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April 7, 2009

VIA EMAIL

The Honourable Jim Prentice
Minster of the Environment
Les Terrasses de la Chaudiere
10 Wellington Street, 28th Floor
Gatineau, Quebec K1A 0H3

VIA EMAIL

Energy Resources Conservation Board
640 – 5th Avenue SW
Calgary, AB T2P 3G4

Attn: Patricia M. Johnston, Q.C.
General Counsel

VIA EMAIL

Canadian Environmental Assessment Agency
Edmonton Office
10237 – 104 Street NW, Suite 100
Edmonton, AB T5J 1B1

Attn: Shauna Sigurdson, Director

Dear Sir and Madam:

**Re: Joint Panel Report and EUB Decision 2004-009; Shell Canada Limited:
Applications for an Oil Sands Mine, Bitumen Extraction Plant, Cogeneration
Plant and Water Pipeline in the Fort McMurray Area, February 5, 2004**

**Joint Panel Report and EUB Decision 2006-128; Albian Sands Energy Inc.:
Application to Expand the Oil Sands Mining and Processing Plant Facilities
at the Muskeg River Mine, December 17, 2006**

By this letter our clients, the Oil Sands Environmental Coalition (“OSEC”), apply for the Joint Panels who have heard the above named applications to be reconvened and reconsider their recommendations and apply for a review and a rehearing of EUB

Decisions 2004-009 and 2006-128 pursuant to section 39 of the *Energy Resources Conservation Act*.

In support of this application, enclosed is the unsworn Affidavit of Daniel Woynillowicz of the Pembina Institute. The Pembina Institute (“Pembina”) is a member group of OSEC. A sworn copy of the Affidavit will be forwarded shortly.

The basis for this application is a substantial change in circumstances which represents new evidence not available at the time of the Joint Panel Review hearings; specifically, Shell Canada has failed to fulfill its commitments and agreements with OSEC regarding greenhouse gas emissions (GHGs).

Applicable Legal Principles

The Energy Resources Conservation Board (“ERCB”) has established a two step process for applications for review and variance (R & V). Prior to reviewing its decision, the Board determines, as a preliminary matter the following question pursuant to subsection 48(6) of the Board’s Rules of Practice:

48(6) When determining the preliminary question, the Board shall grant an application for review,

- (a) with respect to a review of an order, decision or direction other than a review under section 40 of the [ERCA], if the Board determines that:

...

- (ii) in the case where the Applicant has alleged new facts, a change in circumstances or facts not previously placed in evidence, the Applicant has, in the Board’s opinion, raised a reasonable possibility that new facts, a change in circumstances or facts not previously placed in evidence, as the case may be, could lead the Board to materially vary or rescind the Board’s order, decision or direction.

The ERCB pursuant to section 39 of the *Energy Resources Conservation Act* has a wide and unrestricted power to “review, rescind, change, alter or vary an order or direction made by it or it may rehear an application before deciding it”.

In its Decision 2007-045 regarding West Energy Ltd., the Board determined that as an administrative body with a review and rehearing power, it has the authority to undertake an

initial determination of whether a review hearing is warranted and following such a hearing may take various steps, including varying its decision: “The power is by nature corrective and, in the case of section 39 of the ERCA, it is designed to address errors or new circumstances that come to light after an initial determination is made...the Board considers that the legislator intended that the word vary in section 39 of the ERCA include(s) the power to vary retroactively in appropriate cases in order to allow full reconsideration and correctness of an initial decision”.

With respect to the federal aspect of the Joint Panel, a Joint Review Panel is not given explicit powers of review and reconsideration under the *Canadian Environmental Assessment Act*, .S.C. 1992, c. 37 (“CEAA”). However the purpose and structure of a tribunal’s governing legislation may provide an implied power of rehearing; or it may be implied by the nature of the decision making powers in question; or necessitated where the decision was procured by reason of fraud or other circumstances which calls the integrity of the tribunal’s process into question: *Chandler v. Assoc. of Architects* [1989] 2 S.C.R. 848.

