

1 REVIEW OF THE LOWER ATHABASCA REGIONAL PLAN AND ITS ABILITY TO PROTECT CONSTITUTIONAL RIGHTS

1.1 Introduction

The Lower Athabasca Regional Plan (LARP), proclaimed in 2012, represents the Government of Alberta's ten-year plan for development in the Lower Athabasca Region. The Lower Athabasca region is home to the Athabasca Oil Sands, which houses approximately 1.8 trillion barrels of oil (LARP 2012). The LARP, enabled under the Alberta Land Stewardship Act (ALSA), aims to manage development of these and other resources by managing environmental impacts through a series of Management Frameworks and sub-regional plans. Thresholds within the Frameworks might have the force of law, and thus establish regionally enforceable ambient environmental thresholds. As such, they represent a significant regulatory tool to manage oil sands development.

The Fort McKay First Nation's Traditional Territory encompasses most of the northern Athabasca Oil Sands area portion of the LARP. As a signatory to Treaty 8, members of the Fort McKay First Nation (FMFN or 'Fort McKay') possess both Constitutional rights and rights pursuant to section 12 the National Resources Transfer Agreement (1930). Section 35 guarantees First Nations and Aboriginal peoples the rights to pursue their traditional activities.

The bulk of industrial development in the LARP region is within Fort McKay's Traditional Territory, and the community of Fort McKay is located almost in the center of the mineable zone. The intensity and scale of this development has resulted in a situation where the cumulative environmental effects are severely affecting community members' ability to pursue their traditional activities. Oil sands extraction, processing and transportation challenge community members' ability to travel on the land, has reduced air quality in Fort McKay, and has resulted in alarming reductions in moose, caribou, and fur-bearing mammal populations, on which the community rely to exercise their Constitutional rights. The community has seen changes to berry quantity and quality, increasingly frequent experiences with noise and dust, declining fresh water quality and quantity, and has lost accessible and culturally important areas. Even in areas that are not directly under the footprint of development, opportunities for traditional activities are significantly diminished, and the health and cultural and social wellbeing of the community is threatened.

While Alberta is increasingly aware of the need to manage cumulative effects, it has not created any management frameworks or policies that directly implement Alberta's duty to respect Constitutional rights and implement Treaty 8 rights or its obligation to ensure the supply of fish and game for First Nations' domestic use.

FMFN has submitted a number of requests, reviews, and letters regarding the LARP during its development, starting with a joint submission with Athabasca Tribal Council to Alberta Environment in 2007 on the Land Use Framework. FMFN continues to be engaged in development of management frameworks, and has requested a formal review of the plan itself. From its earliest submissions, FMFN outlined how the plan does not protect Constitutional rights. For example, in Fort McKay's Submission Regarding the Draft Lower Athabasca Integrated Regional Plan, 2011-2021 of June 2011, FMFN stated that the proposed plan did not protect and maintain opportunities for meaningful traditional land use and exercise of rights because:

- *All proposed conservation areas in the Plan are located at great distances (> 70 km) from Fort McKay with access impeded by current*

development sites, and therefore have little accessibility for traditional land use by Fort McKay Community members.

- *The draft LARP proposed conservation areas only overlap with Fort McKay's proposed conservation areas by 5% (see map in Appendix O, which overlays the LARP proposed protected areas with Fort McKay's proposed protected areas).*
- *The collective size of the conservation areas (22% target) proposed falls significantly short of Fort McKay's recommendation 40% protection within their Traditional Territory and the TEMFs recommended 20 to 40% protected area within the RMWB.*
- *Conservation areas proposed in the plan are not actually "protected reserves" from an ecological perspective; existing petroleum and natural gas tenure and recreational leases area allowed as are other uses such as motorized recreation and multi-use corridors.*
- *There is no analysis in the Plan that shows how these conservation areas will meet ecological objectives.*
- *More than 85% of the area that Fort McKay proposes to protect for traditional use is in the Green Area, which is designated for mixed-use and there is no limit or cap to industrial development for this area included in the Plan nor are there proposed management strategies.*
- *There is very limited discussion in the Plan regarding how traditional land-use activities will be managed and maintained.*

These comments apply equally to the approved version of LARP, which did not change materially from the draft for which the above comments were prepared.

Despite this, Alberta still assumes that the pursuit of Constitutional rights will naturally follow from the protection of the environment¹. Therefore, we submit this review and recommendations outlining FMFN's concerns surrounding LARP's ability to support Constitutional rights. In this first section, we will outline our concerns regarding the LARP in the broader regulatory context. This will be followed with reviews of the major Management Frameworks, with analyses of how or whether they protect Constitutional rights, and if not, how they can be expanded to do so more effectively.

