oil sands and resource extraction is permitted is 65.31%.

22. New and existing conservation area designations comprise 22.41% of the Region (2,089,491 ha). Some of the conservation area is permitted for use by existing oil and gas tenure holders, and future multi-use infrastructure corridors. 2.19% of the Region is designated for Recreation areas, existing and new, and Public Land Areas for Recreation and Tourism. The remainder of the region, approximately 10% is made up of the Cold Lake Air Weapons Range, First Nation Reserves, Métis Settlements and Lake Athabasca.

23. While the majority of the Region is designated for “mixed use”, the various uses cannot all be supported on the same land and are in competition with each other. This is acknowledged in the *Land Use Framework* (Alberta 2008):

Today’s rapid growth in population and economic activity is placing unprecedented pressure on Alberta’s landscapes. Oil and gas, forestry and mining, agriculture and recreation, housing and infrastructure are all in competition to use the land—often the same parcel of land. There are

more and more people doing more and more activities on the same piece of land. This increases the number of conflicts between completion user groups and often stresses the land itself. Our land, air and water are not unlimited. They can be exhausted or degraded by overuse. (pg. 6)

And in reference to the Lower Athabasca Region:

Northeastern Alberta has been the epicentre for economic growth in Alberta and Canada through the development of the oil sands. With over \$100 billion in planned oil sands investment in the region, the environment and communities are under immense pressure from a variety of stakeholders, often with competing interests”. (pg. 45)

24. The LARP prioritizes oil sands development for this “mixed use” area. The first outcome is that “The economic potential of the oil sands resource is optimized” (LARP at pg. 37) and the indicators for assessing achievement include oil sands production rate, total oil sands investment and cost of production (LARP at pg.38).
25. LARP is a formal statement of Government policy. The Regulatory Details Plan compels statutory decision makers to consider the Strategic Plan and Implementation Plan, in part, to manage activities and set priorities (LARP at s. 2, 3, 4 & 5).
26. The prioritization of oil sands development at the expense of Fort McKay’s rights is apparent from the fact that a) the area in which oil sands and other development is prioritized has been designated; b) most of the management tools that would indirectly support the exercise of treaty and aboriginal rights are not yet developed; c) the absence of any outcome or objective, framework, or threshold, protecting these rights; d) the new conservation areas have not been legally created but the Regulatory Details Plan mandates that no decision-maker may adjourn or refuse an approval for any application because the Crown has not completed or complied with any commitment or direction in the LARP Strategic or Implementation Plans (ss.7(3)).

## **B. Effective Date and subsection 7(3) of the Regulatory Details Plan.**

27. The effective date of LARP is September 1, 2012, despite the majority of land management strategies and implementation are not yet developed or in place. The area in which oil sands and resource development can occur has been designated and the implementation strategies are in place; but the majority of frameworks and regulatory tools to meet the Vision and Outcomes (apart from optimizing oil sands development) have not been created. The following are not in place:

- Creation of the new conservation areas
  - Biodiversity framework including objectives for biodiversity
  - Landscape management plan
  - Tailings management plan
  - Wetlands policy
  - Progressive reclamation strategy
  - Completion of groundwater management framework (unenforceable interim quality limits currently in LARP)
  - Completion of surface water quantity management framework for the Lower Athabasca River
  - Designation of new provincial recreational areas
  - Creation of public land areas for recreation and tourism
  - Regional trail system (Schedule E)
  - Sub-regional plan for south Athabasca oil sands area
  - Sub-regional plan for the north Athabasca oil sands area
  - Cumulative effects assessment and risk assessment (not identified as an action item in the Plan but page 22 of the Strategic Plan says this is a key component of the new cumulative effects management approach by which development pressures will be managed)
  - Mandatory integrated land use management (see page 25 – LARP will make regional integrated land management a necessity; no details provided on how and when)
  - Although conservation offsets are contemplated under Division 4, Part 3 of ALSA, there are no implementation tools or policy developed
  - LARP commits to consult Aboriginal communities, including Métis, on regional planning but does not yet have a Métis consultation policy and does not in fact consult Métis communities
28. Pursuant to subsection 7(3) of the Regulatory Details Plan, a decision maker “must not adjourn, defer, deny, refuse, or reject any application, proceeding or decision making process before it by reason only of a) the Crown’s non-compliance with a provision of either the LARP Strategic Plan or LARP Implementation Plan or b) the incompleteness by the Crown or any body of any direction or commitment made in a provision of either the LARP Strategic Plan or LARP Implementation Plan.”