The powers conferred on a tribunal include those expressly granted by its governing legislation, and those powers reasonably necessary to the accomplishment of its mandate: *Ref. Re. National Energy Board Act* (1986) 29 D.L.R. (4th) 35, leave to appeal refused (1986) 23 Admin L.R. xxi (note)(S.C.C.); *CTV v. Canada* (1993) 99 D.L.R. (4th) 216 (F.C.A.), leave to appeal refused (1993) 107 D.L.R. (4th) viii (note) (S.C.C.). The purpose of its governing legislation is an important factor in delineating the implied powers of an agency. In the case of CEAA, it is clear from section 4, that the primary objective of the legislation is to ensure that projects do not cause significant adverse environmental affects and to promote sustainable development to maintain a healthy environment and a healthy economy and to ensure meaningful public participation in the environmental assessment process.

These purposes and the circumstances of this application strongly support an implied power to rehear. Firstly, the projects will have a greater adverse environmental effect because their greenhouse gases are, and will be, greater than the Joint Panel was advised. The panel did not have the opportunity to consider whether the unmitigated GHG emissions may have a significant adverse effect and did not have the benefit of evidence from OSEC on this point. Secondly, public participation in the process would not be meaningful (but rather meaningless) if project proponents are permitted to make agreements and commitments to public participants to gain their cooperation or reduce their opposition to a project and then renege on those commitments once the proponent attains its desired approvals. Thirdly, an administrative tribunal has such powers that are reasonably necessary for the accomplishment of its objects, which include powers necessary to ensure compliance with the principles of natural justice. This is evident in the final category of circumstances in which a tribunal has an implied authority to rehear in the *Chandler* decision cited above: where there has been fraud or some other circumstance

which threatens or questions the integrity of the process. The provision of incorrect or misleading evidence, we submit falls within this category. This is especially so when misleading information was used by a proponent to induce cooperation by an intervener and the misleading information was indeed relied upon as intended. In this case, reliance on the misleading information caused OSEC to forego providing evidence to the Joint Panel. The principles of natural justice require a rehearing, whether the misrepresentation was negligent or intentional, or inadvertent.

Where express or implied powers of review are present in public interest legislation, they must be construed liberally and not burdened with overly restrictive interpretations: *Bakery and Confectionary Workers International Union v. Salmi* 21 [1966] S.C.R. 282.

A tribunal is not, of course, restricted to considering facts as they existed at the time of the original decision but may consider facts or circumstances that have developed subsequently: *Re: Merrens v. Toronto* [1973] 2 O.R. 265; *Shanahan v. Russell*, 2000 Carswell Ont. 4876 (Ont. C.A.).

Facts

Jackpine Mine Application and Commitments

By letter dated September 18, 2003, OSEC and Mr. Seeley on behalf of Shell, wrote to the Alberta Energy and Utilities Board (“EUB”) providing the Board with a copy of an Agreement entitled “Issue Resolution Document” which set out the commitments made by Shell to OSEC in relation to mitigating the environmental impacts of the proposed Jackpine Mine. Pursuant to paragraph 10.2 of the Agreement, Shell committed to establishing a greenhouse gas emission reduction target for the Jackpine Mine that would, at minimum, 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. This document was tendered as exhibit #24 in the Joint Panel hearing for the Jackpine Mine.

As a result of its agreement with Shell, OSEC did not present evidence at the hearing regarding GHGs or the other adverse effects of the proposed mine.

Mr. Seeley, on behalf of Shell presented an opening statement to the Joint Panel at the Jackpine Mine Hearing. In his evidence to the Panel, Mr. Seeley stated:

“As well, Shell Canada has set voluntary targets for all of its business units including oil sands. Shell’s oil sands goal is to be less CO₂ intensive

than the most likely alternative, which is imported crude on a full cycle basis.

This has led to a voluntary reduction of fifty percent by 2010 for the Muskeg River Mine . . .

