

Review of the Socio-economic and
Traditional Land Use Assessments for
the
Shell Canada Energy Applications for
Approval of the Jackpine Mine
Expansion and Pierre River Mine

Review Prepared By

Twin River Consulting

February 11, 2010

Dr. James Tanner

1. Consultation issues

It is important to point out at the beginning of this review that there are considerable differences surrounding what constitutes proper 'consultation.' The Applicant has included references to meetings and contacts in these lists and tables which do not constitute consultation with respect to this application. The Shell application provides a list of "consultation" activities. The supplemental Information contains approximately 50 pages comprised of tables in section 5.2 called **Stakeholder Consultation activities**. These tables include references to many e-mail and telephone calls made or received by Shell and the ACFN, ACFN IRC, ACFN membership and ACFN Elders. Clearly this detailed record of communications is intended to demonstrate that the Applicant consulted with the stakeholders of the region, however, many of these items do not constitute consultation. Appendix A references the kinds of items which ACFN would not consider consultation.

Furthermore, the Crown as represented by the Provincial Government of Alberta, has not yet provided a clear delegation of responsibilities for conducting consultation on Aboriginal and Treaty rights in this application process. While Shell appears to be following the requirements of the Terms of Reference (TOR) for the EIA, these ToR were not originally designed and have not been amended to include Aboriginal and Treaty Rights consultation nor have they been expanded to include the required information which would allow an adequate consultation to take place in a separate or parallel process.

As a result of this lack of clarity, opportunities for gathering data and opportunities for understanding the Aboriginal traditional land use and socio-economic effects of the project on Aboriginal and Treaty Rights are missed or omitted. The established methodology for performing EIAs and SEIAs focuses specifically on environmental effects based on standards such as biodiversity and ecosystem stability. The SEIA focuses on over-all economic costs and benefits of the project and the associated human health analysis focuses on acceptable levels of emissions.

In contrast to these methods, the purpose of Aboriginal and Treaty Rights consultation is to:

- 1) First gather information on the extent and nature of the rights and
- 2) Then to assess the impacts of the project or project on those rights.

This process takes into consideration social and environmental effects that have an impact on rights. These environmental impacts cannot be measured until the rights are well understood. Further, the rights likely overlap and or conflict with other rights bearing communities including other First Nations and Métis groups. The environmental effects must be measured so that the additive impacts on all groups are assessed.

Crown consultation includes the processes of mitigation, accommodation and compensation. The mitigation and accommodation of any effect cannot be effective unless the effects on each

First Nation are considered together. For example, if there were sufficient moose left to hunt for one first Nation it may not be sufficient for 3 First Nations and three Métis groups plus recreational hunters. Studies that focus on biodiversity or habitat do not specifically assess the impacts upon the First Nation's meaningful right to hunt nor do they assess the impacts upon the culture, language, religion or occupational health. Meanwhile, because they are not properly specified, the EIA studies miss opportunities to collect the appropriate information required to assess rights.

In the following sections, in addition to discussing the materials which are provided by the Shell Applications, we have tried to discuss the appropriate standards and structure of studies which would succeed in providing the required information.

The ACFN began to ask for some of these standards when the IRC first reviewed the TOR for this project. A discussion of the requests that the ACFN IRC made at that time is provided in **Appendix B**. The ACFN has written several letters to the Province outlining what studies should be completed to allow appropriate assessment of the effect on the First Nation's rights. **Appendix C** to this report includes a description of the types of information which would be required to properly assess the impacts on the rights of the ACFN.

2. Context of the Review

The Jack Pine Mine Expansion and the Pierre River Mine Applications represent large increases in the volume of regional economic activity in the Wood Buffalo Municipality. A large percentage of the membership of the Athabasca Chipewyan First Nation lives and practices their culture and land use within the municipality or immediately adjacent. Therefore it is likely that these projects will have adverse direct, indirect, and cumulative impacts on the environment and socio-economic conditions of the ACFN People. **However, no direct assessment of the socio-economic effects on the Athabasca Chipewyan First Nation is included in the Applications.**

According to the Applications these two projects will increase the mined oil production by 300,000 barrels of oil per day which represents a major addition to the total mining activity in the region. These are only the most recent of a series of mining mega projects that have had or have the potential to have, adverse socio-economic effects on the Athabasca Chipewyan First Nation and other aboriginal communities in the area. **Despite numerous requests and demands, neither the Crown nor the proponents of these mega projects have addressed the significant socio-economic impacts already imposed upon the ACFN and other Aboriginal communities in the area.** This major application represents additional potential impacts on the First Nation. It has been established in Canadian courts that major impacts on Aboriginal lands must be assessed mitigated, minimized and compensated before any such projects receive regulatory approval.

In several other previous application processes the ACFN has asked for a full fledged impact assessment to be completed. However, instead of completing a proper and legal consultation and impact assessment process, representatives of the Crown have been attempting to negotiate an agreement wherein the First Nations would release the Crown from their current and previous obligations to consult in return for economic support opportunities for the First Nations.¹

Meanwhile, the Crown continues to consider, and grant approvals to, the Applications brought forward by Industry despite the fact that consultation on previous regional projects has not been properly or meaningfully undertaken. Since the Supreme Court of Canada has ruled that consultation processes should be completed before projects are approved, reviews of this nature must not only discuss the specific aspects of the current applications but should also bring the socio-economic and impact consultation process up to date.

The two proposed mines represent an important turning point in the regulatory process for the reasons set out below:

- (i) These projects represent some of the last proposed major open-pit mines in the area. If these last few major projects are approved without addressing the likely impacts on the ACFN and other First Nations, including in respect of their section 35 rights and what is needed for the meaningful exercise of those rights, it will remove the ability of the First Nations to demand proper mitigation, compensation and alternative mining prospects since changes to these projects should be made in the planning process. According to the consultation principles the projects should minimize the socio-economic effects and must plan to do so **before** the projects are approved. A proper assessment must be made to measure the full impacts. Therefore the EA must include the kind of information necessary to assess such impacts on the ACFN's section 35 rights.

The proposal forecasts that when the construction phase of these projects is finished the population of the region and associated incremental impacts will level off. This further emphasizes the urgency of assessing these impacts now. Since 1967 when oil sands production started in this region the impacts and effects of this activity have gradually pushed the First Nations people off these lands. The tipping point, when the lands no longer support the livelihood of the First Nation, must be determined before the true impacts can be assessed. Without such an assessment attempts at assessing the incremental effects of additional open pit mines is impossible.

¹ These negotiations were the Long Term Benefits Agreement (LTBA) or the Consultation and regional benefits agreement (CRBA) negotiations and extended over a multi-year time horizon.

These projects are severely changing the socio-economic base of the peoples yet the required consultation has not taken place. The issue is that there have been many major developments, renewals and new projects applied for and approved without proper assessment of the cumulative impacts on the aboriginal rights of the peoples in the region. Given the large scale of the environmental and socio-economic effects of these projects, it is obvious that projects have been approved by the Crown's representatives without the Crown fulfilling its consultation responsibilities with Aboriginal peoples. The fact that we are now nearing the end of a series of applications which have allowed industry to adversely affect major portions of the environment of northern Alberta and the traditional lands of these First Nations, should send a warning signal to both the Crown and the First Nations. The Crown should be concerned that the huge capital investments would be subject to the implications of their consultation failure(s) and the First Nations should be concerned that they will have no further opportunities to enforce their rights in a meaningful way in areas "taken up" by these projects and will be left with the prospect of only claiming liquidated damages for socio-economic impacts.

The Jack Pine Mine Expansion currently does not include mining the Fort McKay First Nation reserve acreage. However, a proposal for the development of this reserve as a mine was included in early applications. In all previous major mining applications in this area, the Fort McKay First Nation was the First Nation upon which the companies focused their analysis of traditional land use, socio-economic and environmental effects. Impacts on other First Nations and Métis groups have been ignored or marginalized in favor of obtaining studies on and agreements with Fort McKay First Nation.² The emphasis on Fort McKay was based upon the proximity of the location of their reserve lands rather than comprehensive studies of impact on all of the aboriginal land use in the area or socio-economic effects based on First Nation population. The proximity of reserve lands is not an adequate indicator of impact. The history of the Dené Peoples shows they used one of the largest areas of any hunter gatherers in the world.³ Furthermore, the assessment of effects on only one First Nation does not assess the total use of an area and distorts any clear understanding of the potential impacts or rights infringements on the other aboriginal peoples of the area. Also, lack of proper consultation is creating conflicts within First Nations and between First Nations. Without proper consultation there is a division between those who will directly benefit from development and those who will only suffer destruction of their lands. The honour of the Crown is at stake when the lack of consultation threatens the governance stability and well being of the First Nations.

² Although other First Nations have been included in the regional agreements and some peripheral work has been completed, the focus and assessment has been based upon the Fort McKay First Nation assuming that the impacts or infringement of other land users would be covered by assessing the impacts on local Fort McKay trappers.

³ Kelly, 1995.

- (ii) The proponent is applying for two projects at once. These two applications span both sides of the Athabasca River. One application is on the east side, the other on the west. A bridge that will create new access onto the west side of the River is proposed. There are likely different environmental and socio-economic effects for each project. It is likely that each of the two projects affects different land users and different communities in differing amounts. There is also a concern on the part of ACFN that Shell may be engaged in project-splitting so as to limit the requirement to assess cumulative impacts of the projects separately. There needs to be consultation with the ACFN and other potentially affected First Nations on this important issue.
- (iii) Applying for two projects at once raises issues about the rate of development and the size of the impact. It not only raises cumulative effects issues between the two projects but raises the specter of the unregulated rate of economic development which has caused significant pressures on infrastructure, employment issues, social disruption and cultural upheaval. All this activity is being proposed in cumulative addition to the plants already operating which are on-going and have not yet assessed their existing effects on the socio-economics of all these Aboriginal communities.

The review will discuss the information in the Applications in the context of the issues discussed above and it will also discuss gaps in that information.