29. While a number of management tools and strategies are contemplated, some with target dates, there are no regulatory backstops if the target dates are not met. An updated surface water quantity framework was to be completed in 2012 but this has not occurred. It is highly unlikely that the frameworks targeted for completion in 2013 will meet this target. These include the biodiversity framework, the landscape management plan, regional parks plan, and a subregional plan for the south of the Region. LARP says that aboriginal communities will be consulted and included in the development of these frameworks and plans. There are only 4 months left in 2013 and Alberta has not yet even released a consultation plan to commence this work.
30. Alberta has a long history of failing to meet deadlines for developing frameworks to manage cumulative effects. It never completed the majority of management tools or implemented the Regional Sustainability Development Strategy released in 1999, and eventually abandoned the strategy. By 2000, the Energy Utilities Board (EUB) was already noting the urgency of implementing a comprehensive cumulative effects strategy in its decisions regarding the Petro-Canada Mackay River SAGD in situ warning that: “Significant delays in the process or the failure of the process to begin to establish environmental objectives and guidelines for the management of cumulative effects within the oil sands region in a timely manner could eventually force the [EUB] to revisit its previous decisions” (EUB Decision 2000-50 re: Petro Canada MacKay River at pg.15). In 2005, the EUB identified the need to set a minimum flow rate (IFN) for the Athabasca River and believed that “the timely development of the IFN for the Athabasca River is needed to preserve the future integrity of the river.” Alberta Environment assured the Panel it would be in place by 2006; it has never been finished (see EUB Decision 2004-005 re: CNRL Oil Sands Project). Also in 2005, a management framework for the Muskeg River watershed was contemplated for completion and the EUB said “the Panel believes that establishing guidelines and management systems for an area of intensive oil sands development such as the Muskeg River drainage basin should be given high priority so as to enable future development to proceed in an appropriate way” and Alberta advised the Panel that it would ensure the framework was developed if CEMA failed to do so in a timely manner (EUB Decision 2004-009 re: Shell Jackpine Mine). Alberta developed an Interim Management Framework for Water Quantity and Quality in 2010 but the complete framework was never completed. Alberta advised the EUB in 2007 that the Phase II Framework for the Athabasca River would be completed and implemented by 2011 (EUB Decision 2007-013 re: Imperial Kearn Project). It is still not completed. CEMA completed a management framework for terrestrial effects in 2008 and recommended it to Alberta for approval. It was not approved and now it appears that Alberta intends to replace it with the contemplated biodiversity framework – a draft of which is not yet available.

31. The LARP is in effect and authorizes resource development in the majority of the Region but in the absence of key measures to manage the environmental and social consequences or deliver on the stated intention of managing cumulative effects.
32. As a result, the Vision and Outcomes cannot be achieved apart from the policy direction to optimize oil sands development and requirement that decision-makers comply with the thresholds set for air quality (for NO<sub>2</sub> and SO<sub>2</sub> only), the water quality thresholds for the Athabasca River (which are provincial parameters applied at one monitoring location and only apply to one water body); and the interim framework for water quantity (which applies to one water body only). The environmental thresholds that are in place under LARP do not apply until monitoring results reach “triggers”, which means the existing tools under LARP do not assist in meeting the objective of integration of economic, environmental and social considerations at the “development planning and approval stage of decision making” (see pg. 23 of LARP).

### C. Omissions from LARP

33. Fort McKay is also directly affected by omissions from the Plan. It does not contain any outcomes, thresholds, or frameworks for managing adverse impacts to Fort McKay’s Reserve and other Lands and leased Lands; or for adverse effects on opportunities to exercise treaty and aboriginal rights on Crown land (or on its Lands).
34. LARP states that the Region will be developed using a cumulative effects management approach to balancing environmental and social objectives with development and “cumulative effects management focuses on outcomes” (LARP at pg. 23). But no outcomes and objectives have been established in several areas leading to compromised environmental and community health and impairment of Fort McKay’s rights.
35. LARP, as approved, does not meet the Terms of Reference (ToR) approved for its development in 2009. Pages 17-18 of the ToR state: “It will be important that continued opportunities exist for Aboriginal traditional uses to be in close proximity to First Nations and Métis communities”. No such opportunities are incorporated in LARP with respect to Fort McKay, via the Strategic Plan, Implementation Plan, or objectives. This goal is mentioned in connection with the contemplated biodiversity framework.
36. The ToR also state that “land use must be managed to include Aboriginal traditional use” and the criteria for establishing conservation areas included “areas that support aboriginal traditional uses” (see pages. 11 and 14 of the ToR). The proposed conservation areas do not support traditional land use by Fort

McKay, beyond a *de minimis* level. Only a fraction of Fort McKay's traditional land sites are located within the conservation areas. Of the more than 2,600 traditional use sites that Fort McKay has documented to date, less than 20% of these are within existing parks and conservation areas.

37. LARP does not include any outcomes, objectives or management plan for traditional land use. At page 29 of LARP, reference is made to the fact that managing air, water, and biodiversity is important to the exercise of the constitutional rights of aboriginal communities, but no objectives are included to address this, or even a process of assessing what thresholds this may require in terms of ecosystem health or land use.
38. The ToR also directed that the LARP consider how lands under federal jurisdiction, such as First Nation lands, will be impacted and the long-term needs of these lands. Fort McKay is not able to identify any provision of LARP that ensures the sustainability of its Lands for the community's long-term cultural, social or economic needs. Specifically, how terrestrial resources on its Reserves will support traditional land use, how water quality and quantity on its Lands will support its domestic and commercial needs or how air quality will protect members health. Potential impacts to Reserve lands are not addressed at all by LARP.
39. LARP recognizes both First Nation and Métis communities have constitutionally protected rights, and says they will be consulted and invited to participate in land use planning (see LARP at page 5). However, with respect to the biodiversity framework, LARP says only the rights of First Nations will be "considered" with respect to a biodiversity framework (LARP at page 29).
40. LARP, including Schedules B and C, do not contain or contemplate objectives or a management framework for water quality or quantity for any water bodies other than the Athabasca River. This includes water bodies that provide drinking water to Fort McKay and flow into or border Fort McKay's Lands.
41. There are no odour objectives or thresholds in LARP or contemplated frameworks. Schedule A contains no limits for any substances that adversely affect human health, other than NO<sub>x</sub> and SO<sub>2</sub>. No comprehensive framework is contemplated for managing air quality to protect human health.