We are now working with our Stakeholders and the Shell Canada Climate Change Advisory Panel to assess voluntary targets for new oil sands expansion projects”

In relation to the environmental and socioeconomic mitigation agreements which Shell entered into prior to commencement of the hearing with stakeholders including OSEC, Mr. Camarta testified on behalf of Shell that:

“Delivering on our commitments is a critical business activity for the Athabasca Oil Sands Project”.

In the PowerPoint presentation made by Shell to the Panel, a copy of which was tendered as exhibit #20 at the hearing, Shell gave evidence that:

- “We are committed to taking action on climate change
- On Jackpine . . . setting a goal to be better than the most likely alternative”

Shell also tendered a document in evidence entitled “Commitment List” (exhibit #12). It included at page 5 Shell’s commitment to “establishing energy efficiency objectives annually to reduce CO₂ emissions”.

During the Joint Panel Review hearing, Mr. Seeley on behalf of Shell, confirmed under cross-examination the importance of the commitments made to OSEC to the improved environmental performance of the Jackpine Mine.

The Joint Panel Report and EUB Decision 2004-009 were released on February 5, 2004. With respect to the air emissions, including GHGs the Panel concluded that “there is unlikely to be any significant adverse environmental effects to air quality as a result of the Project, provided that the mitigation measures proposed are implemented” (p. 53 of the Joint Panel Report).

With respect to the commitments made by Shell to various stakeholders including OSEC, the Joint Panel Report states, “The Panel expects that Shell will adhere to all commitments it made during the consultation process, and the application, and at the hearing, to the extent that those commitments do not conflict with the terms of any approval or a licence affecting the Project or any law, regulation or similar requirement

Shell is bound to observe. The Panel expects Shell to advise the EUB if, for whatever reasons, it cannot fulfill a commitment". The EUB would then assess whether the circumstances regarding the failed commitment warrant a review of the original approval. The EUB also gave parties the right to "request a review of the original approval if commitments made by the applicant remain unfulfilled" (p. 97 of the Joint Panel Report).

Shell has failed to fulfill the commitments made to OSEC and the Joint Panel regarding the establishment of a greenhouse gas reduction target for the Jackpine Mine. GHG emissions have not been reduced nor does Shell have a plan to reduce them to the level of the most likely commercial alternative. To the knowledge of Pembina, Shell has not advised the EUB (now the ERCB) that it cannot fulfill this commitment.

Muskeg River Mine Expansion Application and Commitments

On August 25, 2006 OSEC filed with the Joint Panel its written hearing submission including an attached "Issue Resolution Document" in relation to the Muskeg River Mine ("MRM") Expansion Project owned by Shell and but operated by Albion.

The Issue Resolution Document for the MRM Expansion Project documents the commitments made by Shell and the agreements reached as a result of the consultation and negotiations between OSEC and Shell. In section 2.3 of this document, Shell 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" and "for the MRM Expansion 1 Project, we plan to set out a GHG commitment and management plan in 2007 which will achieve a meaningful reduction of GHGs below business as usual". Shell also committed to provide OSEC with an annual update on its GHG reduction activities.

As a result of the commitment regarding GHGs set out above, as well as other commitments made by Shell, OSEC did not oppose federal or provincial approval of the MRM expansion project, and did not call evidence at the hearing regarding greenhouse gases. Instead, it tendered the Resolution Document as an exhibit in the hearing and reserved its right to request a review hearing if Shell did not adhere to its commitments to OSEC.

The Joint Panel released its report and EUB Decision 2006-128 on the Muskeg River Mine Expansion on December 17, 2006.

