

ENCANA SHALLOW GAS INFILL DEVELOPMENT PROJECT  
AND EUB APPLICATION NO. 1435831

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JOINT REVIEW PANEL HEARING CONDUCTED PURSUANT TO:  
SECTION 4.5 OF THE "AGREEMENT TO ESTABLISH A PANEL  
FOR THE ENCANA SHALLOW GAS INFILL DEVELOPMENT PROJECT"  
AND THE EUB'S RULES OF PRACTICE

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PROCEEDINGS AT HEARING

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Energy Resources Conservation Board  
Govier Hall, 640-5th Avenue S.W.  
Calgary, Alberta

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 Bill Ross, Panel Member  
 Gerry DeSorcy, Panel Member

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**DESCRIPTION**

**PAGE NO**

**There were no exhibits entered**

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THE CHAIRMAN: Ladies and Gentlemen, good morning and welcome to our proceedings. A general observation this morning, I see nothing out of the ordinary with, out of the ordinary with respect to our costumes here this morning so I thought I would make that note. Secondly, we have a problem, Mr. Lambrecht. Sorry, I'm not awake yet this morning.

MR. LAMBRECHT: I can understand, sir.

**PRELIMINARY MATTERS SPOKEN TO:**

THE CHAIRMAN: Mr. Lambrecht, we have a problem with the, the screen behind us, so what we're going to do during your presentation is just move ourselves over there so we can see it, just for the purposes of the presentation. I think that's the only way we can observe it on the screen if you think that makes sense.

MR. LAMBRECHT: Right. Now, my understanding was that the materials would display on the screen but not on the Members -- not on the computers of the Members' screens.

THE CHAIRMAN: That's correct. We can't see the material on our computers but if we do move over there we will be able to see it on the screen. I think that may be the only way we can observe it.

1 MR. LAMBRECHT: I, I hate to displace you  
2 from your chairs in that manner. And I can read from  
3 the materials and give you the citations, if that  
4 would be of any assistance rather than displacing you.

5 I should have copies of most everything here  
6 and -- but if you're willing to move and can see that  
7 far, I know I can't see that far.

8 THE CHAIRMAN: We are quite prepared to  
9 move. I think that's a rather minor disruption,  
10 Mr. Lambrecht. So we're prepared to do that.

11 MR. LAMBRECHT: All right. What I had, what  
12 I had done is I had prepared a kind of an electronic  
13 compendium to be able to refer to, to documents  
14 during, during the course of my presentation. Some  
15 are highlighted. The ones that I had a chance to work  
16 on prior to Mr. Denstedt's delivery are highlighted.  
17 A few of the references have been responsive to  
18 Mr. Denstedt's submissions and will not be  
19 highlighted.

20 If at any point, Mr. Chairman, or Panel  
21 Members, you feel that observing the screen is simply  
22 not having an effect for you, I would welcome your  
23 comments to me to that effect and then I can proceed  
24 accordingly.

25 THE CHAIRMAN: Okay. Thank you,

1 Mr. Lambrecht. We will, we will move over and see  
2 where that takes us.

3 But before we do there is one other matter I  
4 want to refer to before you begin and it has to deal  
5 with my intervention yesterday about the transcript  
6 with respect to Friday, October 24th.

7 As you may recall, yesterday morning I  
8 intervened to correct the transcript with reference to  
9 page 3675. This morning I listened to the oral  
10 recording and I wish to report to you that my actual  
11 intervention on, on October 24th was correctly  
12 transcribed.

13 However, I felt that my intervention, when I  
14 reread it, was not as clear as I'd liked it to be,  
15 hence my intervention yesterday. As you can  
16 appreciate, this is a matter of considerable  
17 importance to this Panel and I want to confirm once  
18 again that there have been no meetings or discussions  
19 involving this Panel and the various chairs of the EUB  
20 and Ministers of the Environment on matters of this  
21 proceeding nor any direction received from them other  
22 than our Terms of Reference for this review. So,  
23 again, I wanted to make sure that that was clear and  
24 take this opportunity to do so.

25 So, with that, Mr. Lambrecht, you may proceed

1 and we will just shift ourselves to the other table.  
2 Just excuse us for one moment.

3 **CLOSING ARGUMENT OF GOVERNMENT OF CANADA, BY**

4 **MR. LAMBRECHT:**

5 MR. LAMBRECHT: All right. Thank you for  
6 this accommodation, Mr. Chairman and Panel Members. I  
7 would like to start with a brief outline of my  
8 argument and then following the outline, I would like  
9 to take some minutes to speak about values associated  
10 with this case.

11 I would like to talk about the principles of  
12 environmental assessment, baseline data, the Regional  
13 Study Area design, water, professional judgment in the  
14 assessment of significance in this environmental  
15 assessment, the tempo and pace of development as it is  
16 proposed, fragmentation, reclamation, the legal  
17 framework that supports all of this, and a short  
18 conclusion.

19 I hope that this will go relatively quickly  
20 and I would welcome any questions that you might wish  
21 to ask during the course of my submissions to you.

22 The theme of the submissions is going to be  
23 that the EIS and the evidence tendered by EnCana to  
24 the Joint Review Panel contain such uncertainty that  
25 it is inadequate to support the articulation of a

1 rationale that the environmental effects of the  
2 Project are not likely to be significant having regard  
3 to the implementation and mitigation and follow-up  
4 measures.

5 I know this Panel has a particularly high  
6 level of expertise and I'm going to try to deliver my  
7 submissions at that level. I, I am going to attempt  
8 to show why, in my respectful submission, on behalf of  
9 the RAs and the Federal Authority -- the Responsible  
10 Authority and the Federal Authorities that the Joint  
11 Review Panel has not been provided with adequate  
12 information from which it could reasonably articulate  
13 a rationale.

14 Now, because the uncertainties are evident on  
15 the face of the material, my submissions are going to  
16 consist of a reasonably probing inquiry into the  
17 design and methodology of the EIS and the Panel -- and  
18 the EnCana Panel evidence and its compliance with the  
19 Terms of Reference signed by Rona Ambrose as the  
20 Minister of Environment October 17th '06 and Neil  
21 McCrank as Chairman of the Alberta Energy and  
22 Utilities Board, or AEUB, on November 14th, 2006, and  
23 the EIS guidelines sent to EnCana by the Chairman of  
24 this Panel, Mr. Connelly, on December 20th, 2006.

25 I offer up, as the first of the proof of the

1           uncertainties, a comment that falls from  
2           Mr. Denstedt's comments yesterday in his submissions  
3           where he indicated that the ERCB had statutory  
4           responsibilities under Alberta legislation and the  
5           Alberta Energy and Utilities Board. I have a draft of  
6           his submissions which were made available to me and so  
7           I'm speaking from the draft here, not the final  
8           version and it may not be completely accurate but I  
9           think it captures the substance of it.

10                       Mr. Denstedt was speaking about the 1975  
11           Surface Access Agreement and the fact that it, it  
12           referred to legislation which was now repealed. And  
13           he was saying:

14                       "The implications of a contract  
15                       which incorporates repealed  
16                       legislation is a matter of simple  
17                       contractual interpretation. This  
18                       is determined by looking at the  
19                       intention of the parties and  
20                       imparting the most commercially  
21                       reasonable meaning to the language  
22                       contained in the agreement. In  
23                       other words, the question is  
24                       whether the parties intended to  
25                       incorporate the legislation that

1                   stood at the time of the contract  
2                   or ... the legislation as amended,  
3                   altered or subsumed.

4                   The Supreme Court of Canada,  
5                   no less, has indicated it will  
6                   only interpret a contract as  
7                   incorporating amendments or newly  
8                   enacted legislation if the  
9                   requisite intention to do so is  
10                  clearly contained within the  
11                  contract.

12                  EnCana submits that a clear  
13                  intention to incorporate newly  
14                  enacted legislation cannot be  
15                  found in the [Surface] Access  
16                  Agreements ...

17                  A commercially reasonable  
18                  interpretation of this contract  
19                  leads to the conclusion that the  
20                  parties should continue to apply  
21                  the legislation as incorporated at  
22                  the time of the contract as  
23                  improved by ... recent guidelines  
24                  and development enhancing the  
25                  development and reclamation

1 process."

2 Now, Mr. Denstedt went on to make submissions  
3 about the jurisdiction of the ERCB, but this Panel is  
4 sitting as with a Provincial component of the Alberta  
5 Energy and Utilities Board and not the Energy  
6 Resources Conservation Board, a fact mentioned by  
7 Mr. Mousseau, counsel to the Panel during the public  
8 hearings a few days ago.

9 Now, this may be a small point, but if EnCana  
10 is relying on the 1975 Surface Rights Access Agreement  
11 as authority for the proposition that the ERCB has the  
12 authority to grant it development and application  
13 approvals within the CFB Suffield, then one of two  
14 things is wrong. Either EnCana has come before the  
15 wrong board or the EnCana position submitted by  
16 Mr. Denstedt, which I read out to you a few moments  
17 ago about reasonable interpretation of the Surface  
18 Rights Access Agreement is wrong.

19 My submission to you is that it's the latter  
20 and you will recall that my cross-examination of  
21 Mr. Protti made it reasonably clear that the parties  
22 have long since ceased to abide by the strict letter  
23 of the 1975 Access Agreement because events have  
24 passed it by on a number of fronts.

25 The spirit of that Agreement lives on, but to

1 suggest that EnCana has the right to go to the ERCB to  
2 get development reclamation approvals is simply  
3 erroneous, in my submission.

4 Now, my focus is going to be to not to reply  
5 to the various errors which, in my submission, are  
6 replete within Mr. Denstedt's submissions. Rather, I  
7 would like to focus on assisting the Panel in its dual  
8 function first, making a decision with respect to the  
9 application for three well licences, and, second,  
10 preparing a final report with conclusion and  
11 recommendations with respect to the environmental  
12 assessment of the Project for the Governor in Council  
13 with respect to the application for a permit for 1275  
14 natural gas wells.

15 So with that introduction I would like to  
16 turn to the question of values, and values are  
17 outlined in the EIS Guidelines which is  
18 Exhibit 001-005, page 6, Item 4.1, which provides:

19 [As read]

20 "The value of an environmental  
21 component not only relates to its  
22 role in the ecosystem but also to  
23 the value placed on it by humans  
24 from a cultural, social and  
25 economic point of view."

1           So I think it's important at the outset to get  
2           kind of a bigger picture image of what is occurring  
3           within Suffield and the region so that the context of  
4           the submissions which follow can be placed.

5           Mr. Drummond, perhaps you could put up the  
6           first of these exhibits then. It's 007-006.

7           This is the Oil Agreement from 1977 and I've  
8           highlighted the passage which I want to rely upon.  
9           This was put to Mr. Protti in cross-examination and he  
10          had no dispute with this.

11          This is a preamble to this agreement and it  
12          recognizes the Military value of Canadian Forces Base  
13          Suffield. It says:

14          [As read]

15          "The nature of the Base, including  
16          its location and substantial area,  
17          constitutes a unique asset for  
18          Canada for use for Military  
19          purposes which Canada considers  
20          irreplaceable in financial or any  
21          other terms."

22          So we're dealing with a very unique Military Base  
23          here. There are a number of Federal legislative  
24          authorities which flow to the Base Commander from  
25          powers exercised by Parliament. There is legislative

1 power over public lands and property. There's  
2 legislative power under National Defence and there's  
3 treaty, treaty implementation power and, as you know,  
4 the British Training Army Unit Suffield trains at, at  
5 Suffield through an international agreement which  
6 ultimately flows from Canada's NATO Treaty  
7 obligations.

8 Now, within CFB Suffield there is a further  
9 unique place and that of course is the National  
10 Wildlife Area. And the RIAS contains some material,  
11 interpretive provisions there and that's at 002-132.  
12 And that provides that -- Mr. Drummond perhaps you  
13 could put that up, 002-132:

14 [As read]

15 "The expansion and consolidation of  
16 key prairie habitat areas for  
17 migratory birds will be an  
18 important contribution towards  
19 Canada's international agreements,  
20 including the Migratory Birds  
21 Convention, the North American  
22 Waterfowl Management Plan, the  
23 North American Bird Conservation  
24 initiative and the United Nations  
25 Convention on Biological

1                   Diversity. A wildlife policy for  
2                   Canada emphasizes the protection  
3                   of habitats and ecosystems. It is  
4                   the most cost effective method for  
5                   preserving wildlife. Given that  
6                   the amount of wildlife habitat is  
7                   declining in Canada as diverse and  
8                   unique areas become increasingly  
9                   encroached upon. Moreover, the  
10                  policy indicates that restoring  
11                  habitat is difficult, expensive  
12                  and often impractical. An  
13                  effective protective option,  
14                  therefore, is to incorporate  
15                  important sites such as CFB  
16                  Suffield, NWA lands, into the  
17                  Federal system of national  
18                  wildlife areas as recommended in  
19                  the implementing of the Canadian  
20                  biodiversity strategy protected  
21                  areas."

22                  And then further in the RIAS:

23                         [As read]

24                         "The NWA designation will secure a  
25                         block of prairie habitat

1 sufficient to support the full  
2 spectrum of prairie flora and  
3 fauna endemic to the region. This  
4 contribution to prairie species  
5 conservation, whereby large blocks  
6 of native prairie landscape are  
7 protected under a single  
8 jurisdiction for the benefit of  
9 endemic species and their habitats  
10 is unique because no similar  
11 opportunities will arise in the  
12 future. The area will provide a  
13 secure habitat in which species  
14 can reproduce and repopulate  
15 surrounding prairie environments  
16 currently impacted by human  
17 development and population  
18 growth."

19 The idea that -- now, the Wildlife Area is a  
20 unique thing because not only does it support the  
21 purposes of the **National Wildlife Act**, but since its  
22 creation Parliament has enacted the **Species At Risk**  
23 **Act** whose purposes are outlined in Section 6 of SARA  
24 and the function of the National Wildlife Area and the  
25 species at risk area collectively both support, again,

1 Canada's international treaty obligations, **Migratory**  
2 **Birds Convention Act** and the **UN Convention on**  
3 **Biological Diversity**.

