

Part 1: Details of Request for Review

Name of Regional Plan: Lower Athabasca Regional Plan

Introduction:

The Mikisew Cree First Nation (“MCFN”) applies for a review of the Lower Athabasca Regional Plan (“LARP”) pursuant to section 19.2 of the *Alberta Land Stewardship Act*, SA 2009, c A-26.8.

MCFN is deeply concerned about the direct and adverse impacts of LARP on its community members. In particular, MCFN is concerned that a number of provisions and policy directions included in LARP will potentially adversely affect MCFN members’ health, their livelihood (or income) and their quiet enjoyment of property on which they have a right of access. We apply for review of LARP on behalf of all members of MCFN.

Before we identify the specific provisions of LARP that we believe will directly and adversely affect our members, we first wish to comment on the definition of “directly and adversely affected” set out in section 5(1) of the *Alberta Land Stewardship Regulation*. It is important that the Minister apply this test with reasonable flexibility in order to acknowledge and accommodate the unique circumstances of MCFN and its members.

MCFN is an Indian Band under the *Indian Act* and an Aboriginal group within the meaning of Section 35 of the *Constitution Act, 1982*. We are signatory to Treaty 8 and, as such, hold aboriginal and treaty rights that are protected under Section 35 (“Section 35 Rights”), including the right to use our traditional lands to hunt, trap, fish, gather and engage in a range of cultural and spiritual practices.

It is critical that the Minister, when considering our request for review of LARP, take into account the aboriginal perspective of the definition of “directly and adversely” in the *Alberta Land Stewardship Regulation* as Aboriginal rights, and that Aboriginal concepts of property do not neatly fit into the narrow box set out in section 5(1) of that regulation. As the Supreme Court of Canada explained in *Guerin v. the Queen*, [1984] 2 S.C.R. 335, aboriginal interests in land, our aboriginal rights are *sui generis*.

Since *R v. Sparrow*, courts have repeatedly confirmed that when dealing with an issue related to aboriginal rights, the aboriginal perspective must be taken into account. In *Sparrow*, it was held that it was crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake (p. 1112). That underlying principle must also apply in this context, where the aboriginal perspective of the right to quiet enjoyment of property and of the right to income includes MCFN’s aboriginal and treaty rights. This is essential in order to uphold the honour of the Crown, which is at stake whenever the Crown is dealing with First Nations (see *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para 16). It is also consistent with the principles set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, where the court described why it was important to attempt to reconcile the aboriginal perspective of rights with the Canadian legal and constitutional structure. The court said at paragraph 49:

...As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: "a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] legal perspectives". The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.

Our right to use our traditional lands for our rights-based activities is analogous to our right to quiet enjoyment of property. Our right to earn our livelihood and to obtain sustenance from our harvesting activities is analogous to our right to earn an income. Furthermore, courts have been clear that our Section 35 Rights include a right to access Crown lands for the purpose of exercising our rights and maintaining our way of life. We also wish to highlight that a central component of our Section 35 Rights is a right to have the Crown take positive steps to ensure the continued ability of our members to exercise their rights and culture, taking into account their preferred conditions and location/manner of exercising those rights. To ignore this aboriginal perspective of the rights that are described in the definition of "directly and adversely affected" would foreclose the possibility of a First Nation, or members of a First Nation applying to review a regional plan under s.19(2) of the *Alberta Land Stewardship Act* that would directly or adversely affect their Section 35 Rights, while at the same time providing the tool to private land holders. That would subjugate our constitutionally protected rights and would be completely inconsistent with the honour of the Crown.

We also note that MCFN has reserve lands within the regional planning area and we are concerned that LARP directly and adversely impacts our use and enjoyment of our reserves.

We conclude these opening remarks by noting that courts have established a number of principles (in addition to the requirement to take the aboriginal perspective into account) that must guide the Minister when assessing the serious, direct and adverse impacts that LARP has on the health and well-being of MCFN members and their constitutionally-protected rights:

- a. When considering if a provision or section of LARP has direct and adverse impacts on MCFN's Section 35 rights, Alberta must be guided by a generous purposive approach because "actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown";¹
- b. When considering if a provision or section of LARP has direct and adverse impacts on MCFN's Section 35 rights, Alberta must approach the issue in a

¹ Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 at para 43

manner which maintains the integrity of the Crown because the honour of the Crown is always at stake in its dealing with Aboriginal peoples;²

- c. When considering if a provision or section of LARP has direct and adverse impacts on MCFN's Section 35 rights, impacts must be construed broadly;³
- d. When considering if a provision or section of LARP has direct and adverse impacts on MCFN's Section 35 rights, the historical context of developments also affecting the exercise of those rights must be considered;⁴
- e. When considering if a provision or section of LARP has direct and adverse impacts on MCFN's Section 35 rights, any injurious affection that a provision or priority-scheme may have on other areas or rights must be considered as well;⁵
- f. When considering if a provision or section of LARP has direct and adverse impacts on MCFN's Section 35 rights, potential negative derivative impacts and potential injurious effects must also be considered;⁶
- g. When considering if a provision or section of LARP has direct and adverse on MCFN's Section 35 rights, the Minister must take into account that the impacts to MCFN may not be only physical in nature;⁷ and
- h. When considering if a provision or section of LARP has direct and impacts on MCFN's Section 35 rights, impacts from the future application of the provision or a priority scheme, beyond the immediate consequences, must be considered.⁸

Overview of MCFN's Rights within the Planning Region

MCFN is an Indian Band under the Indian Act and an Aboriginal group within the meaning of Section 35 of the Constitution Act, 1982. MCFN is the largest First Nation within the Regional Municipality of Wood Buffalo, with a registered population of approximately 2,758 members. MCFN has nine reserves set aside for its use and benefit pursuant to the Indian Act, RSC 1985, c I-6 in the oil sands region. Approximately half of our members live in or around Fort Chipewyan. Most of the remaining half of our members lives in the vicinity of Fort McKay and Fort McMurray.

MCFN's traditional lands extend around Lake Athabasca, over the Peace-Athabasca Delta, and south to and including Fort McMurray and the Clearwater River. MCFN's traditional lands have

² R. v. Badger, [1996]1 SCR 771, at par. 41

³ *Dene Tha' First Nation v. MOE et al.*, 2006 FC 1354, at par. 34

⁴ *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para 83 and 117, leave to appeal denied 2012 CanLII 8361 (SCC) [*West Moberly*]

⁵ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras. 15, 44, 47

⁶ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 32

⁷ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at par. 72-73

⁸ *West Moberly, supra*, at 125

always been a central location for the harvesting, social, economic, political cultural and spiritual activities that are vital to the physical and cultural continuity of MCFN.