3. Structure of this Review

(a) Not Limited to Terms of Reference

This is a review of the proposal for approval of two projects located within the traditional lands of the Athabasca Chipewyan First Nation. The proposal contains summaries and general descriptions of the projects as well as specific sections on the environment and the socio-economic conditions of the area. The objective here is to review the materials presented and to identify errors or omissions which should be corrected or added. Through the use of a TOR, the regulatory process does not require the Applicant to conduct studies required to fulfill the Crown consultation processes or conduct the consultation processes. However, these applications are for approval of projects that affect Aboriginal rights and must therefore consider if the proper consultation processes have occurred and what materials or information should be available for an adequate consultation process to take place. **This review will discuss the lack of information supplied to accomplish these requirements. It is noteworthy in this respect that AENV rejected information requirements, in ACFN's suggested revisions to the TOR. Excluding such references does not make the need for such information go away in order to ensure that the EA is comprehensive and credible.**

(b) No Separate Process

It has been an unfulfilled policy of the Alberta Government to establish a separate consultation process to deal specifically with consultation on Aboriginal Rights. There does not appear to be a separate Crown consultation process for these Applications. Moreover, if Alberta does intend to engage in such consultations, there is currently no mechanism or process in place to integrate the results of any such consultation into the regulatory process. Therefore, if the regulatory process is somehow not consistent with the legally required consultation process, it is important that these issues and omissions be identified at this time in this process so that the required proper consultation can take place. **Given the current state of this Application a separate consultation process should be established, including setting out how any results from that process would be integrated into the regulatory review and decision-making process.**

(c) Rights versus Stakeholders

The Applications do not assess the socio-economic issues on the basis of rights but instead tend to address issues as if the First Nations were merely stakeholders with no constitutionally-protected rights other than commercial rights (such as the trappers). However, it is clear that the Aboriginal groups in the area have constitutionally-protected rights; such rights have different implications for the mitigation and planning process. The Supreme Court has stated that the First Nations in some cases have priority rights to use resources. Furthermore, they may have special concerns related to land use and reclamation policies which must be seriously considered and substantively addressed. **The Applicant appears to treat the Athabasca Chipewyan First Nation as a “stakeholder” rather than a rights holder who may have priority rights to resources.**

(d) Adequate Information for Rights Consultation and Accommodation

Generally, the socio-economic analysis in the Applications does not provide adequate information on Aboriginal practices, customs and traditions and socio-economic status to determine the effects of these projects on their socioeconomic situation and on their Section 35 Rights. This is a problem partially caused by the structure of the regulatory system and the lack of specific responsibilities for Crown consultation. However, because there does not appear to be an independent Crown consultation process associated with these applications this process is the only process where such information would be obtained.

This review focuses on the summary and socio-economic sections of the proposals. Although topics like wildlife abundance, water and air quality, water quantity and habitat have important effects on socio-economic conditions, these sections are

reviewed by others. However, this review does comment on the mechanisms by which various factors influence socio-economic impacts.

4. Results of the Traditional Land Use Review

(a) Traditional Land Use Impacts

A member of the ACFN was hired to do a TLU study but was not provided an adequate budget or technical capacity to undertake an appropriately detailed study of the potential effects of these two large projects on the traditional lands and livelihood of the ACFN. In addition the results of the study were reviewed by Shell representatives before the study was complete and some information was not included in the report as a result of this review. In order for such an important study to be useful and effective sufficient financial and technical resources must be provided and the study must be conducted in an independent manner. In the supplemental information provided by Shell, the Applicant states:

“In 2008, Shell received TLU and traditional environmental knowledge (TEK) studies from: - the Athabasca Chipewyan First Nation (ACFN). However, because the ACFN has requested that this report not be made public, it has not been included in this EIA update. ... The two TLU/TEK reports provided by the FMFN and the ACFN were reviewed to determine whether these reports contained information that would change the original assessment based on identified linkages. The review indicates that the TLU information presented in these reports is consistent with the TLU assessment in the EIA. Therefore, the linkages considered in the assessment and the results of the TLU assessment remain unchanged.”

The results of the Shell analysis of the TLU information outlines the following:

- Areas of disturbance in ACFN traditional lands will increase
 - Reclamation will not replace lost habitat until the far future (beyond the current generation of hunters)
 - Trappers expressed concern about vandalism, decrease in wildlife abundance, light pollution, air pollution,
 - Economic benefits/opportunities will erode the potential to sustain the traditional way of life.

At this point in the process Shell has gone drawn conclusions before proper consultation is complete. Supplemental TUS work must be done to clearly identify the specific uses which may be impacted by Project development (including spatial delineation of these uses and an explanation of specific impact pathways). In addition, a pre-development traditional use baseline must be completed in order to provide the proper basis against which to measure

regional cumulative impacts to ACFN's Rights and Traditional Uses. A meaningful consultation process (i.e. one fully informed of the impacts to ACFN's Rights) can only be undertaken once the information that would be provided by such studies is available.

(b) Summary - Quantitative Analysis of Impacts on Traditional Lands from Application

In Volume 5, pages 8-4, Table 8.1-1 presents the quantitative summary of the estimates made by the Applicant of the increases in disturbances within a Regional Study Area (RSA). The Application Case disturbance is estimated to be 32,494 or 1% of the entire traditional lands of the ACFN:

“On a regional scale, the Project will increase the area of disturbance within the Athabasca First Nation and Mikisew Cree First Nation regional study areas by less than 1% each. Within all traditional use culturally significant ecosystems for Fort McKay First Nation, the Project will increase the area of disturbance by 2% for moderate use areas, and by less than 1% for the low use and intense use areas.”

(Reference: Summary – Shell Canada December 2007 - Section 17.10 page 17-18)

Although this appears to be a low percentage, it does not reasonably represent the effects that the project will have on the ACFN traditional lands.

As acknowledged by Shell in its assessment of the Fort McKay First Nation traditional land use, some lands are used more intensively than others. In addition, the use of lands depends on many factors such as accessibility and connectivity. A simple estimate that the mine is 1% of the total identified traditional lands of the ACFN is almost meaningless. It does not provide information on the impact of these massive mines on the traditional livelihood or culture of the Aboriginal peoples affected.

The Fort McKay land use is outlined in three categories, a low use area, moderate use area and intense use area. Each of these categories is compared to the area which is disturbed in the base case and in the project and application cases. The application case shows that in the moderate and intensive Fort McKay land use 21 and 28 percent of these lands are disturbed. Although this does include some assessment of relative impacts, even this method does not take into consideration the effects of accessibility and connectivity and is a poor method of measuring relative effects.

The Application does not include explanation of the implications of these relative disturbances on the land use of the First Nations or Métis. Assessing the impacts is in fact the most important part of any SEIA. **What are the implications of this project for the continued and future traditional land use of the First Nations? We note, in particular, that the Application does not consider the impacts of “taking up” of other lands within the Traditional Territory of the ACFN and what impacts this has on the exercise of ACFN's section 35 rights. Absent an understanding of the impacts of the grants of tenure,**

developments of various kinds on those lands, and what is required for the ACFN to meaningfully exercise their rights in the future, it is difficult to understand the direct, indirect, and cumulative impacts of the Application on the ACFN's rights.

i. ACFN Study Area

The Application states that the ACFN RSA is based upon the Traditional Territories of the Athabasca Chipewyan First Nation. It is well known that the total area that the ACFN People have historically used extends well into the Northwest Territories, covers parts of Saskatchewan and a large portion of northeastern Alberta. In Aboriginal times and well into the fur trade, the Chipewyan People were some of the most nomadic hunters on the planet. However, as hunting methods changed over time and after several periods of settlement so did patterns of land use.

The use of the number of hectares in the historical traditional territories of the Athabasca Chipewyan First Nation as a denominator in a calculation to measure current impacts to the Athabasca Chipewyan First Nation land use is absurd and, at best, misinformed. A scientific method must include specific information on how the land is used and what factors might affect that use. The ACFN members did not uniformly exercise their rights everywhere within their Traditional Territory. For example some of the more northern areas are large because of the caribou migrations. A percentage method ignores the realities of actual land use patterns that derive from a variety of socioeconomic and ecological conditions and preferences (e.g., perceptions of environmental quality; access to lands and resources; costs in time and money associated with harvesting; culturally significant relationships with place; etc.). Furthermore, this sort of approach makes exactly the kind of error that the Supreme Court of Canada cautioned against in the *Mikisew* case – telling aboriginal people that they can simply “go elsewhere” to practice their rights. Just as we would not expect adverse environmental cross-border impacts coming from the United States, such as from a new smelting plant, to be ignored because that plant would affect 0000.1% of Canada's land base, it is equally troubling to seek to minimize impacts on ACFN's actual land use by using essentially the same sort of analysis.

It is important to note that these proposed projects are relatively close to ACFN's Poplar Point Reserve, I.R. 201G, located approximately 49 km from the JME Project and 27 km from the PRM Project. This reserve was used as a base for the various uses of lands in the area.

In addition to their collectively-held **Treaty 8** rights, two ACFN members hold registered trapline rights directly within the area of the Applications. Marvin L'Hommecourt's trapline (RFMA No. 1714) is within the JME Project area. Eduoard Trippe De Roche's trapline (RFMA No. 2863) is in proximity to the PRM Project. A map showing the registered traplines (Fur Management Areas) in the area of the Applications, including ACFN members. In addition to the registered ACFN trapline

holders, a number of ACFM members also make use of these traplines. Their rights also stand to be directly and adversely affected by the Application.

A 30 km radius from each of the Applications was chosen to demonstrate that ACFN will experience direct and adverse impacts from the Applications, and from the cumulative/induced impacts of other existing and reasonably foreseeable oil and gas, forestry and other industrial development within the vicinity of the Applications, including Shell's existing Jackpine Mine and Muskeg River Mine. Those impacts are explained in more detail below. We intend to submit supplementary evidence to support these explanations at a later date, once additional work is completed.

ii. Method Used to Quantitatively Assess Impacts on Fort McKay First Nation

The following analysis of the method used to assess impacts on Fort McKay is provided to ensure that Shell is aware of these problems if the Applicant decides to attempt to use the same methodology to assess impacts upon the ACFN.

iii. Data Problems

The method that has been used to measure the relative impact on the traditional land use of Fort McKay is based upon an attempt at measuring concentrations of activities of this First Nation and therefore is based upon a rational premise which attempts at looking at the cultural aspects of land use in more detail. However, the effectiveness of this method is dependent upon the manner in which this method is applied. The researchers who have provided these data have admitted that the data acquisition methods do not allow one to confirm the data because the Elders were not individually identified.⁴[see my comment below] No controls were introduced in the data collection process to determine if the data came from a balanced sample of land users or a large enough sample of land users. In addition those who provided the data may have not provided a number of icons proportionate to their relative land use intensity. Therefore, the most that can be said of this data is that it may be a rough approximation of the land use of a sample of land users from Fort McKay First Nation. There may be important differences if it were possible to gather this data again in a more systematic fashion.

iv. Methodological Problems

In order to measure impacts of industrial activities on land use, one must become familiar with the specific land use processes, the seasonal nature of the use and the connections between one activity and another, as well as the cultural importance of the land to First Nations. Using an analysis of the location of icons is a misuse of the information that results in very large errors. Icons only help to build a spatial model of

⁴ Personal discussions with interviewers and participants of the Fort McKay First Nation studies.

the land use of a particular group. The model must include information about the quantity and frequency of harvesting. The question which must be asked is what each icon represents to the livelihood of the group. Is the “value” of a moose icon the same as a fish or muskrat? If the rule of placing an icon is to identify each separate activity then a moose icon is clearly of different value than a muskrat or one fish. However, the intensity maps assume that each icon is of equivalent value.⁵ This error reduces the usefulness of the analysis but there are other problems with the methods used.

