Alberta Tailings Ponds II (ATPII) Factual Record: A Submission under the NAFTA Environmental Side Agreement

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2 December 2020

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The Submission

Background

i. On 26 June 2017, Environmental Defence Canada and the Natural Resources Defense Council (based in the United States), along with Canadian resident Daniel T'seleie (the "Submitters"), filed SEM-17-001 (Alberta Tailings Ponds II) (hereinafter the "Submission") with the Secretariat. The Submitters assert that the Government of Canada ("Canada") is failing to enforce the pollution prevention provisions of the federal *Fisheries Act* with respect to alleged leaking of deleterious substances, and specifically oil sands processed water (OSPW), from tailings ponds of oil sands operations in northeastern Alberta. On 20 August 2018 in Council Resolution 18-01, the CEC Council unanimously instructed the Secretariat to develop a factual record for submission SEM-17-001 (see paragraphs 6-24, below).

Scope of the Factual Record*

Scope of Factual Record

ii. In accordance with Council Resolution 18-01, this factual record presents relevant factual information relating to the Submitter's assertions concerning effective enforcement of the pollution prevention provisions (subsection 36(3)) of the *Fisheries Act*, in connection with:

- Alberta's relationship with Canada with respect to the assertions and specific sites referred to in the submission, as well as other specific sites mentioned in Canada's response;
- the state of the publicly available peer-reviewed science on identifying differences between naturally-occurring bitumen-influenced water and anthropogenic oil sands process-affected water (OSPW); and
- how the Oil Sands Monitoring Program (OSMP, formerly the Joint Oil Sands Monitoring Program) is carried out and how it fits into Canada's enforcement of the *Fisheries Act*.

*many twists and turns in the course of this submission's history

Environmental Law in Question

Fisheries Act subsection 36(3)

- 36(3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance…may enter any such water.

- [Subs 36(4) refers to deposits authorized by regulations – *none are presently applicable* to oil sands but effluent regulations are currently being developed]

2 Modes of Contravention

[23] In *R v Western Stevedoring Co.*, [1984] BCJ No. 1450 (CA) the BC Court of Appeal confirmed that this element of a s. 36(3) offence may be provided by **two potential methods of de**posit:

i. The deposit of a deleterious substance into water frequented by fish; or
ii. The deposit of a deleterious substance somewhere where it may enter water frequented by fish.

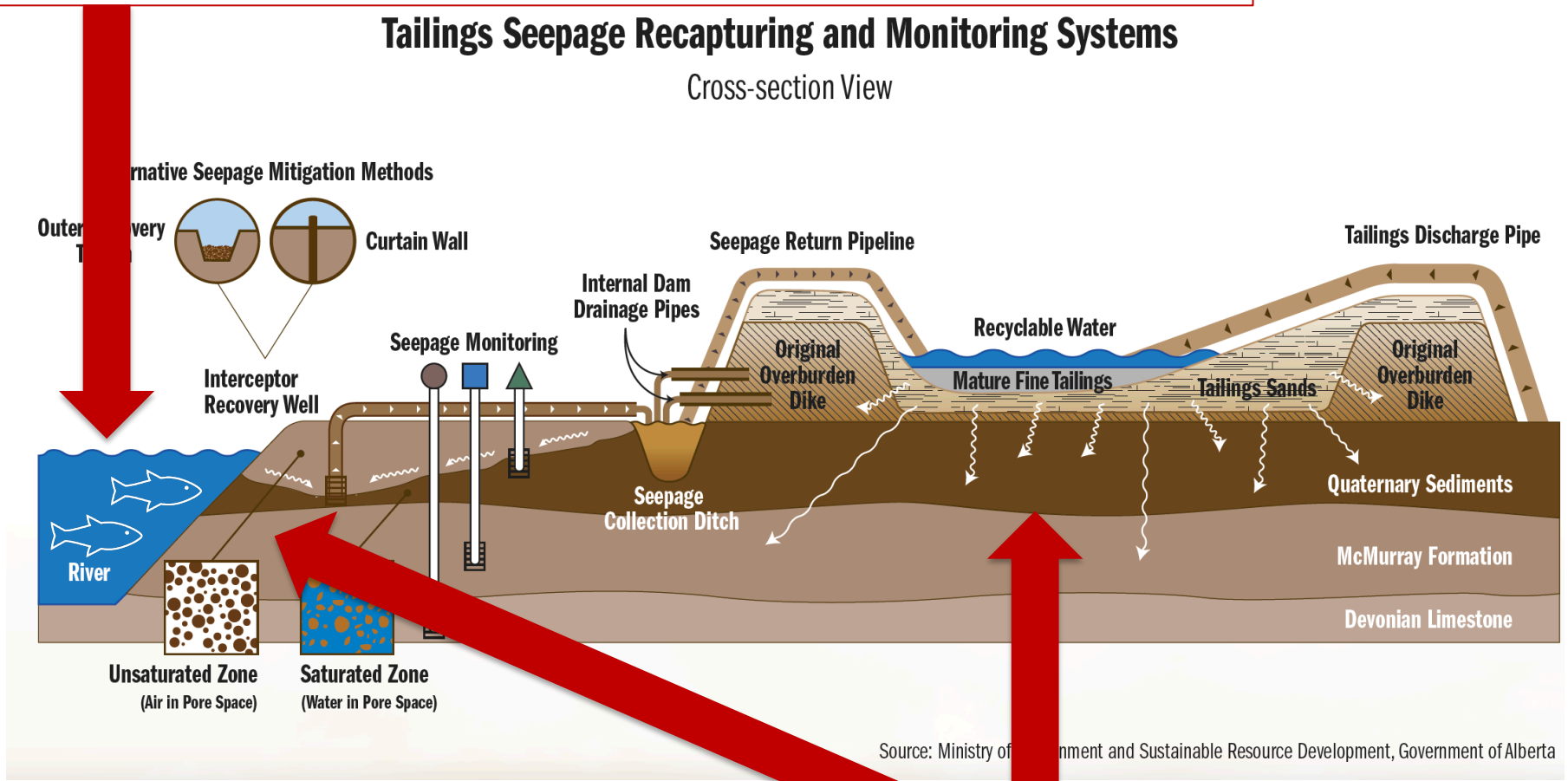
For the second mode, **it is not necessary to prove that the deleterious substance actually entered the water, *only that it could have.***