The population of MCFN is increasing, such that more traditional resources and a greater associated geographical area will likely be necessary to sustain MCFN's traditional use activities and rights in the future.

MCFN holds aboriginal and treaty rights, which are protected by Section 35 of the Constitution Act, 1982. MCFN's Section 35 harvesting rights continue to have great cultural and social significance to our members. Harvesting and other rights-based activities provide food, medicinal plants, building materials, income, and other aspects of our livelihood, culture and well-being for our members.

A proper understanding of Treaty 8 is required to appreciate how MCFN's rights may be directly and adversely impacted by the Project. Treaty No. 8, to which MCFN adhered in 1899, guarantees the following rights to MCFN:

And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [emphasis added]

The MCFN Consultation Protocol articulates the Treaty rights of MCFN as follows:

The Mikisew Cree is determined to preserve, develop and transmit to future generations our ancestral territories and our distinct ethnic identity in accordance with our own cultural patterns and social institutions. The Mikisew Cree considers Treaty 8 to be a sacred agreement and views the oral and written promises of the Treaty Commissioners to be sacred promises. MCFN has endured periods where responsibilities of the Crown have failed to live up to their Treaty promises and constitutional obligations. MCFN honours the promises under Treaty 8 and expects the Crown to do the same. The Mikisew Cree wishes to protect and preserve its cultural, spiritual and economic relationship to its traditional lands and the resources on those lands. MCFN's connection to the land is holistic and is an integral part of its culture and identity. It is critical that the MCFN are able to meaningfully carry out their rights now and in the future including, but not limited to:

- Quality and quantity of wildlife species required;
- Quality and quantity of aquatic species required;
- Quality and quantity of plants or other things gathered; and
- Quantity and quality, as the context requires, of air, water and ecosystems required to support the exercise of MCFN's rights

The Treaty 8 right to meaningfully engage in harvesting activities and in ancillary practices⁹ that support those harvesting activities has been discussed in a variety of decisions of the Supreme Court of Canada and by courts in Alberta, British Columbia and the Northwest Territories. We quote some of those decisions here. To begin, in *R. v. Badger* (1996), 133 D.L.R. (4th) 324, Cory J., for the majority of the Supreme Court of Canada, held, at para. 39, that:

...it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap. The Commissioners wrote:

There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges. We pointed out...that the *same means of earning a livelihood would continue after the Treaty as existed before it*, and that the Indians would be expected to make use of them.

* * *

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, *we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.* [emphasis in original]

In *Badger*, the Supreme Court of Canada went on at paras. 39 and 55 to adopt the following testimony of Treaty Commissioner David Laird, who highlighted the importance of harvesting rights in the Treaty:

The Indians' primary fear was that the treaty would curtail their ability to pursue their livelihood as hunters, trappers and fishers. Commissioner David Laird, as cited in Daniel, "The Spirit and Terms of Treaty Eight", at p. 76, told the Lesser Slave Lake Indians in 1899:

⁹ It is important to note that the right to hunt in Treaty 8 contains numerous ancillary rights that protect activities related to harvesting. See, e.g., *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sundown*, [1999] 1 S.C.R. 393

Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are. [emphasis added]

In *R. v. Horseman*, [1990] 1 S.C.R. 901, the majority of the Supreme Court of Canada took similar note of the importance of hunting to the signatories of Treaty 8, quoting the following passage from Commentary on Economic History of Treaty 8 Area (unpublished; June 13, 1985):

The Indians indicated to the Treaty 8 commissioners that they wanted assurances that the government would look after their needs in times of hardships before they would sign the treaty. The Commissioners responded by stressing that the government did not want Indians to abandon their traditional economic activities and become wards of the state. Indeed, one of the reasons that the Northwest Game Act of 1894 had been enacted was to preserve the resource base of the native economies outside of organized territories. The government feared that the collapse of these economies would throw a great burden onto the state such as had occurred when the bison economy of the prairies failed.

Justice Wilson, dissenting on other points in the *Horseman* decision, also emphasized that the way of life of the Aboriginal signatories of Treaty 8 would be protected: “The *whole emphasis* of Treaty 8 was on the preservation of the Indians’ traditional way of life.” [italics in original].

In *Re Paulette et. al. and Registrar of Titles*, Justice Morrow of the Northwest Territories Supreme Court considered the *viva voce* evidence of numerous Treaty 8 beneficiaries who were alive at the time Treaty 8 was signed. Although Justice Morrow’s grant of a caveat with the Registrar of Titles of the Northwest Territories as part of an aboriginal rights claim was overturned, his assessment of the evidence was not and deserves note:

Throughout the hearings before me there was a common thread in the testimony -- that the Indians were repeatedly assured they were not to be deprived of their hunting, fishing and trapping rights. To me, hearing the witnesses at first hand as I did, many of whom were there at the signing, some of them having been directly involved in the treaty making, it is almost unbelievable that the Government party could have ever returned from their efforts with any impression but that they had given an assurance in perpetuity to the Indians in the territories that their traditional use of the lands was not affected. [emphasis added]¹⁰

More recently, in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, the B.C. Court of Appeal confirmed:

... [W]hile specific species and locations of hunting are not enumerated in Treaty 8, it guarantees a “continuity in traditional patterns of economic activity” and

¹⁰ *Re Paulette*, (1973) 42 D.L.R. (3d) 8 (NWTSC) at p. 33; rev’d (1975) 63 D.L.R. (3d) 1 (NWTCA); [1977] 2 SCR 628

respect for “traditional patterns of activity and occupation”. The focus of the analysis then is those traditional patterns.¹¹

The same reasoning applies to MCFN’s rights under Treaty 8. The Treaty guarantees MCFN the right to hunt preferred species such as bison, moose, woodland caribou and waterfowl, *in perpetuity*, as part of MCFN’s traditional patterns of activity and occupation.

Today, just as in the past, MCFN members are determined to preserve, develop and transmit to future generations our ancestral territories and our distinct identity in accordance with Mikisew cultural patterns and social institutions, as promised in Treaty 8. Our ability to do so depends on having a sufficient quantity and quality of wildlife species, aquatic species, traditional plants, air, water, ecosystems and other conditions required by Mikisew members to maintain our way of life.¹²

A. Clearly identify the specific provision (section) of the Regional Plan that you believe is directly and adversely affecting you, or will directly and adversely affect you.

Please note that MCFN requests a review of and amendment to the LARP *in its entirety*, as the plan as a whole fails to address or protect MCFN’s Treaty Rights, traditional land uses, peaceful use and occupation of lands on which it has a right of access, including its reserve lands, and its culture.

Section 1(e); exclusion of a Regulatory Details Plan Part for Traditional Land Use and Treaty Rights, including limits, triggers and thresholds.