4 The regulatory jurisdiction flowing and  
5 supporting these legislations is, is that of --  
6 primarily that of Federal property. In other words,  
7 it's Federal control over the property on which these  
8 birds reside or dwell in the course of their lifespan  
9 that is what drives this. Overall management of these  
10 species inevitably requires cooperation with the  
11 Provinces because the species moves outside of Federal  
12 jurisdiction and on to Provincial jurisdiction.

13 But when they're resident or located on  
14 Federal lands they fall under Federal protection. And  
15 the **Species At Risk Act** in particular is an important  
16 change to the legal environment because it brought  
17 about an amendment to the definition of "environmental  
18 effects" in the **Canadian Environmental Assessment Act**,  
19 one which was not present when the Express Pipeline  
20 case went to a Joint Review Panel and something which  
21 I will address a little more completely further in my  
22 submissions to you.

23 Now, the idea that the National Wildlife Area  
24 supports wildlife to repopulate the areas is referred  
25 to in the EIS of the Proponent, of EnCana. At Exhibit

1 002-018, Appendix 4A, page 26, curiously enough in the  
2 socio-economic baseline conditions report there's a  
3 passage which shows the location of CFB Suffield in  
4 relation to the surrounding hunting areas within  
5 Alberta. And the authors of this report note that:

6 "While there is no hunting activity  
7 on CFB Suffield or in the National  
8 Wildlife Area the Base provides  
9 important wildlife habitat and  
10 likely affects wildlife abundance  
11 in the surrounding areas."

12 Now, within -- that's the Base itself. The  
13 detailed socio-economic conditions report provides  
14 some interesting context for what's occurring around  
15 the Base from an environmental point of view.

16 And I would ask you to turn next,  
17 Mr. Drummond, if you could to page 4826 of this  
18 report.

19 Now, what -- it's page 26 and this discusses  
20 the amount of oil and gas activity in the region and  
21 it says:

22 [As read]

23 "Detailed statistics on oil and gas  
24 activity in the RSA are not  
25 available. However, according to

1                   the Petroleum Services Association  
2                   of Canada ..."

3                   I'm sorry, I'm going way too fast:

4                   [As read]

5                   "Southeast Alberta has 48 percent  
6                   of all wells in Alberta and 37  
7                   percent in all of Canada. The  
8                   region's oil and gas industry is  
9                   estimated to employ between 4 and  
10                  5,000 people and includes over  
11                  170 companies. It is estimated  
12                  that over 8,000 new wells were  
13                  scheduled to be drilled in  
14                  southeast Alberta and southwest  
15                  Saskatchewan in 2006."

16                  With respect to employment there's a comment at  
17                  page 14:

18                  [As read]

19                  "Currently, this region has the  
20                  lowest rate on unemployment in  
21                  Alberta. Those low rates suggest  
22                  that the regional labor force is  
23                  essentially fully employed and  
24                  that anyone who wants to work can  
25                  be employed."

1           There's a comment on other economic developments  
2           which appears at page 16. For the near future, the  
3           rapid pace of economic development in the RSA and, for  
4           this purpose only, as I understand it, EnCana used  
5           something more than Canadian Forces Base Suffield, is  
6           expected to continue. Alberta Economic Development  
7           maintains a list of all major projects having a total  
8           value in excess of 2 million that have been announced  
9           or proposed.

10           Table 4A-11 summarizes these projects at  
11           locations in the RSA by sector and status. Overall,  
12           the 21 projects have a combined value of nearly  
13           3,208 million. 16 of the projects are proposed for  
14           Brooks and Medicine Hat and would have a combined  
15           value of \$235 million.

16           My review of the chart that appears there  
17           suggests to me that oil and gas may not necessarily be  
18           included in this because there's no specific reference  
19           to the kind of development from the drilling of  
20           8,000 wells that might be suggested.

21           Now, if I -- interestingly, in relation to  
22           all of this, the comment makes -- the EnCana EIS makes  
23           a comment about the relative value of the current  
24           development in the National Wildlife Area at page 31  
25           of that report. And it simply says that:

1 [As read]

2 "From the perspective of the  
3 overall regional economy existing  
4 gas production in the NWA can be  
5 characterized as beneficial but  
6 very small."

7 And that's at page 31 of this document.

8 Now, Mr. Drummond, perhaps I could ask you to  
9 turn next, please, to EIS Volume 3 which is  
10 Exhibit 002-013 at pages 7 and 8. What I'm going to  
11 turn to here, Panel Members, is the EnCana discussion  
12 of what's occurring within the Suffield Block from a  
13 Military training point of view and from an economic  
14 development point of view within -- this is the  
15 cumulative effects assessment section and there are  
16 two comments here.

17 First, which appears at 002-013, pages 7  
18 and 8, and particularly page 8, I think, that EnCana  
19 forecasts 2325 shallow natural gas wells to be drilled  
20 within the Canadian Forces Base Suffield as a whole in  
21 the period to 2012 and it projects that infill  
22 drilling of all of the sections to 16 wells per  
23 section would be complete by that time.

24 This is at pages 7 and 8. I have not had an  
25 opportunity to highlight this. Yes, 002-013,

1 Chapter 7, page 8. I don't think I need to display  
2 this for the purposes of this part of the  
3 presentation.

4 It also goes on to discuss the expansion of  
5 Military training. It talks about the existing  
6 training being at the battle group level and gives an  
7 explanation of the number of vehicles involved in  
8 that. It goes on to explain that the British army  
9 would like to expand its training at Canadian Forces  
10 Base Suffield in the coming years to include a mix of  
11 what is described as battle group and formation level  
12 training.

13 The formation level training is also  
14 described in terms of the number of vehicles and the  
15 implications for live fire exercises and the number of  
16 personnel that are involved, but the implication on  
17 this is that -- and it's clearly stated in the EIS,  
18 that training will increase in its intensity and over  
19 a broader area of the National Training Area in the  
20 coming years.

21 Now, the evidence of Lieutenant Colonel Bruce  
22 was that the Auditor General of Canada conducted an  
23 examination of the Federal ability to sustain Canadian  
24 Forces based across the country from an environmental  
25 perspective for training areas.

1                   The Department of National Defence has  
2                   augmented its environmental stewardship and the amount  
3                   of environmental oversight of activities within the  
4                   Canadian Forces Bases across the country, and in  
5                   Suffield in particular, has increased in recent years.

6                   You will recall the evidence of Lieutenant  
7                   Colonel Bruce that at Suffield, what he described as  
8                   the RSS, or the Range Sustainability Section, was  
9                   stood up, I think, was the phrase that he used, or  
10                  come into effect quite recently within the last year  
11                  or year-and-a-half and that the Base Commander uses  
12                  what is described as RTAM, so the Range Training Area  
13                  Management System, to oversee multiple uses and as an  
14                  effective management plan for the purpose -- all of  
15                  the purposes of the various land uses on the Base.

16                  Now, this increasingly active exercise of  
17                  environmental stewardship by the Department of  
18                  National Defence has not gone without notice by EnCana  
19                  and I think it's fair to say that the Nishimoto well  
20                  incident probably comes at a time which marks a  
21                  transition from what had occurred before to what is  
22                  going to occur in future. And you will recall that  
23                  well.

24                  At around that time, the evidence of the Base  
25                  Commander, and I think it was confirmed by the SIRC

1 representative, was that SIRC had been signing, on  
2 behalf of the Base Commander, in applications for well  
3 licences demonstrating landowner consent, without  
4 knowledge of the Base Commander, for a period of time.  
5 And when the well in the wetland, described as the  
6 Nishimoto well was discovered, there was a struggle  
7 over its withdrawal, ultimately leading to a letter  
8 from the Base Commander referred to by Ms. Klimek and  
9 others in evidence and the, and the closure of that  
10 well.

11 So, interestingly enough, this marks a  
12 transition in the management regime and the exercise  
13 of active environmental stewardship by DND and it  
14 should not be overlooked that there's a change in what  
15 is occurring.

16 Now, during my friend's submissions, he made  
17 a comment that was, was sort of a straw man argument  
18 which I think I need to respond to at this point, and  
19 that is that some sort of suggestion had been made,  
20 which is not true, that the Base Commander could shut  
21 down the Base or close access, or refuse oil and gas  
22 activity on the Base at any time for any reason; in  
23 other words, exercise completely arbitrary authority.

24 Now, there are over 10,000 wells on Canadian  
25 Forces Base Suffield. It is absolutely ridiculous to

1 suggest that the Base Commander has exercised  
2 arbitrary authority which has interfered with the  
3 development of oil and gas industry on Canadian Forces  
4 Base Suffield. It's quite the opposite.

5 The parties have attempted to work within the  
6 spirit of this agreement recognizing dual use, but, in  
7 my submission, recognizing the primacy of the use of  
8 that Base for Military purposes and the paramountcy of  
9 the exercise of Federal legislative power and  
10 authority by the Base Commander. I'll have more to  
11 say about this a little later.

12 But what has been occurring on the Base is  
13 not, not arbitrary but a reasonably based exercise of  
14 authority vested in the Base Commander of legislative  
15 powers and discretion flowing from Federal  
16 responsibility over National Defence and Public Lands  
17 exercised in the interests of the environment.

18 There is a concern about the cumulative  
19 effects environmental assessment of what is occurring  
20 at Canadian Forces Base Suffield.

21 Now, in the EIS guidelines, page 18, which is  
22 Exhibit 001-005 the Panel indicated that it wanted to  
23 know how oil and gas activities had been conducted and  
24 mitigated in the past on Canadian Forces Base Suffield  
25 and so there are some materials in the record on this.

1 EnCana's EIS, Volume 1, page 1-1, indicates that by  
2 the end of 2004 EnCana had drilled more than  
3 9,000 wells at Canadian Forces Base Suffield and  
4 1145 shallow gas wells within the area now designated  
5 as the National Wildlife Area. There are other  
6 operators on the Base. EnCana is not the only one on  
7 the Block. It's certainly the major one on the Block.

8 We went over how these were developed with  
9 Mr. Protti, and you will recall the production of a, a  
10 binder of documents which was examined on. In effect,  
11 early on in 1976, EnCana obtained what is described as  
12 Suffield Environmental Protection Regulations  
13 Development and Reclamation Approval No. 22,  
14 subsequently amended with respect to Reclamation  
15 Applications and named 22A.

16 This has been the authority, the general  
17 authority under which these wells have been drilled on  
18 Canadian Forces Base Suffield outside of the zones  
19 described as the Middle Sand Hills Zone, the South  
20 Saskatchewan River Bank Zone and the mixed grassland  
21 area.

22 The requirements of an environmental  
23 assessment were discussed with Mr. Protti and he  
24 suggested that some sort of environmental assessment  
25 of the day -- this document is dated in 1976, so it's

1 32 years ago -- but some sort of environmental  
2 assessment was done at the time. But since that time,  
3 you will see in EnCana's EIS Volume 1, page 1-9, that  
4 it takes the position that no environmental assessment  
5 is required under Alberta law, indeed for this  
6 Project.

7 It recognizes, I think, that the EUB must  
8 take environmental issues into consideration when  
9 determining whether to issue a well licence in the  
10 public interest. But EnCana's position is clearly  
11 stated that no environmental assessment is required.  
12 And indeed it would seem that other than that early  
13 document, no environmental assessment has ever been  
14 done with respect to these wells and certainly not any  
15 Cumulative Effects environmental assessment.

16 These are proceeded on a well-by-well or  
17 battery-by-battery basis and when you look at the  
18 compendium of documents which is Exhibit 003-027 this  
19 is particularly evident. Tab No. 3 of that document  
20 at page 25 is an exchange of correspondence between  
21 SEAC and a representative of the Federal Crown in  
22 2003 -- between SEAC and a representative of EnCana,  
23 pardon me. And you will recall that SEAC had raised  
24 concerns about cumulative effects of environmental  
25 assessment -- cumulative effects of the amount of

1 development on the Base that had occurred and had  
2 asked if EnCana was aware of any Cumulative Effects  
3 environmental assessment.

4 And EnCana replies, EnCana is not aware of  
5 any specific long-term cumulative effects studies that  
6 have been conducted in the NWA. And indeed the terms  
7 and conditions attached to the -- the development in  
8 the NWA went on in two phases. The early phase in the  
9 1970s had the old form of Development and Application  
10 Approval and the ones that appear in the record are  
11 upon the terms and conditions prescribed. And these  
12 are very rudimentary and provide that prior to well  
13 site pipeline and road development on undisturbed  
14 areas, the company will provide a preliminary  
15 archaeological field reconnaissance, but there's no  
16 mention of the preservation of wildlife or natural  
17 habitat.

18 At page 74, which is Development and  
19 Reclamation Approval No. 38A dated 1979, some  
20 reference is made to wildlife protection. This is for  
21 a small number of wells and it provides that drilling  
22 operations will cease if it is determined that work is  
23 having an unacceptable impact on wildlife, but there's  
24 no criteria by which that is determined, no other  
25 definitions and nothing that appears in the record

1 that would suggest if or how that authority was  
2 exercised.

3 Now, the second series of applications  
4 occurred in the late 1980s and early -- the late 1990s  
5 and the early 2000s just prior -- occurred prior to  
6 the development of the National Wildlife Area. My  
7 understanding of the evidence of the Base Commander  
8 was that all of the wells were approved prior to the  
9 designation of the National Wildlife Area under the  
10 *Canada Wildlife Act*. And these applications, again,  
11 while they may -- are very rudimentary in terms of  
12 what they require for environmental assessment, if  
13 anything at all, and we went through one of them in  
14 cross-examination in the compendium and it simply  
15 contained a reference to wildlife and specifically  
16 mentioned that there had not been a cumulative effects  
17 assessment done.