### III. HOW THE PROVISIONS OF LARP ARE, OR WILL, DIRECTLY AND ADVERSELY AFFECT THE APPLICANTS AND EXPLANATION OF IMPACTS.

42. According to the *ALSR* at ss. 5(1)(c)

“directly and adversely affected”, in respect of a person with regard to a regional plan, means that there is a reasonable probability that a person’s health, property, income or quiet enjoyment of property, or some combination of them, is being or will be more than minimally harmed by the regional plan

43. *ALSA* defines “effects” in subsection 2(h) as including:

- (i) any effect on the economy, the environment, a community, human health or safety, a species or an objective in a regional plan, regardless of the scale, nature, intensity, duration, frequency, probability or potential of the effect, and
- (ii) a cumulative effect that arises over time or in combination with other effects;

44. Therefore, the nature of effects to Fort McKay’s health, property, income or quiet enjoyment of property include environmental, community, an objective of the LARP and cumulative effects. Property is not limited to real property and therefore includes personal property.

#### A. Fort McKay’s Land Rights and Impacts

##### A.1 Rights

45. The Fort McKay First Nation owns fee simple lands at the Hamlet of Fort MacKay and the use and benefit of reserves 174, 174D, 174C, 174B and 174A. The Reserve lands comprise 26,000 ha. Its rights to use and enjoyment of these Reserves for the exercise of traditional land use or other purposes at the discretion of the First Nation, arises from the terms of Treaty 8 and pursuant to section 18(1) of the *Indian Act*. R.S.C. 1985, C. I-5.

46. Fort McKay’s residential community is located at the Hamlet of Fort McKay. Reserve 174 borders the Hamlet of Fort McKay to the north and is set aside for residential development. Reserve 174 is located across from the Hamlet on the east bank of the Athabasca River and a portion is located directly south of the Hamlet on the west bank of the River.

47. Reserves 174A and 174B (“the Moose Lake Reserves”) are contiguous and border the north and east of Namur Lake and south, east and a portion the west of Gardiner Lake in 98-17-W4; 98 -16- W4; 97-16-W4. The Fort McKay First Nation has cabins on both of these Reserves, which are occupied in winter and summer.
48. The Moose Lake Reserves were expanded pursuant to a land claim settlement between the First Nation, Alberta and Canada in 2006 for the purpose of traditional land use. At the time, the parties to the land claim settlement did not anticipate any resource development in the vicinity of these Reserve and the intent was to secure lands that would protect the continued use and enjoyment of these lands for hunting, fishing, trapping and cultural activities and to preserve Fort McKay’s cultural heritage and historical resources such as grave sites, traditional trails, cabins, campsites and artifacts.
49. The Fort McKay Métis Community Association holds Lands pursuant to a long-term lease at the Hamlet of Fort MacKay.
50. LARP designates as “mixed use” all land surrounding and bordering the Hamlet of Fort McKay; Reserves 174, 174C and 174D and about 39% of the land bordering Reserves 174A and 174B (all of the east and south of the latter two Reserves).
51. Fort McKay has riparian rights with respect to the Athabasca River, Ells River and MacKay River. The source of Fort McKay’s drinking water for its residential community on the Athabasca River is the Ells River. The entire length of the River from Namur Lake to the Hamlet runs through lands designated for oil sands development.
52. The MacKay River borders the south of the Hamlet of Fort McKay and Reserve 174D and is used for boating and fishing and it also runs through extensive tracts of land designated for oil sands development.
53. The individual members of Fort McKay who are senior license holders of trapping areas (Registered Fur Management Areas (RFMA)) and their license numbers are set out in Schedule A.
54. These individuals hold trapping licenses that permit the harvest of furs and hunting within their RFMAs. They have constructed cabins containing personal effects within these RFMAs. Pursuant to s. 34(1) of the *Wildlife Regulation*, Alta. Reg. 143/1997 these individuals have these rights:

**Registered fur management licence - entitlements**

**34(1)** A registered fur management licence authorizes its holder

- (a) to hunt fur-bearing animals, and

(b) if the registered fur management area to which the licence relates is north of the Red Deer River, to hunt, other than by trapping up to 6 black bears in the areas described in subsection (2).

55. Trapping areas are used by extended families and are passed down through family members. After creation of regulated trapping areas in the 1940s, family trapping areas were overlain by RFMAs and became focal areas for hunting, trapping, harvesting other country foods, processing furs and food and cultural activities. The time spent on RFMAs is crucial to the passing of skills, knowledge and traditions among the Fort McKay people. From harvesting to the processing of animals and hunting (as well as trapping) involves the entire community of Fort McKay while supporting the sharing of cultural teachings and language.<sup>1</sup>
56. Treaty and aboriginal rights, particularly for harvesting, may be exercised and asserted both collectively and individually (*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 35).