Sections 4 -7; to the extent that the Plan is intended to guide, inform, or bind the Crown, decision makers, local government bodies and all other persons in the absence of measures that are protective of MCFN’s Treaty and Aboriginal rights, traditional land uses, and culture.

For example:

Section 6 of the Regulatory Details Plan states that it is enforceable as law, and its provisions bind

- (a) the Crown,
- (b) decision-makers,
- (c) local government bodies, and
- (d) subject to section 15.1 of the Act, all other persons.

Section 7(1) of the Regulatory Details Plan requires that a “decision-maker, before carrying out *any* function in respect of the decision-maker’s powers, duties and responsibilities in the planning region, consider the LARP Strategic Plan and the LARP Implementation Plan.”

¹¹ *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, paras. 137, 140

¹² See, Appendix D, Tab 6 of this submission.

Section 7(2) requires that a local government body, “before carrying out any function in respect of the local government body’s powers, duties and responsibilities in the planning region, consider the LARP Strategic Plan and the LARP Implementation Plan.”

The direct result of this is that each of the priorities, objectives, strategies, and plans laid out in the LARP Strategic and Implementation plans will guide the decisions respecting land use and land planning made by all government decision-makers (at both the provincial and municipal levels) in and around MCFN’s territory. As such, a number of the principles, priorities and strategies identified in the Strategic and Implementation plans will also directly and adversely impact MCFN to the extent that decision-makers are obliged to consider them and make decisions in accordance with the objectives and strategies set out in LARP.

A number of other provisions in the Regulatory Details Plan also require provincial and municipal decision-makers to consider and seek to achieve specific objectives and strategies of LARP. These include:

- Section 10(2) to the extent that it requires decision making bodies to make changes or implement new initiatives to comply with LARP in the absence of measures that are protective of MCFN’s Treaty and Aboriginal rights, traditional land uses and culture.
- Sections 13-20: The provisions respecting establishing conservation areas and conserved lands:

13 In this Part, “conservation area” means the lands identified as conservation areas and labelled “1” through “6” on the LARP Digital Map.

...

16(1) The Designated Minister may take whatever steps that in the opinion of the Designated Minister are desirable for achieving the conservation objectives of the LARP Strategic Plan and LARP Implementation Plan and for implementing Schedule “F” to the LARP Implementation Plan in respect of conservation areas.

(2) Subject to any other law, a statutory consent may be renewed in a conservation area if the statutory consent is, at the effective date of renewal, in good standing under the provisions of the enactment or enactments applicable to the statutory consent, and

(a) if the statutory consent is consistent with this regional plan; or

(b) if the statutory consent is inconsistent with or non-compliant with this regional plan, within the meaning of section 11(2), but

(i) is an agreement under the *Mines and Minerals Act* or a disposition under the *Public Lands Act* that is valid and subsisting at the time this regional plan comes into force, or

(ii) if it is not an agreement or disposition referred to in subclause (i), but is, within the meaning of section 11(4), incidental to an agreement or disposition referred to in subclause (i).

17 In respect of the land use in a conservation area, the Designated Minister shall establish and maintain programs evaluating the effectiveness of the conservation area in meeting the relevant conservation objectives in the LARP Implementation Plan.

...

19 In this Part,

- (a) “conservation purposes,” in respect of land, means the purposes referred to in section 29(1) of the Act, but does not include the following agricultural purposes:
 - (i) cultivation;
 - (ii) clearing; and
 - (iii) range improvements within the meaning of regulations and rules under the *Public Lands Act*.
- (b) “conserved land” means
 - (i) parks designated under the *Provincial Parks Act*,
 - (ii) wilderness areas, ecological reserves, and natural areas designated under the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, and
 - (iii) public land use zones managed for one or more conservation purposes and declared under the Public Lands Act.

20 The Designated Minister shall establish and maintain programs

- (a) monitoring the total combined area of conserved land in the planning region, and
- (b) evaluating the ratio of conserved land referred to in clause (a) to the total area of land comprising the planning region.

- Sections 22, 24, 25-26: The provisions respecting air quality management frameworks:

22 In this Part,

- (a) “framework” means the document referred to in this regional plan as the Air Quality Management Framework for the Lower Athabasca Region as amended or replaced from time to time;
- (b) “limit” means the applicable limit specified in Table A-1 of the LARP Implementation Plan;
- (c) “person responsible” has the same meaning as defined in the Environmental Protection and Enhancement Act;
- (d) “trigger” means the applicable trigger specified in Tables A-1 and A-2 of the LARP Implementation Plan.

23(1) The Designated Minister in the exercise of the Designated Minister’s powers and duties under this Part may determine

- (a) the measurements of substances of concern at monitoring stations established and maintained under a program referred to in section 24,
- (b) whether a trigger or limit has been exceeded for the purposes of this Part,
- (c) whether a trigger or limit exceeded in respect of one or more specific areas in the planning region is of concern in other areas of the planning region or the whole planning region, and
- (d) the duration of an exceedance of a trigger or limit determined by the Designated Minister.

(2) The Designated Minister's determination is final and binding on the Crown, decision-makers, local government bodies, and, subject to section 15.1 of the Act, all other persons.

24 In respect of the framework, the Designated Minister shall establish and maintain programs

- (a) managing ambient air quality limits and triggers for substances that in the opinion of the Designated Minister are indicators of the air quality effects of concern for the planning region,
- (b) monitoring and evaluating the ambient air quality in the planning region, and
- (c) evaluating the effectiveness of the framework in meeting the air quality objective stated in the LARP Implementation Plan.

26(1) If the Designated Minister determines that a trigger or limit has been exceeded, an appropriate official or officials in the Designated Minister's government department must initiate a management response consistent with the framework....

27 For greater clarification, in reaching an opinion under sections 25 and 26, the Designated Minister may consider such information as in the Designated Minister's opinion is material to

- (a) a particular activity or activities or type or class of activity or types or classes of activities,
- (b) the relevant area or relevant part of the area in which the activity is to occur,
- (c) the relevant area or relevant part of the area in which an effect or effects of the activity or activities are reasonably expected to occur,
- (d) the reasonably expected, relevant period or duration of the effect or effects of the activity or activities,
- (e) any other matter that in the Designated Minister's opinion is advisable under a program referred to in section 24.