FMFN's concerns regarding LARP involves five major issues:

1. Constitutional rights are not limited to hunting, fishing and trapping, but include access to lands to support culturally important activities, and the right to enjoy reserve lands.
2. The protection of Constitutional rights is not secured by general environmental management.
3. The LARP and its management frameworks do not protect the resources needed to exercise Constitutional rights or locations that are culturally relevant. Enabling development to occur up to the borders of reserves is further evidence that the LARP and its management frameworks

¹ June 6th, 2014 Correspondence from Scott Milligan, Executive Director, LUF Regional Planning Branch, to Alvaro Pinto, Director FMFN Sustainability Department. "Setting measurable regional targets and objectives that aim to protect water quality, air quality and biodiversity, where there were no such targets previously, helps support continued hunting, fishing and trapping for food, as does effective reclamation of disturbed land and the creation of conservation areas. While traditional activities might not be expressly mentioned in a particular portion of the LARP, that does not mean they cannot occur to the extent permitted by law, depending on the nature of the activity."

do not support opportunities to pursue Constitutional rights in reasonable proximity to Fort McKay.

4. The triggers and limits within the Management Frameworks are not intended to be criteria to be incorporated into the project approval process, but instead tools to manage environmental impacts after development has occurred. In practice they are being interpreted as planning tools.
5. The consultation process for development is limited to inviting submissions on policies and frameworks already designed by government staff, rather than meaningful consultation and intent to accommodate of Constitutional rights in land management decisions.
6. The existence of LARP is being used as surrogate for assessing, consulting and mitigating the impacts of development on Fort McKay's Constitutional rights or a project's contribution to cumulative effects. Its existence is used as a rationale for not considering the cumulative effects of new projects in project approvals or consulting on impacts to treaty rights.
7. There is no traditional land use framework or management strategies planned with the objective and tools necessary to preserve reasonable opportunities for the exercise of Fort McKay's Constitutional rights.

1.2 Definition of Constitutional Rights

In this document, Fort McKay's treaty and Constitutional rights and rights pursuant to the NRTA are collectively referred to as "Constitutional rights."

The LARP does not expressly discuss Constitutional rights except to state that consultation will occur in relation to treaty rights such as hunting, fishing and trapping, (Outcome 7), however, this is not an 'outcome' but a statement of an intention to have procedure. There are no outcomes, thresholds, objectives or strategies in LARP with respect to securing the supply of fish and game to support aboriginal sustenance nor land, access, or other matters essential to respecting and implementing Fort McKay's Constitutional rights. The terms of reference for LARP included the requirement that opportunities to exercise treaty rights would continue in reasonable proximity to First Nations' reserves but this has not been operationalized in the LARP.

1.3 Protecting Constitutional Rights Is Not Simply a Natural Outcome of Protecting the Environment

The role of the LARP in protecting Constitutional rights and its ability to protect aboriginal communities and culture is a critical issue. The absence of thresholds for traditional land allows a lack of consideration of the degree of impacts, as stated by the Shell Jackpine Mine Joint Review Panel: "the absence of a management framework and associated thresholds for TLU [traditional land use] makes it very difficult for Aboriginal groups, industry, and panels such as this one to evaluate the impact of individual projects on TLU. The Panel believes that to inform land use planning and allow better assessment of both project and cumulative effects on Aboriginal TLU, rights, and culture, a TLU management framework should be developed for the Lower Athabasca Region. The Panel recommends that Alberta develop and implement a TLU management framework for the Lower Athabasca region as a component of the LARP. The Panel recommends that the government of Alberta develop this framework with the involvement of all of the Aboriginal peoples who practice their rights in the oil sands region and who are affected by industrial development." (para 36, 2013 ABAER 011)

The cumulative environmental effects of development impact Fort McKay's members' abilities to pursue their Constitutional rights, and Alberta has divorced consultation and accommodation on these impacts on the theory that LARP manages cumulative impacts. Therefore, in our May 20, 2014 correspondence to Scott Milligan, Executive Director of the LUF Regional Planning Branch, we requested clarification on how the LARP would protect Constitutional rights. A reply from this office dated June 6, 2014 outlined a number of initiatives aimed at protecting Alberta's environment, including increasing protected areas and developing the management frameworks. This letter stated that: "setting measurable regional targets and objectives that aim to protect water quality, air quality and biodiversity, where there were no such targets previously, helps support continued hunting, fishing and trapping for food, as does effective reclamation of disturbed land and the creation of conservation areas...."

