

No. \_\_\_\_\_

**FEDERAL COURT OF CANADA**

BETWEEN:

PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT,  
PRAIRIE ACID RAIN COALITION,  
SIERRA CLUB OF CANADA, and  
TOXICS WATCH SOCIETY OF ALBERTA

APPLICANTS

AND:

ATTORNEY GENERAL OF CANADA,  
MINISTER OF FISHERIES AND OCEANS,  
MINISTER OF ENVIRONMENT, and  
IMPERIAL OIL RESOURCES VENTURES LIMITED

RESPONDENTS

**NOTICE OF APPLICATION**

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Edmonton, Alberta.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitor WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: March 29, 2007

Issued by: \_\_\_\_\_

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local office: Federal Court of Canada  
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## APPLICATION

This is an application for judicial review in relation to an environmental assessment report published February 27, 2007 of a Joint Panel established by both the Government of Canada and the Alberta Energy and Utilities Board to conduct an environmental assessment of the Kearl Oil Sands Project (the “Kearl Project”). This application also seeks to prohibit the Minister of Fisheries and Oceans from issuing any authorizations or taking any other actions to enable the Kearl Project to proceed in whole or in part until an assessment has been conducted in accordance with the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (“CEAA”).

The applicants make application for:

1. An order or orders:
  - (a) Declaring that the environmental assessment conducted by the Joint Panel for the Kearl Oil Sands Project (the “Panel”) established under CEAA failed to comply with CEAA and with the *Agreement to Establish a Joint Panel for the Kearl Oil Sands Project* (including the Panel’s Terms of Reference) dated July 13, 2006 (the “Agreement”), and is therefore invalid and unlawful;
  - (b) Declaring that the Panel’s report and recommendations concerning the Kearl Project, entitled *Imperial Oil Resources Ventures Limited: Application for an Oil Sands Mine and Bitumen Process Facility (Kearl Oil Sands Project) in the Fort McMurray Area*, dated February 27, 2007 (the “Report”), failed to comply with CEAA and the Agreement, and is therefore invalid and unlawful;
  - (c) Directing that the environmental assessment and Report be referred back to the Panel for further consideration and determination in accordance with such directions as the Court considers appropriate to assure compliance with the legal requirements set out in CEAA and the Agreement;
  - (d) Declaring that the requirements of CEAA and the Agreement must be complied with before the Minister of Fisheries and Oceans issues any authorizations under the *Fisheries Act* or takes any other action for the purpose of enabling the Kearl Project to proceed in whole or in part;
  - (e) Prohibiting the Minister of Fisheries and Oceans from issuing any authorizations under the *Fisheries Act*, or taking any other action for the purpose of enabling the Kearl Project to proceed in whole or in part, until CEAA and the Agreement have been complied with;
  - (f) Quashing or setting aside any authorizations or approvals that may be issued, prior to the hearing of this matter, by the Minister of Fisheries and Oceans under the *Fisheries Act* for the purpose of enabling the Kearl Project to proceed in whole or in part;

- (g) Declaring that the Governor in Council has no jurisdiction to approve the Minister of Fisheries and Oceans' response to the Report under s. 37(1.1) of CEEA or to otherwise permit a course of action by the Minister of Fisheries and Oceans under s. 37(1) of CEEA until CEEA and the Agreement have been complied with; and,
  - (h) Quashing or setting aside any approval that the Governor in Council may issue under s. 37(1.1) of CEEA, prior to the hearing of this matter, for the purpose of enabling the Kearl Project to proceed in whole or in part.
2. An order that the applicants shall not be required to pay costs to the respondents of this application, pursuant to Rule 400 of the *Federal Courts Rules*, in the event that this application is dismissed.
  3. Such further and other relief as this Honourable Court may deem just.

