IN THE MATTER OF THE ENERGY RESOURCES CONSERVATION ACT
R.S.A. 2000, C. E-10;
AND THE OIL SANDS CONSERVATION ACT, R.S.A. 2000, C. 0-7;
AND IN THE MATTER OF THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT,
S.C. 2012, c 19;
AND IN THE MATTER OF A JOINT PANEL REVIEW BY THE ALBERTA ENERGY
RESOURCES CONSERVATION BOARD AND THE GOVERNMENT OF CANADA;
AND IN THE MATTER OF:
JACKPINE MINE EXPANSION PROJECT by SHELL CANADA LIMITED;

CEAR Reference number: 59540
ERCB Application No. 1554388

SUBMISSION BY THE FORT MCKAY FIRST NATION
And the FORT MCKAY METIS COMMUNITY ASSOCIATION
(“FORT MCKAY”)

Submitted to:  Submitted by:
Joint Review Panel Secretariat  Klimek Buss Bishop Law Group
Canadian Environmental Assessment Agency 240, 4808 87 Street
160 Elgin Street, 22nd Floor Edmonton, AB T6E-5W3
Ottawa, ON K1A 0H3 Tel: 780-468-1843
Tel.: 1-866-582-1884 Fax: 780-468-3437
Fax: 613-957-0941 <email address removed>

Shell.Reviews@ceaa-acee.gc.ca

Per: Meighan G. LaCasse  Per: Karin E. Buss
Counsel to the Joint Review Panel Solicitors for Fort McKay
## Contents

I. **Overview** .......................................................................................................................... - 1 -  
   A. Submission by Fort McKay .................................................................................. - 1 -  
   B. Shell Jackpine Mine Expansion Project ............................................................... - 2 -  

II. **FORT MCKAY** ...................................................................................................... - 3 -  
   A. Lands and People ................................................................................................ - 3 -  
   B. Fort McKay’s Rights and Interests ...................................................................... - 4 -  

III. **REQUESTED DISPOSITION** .............................................................................. - 6 -  

IV. **FACTS AND REASONS FOR REQUESTED DISPOSITION** ................ - 8 -  
   A. Project Impacts ................................................................................................... - 8 -  
   B. The Fort McKay Specific Assessment (FMSA) ..................................................... - 9 -  
   C. Land Disturbance ................................................................................................ - 12 -  
   D. Terrestrial Impacts ............................................................................................ - 13 -  
   E. Wildlife .............................................................................................................. - 13 -  
   F. Air and Odours .................................................................................................. - 14 -  
   G. Surface Water ................................................................................................... - 15 -  
   H. Lack of Justification and Accommodation ........................................................ - 15 -  

V. **THE NATURE AND SCOPE OF PARTICIPATION** ........................................ - 17 -  

VI. **APPENDICES** ...................................................................................................... - 18 -
I. Overview

A. Submission by Fort McKay

1. This submission is made on behalf of the Fort McKay First Nation and, Fort McKay Metis Community Association; collectively referred to as “Fort McKay.”

2. Fort McKay is:
   - one of the continuous and longest-term land users in the Lower Athabasca Region;
   - is the largest private landowner in the northern portion of the Lower Athabasca Region (apart from the RMWB); the holder of aboriginal and treaty rights, which are exercised in the Lower Athabasca Region; and,
   - the community most impacted by current industrial development in the Lower Athabasca Region; the mineable and portions of the in-situ oil sands zones are in the heart of Fort McKay’s Traditional Territory.

3. No other community is impacted by oil sands development as is Fort McKay. Oil sands production has doubled since 1986 and it is expected to double again by 2020. The loss of 75% of Fort McKay’s Traditional Territory to potential development\(^1\), significantly increased off-highway access by non-traditional land users to previously isolated areas, and the cumulative effects on the environment reflect a truly overwhelming daily reality for Fort McKay. The Community as a whole is significantly impacted by the socio-economic, cumulative and environmental effects of multiple projects in the area.

4. Fort McKay understands the need to change and adapt to these rapidly changing circumstances. It has developed positive relationships with its industrial neighbours and attempted to mitigate the environmental and socio-economic effects of each new project, to the extent possible. However, incremental changes to specific projects has had minimal effect on the cumulative and increasing loss of Fort McKay’s aboriginal and treaty rights and adverse quality of life impacts on its community from the unbridled development of the Athabasca Oil Sands.