- Sections 29, 30-34, 36, 37-38: The provisions related to surface and ground water quality management frameworks:

29 In this Part,

- (a) “framework” means the document referred to in this regional plan as the Surface Water Quality Management Framework for the Lower Athabasca River as amended or replaced from time to time;
- (b) “limit” means the applicable limit specified in Tables B-1 and B-2 of the LARP Implementation Plan;
- (c) “Lower Athabasca River” means that portion of the Athabasca River commencing at the easternmost boundary of the Grand Rapids Wildland Provincial Park to the confluence of the Athabasca River with the Athabasca Delta;
- (d) “person responsible” has the same meaning as defined in the Environmental Protection and Enhancement Act;
- (e) “trigger” means the applicable trigger specified in Tables B-1 and B-2 of the LARP Implementation Plan;
- (f) “water” has the same meaning as defined in the Water Act.

30(1) The Designated Minister in the exercise of the Designated Minister’s powers and duties under this Part may determine

- (a) the measurements of substances of concern at monitoring stations established and maintained under a program referred to in section 31,
- (b) whether a trigger or limit has been exceeded for the purposes of this Part,
- (c) whether a trigger or limit exceeded in respect of one or more specific areas in the Lower Athabasca River is of concern in other areas of the Athabasca River, or its tributaries or distributaries, or other areas of the planning region or the whole planning region, and
- (d) the duration of an exceedance of a trigger or limit determined by the Designated Minister.

(2) The Designated Minister’s determination is final and binding on the Crown, decision-makers, local government bodies, and, subject to section 15.1 of the Act, all other persons.

31 In respect of the framework, the Designated Minister shall establish and maintain programs

- (a) managing water quality limits and triggers for substances that in the opinion of the Designated Minister are indicators of the surface water quality effects of concern for the Lower Athabasca River,
- (b) monitoring and evaluating the water quality in the Lower Athabasca River, and
- (c) evaluating the effectiveness of the framework in meeting the water quality objective for the Lower Athabasca River stated in the LARP Implementation Plan.

...

33(1) If the Designated Minister determines that a trigger or limit has been exceeded, an appropriate official or officials in the Designated Minister’s government department must initiate a management response consistent with the framework.

34 For greater clarification, in reaching an opinion under sections 32 and 33, the Designated Minister may consider such information as in the Designated Minister’s opinion is material to

- (a) a particular activity or activities or type or class of activity or types or classes of activities,
- (b) the relevant area or relevant part of the area in which the activity is to occur,
- (c) the relevant area or relevant part of the area in which an effect or effects of the activity or activities are reasonably expected to occur,
- (d) the reasonably expected, relevant period or duration of the effect or effects of the activity or activities,
- (e) any other matter that in the Designated Minister’s opinion is advisable under a program referred to in section 31

...

36 In this Part,

- (a) “framework” means the document referred to in this regional plan as the Groundwater Management Framework as amended or replaced from time to time;
- (b) “groundwater” has the same meaning as defined in the Water Act. Programs to manage effects

37 In respect of the framework, the Designated Minister shall establish and maintain programs monitoring and evaluating the groundwater quantity and quality in the planning region.

- Sections 39, 42-45: The provisions respecting the creation of recreation and tourism areas:

39 In this Part,

- (a) “provincial recreation area” means lands identified as a provincial recreation area and labelled “A” through “I” on the LARP Digital Map;
- (b) “public land area for recreation and tourism” means lands identified as a public land area for recreation and tourism and labelled “1” through “5” on the LARP Digital Map;
- (c) “water” means water as defined in the Water Act.

42 In respect of public land areas for recreation and tourism and provincial recreation areas, the Designated Minister may take whatever steps that in the opinion of the Designated Minister are desirable for achieving the recreation and tourism objectives of the LARP Strategic Plan and implementing Schedule “F” to the LARP Implementation Plan.

43 Subject to any other law, a statutory consent may be renewed in a provincial recreation area if **the** statutory consent is, at the effective date of renewal, in good standing under the provisions of the enactment or enactments applicable to the statutory consent, and

- (a) if the statutory consent is consistent with this regional plan; or
- (b) if the statutory consent is inconsistent with or non-compliant with this regional plan, within the meaning of section 11(2), but
 - (i) is an agreement under the Mines and Minerals Act or a disposition under the Public Lands Act that is valid and subsisting at the time this regional plan comes into force, or
 - (ii) if it is not an agreement or disposition referred to in subclause (i), but is, within the meaning of section 11(4), incidental to an agreement or disposition referred to in subclause (i).

...

45 In respect of the land use in public land areas for recreation and tourism and provincial recreation areas, the Designated Minister shall establish and maintain programs evaluating the effectiveness of the public land area for recreation and tourism or provincial recreation area in meeting the recreation and tourism objectives in the LARP Strategic Plan and LARP Implementation Plan.

- The Strategic and Implementation Plans.
- Schedules
 - Schedule A – Air Quality Management Framework Limits and Triggers
 - Schedule B – Surface Water Quality Management Framework Limits and Triggers
 - Schedule C – Groundwater Management Framework Interim Quality Triggers
 - Schedule E – Lower Athabasca Regional Trail System Plan – does not include Treaty rights and traditional land uses or ability to peacefully use and enjoy reserve lands as criteria or objectives, or as factors to be included in development of plan.
 - Schedule F
 - Schedule G

Each of the above provisions (including the strategic and implementation plans) of LARP has the potential to directly and adversely affect MCFN in the manner described in the following section.

B. Explain how the provision (section) in the Regional Plan you identified in A (above) is directly and adversely affecting you, or will directly and adversely affect you.

In order to understand how the provisions outlined above will directly and adversely affect MCFN, it is important to understand MCFN’s interests in the Lower Athabasca Region. MCFN is the largest First Nation within the Regional Municipality of Wood Buffalo, with a registered

population of approximately 2,758 members. MCFN has nine reserves set aside for its use and benefit pursuant to the Indian Act, RSC 1985, c I-6 in the oil sands region.¹³

MCFN's traditional lands extend around Lake Athabasca over the Peace-Athabasca Delta and south to, and including, Fort McMurray and the Clearwater River. MCFN's traditional lands have always been a central location for the harvesting activities and other rights-based activities vital to the cultural continuity of our members. The ability to use our traditional lands for a range of practices is extremely important to MCFN members, for the land is at the heart of our culture, traditions, identity, well-being, spirituality and rights. The practices conducted on the land have been integral to our physical and cultural survival, and healthy and sustained traditional lands are critical for ensuring our ability to pass on our culture to future generations and meaningfully exercise our rights. As such, we are not merely concerned about LARP's potential to directly and adversely affect our health, income and quiet enjoyment of property. MCFN is concerned about LARP's potential to undermine our ability to exercise our aboriginal and treaty rights and the sustainability of our community into the future.