## A.2 Effects

57. Fort McKay's property rights to land are already adversely affected by the proximity of oil sands development and the intensity and scale of this development. LARP, in its incomplete form, authorizes development in the majority of Fort McKay's Traditional Territory and up to the borders of its Lands but does not contain the necessary tools to manage the cumulative effects of this development.
58. Apart from the conservation areas, Reserve lands, and the urban development area of Fort McMurray, oil sands, oil and gas, forestry and other development is permitted within the remainder of Fort McKay's traditional territory within the Region. 98% of Fort McKay's trapping areas and about 70% of its Traditional Territory has been leased to oil sands developers. See attached for map of existing and planned development in Fort McKay's traditional territory.
59. The impacts of regional development will increase, each year, as more approved projects begin operating and more projects are approved. Approximately 1.7 million barrels per day of oil sands production is operating in the Region and about 3.2 million barrels per day have been approved.
60. Within a 20 km radius of the Hamlet are the following Projects: Shell Muskeg River Mine, Shell Jackpine Mine Phase I, the CNRL Horizon Mine, Suncor's Fort Hills Project, Suncor's McKay River SAGD, portions of Suncor's Steepbank,

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<sup>1</sup> Fort McKay Industry Relations Corp., Overview Level Traditional Land Use Study, Sept 30, 2010; Fort McKay Specific Assessment, Cultural Heritage Baseline Study, 2010

Millennium and Voyageur Projects, the Syncrude Aurora North Mine, Syncrude Mildred Lake, the TOTAL Joslyn North Mine and the Jackpine Mine Expansion. Within approximately 10 km, the Shell Muskeg River Mine and Syncrude North Mine are operating.

61. Adverse impacts to Fort McKay's use and enjoyment of its homes and Lands from existing oil sands experienced to date include: air pollution, including odours, degradation of air quality, noise, light pollution, the shaking of houses, blocked or delayed access to the Hamlet, cabins and Moose Lake Reserves. These impacts will likely increase under LARP.
62. Noxious odours have caused headaches and nausea in community members and on one occasion the school children were evacuated from the community due to the number of children becoming ill. These acute incidents were associated with upset operations at Syncrude in the spring of 2006 and in February of 2009, and tailings reclamation at Pond 1 at Suncour. However, since then there has been more frequent, albeit less acute, odour incidents in the community.
63. The source of these impacts include noise cannons on tailings ponds, back up beepers on mine trucks, traffic on the CNRL and TOTAL access road next to the Hamlet, blasting from a quarry, emissions from upgraders, mine fleets, tailings ponds, high levels of traffic on highway 63 commuting to oil sands projects, traffic accidents, and wide loads, large mine sites blocking or destroying traditional trails such as the trail to the Moose Lake Reserves.
64. LARP authorizes mining and *in situ* extraction projects and associated development up to the borders of Fort McKay's Lands. This will cause greater air pollution, noise, odours, and light pollution and will increase risk of injury to people and property. Explosions, fires, and release of toxic substances have already occurred at industrial sites within 10 to 20 km of the Hamlet of Fort McKay. They are inherent risks of this type of development and the closer they are, the greater the probability of harm.
65. Industrial development in proximity to Fort McKay's Reserves will also change the ecology of these Lands. For example, the Moose Lake Reserves (174A and 174B) will not be fit for their designated purpose of supporting cultural land use, including harvesting of country foods, with the development of projects within 20 km of its borders. The intensity and proximity of development to the borders of conservation areas (such as parks) has been shown to be directly and adversely related the ability of the conservation area to support biodiversity, including wildlife. The neighbouring development creates a population sink within the conservation area and this is particularly acute in areas the size of Reserves 174A and 174B.

66. Fort McKay's Traditional Territory is located within the LARP Region and comprises 34% of the Region. Within Fort McKay's Territory, the newly planned conservation areas comprise about 12% of the Territory and are located within its outer fringes.
67. The designated conservation areas or any other aspect of the Plan, do not fulfill the ToR to provide "continued opportunities for Aboriginal traditional uses to be in close proximity to First Nations and Métis communities". No outcomes, objectives or strategies are articulated to address this requirement. The direct distance from the Hamlet of Fort McKay to the conservation areas are:
- 74 km to the Marguerite River Wildland Provincial Park
  - 60 km to the Gipsy-Gordon Wildland Park
  - 74 km to the Richardson Wildland Park
  - 65 km to the Birch Mountain Wildlands Provincial Park (Expansion)
  - 101 km to the Birch River Conservation Area (Public Land Use Zone)
68. These distances do not taken into account additional distances to circumnavigate mine sites. Several assessments of cumulative effects have shown that existing and approved development is causing adverse effects to wildlife populations that are necessary to support the exercise of treaty and aboriginal rights. These include the studies done by CEMA for the Terrestrial Effects Management Framework; the studies commissioned by Alberta in preparation of the LARP, the Fort McKay Specific Assessment and Fort McKay's more recent cumulative effects study of its Traditional Territory<sup>2</sup>.
69. Terrestrial Ecosystem Management Framework (TEMF) in 2008 found that caribou, fisher, moose, and black bear habitat indicators were below or at the lower limit of their natural range of variation (NRV). The TEMF report indicated that aggressive steps needed to be taken immediately to preserve those indicators in the Regional Municipality of Wood Buffalo (RMWB) and recommended wildlife populations be maintained within 10% of the lower limit of NRV.
70. In the development of the LARP, the Government of Alberta used ALCES simulation modeling to evaluate planning options in the Region. Moose and fisher habitat quality were used as terrestrial wildlife indicators to assess the impacts of development if it continued at the current rate. The simulations measured changes from NRV. The computer simulations of the baseline found that moose and fisher habitat quality declined rapidly. Moose and fisher were 30% below

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<sup>2</sup> ALCES Group, Conserving Opportunities for Traditional Activities (2013); ALCES Group, Cumulative Effects Technical Report (2013); ALCES Group and IEG Group, A Community Approach to Landscape Planning (2013).