Effects on fishing are a good example of the lack of using a proper model of assumptions. The impacts to traditional land use go beyond the quantitative measure of a disturbance of a spatial land use footprint and into the environmental effects of the project as a whole and their linkages to resources and conditions that are integral to the traditional use and rights of the nations. Effects on fishing may have to do with historical spills and the perception about the quantity and quality of the water and not on a western science assessment of fish habitat. In Volume 4A, page 6-29, the Applicant claims that *“no residual impacts of the Project to fish and fish habitat diversity are expected for the Athabasca River.”* They go further to imply that because of this conclusion there will be no effect upon the ability of the First Nations to continue their traditional livelihood. In fact, Elders in most communities including Fort McKay and the Athabasca Chipewyan First Nation have reported that they have stopped fishing on the Athabasca River downstream from the major area of disturbance shortly after the historical Suncor oil spill.⁶ Therefore, it may be true that this project will not have additional incremental effects on fishing on this portion of the Athabasca River because fishing for food has already been adversely affected. The percentage of land disturbance or water quality is not adequate for assessing impact to traditional use, because there are also socio-cultural reasons that must be taken into account in the assessment. Furthermore, what this approach ignores is that if further development on this scale were not approved, it might be possible to start to mitigate the impacts of development on subsistence fishing. We do not suggest this would be easy; however, allowing more and more development to occur makes this increasingly difficult and the threshold at which this impact becomes irreversible is not known. This also demonstrates the problem with allowing companies to use an “already disturbed” baseline – using that approach minimizes the incremental or cumulative impacts of yet more development.

In addition, the possible impacts to harvesting activities are not considered in areas adjacent to the project, which might be affected by the environment effects or activities of the Project development and operations. For example, there still may be fishing activities in other areas that the Project is affecting. The EIA does not examine what the possible impacts on fishing activities and, subsequently on community food supply and well-being that these effects might have. The same would hold true for

⁵ Discussions with J. McKillop and Cormack Gates

⁶ Interviews with Fort McKay and Mikisew Cree First Nation Elders and Land users.

other harvesting activities such as hunting, berry-picking, medicine plant gathering, etc. In order to assess this it is not enough to simply comment on the quality of the water (or the moose habitat, or the number of plant species in the LSA, etc.), but one must look at access (and impediments thereto, from a cultural perspective), socio-cultural perceptions of and sensitivities to environmental change, seasonal timing of development activities vis-à-vis the seasonality of land and resource use, and many other factors that are rarely made explicitly or examined in the project-specific impact assessment process.

Seasonal and sequential activities in traditional land use are very important. The timing and nature of development activities can interfere hunting, trapping, gathering activities; for example, by interfering with the access to the area by the hunter. If a hunter cannot utilize his preferred area, or his preferred route to his hunting destination, he may not have an appropriate alternate. If the development activity continues to impede the access over the harvesting window (for example, during the spring bird hunt, or the fall moose hunt, or over the time which the hunter has requested off of his regular work schedule) it may result in a lost harvesting opportunity. Developing mitigations for this requires much more consultation and analysis with potentially affected land users.

If one area is disturbed it may lessen activities on adjacent areas that are still not entirely disturbed. The land use patterns and associated activities must be understood better in order to understand the overall effect on traditional land use. In the example of Fort McKay where 28 percent of the intensively used area is disturbed it may cause a 50% decline in total land use. A 50% decline in use may cause a cultural collapse of the system due to an economic or social tipping point. This cannot be assessed using the methods contained in this Application. The use of the land may not be proportional and is not likely to be proportional to the percentage of land disturbed even if good numbers were used in the calculations.

v. Summary of Problems with the Quantification of Impacts on Traditional Land Use

Using the percentage of total traditional lands method to attempt to measure the relative impact of the Projects on the land use of the ACFN is uninformed. The methods used to assess the Fort McKay First Nation traditional land use are based upon a rational approach but do not include enough information about the land use process to allow appropriate estimates of effects.

Questions to Shell

Has Shell studied the cultural traditional land use of the First Nations enough to be able to model and assess the impacts of the project on traditional land use tipping points?

Is there adequate information to identify possible thresholds, and the effects of crossing those thresholds, on traditional use?

Has Shell studied the cultural traditional land use enough to develop appropriate timing restraints, access management considerations, etc.

Recommendation

In order for a proper impact assessment to be undertaken a full consultation process as described below must be completed. (See below.) Useful conclusions cannot be made using the methods contained in the current application.

(c) TLU Impact Mitigation by Shell

The Applicant has proposed to introduce mitigation measures to attenuate the impacts on First Nations. In volume 5, page 8-6, the Applicant states that they will continue to participate in the End Land Use and Conservation and Reclamation Agreement with Fort McKay First Nation and the Fort McKay Métis Association. Note that this participation does not mention any participation in reclamation consultation with the Athabasca Chipewyan First Nation. The participation in reclamation planning is perhaps the major type of consultation which could continue into the future. The rest of the major issues in the consultation process should be dealt with before the project is approved not on an on-going basis as seems to be proposed.

In section 8.7.7 of Volume 5, page 8.242 the proponent proposes to reduce the occupation of the lands by attempting to provide early reclamation and to minimize the impacts of the mining process while they are operating where possible. Although this appears to be consistent with a noble goal of minimizing effects it must be viewed in perspective. The length of time that actual effects of developments on aboriginal traditional use will last generations. The short incremental period where lands will be reclaimed early in the far future will have little or no effect on the practical land use opportunities for these First Nations. The First Nations are essentially being told to suspend or ignore their rights in important parts of their traditional territory and to just “trust” that reclamation will work. There is no analysis of what it means culturally, economically, and socially to essentially require people to either suspend or fundamentally alter their patterns of land use in terms of the viability and sustainability of that culture. In addition, the interruption of these activities will disrupt opportunities to pass along TEK and cause impacts on TEK as hunters are required to change locations.

The issues that must be addressed, which would quickly be identified through meaningful consultation, informed by a proper cumulative impacts study, are the ability of the First Nations to maintain and meaningfully practice the traditional activities and cultural knowledge and to transmit this to younger generations over the period of the most

intensive impacts. TK includes more than knowledge of resources, how to obtain them and how to process them, but also includes knowledge of specific places (i.e. where to go and how to travel there). The transmission of TK requires more than films, studies, cultural gatherings and programs. It requires that sufficient lands and resources exist so that the harvesting rights, which are central to the cultural identity and traditional economies of the First Nation, can continue to be practiced. Through this practice, knowledge is transferred in a culturally appropriate and meaningful fashion. If this transfer of knowledge is not successful the quantity or timing of the questionable reclamation of lands will be moot.

The First Nations in the ATC have been very willing to share TEK in an effort to assist the planning and reclamation aspects of the proposed project in the area despite the enormous negative effects these project have had on their lands. TEK gathering can be an important part of the maintenance of culture and continued traditional land use. However, the emphasis on TEK gathering has been to support the environmental analysis required for regulatory planning rather than supporting on-going traditional land use. The lack of responsiveness of the regional associations and the proponents of projects in acknowledging the importance of the Aboriginal right to maintain their traditional land use and maintain their TEK was the impetus for resigning from the CEMA TEK Committee.

The Application states that Shell will continue to participate in multi-stakeholder planning and research initiatives. On Page 8-17 of Volume 5, the Applicant makes mention that Shell will continue to participate in multi-stakeholder organizations such as CEMA. Note that at this point participation in the CEMA TEK Committee is only for the benefit of Shell since the ACFN and other First Nations have resigned from participation in this committee because of its refusal to deal with Aboriginal issues in proper cultural context.

References: Traditional land use effects: page 149 of the EIA Update.

The reviewer is unable to find any significant mitigation or accommodation proposals which is understandable since little reliable information about impacts on ACFN traditional land use is contained in the Application.

i. Summary Conclusions TLU

The ACFN is concerned about mitigation proposals put forward by individual companies and having regulators and decision-makers consider them adequate while companies continue to apply for more projects without conducting a full impact assessment or socio-economic study of impacts. This is simply not an acceptable response and denies the aboriginal rights of the Athabasca Chipewyan First Nation.

Only by focusing on potential impacts on constitutionally-protected rights through a proper consultation process and living up to the legal responsibilities as dictated by the Supreme Court of Canada will provide the support adequate to preserve the

Aboriginal culture, and allow the First Nations to exercise their right to maintain their traditional land use.

Recommendation: Given the potential exposure to constitutional challenges over the lack of adequate consultation, Shell should consider assisting in or pushing for a full cumulative impact assessment on ACFN and other First Nation lands. All of the TLU work done on each separate proposal should be done so that the information will contribute to such a full impact assessment.

5. Results of the Socio-economic Review

(a) Introduction

The socio-economic impacts on the Athabasca Chipewyan First Nation cannot be separated from an understanding and appreciation of their Aboriginal rights. Participation in the industrial, commercial and residential economies is inevitable and has been part of the history of the First Nation since their participation in the fur trade starting in the 18th century. However, the First Nation also has the right to maintain and develop its culture, language and traditional livelihood in association and coincidental with participation in the industrial economy. This implies different approaches to many issues including health, housing organization, socio-economic organization, reasons for leave from work and may other culturally related factors.

For example, as a result the socio-economic impacts on the Athabasca Chipewyan First Nation include impacts on the cost and availability of housing but also the location and characteristics of the housing. In order to assess the impacts of a development on the Athabasca Chipewyan First Nation a thorough understanding of the First Nation rights is required. There is no evidence that Shell attempted to understand these rights or address them in the SEIA.

(b) Socio-economic Information – employment and taxes

The socio-economic information provided emphasizes the employment and tax revenue that this project will generate for the economy and Government of Alberta. Meanwhile, no study has been done of the socio-economic effects on the ACFN peoples. Such a study would include loss of traditional livelihood opportunities, health impacts due to loss of country food and exercise, social welfare effects of a changing culture, loss of language, educational requirements, training requirements and a range of other important data required to mitigate the effects of large developments on the ACFN peoples. To date there has not been adequate socio-economic information on the losses. Shell has followed the conventional approach in emphasizing the positive side of the ledger and has omitted if not hidden the negative effects.

