

Back on track to socio-ecological ruin: Kearl oil sands project re-authorized

By Shaun Fluker

Cases Considered:

[*Imperial Oil Resources Ventures Limited v. Pembina Institute for Appropriate Development et al*, 2008 FC 598,](#)

[*Pembina Institute for Appropriate Development v. Canada \(Attorney General\)*, 2008 FC 302,](#)

My initial post on the Kearl project (see [Just a Bump on the Road to Socio-Ecological Ruin](#)) was accurate after all. Madame Justice Tremblay-Lamer's decision in *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, that held the Kearl joint panel breached section 34 of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, was simply a brief foray into environmental bliss. On June 6, 2008, the Department of Fisheries and Oceans re-issued the requisite authorization under the *Fisheries Act*, R.S.C. 1985, c. F-14, to Imperial Oil, reportedly on identical terms and conditions as set out in the original authorization (see my previous post [Federal Court upholds nullification of Kearl oil sands authorization for more discussion on the nullification of the initial authorization](#)).

The regulatory battle over Kearl was lost by its opponents in February 2007 when Alberta's Energy Resources Conservation Board (ERCB) licensed the project under the *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7, and the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10. Recall that during the hearing, the Regional Municipality of Wood Buffalo had requested the ERCB to deny the Kearl license to allow time for the Municipality to alleviate its public infrastructure and municipal services deficit caused by rapid oil sands development in the region. Alternatively, the Municipality requested the ERCB to condition its Kearl license to require Imperial Oil to contribute towards alleviating the deficit. The ERCB denied both requests, and in doing so the ERCB failed to exercise its obligation to have regard to the social and economic effects of the Kearl project in the Wood Buffalo region, as set out in section 3 of the *Energy Resources Conservation Act* (for more discussion of the ERCB's legal obligation imposed by this legislation, see Shaun Fluker, "The jurisdiction of Alberta's Energy and Utilities Board to consider broad socio-ecological concerns associated with energy projects" (2005) 42 *Alta. L. Rev.* 1085).

At the hearing, the Municipality informed the ERCB of its futile efforts to invoke action by the Alberta government to address the growing social problems in the region in years leading up to the Kearl hearing. Having received this submission, I find it very difficult to determine how

exactly the ERCB had regard to the social effects of the Kearl project when its response in the license decision was simply to recommend the Alberta government take action in the near future (see Kearl Oil Sands Project (February 27, 2007), EUB Decision 2007-013 at 29, online: ERCB <http://www.ercb.ca/docs/documents/decisions/2007/2007-013.pdf>). The ERCB's obligation under section 3 of the *Energy Resources Conservation Act* has to require more than simply making recommendations if this legislation is to have any meaning at all.

Consider for a moment how events may have unfolded if the ERCB had denied the Kearl license as requested by the Municipality AND the Alberta Court of Appeal had upheld such decision in the event of an Imperial Oil appeal. I believe the ERCB denial would have triggered significant and immediate Alberta government initiatives in the Wood Buffalo region to address some of the socio-ecological concerns of oil sands opponents as well as clear some of the uncertainty of oil sands proponents over the future land-use direction in the region. Eventually, the Kearl project would have proceeded anyways, but in a much different socio-ecological environment.