

Extracts from Recent Regulatory Decisions/Reports

Re Jackpine Mine Expansion, 2013 ABAER 011:

[36] It is apparent to the Panel that the mitigations being proposed by individual project proponents are not effective at avoiding significant adverse cumulative effects on TLU in the Project region. The Panel acknowledges that the intent of the LARP is to take more of a cumulative-effects-based approach to managing environmental effects in the Lower Athabasca Region, but notes that the LARP does not specifically address TLU issues. Instead, the LARP provides for continued consultation and engagement with Aboriginal peoples to help inform land and natural resource planning in the region. Several of the Aboriginal groups expressed concern that the LARP does not address their concerns and does nothing to ensure ongoing traditional use of the land or to protect their Aboriginal or treaty rights. The absence of a management framework and associated thresholds for TLU makes it very difficult for Aboriginal groups, industry, and panels such as this one to evaluate the impact of individual projects on TLU. The Panel believes that to inform land use planning and allow better assessment of both project and cumulative effects on Aboriginal TLU, rights, and culture, a TLU management framework should be developed for the Lower Athabasca Region. The Panel recommends that Alberta develop and implement a TLU management framework for the Lower Athabasca region as a component of the LARP. The Panel recommends that the government of Alberta develop this framework with the involvement of all of the Aboriginal peoples who practise their rights in the oil sands region and who are affected by industrial development.

[37] All of the Aboriginal groups that participated in the hearing raised concerns about the adequacy of consultation by Canada and Alberta, particularly with respect to the management of cumulative effects in the oil sands region and the impact of these effects on their Aboriginal and treaty rights. In its submissions to the Panel on the questions of constitutional law, Canada and Alberta both advised the Panel that Crown consultation with Aboriginal groups was not complete and that the Panel's report would inform the Crown's subsequent decisions about Aboriginal consultation. The Panel notes that it has determined that the Project may affect Aboriginal TLU, rights and culture and that the cumulative effects of existing, approved, and planned development on Aboriginal TLU, rights, and culture are likely to be significant. The Panel recommends that Canada and Alberta each consider the Panel's findings in this report when it . . . considers what further consultation may be needed or desirable in order to complete their respective consultation obligations to affected Aboriginal groups.

[1476] The Panel is of the opinion that ACFN has provided evidence of existing cumulative effects on its TLU activities leading to loss and avoidance of use and that traditional users are finding it increasingly difficult to relocate and find lands of equivalent value. The Panel, therefore, finds that the Project effects, in combination with

the effects of other existing, approved, and planned projects, are likely to have a significant adverse effect on ACFN's TLU and Aboriginal and treaty rights in the broader region surrounding the Project.

[1477] The Panel agrees with ACFN that assessing the effects of individual projects on the TLU and Aboriginal and treaty rights of ACFN and the other Aboriginal groups is not efficient or effective and that LARP does not specifically address the issues of Aboriginal TLU or rights. . .

[41] Dover argued that the AER is bound by LARP and cannot reverse government policy by designating new areas where development is prohibited. It was Dover's position that the AER must determine whether the Project is in the public interest, taking into account that this area has been identified for potential oil sands development by the Government of Alberta after extensive consultation with all stakeholders, including Fort McKay.

[42] The AER is required under section 20 of REDA to act in accordance with any applicable Alberta Land Stewardship Act (ALSA) regional plan. The applicable regional plan for this subject application is LARP. LARP was approved by the Government of Alberta on August 22, 2012, and became effective September 1, 2012.

[44] In addition to considering social, economic, and environmental factors and the public interest in making its determination on the subject application, the AER must also act in accordance with LARP as it exists today. The Panel heard evidence that Fort McKay had requested a protected buffer area around its reserves during development of LARP. The Panel notes that such an area was not included in LARP, reflecting the province's overall land-use intent for the lands where the Project is located. The Panel notes that proper application of LARP is based on regional limits, not project-specific effects. It is expected that as subregional plans and management frameworks continue to be developed they will influence project-specific land use decisions.

[45] The Panel accepts Dover's submission that the Project is located in an area that is designated for oil sands development under LARP, and that developing its subsurface rights under the terms of its leases issued by the province of Alberta is not contrary to LARP.

[46] The Panel notes that Dover's Project is not in, and does not overlap, any of the conservation areas to be established under LARP, and that development of oil sands resources is permitted in the Project area. The Panel finds that Dover's application is compliant with LARP.

2013 ABAER 017: Teck Resources Limited, Application for Oil Sands Evaluation Well Licences, Undefined Field

[28] Based on the AER's existing requirements and in recognition of the fact that Teck is seeking these wells not only to meet the AER's requirements but also to assess the economic feasibility of the Frontier Project and to refine its design, the panel finds that the Corehole Program is needed. The applications are consistent with the AER's resource conservation mandate under OSCA section 3 "to effect conservation and prevent waste of the oil sands resources of Alberta; to ensure orderly, efficient and economical development in the public interest of the oil sands resources of Alberta; and to provide for the appraisal of Alberta's oil sands resources." With regard to the request that the approval be delayed, the panel sees no need for such a delay. The panel accepts Teck's submission that the Corehole Program is located in an area designated for oil sands exploration and development under LARP. While the panel understands that ACFN may have initiated a legal challenge of LARP, the AER must act in accordance with LARP as it currently exists.

[55] The panel acknowledges that there is no requirement under the Environmental Protection and Enhancement Act (EPEA) or the AER's rules to conduct an EIA or cumulative effects assessment for exploration programs such as those proposed in the Corehole Program applications. The panel also believes that a formal EIA or cumulative effects assessment for each exploration program would not be practical and that LARP is a more appropriate mechanism for establishing disturbance limits and managing regional cumulative effects. While the panel recognizes that some of the tools and frameworks contemplated under LARP for managing cumulative effects, such as disturbance limits and the biodiversity management framework, have not yet been developed or implemented, the panel does not believe that it is necessary or would be appropriate to wait until these tools have been developed and implemented before issuing the authorizations for the Corehole Program wells. Section 7(3) of the Regulatory Details Plan in LARP states that

a decision-maker or local government body 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.

[63] The AER accepts that LARP reflects government policy on land development as set out in the plan and that bitumen resource development is a priority use for the Lower Athabasca region, which includes the area of the applications. The panel notes that the applications are not for projects that would be located in an area identified for protection under LARP, and it therefore believes that completion of the proposed Corehole Program is consistent with the requirements of LARP.