18 So where we are in all of this is that we end  
19 up at the compendium of documents, page 003-027, Tab  
20 No. 4, page 27. This is a letter from SEAC to EnCana.  
21 SEAC, as Mr. Denstedt submits, is the body with the  
22 expertise to oversee environmental issues within this  
23 area. And I have submissions on that, but according  
24 to Mr. Denstedt this is the right body for this kind  
25 of comment. And it indicates that:

1 [As read]  
2 "SEAC has previously expressed  
3 concern regarding the need to  
4 better understand long-term  
5 cumulative effects, both positive  
6 and negative, associated with the  
7 shallow gas infill program. SEAC  
8 fully recognizes and appreciates  
9 the best practices used to  
10 mitigate immediate and short-term  
11 impacts on the environment. These  
12 best practices have focused  
13 primarily on minimizing and  
14 repairing ground disturbance with  
15 some attention to temporal season  
16 strategies to avoid conflicts with  
17 biological activity when it is at  
18 its peak, e.g., raptor nesting,  
19 snake migration, ground nesting,  
20 grassland birds, avoiding known  
21 wildlife residences and ..."  
22 And to tell you the truth, that really sounds  
23 like what is being brought forward today.  
24 Notwithstanding these best practices, the  
25 long-term cumulative effects of infilling must focus

1 on ecological sustainability and ecological integrity  
2 of the prairie ecosystem.

3 This is most certainly the case in the  
4 newly-established National Wildlife Area. We know  
5 very little about how infilling might be changing  
6 quality and integrity of the prairie ecosystem in the  
7 Wildlife Area. There are presently no monitoring  
8 and/or investigative studies to see how and why these  
9 things are changing, if indeed they are. No one party  
10 appears to be monitoring and identifying long-term  
11 cumulative effects.

12 As I mentioned, EnCana replied by letter of  
13 November 6, 2003 saying it's not aware of any  
14 cumulative effects and, by the way, our understanding  
15 of what the ultimate well spacing should be to  
16 maximize the recovery of the gas hasn't changed and  
17 this has required EnCana to re-enter the NWA and there  
18 is a possibility that EnCana will want to develop a  
19 portion of the NWA to 16 wells per section, mainly in  
20 the southern half.

21 Now, where we went up with on this is that  
22 there really is not a lot of baseline data to support  
23 the environmental assessment of cumulative effects on  
24 activities within the National Wildlife Area or  
25 Canadian Forces Base Suffield. A lot of studies have

1           been brought forward, but let me point out that  
2           EnCana, prior to this, has not been engaged;  
3           notwithstanding its corporate policies for high levels  
4           of environmental stewardship, has not been engaged in  
5           a cumulative effects environmental study of what is  
6           occurring by virtue of its activities within Canadian  
7           Forces Base Suffield or the National Wildlife Area.

8                         And I would adopt the cross-examination of  
9           the Joint Review Panel expert, Dr. Whidden, where he  
10          confirmed the accuracy today of the statement which  
11          appears at page 10 of his report of February, 2008.

12                         The GOC request, the Government of Canada  
13          request to provide scientifically sound baselines is  
14          appropriate:

15                         [As read]

16                         "EnCana should be expected to  
17                         provide a good understanding,  
18                         including validated habitat models  
19                         of the potential for any species  
20                         at risk to be disturbed by the  
21                         proposed Project. It appears that  
22                         the information provided lacks  
23                         scientific principles."

24                         So there is not a lot of baseline data. There  
25          certainly has been a Canadian Wildlife Service study

1 done in two years in the mid-1990s which Mr. Denstedt  
2 has applauded. It's now 12 years old and I will make  
3 some more comment on that a little later as I go.

4 So, given the lack of baseline data, how does  
5 EnCana proceed to design its RSA? The EIS guidelines,  
6 Exhibit 001-005, page 16, require that -- EnCana to  
7 establish and, and justify study area boundaries. The  
8 study area boundaries are set out in Exhibit 002 --  
9 and Mr. Drummond, it might be helpful to pull this up,  
10 002-013. This is the EIS Volume 3 and the maps appear  
11 at pages 1 to 3.

12 We went over these maps early in the  
13 cross-examination of the EnCana Panel, but this sets  
14 out what is described as the Local Study Area and the  
15 Regional Study Area in relation to the boundaries of  
16 Canadian Forces Base Suffield. It's important to note  
17 -- and I will come back to this in a moment -- that  
18 not all of Canadian Forces Base Suffield is included  
19 in the Regional Study Area and that there are areas  
20 along the eastern -- or, pardon me, the western and  
21 northwestern boundary which are not included in the  
22 Regional Study Area.

23 These happen to be an area which is described  
24 as, in Exhibit 003-032 -- perhaps, Mr. Drummond, you  
25 could turn to that, Exhibit 003-002 (sic), the Base

1 map -- and this is the area described as the oil  
2 access area. Yes, if you can -- in the upper  
3 left-hand corner you will see the oil access area  
4 there. And if you compare that to the map we were  
5 just looking at of the Regional Study Area you will  
6 see this quadrant of the Base is not included in the  
7 boundaries of the Regional Study Area.

8 If you contrast then, this with  
9 Exhibit 003-034, this is the same map of Canadian  
10 Forces Base Suffield but shows the well densities and  
11 I think -- I'm not sure if the Panel Members had a  
12 tour of this aspect of the Base when you had a tour of  
13 this, but this, this is the oil area. There are  
14 considerable densities of oil wells here and it's not  
15 an accident that the safety templates during live  
16 firing with high velocity munitions are pointed to the  
17 east instead of the west because it is the open spaces  
18 of the National Wildlife Area that the ricochet  
19 ordnance may fall into rather than this high-density  
20 well developed area.

21 Now, the point of this is simply that the oil  
22 and -- we know the difference between oil and gas and  
23 the Panel specifically wanted to know how past oil and  
24 gas activities had been conducted and their effects  
25 mitigated, and the design of the Regional Study Area

1 excludes the oil area. That's an anomaly. The  
2 explanation for the development of the study area  
3 boundaries does not cast any light on how this was  
4 done.

5 There's a description of the study which  
6 appears at Exhibit 002-013, page 6-2, and it basically  
7 says:

8 [As read]

9 "The spatial and temporal study  
10 area boundaries used to assess the  
11 effects of the Project on  
12 biodiversity are the same as those  
13 used for other biophysical  
14 sections including soil  
15 landscapes, vegetation, and rare  
16 plants and wildlife and habitat.  
17 The rationale and approach to  
18 establishing spatial boundaries  
19 for distances is described in  
20 detail in Section 1."

21 So, I went to Section 1 and I looked at the  
22 detail that is supposed to be provided there and you  
23 can find that at page 1-2 of this document:

24 [As read]

25 "This provides that the RSA, or the

1 Regional Study Area encompasses  
2 potential effects on valued  
3 vegetation components beyond the  
4 local study area. These effects  
5 include those from the Project,  
6 e.g., use of access roads, and  
7 those from other planned and  
8 reasonably foreseeable land uses,  
9 e.g., Military training. The  
10 western and northern boundaries of  
11 the RSA or the watershed boundary  
12 between the South Saskatchewan and  
13 the Red Deer River, the eastern  
14 and southern boundaries of the RSA  
15 are the same as for the LSA."

16 And then it's -- and then there's a description  
17 of size and the inclusion of the Koomati Block and  
18 this -- some -- what is an area outside the Base to  
19 the north described as, "Special Areas Rangelands to  
20 the North and Outside of the NWA".

21 So, this constitutes the rationale for the  
22 creation of the Regional Study Area. There's no  
23 explanation why, given the request of the Panel to  
24 explain how past oil and gas activities were  
25 mitigated. The oil area is left out.

1           The practical result of avoiding compliance  
2           with the EIS request in this respect is to reduce the  
3           footprint of the developed area within Canadian Forces  
4           Base Suffield and to effect consequences for the  
5           prediction of significance of environmental impacts on  
6           species at risk, such as the Sprague's Pipit.

7           Now, we've gone back and forth over the  
8           Linnen study and my friend objected significantly to  
9           the fact that the Linnen study was a study of oil and  
10          not gas, but there is oil development in the Base and  
11          it has not been looked at.

12          More particularly, the Terms of Reference of  
13          the Panel required or suggested that study area  
14          boundaries could vary according to VEC. Birds will  
15          fly outside of the, of the Regional Study Area and the  
16          evidence of Mr. Collister was absolutely clear. At  
17          his testimony in the transcript at pages 884, and we  
18          don't need to go there for this purpose, but it's very  
19          clear that agriculture is the major impact on bird  
20          species outside of the National Wildlife Area, yet  
21          because little agriculture is carried on within the  
22          Regional Study Area other than what might be described  
23          as the special rangeland areas to the north, on which  
24          I think we've heard virtually nothing, there has been  
25          no examination on the pressures on bird species by

1 population as these birds move outside of the Wildlife  
2 Area or the Canadian Forces Base Suffield during the  
3 course of their life and are exposed to these  
4 pressures.

5 There's simply a recognition that agriculture  
6 is a tremendous effect on these birds. So let's  
7 accept that.

8 The -- I cross-examined on this point  
9 particularly, and the cross-examination appears at  
10 page 906 of the transcript, and from lines 11 to  
11 line 6. I think it was Mr. Kansas. The question is:

12 "Q. Okay, thank you. Now, to  
13 return to those who developed  
14 the EIS, my, my proposition  
15 to you is that the -- it  
16 appears that the design of  
17 the regional study area did  
18 not allow the EIS to have  
19 sufficient regard to  
20 pressures on, on bird species  
21 listed in the schedule to the  
22 **Species At Risk Act** in order  
23 to properly assess whether  
24 there may be cumulative  
25 pressures on those species

1           together with the effects of  
2           this project. In other  
3           words, you didn't really look  
4           when you might have done  
5           that?

6           A.     MR. KANSAS: I, I don't agree  
7           with that, sir.

8           Q.     All right. Would you agree  
9           with me that examining the  
10          interactions between a specific  
11          project and a specific VEC is  
12          largely incapable of securing VEC  
13          sustainability.

14          A.     We looked at other projects;  
15          we looked at other land actions.

16          Q.     And you looked within the  
17          regional study area boundaries.

18          A.     Yes, we did."

19                 Now, if we accept outside of the Regional Study  
20                 Area that agriculture is the main industry, and that's  
21                 supported by the EIS materials, if we accept that  
22                 there's a lot of oil and gas activity outside of the  
23                 Regional Study Area, which is also supported by the  
24                 materials, if we accept that Military training within  
25                 the National Training Area is going to increase from

1 battle group level training to formation level  
2 training, which will occur over a broader spatial area  
3 of Canadian Forces Base Suffield, and if we accept  
4 that EnCana has aspirations to infill wells throughout  
5 -- shallow natural gas wells throughout the National  
6 Training Area to 16 wells per section, this is the  
7 context in which we've come to examine the effect of  
8 this Project on species at risk within the National  
9 Wildlife Area.

10 It is an ocean of undeveloped land within a  
11 sea of economic activity worth thousands of millions  
12 of dollars.

13 I want to spend some time on water because  
14 water sustains life and the EIS guidelines at page --  
15 at Exhibit 001-005, pages 3 and 19, require EnCana to  
16 include water supply within the definition of  
17 "project" for this environmental assessment. That's  
18 at page 3 and at page 19 the EIS guidelines asks for,  
19 "Regional local and site, site specific hydrology".

20 Now, there are a series of exhibits that I  
21 would like to refer to here and it would be helpful to  
22 display these, I think, for the purposes of this  
23 submission.

24 So, Mr. Drummond, let me ask you to start, if  
25 you can, please, Exhibit 002-010. This is Volume 1 of

1 the EIS, at page 3-4. Now, there's no surprise here.  
2 What this provides is that the NWA is in the driest  
3 part of Alberta and the interior drainages are  
4 normally dry except for a brief typically two-week  
5 period of snow melt, usually in March, lasting for a  
6 period of one or two weeks.

7 Mr. Drummond, can I ask you to turn next,  
8 please, to Exhibit 002-013 at page 9-3. This is some  
9 discussion from EnCana's EIS on climate change and the  
10 material passages that I want to highlight are there  
11 and I'm going to read them out:

12 [As read]

13 "Central and southern Alberta lies  
14 within the palace or triangle  
15 area, the most drought-prone  
16 region in the Canadian prairies.  
17 Specifically, the Suffield region  
18 lies within the dry belt which  
19 commonly experiences little annual  
20 precipitation. There is a  
21 discussion about what is projected  
22 to occur with respect to global  
23 warming."

24 It says:

25 [As read]

1 "Projected warming in this area is  
2 expected to be accompanied by a  
3 rise in atmospheric moisture flux  
4 which would result in increased  
5 precipitation. However, due to  
6 the increase of moisture in the  
7 atmosphere and the increasing  
8 temperature, evaporation rates are  
9 also expected to increase. The  
10 projected increase in  
11 precipitation in the prairies is  
12 expected to be offset by increases  
13 in evaporation and model  
14 prediction indicates that the  
15 annual mean precipitation is  
16 likely to decrease in southern  
17 Alberta."

18 And then EnCana goes on in what I think is, with  
19 the greatest of respect, a very curious comment to  
20 say:

21 [As read]

22 "Potential effects of climate  
23 change on the Project are expected  
24 to be minimal."

25 Now, we know it's possible to drill for oil in

1 the desert. It's done in Saudi Arabia all the time.  
2 What is important here is whether water use within the  
3 National Wildlife Area will allow it to -- will  
4 support sustainable development.