R v Gibson Energy ULC, 2019 ABPC 191 (CanLII)

62. The Secretariat notes that, as interpreted by Canadian courts, the deposit of a deleterious substance *in a place* where it *may* enter water frequented by fish is sufficient to constitute a violation of subsection 36(3). "May" connotes possibility, and not probability.[73] Thus, a contravention of subsection 36(3) could occur if OSPW was directly deposited into waters frequented by fish, or if it was deposited in a place where it may enter such waters.[74] In the context of the oil sands, OSPW is placed into tailings ponds which the Submitters allege are leaching into groundwater and the surface waters of the Athabasca river, which is a fish-bearing water body.

2 Modes of Contravention cont'd

1st mode: prove OSPW deposited in fish-bearing waters (BRD)



2nd mode: prove OSPW could enter fish-bearing waters after being deposited in tailings ponds (BRD)

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Relevant Findings

iii. Regarding the information presented in this factual record concerning the above scope, a review of the information shows:

- The Secretariat could not locate any information supporting any relationship between Alberta and Canada with respect to releases from tailings ponds at sites referred to in the submission or Canada's response. There are, however, a number of documents, including interagency agreements and policies, which create the structure for a relationship with respect to the *Fisheries Act* and other areas which may concern oil sands tailings ponds (e.g., interagency notification process for spills and releases between Alberta and Canada) as well as the OSMP, which is discussed below.
- The Secretariat commissioned an independent expert to assess the state of peer-reviewed science relevant to this investigation. The expert concluded that there is scientifically valid evidence of OSPW seepage into near-field groundwater around tailings ponds, especially when compared with the first peer-reviewed evidence published in 2009. However, there is generally less publicly available peer-reviewed science that OSPW is reaching natural surface waters.
- With respect to OSMP, as Canada noted in its response to the Submission, the program does not have an enforcement mandate but is rather an ambient monitoring program designed to support and inform regulatory and policy decision-making concerning any potential environmental impacts of oil sands operations.

Relevant Findings cont'd

107. Section 5 of the report provides volumetric estimates of seepage of process-affected water that has migrated from the ditch system. Chloride concentrations were used to determine volumes, using a ratio of the observed parameter to the concentration observed in the ABS.[123] The volume of process-affected water outside the perimeter ditch system containment area was 730,319 m^3 (summer), 785,431 m^3 (fall) in 2017, demonstrating a slight increase from the 2016 modeled volume of 630,658 m^3.[124]

110. The Secretariat's expert reviewed Suncor's report, which consists of primarily data and little supporting narrative, and concluded that although Suncor Pond 1 is currently being reclaimed and no longer contains any surface OSPW, 10 wells there have water chemistry reflective of a potential influence of OSPW.[125] All of these wells appear to be within 150 m of the Athabasca River. NA concentrations in these wells have remained stable since 2007. The Secretariat notes that these results are consistent with the published results of Frank et al. (2014) and Roy et al. (2016), which studied seepage of OSPW from the same tailings pond. This consistency appears to further confirm likely OSPW influence in these monitoring wells.

Nevertheless, the Secretariat's expert acknowledges that two tributaries (Beaver River, McLean Creek) are suspected of receiving OSPW seepage or runoff from nearby tailings ponds.[197] This is based on elevated NA concentrations, and similar organic and inorganic chemistry profiles compared to fresh OSPW. McLean Creek's upper watershed was redirected by construction of a nearby tailings pond, and its lower watershed is known by the industry to be a possible site of OSPW seepage. Accord-

Moving Forward…

- Transparent, comprehensive, and participatory (esp. downstream communities) investigation into tailings ponds leaching?

3.1.3. Selected Policies Implementing the Pollution Prevention Provisions

68. With respect to the habitat protection and pollution prevention provisions of the *Fisheries Act*,[80] Environment Canada and the Department of Fisheries and Oceans have issued an enforcement policy statement for these two sets of provisions.[81] Regarding inspections, the power of which is derived from the Act, the policy states:

> Inspection requires that a Fishery Officer or Fishery Guardian [including Fishery Inspectors] must have reasonable grounds to believe that there are activities or things that are subject to the *Act* or are relevant to its administration. In carrying out an inspection, the Fishery Officer or Fishery Guardian is verifying compliance with the *Act* and is not undertaking a search in order to gather evidence of an alleged offence.[82]

69. Searches, as opposed to inspections, generally require a warrant. Searches involve a belief of reasonable grounds that an offence has been committed:

> Search requires the belief, on reasonable grounds, that an offence has been committed before a Fishery Officer [or Inspector] may enter premises to search for evidence of an alleged offence. The officer may search for anything that he or she believes on reasonable grounds will provide evidence of a violation of the *Act*, or that was used in connection with the commission of an offence against the *Act*.[83]