With respect to the commitments made by Albion (Shell) to stakeholders, the Joint Panel held:

"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. The Joint Panel expects that Albion will adhere to all commitments its made during the consultation process, in the application, and at the hearing, to the extent that those commitments do not conflict with the terms of any approvals, or licence affecting the Project or any law, regulation or similar requirement that Albion is bound to observe. The Joint Panel expects Albion to advise the EUB if, for whatever reason, it cannot fulfill a commitment. The EUB would then assess whether the circumstances regarding the failed commitment warrant a review of the original approval. The EUB also notes that the affected parties also have the right to request a review of the original approval if commitments made by the applicant remain unfulfilled.” (p. 90 of the Joint Panel Report)

Shell has not fulfilled its commitments to OSEC with respect to GHG reductions for the Muskeg River Mine Expansion Project. To the knowledge of Pembina, neither Shell nor Albion has advised the EUB (ERCB) that these commitments cannot be fulfilled.

Shell has not reduced its GHG emissions from the MRM Expansion Project to better than the most likely commercial alternative on a full cycle basis, nor does it have a plan for doing so.

Communication Between OSEC and Shell

On July 10, 2007 Dr. Raynolds, Executive Director of Pembina, wrote to Mr. Loader, President of Shell, and advised that “we are eager to learn how these commitments will be fulfilled” in relation to the GHG commitments made by Shell for the Jackpine and MRM Expansion Projects.

By letter dated July 25, 2007, Mr. Loader sent a brief reply to Pembina advising that Shell would follow up in due course to the matters set out in the July 10, 2007 letter.

Eventually, by letter dated January 9, 2008, Mr. Collyer, President and Canada Country Chair, on behalf of Shell wrote to Dr. Raynolds advising that “Shell will not establish further voluntary targets” but remained committed to its original 1999 start-up target.

By letter dated February 11, 2008, Dr. Raynolds responded to Mr. Collyer’s letter requesting clarification as to whether or not Shell would fulfill its climate change mitigation commitments to OSEC and requested a reply by March 14, 2008.

Shell then requested, and Pembina granted, a two week extension for reply to Dr. Raynolds’ letter of February 11, 2008. Eventually, a meeting was arranged between Shell and OSEC for April 3, 2008. At the April 3, 2008 meeting, Shell’s representatives advised that its GHG commitments would take the form of actions with quantifiable

reductions rather than absolute targets. A further meeting was held on April 28, 2008 at which Shell's representatives agreed to clarify their revised commitment in writing.

By letter dated May 13, 2008, Pembina wrote to Shell on behalf of OSEC confirming its expectations of receiving written clarification from Shell.

In his letter dated July 31, 2008, Mr. Collyer advised Dr. Raynolds that Shell was fully aware of the Agreements that it had with OSEC regarding the Jackpine Mine and the Muskeg River Mine Expansion Projects and said that Shell remained committed to implementing a GHG management plan for the Expansion 1 Project "that results in meaningful CO₂ reduction that is aligned with the spirit of the Agreements that we have in place with OSEC".

By letter dated August 18, 2008, Dr. Raynolds, on behalf of OSEC wrote to Minister Baird and Chairman McFadyen advising that OSEC had been unsuccessful to date in obtaining compliance from Shell on its GHG commitments but that OSEC intended to meet with Shell on one further occasion.

On September 29, 2008, representatives of OSEC met with representatives of Shell. At this meeting Shell verbally affirmed its willingness to meet its GHG commitments to OSEC and agreed to provide OSEC with the required GHG management plan. OSEC once again requested a written summary of how Shell intended to meet its original commitments.

On October 15, 2008, Mr. Bojé, Vice-President of Shell, wrote to Dr. Raynolds advising "our goal is to meet the spirit of the Letter Agreements by demonstrating a level of GHG emissions for Expansion 1 that is better than the most likely commercial supply alternative (MLCA) on a Wells-to-Wheels (WTW) basis. We believe that the new Alberta and federal regulations require CO₂ reductions that are consistent with the spirit of the Letter Agreement and our commitments to set voluntary GHG reduction targets."

On November 20, 2008, Dr. Raynolds replied to Mr. Bojé requesting clarification and noting that "there is substantially less information presented in the [October 18] letter than was communicated during previous meetings". A list of specific questions was posed by Dr. Raynolds and a response was requested by December 31, 2008.