As signatories to Treaty 8, MCFN member's have a right of access to unoccupied Crown lands for the purpose of exercising our treaty rights (see *R. v. Badger*, [1996] 1 SCR 771). As noted above, this is analogous to the right to "quiet enjoyment of property" described in section 5(1) of the *Alberta Land Stewardship Regulation*. The right of access is also intrinsically connected to MCFN member's right to hunt, trap, fish and gather for food, which is analogous to earning an "income" as defined in section 5(1) of the *Alberta Land Stewardship Regulation*. Section 7 of the Regulatory Details Plan will directly and adversely affect both the right of access to unoccupied Crown land and the treaty right to hunt, trap, fish and gather for food.

Direct and Adverse Impacts of Prioritizing Economic Interests Over Section 35 Rights

As noted above, ss. 7(1) and 7(2) requires that a provincial decision maker or local government body consider the LARP Strategic and Implementation Plan prior to carrying out any function related to their powers, duties and responsibilities in the planning region. As a result of this, every decision made in the Lower Athabasca Region will be made in accordance with the priorities, and to achieve the objectives, set out in LARP. This will directly and adversely impact MCFN because the Strategic and Implementation Plans in LARP prioritize a range of land-uses for the majority of lands within the Lower Athabasca Region over the practice of Treaty Rights, which appear to be treated as recreational activities. For example, under LARP - and as LARP will be considered in land use decisions going forward - economic interests take precedence over other interests, including our constitutionally protected rights, in many of the areas that MCFN members rely on for the exercise of our rights and culture. LARP does not provide any guidance to decision makers to avoid further adversely affecting and infringing MCFN's Treaty rights and completely ignores that previous decisions made by Alberta have adversely affected and infringed MCFN's section 35 rights already.

Instead, LARP creates a vision for the Lower Athabasca Region that completely ignores aboriginal and treaty rights and puts a major focus on economic interests. The vision states:

¹³ Allison Bay 219, Charles Lake 225, Collin Lake 223 Cornwall Lake 224, Devil's Gate 220, Dog Head 218, Old Fort 217, Peace Point 222, Sandy Point 221

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 are supported by infrastructure and people can enjoy a wide array of recreation and cultural opportunities. (see page 22)

This emphasis on economic interests is also clear from the regional outcomes. These focus on maximizing the development of the oil sands (outcome 1), diversifying the region's economy (outcome 2), improving infrastructure to encourage economic and population growth in the region (outcome 5), and improving opportunities for recreation and tourism (outcome 6).

MCFN has previously explained to Alberta the link between protecting areas for rights-based activities and the physical health of MCFN members:

The Lower Athabasca River system, which includes the Peace-Athabasca Delta, is absolutely critical for the ability of our [MCFN] members to practice their Treaty 8 rights, and to sustain their unique [A]boriginal livelihoods, cultures, and identities as Cree and Dene peoples. Our First Nations have depended upon the bountiful ecology of the Delta to sustain our families, cultures, and livelihood for generations. The Athabasca River itself is our main travel route into the heart of our Traditional Lands. Without adequate water quality or quantity in the river system, we cannot access our important cultural, spiritual, and subsistence areas and we cannot sustain the health and well-being of our families on the traditional foods that we have always obtained from the river system. (Adam and Marcel, 2010, p. 6)

The Shell Jackpine Joint Review Panel noted serious gaps in LARP:

[30]...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...

The suggestion in LARP that Alberta will consult later does not lessen the direct and adverse impacts of this scheme. As set out decisively by the Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, planning initiatives that affect how decisions are made, may have direct and adverse impacts on Section 35 rights. That is precisely the case with the sections of LARP that contain the strategic plan and implementation plan. Decision-makers are required by law to consider and integrate the strategic plan and implementation plan when making decisions about activities within the Lower Athabasca Region. MCFN has previously explained how this has a direct and adverse impact on MCFN's right to be consulted by a decision-maker with an open mind and MCFN's right to have a decision-maker ensure the protection of MCFN's Section 35 rights in a manner consistent with

the requirement to minimize impacts and give priority to the exercise of MCFN's Section 35 rights. Indeed, since LARP was finalized MCFN has heard from Alberta officials during consultation meetings that the balancing of interests between MCFN's Section 35 rights and the interests of expanded oil production will clearly tip in the favour of expanded oil production.

We now have two oil sands decisions since LARP was finalized, the Dover decision [Re Dover Operating Corp 2013 ABAER 014] and the Shell Jackpine Report [Re Jackpine Mine Expansion, 2013 ABAER 011], that clearly outline the effect of this priority scheme. In both decisions, it is evident that decision-makers viewed themselves as bound by the priority-scheme established in the strategic plan and implementation plan of LARP to approve the projects.

MCFN is now participating in an AER hearing for a winter exploratory program¹⁴ that will adversely impact the only free ranging bison herd in MCFN's traditional lands. The proponent in the proceeding has taken the position that LARP requires the decision-maker to approve the exploratory program because oil sands development must be prioritized over other uses in the area.

LARP is being applied by decision-makers to effectively rule out the possibility of establishing areas that can be set aside for traditional land use and the exercise of Treaty rights. Unless LARP is reviewed to include a requirement to consider and integrate conditions and criteria related to the exercise of MCFN's Section 35 Rights and culture, this trend will continue with mounting direct and adverse impacts on MCFN's rights and culture.

The Environmental Thresholds, Limits and Limited Management Responses under LARP Directly and Adversely Impact Section 35 Rights

While LARP directs that landscapes are to be managed to “maintain ecosystem function and biodiversity” (outcome 3) and that air and water are to be managed to support human and ecosystem needs, the environmental frameworks LARP mandates to achieve these goals were developed without consideration of what is necessary for the meaningful exercise of aboriginal and treaty rights. Thus, they lack essential thresholds and triggers relating to the protection of aboriginal and treaty rights. The practical result is that LARP establishes thresholds that effectively guarantee that the Lower Athabasca Region will fail to support the conditions and resources required for the exercise of MCFN's Section 35 Rights and Culture. This is a direct and adverse impact to MCFN's right under section 35 of the Constitution Act, 1982 to have the Crown take positive steps to ensure the continued ability of our members to exercise their rights and culture, taking into account the conditions and preferred location/manner of exercising those rights

LARP requires Alberta to establish various environmental frameworks including Air Quality Management (sections 22 – 27 identified above), Surface Water Quality/Quantity Management and Groundwater Quality Management Frameworks (sections 29, 39, 31, 33, 34, 36 & 37 set out above), but gives the designated Minister discretion over what to measure, where to measure it,

¹⁴ AER Application Nos. 1749543, 1749567, 1749568, 1749569, 1749570, 1749572, 1749605, 1749607, 1749620, 1751999, 1752756, 1763318, 1763325, 1763326, and 1763327.

what thresholds to set and what responses are required when any thresholds or limits are exceeded. Several of the Management Frameworks have already been finalized, such as the Air Quality and Surface Water Quality Frameworks, without taking into account what is needed now and in the future for us to exercise our Section 35 rights.