(c) Rights Holder versus Stakeholder:

The approach that has been taken by the Applicant in obtaining this information is similar to the approach which would be taken in typical stakeholder consultation process where the stakeholder did not possess affected aboriginal rights. These responses would be obtained in encounters such as community presentations and walk-in open houses. In such stakeholder meetings the company presents their proposal and asks for comments. No thorough analysis of rights and impacts is prepared or discussed. The stakeholder approach is inadequate when there are impacts on rights. The extent of the right must be identified. Information must be considered according to what is needed to exercise that right or rights in a meaningful fashion. Then the impacts on the right must be assessed. Finally consultation must occur to determine how mitigation, compensation and preferred adaptation should occur. Given the potential cumulative impacts of development on ACFN's rights, a single proponent may not be able to collect the required information, which is why, for years, the ACFN and other First Nations have been calling for one or more regional baseline studies involving other proponents and the federal and provincial governments. The comments above, although they may contain some of the expressed interests and desires of the First Nation, do not adequately address the socio-economic impacts upon the Athabasca Chipewyan First Nation and their rights.

The application says that the key sources are ongoing consultation with communities of Ft. McKay, Ft. McMurray and Ft. Chipewyan. There is no mention on consultation with the ACFN per se. The approach here is not towards the divisions of rights holders but to the general public stakeholder.

(d) Issues Identified in Shell Application

In Section 18-2, page 18-6 the Application presents socio-economic issues for the region and for First Nations as follows:

Regionally, the key socio-economic issues are:

Employment training

Population effects on total and regional service providers

Transportation and other infrastructure

Access to land and land use⁷

Regional and provincial benefits

⁷ Although access to traditional hunting, trapping, fishing and gathering areas is an important consideration, what is missing entirely from the EA (as previously noted) is an analysis of what is needed to sustain those rights today and into the future.

In addition to these key regional issues, First Nations and Métis issues and concerns include:

Access to education and training opportunities
Access to economic development opportunities
The retention of Aboriginal culture
Physical infrastructure requirements
Safety

Summary of traditional Land and Cultural Impacts

-removing land from traditional uses by means of mines, and in situ field facilities, plant sites and transportation networks.
-increasing the regional population, and increasing access to places that were previously difficult to access. This will likely increase competition for traditional resources.
-providing wage economy opportunities for local Aboriginal people, which will likely reduce their involvement in traditional pursuits.

These concerns are provided in the Application as a result of the information gathering that the Applicant performed under the requirements of the TOR. The identification of these issues was not done in the context of a rights based framework. Although many of these issues are important to the First Nation, a socio-economic study was not conducted to identify these issues. Rather, these issues were identified in various meetings held with members and other representatives of the First Nation

The Application outlines some other issues:

- **Housing:**

“Affordable housing is expected to remain scarce.”
SEIA: Page 18-14

One of the proposed solutions for a continued housing shortage accompanied by high prices is to make more complete use of the recently completed Albian Village located at the Muskeg River Project and to construct a residential camp on the Pierre River Mine site.

Shell’s Solutions:

- Albian village: capacity 2,500 workers
- Pierre River will have an on-site camp
- Jackpine will not have a camp and the workers will be expected to find accommodation in Fort McMurray.

Response

Athabasca Chipewyan First Nation people have been forced off the lands by industrial development and many are unable to find affordable housing in Fort McMurray which prevents them from taking advantage of employment opportunities. Housing that would be available is too expensive, not available and not culturally appropriate.

Recommendations

The Government and Industry should propose alternatives which are culturally appropriate and affordable.

- **Education**

The Application identifies a problem which is well known to the ACFN community.

“Rural schools report issues including low student performance, high dropout rates and students finding the transition to high schools in Fort McMurray difficult.” (Emphasis added) Reference: Page 8-250 Volume 5.

Education has been mentioned as part of the impact mitigation strategy several times. However, education in general is not considered to be a responsibility of the industrial sector except perhaps in the field of training. In a more appropriate assessment and process the Applicant would provide information in the SEIA which:

- 1) Outlined the number of students in each community who held aboriginal rights.
- 2) Identify those students who have been affected or will be affected by the industrial developments included in the base and application cases.
- 3) Identify how these students have been affected, such as that their parents are homeless, or unable to find suitable accommodation or unemployed or they are having trouble adjusting to living in a city rather than a small community, etc.
- 4) What levels of education have these students obtained? What current prospects do the students have with the historical success with the current education programs?

Shell has proposed that they continue their support for various programs such as scholarships, job training and cultural retention workshops. Shell has specific programs noted on page 8-277 of Volume 5 of the Application.

Response

There is not enough information or analysis provided in the Application to provide further analysis or strategy to properly fulfill a consultation responsibility on educational effects and problems and how to address them.

Recommendation

A full socio-economic study in association with a proper consultation process should identify the problems and causes of educational shortfalls. This will allow a thorough and coordinated mitigation plan to be developed.

- **Social Services**

The Applicant mentions that there are social service problems associated with the growth and current situation in the Municipality. *“Generally, the social services available in outlying rural communities indicate that they have limited staff and financial resources to service their clients.”* Page 8-254, Volume 5.

The social service problems include homelessness, reduced community life, problems from a transient population and alcohol and drug use.

Response

The solutions that have been proposed by Shell appear to be focused on providing on-site residential camps for Shell workers.

Recommendation

A full consultation process should be initiated which will assist all parties in identifying mitigation measures that directly address the socio-economic problems of the area, including information from a First Nations perspective.

- **Health Service**

The Applicant identifies that the health services are having and will continue to have difficulty in recruiting and retaining staff particularly in **rural** and isolated communities. Reference: Page 8-257 Section 8.7.11 Volume 5.

Shell is proposing that one mitigation factor will be the establishment of onsite medical care for Shell employees. Shell suggests that this will reduce the pressure on local medical facilities.

Response

Given the higher rates of cancer and other problems reported in one of the rural communities, how will providing better care for Shell employees assist the on-going impacts on rural health services in the area?

Recommendation

Mitigation proposals should directly address the issue of attracting and keeping qualified staff at rural medical centers.

- **Emergency Services**

Shell notes that there are some challenges in maintaining adequate emergency response services especially in **rural** communities. Reference: Page 8-260, Section 8.7.12, Volume 5.

Response

There appears to be a pattern in the Application in describing shortfalls in socio-economic services. The rural problems seem to be prevalent.

Recommendation

The question is: are the rural communities adequately serviced in the emergency, health and education fields?

- **Transportation:**

Shell analyses the mortality and accident rates of highways in the McMurray region and discusses the road transportation plans. There is no comment on transportation to and from Fort Chipewyan either by air or by boat and no analysis of the winter road. Reference: Page 8-263, Section 8.7.13, Volume 5.

Response

The First Nations in the area have a right to maintain their traditional transportation in order to exercise their rights. This has not been discussed in the Application. Access to and from McMurray via the winter road is becoming increasingly dangerous as traffic increases and as black ice (as a result of the high humidity caused by the releases from the plants) is becoming more prevalent.

Recommendation

Proper study of the transportation rights and safety should be included in the consultation process.

(e) Socio-economic Statistics

- **Employment**

(Reference Page 8-211 of Volume 5)

The Application does provide some aggregate statistics on employment of Aboriginal peoples and compares those statistics with average Alberta percentages.

They note that the average off reserve unemployment rates in Alberta for Aboriginal peoples is 7.3 % where the average unemployment rate for the wood Buffalo – Cold

Lake Region of Alberta is 5.3% which was above the 3.6% unemployment in the Province as a whole. (September 2007).

They note that on reserve unemployment is higher with a report from ATC estimating unemployment to be in the range of 38 to 54%. Given the opportunities and lack of unemployment generally in the region, these figures are extremely high. There is no more detailed analysis of these statistics provided in the Application.

The Application notes that the ATC Study identifies four barriers to employment. Two of these are associated with lack of education and/or no driver's license. However, it reports that 26% of respondents indicated that they face drug/alcohol tests as a barrier to employment.

Response

There is no further discussion of the causes of this situation or discussion of the socio-economic setting which would allow mitigation proposals to be made and carried out in a meaningful fashion.

Recommendation

The causes of income disparity should be studied and the role of this Project and others discussed in that study context.

- **Income**
(Reference: Page 8-212 Volume 5)

The Application provides estimates of average income for the region for Aboriginal people and compares that with the average for Alberta. The presentation notes that the levels of single family incomes is much higher in the rural communities and that those single family incomes are much lower than the average for the Province and much lower than the average for Fort McMurray. What is not explicitly stated is that these numbers suggest a breakdown in the family structure in the rural communities and that there is a large income disparity between the average for Fort McMurray and the rural communities that appears to be related to the family structure.

Response

The Application does not discuss the causes of this disparity or discuss how the project specific or cumulative effects of development have contributed to this situation.

Recommendation

These figures show considerable disparity yet there is no analysis or explanation for why this is so or if this has to do with the development of the area. The analysis of the effects on development on family structure and income especially in the rural areas should be undertaken.

(f) Socio-economics of Water

Use of Water is important from a **socio-economic** point of view for several reasons, for example:

- 1) **Transportation**: Surface access to Fort Chipewyan is only via the Rivers when the winter road is closed.
- 2) **Fish consumption**: One of the most important traditional foods is fish.
- 3) **Seasonal flooding** to create habitat for fish and other animals: Lower volumes of water in the Athabasca River could affect the frequency of important flooding cycles, which are necessary to the hydrology and ecological health of the Peace-Athabasca Delta, a prime resource harvesting area

The application discusses the issue of water quality and quantity within the Athabasca River but does not address the issue of transportation on the River. (See Application Volumes on water quality and quantity)

There is no assessment of the navigability of the River in the application. One of the aspects of this issue is that water quality is affected by dredging and the issue of both traditional and commercial transportation should be weighed against environmental effects and socio-economic impacts. Specifically, transportation on the River is quite important in the future for both the community of Fort Chipewyan and the Industry in the region. Water is being removed from the River. This will reduce the ability of impurities to be diluted and affect the possible transportation on the River without dredging. Dredging however is suspected to be one of the causes of high levels of mercury in the water which has devastating effects upon the traditional fishery.

The traditional activities of the ACFN require certain levels of the quantity and quality of water. Oil sands use of this water represents an economic and social loss to the ACFN.

Response

What is the economic and environmental loss (or opportunity cost) of the use of water for the production of oil sands rather than being available to support traditional and cultural activities?

Recommendation

An analysis of the implications of water on each of the socio-economic issues outlined above. These issues do not appear to be discussed in the EIA nor the SEIA.