On January 28, 2009, Mr. Bojé of Shell wrote to Dr. Raynolds advising that Shell intended to comply with the federal GHG regulations, once such regulations are made.

Analysis

It is OSEC's opinion that even if the federal regulations contemplated by the government of Canada in the spring of 2008 were enacted, complying with these regulations would not be sufficient to meet the GHG reduction commitment made by Shell. GHG emissions from Expansion 1 would need to be reduced by 36% to reach a level better than the MLCA on a WTW basis. The attachment to Mr. Bojé's October 15 letter implies that the reduction would need to be 35.5%.

Mr. Bojé's January 28 letter contains the assertion that the federal regulations proposed in March 2008 would eventually require GHG emissions from both the Muskeg River Mine (including its Expansion) and the Jackpine Mine to be reduced by 33%. This is less than the 35.5-36% reduction that Shell's analysis shows would be needed to reach a level better than MLCA on a WTW basis.

Further, the federal government's description of its proposed regulations in "Turning the Corner: Regulatory Framework for Industrial Greenhouse Gas Emissions" states that an increase of 25% or more in the physical capacity of an existing facility would be considered "a major expansion" and the expanded portion would be treated as a new facility. The Muskeg River Mine Expansion would therefore be treated as a new facility. The Jackpine Mine would also be treated as a new facility because it would come into operation in 2004 or later. These new facilities would be subject to a "clean fuel standard" for GHG emissions based on the use of natural gas as fuel, with a 2% annual improvement applying starting in the fourth year of operation, according to "Turning the Corner".

Assuming that the Muskeg River Mine Expansion plus the Jackpine Mine (together comprising Expansion 1) would initially meet the "clean fuel standard," they would not be required to reduce emissions by 33% before the 23rd year of operation (because $0.67=0.98$ to the power of 20).

In addition, "Turning the Corner" states that "fixed process emissions" would be subject to no reduction requirement. According to the government's technical briefings on the framework, emissions from steam methane reforming in the oil sands would be considered "fixed process emissions" and would be exempt from the emissions reduction requirements.

Expansion 1 would therefore not be required to reduce emissions by 33% until later than the 23rd year of operation. However, the proposed federal regulated targets would apply only until the year 2020, because the government "intends to move from emission-intensity targets to fixed emission caps in the 2020-2025 period", according to "Turning the Corner".

Therefore, during the period to which the proposed federal regulations apply (2010-2020), Expansion 1 would be required to reduce emissions at most by an amount much less than 33%.

Further, it appears that the regulations proposed by the federal government in "Turning the Corner" may no longer be planned. According to "Turning the Corner", "the draft regulations are expected to be published in the Canada Gazette, Part I for public comment in fall 2008". No draft regulations have been published in the Canada Gazette. In the November 2008 Speech from the Throne it is stated "We will work with the provincial governments and our partners to develop and implement a North America-wide cap and trade system for greenhouse gases", but there is no mention of the GHG regulations that the government had announced in March 2008. This indicates that those regulations have now been abandoned in favour of a policy to be jointly developed with the U.S. government.

Further, Minister Prentice, in a speech given on January 20, 2009, stated: "the federal regulations for major industrial emitters of greenhouse gases that were first conceived in 2007 are scheduled to come into effect in January next, January of 2010." But he further stated, in regard to federal measures and regulations to address GHG emissions: "Now I cannot tell you today precisely how we will proceed. I can tell you that the matter is currently under review".

On February 23, 2009 Mr. Mark Warawa (Parliamentary Secretary to the Minister of the Environment, CPC), made the following statement in the House of Commons:

"In light of the current economic downturn and the opportunities offered by other developments in the United States, such as the recent election of the new President Barack Obama, ***we are reviewing our previous regulatory approach and determining what the best path forward is on climate change.*** We need to ensure that actions we take do not further harm struggling industries.

In addition, the re-engagement of the United States on climate change provides an opportunity to put in place a North American cap and trade system that will benefit all parties. We believe that a cooperative bilateral approach to the environment and to energy will spur economic recovery and renewal."