5 So let me go back to Exhibit 002-015. This  
6 is EIS Volume 4 at pages 2-23. The highlighted  
7 passages read:

8 [As read]

9 "Dugouts and springs are important  
10 for the survival of surface  
11 ecosystems. The HCL 2002 study  
12 suggests that groundwater  
13 elevations in the southwestern  
14 corner of the CFB Suffield in the  
15 RSA are declining due to pumping  
16 from the lower sand and gravel  
17 aquifer within the pre-glacial  
18 valley. McNeil et al, 2000 and  
19 2002, present hydro-geological  
20 computations based on pump test  
21 results that suggests over-pumping  
22 of the lower sand and gravel  
23 aquifer will cause excessive  
24 drawdown to occur over large areas  
25 of CFB Suffield. In the document,

1 'Water Conservation and Allocation  
2 Guideline For Oil Field Injection,  
3 AENV, 2006' the area has been  
4 identified [the area] as 'water  
5 short'. 'Water short' is defined  
6 as when the cumulative human  
7 demand for water meets or exceeds  
8 the average natural capability of  
9 the source or area to reasonably  
10 supply the present or the future  
11 needs of water users and the  
12 aquatic environment."

13 Let me turn to page 224 in this same EnCana  
14 discussion of groundwater importance in its EIS. The  
15 highlighted passage reads:

16 [As read]

17 "Groundwater discharges to the  
18 surface springs and wetlands  
19 within the RSA.

20 Groundwater discharges to  
21 surface springs and waters and  
22 wetlands within the RSA and is an  
23 important water source for  
24 wildlife and wetland habitat. The  
25 unconsolidated sand and gravel

1                   aquifers in the pre-glacial buried  
2                   valleys are generally the best  
3                   source of water for these wells.  
4                   These aquifers also discharge to  
5                   the springs that maintain local  
6                   wetlands."

7                   And then to page 226 -- so I'm going to -- this  
8                   basically establishes that it's dry in southern  
9                   Alberta and that the drawing of water has an important  
10                  relationship to wetlands and wetlands have an  
11                  important relationship to the sustenance of the  
12                  ecosystems in the National Wildlife Area.

13                 Now, we, we heard some interesting evidence  
14                 from EnCana during its reply about the water supply,  
15                 and I want to go over the evidence that is presented  
16                 in EnCana's EIS about where the water for this Project  
17                 is going to come from and what wells are going to be  
18                 used. The thrust of this is not to demonstrate so  
19                 much which of these numbers is right, 35, 45, 55, it  
20                 is to demonstrate that there's a lack of certainty and  
21                 where the wells -- which wells are going to be drawn  
22                 from.

23                 I'm going to take you to a series of three  
24                 presentations, and they change. And not only is  
25                 there -- and you will recall the cross-examination of,

1 of, of EnCana's Panel on this question and I think it  
2 was Mr. Fudge who had very low confidence in the  
3 estimates of the water availability in the aquifer.  
4 I'll come to that point, and I believe agreed with me  
5 in cross-examination that the record-keeping with  
6 respect to water withdrawal from the wells is poor.

7 So what do we know about water? We know it's  
8 important, but what do we know about water use?  
9 You'll see the description of the wells change and I'm  
10 about to demonstrate that. You'll see that what --  
11 record-keeping in the recent years, in terms of water  
12 withdrawal is poor and you'll see that information,  
13 the confidence levels about the aquifer availability  
14 is low.

15 So something more needs to be done with  
16 respect to water than has been done for the purposes  
17 of this Project.

18 All right. Let's start with page 226 of  
19 Exhibit 002-015. This is Volume 4 of the EIS. All  
20 right. Now, here the highlighted words read:

21 [As read]

22 "An estimate amount of water that  
23 EnCana uses at Suffield is  
24 presented in Table 2-9. EnCana is  
25 proposing that approximately

1                   35,000 cubic metres of water will  
2                   be sourced from the Dugway Well,  
3                   Big Bob Well and other dugouts and  
4                   wells that are highlighted in  
5                   Table 2-8. This will not require  
6                   the construction of any new water  
7                   wells within the NWA."

8                   So let's go to have a look at Table 2-8 because  
9                   EnCana says, at this point, these are the ones we're  
10                  going to use. And some of them are starred; actually  
11                  there's ten of them. And if you look at the stars it  
12                  says:

13                  [As read]  
14                  "EnCana licensed water sources  
15                  proposed for Project water supply,  
16                  see Volume 1."

17                  Okay, so these are the ones which, at this point,  
18                  EnCana says they're going to use, "see Volume 1".

19                  So we go to Volume 1 of the EIS, which is  
20                  Exhibit 002-010, page 245. Here EnCana identifies  
21                  local sources of water for the Project to include the  
22                  South Saskatchewan River, the municipality of Medicine  
23                  Hat and then five wells which are specifically  
24                  identified by legal description. So I've taken the  
25                  legal description of these wells and I've included

1           them again.

2                       So, Mr. Drummond, could you go then to the  
3           next Exhibit which is these five wells highlighted?

4                       Now, these are the -- first there were ten,  
5           now there's five. And the interesting thing about  
6           this is that one of these wells was described in  
7           direct rebuttal evidence last Saturday as unlicensed  
8           and so ultimately EnCana provided a new piece of  
9           paper, which is 002-138, and here you'll see the  
10          change.

11                      There's a -- the highlighted well is the new  
12          well that appears to have been substituted for the  
13          unlicensed well and if you just look on the face of  
14          this document, and Mr. Mousseau pointed this out, the  
15          top two wells appear to exceed, in average use, the  
16          licensed allocation. So there is a considerable  
17          amount of uncertainty, just on the face of the  
18          materials as to which wells are going to be used.

19                      With respect to water availability, the  
20          LandWise report was cited by everyone involved and  
21          that's Exhibit 003A-031, Tab G. This is a report  
22          commissioned by the Department of National Defence  
23          which commissioned a company called LandWise to  
24          conduct the "Wetland Ecosystems: An Investigation of  
25          Wetland Ecosystems Within Canadian Forces Base

1 Suffield" as a follow-up to studies completed in 2000  
2 and 2002.

3 The major goals were to provide a detailed  
4 groundwater information for the study area and to  
5 re-evaluate the biological communities at selected  
6 Wetland sites and to identify potential changes in  
7 biological health since 2000.

8 LandWise makes a very interesting observation  
9 at page Roman numeral VII, so, Mr. Drummond, if you  
10 could please call up Exhibit 003A-031, Tab G, page  
11 Roman numeral VII. I'm going to read this out because  
12 there's two points here that contra -- exactly  
13 contradict what Mr. Denstedt submitted yesterday:

14 [As read]

15 "The estimated amount of  
16 groundwater flowing through the  
17 main Lethbridge Valley and its  
18 three main tributaries in CFB  
19 Suffield is slightly lower,  
20 92 percent than the minimum  
21 non-industrial plus industrial  
22 water requirements of the Base,  
23 which are all together estimated  
24 to be 455,720 cubic metres a year.  
25 When groundwater flow is

1 equivalent to withdrawal,  
2 discharge to wetlands is  
3 eventually reduced. Therefore,  
4 removal of water from surficial  
5 and pre-glacial aquifers at CFB  
6 Suffield will potentially reduce  
7 the amount of water available for  
8 discharge to wetlands in the study  
9 area."

10 I'm going to stop here before I go on, simply to  
11 say that my note of Mr. Denstedt's submissions  
12 yesterday was that this was a very good aquifer. And  
13 I'm sure it is a very good aquifer; it's just that  
14 it's a very full aquifer, it's used, according to this  
15 study.

16 I think Mr. Fudge said that conservative  
17 numbers were used here but he didn't take any issue  
18 with the conservative approach to water in the  
19 drylands of southern Alberta.

20 So there's an important point that follows on  
21 in the next sentence:

22 [As read]

23 "Water level records that extend  
24 back to the early 1980s suggest  
25 declines in water levels of 0.5 to

1                   2 metres in bedrock (Telfer well)  
2                   and in pre-glacial sediments near  
3                   the Hamlet of Suffield in the city  
4                   of Medicine Hat."

5                   Now, my note of Mr. Denstedt's submissions  
6                   yesterday are that there was no decline in water  
7                   levels of wells used by EnCana. The Telfer well is  
8                   specifically mentioned here. The Telfer well is the  
9                   well that is included in the most recent of the  
10                  documents tendered by EnCana showing its well use and  
11                  that is 002-138. This is the list that was produced  
12                  in rebuttal evidence. So I don't know where this  
13                  comes from, but it's not supported by EnCana's  
14                  materials.

15                  Now, at page 30 of the LandWise report,  
16                  LandWise observes that:

17                  [As read]

18                  "Groundwater records from 2005 to  
19                  2007 are much less detailed."

20                  And I questioned Mr. Fudge during rebuttal and  
21                  this passage appears at page 3980, lines 6 to 21, "The  
22                  point I just wanted to make -- this is the question:

23                  "Q. The point I just wanted to  
24                  make is that the recordkeeping  
25                  isn't robust in the recent years

1 with respect to groundwater  
2 withdrawal. And I'm asking if you  
3 would agree with that.

4 A. I don't know if 'robust' is  
5 the, is the proper word, but  
6 certainly there can be  
7 improvement[s] made. And I  
8 believe in the acceptance of the  
9 groundwater monitoring or  
10 recommendations in the LandWise  
11 Report, EnCana's hydrogeologist  
12 has recognized -- recognizes that  
13 better recordkeeping should be,  
14 should be kept in -- as in an  
15 ongoing basis, as we go forward,  
16 regardless of the Project."

17 And then he goes on to say:

18 "A. And in fact, a number of  
19 investigations ... [are] --  
20 studies are underway by EnCana  
21 in-house, quite divorced from  
22 these proceedings, to get a better  
23 understanding of, of the whole  
24 area."

25 His -- Mr. Fudge's comments about the confidence

1 level of the estimates is in the transcript of the  
2 cross-examination at page 3951 beginning at line 21:

3 "Q. Okay. [So] Yes, so anyway we  
4 have a ..."

5 I'm sorry, this is the answer. Yes. This is an  
6 answer and it's the end of a long answer and it's just  
7 a passage I've, I've brought together at line 21 of  
8 page 3951:

9 "A. Okay. Yes, so anyway, we have  
10 a -- now we have a  
11 40-thousand-dollar -- a 40,000  
12 cubic metre surplus, quote  
13 unquote. But these are all very  
14 big estimates with very low levels  
15 of confidence, I would say, in  
16 this groundwater world. So there  
17 we are."

18 So I, I was struck by the language that Mr. Fudge  
19 chose to use in his rebuttal evidence of "very big  
20 estimates with very low levels of confidence". And I  
21 asked him about that at page 3977 line 16:

22 "Q. All right. Thank you. And,  
23 Mr. Fudge, I have a couple  
24 questions for you, then. I was  
25 struck by -- you were going

1 through the numbers, but I  
2 understood you to say they were  
3 all very vague with and you had  
4 very low levels of confidence in  
5 them. Did that phrase, 'very low  
6 level of confidence' apply to the  
7 estimates of groundwater use  
8 because the recordkeeping with  
9 respect to groundwater extraction  
10 in the recent years isn't very  
11 thorough or robust?"

12 And his answer was:

13 "A. I was speaking not to the  
14 prediction of use, because it's  
15 pretty well-established that it  
16 takes 165, or thereabouts, cubic  
17 metres of water to drill and  
18 complete a well, that sort of  
19 thing. So EnCana, after drilling  
20 10,000 wells has a pretty good  
21 idea of what their usage is.

22 I was referring to the  
23 estimates made by various firms,  
24 including LandWise and their  
25 predecessors, on what is the

1                   availability of groundwater in the  
2                   NWA. And when you really look at  
3                   it, they don't really have a great  
4                   handle on it. And everybody's got  
5                   a different number. And when I  
6                   see 100 percent difference, or  
7                   greater, in different reports, I'm  
8                   thinking, yeah, it's, it's a bit  
9                   -- this is not nailed down and  
10                  this is not based upon empirical  
11                  data that's strong."

12                 Now, to bring this to the conclusion, one of the  
13                 Natural Resources Canada individuals who testified on  
14                 the Federal Panel recommended that there be a water  
15                 budget and I think it's generally agreed that there's  
16                 no water budget yet and not one proposed for this  
17                 Project or brought forward. There's a promise to  
18                 develop one in future.

19                 The recommendations made by NRCan are at  
20                 Exhibit 003-019, under heading 5.1.6, and again it  
21                 refers to the lack of baseline data which is a generic  
22                 problem that I touched upon earlier:

23                         [As read]

24                         "Due to the lack of baseline  
25                         information on groundwater use,

1 NRCan recommends to the JRP that  
2 EnCana in its monitoring and  
3 follow-up activities establish a  
4 record of past, current and future  
5 use, water use, in the Suffield  
6 area, not just the NWA but in the  
7 Suffield area, to verify the  
8 prediction that groundwater is not  
9 adversely impacted by its  
10 operations developments. NRCan  
11 also recommends to the JRP that  
12 EnCana provide a higher degree of  
13 detail on all aspects of the  
14 preliminary groundwater monitoring  
15 and follow-up program required in  
16 the EIS guidelines and under CEAA.  
17 This further information on  
18 groundwater monitoring will  
19 include monitoring locations,  
20 methods, proposed monitoring  
21 wells, if any, monitoring  
22 frequency and any further details  
23 on groundwater chemistry and flow  
24 rates monitoring that EnCana  
25 intends to do. This will assist

1 in assessing the EEMP."

2 There are a number of overall recommendations  
3 with respect to water use made in the LandWise report  
4 at Exhibit 003A-031, Tab G, pages 111 to 116 -- 115  
5 exclusive. I don't want to run through these in  
6 detail. I'll, I'll touch on the headings:

- 7 - Monitor groundwater withdrawal at five  
8 well locations in the Bayer Net Cript  
9 (phonetic) Spring.
- 10 - Monitor water levels at five locations.
- 11 - Conduct aquifer tests on each well.
- 12 - Install and monitor observation wells.
- 13 - Control groundwater withdrawal rates.
- 14 - Control and monitor withdrawal from all  
15 water sources.
- 16 - Periodically assess each water source  
17 wetland and well.
- 18 - Conduct an ecosystem characterization  
19 in the Dishpan Lake area.
- 20 - Update the Military land use plan to  
21 protect sensitive locations.
- 22 - Prepare and adhere to a livestock  
23 grazing management plan.
- 24 - Protect wetlands and water sources from  
25 potential pollution and ensure

1 adherence to site recommendations --  
2 site access recommendations.