NRV as of 2009. Within 20 years fisher and moose habitat quality was at least 60% below the NRV<sup>3</sup>.

71. The modeling work done by ALCES for LARP is generally consistent with empirical data regarding moose populations. Alberta Sustainable Resource Development has conducted several moose population surveys since the early 1990s in Fort McKay's Traditional Territory and these indicate moose populations have declined as much as 50% in last 15 years.
72. Fort McKay's cumulative effects studies completed in 2013 found 57% of the Traditional Territory is disturbed or within 500 m of disturbed land – mostly oil sands development. Some wildlife populations are already below sustainable levels and over the next 50 years, fish population will decline 99% NRV; fisher 66% below NRV; and moose by 55%. All of these changes fall within the "threatened" or "endangered" standards set by the International Union of Conservation of Nature Conventions. These are the same standards identified in LARP for objectives for conserving terrestrial resources (see page 45). Modeling of the effect of expanded protected areas (LARP conservation areas plus additional protected areas) did not reverse this trend but suggests the declines will not be as severe, if combined with improved management of development in the Region.
73. The recent decision of the Joint Review Panel with respect to the Shell Jackpine Mine Expansion (Shell JRP decision) found, in relation to the 2,300 million ha regional study area assessed by Shell, that despite LARP's new conservation areas, the cumulative impacts on wildlife have exceeded or are reaching thresholds, resulting in significant adverse effects on biodiversity, some of which are likely permanent.<sup>4</sup>
74. Existing impacts to Fort McKay members' trapping areas include loss of substantial areas for use, blocked access, decreased wildlife, and increased risk of personal injury due to heavy equipment being operated on traditional trails and access routes. The large scale increase in linear features (roads and cutlines) is increasing public access to trapping areas which in turn is causing increased competition for harvesting of dwindling wildlife populations and vandalism and other destruction of cabins and personal property.
75. None of these effects accord with LARP's stated purpose of "a healthy environment within the region over the next 50 years" (LARP at page 2) and

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<sup>3</sup> ALCES Group. 2009. Lower Athabasca Regional Plan, ALCES III Scenario Modeling Summary and technical results for Scenario Package One. Prepared for WorleyParsons by the ALCES Group, June 2009.

<sup>4</sup> 2013 ABAER 011; JACKPINE MINE EXPANSION PROJECT AER Application No. 1554388 FORT MCMURRAY AREA CEAA Reference No. 59540 at para 31.

vision of “environmental and social wellbeing” preserving biodiversity integrity or ensuring “ample cultural opportunities” (LARP at pages 22 & 23).

76. The fact that current and planned development is exceeding thresholds for biodiversity and wildlife population survival is serious. It is a threat to Alberta’s future that was identified in the Land Use Framework, and one that was intended to be avoided by the development of cumulative effects management through regional plans: “cumulative effects management recognizes that our watersheds, airsheds, and landscapes have a finite carrying capacity. Our future well-being will depend on how well we manage our activities so that they do not exceed the carrying capacity of our environment”(at page 31).
77. It is highly likely the development planned for the area near the Reserves will render harvesting of wildlife unsustainable from these Reserves in the near future.<sup>5</sup> Fort McKay also wants to preserve the ecological integrity of its Lands, and the LARP is currently inconsistent with achieving this objective.<sup>6</sup>
78. Brion Energy, in an environmental assessment prepared in 2010, forecasted that the cumulative effects of its project and others will result in the extirpation of caribou and near extirpation of moose within 30 years, including on its lease adjacent to Reserve 174B and the Reserves themselves.
79. Alberta and Canada’s Caribou Policies call for the preservation of existing habitat and restoration of habitat to meet a threshold of 65% of intact habitat in each endangered caribou herd. The ranges for the endangered Red Earth and WSAR herds overlap or are adjacent to Reserves 174A and 174B. The Alberta Landscape Team identified the WSAR range as having the greatest probability of success for preventing extirpation through habitat restoration and mortality control and recommended establishment of a conservation area adjacent to the Birch Mountain Wildland Park comprised of “thousands of square kilometers.” This would also be adjacent to the Moose Lake Reserves and therefore overlap Fort McKay’s requested buffer area and serve the dual purposes of preserving the integrity of the Reserves, traditional land use in the area and the caribou.
80. LARP is essentially an expression of intention to manage cumulative effects, but its skeletal content is resulting in the unchecked escalation of cumulative effects, particularly to terrestrial resources, traditional land use, treaty and aboriginal rights, and impacts to Fort McKay’s Reserves.
81. The Shell Joint Review Panel (JRP) also remarked on the incomplete nature of LARP and the need for its content to be completed, noting it was “a work in progress” and “While the LARP is an essential first step, its value will be fully

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<sup>5</sup> ALCES, Moose Lake Protected Areas Report (2013).