\(^1\) Approximately 75% of Fort McKay’s Traditional Territory is covered by oil sands leases (oil sands lease data from Divestco, March 2010)
5. Fort McKay’s primary interests are in securing the long term sustainability of its community and protection of its rights. It seeks reconciliation of its rights and interests with those of Alberta and Canada in the development of the oil sands. The continued granting of oil sands leases and project approvals has infringed its rights without accommodation by government.

6. The Panel is requested to:

- Find that the Shell Jackpine Mine Expansion Project (the “Project”) is not, at this time, in the public interest pursuant to s.3 of the Energy Resources Conservation Act and refuse to grant an approval under ss. 10(3) and 11(3) of the \textit{Oil Sands Conservation Act}; and
- Recommend to the Governor in Council that no approvals be issued to enable the Project to proceed, because the Project’s significant and adverse effects, including its added contribution to the loss and infringement of Fort McKay’s treaty and aboriginal rights, are not justified in the circumstances, pursuant to s. 52 and 7 of the \textit{Canadian Environmental Assessment Act} (S.C. 2012 c.19).

B. Shell Jackpine Mine Expansion Project

7. Shell Canada Ltd (“Shell”) is applying for provincial and federal approvals and authorizations to increase bitumen production at the Jackpine Mine by 100,000 bbl/cd to 300,000 bbl/cd. Specifically, the Jackpine Mine Expansion (“JPME”) requires

- an approval pursuant to the Energy Resources Conservation Act, s.3;
- an approval pursuant to the Oil Sands Conservation Act, s. 13 to amend Approval 9756 to access additional mining areas on Lease 13; Lease AT36 and Lease 631, and to modify and add processing units to the Jackpine Mine;
- approval from the ERCB to receive third party oil sands material for processing at the JPME;
- approval from the ERCB to ship bitumen materials for processing at third party-party facilities;
- an amendment to its operating approval 153125-00-00 for the Jackpine Mine from Alberta Environment Sustainable Resource Development (ESRD) to increase production, modify and extend its mine and reclamation plan, to increase the capacity of the existing Jackpine Mine, as well as installing
new infrastructure and tailings disposal areas, pursuant to s. 67 and 70 of the *Environmental Protection and Enhancement Act*;

- an amendment to its water License No. 00186157-00-00 to increase the amount of water it diverts from the Athabasca River by 18.5 Mm³, pursuant to s. 49, 50, 51, 54, and 59 of the *Water Act*;

- approvals under the *Navigable Waters Act*, s.5, s.10, for the proposed diversion of the Muskeg River, for the proposed bridge across the Muskeg River and for modifications to the existing Muskeg River Mine water intake system; and

- an authorization pursuant to ss.35(2) of the *Fisheries Act* for the harmful alteration or destruction of fish habitat.

II. FORT MCKAY

A. Lands and People

8. The community of Fort McKay consists of approximately 800 Cree, Dene and Métis residents who have for generations been self governing and practicing hunting, fishing and trapping in their Traditional Territory. They are aboriginal peoples within the meaning of the *Constitution Act*, 1982.

9. The majority of community members are members of the Fort McKay First Nation, are Indians within the meaning of the *Indian Act*, and are beneficiaries of Treaty 8, 1899. The First Nation has approximately 650 registered members. Its government is led by Chief and Council. The Chief is Jim Boucher.

10. There are approximately 63 members of the Métis Community Association who are residents of Fort McKay. It is led by a Board of Directors and Ron Quintal is President.

11. The Fort McKay First Nation owns fee simple lands and the use and benefit of reserves 174, 174C, 174D, 174B and 174A. The Reserve lands comprise 26,000 hectares (ha), making Fort McKay the largest land holder in the Northeast Region after the provincial government and Wood Buffalo National Park.

12. The Fort McKay Métis holds about 800 acres in the community of Fort McKay pursuant to a long term lease with the government of Alberta.

13. Community members also hold 30 traplines (Registered Fur Management Areas; RFMAs) to lands within their Traditional Territory. These total
935,146 ha and approximately 80% of this land has been leased for oil sands development.