Thus Alberta fails to acknowledge its obligation to actively protect Constitutional rights and Fort McKay's ability to practice its rights within its traditional territory at locations that are meaningful and relevant. Alberta continues to approve projects that contribute to the escalation of cumulative impacts and asserts that protection of Constitutional rights is a natural outcome of the environmental protection provided by LARP and its associated frameworks. In fact, these management frameworks are too broad and general to offer meaningful protection, and are devoid of objectives and thresholds for terrestrial resources or traditional land use. And it is invalid to assume that protection of particular environmental values averaged over a large geographic area, results in the automatic protection of Constitutional rights. For example, the Air Quality Management Framework manages NO₂ and SO₂, over a large regional area, but does not manage the local air quality that affects Fort McKay, the episodic high pollution events, The framework does not manage many other air contaminants that cause health risks and do not manage compounds that cause odors. Odor-causing compounds impact Fort McKay's right to enjoyment of reserve lands, the ability to hunt on the land, and the contaminants that cause the odours, potentially impact the quality of country foods.

None of the management frameworks address access to culturally important areas, or supply of fish, game and plant resources in a reasonable proximity to Fort McKay's reserves or within culturally important areas. Conservation areas are assumed to provide locations for traditional land use, but these are relatively small, remote, and there has been no assessment as to whether these areas are useable, or contain the terrestrial and other resources necessary to enable Constitutional rights.

Finally, the assumption that reclamation will return the land to a natural state does not mean that the reclaimed lands will support traditional uses or will do so during a time period that will enable the survival of traditional environmental knowledge and cultural practices. For example, a number of tailings ponds were built on culturally important muskeg habitat. Their reclamation to boreal forest might regionally give the impression that the land has been returned to a natural state, but the muskeg will never be restored (because this is not possible based on the fact that companies have not figured out how to do it), and a mature old growth forest cannot be achieved for 80-120 years. Thus one cannot assume that protecting the environment through existing standards will automatically result in the protection of Constitutional rights; these are issues that must be dealt with explicitly.

1.4 Relationship to the Assessment and Approval of Projects

The LARP is intended to be a measurement-based tool, meaning that management actions are triggered only by environmental conditions reaching measured limits. Instead of being a proactive planning tool, the LARP reacts to changes to the receiving environment. While this is important, a more proactive planning framework would require a combination of predictive limits and modeling to estimate the impacts of different development scenarios. Most importantly, thresholds should be incorporated into the environmental assessment and approval process for projects.

Projects continue to be approved, even though there is evidence of significant adverse effects. In the Dover Project Decision 2013 ABAER 014, the AER relied on the *intention* to create wetlands policy and biodiversity framework to ameliorate or remedy the increased cumulative effects. No management framework or threshold exists within the LARP to address these significant adverse effects. Fort McKay has highlighted the inability to address cumulative effects by the LARP, or by any other section of the Integrated Resource Management System (IRMS), as a critical gap and high risk.

Environmental assessments are, according to the Environmental Protection and Enhancement Act, and EIA international standards, tools to identify potential impacts so that they can be avoided or otherwise managed. The purpose of environmental assessments of projects is denuded of usefulness when the thresholds in LARP are not required to be used to inform project assessments and approvals.

The approvals process would benefit from clearer guidelines on how to apply LARP and its thresholds and objectives in making decisions on projects. Predicted exceedances of LARP thresholds should be considered in the project assessment approval process. This would enable more robust and useful assessments and provide opportunities to avoid and manage impacts.

Bulletin 2014-28 of the Energy Resources Conservation Board states that applicants that seek approval for an activity ... that “is not permitted and is inconsistent” with the land uses established in the LARP, or activities that “may result in exceedance of a regional trigger or limit in the applicable Regional Plan” must submit a non-routine application.

Schedule F to LARP designates industrial development and hunting, fishing and trapping, “including by aboriginal peoples.” However the LARP does not resolve the fact these two land uses are incompatible. As there is no threshold for the amount of land or natural resources required for traditional land use activities by aboriginal persons, the project approval process treats all projects in these areas as “consistent” with LARP and therefore permitted and “routine”. The consequence is that development will continue to be authorized, despite the fact it displaces the other permitted use of the area: traditional hunting, fishing and trapping.

In practice, the fact that the thresholds in LARP are based on monitored results, has meant that projects are still approved, despite predicted exceedances, on the theory that when monitored levels approach a threshold, then corrective action can be taken (see for example, Shell Jackpine Mine Joint Review Panel Report, 2013 ABAER 011 at para 278.) This is so even when the potential corrective action or mitigation is not identified or assessed as to its viability.