(g) Socio-Economic Mitigation Responses

i. Socio-economic Mitigation Initiatives and Proposals

The following section describes the socio-economic mitigation issues and proposals provided in the Application. Many of these are regional initiatives outlined in Government documents. These measures have been initiated in response to concerns which have been expressed in previous hearings which have caused significant shortfalls in infrastructure, housing and services and by the Municipality of Wood Buffalo and various stakeholders affected by the unprecedented development in the region.

Reference: On page 136 of the EIA update, the applicant lists several initiatives in the Wood Buffalo region contained in Government documents to alleviate the pressures of rapid growth and enhance the quality of life of local residents (GOA 2008a):

- addressing traffic congestion in and around Fort McMurray with the construction of major highway interchanges (\$300 million);*
 - expanding long-term, ambulatory and emergency care (\$49 million);*
 - support for policing (\$9 million);*
 - contributions to a new child care facility (\$2 million);*
 - school buildings (\$14 million); and*
 - wastewater and solid waste infrastructure (\$45 million).*
- \$0.9 million affordable housing funding to the Wood Buffalo Housing and Development Corporation (GOA 2008b).*

The proponent describes how these initiatives impact the members of the Athabasca Chipewyan First Nation. In this context, the applicant lists a number of projects:

- A 20-year Strategic Capital Plan with an average annual commitment of \$6 billion to meet infrastructure needs (GOA 2008c). Specific capital projects will be announced through the regular budgeting process. The plan outlines long-term priorities and reaffirms current Alberta government commitments in the following areas:*
- municipal infrastructure, e.g., support for high-growth areas, such as Wood Buffalo, support through the Municipal Sustainability Initiative and other municipal grant programs;*
 - the provincial highway network, other transportation, and corridors, e.g., new Highway 63 section north of Fort McMurray, east-west travel routes by extending Highway 686 and construction of a new highway between Fort McMurray and Peerless Lake, improvements of Highway 813 in Wood Buffalo region;*

- health facilities, e.g., new primary health care centre's in Wood Buffalo;
- schools, e.g., modernization of Westwood Community High School and construction of two new high-schools in Fort McMurray post-secondary facilities, e.g., commitment to technical trades and health workforce training;
- housing and government projects, e.g., commitments under the Municipal Sustainable Housing Program, Affordable Housing Program and the Alberta Secretariat for Action on Homelessness (\$285 million announced on January 23, 2008 to address immediate housing pressures, GOA 2008e);
- Community facilities, e.g., commitments under Alberta's Cultural Policy, Major Community Facilities Program and Community Facilities Enhancement Program; and
- water and wastewater facilities, e.g., commitments under the Water for Life strategy, the Municipal Water/Wastewater Partnership program.

The proponent suggests infrastructure projects that will assist the Athabasca Chipewyan First Nation to address the impacts of these developments.

- *Continued commitment to trades training, addressing key labour shortages in the province, and engagement of Alberta's untapped labour force. On January 31, 2008, the Government of Alberta announced \$1.5 million towards the completion of training facility for women entering trades.*

The facility, operated by Women Building Futures – a non-profit organization – will provide 400 spaces annually for women who wish to achieve economic independence through trades training (GOA 2008f).

- *Support for carbon capture and storage under the Alberta Climate Change plan which aims to reduce emissions by 50 percent by 2050. Funding for carbon capture and storage, energy conservation, and green energy production will be allocated through the Canada ecoTrust and the Climate Change and Emissions Management Fund (GOA 2008i).*
- *Phase-out of Alberta health premiums in the next four years which will translate into savings of \$1,056 for families and \$528 for individuals (GOA 2008g).*
- *Support to low-income earners through an increase in Alberta's minimum wage to \$8.40 per hour (GOA 2008h).*

The federal government is also responding to the growth pressures in the region, including cost sharing with the provincial government of the twinning of

Highway 63 and providing living allowances to civilian and uniformed RCMP employees in Fort McMurray. See Volume 5, Section 8.7.3 of the EIA for details. A new initiative by the federal government is additional joint funding under the Canada-Alberta Affordable Housing Program to the Wood Buffalo Housing and Development Corporation. The federal government's share was \$0.9 million.

Do any of these projects and initiatives address the impacts on the ACFN?

What effects have been experienced by the ACFN that these mitigations address? It may be true that some or all of these initiatives will have some positive effects for the ACFN. It remains to be seen if these projects address impacts suffered by the ACFN on their rights from the effects of these and previous oil sands mines. The studies which will provide those answers simply have not been done.

Questions

What are the total expenditures on these initiatives and what percentage of these expenditures will assist the ACFN in protecting their constitutional rights?

How do the major capacity and Infrastructure Projects address the ACFN concerns?

ii. Applicant Mitigation Approach

Examples of Shell's mitigation approach are as follows:

Shell will adopt construction and operations practices that limit the impact of its workers with local communities, such as full-service camps, expanded work schedules with adequate break periods to allow for travel to place of permanent residence. During operations, Shell employees will have access to the company's confidential assistance plan and specialized expertise. To constrain the impact of development on small Aboriginal communities, Shell will continue to assess and support, where warranted, a number of cultural retention initiatives.

To mitigate health service pressures associated with the Project, Shell is considering the expansion of the current on-site health care facility at the Albian Sands Village to serve the enlarged Jackpine Mine workforce, and the construction of a similar facility at the PRM site. These facilities are expected to reduce the number of people from outside the region that use emergency room services in Fort McMurray. (Reference: Page 154, EIA Update.)

The regional initiatives presented above are primarily directed to the general capacity and infrastructure shortfalls in the Fort McMurray region. However, as noted in the Application and pointed out in several sections of this review, many

of the most serious problems in the Municipality occur in the **rural** regions where many of the ACFN People reside. The Application points out the difficulties of obtaining staff for schools, social services and medical facilities in isolated and rural locations. There are additional problems associated with emergency services in rural communities (Volunteer fire departments and medical emergency response facilities.) School and recreational services and infrastructure appear to be focused on the Fort McMurray area. It appears that the greatest need for mitigation and infrastructure is in the rural areas yet these areas appear to be left out of the major mitigation and infrastructure projects.

Questions to Shell

How do Shell's mitigation proposals assist the Athabasca Chipewyan First Nation in dealing with the impacts of the projects?

iii. Summary of the SEIA Analysis

The SEIA says that one of the key indicators to be used to assess impacts is traditional land use and culture. However, while they include a brief overview of traditional land use, they do not describe the traditional economy/livelihood, nor describe the ties b/w socioeconomic aspects and the well-being of the ACFN community.

The Application has not dealt with the First Nation on the basis of rights but rather the ACFN has been treated like a rural stakeholder. The rights of the First Nation from a socio-economic point of view appear to be ignored. However, consultation on these rights is required before such an application can be approved. A major socio-economic study is required in order to prepare for a proper consultation process. The Application does not include the materials required to support that process. The application does, however, make it clear that the rural regions of the Municipality appear to have the most pressing socio-economic problems but it does not discuss how those problems are related to the project or cumulative effects of development. An outline of some of the additional data requirements to answer these important questions is included below.

6. Analysis of the Assessment of Impacts

The information and data collected for the purposes of this application is far from adequate in supporting an appropriate consultation process for the socio-economic and traditional land use impacts of this project on the ACFN. Even if there were a separate Crown consultation process, which there does not appear to be, the information should be collected by the proponent, other proponents, and the federal and provincial governments through a larger baseline study to show the potential effects on the First Nation. This has not been done in this application.

Section 8.7.7 of the Application describes impacts on traditional land and culture but there are many attempts in this section that try to downplay impacts on traditional use without the benefits of a complete study. As a result of not knowing the impacts, most mitigations suggested are inappropriate. There is no discussion of the relationship between traditional resource use, cultural well-being and rights. In order to complete a proper analysis the Applicant needs to have a complete effects assessment which would include a cumulative effects assessment from 1967. In addition, a proper socio-economic study of the ACFN membership is required to be able to gauge the overall impacts.

The following is a list of the types of information which should be collected in order to accomplish a proper consultation process. The information required could be categorized into baseline information, cumulative impacts information and Application effects information. The consultation process needs sufficient information to be able to measure the impacts and to value the impacts.

Once this process has been completed there should be an opportunity for all parties to discuss and agree on minimization strategies and mitigation strategies. A discussion of accommodation options would then take place between the Crown and the First Nation.

This process must be completed before the project proceeds so that questions like **“Are there any places or activities which need to be preserved which require a reduction in mining or a change in proposal scope?”** can be dealt with before the project operations renders them moot.

Appendix A – Email from the ACFN IRC to Shell, dated September 11, 2009, regarding comments on Shell’s Aug-Sept consultation log

Nicole Nicholls

From: Nicole Nicholls [n.nicholls@acfn.com]
Sent: November 9, 2009 4:18 PM
To: 'Karen.Roberts@shell.com'
Cc: 'Ashley.Nixon@shell.com'; 'Alvaro Loyola'; 'Lisa King'; 'Ian Peace'; 'Linda.Jefferson@shell.com'; 'Linda.Mcnabb@shell.com'; 'drew.cullen@gov.ab.ca'
Subject: FW: Shell-ACFN August-September 2009 Consultation Report to AENV for JPME & PRM Application
Attachments: ACFN Aug-Sept 2009.ZIP
Importance: Low

Karen,

Lisa has forwarded to me the August-September 2009 bi-monthly AENV consultation report for the JPME & PRM Application, which you sent to Lisa on October 29th. As Lisa has previously advised Shell, please ensure that these reports are sent to myself (Nicole Nicholls) as well as to Lisa and to Ian. In addition, we also ask to review these logs prior to their submission to the regulators. This will help ensure that the logs are accurate.

We have reviewed this consultation log, which we understand to be in respect to the Jackpine Mine Expansion and Pierre River Mine Application. We find that, overall, the log is more of a record of communication than it is a record of consultation, and would like to bring to your attention the following issues with the log.

- (1) Lack of separation between issues of concern expressed by ACFN versus topics of an administrative nature tends to obfuscate issues of concern.
 - For example, the May 1, 2009 entry summarizes the issues discussed as “TEK/TLU Information for JPME & PRM EIA”. That is a topic. The issue expressed was that there is a need for Shell to demonstrate, and to report back to the ACFN Community, on how the TEK/TLU information contained in the TUS submitted to Shell was taken into account in the EIA.
 - For example, the August 17, 2009 SoC includes concerns about the direct and adverse impacts to ACFN’s Treaty and Aboriginal Rights. These concerns are not documented in the log.