<sup>6</sup> Alberta Landscape Team, Management Options Report (2009)

realized only when all of its frameworks and thresholds are in place and being applied” and recommended it be completed on an urgent basis, considering the significant adverse effects that are occurring in the Region to biodiversity, the sustainability of environmental resources and to traditional land use, treaty and aboriginal rights and culture. “It is critical that the frameworks, plans, and thresholds identified in the *LARP* be put in place as quickly as possible” (Shell JRP decision at para. 32)

82. In addition, the Shell JRP noted that the LARP does not address impacts to aboriginal communities and recommended this gap be addressed through development of a traditional land use framework, in light of the significant adverse effects of regional development.
83. Perversely, the fact that LARP was intended to manage cumulative effects, but does not, is resulting in an increase, and likely irreversible, environmental degradation and loss of meaningful opportunities for the exercise of traditional land use and rights, and protection of “healthy communities” and a “healthy environment”.
84. At least 6 new projects have been approved in Fort McKay’s Traditional Territory since the effective date of LARP. More are seeking approval and it is likely they will be approved before LARP’s plans for cumulative effects management systems are completed.
85. The adverse effect on Fort McKay of the designation of most of the Region for development in conjunction with the lack of the majority of cumulative effects management systems contemplated by LARP, is illustrated by the Alberta Energy Regulator’s (AER) recent decision with respect to the Dover Project.<sup>7</sup>
86. The proponent, Brion Energy, argued it had purchased its oil sands lease, and it was located within an area designated under LARP for development, and therefore was in the public interest and must be approved. The AER agreed. It made these findings:
  - “The Panel accepts Dover’s submission that the Project is located in an area that is designated for oil sands development under LARP” (para. 45)
  - “Dover’s Project is not in, and does not overlap, any of the conservation areas to be established under LARP” (para.46)
  - “... the AER must also act in accordance with LARP as it exists today” (para. 44)

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<sup>7</sup> 2013 ABAER 014.

- A buffer area could not be mitigation for impacts to Fort McKay because it is not identified in LARP (para. 170)
87. The Panel considering Brion’s project did not assess or address the cumulative impacts associated with the project because LARP was intended to manage these impacts: “While LARP is still a work in progress, the Panel believes that through mechanisms being developed—such as the proposed biodiversity management framework and the Alberta wetlands policy— LARP is the appropriate mechanism for identifying and addressing the regional cumulative effects of resource development activities”(para. 43).
88. This decision is testament to the adverse effects of having a plan intended to manage cumulative effects of large scale intensive development, without in fact doing so. The result is long term, likely irreversible harm to the environment and Fort McKay from the continued approval of projects.

## **B. Health Impacts**

### **B.1 Health Determinants and Policy Objectives**

89. LARP is intended to provide strategic direction for land use outcomes in relation to specified government policies, one of which is *Responsible Actions: A Plan for Alberta’s Oil Sands (Alberta 2009)* (see page 24). According to this policy, Alberta’s goal is to support “clean, healthy, vibrant communities” and its Strategy #2 is to “foster healthy communities by managing social impacts and improving the quality of life for present and future generations” (pages 8 & 9). Some of this strategy is reflected in LARP’s stated outcome of vibrant communities “are supported by ample recreational and cultural opportunities” (LARP at page 24).
90. This community approach to health is reflected in the World Health Organization’s (WHO) definition: “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” This definition has been adopted by Health Canada. As noted in its *Handbook of Health Impact Assessment (2004)*, the influences of political, social, cultural and economic elements are all crucial determinants of human health (Handbook at page 7). According to Health Canada, the negative health impacts development and how it is planned and managed can be directly “related to physical health, such as mortality and morbidity from disease and injury” and “social and community health may also be affected negatively where individuals face a loss of cultural identity and quality of life, social disruption and violence, and a breakdown of community and family support networks. Furthermore, socio-cultural well-being can be affected by increasing stress, anxiety, and feelings of alienation”.

91. Culture is a determinant of health, as confirmed by several research reports, such as *A Healthy Future: The Second Report on the Health of Canadians* (Canada, 2009). Loss or devaluation of language and culture adversely affects health.

## **B.2 Adverse Health Impacts from loss of Traditional Land Use**

92. LARP adversely affects Fort McKay’s social and cultural health which in turn affects the health of community members. This is largely due to the loss of opportunities to pursue traditional land use and cultural activities in clean, accessible and culturally relevant areas. LARP also adversely affects the health of community members by facilitating increased development with its associated pollution, in the absence of tools to manage and mitigate this pollution.

93. Cultural heritage is inextricably linked to the land and the values expressed and preserved through traditional land use. Traditional environmental knowledge, history and identity are linked to specific landscapes and locations. Even if reclamation was successful at restoring the pre-disturbance landscape and ecology, this would not occur for several generations. Fort McKay is permanently adversely affected by loss of intergenerational knowledge transfer.

94. The *Cultural Heritage Baseline Report* and *Cultural Heritage Impact Assessment* contained in the attached *Fort McKay Specific Assessment* (Fort McKay, 2010) documents that significant adverse effects have already occurred to Fort McKay’s cultural heritage, including traditional land use, as a result of existing oil sands and related development. This is directly related to loss of cultural landscapes, the ability to practice treaty rights, loss of cultural values, (including language and traditional knowledge) and loss of social integration through rapid socio-economic changes since the advent of oil sands development.

95. The Shell JRP found that “that the cumulative effects on some elements of Fort McKay’s cultural heritage are already adverse, long-term, likely irreversible, and significant” (Shell JRP Decision at para. 1742).

96. These effects will increase as a result of the authorization of continued development and the lack of conservation areas and land management adequate to preserve cultural landscapes and land based activities.