FMFN has found that rather than protecting the environment and community members’ rights, the mere existence of LARP has instead resulted in a decreased onus for the Regulator and proponents to consider cumulative effects in their applications. As a recent example, in a Statement of Concern,

FMFN requested that “as a condition of approval that [Company] is required to develop and implement a Wildlife Mitigation Offset Plan for both key cultural species and species at risk that includes conservation offsets and comprehensive monitoring for effectiveness and that Fort McKay is consulted in the development and implementation of the plan.” In response, the company stated that “[The Company] believes that regional wildlife mitigation and monitoring is addressed through the following existing and future provincial and federal policies:

- the Lower Athabasca Regional Plan (LARP), which identifies regional conservation areas and management thresholds for monitoring cumulative effects to key resource indicators, including wildlife species;
- the recently established provincial independent monitoring agency (AEMERA), which will oversee regional monitoring of impacts associated with regional land use; and
- a provincial environmental offset program to potentially be developed under the Alberta Land Stewardship Act.”

The existence of the LARP has reduced the FMFN’s ability to consult with industry and the Crown, and in fact, removes the impetus for reaching mitigation agreements with proponents – an important mechanism for protecting Constitutional rights.

Under the assumption that the LARP exists with the intention to manage cumulative effects, every project can be approved and no limits on the timing and pace of development are necessary. The very development that causes the cumulative effects that the LARP theoretically manages, continues unabated.

1.5 Geographic Scope of Planning Obscures Local Realities

While regional planning is of utmost importance, it is important to recognize that this is simply a first step to rational land use planning that can protect Constitutional rights. FMFN’s concerns relate to the impacts within the traditional territory, which is only part of the LARP area. However, the impacts of development are disproportionately located within this territory. Thus the intensity of local impacts might be obscured by the large geographic area. As a hypothetical example, should the LARP might determine that a 2% decrease in moose population across the entire LARP region is acceptable, if this decrease is localized to Fort McKay’s traditional territory, then it will have a large negative impact on the community’s ability to pursue their Constitutional rights.

The LARP proposes sub-regional assessments and plans to help address these issues. Consultation on the South Athabasca Regional Assessment was slated to begin in the fall of 2014, while no sub-regional plan for the North – arguably the area experiencing the most development and cumulative effects – has been contemplated. We recognize that this approach might allow Fort McKay to address some local issues. However, in many consultation sessions on the LARP and its individual frameworks, we have been assured that “the next process” will be the arena in which to deal with concerns. In the meantime, project approvals continue and Fort McKay remains no more able to protect its members’ Constitutional rights. Furthermore, no matter the provisions of the sub-regional plan, they will not supersede the various management frameworks that already do not protect Constitutional rights.

1.6 Lack of Meaningful Engagement

Fort McKay has been involved in the development of the Lower Athabasca Regional Plan since the inception of the ALSA in 2007. We have been waiting since the fall of 2012 to understand how Alberta intended to engage with FMFN on the individual management frameworks. It was not until the fall of 2013 that the development of the remaining management frameworks was initiated, yet they were slated for completion by the end of 2014. This was an extremely short schedule, and combined with the lack of a defined engagement process it was unlikely that Fort McKay's engagement could be meaningful. Thus far, engagement has consisted of an opportunity to comment on Framework parameters already chosen by Government of Alberta staff, and no opportunity to discuss larger issues surrounding Constitutional rights. While some of our technical feedback has been included in subsequent drafts of individual frameworks, there remains a lack of attention to an explicit consideration and inclusion of protection of Constitutional rights as an outcome of managing cumulative effects. While we can provide technical input on all Frameworks, we have not seen in the past, and have not seen any indication that there will be, incorporation of outcomes or thresholds for land and resource management to address preservation of opportunities for the exercise of Fort McKay's Constitutional rights.

1.7 Summary

The cumulative effects of development are having significant impacts on FMFN's community members' ability to pursue their Constitutional rights. There are limited ways for FMFN to consult on these impacts. The LARP is intended to manage the Cumulative effects of development. In the vacuum of rational ways to address impacts to Constitutional rights, it has fallen on LARP to take this role. However, protecting the environment does not in itself, protect Constitutional Rights and the limited measures in LARP are applied to a large geographic that does not mitigate the impacts on the local area affecting Fort McKay. . In the sections that follow, we will evaluate the ability of existing and planned management frameworks to address Constitutional rights. We request that Alberta will develop a process for engaging Fort McKay in the ongoing management of cumulative effects on its Traditional Territory including specific strategies to protect Fort McKay's use and enjoyment of its Reserve lands and reasonable opportunities to exercise its Treaty rights.