3 This is something I'm going to touch upon a  
4 little bit later but this author makes a comment about  
5 observations of uncontrolled -- of trails, accessing  
6 wetlands including some areas over steep slopes and  
7 I'll touch upon that a little bit later.

8 I've spoken with Colonel Lamarre and DND is  
9 fully supportive of the LandWise recommendations and  
10 if the Joint Review Panel would like to incorporate  
11 the LandWise recommendations and the NRCan  
12 recommendations into whatever conclusions or  
13 recommendations it may make, DND would fully support  
14 that. Water is an important issue here. It has not  
15 been adequately examined in the EnCana EIS, with the  
16 greatest of respect.

17 The response appears to be that because we're  
18 not having any incremental water use, there's no  
19 effect and the EIS guidelines at page --  
20 Exhibit 001-005, page 19, suggests that more is  
21 required, that there should be a discussion of  
22 regional, local and site specific hydrogeology.

23 So, EnCana has been -- it's true, EnCana has  
24 been drilling, or its predecessors have been drilling  
25 in the Suffield Block for decades now, since 1975,

1 over 30 years, and they know a lot about shallow  
2 natural gas development in this remarkably rich  
3 producing horizon of, of, of rocks underneath the  
4 surface in this area of Alberta and Saskatchewan, but  
5 not much has been done with respect to the assembly of  
6 information with respect to water use.

7 So, with the greatest of respect, DND's  
8 concerns in this respect are valid and because this is  
9 a dry area, forecast to get dryer, in the result of  
10 climate change, with an important correlation between  
11 the aquifer level and the water flow into the wetlands  
12 on the surface, an essential connection between those  
13 wetlands and the sustenance of wildlife on the  
14 surface, and a correlation, a direct -- a correlation  
15 between water withdrawals through wells and water  
16 levels on the surface, this is something that needs to  
17 be examined; and it should be examined as a  
18 pre-condition to development.

19 And I will simply conclude this section by  
20 noting that when my friend, Ms. Klimek, made a motion  
21 to have Alberta's representatives attend here, I  
22 reserved my right to make submissions on the  
23 consequences of Alberta's absence.

24 I regret to say that in this instance, as I  
25 understand it, EnCana's evidence was that they send

1 the statistics of their water withdrawals, such as  
2 they are, to Alberta, but what Alberta, but what  
3 Alberta does with them we know not. And in this  
4 instance, Alberta's absence, the consequences of  
5 Alberta's absence fall on EnCana.

6 You'll be relieved to know that I'm not going  
7 to be demonstrating anymore documents for a while. I  
8 would like to talk about the principles of  
9 environmental assessment.

10 Where this is going is into the design of the  
11 EIS methodology particularly, so it's important to  
12 understand, in my submission, the principle supporting  
13 environmental assessment and how those principles may  
14 have been applied in the circumstances of this case,  
15 in particular with particular consequence for the PDA  
16 process.

17 Now, I know, as a Joint Panel, that the  
18 statutory obligations under Federal legislation and  
19 Provincial legislation are not exactly the same. The  
20 EUB assesses environmental -- takes environmental  
21 factors into account in the assessment of public  
22 interest.

23 For the purposes of this Panel, in the Terms  
24 of Reference conferred upon it, the definition of  
25 "environmental effects" and the requirements of

1 Section 16 have been incorporated into the Terms of  
2 Reference and flow through to the EIS Guidelines under  
3 which the thing has been prepared. So I'm going to be  
4 drawing on some jurisprudence from the Federal  
5 environmental assessment regime with respect to the  
6 general principles of environmental assessment.

7 But I would like to say that in my respectful  
8 submission, what I'm trying to say here is not  
9 restricted to any particular legislative scheme of  
10 environmental assessment or assessment of  
11 environmental effects in the public interest. The  
12 points that I want to make are generic ones. What is  
13 the function of environmental assessment? How do we  
14 do it? Why is it done? These are points that fit  
15 into any statutory regime for environmental  
16 assessment.

17 So I want to start, in this respect, with the  
18 ground -- the landmark case, ***Friends of the Oldman***  
19 ***River Society v. Canada***. Mr. Ross, I understand that  
20 you were the Chair of this Panel. It's apparent from  
21 the biography that is included with the Panel in that  
22 -- in the materials and -- but this was the first case  
23 to reach the Supreme Court of Canada where the Supreme  
24 Court of Canada discussed environmental assessment as  
25 a process. And the guiding passage appears at page 3

1 of its decision:

2 "Environmental Impact Assessment  
3 is, in its simplest form, a  
4 planning tool that is now ...  
5 regarded as an integral component  
6 of sound decision-making. Its  
7 fundamental purpose is summarized  
8 by R. Cotton and D. P. Edmond in  
9 'Environmental Impact Assessment'  
10 ... [is] ...:

11 'The basic concepts behind  
12 environmental assessment are  
13 simply stated: (1) early  
14 identification and evaluation  
15 of all environmental  
16 consequences of a proposed  
17 undertaking; (2) decision  
18 making that both guarantees  
19 the adequacy of this process  
20 and reconciles, to the  
21 greatest extent possible, the  
22 Proponent's development  
23 desires with environmental  
24 protection and preservation.'

25 As a planning tool it has both an

1 information-gathering and a  
2 decision-making component which  
3 provides the decision maker with  
4 an objective basis for granting or  
5 denying approval[s] for a proposed  
6 development ... In short,  
7 Environmental Impact Assessment is  
8 simply descriptive of a process of  
9 decision making."

10 Now, there are a couple of important points I  
11 want to make here. First -- and I, I mentioned this  
12 earlier on in the proceedings -- environmental  
13 assessment precedes and informs decision-making. It  
14 integrates environmental factors into decision-making.  
15 It's a good thing. It's -- it supports -- it's an  
16 integral component of sound decision-making.

17 It has two parts, an information  
18 gathering-component and a decision-making component.  
19 With respect to the information-gathering component,  
20 you can consider the PDAs as an information-gathering  
21 component, in my submission. These should precede the  
22 decision-making component of the environmental  
23 assessment process. That should not come after it.  
24 And there has been something fundamentally reversed in  
25 what has been done here to put the PDAs after the

1 grant of regulatory approval.

2 This is very, very important because it is  
3 only at the PDA stage when the direct effects on SARA  
4 species or their residences is going to be examined.  
5 In other words -- and I'll come to this in a little  
6 more detail at a little later point.

7 Now, the timing of environmental assessment  
8 as a planning tool is important. In *Friends of the*  
9 *Oldman River* the Courts said:

10 "Early identification and  
11 evaluation ..."

12 And "early" is undefined. The Supreme Court of  
13 Canada in 1994 had a further opportunity to make some  
14 discussion about the timing of environmental  
15 assessment. In the case called *Quebec (Attorney*  
16 *General) v. Canada (National Energy Board)* (1994) 1  
17 F.O. 159. And this is also known as the *Quebec*  
18 *Council of Crees* case and it involved a dispute over  
19 the adequacy of an NEB approval for the development of  
20 electricity generation and transmission line.

21 Now, the material passage that I want to refer to  
22 of the majority of the Court is as follows this  
23 occurred under the old ERP Guidelines order, but the  
24 principle here, in my submission, has been -- is  
25 applicable to the *Canadian Environmental Assessment*

1           **Act.**

2           What the Court was doing here was talking about  
3           the flexibility of environmental assessment process to  
4           -- in order to do justice in the environmental  
5           assessment and to meet the circumstances of sound  
6           decision-making in any given case. And what the Court  
7           did was adopt the words of Reed J. in the *Friends of*  
8           *the Island* case which is the Prince Edward Island  
9           Bridge case across the strait, so the Supreme Court  
10          adopts the concept that the timing of environmental  
11          assessment is flexible. The passage is this:

12                           [As read]

13                           "This case appears to me to be just  
14                           such a situation where the nature  
15                           of the proposal means that the  
16                           flexibility of the process set out  
17                           in the ERP guidelines order is  
18                           helpful. In this regard I adopt  
19                           the words of Reed J. of the Trial  
20                           Division of the Federal Court in  
21                           ***Friends of the Island Inc. v.***  
22                           ***Canada*** where she stated ..."

23                           And then this is a quotation from Madame Justice  
24          Reid:

25                           [As read]

1 "It is not disputed that it is  
2 preferable to identify potential  
3 environmental concerns relating to  
4 a project before private sector  
5 developers or public sector  
6 developers for that matter proceed  
7 to a final design. It is also  
8 desirable to use the process as a  
9 planning tool and to avoid  
10 duplication. I am not convinced,  
11 however, that it is useful to  
12 consider whether the guidelines  
13 order requires the assessment of a  
14 proposal at the concepts stage or  
15 at a more specific design stage.  
16 What is required may very well  
17 depend on the type of project  
18 being reviewed. What does seem  
19 clear is that the assessment is  
20 required to take place in the  
21 stage of the proceedings when the  
22 environmental implications can be  
23 fully considered and when it can  
24 be determined whether there may be  
25 any potentially adverse

1 environmental effects."

2 Now, this passage of Madame Justice Reed J.  
3 Approved by the Supreme Court of Canada was also  
4 referred to by the Federal Court of Appeal in its  
5 decision in *Inverhuron & District Ratepayers*  
6 *Association v. Canada*, and this is a decision of the  
7 Federal Court of Appeal and the gloss on this is the  
8 correct gloss and it appears at page 56 of the  
9 judgment:

10 [As read]

11 "Given the nature of the process  
12 and the differences between the  
13 various types of projects subject  
14 to environmental assessment, there  
15 can be no one prescriptive method  
16 for conducting an environmental  
17 assessment."

18 Now, remember what the Supreme Court said,  
19 adopting the words of Reed J. that it's a flexible  
20 process and it -- and what may be required can vary.  
21 In one case, EA at the concept stage; another one at a  
22 more detailed planning stage, but in any event, at an  
23 appropriate time when all of the environmental effects  
24 can be considered.

25 Contrast that with the submission made to you

1 by Mr. Denstedt citing a four-part conjunctive test  
2 that must be applied. The rigidity of that is not  
3 supported in the jurisprudence and, with the greatest  
4 of respect, reflects a misunderstanding of some of the  
5 fundamental principles of environmental assessment  
6 that appear to have informed the design and  
7 implementation of EIS by EnCana in this case.

8 The Federal Court of Appeal goes on to say in  
9 paragraph 56, referring to Madame Justice Reed's  
10 decision which had been the subject of judicial  
11 approval by the Supreme Court:

12 [As read]

13 "Moreover, in that case, Reed J.  
14 refused to consider whether the  
15 order even required that a  
16 proposed project must be assessed  
17 at the concept stage or at a more  
18 specific design stage. She simply  
19 held that the assessment must take  
20 place when the environmental  
21 implications of a project can be  
22 fully considered."

23 Now, that phrase, "when the environmental  
24 implications of a process can be fully considered",  
25 you will find in the judgment of the Supreme Court of

1 Canada in *Oldman River*, in the judgment of the Supreme  
2 Court of Canada in the *Quebec Council of Crees* case,  
3 and in the judgment of *Inverhuron & District*  
4 *Ratepayers' Association* of the Federal Court of  
5 Appeal. That is the correct statement of the law.

6 And so when Mr. Denstedt says that  
7 environmental assessment must be done as early as  
8 practicable in the planning stages of projects, this  
9 is true, in part, but it's not a justification for  
10 what has occurred here, which is a deferral of any  
11 field work to look for species at risk until after  
12 project approval.

13 So what is required depends on the type of  
14 project being considered. When you look at the type  
15 of project here, we have a lack of baseline data, we  
16 have a lack of prior cumulative effects assessment, we  
17 have increased development outside of the Regional  
18 Study Area. We have increased Military training and  
19 industrial development within the Regional Study Area.  
20 We have a National Wildlife Area created as a refuge  
21 for wildlife and which supports residences for species  
22 at risk, both plants and -- flora and fauna, and  
23 supports Canada's international obligations for  
24 migratory birds and biodiversity.

25 In my respectful submission, what should have

1           been done here is that the PDAs should have been done  
2           for this purpose and not later. So let me turn then  
3           specifically to the PDA process.

4                       Now, I'm going to read a transcript of the  
5           cross-examination of the Panel's experts. While I'm  
6           doing that, Mr. Drummond, I'm going to ask you to pull  
7           up Volume 002-010. This is Volume 1 of the EIS at  
8           page 215. So while Mr. Drummond is doing that, let me  
9           say that when the Panel's independent experts  
10          testified I asked them if it would have helped them in  
11          their work to have the PDA done and their answer was,  
12          yes, it would have helped.

13                      Now, what the PDA does is described by EnCana  
14          in its Volume 1 of its Environmental Impact Statement  
15          and also in its Opening Statement which was the --  
16          this document here. I'm going to read from the  
17          Opening Statement while Mr. Drummond pulls up Volume 1  
18          of the EIS and I'm reading from page 12 of the Opening  
19          Statement:

20                      "In addition, EnCana has committed  
21                      to providing the environmental  
22                      information obtained through the  
23                      Project, by way of the proposed  
24                      PDA process and the Environmental  
25                      Effects Monitoring Plan to

1 regulators, interested parties and  
2 other operators, in an effort to  
3 contribute to environmental  
4 understanding and improve  
5 operating practices in native  
6 prairie."

7 In other words, the PDAs contribute to  
8 environmental understanding. That's why it would have  
9 been helpful for them to be done and brought to this  
10 Panel and that's what the Panel's independent experts  
11 thought.