97. The practice of traditional land use and simply “going out on the land” are important health determinants because they are linked to physical health. They are an important source of physical activity to maintain fitness for Fort McKay members. Harvesting activities provide country foods, which is associated with much better health status in aboriginal communities than processed food. Decrease in harvesting and consumption of country foods is associated with higher levels of obesity, diabetes, and other health conditions. (see Earle,

*Traditional Aboriginal Diets and Health*, (National Collaborating Centre for Aboriginal Health 2011)). This is true also for Fort McKay.

98. According to research commissioned by Fort McKay, existing and approved development will result in Fort McKay being able to sustainably harvest from its Moose Lake Reserves and environs, enough moose (a key traditional food) to provide 1/3 of one ounce of dry meat per person per year (ALCES, 2011, *Conserving Opportunities for Traditional Activities*). This is a severe reduction in the amount of food harvested and processed by Fort McKay and abrogation of the treaty right to meaningful opportunities to hunt.
99. LARP does not contain any objectives or management systems for addressing the cumulative loss of wildlife and other traditional foods, as well as access to harvest them. These losses will increase as a result of LARP.

### **B.3 Impacts from Lack of Management of Pollution**

100. LARP says its cumulative management approach will ensure regional thresholds are not exceeded and the air and water remain healthy for the Region's residents and ecosystems. At page 37, the fourth outcome of LARP is stated to be that "air and water are managed to support human and ecosystems needs." However, with respect to air, Schedule A does not protect Fort McKay's members' health or needs. It sets thresholds for only two criteria air contaminants and does not include health based limits.
101. The thresholds for NO<sub>x</sub> and SO<sub>2</sub> are based upon Alberta's Ambient Air Quality Objectives. These objectives are based not just on health outcomes but also incorporate other considerations such as economics of air pollution control technology (see Alberta Environment, Alberta Ambient Air Quality Objectives and Guidelines, 2010). They are also outdated, and do not reflect the World Health Organization's criteria for ambient air quality that has been adopted by other countries.
102. Just meeting the annual NO<sub>x</sub> and SO<sub>2</sub> objectives would result in regional air quality similar to that of some of the most polluted cities in the world. (For levels see *Air Quality in Ontario 1998 Report* (Ontario Ministry of the Environment, 2001)).
103. NO<sub>x</sub> and SO<sub>2</sub> are important pollutants to manage because they have been increasing, and will continue to increase with more mining projects at Fort McKay and elsewhere in the Region.
104. The AER, as member of the JRP appointed for the Shell Jackpine expansion found:

- SO<sub>2</sub> and NO<sub>2</sub> modeling results exceed LARP and AAQO limits in the Regional Study area which is an area over 2,000,000 ha and includes Fort McKay's Reserves (except the Moose Lake Reserves) (paras. 275 & 276).
  - "The Panel is of the view that many oil sands facilities have been approved but not yet built and that model predictions serve as a warning that the AAAQO and LARP limits may be exceeded when all approved oil sands facilities become operational" (para. 277).
105. Schedule A of LARP and the Implementation Strategy Plan for air, does not require any action to address this problem, until after projects are built and monitoring detects exceedances to levels approaching exceedance of thresholds. This is contrary to the statement at page 24 of LARP that a "proactive approach" will be taken to impacts to the environment for managing cumulative effects.
106. Other substances that need to be regionally managed because of the threat they pose to human health include: ozone, carbon monoxide, particulate matter, hydrogen sulphide and benzene.
107. Odours have caused health impacts such as nausea, headaches and exacerbation of asthma. Odours are a chronic, unregulated and unmonitored adverse effect on Fort McKay.
108. *The Royal Society Report on Oil Sands* (2010) noted: "Although odour has often been considered a nuisance rather than a health effect, chronic odours become a burden on community well-being which ultimately leads to stress with the possibility of associated health effects."<sup>8</sup>
109. LARP does not address either monitoring or standards for odours or odour causing substances, such as poly-aromatic hydrocarbons, reduced sulphur or acrolein. As is the case for all effects, each project's contribution to cumulative effects is small, because the total impacts keep growing in orders of magnitude. This, combined with LARP's unfulfilled promise of managing cumulative effects, leads to continued approval of projects and escalation of effects on Fort McKay. For example, the Shell JRP notes at paragraph 1830 that Shell provided evidence indicating that acrolein emissions will exceed health-based guidelines and "Shell proposed no mitigation measures for reducing acrolein emissions because Shell considered that its contribution to acrolein would be negligible"; The JRP noted "that Alberta has not developed ambient air quality objectives for acrolein but is in the process of doing so".

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<sup>8</sup> Royal Society of Canada Expert Panel. 2010. Environmental and Health Impacts of Canada's Oil Sands Industry- Report. December 2010

<<http://www.rsc.ca/documents/expert/RSC%20report%20complete%20secured%209Mb.pdf>>

110. With respect to water, LARP contains some thresholds for water quality, based on Alberta's water quality criteria. This creates likely adverse effects on Fort McKay because key pollutants associated with oil sands are not included, the thresholds only apply to the Athabasca River, and only apply at a measurement point about 100 km downstream from Fort McKay – at a point where many substances of concern will be diluted.
111. No management framework is in place for the cumulative effects to Fort McKay's drinking water source – the Ells River, or for any other Rivers or water bodies that Fort McKay uses for fishing or other consumptive uses.
112. The Shell JRP noted the problem of lack of standards for pollutants of concern to water quality. It stated that "There are no provincial water quality guidelines for chemicals of concern such as, but not limited to, naphthenic acids and PAHs" (para. 458). It also noted that the release of PAHs and other atmospheric pollutants is not being addressed by any policy or management system in Alberta, and may be affecting the viability of country foods for consumption (for example, in fish) (para. 1069).