14. Fort McKay is the community most directly affected by oil sands development. The first wave of development included the Suncor Tar Island Project and the Syncrude Mildred Lake Project, which were constructed in the late 1960’s and 1970’s, respectively. A second wave of development began in the mid 1990’s, and included expansions of the original Suncor and Syncrude Projects, as well as new projects including: the Albian (Shell) Muskeg River Mine, the Syncrude Aurora Mine, the CNRL Horizon Mine and Upgrader, the Shell Jackpine Mine and some insitu oil sands projects (Suncor McKay River and Firebag Projects, for example). The third wave of development includes the TOTAL Joslyn North Mine Project, Shell’s Jackpine Mine Expansion and Pierre River Mine, Suncor’s Voyageur South Mine Project and Teck Resources/UTS Energy’s Equinox Oil Sands Mine and Frontier Oil Sands Mine.

15. Many new in situ projects are seeking approval such as Cenovus’ Telephone Lake Project, Ivanhoe Energy’s Tamarack Project, McKay OPCO’s McKay Commercial Project (recently approved), Dover OPCO’s Dover Commercial Project, Athabasca Oil Sands’ Leduc TAGD, Dover Clastics, and Birch projects, Southern Pacific’s STP McKay Project, Oakpoint Lewis Pilot Project, Sunshine Oil Sands West Ells, Legend Lake, Harper and Thickwood projects. Several of these projects are pilots or the first phase of much larger projects planned.

16. Within a twenty kilometer radius of the Community 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, Millennium and Voyageur Projects, the Syncrude Aurora North Mine, Syncrude Mildred Lake, the TOTAL Joslyn North Mine and the Jackpine Mine Expansion.

B. Fort McKay’s Rights and Interests

17. The people of Fort McKay have statutory and common law rights, but in addition to their rights as Canadians, they have constitutional communal and individual rights as the first peoples of Canada.

18. Their constitutional rights are as follows:

- Treaty rights; as guaranteed by the text of Treaty 8 (1899) and the oral assurances made on behalf of the Crown at the time the Treaty was negotiated. These treaty rights include the right to hunt, trap and harvest natural resources within their traditional territory, to their way of life, to
the use, enjoyment and control of lands reserved for them and the right to a livelihood. Attached as Appendix A is the report of Dr. Pat McCormack regarding the nature and scope of Fort McKay’s treaty rights as it pertains to land use.

- While Alberta has the ability to “take up” lands for mining and other purposes pursuant to Treaty 8, this right is limited by Fort McKay’s right to sufficient lands, and access to them, within their traditional territory, of a quality and nature sufficient to support the meaningful exercise of their treaty rights;²

- Aboriginal rights; which are the practices, traditions and customs integral to the aboriginal group and arising from their prior occupation of the lands now comprising Canada. These include harvesting rights. Some aboriginal rights are confirmed by Treaty 8; others include the right to self government, culture and religion;

- The right to hunt for food in all seasons pursuant to the Natural Resources Transfer Agreement (being schedule 2 of the Constitution Act, 1930);

- The Métis also have aboriginal rights including the right to hunt and the right to harvest natural resources in their traditional territory;

- The right to be consulted and accommodated with respect to potential adverse effects on their rights and the interests secured by these rights; and

- The provincial and federal Crowns have a duty not to restrict treaty and aboriginal rights and any infringement must be justified by demonstrating a) a compelling and valid legislative objective; b) that priority was given to the rights; c) the means of achieving the objective infringed the right, including the preferred means of exercising it, as little as possible; d) the First Nation was consulted; and (e) necessary compensation was paid.

19. Fort McKay’s statutory rights include:

- The right to use and enjoyment of their reserve lands pursuant to section 18(1) of the Indian Act (R.S. 1985, C. I-5) with a corresponding fiduciary obligation on Canada to protect these land rights and their value to the First Nation;

- The right to commercial fur harvesting for holders of trapping areas pursuant to the Wildlife Regulation, Alta Reg. 143/1997; and

² Mikisew v. Canada, 2005 SCC 69
The statutory right to hunt, fish and trap on Crown lands pursuant to the *Hunting, Fishing and Trapping Heritage Act* (S.A. c. H-15.5).

Fort McKay’s common law rights include:

- The right to use and enjoyment of the lands they occupy in the community free from noxious odours, pollution, noise and other nuisances.