Moreover, LARP indicates that frameworks will use disturbance levels, triggers and thresholds based on future anticipated oil sands development rather than on pre-disturbance levels, or current disturbance levels. By focusing on future development, the air and water quality frameworks will fail to capture and address cumulative effects of pre-existing development. Again, this directly affects MCFN's right to have the Crown take positive steps to ensure the continued ability of our members to exercise their rights and culture, taking into account the conditions and preferred location/manner of exercising those rights.

In addition, the scope and utility of the proposed frameworks are seriously limited by:

- excluding important elements such as odours, flaring, CO₂, and particulates from air quality thresholds;
- not setting baseline levels and excluding PAHs (polycyclic aromatic hydrocarbons) from surface water quality thresholds;
- basing the ground management framework on self-reported industry data and by excluding wetland health from that framework; and by
- basing land disturbance plan on future anticipated oil sands development.

To this end, we note that the final LARP increased the amount of contamination allowed under the LARP frameworks. This increase in potentially harmful emissions and contaminants was done without any regard for the health impacts of downstream communities, such as Fort Chipewyan. We note that the recent report of the Joint Review Panel for the Shell Jackpine Mine noted that Alberta has not conducted necessary health studies.

These limitations and flaws minimize the efficacy of the frameworks as a tool to ensure that the Lower Athabasca Region is a healthy ecosystem that sustains its biodiversity over the next 10 to 50 years. Because the exercise of aboriginal and treaty rights depends, among other things, on biodiversity and healthy ecosystems, this flawed conservation approach is likely to result in adverse effects and potential infringements to MCFN's Section 35 rights. In turn, this will have a direct and adverse impact on our livelihood and our quiet enjoyment of our traditional lands and resources for the purposes of exercising our Section 35 rights.

Direct and Adverse Impacts from Conservation and Recreation Areas that Limit Section 35 Rights

LARP also sets out guidelines for establishing conservation areas and conserved lands (sections 13, 16, 17, 19 & 20 above). Conservation areas will be enacted under the *Public Lands Act* and the *Provincial Parks Act* and instruments such as the *Public Lands Act* will govern the use of and access to certain conservation and mixed-use areas. Unfortunately, LARP designates conservation, recreation and mixed-use areas without taking any steps to ensure that the legal

regimes for these areas are or will be capable of protecting and accommodating aboriginal and treaty rights.

For example, the provisions of the *Provincial Parks Act*, the *Public Lands Act*, and their associated regulations impose limits on the location, time and manner of accessing lands for exercising Section 35 Rights and these enactments provide no priority scheme for aboriginal access to areas relied upon for the practice of these rights.¹⁵ In some cases, industrial activities will still be permitted in these same conservation areas, while at the same time no steps have been taken in PLAR to ensure that MCFN will continue to have sufficient access to Crown lands for the exercise of their treaty rights that Treaty 8 and the NRTA guarantees. This is extremely problematic, because a central component of the right to hunt and trap under Treaty 8 is the right to access sufficient lands on which wildlife is located to preserve a way of life that depended on hunting, trapping and fishing.

Sections 39, 42, 43 and 45 respecting the creation of recreation and tourism opportunities is similarly problematic in that they direct the Designated Minister to set aside additional land for purposes that are incompatible with the exercise of our Section 35 Rights. These recreational areas, established under the provisions of the *Public Lands Act*, will again impose certain limits on access and on the activities that may be done in those areas. In addition, the creation of new provincial recreation areas is intended to support greater tourism development, which will reduce the ability of MCFN members to engage in our treaty rights as increased non-aboriginal presence creates safety concerns (for example with respect to hunting) and increased competition for resources (such as wildlife as more sports hunters come to the area).

One example of this is the creation of the Lake Athabasca Public Land Use Area for Recreation and Tourism. This Public Land Use Area is to be designated as a Public Land Use Zone pursuant to the *Public Lands Administration Regulation* (“PLAR”). PLAR includes a number of general land use restrictions for Public Land Use Zones, including:

- restrictions on the uses of conveyances, including on and off-highway vehicles or snow vehicles, and motorized boats, which many MCFN members rely upon for accessing our traditional lands for rights-based activities (see section 185).
- restrictions on camping and fires in certain circumstances within public recreation areas within public land use zones; and
- restrictions on the use of firearms in public land recreation areas or public recreation trails (see section 188), which are created pursuant to Schedule “F” of LARP.

In addition to these general restrictions, it is likely that specific land use restrictions will be identified in a schedule to PLAR when the Lake Athabasca public land use zone is created (as has been the case for other public land use zones). Moreover, we note that according to Schedule F of LARP, the Lake Athabasca public land use zone will still permit a certain amount of development. Together, the restrictions on activities and any permitted development will limit MCFN’s ability to access this area for the exercise our Section 35 rights. This is particularly of

¹⁵ The *Provincial Parks Act* is particularly problematic in this regard, as only marked trails can be used and the Minister is given absolute discretion to determine what areas of park lands can be accessed at any time. Similarly, the *Provincial Parks Act* also places no limits on the power of officers to prohibit vehicle entry into parks.

concern given the strong connection our community has with Lake Athabasca as a preferred area of our traditional lands.

Finally, to the extent that conservation areas can provide some areas for the exercise of MCFN's rights, the Minister must consider that MCFN's rights and interests are adversely affected by the fact that LARP establishes conservation areas far away from MCFN.

Direct and Adverse Impacts to MCFN Members' Health

MCFN has repeatedly raised concerns about the effects of intensive oil and gas development throughout its traditional territory on the health of its members. Recently, in response to MCFN's concerns, the Joint Review Panel for the Shell Jackpine Mine Expansion recommended that Alberta Health and Wellness and Health Canada:

complete a regional baseline health study focused on First Nations, Métis, and other Aboriginal groups that considers all relevant health factors, including environmental exposures and potential exposure pathways, such as water, air, and consumption of traditional foods. (see paragraph 1069 of the decision)

The Joint Review Panel observed that there was a gap in knowledge about contamination of country foods from the development in the region (the Shell Jackpine Mine Expansion is within the Lower Athabasca Region) and noted that recent research on atmospheric deposition indicates that the concerns MCFN has been raising (together with other First Nations) are not unfounded. As such, continuing to manage land use in the region according to LARP, which prioritizes economic development and development of the oil sands in particular, without first collecting that health information puts the health of MCFN members who consume country foods harvested pursuant to our treaty rights at a very real risk.

Direct and Adverse Impact to the Right to have Impacts to the environment and Section 35 Rights managed in way that preserves MCFN's ability to maintain its rights and culture

At the core of Treaty 8 is a promise made by the Crown that Aboriginal signatories such as MCFN would be able to maintain their way of life through the exercise of rights-based and cultural activities on the land.