We recommend that key issues of concern raised are made more evident in the log, perhaps by adding a column that makes clear the concerns expressed in respect to a particular issue. How can AENV adequately assess whether or not concerns have been addressed if it is not obvious what the concerns are?

(2) **Missing entries:**

- The log is missing the months of January, February and March 2009
- On January 23, 2009, ACFN IRC’s consultant DS Environmental emailed to Shell a list of preliminary technical review questions, the answers to which were required to inform the technical review.
- On January 27, 2009, ACFN IRC Project Manager sent an email to SPAC Rep flagging ACFN concerns about bison in the area of the PRM project and asking whether bison were assessed in the EIA. Please note that the response sent by Shell referring the ACFN IRC to include this question in their technical review did not address the issue.
- At our meeting on March 20, 2009 the ACFN IRC raised numerous issues about the JPME and PRM Application including the need to assess impacts on ACFN’s Treaty and Aboriginal Rights and Culture, the need to report back to the ACFN Community about how the issues and concerns documented in the TUS completed by the ACFN IRC and submitted to Shell were incorporated into the EIA and will be addressed, and concerns about NNLP
- On May 5, 2009, ACFN IRC sent an email to Shell requesting information on the regulatory process for the JPME and PRM applications. Shell responded to this email on May 26, 2009.

- On May 26, 2009, ACFN IRC sent an email to Shell regarding the need for a meeting between ACFN IRC's technical consultant DS Environmental and Shell in order to provide information necessary to inform the technical review.
- On May 12, 2009, ACFN IRC sent a letter to DFO that was copied to Shell expressing concern about participation in NNLP for the JPME and PRM Application.
- On June 4, 2009, ACFN IRC sent a letter to the Honorable Jim Prentice requesting a joint panel review for the Application

(3) The log contains **documentation of communications and events that are irrelevant to consultation on the JPME and PRM applications**. The inclusion of this irrelevant information does nothing more than obfuscate the activities related to the actual JPME and PRM application.

- (a) We note that much of the log consists of documenting meetings, or requests for meeting, that are related to the relationship between Shell and ACFN in respect to existing approved projects such as the Muskeg River Mine. For example, there are many entries about ACFN Advisory Committee tours and other events relating to the Muskeg River Mine. As we have made clear to Shell on numerous occasions, these Advisory Committee meetings are for the purpose of relationship building in respect to approved projects only, and are not to be used as a vehicle for consultation on the JPME and PRM applications. As well, there are some entries related to arranging for Chief to Chief meetings to discuss the relationship between Shell and ACFN in respect to approved projects.

We suggest that the following entries from 2009 be removed from the log:

- July 14, 2009 Advisory committee meeting and MRM tour, May 12-13, 2009
- July 18, 2009 emails regarding ACFN Advisory committee meeting and camping trip
- August 19, 21, 25, 26 and 28th 2009 entries regarding Advisory committee meeting and camping trip
- September 9 entry regarding advisory committee meeting and camping trip
- September 9 entry regarding a monthly IRC meeting and visiting community gardens
- September 10, 11, 14, 15, 16 entries regarding advisory committee meeting, quarterly meeting, and camping trip
- September 18th phone call from SPAC to Chief about matters not related to the JPME and PRM application
- September 21st emails regarding ACFN Elders Youth camp
- September 21st emails regarding advisory committee meeting and MRM tour
- September 24 emails regarding ACFN Elders Youth camp

If you'd like to keep a record of such activities and share that record with us, we welcome that. However, we ask that you discontinue including this in your consultation log for the JPME and PRM project as it is not relevant.

- (b) The log also consists of entries (e.g., July 15, 2009) that are of a purely administrative nature, such as the receipt of invoices from consultants (e.g., July 15, 2009). We suggest that these entries be removed.

(4) As per the email sent to all of Industry (including Shell) on June 19, 2009, all consultation is to be organized through the IRC. Any activities or conversations that occur outside of this process are not considered consultation. Therefore, phone conversations with individual ACFN members, who are not elected representatives of the ACFN, are not considered to be part of the consultation process for this Application and should not be included in the log. If Shell is communicating with ACFN members outside of the IRC process, we simply ask that Shell please call the ACFN Project Manager (in this case, Nicole Nicholls) to inform the IRC directly so that we can work out any kinks together.

- (5) The log includes an entry for **September 26, 2009** saying that the ACFN member that holds TPA 1714 and the ACFN IRC Program Manager met with the Shell Landman to talk about the Pierre River winter drilling programs. Please be advised that the ACFN IRC Program Manager was otherwise engaged on that day in Calgary and has actually never met TPA 1714 holder. To our knowledge, the ACFN IRC has not yet received any information from Shell on their upcoming winter drilling programs. This entry is therefore erroneous and should be removed.

- (6) Your October 29th email notes that Shell has included in this log “some engagements pertaining to the 2008-2009 JPME & PRM winter exploration and drilling programs that occurred in late 2008 that had not previously been reported.” In the future please distinguish new additions to the log so that these additions can be reviewed efficiently.

Please note, as well, that we may request additional changes in the future if we become aware of discrepancies or gaps in the log.

I have copied two Alberta Environment staff on this email in the hopes that they can forward this to whomever in their department is reviewing the consultation logs for the JPME and PRM Applications. We find it disturbing that we do not even know whom at Alberta Environment is reviewing the adequacy of consultation for this applications.

Nicole Nicholls
Project Manager
Athabasca Chipewyan First Nation
Industry Relations Corporation
110B-9816 Hardin Street
Fort McMurray, AB T9H 4K3

Phone: 780-791-3311
Fax: 780-791-3632
Cell: 780-742-9163
n.nicholls@acfn.com

From: Karen.Roberts@shell.com [mailto:Karen.Roberts@shell.com]
Sent: Thursday, October 29, 2009 10:27 AM
To: lisa.king@acfn.com; ian.peace@acfn.com
Cc: Ashley.Nixon@shell.com; Linda.Mcnabb@shell.com; Linda.Jefferson@shell.com
Subject: Shell-ACFN August-September 2009 Consultation Report to AENV for JPME & PRM Application
Importance: Low

Lisa,
FYI, attached is the August-September 2009 bi-monthly consultation report submitted to AENV with respect to our JPME & PRM Application. Please note we have included in this report some engagements pertaining to the 2008-2009 JPME & PRM winter exploration and drilling programs that occurred in late 2008 that had not previously been reported.

These consultation reports are submitted on a bi-monthly basis to AENV. Each individual report may contain a few consultation records that pre-date the report period. This is typically due to a lag time between the filing of consultation records and the cut off period for the report preparation. We do capture all of the consultation records and will include them in subsequent reports.

Feel free to contact me if you have any questions.

<<ACFN Aug-Sept 2009.ZIP>>

Karen Roberts

Consultation Coordinator

Shell Canada Limited

400 4th Avenue S.W., P.O. Box 100 Station M, Calgary, Alberta T2P 2H5, Canada

Tel: +1 403 691 4028

Email: karen.roberts@shell.com

Internet: <http://www.shell.ca>

Appendix B – ACFN Review of the Draft Terms of Reference

The ACFN review of the Draft TOR was produced in September of 2007 and signed by Blair Whenham the IRC Director. At that time the ACFN was not focused on introducing Aboriginal rights and constitutional issues into the ERCB approval process. At the end of 2007 the rights based consultation and compensation negotiations (LBTA/CRBA) were collapsing and negotiations to create a consultation protocol (PWG) with the Province had made no significant progress because of the consistent refusal of the Alberta Provincial Government to implement proper Crown consultation. For many years the ACFN and the MCFN had been asking for a thorough consultation process that included a cumulative effects analysis capable of assessing the impacts of oil sands mining on their traditional livelihoods and traditional lands. These requests were repeated during the 5 year CRBA process, in the 3 year PWG process, in several hearings at the ERCB and repeatedly in direct communication with the Provincial Government, the Federal Government and to industry applicants. Efforts to obtain this consultation have been stymied at every turn.

Before the Albian Application process in 2006, the Provincial Government amended the regulations of the *Administrative Procedures and Jurisdiction Act* and added the ERCB to those organizations able to rule on constitutional issues. As a result of this change and the collapse of the CRBA and PWG negotiations it became clear that a rights based approach at the ERCB may be the only efficient method to achieve the consultation, mitigation and compensation goals of the ACFN.

However, even after the expansion of powers of the ERCB, oil sands mines and plants continue to be approved by the ERCB without a full consultation process ever being undertaken. In previous hearings the MCFN signed an agreement not to pursue constitutional issues and the ACFN came to some agreements without pursuing rights at the ERCB. Meanwhile the Alberta Provincial Government continues to ignore requests to establish a separate Crown consultation process for any of the First Nations in the oil sands mining area. Most recently they have initiated a regional planning process within for which they promise (yet again) to consult. However, requests for a proper consultation process have not been accepted in this new planning process either. The Government would pay compensation and consult under the CRBA process if the ATC First Nations compromised their rights. However, the First Nations were not willing to sign away the exercise of their rights in the area and the Governments refused to sign. The CRBA process failed. The CRBA process contemplated a new all parties' core agreement and without a new all parties' core agreement the stability of the IRC system of consultation is threatened and consultation may completely collapse. The root of these problems is that the Alberta Provincial Government has consistently refused to perform a complete pre-development assessment of the effects of oil sands mining and other industrial developments on the traditional lands and livelihood of the ACFN and other aboriginal peoples in the region. There have been no court proceedings demanding that the Government live up to its responsibilities in this matter primarily because of the LTBA / CRBA negotiations. Only recently has the Beaver Lake First Nation started such a case for activities further south.

Despite the focus of the IRC at the time, the 2007 TOR review for the Jackpine Expansion and Pierre River Mine contained some important comments that relate directly to a rights based consultation process including a full cumulative impacts analysis.

- a. In the Environmental Assessment section the review stated that a full pre-development baseline analysis is required to assess the impacts upon First Nations. This section also asks for a 40 year assessment of the socio-economic impacts.
- b. In the reclamation and closure section there are two mentions of the importance of restoring the lands to support rights based traditional land uses.
- c. In the Basic Information Requirements section further statements are made regarding the need for complete traditional land use information, effects of human activities on renewable resources and how the impact assessment must consider the First Nations values.
- d. In the Cumulative Environmental effects Assessment section it states clearly that the full impacts on traditional lands should be included.

The Government did not require Shell to change the baseline cumulative effects required in the TOR or to incorporate a pre-development cumulative effects assessment but it is important that these items were requested by the ACFN. After each additional plant and mine is approved it is becoming clearer that in order to properly assess the effects of oil sands activities on the First Nations in the area, particularly the ACFN whose Poplar Point Reserve is now surrounded by leases and included in the Surface Mineable Area, that a thorough cumulative impacts assessment is required.