### III. REQUESTED DISPOSITION

21. Fort McKay requests that the Joint Review Panel:

- Find that the Shell Jackpine Mine Expansion Project (the “Project”) is not, at this time, in the public interest pursuant to s. 3 of the *Energy Resources Conservation Act* and refuse to grant an approval under ss. 10(3) and 11(3) of the *Oil Sands Conservation Act*; and
- Recommend to the Governor in Council that no approvals be issued to enable the Project to proceed, because the Project’s significant and adverse effects, including its added contribution to the loss and infringement of Fort McKay’s treaty and aboriginal rights, are not justified in the circumstances, pursuant to s. 52 and 7 of the *Canadian Environmental Assessment Act* (S.C. 2012 c.19).

22. Alternatively, that any approval be conditional upon the following:

a) For traditional land use:

- the establishment of protected areas for traditional land use that are: in reasonable proximity to the community; in culturally significant ecosystems including those surrounding its reserves at Moose Lake (I.R. 174a and 174); and contain sufficient undisturbed resources to mitigate the declines in wildlife and other terrestrial resources;
- implementation of access management plan that includes 1) measures to reduce new linear disturbance, decrease public access to linear disturbances, and accelerates reclamation of them; and 2) protection for Fort McKay’s traditional trails and access to its reserves, traplines and hunting areas; and
- a commitment and process by Alberta and Canada to consult and accommodate Fort McKay with respect to the impacts of regional development on its aboriginal and treaty rights.

b) For Air Quality and Odours...
enforceable limits for odours and a regional monitoring system that will include monitoring odours in Fort McKay;

- limits on air emissions to keep them well within Fort McKay’s air quality permissible levels;

- reduction of existing emissions and use of Best Available Technically and Economically achievable emission control technology; and

- a comprehensive monitoring system that reports on the sources of emissions as well as the resultant impacts within the environment, including air quality and odours. Fort McKay wants to be a partner within the monitoring system.

c) For Wildlife:

- annual wildlife population surveys;

- immediate reduction of moose harvest levels allowed for non-Aboriginal hunters throughout the entire oil sands region until current moose populations are determined;

- establishment of conservation offsets, including protected areas, to preserve wildlife habitat and populations;

- acceleration of reclamation of disturbed areas in the oil sands area. Additional development approval based upon reclamation performance and re-establishment of effective wildlife habitat. For example, approval of further development be contingent on the amount of moose habitat re-established in reclaimed areas or wildlife habitat protected through conservation offsets; and

- wildlife monitoring that contributes to validation of habitat models and tests EIA predictions.

d) For Surface Water:

- the Phase 2 Water Management Plan for the Athabasca River be implemented with a minimum flow level required for the River.

23. Fort McKay also requests that the Panel recommend to Canada and Alberta that they appoint negotiators with the necessary mandate to negotiate accommodation measures with Fort McKay that include:

- Management of designated areas for the objective of maintaining traditional land use in reasonably close proximity to Fort McKay;
• Establishment of a protective buffer zone around Fort McKay’s community and reserves (including 174a and 174b) on the west side of the Athabasca River;

• consultation and coordination of land planning and development near the borders of Fort McKay’s reserves and the community aimed at maintaining Fort McKay’s land use on its reserves;

• collaborative arrangements for the management of Fort McKay’s traditional territory and its resources, including partnering in environmental monitoring and development of management strategies;

• development of reclamation planning and criteria, in consultation with Fort McKay, that is aimed at restoring the land for traditional and other uses by the community, and that incorporates the knowledge held by Fort McKay members regarding the land prior to disturbance;

• Long-term economic arrangements to provide social and physical infrastructure and assist the community to prepare for and transition to a post oil sands economy; and

• Measures to promote, sustain and protect the health, security, well-being and economic development of the Community.

IV. FACTS AND REASONS FOR REQUESTED DISPOSITION

A. Project Impacts

24. The proposed Project is located within Fort McKay’s traditional territory about 15 km northeast of the community. It will disturb an additional 12,719 ha on top of the 7,836 ha already permitted under the Jackpine Mine, bringing the total disturbance to 20,555 ha. The proposed JPME will extend the mine completion date from 2031 to 2049.

25. The Project development area for the JPME overlaps with three Registered Fur Management Areas (also referred to as traplines) held by Fort McKay members: #1716, #1714, #2137. The existing mines plus the JPME will impact 73% of trapline #1714, 43% of #1716, and 44% of #2137.