The grounds for the application are:

1. The Kearl Project is a proposed oil sands mine and processing facility north of Fort McMurray in Alberta. The Kearl Project includes the design, construction, operation and reclamation of four open pit mines and three trains of ore preparation and bitumen extraction facilities. The Kearl Project is designed to produce more than 300,000 barrels per day of bitumen for a period of 50 years.
2. The Kearl Project is subject to environmental assessment under CEEA.
3. The applicants are non-profit organizations that are concerned about the environmental effects of the Kearl Project. The applicants are concerned about the lawful application of CEEA to the Kearl Project and to other oil sands projects in Canada.
4. The Minister of Environment has statutory responsibilities for the environmental assessment of the Kearl Project pursuant to CEEA and the Agreement.
5. Fisheries and Oceans Canada ("DFO") determined itself to be a "Responsible Authority" under CEEA responsible for preparing a federal environmental assessment of the Kearl Project. DFO's role as responsible authority arises from Imperial Oil Resources Ventures Limited's application for an authorization, pursuant to s. 35(2) of the *Fisheries Act*, to harmfully alter and/or destroy fish habitat. Pursuant to, *inter alia*, s. 5(1)(d) and s. 13 of CEEA, and Part I, s. 6(e) of the *Law List Regulations*, SOR/94-636, DFO is responsible for ensuring that an environmental assessment of the Kearl Project is undertaken in compliance with CEEA prior to issuing any s. 35(2) *Fisheries Act* authorization.
6. On January 18, 2006, the Minister of Fisheries and Oceans requested, pursuant to s. 25 of CEEA, that the federal Minister of Environment refer the Kearl Project to a review panel.

7. On June 14, 2006, the Minister of Environment referred the Kearl Project to a review panel in accordance with s. 29 of CEAA. The federal Minister of Environment determined that a Joint Panel should be established pursuant to s. 40(2) of CEAA to consider the Kearl Project.
8. On July 13, 2006, the Minister of Environment and the Chair of the Alberta Energy and Utilities Board signed the Agreement to establish a Joint Panel for the Kearl Project. The Minister of Environment entered the Agreement and approved or fixed the terms of reference for the Panel pursuant to s. 41 of CEAA.
9. In November of 2006, the Panel held hearings, at which some of the applicants appeared and made submissions.
10. On February 27, 2007, the Panel published its report and recommendations concerning the Kearl Project, entitled *Imperial Oil Resources Ventures Limited: Application for an Oil Sands Mine and Bitumen Process Facility (Kearl Oil Sands Project) in the Fort McMurray Area* (the "Report").
11. In the Report, the Panel purported to conclude with regard to its responsibilities under CEAA that the Kearl Project is not likely to cause significant adverse environmental effects, provided that the Panel's proposed mitigation measures and recommendations are implemented.

***Grounds of Review – Panel Report***

12. The Panel erred in law and/or in jurisdiction by failing to consider the factors listed in ss. 16(1) and 16(2) of CEAA and in the Agreement. Without limiting the generality of the foregoing, the Panel erred by:
  - (a) failing to consider the change that the Kearl Project may cause to listed wildlife species under the *Species at Risk Act*, S.C. 2002, c. 29, to those species' critical habitat or to the residences of individuals of those species;
  - (b) failing to consider the environmental and cumulative effects of the Kearl project, the significance of those effects, and the existence of technically and economically feasible measures that would mitigate the significant environmental effects of the Kearl Project;
  - (c) Incorrectly interpreting the terms "mitigate" and "mitigation", as used in CEAA (s. 2(1) and s. 16(1), *inter alia*) and in the Agreement;
  - (d) Incorrectly or unreasonably relying on various regional environmental management processes to address the significant environmental effects of the Kearl Project, when such processes are not "technically and economically feasible" measures that would mitigate the significant environmental effects of the Kearl Project;