In Shell's responses to the subsequent ACFN questions and comments on the Pierre River Mine application, Shell cites the parameters that were put in the final TOR which ignored the ACFN requests. In addition, Shell cites their *extensive discussions with 'the regulator.'* However, the regulator did not require Shell to assess the long term impacts on the ACFN traditional lands or livelihood. It is important to note that the ACFN made these early requests for proper assessment and consultation.

Appendix C - Information required for Baseline study

A. Baseline Information to Inform Development

1. In our view, proper baseline information is needed to understand the potential direct, indirect and cumulative impacts of existing, planned and reasonably foreseeable industrial development on our ability to exercise our rights. We regard 1965, when the impacts of intensive oil sands development began to be felt in our Traditional Territories, as the date needed to establish the baseline data. The following information is required to inform the baseline:

(a) Quantitative Information on our Traditional land Use:

- (i) Define Traditional Land Use study area⁸ and size in miles² and hecatres²
- (ii) Fixed Sites of Cabins, Camps, Communities, Historical Trails, Graves, Trap Lines, Spiritual sites (locations to be kept private unless authorized by the First Nations) within Traditional Territories
- (iii) Current and past potable water sources and infrastructure.
- (iv) Current and past travel routes within our Traditional Territories.
- (v) Amount of land within study area already taken up for development (energy, forestry, agriculture, pipelines, project footprints and related infrastructure, seismic activity, etc.) and analysis of how this affects traditional cycles of use.
- (vi) Traditional activities currently and potentially impacted by reasonably foreseeable industrial development.

(b) Quantitative and qualitative information on Current and Historical Traditional Uses (hunting, fishing, plants and medicines, spiritual use):

- (i) Hunting
 - (A) Main species hunted for food and domestic purposes and the uses made of those species;

⁸ Traditional territories of historically nomadic First Nations have extended vast distances and are very difficult to limit or measure in conventional terms. Over time, traditional activities have been focused in various areas associated with camps, summer villages and central areas. It is therefore necessary to define a study area for the First Nations which will properly reflect where the First Nations have carried out their traditional pursuits historically as well as today. Please note that a study area is not an area that defines the traditional lands.

- (B) Locations and access routes currently used for hunting main species
 - (C) Changes from 40, 20 and 10 years ago in locations and access routes used and costs associated with hunting main species based on such changes, both qualitative and quantitative
 - (D) Estimated amount of current consumption and percentage of total meat intake from hunted animals.
 - (E) Estimate of change in amount of hunted meat as a percentage of total meat consumed from 40, 20 and 10 years ago
- (c) Fishing
- (i) Main species fished for food and domestic purposes and uses made of those species
 - (ii) Locations currently used for fishing main species
 - (iii) Changes from 40, 20 and 10 years ago in locations used for fishing main species and costs associated with such changes, both qualitative and quantitative
 - (iv) Estimated amount of current consumption and percentage of total fish intake from fishing
 - (v) Estimate of change in amount of fish as a percentage of total fish consumed from 40, 20 and 10 years ago.
- (d) Gathering Plants and Medicines
- (i) Main species gathered and uses made thereof
 - (ii) Locations currently used for gathering main species
 - (iii) Changes from 40, 20 and 10 years ago in locations used for gathering main species and costs associated with those changes
 - (iv) Changes in frequency of gathering activities.
- (e) Spiritual and Cultural Use
- (i) Locations currently used for spiritual and cultural practices and information about the traditional, cultural and spiritual aspects of

land use (locations to remain confidential unless disclosure is authorized by the First Nations)

- (ii) Changes in location from 40, 20 and 10 years ago and costs associated with those changes, both qualitative and quantitative together with explanations describing the reasons why cultural and spiritual locations have changed.
- (f) Traditional Economic Pursuits
 - (i) Animals, plants, medicines used for barter or trade
 - (ii) Changes in bartering and trading from 40, 20 and 10 years ago and reasons for change
 - (iii) Estimated cost of purchasing goods previously gathered, hunted, fished, or traded or bartered.
- (g) Traditional Resource Pursuits
 - (i) Current forest and mineral resources gathered and used.
 - (ii) Changes in forest and mineral resources gathered and used from 40, 20 and 10 years ago.
- (h) Traditional Social Structure
 - (i) Information on sharing of traditional foods
 - (ii) Information on the social structure of hunting and gathering
 - (iii) Information on the relationship between hunting, gathering and trapping and the seasonal cycles of traditional land use
 - (iv) The changes in these traditional activities over time and the causes of the changes.
 - (v) The basic cost structure of traditional hunting and trapping and gathering from 40, 20 and 10 years ago. Costs should be measured in money and time
- (i) Socio-Economic Information
 - (i) Current demographics - age, family units, education, sex, private sector employment, FN public sector employment, self-employment)

- (ii) Changes in demographics from 40, 20 and 10 years ago
 - (iii) Predicted demographics in 10 years based on current trends
 - (j)
- (k) Occupations
 - (i) Number of individuals involved in traditional occupations and percentage involvement (full time, part time, weekends)
 - (ii) Involvement in private wage employment
 - (iii) Involved in private businesses
 - (iv) Employment by Band
 - (v) Employment by Government
 - (vi) Studying
 - (vii) Unemployed
 - (viii) Domestic work
- (l) Income
 - (i) Amount and sources (trapping, wage employment, etc.) of income
 - (ii) Changes in amounts and sources of income from 40, 20 and 10 years ago
 - (iii) Number and percentage of individuals and families receiving social assistance
 - (iv) Changes in number and percent of social assistance recipients from 40, 20 and 10 years ago.
- (m) Personal and Family Expenditures
 - (i) Expenditures on food, housing, travel and recreation
 - (ii) Changes in expenditures from 40, 20 and 10 years ago
 - (iii) Resource Sector Employment and Income (energy, forestry, agriculture, other)

- (iv) Current number of First Nation members employed in resource sector
- (v) Changes in number of people employed in resource sector from 40, 20 and 10 years ago
- (n) Educational and Training Information
 - (i) Level of education by location (Include traditional knowledge)
 - (ii) Level of training or skills by location (Include traditional knowledge)
 - (iii) Percentage enrolled in education or training (Include traditional activities)
- (o) Health Information:
 - (i) First Nation health problems by age and sex
 - (ii) Changes in health problems from 40, 20 and 10 years ago
 - (iii) Deaths (ages, causes)
 - (iv) Changes in causes of deaths from 40, 20 and 10 years ago
 - (v) Structure and changes in diet including types of traditional foods 40, 20 and 10 years ago
 - (vi) Health problems and causes of death compared to regional population

B. Cumulative Impacts

As noted earlier, Alberta assess the cumulative effects of development rather than the cumulative impacts of development and it does so from a very limited and narrow standpoint. In our view, this results in flawed or incomplete predictions. Information required to effectively assess the cumulative impacts of existing, planned and reasonably foreseeable development and their significance on the ability of the First Nations to exercise their rights now and into the future is often missing from this narrow Alberta focus. For example, companies are not required to assess things such as exploration and winter drilling activities, seismic activity, and forestry or parts thereof. We are simply not prepared to accept Alberta's narrow, legislated definition of "cumulative effects" in the development of the Plan. What is needed is a proper study of regional cumulative impacts and not narrow, project-specific effects.

In addition to properly identifying the existing, planned and reasonably foreseeable industrial development that must be assessed in a cumulative impacts assessment, it is also necessary to include in such assessments:

- The full footprint of the existing and future projects at issue
- Cut-blocks and linear developments such as roads, pipelines and power lines, including the impacts of same⁹

Additional information required to properly assess the cumulative impacts of development on our rights includes:

1. Cumulative Impact on our Traditional Territories and their Uses
 - (a) Amount (quantity and percentage) of potential oil sands deposits within our Traditional Territories
 - (b) Amount of land (quantity and percentage) currently leased for oil sands exploration within our Traditional Territories
 - (c) Percentage of oil sands leases developed in our Traditional Territories in past 10, 20, 30, and 40 year increments
 - (d) Amount of land within our Traditional Territories potentially impacted by other oil sands developments (reasonably foreseeable development and not simply applied-for projects)

⁹ For example, it is known that linear developments including seismic lines and pipelines provide open access that is used by ATVs for decades after they have been constructed. This indicates that there will be long-lasting effects of these developments, much past the closure scenarios indicated in many of the existing project-specific cumulative effects studies. These effects are therefore cumulative and must be included as part of proper information gathering.

- (e) Amount of land within our Traditional Territories already taken up for other non-oil sands developments (i.e. converted from natural vegetation)
 - (f) Amount of land within our Traditional Territories that is planned/reasonably foreseeable to be taken up by non-oil sands development
 - (g) Amount of our Traditional Territories lost to Traditional Uses because of direct and indirect impacts of development and how this impacts ability to carry out traditional pursuits, livelihood/usual vocations.
2. Impacts of Forestry
- (a) Forest tenure holders in our Traditional Territories
 - (b) Size of forest tenures in our Traditional Territories
 - (c) Estimated size of area of direct and indirect disturbance to wildlife relied upon by our First Nations within our Traditional Territories
3. Linear Corridors
- (a) Identification of all linear corridors (pipelines, transmission lines, roads, seismic lines) in Project area.
 - (b) Estimated size of area of direct and indirect disturbance to wildlife relied upon by our First Nations within our Traditional Territories
4. Other tenure holders
- (a) Identification of all other tenure holders in the Project area including exploration leases.
 - (b) Size of area of held by other tenure holders in our Traditional Territories
5. Reasonably Foreseeable Future Developments
- (a) The identification of all planned and reasonably foreseeable industrial activities within our Traditional Territories
 - (b) The infrastructure required to serve the future developments.
 - (c) The number of access roads, and size of accessible area, for all future developments, including exploration, based upon current averages.
6. Other Information

- (i) Impacts of climate change within the area of the Plan/within our Traditional Territories

Appendix D - Aboriginal and Treaty Rights Assessment and Traditional Resource Use Plans

On February 1, 2010, ACFN provided a conceptual framework for undertaking an Aboriginal and Treaty Rights Assessment and development of Traditional Resource Use Plans. The following is taken from the February 1, 2010 letter to Alberta Environment and Shell.

Background

Current EIA process does not analyze potential impacts of development from a Treaty rights perspective. The ACFN Treaty Rights are based upon their traditional livelihood and culture. Environmental studies conducted as part of the EIA process do not capture the impacts on their cultural ecosystem and the socio-economic studies do not even identify the ACFN as an entity to be studied. The needs of ACFN to exercise their rights in a meaningful and viable fashion are not studied from an ACFN perspective. These gaps in data are an impediment to meaningful decision making and often slow down regulatory processes.