26. Shell completed the Traditional Knowledge Report (Shell 2008) to complement the Traditional Knowledge Land Use Report (TKLU Report) originally completed for their EIA (Golder 2007, Shell 2007). Both reports present similar findings though employ somewhat different approaches in their assessments.
27. According to the TKLU Report, traditional land use will not be possible in the Project development area during operations, leading to a high negative effect on traditional land use for 25 to 50 years. Even with successful reclamation, a minimum of two to three generations of Fort McKay members will be without access to significant portions of their traditional lands. Further, at closure, reclamation activities will not result in a landscape that resembles pre-disturbance conditions. According to Shell Canada Limited (2007), a site is “considered to be restored if natural succession processes are restored” and does not require the establishment of a site to a mature stage. The impact on traditional land use reaches into the far future with regards to Fort McKay cultural heritage is similar for all mines.

28. Attached as Appendix B is the technical review of the Jackpine Mine Expansion and Pierre River Mine Projects prepared on behalf of Fort McKay in February 2010 (based on the application and environmental assessment submitted by Shell in 2007).

B. The Fort McKay Specific Assessment (FMSA)

29. Fort McKay, Shell and the Governments of Alberta and Canada agreed to conduct a Fort McKay Specific Assessment, as a pilot project in relation to Shell’s proposed Jackpine Mine Expansion and Pierre River Mine Application. It has been filed in these proceedings as part of Shell’s application to the ERCB and ESRD. The objective of this assessment was to provide, from Fort McKay’s perspective, appropriate and sufficient information that:

- Fort McKay can use to more fully understand and assess the effects of the Shell projects and cumulative oil sands developments on environmental, cultural and traditional resources of concern and interest to Fort McKay as well as on Fort McKay’s cultural heritage;
- Is specific to Fort McKay and the regulators must consider when making public-interest decisions; and
- Provides information and recommendations to assist Alberta, Canada, Shell and Fort McKay develop mitigation and accommodation strategies to address any potential adverse effects; and to inform consultation.

30. The FMSA is comprised of three main documents:

- An Environmental Assessment (the Environmental Specific Assessment)
- A Cultural Heritage Assessment (CHA) Baseline: Pre-development (1964) to Current (2008) (the Cultural Heritage Assessment Baseline)
• An assessment of the effects of the Shell projects on cultural heritage (the Project-Specific Cultural Heritage Assessment), which is presented as an attachment to the CHA Baseline

31. Much of the data used for the environmental impact assessment of the FMSA was provided by Shell through its contractor, Golder.

32. The FMSA found 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. These effects will increase as a result of the Project and the Planned Development Case (2012) described in Shell’s application.

33. The Cultural Heritage Baseline Assessment and terrestrial effects assessment of the FMSA utilized a Forty Township Study Area (FTSA). The FTSA (379,641 ha) is bounded by the following: Townships 93 to 100, Ranges 8 to 12, W4M). The FTSA is considered a regional-scale study area in the FMSA. It includes the community and the Project and the priority traditional use area reasonably accessible by the community. It is important for Fort McKay to have a study area that is focused in on the Community and the areas adjacent to it since the impacts that occur in the vicinity of the Community are experienced directly by Community members on a regular basis. Development and disturbances immediately surrounding the Community affect the quality and abundance of readily accessible traditional resources and the opportunities to access and use those resources. The FTSA was also chosen because vegetation information at a level of detail necessary to assessment impacts on Fort McKay’s key traditional resources.

34. The Cultural Heritage Assessment found that the level of development (as of 2007) has already created significant adverse effects on the following:

a) **Hunting, trapping, fishing and gathering areas.** Disturbance from oil sands development has occurred disproportionately in the intensely and moderately used areas of Fort McKay’s traditional territory. Impacts on lands close to the community and within the culturally significant land use areas, is more severe.

b) **Trapping areas.** Existing and approved developments have or will directly disturb 113,000 ha within Fort McKay member’s registered trap lines; primarily affecting trapping areas closest to the community. With consideration of tenured oil sands leases, which are likely to be developed in the future, up to eighty percent of Fort McKay trap lines are vulnerable to development. In addition to direct disturbance, a further unmeasured
amount of trap lines will be unusable due to noise, dust, odours, traffic, habitat fragmentation and wildlife population loss. This effect is considered significant and adverse.

c) **Wetlands.** Muskeg is integral to Fort McKay’s culture and supports many valued traditional resources such as traditional plants and wildlife habitat. There has been a twenty-six percent reduction in wetlands between pre-development and 2007. Most of the loss occurred in the ten year period prior to 2007.