12 Now, here is Exhibit 215 and this describes  
13 what the PDA process is intended to be. This  
14 description was done in May. I understand that the  
15 PDA process itself was somewhat refined by the time of  
16 EnCana's August reply, and perhaps slightly further  
17 refined during the presentation, but the information  
18 here defines the fundamental purpose of the PDAs and  
19 has not been affected by the revisions that have -- to  
20 the PDA process that occurred in August.

21 So if you look, I've highlighted the verbs  
22 because I put this to EnCana's Panel when I was  
23 cross-examining. It struck me that all of this is in  
24 the future and it's the wrong time for a project of  
25 this time, given the context that we've got here.

1                   But if, if you, if you go to the verbs what  
2                   will occur in future is that the information compiled  
3                   through the baseline mapping process, part of the PDA  
4                   process, will be used to identify ecologically and  
5                   culturally sensitive areas and to determine the least  
6                   disruptive locations for well sites, access routes,  
7                   pipelines and associated infrastructure.

8                   In other words, the PDAs will identify  
9                   ecologically and culturally sensitive areas. So what  
10                  happens is that today the exact locations of  
11                  ecologically sensitive areas are not known.

12                 Now, it goes on to say:

13                 [As read]

14                 "Once you find the ecologically  
15                 sensitive areas, a series of team  
16                 planning meetings will be held to  
17                 discuss siting or routing areas.

18                 This process reduces the number of  
19                 visits to the sites and then once  
20                 preliminary sites for wells and  
21                 access routes are made, any  
22                 outstanding environmental issues  
23                 are identified, then all field  
24                 locations will be field checked.

25                 The field components allow any

1                   outstanding issues to be confirmed  
2                   and addressed at the field level.  
3                   A field crew consisting of  
4                   environmental specialists  
5                   biologists, archeologists and  
6                   botanists will visit each location  
7                   to collect additional  
8                   site-specific data and to ensure  
9                   that each location is suitable  
10                  with respect to terrain, wildlife  
11                  and other environmental concerns  
12                  before construction."

13                 So the PDA process, in its essence, without  
14                 having to sort of go through it in detail, is intended  
15                 to identify ecologically sensitive areas, to make a  
16                 preliminary placement of the wells and the pipelines,  
17                 to go out into the field to look and see if the  
18                 species at risk or other sensitive species are there  
19                 and are affected by the proposed initial placement and  
20                 to see whether any adjustments can be made.

21                 And all of that is supposed to happen in  
22                 future and, with the greatest of respect, it would  
23                 have been tremendously helpful if it had been done for  
24                 this Panel so that you would know where the SARA  
25                 species were, you would know where those species were

1 in relation to the proposed siting of the wells and  
2 the access routes, and you would know -- you would  
3 have had the benefit of the visit of the, of the  
4 biologists and botanists throughout the field surveys  
5 so that we would have the ability to look at a -- not  
6 at a conceptual level but at a more detailed planning  
7 level about just exactly what is going to be the  
8 effect of this Project. None of that has been done.

9 Now, that's evident, that's evident in the  
10 materials. I would invite you at your leisure to go  
11 through the EIS filed by EnCana and conduct a search  
12 for the word "possible", "wherever possible",  
13 "whenever possible" or perhaps a search for the word  
14 "feasible" or "practicable". I've done that and when  
15 you get -- I'm just going to use some illustrations.

16 In Volume 1 of EnCana's EIS, Project  
17 Description, under the -- at page Roman numeral IV  
18 under the heading, "Wetlands":

19 "Wetlands will be avoided to the  
20 extent practically possible."

21 I've got a couple of points to start here. At  
22 page 2-44:

23 [As read]

24 "At this time, laterals and loop  
25 line and pipeline routes have not

1           finely been selected. Routing  
2           alternatives have been and will be  
3           considered in the route selection  
4           process. EnCana has determined  
5           that the preferred strategy is to  
6           avoid, where possible, sensitive  
7           environments, i.e. species at  
8           risk."

9           At page 2-48:

10          [As read]

11          "The route selection process and  
12          the criteria considered in route  
13          selection are described in  
14          Section 2.8.3. In selecting  
15          access routes, EnCana will avoid,  
16          where possible, sensitive  
17          environments and species at risk."

18          "Where possible", "where reasonably possible",  
19          "where practical", "where feasible", it's sprinkled  
20          throughout. It's because they're not sure.

21          But if, if you go, what is sure appears from  
22          an examination of the **Environmental Protection Plan**  
23          which is Exhibit 002-077 and, Mr. Drummond, perhaps I  
24          can ask you to pull that up, 002-077. And let's go,  
25          for example, to page 2-4, paragraph under heading 14.

1                   Now, I attempted to cross-examine  
2                   Mr. Kennedy, the SEAC representative, on this because  
3                   SEAC is going to be burdened with -- in EnCana's  
4                   proposal, with making a decision or with something,  
5                   I'm not sure exactly what, and I'll have submissions  
6                   to you on that a little later.

7                   But where it's not possible, where it's not  
8                   practical, where it's not feasible, EnCana in its  
9                   materials describes that as exceptional circumstances  
10                  and it says:

11                  [As read]

12                  "In those exceptional circumstances  
13                  where rare plant species cannot be  
14                  avoided this ..."

15                  Read here "SARA plant species":

16                  [As read]

17                  "... then EnCana in consultation  
18                  with the environmental specialists  
19                  may propose an alternate site  
20                  together with appropriate site  
21                  mitigation measures to be approved  
22                  by SEAC or EnCana may elect to  
23                  cancel that location."

24                  So the tough ones are all going to go to SEAC.

25                  But I think it fair to say -- and there are many other

1 illustrations of this reference to SEAC in what is  
2 described here as "exceptional circumstances".

3 You'll see it at page 2-6 under Item 25 which  
4 is "wetlands". You'll see it on page 2-8 under  
5 Item 34, with respect to access trails and,  
6 Mr. Drummond, I don't think you need to follow along.  
7 At page 2-10, under item 47, with respect to location  
8 of well sites and pipelines.

9 The -- it seems certain that species at risk  
10 are going to be directly affected by this Project  
11 because EnCana provides in its Environmental Impact  
12 Assessment for this to occur and defines a role for  
13 SEAC in that respect and reserves to itself the right  
14 to cancel the location.

15 Now, this has implications for the  
16 fundamental design of the EIS process because of the  
17 definition of "environmental effects" which is found  
18 in the Terms of Reference given to the Panel and,  
19 Mr. Drummond, if you could pull up the Terms of  
20 Reference, I think it would probably be prudent to  
21 take a moment just to look at that.

22 I'm on page 2 of the Terms of Reference under  
23 the definition of "environmental effect". I'll read  
24 this out while my colleague is locating that.

25 This is basically an incorporation of the

1 Terms of Reference for this Panel flowing through to  
2 the EIS Guidelines conveyed by the Panel to EnCana  
3 from the definition of "environmental effect" in the  
4 **Canadian Environmental Assessment Act** and it means:

5 [As read]

6 "Any change that the Project may  
7 cause in the environment,  
8 including any change it may cause  
9 to a listed wildlife species, its  
10 critical habitat or the residence  
11 of individuals of that species, as  
12 those terms are defined in  
13 Subsection (2)(i) of the **Species**  
14 **At Risk Act.**"

15 Now, I'm going to stop there for my purposes and  
16 I'm going to -- this part of the definition -- it goes  
17 on. Mr. Denstedt read out the definition of  
18 "environmental effect". He did not read out this  
19 passage. This is what is described as the "species at  
20 risk amendment to the definition of 'environmental  
21 effect'" in the **Canadian Environmental Assessment Act.**

22 The -- it, it requires -- it is a direct  
23 effect. In other words, if you are going to have a  
24 direct effect on a, on a listed wildlife species or  
25 its residence, as defined in Subsection (2) of the

1        **Species At Risk Act**, that has to be assessed and all  
2        of this is done in future through the PDA process.

3                So there is something fundamental about the  
4        design of the EIS or the PDA process which, which is  
5        at, at the route here of what has resulted in a  
6        situation where we have such uncertainty.

7                I mean -- now, the methodology that EnCana  
8        cites is -- appears to be derived from the report of  
9        the Joint Review Panel for the Express Pipeline  
10       Project, and I have a passage of the transcript which  
11       is -- that I would like to read out.

12               This is Mr. Denstedt's submissions again.  
13       It's draft, but this is what I understand him to have  
14       been saying:

15               [As read]

16               "The Canadian Environmental  
17               Assessment Agency and the Courts  
18               have informed the process to  
19               systematically determine whether  
20               there are likely to be any  
21               significant adverse environmental  
22               effects. And here's the test that  
23               has been derived as a result of  
24               the legislation and the Court's  
25               interpretation."

1           Now, I will pause here to insert some commentary.  
2           I have already commented that I disagree with  
3           Mr. Denstedt's interpretation of what the Courts  
4           interpret on these obligations. Mr. Denstedt's view  
5           is that there appears to be a sort of a sequential  
6           process of decision-making and I submit, based on the  
7           authorities that I've read to you, that a sequential  
8           process of decision-making is, is, is inconsistent  
9           with the flexible environmental process. And I will  
10          come to this in respect of the Federal Court of Appeal  
11          judgment in the **Express Pipeline** case in a moment.

12                 So Mr. Denstedt then goes on to sort of  
13          define a process, well, first you look at something  
14          and if there's nothing then you stop. But if you got  
15          something then you go to the second thing and if, if  
16          you've got nothing there, then you stop. And then you  
17          go to the third thing, and if there's nothing there  
18          then you stop, and then if you go to the fourth thing,  
19          you go there and you stop.

20                 In other words, a very separate and  
21          sequential series of decision-making steps is proposed  
22          and it appears to be derived from the decision of the  
23          Joint Review Panel in, in the **Express Pipeline** case.

24                 Now, the Express Pipeline Joint Review Panel  
25          is very distinguishable from this case. I realize

1           that one of the EnCana's experts was also retained as  
2           an expert on the Express Pipeline Joint Review Panel,  
3           so I can understand why there would have been some  
4           reference to that material, and perhaps some  
5           incorporation of methodology there, but there's a --  
6           you have to be careful when you're doing some --  
7           adopting something that's 12 years old as the Express  
8           Pipeline Joint Review Panel decision was.

9                         First, this was very near within the time  
10           that the **Canadian Environmental Assessment Act** had  
11           come into force. It came into force in 1995. It was  
12           enacted in 1992. The Express Pipeline Joint Review  
13           Panel is 1996.

14                        I, I had a chance to look at the Panel report  
15           and it -- the Panel majority states at  
16           Section 3.6.1.3, quote:

17                                 [As read]

18                                 "The Panel realizes that cumulative  
19                                 effects assessment is an evolving  
20                                 science with no single  
21                                 methodology. The method of  
22                                 undertaking such an assessment  
23                                 will usually depend on the project  
24                                 and its environmental effects.  
25                                 Even within the cumulative effects

1 assessment of one project, the  
2 method of assessing can vary from  
3 one project to another."

4 The antiquity of the **Express Pipeline** case is  
5 that it's 12 years old and it's surpassed now by  
6 subsequent experience. This was a single pipeline  
7 running from Hardisty across the American border into  
8 the United States. It did not go through a National  
9 Wildlife Area and, in particular, it was assessed  
10 prior to the enactment of the **Species At Risk Act**.

11 Our experience here is much different. What  
12 we're looking at here is what I've described to you  
13 earlier as a National Wildlife Area in the midst of an  
14 ocean of development and economic activity.

15 And so, while they're both pipeline cases,  
16 they're very different projects in very different  
17 contexts and very different legal regimes, and  
18 particularly that the **Species At Risk Act** now has  
19 affected the definition of "environmental assessment"  
20 in the **Canadian Environmental Assessment Act** and did  
21 not exist at the time of the Express Pipeline Joint  
22 Review Panel report.

23 Now, Mr. Chairman, this would probably be an  
24 appropriate moment to break, if we could. It's 25  
25 after 10:00, but this is probably a good moment to

1 break.

2 THE CHAIRMAN: Yes, thank you,  
3 Mr. Denstedt -- sorry, Mr. Lambrecht. Just one  
4 question before we break.

5 Could you give us an estimate of  
6 approximately how much more time you might need? This  
7 is just again for our planning purposes once we  
8 reconvene after the break.

9 MR. LAMBRECHT: Perhaps till about 1:00. If  
10 you wanted to break at 1:00 I would expect that I  
11 would be done by 2:00.

12 THE CHAIRMAN: I think what we will try to  
13 do obviously is to complete your argument.

14 MR. LAMBRECHT: Yes.

15 THE CHAIRMAN: And then have a later lunch  
16 break then, all right?

17 MR. LAMBRECHT: I'm okay with that, thank  
18 you.

19 THE CHAIRMAN: Okay. We will return then at  
20 -- in 15 minutes at 20 to 11:00, thank you.

21 **(Morning Break)**

22 **(Proceedings Adjourned at 10:24 a.m.)**

23 **(Proceedings reconvened at 10:40 a.m.)**

24 THE CHAIRMAN: Mr. Lambrecht, we are ready  
25 to proceed once again. I presume you will continue to

1 want to put exhibits up on the screen, so we will  
2 continue to sit here during that period. So please  
3 proceed.

4 MR. LAMBRECHT: Mr. Chairman, I think I'm  
5 pretty much through the part of my submissions that  
6 are going to rely heavily on these materials. There  
7 will be some additional materials that I will refer  
8 to. I'm comfortable if the Panel resumes its other  
9 position or does whatever.

10 THE CHAIRMAN: In that case we will move  
11 back to the --

12 MR. LAMBRECHT: Thank you. Thank you.

13 THE CHAIRMAN: -- to our normal sitting  
14 here.

15 MR. LAMBRECHT: I appreciate you  
16 accommodating me and I'm sorry the technology didn't  
17 work. We, we thought we had it yesterday, but things  
18 change.