ACFN is concerned that the current regulatory review process for the Shell Jackpine Mine and Pierre River Mine Applications will not properly examine potential impacts to ACFN's Treaty 8 rights. Some of the reasons are set out below.

- Social and cultural indicators are not linked and applied in an EIA Application to the assessment of impacts to the exercise of a First Nation's rights. For example, an Application will indicate potential changes to plants or animals and the Proponent will set out mitigation measures; however, consideration needs to be given to what that change means to the traditional resource user (the direct, indirect and cumulative impact to their livelihood, their ability to teach the next generation how to exercise the right, and the ability to have places to exercise the right that are not heavily impacted by development). Without consideration of these issues, the true ability of ACFN harvesters to exercise their rights is not assessed.
- The EIA included in these project applications does not seek to understand or consider the impacts on the ACFN cultural ecosystem, nor has Alberta or Shell sought to fully understand this information. Neither the ACFN livelihood nor their cultural ecosystem have been linked to the very things the EIA is supposed to assess such as water quality, air emissions, increase in noise, impacts on plants and animals and how all of this is in fact holistically connected.
- The methodologies in project-specific impact assessments are largely inadequate for elucidating the key relationships among socio-cultural and ecological aspects that support the meaningful practice of rights.
- There is no attempt in the Applications to assess the true impact of development from the Projects, and other developments within ACFN's Traditional Lands, on their ability to exercise their rights given the large cumulative infringements in the region. What attempt has been made by AENV or Shell to truly discern, as cases like *Sparrow* and *Van der Peet* require, the aboriginal perspective of the rights at stake in terms of assessing impacts?

- There is often an assumption that “mitigation” means giving jobs to First Nation members or taking fairly minor steps such as re-planting vegetation that will be lost. There is no discussion of the social and cultural impacts to the First Nation of taking up yet more of their lands, or removing more places where they can practice their rights and teach the next generation. There is an assumption that there will always be “other places”, animals, plants, waters and resources where this can be done which is contrary to the Mikisew decision. This is why there is a need to look at the tenures that have already been granted in the vicinity of the Project, both within ACFN’s Traditional Lands and extending to and surrounding an ACFN reserve, because a project-specific approach ignores the fact that there will likely be development on many of those tenures likely destroying the ability of the First Nation to use the reserve for traditional purposes.

Set out below are some other things that are not typically examined in EIA Applications nor in assessing potential impacts of development, but need to be examined/assessed as part of the duty to consult:

- **Impacts of existing disturbance:** impacts on Treaty rights are already adversely impacting ACFN’s Treaty 8 rights in many parts of their Traditional Lands. What we do not learn from EIAs is how the addition of disturbance (both project specific and other foreseeable projects) affects the already diminished exercise of Treaty rights. EIAs start with the "existing environment" as a baseline, but no one has assessed how much of a First Nation’s ability to exercise Treaty rights is already affected. Past EIAs have not included an infringement/adverse impact assessment on rights and hence, we do not know the effect of the additional infringement/adverse impact to something unknown.
- **Fragmentation affecting Treaty rights:** the fragmentation of the landscape also affects Treaty rights, not just the clearing of an area. Fragmentation can only be assessed if the connections in the full cultural ecosystem are assessed.
- **Disturbances by all industry activities:** most small projects, including exploration, camps, roads and even pilot projects do not trigger an EIA or require a cumulative effects assessment. These projects are, in turn, not usually shown on the disturbance maps shown in EIAs with the result that the predicted cumulative effects (on Treaty rights and anything else) are underestimated. This omission brings into question the reliability of the entire cumulative effects analysis.
- **Mitigation measures:** are usually project specific and it may be assumed that such mitigation measures are sufficient; however, they do not address potential direct, indirect and cumulative impacts on Treaty 8 rights
- **The need to access traditional areas to practice Treaty rights:** there is no assessment or requirement that would deal with the disruption of travel/ability to access parts of the Traditional Territory – gates, infrastructure, project footprints, etc.

Traditional, Cultural and Socio-Economic Assessment

The shortcomings of the current EIA and TOR system can only be remedied by conducting a proper impact assessment on Aboriginal and Treaty rights. There has been some discussion of the problems with the current EIA and traditional land use study methodologies above. This section will provide some

suggestions for conducting impact studies that capture the impacts on Treaty rights and socio-cultural ecosystems.

The nature of Aboriginal communities in the Treaty 8 area requires analysis of two inter-related socio-economic systems, 1) what could be called traditional activities and 2) mainstream socio-economic activities. In order to capture these activities the assessment requires two associated foci: 1) a thorough traditional land use and activities study integrated with; 2) a socio-economic conditions study. Although some information on each of these areas is included in current practices, the current EIA process (beginning with the Terms of Reference that guide the assessment) does not specify that links amongst these areas are made, especially with respect to an assessment of rights.

Socio-Economic Analysis

The primary failure of the current methodology is that socio-economic studies are conducted based upon an urban or rural region without identifying the aboriginal and treaty rights holders' conditions. Since the First Nations and Métis groups have different rights each group requires a separate study to identify the specific effects on that particular group. For example if the large development projects are preventing a First Nation from maintaining its language or traditional knowledge, that will not be relevant or important to non-native residents of Fort McMurray or Fort Chipewyan who are typically included in socio-economic study statistics associated with a typical SEIA.

Because of the differences in value systems and the Aboriginal legal rights, a socio-economic assessment must assess the relative importance of traditional practices and their relationship with mainstream social and economic activities. For the study to be used in the mitigation and compensation processes of consultation, quantification of changes in social and economic activities must be included. For example, the study should indicate the portion of time spent on traditional activities versus mainstream activities and how the portion has changed over time. A socio-economic study of a rights bearing community:

- 1) Must include and be limited to members of the First Nation or Métis community who are rights holders.
- 2) Should include typical as well as traditional issues. Examples:
 - a. Time spent in wage earning activities versus time spent on the lands hunting and gathering. (time and income, employment, activities).
 - b. Level of education in schools versus knowledge about traditional pursuits (traditional knowledge).
 - c. Consumption of traditional foods versus store bought foods.

In addition, the ACFN has the right to determine how they will exercise their rights over time. This requires, in addition to the proper impacts analysis on traditional lands and socio-economic conditions, a Traditional Resources Use Plan.

Purpose and Objectives of a Traditional Resource Use Plan (TRUP)

The purpose of the traditional resource use plan would be to provide credible, sufficient and reliable information on the land and resource needs of ACFN for the meaningful exercise of their Treaty 8 rights within their Traditional Lands now and into the future. Consideration of this information will lead to a more credible system of decision making which integrates FN information, and would ACFN, Industry and the Crown in making decisions about land and resource development.

Specific objectives are:

- Create a vision for what constitutes the meaningful practice of ACFN Treaty 8 rights currently and in the future;
- Identify what resources are integral to the meaningful practice of ACFN Treaty 8 rights;
- Determine the socio-cultural, ecological and economic conditions (including thresholds of acceptable change) that support the meaningful practice of ACFN Treaty 8 rights for each identified resource currently;
- Predict the socio-cultural, ecological and economic conditions that support the meaningful practice of the rights into the future;
- Identify key drivers of change and impacts to the resources and the conditions supporting ACFN use of the resource;
- Recommend land and resource management strategies that would ensure the continued meaningful exercise of ACFN Treaty 8 rights (e.g., protected or conservation areas; hunting restrictions; setbacks; timing windows; etc.)
- Integrate the information into an appropriate management tool format (e.g., GIS; planning documents) for use by decision-makers.

Time Frame to develop a TRUP

We estimate that this would take approximately one year of full time work by a dedicated team of experts to complete. This would ensure that there is sufficient time to conduct interviews, including community surveys, collect and analyze data, present data. Please note that the five month delay in your response to our questions should not be held against ACFN. This process would include the proper traditional land use assessment and the socio-economic assessment outlined above.

Project Team

The development of the TRUP would require guidance from and participation of the ACFN community in an interdisciplinary research exercise. An ACFN committee would be formed to guide provide input into key research stages, to work closely with the interdisciplinary research team to understand the ACFN issues of concern, to advise on liaising with the remainder of the ACFN community and on the selection of participants for workshops, interviews (and possibly fieldwork).

We anticipate that an interdisciplinary research team consisting of people with social science, landscape ecology, wildlife ecology, plant ecology, land and resource planning and project management expertise would be key to successful completion of the TRUP.

Required Information

A large variety of information will need to be collected, including, but not limited to:

- Key resources on which ACFN relies: fish, wildlife, vegetation, plants
- Information on the use of the resources: food, social, ceremonial, commercial, spiritual uses, cultural uses

- Specific information on the demographic conditions associated with the use and harvest of resources:
 - Number of, and demographics of, ACFN members that utilize certain types of resources and amount that is used (the measure of use must be specified – household, individual, etc.)
 - Resource pooling and sharing – are there relationships of reciprocity and exchange amongst ACFN members and non-ACFN members that contribute to the use of the resource?
 - Demographic information on who is harvesting
- Specific information on the harvesting of each resource (including differentiation amongst harvesting preferences for different uses of the same resource, if applicable):
 - amount harvested
 - timing of harvest (when is a resource harvested?)
 - preferred places for harvesting
 - preferred methods for harvesting
 - impediments experienced to harvest, if any
- Ecological requirements for each resource
- The socio-cultural and economic conditions required to harvest those resources, including:
 - Remoteness / Privacy
 - Aesthetics (visual, noise, odour)
 - Lack of contamination
 - Safety and risk
 - Access
 - Economic conditions (time available for harvest; costs associated with access)
 - Impacts of tenure grants – availability of lands and corridors
 - Multi-generational considerations (e.g., is it safe to bring children?)
- Key issues affecting resource harvest (ecological, socio-cultural and economic) currently
- Key issues that could affect resource harvest in the future
 - E.g., abundance of resource and competition for resources as a result of growing First Nations and non-First Nations populations in the region
- Thresholds of acceptable change for conditions sustaining each resource
- “Best Management Practices” and culturally-appropriate management practices

Methods

Some of the required information may be available as part of existing data sets; however, much of the information (especially quantitative information and detailed work on “conditions” or preferences) has not yet been collected. We will leave it up to the Project Team to detail the most appropriate methods for collection of information. However, we expect that there will be a variety of interviews, surveys and focus groups that would be required. Field work may also be required. Modeling would be required to examine possible future scenarios and to inform community work on thresholds identification.