(Emphasis added.)

Therefore, it appears that the federal regulations relied upon by Shell may not be implemented as proposed and, even if implemented as proposed, would not require the

36% reduction in greenhouse which by Shell's own estimation would be required to meet the intent of the agreements with OSEC.

Directly and Adversely Affected

The following information was included in OSEC's written submission to the Joint Panels.

- 1) The Oil Sands Environmental Coalition (OSEC) is a coalition of Alberta public interest groups with a longstanding interest in the Athabasca Oil Sands area. OSEC was formed to facilitate more efficient participation in the regulatory approvals process for oil sands applications. Its members include:
 - a) the Fort McMurray Environmental Association consists of residents living in and around Fort McMurray who are concerned about the effects of oil sands development on human health, the ecosystem and the socio-economic quality of life in the municipality of Wood Buffalo.
 - b) the Pembina Institute is an Alberta-based non-profit environmental research and a policy analysis organization with members across Alberta, including some in the municipality of Wood Buffalo. One of Pembina's objectives is to minimize the environmental impacts associated with fossil fuel development in Alberta. The Institute has monitored the health and environmental implications of oil sands development since the mid 1980's and has been particularly active in the assessment and management of long term, chronic and cumulative impacts. The Institute has an interest in lands near Fort McKay, and in close proximity to the proposed projects. The interest consists of a license to occupy lands on the Muskeg and Athabasca Rivers for recreational purposes, such as camping and boating.
 - c) The Toxics Watch Society of Alberta is an Edmonton-based public interest organization with a special focus on the toxicity effects of air and water pollution on human health and the environment. Its goal is to promote and advocate for policies for improved air quality management, pollution prevention, and continuous improvement.
- 2) OSEC's primary objectives are:
 - a) monitoring the environmental implications of oil sands development, and

- b) minimizing the environmental impacts associated with oil sands development in the Athabasca Oil Sands region.
- 3) OSEC has been engaged in reviewing and assessing oil sands development since the mid 1980's and has been particularly active in the assessment and management of long-term chronic and cumulative impacts. OSEC has provided evidence and submissions to the Alberta Energy and Utilities Board and Joint Panels at several hearings, including the following:
- (a) The 1993 Syncrude expansion hearing (under the name Syncrude Environmental Assessment Coalition)
 - (b) The 1997 Syncrude Aurora Mine (Pembina Institute and Toxics Watch)
 - (c) The 1998 Shell Canada Muskeg River Mine Project
 - (d) The 1999 Suncor Millennium Project
 - (e) The 1999 Syncrude Canada Mildred Lake Upgrader Expansion
 - (f) The 1999 PanCanadian Christina Lake Project
 - (g) The 2000 Petro-Canada McKay River Project.
 - (h) The 2002 TrueNorth Fort Hills Project.
 - (i) The 2003 Joint Panel Review of the CNRL Horizon Project.
 - (j) The 2003 Joint Panel Review of the Shell Jackpine Mine Phase 1 Project.
 - (k) The 2006 Suncor Voyageur Expansion Project
 - (l) The 2006 Joint Panel Review of the Albian Sands Inc. Muskeg River Mine Expansion Project
 - (m) The 2006 Joint Panel Review of Imperial Oil Kearl Project

Until 2008, members of OSEC participated actively with other stakeholders through the formation and operations of the Cumulative Environmental Management Association ("CEMA") to develop environmental management systems intended to preserve and to protect the long-term ecological integrity of the Athabasca region from industrial development. OSEC members' specific involvement included:

- (a) Member of CEMA Board;
- (b) Officer at large – CEMA Management Committee
- (c) Co-chair of NO_x/SO₂ management working group (NSMWG);
- (d) Member of the Sustainable Ecosystems Working Group (SEWG);
- (e) Member of Surface Water Working Group (SWWG);
- (f) Member of the Muskeg River Watershed integrity (MRWI) subgroup.