#### **IV. AMENDMENTS REQUESTED**

113. Fort McKay requests the following amendments:
  - a) The effective date of LARP be amended to December 2015 or completion of the management frameworks and tools identified in paragraph 27 of this submission and a traditional landuse framework, whichever is earlier.
  - b) Buffer areas in which resource development is not permitted be designated in the following areas: surrounding the Hamlet of Fort McKay and adjacent Lands owned by Fort McKay, and surrounding Reserves 174A and 174B.
  - c) Creation of additional conservation areas contiguous to the Birch Mountain Wildland Park and the north, south and east of Reserves 174A and 174B sufficient to support reasonable and meaningful opportunities to exercise treaty and aboriginal rights.
  - d) The inclusion of a requirement to develop and implement a management framework by 2015 for traditional land use, with thresholds for preserving sufficient animal and traditional plants and fish to support reasonable opportunities for the exercise of treaty and aboriginal rights.
  - e) Designation of areas preserved for traditional land use purposes within reasonable proximity to Fort McKay's communities.

- f) An amendment to include outcomes, and objectives for the preservation of reasonable opportunities for the exercise of treaty and aboriginal rights.
- g) The inclusion of a requirement to complete a framework for protection water levels and water quality in all Rivers and Namur and Gardiner Lake.
- h) An amendment to require the expansion of the air management framework to include all criteria air contaminants and reduced sulphur compounds, acrolein, and other substances with thresholds necessary to protect human health.
- i) Clarification that predicted exceedances in regional thresholds are to be considered by decision-makers and preventative measures taken before issuing approvals.
- j) An amendment to require consultation of Métis communities in the development of the biodiversity and traditional land use framework.

## V. CONCLUSION

114. Fort McKay will endeavour to provide any additional information required by the Review Panel or Minister and reserves the right to provide further or updated information once a review panel is struck and the review process established.

## VI. CONTACT INFORMATION

### Applicants:

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The individual applicants represented by Fort McKay are listed in schedule A.

### Person Appointed to Represent the Applicants

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## VII. LIST OF ATTACHMENTS

1. Schedule A: List of individual applicants
2. Completed Applications for Review and Amendment of a Regional Plan
  - a) Alvaro Pinto on Behalf of Fort McKay First Nation & Fort McKay Métis Community Association
  - b) Celina Harpe
  - c) Richard McDonald
  - d) Dennis Shott
  - e) Mary Tourangean
  - f) Andrew Boucher
  - g) John Ahyasou
  - h) Marie Boucher
  - i) Joe Grandjambe
  - j) Edward Rolland
  - k) Howard Lacorde
3. Maps
  - a) Existing and planned development in Fort McKay's Traditional Territory
  - b) Leases in Fort McKay's Traditional Territory
4. Adamache, L. & Spink, D., *Cumulative Effects: Concerns of Fort McKay regarding the Impact to Air from Industrial Development (2012)*
5. Fort McKay, *Submission Regarding the Draft Lower Athabasca Integrated Regional Plan (June 2011)*
  - a) Submission Regarding the Draft Lower Athabasca Integrated Regional Plan
  - b) Attachment – Notes on a Ft. McKay-specific scenario for LARP modelling
6. ALCES Group, *Moose Lake Protected Areas Report (2013)*

7. ALCES Group, *Cumulative Effects Technical Report (2013)*
8. ALCES Group, *Conserving Opportunities for Traditional Activities (2013)*
9. ALCES Group & IEG, *Community Approach to Landscape Planning (2013)*
10. Garibaldi & Behr, *Traditional Land Use Update Report*
11. Gould Environmental, *Wildlife Report (2013)*
12. Gould Environmental, *Models and Data: What are they saying about cumulative effects on wildlife species important to the community of Fort McKay (2012)*
13. Lagimodiere, M., *Disturbance and Access Report (2013)*
14. Fort McKay Industry Relations Corp., *Fort McKay Specific Assessment (2010)*
  - a) Covers, Table of Contents and Bibliographies
  - b) Section 1 – Introduction
  - c) Section 2- Air
  - d) Section 3 – Groundwater
  - e) Section 4 – Surface Water
  - f) Section 5 – Water Quality and Fisheries Resources
  - g) Section 6 – Wildlife
  - h) Section 7 – Vegetation
  - i) Section 8 – Biodiversity
  - j) Section 9 – Access and Disturbance
  - k) Section 10 – Reclamation
  - l) Section 11 – Recommendations Summary
  - m) CHA Baseline
  - n) Project-Specific CHA
  - o) Backup Materials
15. Curriculum Vitae of:
  - a) Dr. Brad Stelfox (ALCES Group)
  - b) Matthew Carlson (ALCES Group)
  - c) John Nishi (ALCES Group)
  - d) Towagh Behr
  - e) Lorne Gould
  - f) Dr. Shanti Berryman (IEG Group)
  - g) Ann Garibaldi (IEG Group)
  - h) Marie Lagimodiere
  - i) David Spink