As set out in MCFN's June, 2011 submission to Alberta and expressed repeatedly in various letters and meetings with Alberta officials, LARP utilizes a planning approach that achieves just the opposite. Alberta finalized LARP without working with MCFN to develop a knowledge base of what resources, conditions and criteria are needed for MCFN to sustain its livelihood and protect its rights and culture. None of the initiatives and priorities in LARP takes into account what is needed now and in the future for Mikisew to exercise our Treaty and Aboriginal rights. Simply put, LARP does not meet even the minimum definitions or processes for proper planning and falls very far short of other planning initiatives in Canada where First Nations rights and concerns have been integrated into planning. This is a direct breach of MCFN's right to have the Crown manage impacts from industrial development in a manner that allows for the continued exercise of MCFN's culture.

Direct and Adverse Impact to the Right to be Consulted about Impacts to Section 35 Rights

The entire LARP itself is a failure of Alberta to meaningfully consult with MCFN. Unless a review of LARP is undertaken by the Minister through meaningful consultation with MCFN, LARP will remain an ongoing direct and adverse impact to MCFN's right to be consulted.

We have set out Alberta's myriad failures to consult with MCFN respecting LARP in our letters and submissions respecting the draft LARP. Mikisew has provided considerable information about our section 35 rights in these processes including, without limitation, concerns with LARP, maps and information showing some of the lands, corridors and waterways that need to be protected, and various recommendations. Our input has been largely ignored. Alberta has refused to provide constructive feedback on Mikisew's submissions and has refused to answer key questions about how planning has been undertaken. This is contrary to the case law on the Crown's duty and honour in respect of consultation, including the need for reconciliation and including, for example, the recent West Moberly decision. In this decision, the BC Court of Appeal's majority decision made it clear that consultation is required on strategic level decisions, exploratory stages of projects and that the promises in Treaty 8 cannot be read as only protecting some sort of general right to hunt irrespective of location or importance to the First Nation.

For example, in the Haida decision of the Supreme Court of Canada, the Court said that consultation includes informing First Nations of all relevant information on which proposals are made (LARP is secretive), being prepared to alter the original proposal based on First Nations input (no indication of this), and providing feedback both during the consultation period and after the decision-making process (not being done).

We attach some of these materials to this submission to assist the Minister in understanding why LARP, in its entirety, is directly and adversely impacts MCFN's rights and interests.

Outcome 7 of LARP is that aboriginal peoples will be included in land use planning. However, upon closer inspection it is clear that Alberta is proposing to conduct *ad hoc* consultations on individual decisions to be made under LARP, not to meaningfully address and accommodate MCFN's concerns at the land use planning stage. This approach restricts MCFN from being consulted regarding the strategic land use decisions Alberta is making pursuant to LARP, despite the fact that the honour of the Crown requires consultation at that level (see *Haida Nation* and *Rio Tinto Alcan Inc. v. Carrier Sekani*, 2010 SCC 43).

Specifically, Alberta only commits to "review" input from consultations prior to making decisions that have the potential to adversely affect section 35 rights. It does not acknowledge that the Supreme Court of Canada requires that Alberta must provide feedback to the First Nations with respect to their submissions or that the Crown must always intend to substantially address aboriginal concerns (*Haida* at para. 42) and must accommodate section 35 rights, where necessary. For consultation to be meaningful, the Crown must demonstrate that, in balancing the competing interests at stake, it listened to the First Nations' concerns with an open mind, and must in good faith make an effort to understand and address those concerns, with a view to minimizing the adverse impact of the decision while providing reasonable accommodation.

There is no direction in LARP to provincial and local government level decision makers that they must engage in this level of consultation when they are also considering the other elements of LARP as directed by section 7 of the Regulatory Details Plan.

LARP fundamentally misunderstands what is required to meaningfully involve aboriginal people in land use planning. For example, it judges whether Outcome 7 is successful based on the level of participation of aboriginal peoples rather than on whether any initiative or ad hoc consultation provides meaningful inclusion of aboriginal peoples and their knowledge in land planning processes and whether section 35 rights are protected.

Ultimately, despite Outcome 7, LARP generally fails to incorporate our traditional knowledge and allows the Province and local government decision makers to make decision about land use without adequately considering the impacts to our traditional land use and to our Section 35 rights. In this regard, we note that the Joint Review Panel for the Shell Jackpine Mine Expansion explicitly recommended that the Province develop and implement a TLU management framework as a component of LARP. It said that this framework should be “maintained and adapted over time to ensure the protection of Aboriginal land use and treaty rights in the oil sands region” (see Recommendation 65). This is the kind of engagement that is necessary to protect MCFN’s rights, including our members’ health, their ability to sustain themselves and earn a living through the exercise of their Section 35 Rights, and their ability to use our traditional lands for the exercise of their Section 35 Rights.

C. Explain the adverse effects that you are suffering or expect to suffer as a result of the specific provision (section) you identified in A (above).

Alberta's failure to account for our Section 35 rights in LARP and to create a rights-based land use Plan puts our rights, culture, traditional knowledge and well-being at significant and immediate risk of harm (and, in the case of our rights, infringement). LARP fails to assess the quantity and quality of resources that are necessary for Mikisew to sustain its rights now and in the future. Without this information, we do not understand how land-use decisions made pursuant to LARP, including the establishment of small and fragmented conservation areas and the development of environmental thresholds, will be made in way that appropriately reflects the needs and conditions required to uphold the constitutional protection of our rights. LARP will therefore result in the following adverse effects to MCFN.

As a result of the emphasis on economic interests in LARP, MCFN will lose the lands, waters and resources that are required for the continued exercise of MCFN’s way of life. LARP directs decision-makers to meet the objective of maximizing the development of the oil sands, but also to maintain and diversify other industries, including forestry, agriculture, tourism and, importantly, energy, mineral and coal exploration and extraction and the extraction of surface materials. This is particularly concerning because LARP plans for a massive expansion of infrastructure in the region, as well as, at least a doubling of oil production in the area. Maximizing these priorities will require decisions to put land to uses that are inconsistent with our Section 35 rights and will directly and adversely affect our ability to access our traditional lands for rights-based activities and to earn our livelihood and obtain sustenance through those rights-based activities.

Each time the Government of Alberta authorizes the use of Crown lands for purposes incompatible with the exercise of treaty rights, our ability to access Crown lands for the exercise of our treaty rights is eroded. This is particularly a concern where so much of our traditional lands have already been developed for oil sands, forestry, roads, urban residential development and other industrial purposes.