In addition to CEMA, OSEC members assisted with the planning and management of environmental assessment and monitoring in the region through other regional multi-stakeholder groups.

- (a) Wood Buffalo Environmental Association
 - 3 representatives of OSEC are members, 1 is president
- (b) Terrestrial Environmental Effects Monitoring Group
 - representatives of OSEC are members
 - 1 representative participates on the Science Sub Committee
- (c) Human Exposure Monitoring Program
 - 1 representative of OSEC is a member
- (d) Resource Review Committee of the Municipality of Wood Buffalo
 - 1 representative of OSEC is a member
- (e) Regional Infrastructure Working Group (RIWG)
 - 1 representative of OSEC is a member of the Social Indicators Sub-committee

OSEC has a long-standing practice of working pro-actively with oil sands proponents, in order to resolve issues when possible.

At the Shell Jackpine hearings, OSEC tendered only one witness for the purpose of describing the agreement with Shell, requesting that the Board formally recognize the agreement, and to testify with respect to concerns outside of the terms of the agreement. At the MRM expansion hearings, OSEC did not tender a witness panel to provide evidence regarding the potential adverse effects of the project on OSEC members. In both cases, OSEC restricted its testimony as a result of having reached agreements with Shell. One of the benefits to Shell in entering these agreements was it obviated the need for OSEC to present witness panels and thereby shortened the hearing and reduced Shell's hearing costs. In addition, Shell did not take issue with

OSEC's standing nor its eligibility for costs. Therefore there was no need for OSEC to present extensive evidence on the issue of their status.

In OSEC's pre-hearing written submission regarding the Jackpine Mine, it advised the Board that it owned an interest in lands; specifically a licence to occupy lands on the Muskeg and Athabasca Rivers for recreational purposes including camping and boating. This land is located adjacent to the community of Fort McKay. This land was within the zone of impact of the air emissions from Shell's mining activities. In addition, members of the Fort McMurray Environmental Association reside in Fort McMurray, which would be heavily impacted by the social and economic effects of Shell's projects including the Jackpine Mine.

The ERCB has found OSEC members to be directly and adversely affected pursuant to s. 31 of the ERCA in the following applications: Petro-Canada McKay River, Shell Canada Muskeg River Mine, Syncrude Mildred Lake Upgrader Expansion and TrueNorth Energy Fort Hills Mine.

With respect to the Muskeg River Mine Expansion, OSEC tendered evidence in their pre-hearing written submission that:

Members of the Association reside in and near Fort McMurray, travel Highway 63 to access their homes and places of work. As such they are affected by impaired air quality from oil sands developments, such as the recent ammonia leak from the Mildred Lake Site and the naphtha odours released during a recent upset at the Suncor site. Shell's expansion project will increase the release of pollutants into the local air shed, increasing the risk of impaired air quality in Fort McMurray. The project will also increase the number of itinerant and permanent workers in the area, which will add to cumulative adverse effects created by the inability or essential provincial and municipal services and infrastructure to keep pace with the requirements of development in the region.

OSEC is also directly and adversely affected by Shell's failure to comply with its commitments and agreements. OSEC has expended time and resources negotiating the commitments and attempting to obtain Shell's compliance over an 18 month period. Shell's failure also has the potential to affect other stakeholders, other companies, as well as Shell in the future. If companies are permitted to make commitments and not comply with them, this will create a disincentive for stakeholders to work cooperatively, in good faith in an attempt to reach workable solutions to the mounting cumulative and project specific environmental harm caused by oil sands mining. Agreements and long term working relationships that are necessary for the creation of such agreements, are beneficial to proponents and to the ERCB and Joint Panels because they (a) reduce the

issues in dispute at the hearing; (b) shorten the length of hearings; and (c) improve the environmental performance of projects.