d) **Biodiversity.** Biodiversity is critical to Fort McKay because it reflects the integrity of the landscape and ecosystems that support traditional activities. Lands ranked with high biodiversity potential have decreased in the FTSA by twenty-six percent between 1960 and 2007, creating a significant adverse impact.

e) **Traditional Land Use.** Of 114 traditional use berry sites, 53 (forty-six percent) had been lost as of 2007. This is a permanent loss because these sites cannot be replaced by reclamation.

f) Approximately 320 kilometers of Fort McKay’s traditional trails have been directly disturbed by development, a twenty-four percent direct loss. However the actual loss has been much greater as the loss of large sections of a trail usually render the rest of the trail unusable and prevents access to many areas beyond the community, rendering large areas of the traditional territory unusable.

g) A substantial amount of moose habitat has been directly disturbed and population levels have declined. Twenty percent of the high and moderate quality moose habitat in Fort McKay’s intense-use culturally significant ecosystem for moose harvesting has been lost.

h) Loss of lynx, beaver, fisher and marten habitat is significantly adverse due to habitat loss greater than twenty percent. Population declines have been observed by community members.

i) **Reclamation.** Lack of progress on reclamation, coupled with the high level of uncertainty of whether the land will be restored and the inability to reclaim muskeg is a significant adverse effect. Of the 133,000 ha of disturbed lands, only a few hundred hectares have received reclamation certification. Current regulation does not require restoration of traditional land use to obtain reclamation certification.
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.

C. Land Disturbance

35. The FMSA indicated that the principal stressor adversely affecting biodiversity is land disturbance. The amount and location of land mined or otherwise taken up and disturbed directly reduces the amount of lands to which Fort McKay has access and which can support traditional land use opportunities. It also directly removes the wildlife and fish habitat, and trees and plants required to support Fort McKay’s rights and culture. It also has indirect effects such a blocking access, displacing traditional land use activities to remote and less desirable locations. Indirect effects on wildlife include population reduction from habitat fragmentation, noise and increased harvesting by recreational hunters and fishers.

36. Appended to this submission as Appendix C is a report by Marie Lagimodiere updating the land disturbance calculations using more recent disturbance data and applying buffers to account for the influence of the various landscape disturbances on two key species of wildlife (moose, fisher). The amount of land disturbance from existing, approved and planned disturbance in Fort McKay’s traditional territory is 1,219,738 ha and 253,594 ha of the 379,641 ha in the Forty Township Area (67%).

37. Appendix C includes the following figures:

- Figure 2-1: Map of Fort McKay’s Traditional Territory: Existing Disturbance
- Figure 2-2: Map of Fort McKay’s Traditional Territory: Existing Disturbance with Buffer Distances
- Figure 2-3: Map of Fort McKay’s Traditional Territory: Existing, Approved and Planned Disturbance
- Figure 2-4: Map of Fort McKay’s Traditional Territory: Existing, Approved and Planned Disturbance with Buffers
D. Terrestrial Impacts

38. Fort McKay has increasingly found that environmental assessments prepared for project approvals do not reflect the changes the Community see and experiences. In 2011, it commissioned its own cumulative effects study: the Fort McKay Terrestrial Thresholds study. The purpose of the project is to determine if mitigation measures could moderate the negative effects of oil sands development, and if so, what measures would provide mitigation and to what degree. Attached as **Appendix D** is the report of Integral Ecology which provides an overview of the results of Fort McKay’s Terrestrial Thresholds study.

39. The findings of this study confirm Fort McKay’s traditional territory has already experienced significant transformation by the bitumen development sector, and indicates that current performances of ecological indicators are at levels below the “Range of Natural Variability” (levels supported in the pre-development landscape, on which Fort McKay’s Treaty rights are based).

40. In all scenarios, performance of key ecological indicators will decline. The study results underscore the importance of developing and implementing an access management strategy for the region, as the combination of increased road networks and regional human populations will substantially impact key wildlife species important to Fort McKay. As previously demonstrated by the Terrestrial Effects Management Framework developed by CEMA, expanded protected areas and access management are key management levers that can significantly improve the performance of environmental indicators in the region. Strict adoption of best management practices can also serve as an effective management tool to mitigate risks of industrial development to the environment, but these tools are currently not in place. These management practices and protected areas will help mitigate the risk to environmental indicators, but will prevent the profound effects of oil sands development to the lives and rights of the members of Fort McKay.

