

BACKGROUND

Court ruling demonstrates oil sands review process broken

ERCB not required to review Shell's failure to follow through on pollution limits

QUESTIONS AND ANSWERS

1. In light of Shell's decision to break these commitments, what have the Pembina Institute and Toxics Watch Society of Alberta done?

The Oil Sands Environmental Coalition (OSEC, of which the Pembina Institute and Toxics Watch are members) went to significant lengths to resolve this matter bilaterally with Shell through written correspondence and face-to-face meetings between November 2007 and January 2009. Despite OSEC's efforts, Shell has made it clear that it does not intend to fulfill the commitments.

In the decision reports for both the Jackpine Mine and the Muskeg River Mine Expansion, the respective joint review panels clearly stated that they expect Shell to adhere to all commitments made during the consultation process, in the application and at the public hearing. In addition, the joint review panels noted that Shell should advise the Alberta Energy and Utilities Board (now the Energy Resources Conservation Board, ERCB) if, for whatever reason, it could not fulfill a commitment. In the event that Shell failed to fulfill a commitment, the Joint Review Panels indicated that the affected parties have the right to request a review of the original approval.

The Joint Panel believes that when a company makes commitments of this nature, it has satisfied itself that these activities will benefit the Project, the stakeholders, and the public, and the Joint Panel takes these commitments into account when arriving at its decision.

— EUB Decision 2006-128, p. 90

The Pembina Institute and Toxics Watch exercised this right, with counsel from Ecojustice, and requested that the ERCB and the Government of Canada reconvene joint panel public hearings to re-evaluate the approvals they granted Shell for these projects. Both the ERCB and Government of Canada denied this request.

As a result, on behalf of the Pembina Institute and Toxics Watch, Ecojustice sought leave to appeal the ERCB's decision not to reconvene public hearings in the Alberta Court of Appeal. On August 27, 2009, this leave to appeal was denied.

There is no further, formal recourse that the Pembina Institute and Toxics Watch can pursue.

2. What were Shell's climate change commitments to OSEC for the Jackpine Mine and Muskeg River Mine Expansion?

OSEC and Shell reached bilateral agreements in 2003 and 2006 that included commitments to reduce greenhouse gas (GHG) pollution from the Jackpine Mine and Muskeg River Mine Expansion oil sands projects, respectively. Shell now refers to these projects collectively as "Expansion 1."

For the Jackpine Mine project, Shell committed that, at a minimum, it would reduce emissions to better than the most likely commercial alternative (to producing oil from oil sands) on a full cycle basis. A

process for establishing the specific target is set out in the agreement, with an expected completion date of the second quarter of 2006.

For the Muskeg River Mine Expansion, Shell similarly committed to setting an emission reduction target or goal for new facilities (on a full cycle basis) that is better than the most likely commercial supply alternative at start-up, with a GHG commitment and management plan to be established by 2007.

In written correspondence and face-to-face meetings, Shell has indicated that it does not intend to quantify a reduction target; rather it intends to comply with future federal GHG regulatory requirements as outlined in the *Turning the Corner* climate change plan. Shell believes that compliance with these regulations will result in sufficient GHG reductions to meet the “spirit” of the commitments to OSEC.

However, not only do these regulations not yet exist, but also their future is uncertain because the Government of Canada is reviewing its approach in light of developments on climate change and GHG regulations in the United States. Furthermore, based on our analysis, even if Shell were to comply with the reduction requirements envisioned in *Turning the Corner*, the GHG intensity of these projects would remain higher than the “most likely commercial alternative” and therefore Shell would fail to fulfill its commitments to OSEC.

3. How environmentally significant were these climate change commitments?

By reducing greenhouse gas emissions associated with Expansion 1 to a level consistent with the most likely commercial alternative, as per the commitments, OSEC estimates that Shell would avoid emitting approximately 900,000 tonnes of CO₂ each year. This is equivalent to the annual greenhouse gas pollution from 200,000 cars.

4. Why did OSEC negotiate with Shell on commitments for improved environmental performance?

OSEC takes an active and cooperative approach to minimizing and mitigating project-specific environmental impacts by engaging in negotiations with the proponents of oil sands projects. These negotiations, which are intended to improve environmental performance, occur after a proponent has filed its application and environmental impact assessment, but prior to ERCB or joint review panel public hearings.

When successful, these negotiations lead to bilateral agreements that include specific commitments for improved environmental performance. These written agreements are submitted as evidence at public hearings to inform the ERCB and/or joint review panel’s public interest decision.

For those issues that are not successfully addressed through a bilateral agreement, OSEC presents evidence at ERCB or joint review panel hearings and makes recommendations for approval conditions or recommends that the project be denied approval.

Government decision-makers have advocated for this approach in order to minimize the scope, duration and conflict of public hearings. It is also commonly used by First Nations and Métis stakeholders in the oil sands region.