Reasons to Grant the Request for Review and Rehearing

Shell committed to:

1. A detailed process for establishing the target was set out in paragraph 10.2 of the Issue Resolution Document for the Jackpine Mine.
2. Setting a GHG reduction target for the Jackpine and Muskeg River Mine expansion projects to reduce GHG emissions to be less than the most likely commercial alternative which at the time was imported crude on a full cycle basis.
3. Developing a process to set such targets for the Jackpine Mine by the second quarter of 2006.
4. To establish annual objectives to reduce CO₂ emissions for the Jackpine Mine.
5. For the MRM expansion project, to set a target and GHG management plan in 2007.
6. To provide OSEC with an annual update on GHG reduction activities for the MRM expansion project (see section 2.3 of the 2006 Issue Resolution document).

Shell has not met any of the above commitments.

Shell advised the Board in its opening statement and elsewhere in its evidence at the Jackpine Mine hearing that it took its commitments seriously and intended to fulfill those commitments as they were critical to Shell's business success. Shell acknowledged that the environmental performance of this project was improved as a result of the commitments it made to OSEC.

The Joint Panel relied on this evidence. In both Joint Panel reports the Joint Panel stated that "it takes these commitments into account when arriving at its decision". As the Panel stated, "it follows that the Panel expects Shell to adhere to these commitments". To enforce this expectation, the Panel invited stakeholders to apply for a review and variance if these commitments were not fulfilled. Hence the current application.

OSEC negotiated in good faith with Shell in order to mitigate one of the significant adverse effects of Shell's projects: climate change. This was and continues to be a priority concern of OSEC. OSEC made decisions and altered its course of conduct in

reliance upon these agreements. For example, it did not tender a witness panel at the hearing, thus foregoing the opportunity to provide the Board with evidence upon which the Joint Panel could have been persuaded to impose conditions or make recommendations other than the ones that it did, had this evidence been called or the Joint Panel may have recommended the projects not be approved. Should the hearing be reconvened, OSEC will tender expert evidence upon which the Board can determine whether its decision regarding the significance of the adverse impacts of these projects was sound and whether the conditions imposed were sufficient. Until this evidence is heard, the Joint Panel cannot evaluate what impact this evidence would have had.

It follows from the summary of events provided in this submission, that the integrity of the Board's process (and the entire regulatory system for oil sands development), depends on companies to provide accurate and reliable evidence and follow through on their commitments regarding environmental performance. The current hearing, approval and regulatory process has functioned with greater efficacy because stakeholders, companies and regulators have been able to work together in good faith to resolve issues and improve environmental performance.

Joint Panel reviews are intended to be and were relied upon as transparent, fair processes in which stakeholders could have meaningful input. If companies are not held to account for their commitments the entire system is undermined, as are the purposes set out in the *Energy Resources Conservation Act* and the *Canadian Environmental Assessment Act*. Both of these are public interest legislation and provide mechanisms for public or affected parties' participation in a fair manner. Fairness cannot be achieved if companies like Shell are permitted to negligently, inadvertently or otherwise induce stakeholders to change their participation and make decisions in reliance upon commitments and processes which are not reliable or invalid.

The effectiveness of the environmental assessments, approvals and monitoring in controlling pollution and environmental degradation, and corporate behaviour in meeting commitments and expectations of environmental performance is increasingly subject to a national and international spotlight. With the evidence of the adverse environmental impacts of oil sands development mounting and public concern increasing, OSEC believes the Joint Panel and ERCB must ensure that its processes are, and are seen to be, consistent with fairness, integrity and enforceability.

Conclusion

OSEC respectfully requests that the Joint Panel review hearings be reconvened and for the ERCB to review and reconsider its decision to grant approvals in relation to the Jackpine and MRM expansion projects. OSEC wishes to tender expert and other evidence regarding the environmental effects of the GHGs from these mines. All parties to these Joint Panel reviews ought to have the opportunity to participate in this review and tender evidence in relation to the greenhouse gas emissions of these projects.

Yours truly,

A handwritten signature in cursive script, appearing to read "Karin E. Buiss".

for
KARIN E. BUSS
Counsel

cc. Shell Canada Ltd.
Attn: Shawn Denstedt, Oslers

cc. OSEC