E. Wildlife

41. Wildlife, including moose, fisher, lynx and beaver are traditionally and currently critical species for the exercise of treaty rights. A large amount of habitat for wildlife has been removed from Fort McKay’s traditional territory. Existing data indicates Moose populations are declining. Some surveys have been done on Moose, as result of fund raising by Fort McKay, but these are still not being...
done regularly or throughout the region. No population surveys have been done for other key traditional use species. The habitat modeling and population viability analysis used in EIAs do not have the necessary reliability to enable understanding of potential impacts. It is highly likely wildlife populations will decline faster than predicted.

42. ALCES modeling conducted for the government of Alberta for the development of the Lower Athabasca Regional Plan and for Fort McKay indicates that at the current rate of oil sands development, severe declines in wildlife populations will occur, in some cases 60% below the natural range of variation within 20 years (such as moose, fisher). CEMA recommended in 2008 that populations be kept within 10-20% of the natural range of variation to prevent extirpation. Attached as Appendix E is the report of Lorne Gould providing further information.

F. Air and Odours

43. Ambient air quality trends reveal that pollution levels in the region are rising. Fort McKay is keenly interested in keeping the air as clean as possible on its lands and at minimum wishes to ensure the health of its members is protected by ambient air quality that is consistent with health protection. Clean air is also a basic human right. To this end, Fort McKay has established its own air quality standards “air quality permissible levels.”

44. Odours are a significant concern and impact to Fort McKay. Fort McKay is surrounded by complex odour sources. 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.”

45. Environmental assessments are under-predicting impacts. Standards are lacking for assessing odours. There are no policies or regulations with respect to odours in Alberta.

46. Detailed and ongoing emission characterization is required to determine the source of odours from the oil sands extraction and processing. In the absence of government initiatives, Fort McKay initiated a program of canister sampling during odour events to investigate the sources of the odours that are affecting

<http://www.rsc.ca/documents/expert/RSC%20report%20complete%20secured%209Mb.pdf>
the community. Environment Canada is planning, in collaboration with Fort McKay, to install a temporary monitoring station at Fort McKay for the purpose of odour characterization.

47. Attached as Appendix F is the report of Lori Adamache and David Spink explaining Fort McKay’s health based standards for air quality and Fort McKay’s concerns and recommendations regarding the current process for assessing and managing air quality and odours in the region.

G. Surface Water

48. The Project, along with several approved projects, will cause significant adverse effects to the Muskeg River basin, including several diversions and mining through the main stem of the river. Despite recommendations of previous Joint Review Panels, Alberta has not completed a comprehensive or adequate management plan for the Muskeg River. It has published an interim framework that sets out some arbitrary water quantity and quality parameters.

49. Alberta and Canada, despite recommendations of previous Joint Review Panels, have not established a minimum flow (ecological base flow) for the Athabasca River. The Project will increase water withdrawals. The River is therefore at significant risk.

50. Attached as Appendix G is the report of Ron Bothe, addressing these points. His report complements the surface water section of the Technical Review and Fort McKay Specific Assessment.

H. Lack of Justification and Accommodation

51. To date, Fort McKay has not been consulted by Alberta and Canada on the cumulative impact of oil sands development or the wholesale taking up of lands within its traditional territory. As a result, Fort McKay’s opportunities to exercise its treaty and aboriginal rights continue to be increasingly restricted and lost.

52. Although each project adds to the cumulative loss of traditional land use opportunities and adversely affect the community of Fort McKay and its rights, neither Canada or Alberta have a process for consulting on the overall impacts of intensive oil sands development. Neither government will consider or address options for accommodating the significant loss of Fort McKay’s traditional lands and resources necessary to support traditional land use opportunities.
53. Alberta and Canada continue to take the position that impacts to treaty and aboriginal rights can be addressed on a project by project approach in relation to specific impacts to rights. Canada’s policy is to require Fort McKay to participate in the Joint Review Panel so that Canada review Fort McKay’s submissions. Alberta delegates consultation to project proponents who do not have the power or authority to accommodate aboriginal and treaty rights nor do they have the constitutional obligation to do so.