19 THE CHAIRMAN: Please proceed,  
20 Mr. Lambrecht.

21 **CLOSING ARGUMENT OF GOVERNMENT OF CANADA, BY MR. LAMBRECHT**

22 **(CONTINUED):**

23 MR. LAMBRECHT: I was responding to  
24 Mr. Denstedt's submissions about what I describe as  
25 the conjunctive four part -- what he described, as I

1 understood it, as the conjunctive four-part test  
2 which, in my submission, was wrongly attributable to  
3 the judicial consideration of CEA.

4 This was the submission that the test for  
5 this Panel, as Mr. Denstedt suggested, was a sort of  
6 an if stop, if stop, if stop, if stop, kind of  
7 process. As I indicated earlier, that approach is not  
8 consistent with the judicial adoption of a more  
9 flexible approach to environmental assessment  
10 evidenced in the Supreme Court of Canada decisions in  
11 **Oldman River** and **Quebec Council of Crees** and the  
12 Federal Court of Appeal decision in **Inverhuron**.

13 To the extent that it may flow from the  
14 Express Pipeline Joint Review Panel, it has been  
15 overturned by the Federal Court of Appeal decision in  
16 **Express Pipeline**. And the material passage here is at  
17 page 13 and the proposition that it stands for is that  
18 the assessment of environmental effects is not  
19 sequential or separate. So the Court of Appeal  
20 writes:

21 [As read]

22 "It was argued and in this the  
23 applicants echoed the views of the  
24 dissenting Panel member that  
25 Subsection 16 requires a

1 sequential examination of the  
2 factors enumerated therein. In  
3 particular, it was said that the  
4 Panel erred in not considering the  
5 possible environmental effects of  
6 the project before looking at any  
7 possible mitigation measures.  
8 Nothing in the statute supports  
9 such a view. Section 16 certainly  
10 does not say or imply that the  
11 listed factors must be considered  
12 sequentially while Section 37 as  
13 well as Sections 20 and 23, which  
14 do not apply in this case,  
15 strongly suggest that mitigation  
16 measures and environmental effects  
17 must be considered together. In  
18 our view, logic and common sense  
19 point the same way."

20 And then there's a passage that my friend read  
21 about:

22 [As read]

23 "There being no point in  
24 considering hypothetical effects  
25 if you can mitigate them."

1           The point that I wanted to draw upon from the  
2           fuller passage is that this sort of sequential  
3           decision-making process is expressly rejected by the  
4           Federal Court of Appeal in that decision. And it  
5           finds its way, with the greatest of respect, into some  
6           of the treatment of cumulative effects issues because  
7           the suggestion is that, well, if the cumulative  
8           effects is minor -- I think the phrase was used  
9           "negligible", then we don't need to conduct a  
10          cumulative effects environmental assessment of it.

11                   And -- to respond to that, I would like to  
12          note that the EIS Guidelines given to EnCana, which is  
13          Exhibit 001-005, at page 32, suggest -- they use the  
14          word "shall adhere" to the *Cumulative Effects*  
15          *Assessment Practitioner's Guide* published in February  
16          1999 by the Canadian Environmental Assessment Agency.  
17          And I would like to refer to passages at pages 1 and 3  
18          of that document, starting at 1:

19                   [As read]

20                   "Concerns are often raised about  
21                   the long-term changes that may  
22                   occur not only as a result of a  
23                   single action but the combined  
24                   effects of each successive action  
25                   on the environment. Cumulative

1 effects assessment is done to  
2 ensure the incremental effects  
3 resulting from the combined  
4 influences of various actions are  
5 assessed. These incremental  
6 effects may be significant even  
7 though the effects of each action,  
8 when individually assessed, are  
9 considered insignificant."

10 And so contrast the EnCana approach with this:

11 [As read]

12 "Cumulative effects assessment is  
13 increasingly seen as best  
14 practice."

15 And then go on to page 3:

16 [As read]

17 "Cumulative effects are not  
18 necessarily that much different  
19 than effects examined in an EIA.  
20 In fact, they may be the same.  
21 Many EIAs have focused on a local  
22 scale in which only the footprint  
23 or area covered by each action  
24 component is considered. Some  
25 EIAs also consider the combined

1 effects of various components  
2 together, a pulp mill and its  
3 access route. A cumulative  
4 effects assessment further  
5 enlarges the scale of an  
6 assessment to a regional scale.  
7 For the practitioner, the  
8 challenge is determining how large  
9 an area around the action should  
10 be assessed, how long, in time."

11 And so the EIS Guidelines define cumulative  
12 effects as changes to the environment due to the  
13 project combined with the existence of other works or  
14 and/or other past, present and reasonably foreseeable  
15 future approaches.

16 So, to go back, just briefly, to the question  
17 of the Regional Study Area, without EnCana -- without  
18 an examination of what is occurring outside the  
19 Regional Study Area, at least on those species that  
20 spend some of their life cycle outside of the National  
21 Wildlife Area, it's difficult to see how there can be  
22 an adequate environmental assessment of the influences  
23 on these species and Environment Canada makes this  
24 point in its, in its -- in the Government of Canada  
25 submissions, Exhibit 003-012, page 293.

1 I'm going to try to illustrate this with  
2 reference to use of judgment and, and, and with  
3 respect to fragmentation for the antelope and the  
4 Sprague's Pipit particularly, just by way of  
5 illustration, but I do not mean to limit the  
6 generality of this submission by that focus.

7 Now, the use of professional judgment in the  
8 assessment of significance done by EnCana's EIS was  
9 the subject of comment by Dr. Whidden and is also  
10 articulated in Exhibit 002-013 at page 5-9. This is a  
11 part of EnCana's EIS, I think, and it is Section 5.6.1  
12 which discusses the overall assessment approach. It  
13 says:

14 [As read]

15 "Wildlife resources are clearly an  
16 important attribute in the NWA as  
17 conservation of wildlife and  
18 habitat is the area's primary  
19 mandate."

20 It goes on to say that:

21 [As read]

22 "Few scientific studies have  
23 empirically assessed the effects  
24 of infill drilling and well  
25 density on wildlife species and

1                    assemblages in this particular  
2                    ecological setting, e.g., dry  
3                    mixed grass."

4                    And:

5                    [As read]

6                    "Given the limited empirical  
7                    measures relevant to the study  
8                    area we avoided modelling which,  
9                    by its very nature, demands  
10                    empirically derived inputs.  
11                    Although best professional  
12                    judgment ultimately plays a major  
13                    role in assessing effects  
14                    significance, the importance of  
15                    wildlife effects for this Project  
16                    demanded a scientific  
17                    underpinning. Fortunately, infill  
18                    drilling has taken place within  
19                    the NWA in immediate environs in  
20                    the recent past. This presented  
21                    an opportunity to empirically  
22                    investigate, to some extent, the  
23                    magnitude of infill drilling  
24                    effects during field  
25                    investigation."

1 I'm going to have quite a bit of comment on this.  
2 The field investigations I think that are going to be  
3 material, particularly for the Sprague's Pipit, is  
4 this two two-week period of field studies in 2006  
5 which attempted to compare population numbers for  
6 Sprague's Pipit in 2006 to what had been discovered by  
7 in the Canadian Wildlife survey some 10 or 11 years  
8 earlier.

9 There was a lot of discussion with respect to  
10 the scientific validity of that approach and I'll just  
11 touch upon that by way of highlight.

12 The point here is the recognition in EnCana's  
13 own EIS that "best professional judgment ultimately  
14 plays a major role in assessing effects significance  
15 here".

16 Now, the defence by Mr. -- this was -- the  
17 defence by Mr. Denstedt was that reasonable minds can  
18 differ on the assessment of significance. But I would  
19 encourage upon the Panel the opinion of the Joint  
20 Review Panel expert, Dr. Troy Whidden, whose opinion  
21 still today survived after his consideration of  
22 materials and evidence submitted during the report.

23 Now, his August report from 2008, he agreed  
24 with the following statements that were his opinion  
25 today:

1 [As read]  
2 "We concur that the evidence  
3 supporting impact predictions was  
4 not provided in many instances.  
5 There is a heavy reliance on  
6 unproven or questionable  
7 mitigation strategies and several  
8 species at risk were not assessed  
9 through systematic surveys."

10 He said this:

11 [As read]  
12 "Several conclusions relating to  
13 wildlife in the EIS appear to be  
14 based more on subjective  
15 professional judgment than actual  
16 filed data or model results."

17 This was his opinion:

18 [As read]  
19 "We agree that the cumulative  
20 effects assessment for the  
21 wildlife VECs was inadequate. The  
22 Proponent did not undertake a  
23 cumulative effects assessment for  
24 all terrestrial wildlife species  
25 listed on Schedule 1 of SARA as

1 all environmental effects on  
2 species at risk VECs were  
3 predicated on being not  
4 significant or negligible. These  
5 predictions were generally not  
6 based on quantitative data or were  
7 based on insufficient data and  
8 subjective professional judgment."

9 He also was of the opinion that:

10 [As read]

11 "EnCana's apparent reluctance to  
12 conduct adequate statistical  
13 analysis, including the power  
14 analysis and consideration of  
15 sample sizes requested by the  
16 Government of Canada, is  
17 disappointing and disenchanting.  
18 If a lack of proper analysis is  
19 typical for Canadian environmental  
20 assessments as EnCana argues, then  
21 the typical assessment is  
22 inadequate indeed."

23 It was his opinion that:

24 [As read]

25 "Benchmark of natural range of

1 variation is not a good parameter  
2 for predicting impact significance  
3 and we provide this suggestion  
4 quite aside from the fact that  
5 natural variation has been  
6 quantified by EnCana and therefore  
7 their claim that a given effect is  
8 within the range of natural  
9 variation is flawed."

10 It was his opinion that:

11 [As read]

12 "Habitat fragmentation was not  
13 assessed because it was not  
14 considered to be a key issue for  
15 the Project as disturbance from  
16 pipelining would be less than  
17 2 metres for well tie-ins and less  
18 than 4 metres for loop lines.

19 These widths were considered  
20 insufficient to result in a  
21 habitat fragmentation effect.

22 However, these claims remain  
23 unsubstantiated and lack any  
24 provision of rationale related to  
25 the potential impacts to all VECs,

1 large and small, from linear  
2 disturbances less than 4 metres in  
3 width on the ecological integrity  
4 of the NWA."

5 Now, the defence of Mr. Denstedt was simply to  
6 dismiss the evidence of the Panel's independent  
7 expert, Dr. Troy Whidden.

8 The problem, in my respectful submission, is  
9 that it goes deeper than merely a difference of  
10 opinion between reasonable minds. This goes to the  
11 adequacy of the EIS design and methodology and its  
12 compliance with the spirit of the EIS Guidelines.

13 So let me turn to one of the passages on  
14 cumulative effects that appears in the EIS material.  
15 I'm in Volume No. 3 of the "Terrestrial Bioeffects"  
16 and I'm going to compare a statement made at page 7,  
17 which is Exhibit 002-013. I want to compare a  
18 statement that appears at page 729 with a statement  
19 that appears at 726.

20 Now, I'm going to start at 726. This was VEC  
21 response to cumulative land use and thresholds in the  
22 MTA. It cites the Dillon study. Now, Dillon's study  
23 was an environmental assessment of, of formation  
24 level, Brigade -- battle group level training in 2006  
25 at CFB Suffield and it says as follows:

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[As read]

"Some information exists concerning the magnitude of combined military and oil and gas effects in the MTA. This is found in the recent environmental assessment of formation level training at the CFB Suffield (Dillon 2006) as well as from data analysis conducted for the current infill drilling EIA. The formation level training EA (Dillon 2006) concluded that two listed species of song bird, Baird's Sparrow and Sprague's Pipit, showed declines in the areas with the highest levels of Military training from 1996 to 2004."

Now, jump over to page 729 with respect to the significance, and you go down to the fourth -- third and fourth bullet:

[As read]

"2006 field investigations suggest that densities of breeding birds song birds in the upland grassland

1 habitat type and the grassland  
2 mid-low shrub habitat type  
3 respectively were not  
4 significantly higher in the 8  
5 wells per section versus the 16  
6 wells per section."

7 And then their professional judgment is  
8 exercised:

9 [As read]

10 "Breeding birds are resilient to  
11 the current cumulative effects of  
12 land use in the MTA."

13 So we have EnCana's own environmental assessment  
14 citing DND's study which documents what is described  
15 as a reduction in the number of Sprague's Pipit which  
16 is, which is of course one of the species at risk over  
17 which we have had -- heard quite a lot of evidence in,  
18 in the National Training Area. And then simple  
19 dismissal of that by saying, well, we went out for  
20 four weeks and we looked -- we, we didn't -- we found  
21 more birds and therefore they're resilient.

22 Now, there was a lot of examination and  
23 evidence on this point. It came down to the tables  
24 and the scientific approach that was in Tables 5J.  
25 I'm just going to grab my table. I don't think you

1 need to refer to it. I won't refer to it because I  
2 can't find it, but the -- essentially, as I recall, it  
3 was -- Mr. Collister had gone out into the field  
4 and/or field work had been done under his study for  
5 two two-week periods in the summer of 2006 which is  
6 before the EIS Guidelines were issued to EnCana. And  
7 based on that, the EIS was filed shortly after the EIS  
8 Guidelines were issued to EnCana in the late winter of  
9 2007 and well before the birds returned to the habitat  
10 for any field work.

11 So it's not necessarily wrong that EnCana  
12 prepared its EIS or began the work on its EIS before  
13 the issuance of the Terms of Reference. It's just  
14 that I think all of the substantial field work was  
15 done before they -- and the design of that field work  
16 was done before the EIS Guidelines were received.

17 And so little was done afterwards to correct  
18 any of the deficiencies that may have arisen in, in  
19 that approach and this becomes particularly apparent  
20 with respect to this study.

21 Brenda Dale's evidence on this point is  
22 particularly probative. She was accepted by her peers  
23 as the person on the Federal Panel, and indeed of all  
24 the panelists here, with the most experience in  
25 respect of the Sprague's Pipit. And she was

1 particularly critical of these field surveys for lack  
2 of statistical power analysis and failure to comply  
3 with observer bias and to take account of other  
4 varieties, particularly moisture, and -- that can have  
5 an effect on bird abundance.