LARP requires the creation of a number of environmental management frameworks (as detailed above) that fail to consider what is necessary now and into the future to protect our Section 35 Rights and our ability to access a healthy ecosystem throughout our traditional lands. Rather, LARP requires the designated minister responsible for each of the Air Quality, Surface Water Quality and Quantity, and Ground Water Quality and Quantity have wide discretion over what effects to measure, where to measure it, the thresholds and limits for certain indicators and what responses are necessary when thresholds and limits are exceeded.

As a result of this approach, the environmental management frameworks will continue to permit adverse impacts to the ecosystem and to our ability to access healthy lands and resources for the exercise of our Section 35 rights. This will result in adverse effects to our members' health and wellbeing as inappropriate thresholds and limits for contaminants in air and water will affect the level of contaminants in our country foods. It will also result in adverse effects to our ability to enjoy property, as any adverse impacts to water bodies in the Lower Athabasca Region (such as Lake Athabasca, the Athabasca River and its tributaries) and their surrounding ecosystems will further limit our ability to exercise our rights on the surrounding unoccupied Crown land.

The LARP regulations also show that Alberta has misconceived the role of conservation areas. To take just one example, the proposed LARP regulations require the designated minister to report on the ratio of conserved land to the total area of land in the region. The "ratio" of conserved to exploitable land shows a complete misunderstanding of the real issue and concerns of First Nations, namely whether the air, water, biodiversity and land disturbance levels (qualitatively and quantitatively) in the region are maintained at levels capable of supporting vegetation, wildlife, water flow, land base and other traditional resources to ensure that the meaningful practice of aboriginal and treaty rights is sustained. Alberta's approach fundamentally misunderstands the ecosystem approach to assessing sustainable and responsible development. It also demonstrates Alberta's failure to understand that to uphold aboriginal and treaty rights, the appropriate thresholds that underlie the meaningful practice of rights (e.g., resource quality, resource quantity, proximity/access, spiritual values, and cultural connection to place) need to be identified and evaluated.

The location of the conservation areas under LARP provides a further clear example of how LARP will directly and adversely affect our rights. For example, in the final LARP, Alberta established a large conservation area that is completely unrelated to the areas where our members exercise their rights and demonstrates, in our view, a complete rejection by Alberta of its obligation to assess and manage impacts to our rights in a manner consistent with constitutional principles. Conservation areas have been chosen to avoid conflict with oil sands and other leases, not on ecological needs or considerations.

The various conservation areas created in our traditional lands both include restrictions on activities that are incompatible with the exercise of our treaty rights *and* in some circumstances allow continued petroleum and gas development. In addition, the creation of new provincial recreation areas is intended to support greater tourism development, which will result in reduced ability of MCFN members to engage in our treaty rights as increased non-aboriginal presence creates safety concerns (for example with respect to hunting) and increased competition for resources (such as wildlife as more sports hunters come to the area).

The fact that these conservation and recreation areas were identified without meaningful consultation with MCFN undermines the capacity of the conservation initiatives to protect lands for the exercise of Section 35 Rights now and into the future. MCFN is left with a situation where lands designated for mixed use will be developed to achieve the economic objectives in LARP, while lands designated for conservation will potentially preserve the ecosystem, but will simultaneously limit our ability to exercise our aboriginal and treaty rights in those same protected areas. The restrictions that will be in place in some of the conservation areas actually further impact our quiet enjoyment of property.

With respect to our right to be consulted, the fact that all decision-makers must consider LARP in making their land use decisions has a direct and adverse impact on MCFN's right to be consulted by an unbiased decision-maker with an open mind. As noted above, LARP requires provincial and local government decision-makers to give priority to land uses that are inconsistent with MCFN's treaty rights. In addition, the *Responsible Energy Development Act*, SA 2012, c R-17.3 requires the Alberta Energy Regulator to act in accordance with any applicable ALSA regional plan (s.20). This will seriously undermine consultation between the Government of Alberta and MCFN. As each land use decision is made in accordance with LARP, our ability to access lands for the exercise of our Section 35 Rights, and our ability to maintain our incomes or livelihoods and to quiet enjoyment property will be steadily eroded.

Part 2: Relief Requested

In MCFN's view, as described above, LARP does not create a land use planning regime that can credibly or effectively avoid further interference with, and infringement of, Mikisew's rights and appears to create a planning regime that is inconsistent with what is required to uphold Crown honour in decision-making. MCFN requests that the Minister amend the provisions of the Lower Athabasca Regional Plan identified above to be consistent with the exercise of MCFN's Treaty and Aboriginal rights and traditional land use in perpetuity.

As part of that request, MCFN requests the review of LARP to, through consultation with MCFN, consider the following:

- the development of a traditional land use framework to be incorporated into LARP (as recommended by the Joint Review Panel for the Shell Jackpine Mine Expansion)¹⁶;

¹⁶ We wish to be clear that it is our understanding that when the Panel referred to a Traditional Land Use Management Framework, it was referring to the Traditional Land and Resource Use Management Plan described in detail in our evidence and raised on many occasions with Alberta. For this framework to be effective and in keeping

- the development of specific objectives, strategies and outcomes for protecting sufficient quality and quantity of unoccupied Crown land for the purposes of exercising Section 35 Rights;
- the identification of conservation areas in a manner that respects and recognizes MCFN's ability to exercise their Section 35 Rights;
- an approach to environmental management and monitoring that is based on pre-disturbance baselines to account for and address the cumulative effects of pre-existing development on the environment and MCFN's Section 35 Rights;
- the development of specific consultation processes and information that decision-makers should consider respecting our exercise of our Section 35 Rights and spiritual cultural practices prior to making land-use decisions in accordance with LARP;
- the development of a regional baseline health study focused on the health of First Nations, Metis and other Aboriginal groups and impacts from the environmental effects of oil sands development in the Lower Athabasca Region (as recommended by the Joint Review Panel for the Shell Jackpine Mine Expansion);
- the development of a clear communication plan to ensure that MCFN understands how its concerns were considered and integrated into LARP; and
- potential revisions to LARP to address the adverse impacts to MCFN's Section 35 Rights and our members health and well-being as identified in this request for review and in previous meetings and correspondence with the Government of Alberta respecting LARP.

Additional recommendations to be considered during the review of LARP can be found in our LARP submissions appended hereto.

Part 3: Other Applicable Information

MCFN requests that all of its submissions and correspondence regarding LARP be considered during this review. MCFN can provide a list of these materials if requested.

with the core promise of Treaty 8, it must include criteria, thresholds, indicators and conditions related to the continued exercise of our Section 35 rights, our culture, and our way of life. It is absolutely critical that Alberta work with us to develop a rights- and culture-based framework for assessing and managing effects in the region.