54. Because each project, considered in isolation, removes a relatively small portion of Fort McKay’s traditional territory, the Crown does not consider whether some protection and accommodation is required or assumes none is required. As a result of the large number of projects that have been approved, the result of the Crown’s approach is that impacts have dramatically increased, and Fort McKay’s rights have been eroded to the point of infringement. The experience of the community, and the scientific assessments it has commissioned, confirm these impacts. The impacts projected through the modeling work commissioned by the government of Alberta and Fort McKay from ALCES, and the wildlife surveys that Fort McKay has sponsored, as well as other data, indicate that as a result of the planned bitumen production, the land and resources within Fort McKay’s traditional territory will likely not support traditional land use activity.

55. The Lower Athabasca Regional Plan will not change this situation. It is a plan to maximize oil sands production. The protected areas under the plan are, for the most part, not located within Fort McKay’s traditional territory and there is no evidence that they are sufficient to support wildlife populations and other terrestrial resources in the region. The protected areas were not selected based on an assessment of their impact on the projected decline of environmental indicators. Neither the protected areas, nor any existing management frameworks will prevent the mining or other development of 80% of Fort McKay’s traditional territory, as is currently projected and optimized by government policy.

56. Prior to further oil sands development, accommodation in the form of environmental, land management and economic benefits are essential because the mining and processing of bitumen is destroying large tracts of land and transforming the landscape, way of life, culture and environment of Fort McKay, infringing its rights. And it is essential because the cumulative effects of this large scale industrial development on Fort McKay cannot be mitigated by incremental change to individual mine operations.

57. Why should the Panel be concerned about the impacts to treaty and aboriginal rights? Because they are constitutional rights. In exercising its decision making
functions under the Oil Sands Conservation Act and Energy Resources Conservation Act, the Panel must exercise its discretion within the dictates of Constitution of Canada, including s. 35 which affirms the constitutional rights of Fort McKay. The legislature of this province is bound by the Constitution and its delegation of powers to statutory tribunals is always presumed to be limited to delegation to act within constitutional principles: Quebec v. Canadian National Energy Board 1994 CanLII 113 (SCC); 112 DLR (4th) 129. Any exercise of statutory discretion is subject to constitutional values: R. v. Conway 2010 SCC 22, [2010] 1 S.C.R. 765 at para. 5. In short, legislation does not authorize a decision maker to make a decision that is unconstitutional.

58. Section 35(1) of the Constitution was intended to provide constitutional protection for aboriginal and treaty rights: R. v. Badger [1996] 1 SCR 771. It lays down “the constitutional minimums that governments must meet in their relations with aboriginal peoples:” R. v. Côté, [1996] 3 SCR 139. One of the purposes of s. 35(1) is to protect aboriginal peoples against provincial legislative power: R. v. Sparrow [1990] 1 SCR 1075.

V. THE NATURE AND SCOPE OF PARTICIPATION

59. Fort McKay intends to participate in this hearing by:

a) examining the witness panels of Shell, and the Government of Canada and it reserves its right to ask questions of other witnesses as necessary;

b) presenting expert and community experts to provide testimony on:
   i. Land disturbance impacts
   ii. Vegetation and biodiversity impacts
   iii. Air Quality impacts
   iv. Odour impacts
   v. Noise impacts
   vi. Human Health impacts
   vii. Surface water and fisheries impacts
   viii. Ground water impacts
   ix. Wildlife impacts
   x. Reclamation
   xi. Socio-Economic impacts
   xii. Traditional land use and cultural impacts
   xiii. Treaty rights

c) making final argument.
VI. APPENDICES

Document

A. Dr. Pat McCormack; *Treaty 8 and the Fort McKay First Nation* (September 2012)


C. M. Lagimodiere; Disturbance and Access: *Implications for Traditional Use, Land Disturbance Update to the Fort McKay Specific Assessment* (September 2012)

D. Integral Ecology Group and ALCES Group; *Fort McKay Terrestrial Thresholds Project, Summary Report* (October 2012)

E. Lorne Gould; Models and Data: *What are they saying about cumulative effects on wildlife species important to the community of Fort McKay* (September 2012)

F. Lori Adamache and David Spink; *Cumulative Effects: Concerns of Fort McKay regarding the Impacts of Emission to Air from Industrial Development* (September 2012)

G. Ron Bothe; *Risk of Continued Oil Sands Development to the Athabasca River and Muskeg River* (July 2012)

All of which is respectfully submitted this 1st day of October 2012.

Klimek Buss Bishop Law Group

Per: KARIN BUSS