- (e) Incorrectly or unreasonably considering that various regional environmental management processes would render the Kearl Project's environmental effects insignificant or could replace the Panel's mandatory inquiry into the significance of the Kearl Project's environmental effects;
  - (f) Incorrectly or unreasonably relying on uncertain future actions by the federal and provincial governments to mitigate the significant environmental effects of the Kearl Project, when such future actions are not "technically and economically feasible" measures that would mitigate the significant environmental effects of the Kearl Project; and,
  - (g) Failing to consider the effects of malfunctions or accidents that may occur in connection with the Kearl Project.
13. The Panel erred in law and/or in jurisdiction by failing to meet the requirements of s. 34 of CEAA and of the Agreement. Without limiting the generality of the foregoing, the Panel erred by:
- (a) Failing to ensure that the information required for an assessment by a review panel was obtained and made available to the public;
  - (b) Failing to provide a rationale in the Report, and in particular by failing to provide a rationale for their conclusion that the Kearl Project will have no significant environmental effects;
  - (c) Failing to provide a rationale for their conclusion that the effects of the Kearl Project on listed wildlife species under the *Species at Risk Act* would not be significant or could be mitigated, in spite of having insufficient information about the environmental effects of the Kearl Project on listed wildlife species, and in spite of uncertainties about the availability and effectiveness of mitigation measures;
  - (d) Failing to provide a rationale for their conclusion that various regional environmental management processes were technically and economically feasible and would mitigate the Kearl Project's significant environmental effects; and,
  - (e) Failing to provide a rationale for their conclusion that potential future actions of the federal and provincial governments would mitigate the Kearl Project's significant environmental effects.
14. The Panel's conclusion that the Kearl Project will have no significant environmental effects is premised on the Panel's reliance on other parties to implement mitigation measures and recommendations in the future. Such reliance is based on an incorrect interpretation of the Panel's duties under CEAA and under the Agreement, and is unreasonable based on the record before the Panel and based on the Panel's own findings.

15. In rendering its Report, the Panel erred in law and/or in jurisdiction by failing to take into account relevant considerations, or by taking irrelevant considerations into account.
16. In conducting the environmental assessment for the Kearl Project and in rendering its Report, the Panel erred in law and/or in jurisdiction in failing to meet the duties imposed by s. 4(2) of CEAA.

***Basis for Seeking Relief against the Ministers and the Governor in Council***

17. Compliance with the requirements of CEAA and the Agreement are mandatory prerequisites to the issuance of any authorization under section 35 of the *Fisheries Act* (sections 5, 11 and 13 of CEAA; Part I, item 6 of the *Law List Regulations*, SOR/94-636; and the Agreement). Until the requirements of CEAA and the Agreement have been complied with, DFO has no jurisdiction to issue any authorizations under section 35 of the *Fisheries Act* or to otherwise permit the Kearl Project to proceed in whole or in part.
18. The Governor in Council has no jurisdiction to approve DFO's response to the Report under s. 37(1.1) of CEAA or to otherwise permit a course of action by DFO under s. 37(1) of CEAA until an environmental assessment has been completed in accordance with CEAA and the Agreement (pursuant to s. 13 of CEAA).

***General Bases for Seeking Relief***

19. The applicants rely on sections 18, 18.1 and 18.2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the *Federal Courts Rules*, CEAA, the Agreement, and the *Species at Risk Act*, S.C. 2002, c. 29.
20. Such further additional grounds as counsel may identify and this Honourable Court may consider.

This application will be supported by the following material:

1. The Affidavit of Simon Dyer, on behalf of Pembina Institute for Appropriate Development, to be served.
2. The Affidavit of Dr. Martha Kostuch, on behalf of Prairie Acid Rain Coalition, to be served.
3. The Affidavit of Stephen Hazell, on behalf of Sierra Club of Canada, to be served.
4. The Affidavit of Myles Kitigawa, on behalf of Toxics Watch Society of Alberta, to be served.
5. The Panel's Report.

6. The record before the Minister of Fisheries and Oceans.
7. Such further and additional materials as counsel may advise.

Rule 317 request:

The applicants request that the Minister of Fisheries and Oceans send a certified copy of the following material – that is not in the possession of the applicants but is in the Minister’s possession – to the applicants, and to the Registry:

1. The record before the Minister of Fisheries and Oceans in considering and responding to the Panel’s Report under ss. 37(1) and 37(1.1) of CEEA, and in making his decision under s. 37(1) of CEEA for the purpose of allowing the Kearl Project to proceed in whole or in part.
2. The record before the Minister of Fisheries and Oceans in considering or issuing any authorizations for the purpose of allowing the Kearl Project to proceed in whole or in part.

Date: March 29, 2007

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