6 Essentially, as I recall, the table relied  
7 upon by Mr. Collister which was 5J-1, it showed a  
8 significant increase in the numbers of Sprague's Pipit  
9 and that's used throughout the EnCana EIS, in  
10 particular in the Reply, to distinguish all of the  
11 other concerns about the decline in the population of  
12 that species.

13 It's admitted by Mr. Collister during  
14 cross-examination and in the materials that, that  
15 there were many factors that could have affected the  
16 abundance of Sprague's Pipit in that -- those two  
17 two-week periods. And Ms. Dale was particularly  
18 strong on the point that the numbers in Table 5J-1  
19 which showed the increase in numbers were not valid  
20 and that the only valid numbers were the numbers  
21 demonstrated in Table 5J-3 which showed a decline.

22 But the point I want to make with respect to  
23 the Sprague's Pipit is essentially this, that the  
24 Dillon study, which is referenced in EnCana's own EIS,  
25 shows a decline in Sprague's Pipit in the training

1 area in relation to training activity which occurs in  
2 the summer months and we know training activity is  
3 going to increase.

4 I think we can accept Mr. Collister's  
5 evidence that agriculture outside of the boundaries of  
6 the Regional Study Area is having an adverse effect on  
7 Sprague's Pipit populations. So we know that the  
8 pressure on this bird outside of the National Wildlife  
9 Area is increasing from agriculture and from increased  
10 Military training that will occur in the future.

11 And where we end up with this is the position  
12 which I found surprising, which is that EnCana is not  
13 going to survey for Sprague's Pipit in the course of  
14 its PDA process.

15 So although there's evidence that the numbers  
16 are declining and that the Sprague's Pipit -- this is  
17 simply dismissed based on professional judgment, on a  
18 statistically flawed survey period in one -- two  
19 two-week periods and then the general professional  
20 judgment is exercised, well, the birds are resilient,  
21 which flies in the face of the evidence  
22 scientifically. And then the conclusion is reached,  
23 and we're not going to have any effect on them anyway  
24 because we're going to avoid their habitat. But we're  
25 not going to look for them, by the way, when we do our

1 PDA surveys.

2 Now, this just does not -- this is not  
3 just -- this attracts, in my respectful submissions,  
4 the criticisms that Dr. Whidden made of these  
5 judgments. And these are valid criticisms and are  
6 reflective of some of the problems with respect to the  
7 exercise of judgment in the assessment of significance  
8 made, in this case, for a specific species at risk.

9 This is compounded -- I think I would submit  
10 simply that a precautionary approach would have  
11 suggested something less dismissive than simply  
12 saying, we're not going to look for the bird. If the  
13 justification for not looking for the Sprague's Pipit  
14 during the survey is that they're too sensitive,  
15 they're too area sensitive and we don't want to  
16 disturb them, then that is wholly inconsistent with  
17 the idea that the birds are resilient to trails and  
18 traffic. If, if they're going to be disturbed by  
19 researchers in the field who -- then they're going to  
20 be disturbed by trails and traffic and wells.

21 If, if -- and in any event, as I understand  
22 it, there will be field surveys for other species  
23 which are likely to do the kind of disturbance that is  
24 sought to be avoided anyway. And with respect to the  
25 Burrowing Owl, as I understand it, the proposal is to

1 walk everywhere in the Wildlife Area, not just the  
2 well sites and the access areas, but throughout the  
3 Wildlife Area in thirds, in each season, to look for  
4 the birds.

5 So I just don't understand this and I have a  
6 couple of points I'll make on this. But the problems  
7 here are not precautionary. This does not reflect a  
8 sort of precautionary approach to this, to this  
9 species at risk and indeed the refusal to look for  
10 this species is baffling because the PDA process is  
11 championed as one which will get environmental  
12 information and provide it publicly.

13 Now, I'll come to the question of the  
14 designation of critical habitat in my submissions.  
15 EnCana is dismissive of that saying that, well, there  
16 is no legal status of preliminary critical habitat  
17 and, in fact, this is simply an effort to frustrate  
18 EnCana's development rights.

19 My submission to that is simply that it is  
20 the scheme of the legislation under the **Species At**  
21 **Risk Act** that recovery plans and action plans will be  
22 prepared for the species at risk including the  
23 Sprague's Pipit and that this can include a  
24 designation of "critical habitat".

25 And so all that Environment Canada is doing

1 is attempting to comply with the obligations that  
2 Parliament has conferred on it under the ***Species At***  
3 ***Risk Act***.

4 Indeed, in other environments they would have  
5 criticized for moving far too slowly. But for the  
6 EnCana Project not much is happening in the National  
7 Wildlife Area. There's a little bit of grazing and  
8 some well access activity for the existing well sites,  
9 but this is otherwise an area that is within the  
10 protected boundaries of the Canadian Forces Base  
11 Suffield to which access is denied at law, under the  
12 *Defence Controlled Area Access Regulations*.

13 So when there's a correlation between  
14 EnCana's Project and Environment Canada's activities,  
15 it is both a consequence of the statutory obligation  
16 under the ***Species At Risk Act*** and a response to a  
17 proposal to industrial development that is brought  
18 forward by the developer. The whole thing is  
19 complicated by the tempo and the pace of the  
20 development.

21 Now, there were questions from the Panel, and  
22 very good questions I thought, about the tempo and the  
23 pace of the development. What is proposed is a  
24 project where construction will occur in three years.  
25 The commitments, which are Exhibit 002-136, this is

1 EnCana's commitment letter, do not commit to doing  
2 this Project on a pilot basis or over a longer period  
3 of time. The possibility of a pilot project was  
4 something that could have been included as an  
5 alternate to the Project.

6 Indeed, the Terms of Reference given to  
7 EnCana by the Panel require the, the consideration of  
8 alternatives including the postponement or  
9 cancellation of the Project. And really, postponement  
10 or cancellation simply were not looked at. All that  
11 was looked at is that, we want -- is a three-year  
12 construction window period followed by a 20 to 40-year  
13 operating lifecycle of the Project, all of which is  
14 going to be covered by one permit.

15 I understand, from the submissions of  
16 Mr. Denstedt, that EnCana would be prepared to accept  
17 a pilot or perhaps some small extension of the  
18 construction period from three to four or five years,  
19 if it was imposed upon it as a condition of project  
20 approval. But even then it asks that the pilot be of  
21 sufficient size to give data to verify the process  
22 predictions and all of that is not discussed in -- as  
23 an alternative in the EIS.

24 So what a three-year project does, which is  
25 the Project that is proposed, is it really challenges

1           some of the principles of adaptive management. The  
2           EIS Guidelines require some consideration of the  
3           ability of species to recover from effects so that you  
4           can adaptively manage. And the point has been made by  
5           the Federal Panel and by the Environmental Group's  
6           Panel I believe as well, that by the time the effects  
7           are assessed the Project is constructed.

8                         So this really challenges the adaptability of  
9           adaptive management and that is a matter wholly within  
10          EnCana's command and they have chosen to come forward  
11          with a proposal of this kind for a three-year  
12          construction window.

13                        The EIS Guidelines, at page 6, suggest that  
14          EnCana should consider the values of the VEC, and I  
15          went over this at the beginning of my submissions when  
16          we talked about values. Mr. Denstedt's response there  
17          is to talk about the waste of the natural gas if it's  
18          not extracted. And so there really is an  
19          under-appreciation of the capital value of undeveloped  
20          land as a social and cultural heritage.

21                        At page number -- at the EIS Guidelines  
22          Exhibit 001, page 005, page 23, Item No. 34 requires  
23          EnCana to consider land use policies and research  
24          manage -- and, and initiatives.

25                        Now, this is sort of forward looking. In

1 other words, this -- as I read this, when I read this,  
2 might have invited EnCana to anticipate that during  
3 the course of its Project some part of the National  
4 Wildlife Area on which there are multiple species at  
5 risk, for which recovery plans and action plans and  
6 designation of critical habitat are compelled by  
7 statute and are underway, might actually be declared  
8 critical habitat.

9 So to anticipate that and to respond to it in  
10 the EIS to say, well, if some or some part of, of the  
11 National Wildlife Area were to be designated critical  
12 habitat, this is how, this is how it would reflect or  
13 impact our need for the Project. But the evidence in  
14 that regard is entirely missing, and I confirmed this  
15 on cross-examination with the EnCana panel.

16 We don't know where, in effect, the  
17 break-even point for this Project is. Is it  
18 200 wells, 400 wells, 600, 800? At what point does  
19 the Project become uneconomic for EnCana? There is no  
20 evidence on this, and so there is simply a complete  
21 failure to anticipate land use initiatives that are  
22 underway to the knowledge of EnCana at the time and to  
23 incorporate that into postponement or perhaps  
24 cancellation of the Project as an alternative, as it  
25 is requested of EnCana in the EIS.

1                   So, the tempo and pace of development  
2                   challenge the ability of adaptive management and do  
3                   not have regard to some of the obligations set upon  
4                   EnCana in the EIS Guidelines which is to consider  
5                   alternates, including postponement or cancellation of  
6                   the Project and to include land use initiatives which  
7                   are underway.

8                   I would like to take some time to talk about  
9                   habitat fragmentation and I want to use antelope and  
10                  Sprague's Pipit as illustrations. I think the points  
11                  that I'm going to make are easily made with respect to  
12                  snakes as well and I'm, I'm just going to start with  
13                  snakes but I'm not -- use them by way of illustration  
14                  to say that there is simply a difference of  
15                  professional judgment again, as I see it, between  
16                  Mr. Collister and Mr. Didiuk as to the significance of  
17                  effects on rattlesnakes.

18                  With the greatest of respect, Mr. Didiuk has  
19                  a superior field experience and it is unfair of, of  
20                  Mr. Denstedt to criticize Mr. Didiuk's illustration  
21                  for the Panel which used a smaller number of snakes,  
22                  to be dismissive of that when it was well known by  
23                  saying, well, there's 10,000 snakes and so obviously  
24                  this isn't the right number of snakes to be used.

25                  The example that Mr. Didiuk was attempting to

1 give was based on a much smaller area in the NWA and  
2 that was confirmed by my cross-examination of  
3 Mr. Collister. So this rhetoric about there's  
4 10,000 snakes and therefore you can ignore  
5 Mr. Didiuk's example is that, it's rhetoric.

6 And so passing on from snakes to goat to  
7 antelope, one of the themes of the EnCana EIS is  
8 avoidance of migratory birds by having the  
9 construction period in the winter and this, this is an  
10 irony because the National Wildlife Area and Canadian  
11 Forces Base Suffield are important winter habitat  
12 ranges for antelope, as it turns out.

13 With respect to fragmentation, EnCana's  
14 position is stated in Exhibit 002-013 at page 53 and  
15 it's as follows:

16 [As read]

17 "Fragmentation was not assessed for  
18 project effects as the anticipated  
19 surface disturbance for all  
20 pipelines will be less than  
21 4 metres, with insufficient to  
22 cause a habitat fragmentation  
23 effect. Little potential exists  
24 for impairment of wildlife  
25 movement due to the Project as no

1 new roads or other potential  
2 barriers will be constructed."

3 So although the EIS Guidelines require a  
4 consideration of fragmentation, professional judgment  
5 was used to dismiss fragmentation as an effect.

6 There are a number of interesting maps with  
7 respect to antelope. The map at Exhibit 003-019,  
8 page 55 of 61, shows Pronghorn antelope, four-hour GPS  
9 collar locations from December of 2003 to February of  
10 2007, and this is the construction period, as I  
11 understand it, or a part thereof, and it overlays the  
12 distribution of antelope as, as reflected on their GPS  
13 collars with the boundaries of the Base and it's quite  
14 remarkable and I would invite you to have a look at  
15 it. It's Exhibit 003-019 at page 55.

16 The Base is virtually full of antelope in  
17 this period. That reality was the subject of a slide  
18 in the Federal Panel -- Federal presentation at  
19 003-031, page 10, which showed how antelope flow  
20 through the Base and the Wildlife Area en route to  
21 habitat above and below the Wildlife Area.

22 Now, EnCana's own materials include at  
23 Exhibit 002-014, page 291 of 518, a report by Tobin  
24 Siegel entitled, "Summer Resource Selection Function  
25 For the August, 2006 Suffield Pronghorn Survey". At

1 page 15 of that study the following passage appears --  
2 this was a survey of, of antelope in August, but this  
3 passage appears:

4 [As read]

5 "It is the author's opinion that  
6 the available information suggests  
7 that the actual wells themselves  
8 are not providing negative sensory  
9 feedback for Pronghorn. However,  
10 the results of the analysis and  
11 known Pronghorn behaviour suggests  
12 fragmentation of the landscape and  
13 net loss of habitat from well  
14 pads, pipelines, roads and the  
15 introduction of exotic species by  
16 human traffic could be factors  
17 affecting Pronghorn use of this  
18 landscape as evidenced by a  
19 negative response to well density  
20 in this study."

21 The author goes on at page 16 of the report to  
22 make a recommendation:

23 [As read]

24 "The following recommendations  
25 could potentially benefit

1 confidence in the model reported  
2 herein when determining the  
3 effects of development on  
4 Pronghorn resource selection  
5 functions.

6 Fragmentation Effect.

7 In light of work by best of  
8 work by Berger, et al, 2006, the  
9 effect of habitat fragmentation by  
10 oil and gas infrastructure and  
11 other anthropogenic activities  
12 should be assessed to determine  
13 impacts and possible mitigation  
14 measures. Pronghorn net winter  
15 habitat and food loss resulting  
16 from the cumulative effects of  
17 human disturbance should be  
18 analyzed when assessing impacts of  
19 development on Pronghorn since  
20 winter survival is particularly  
21 dependent on fragile forage  
22 availability and movement  
23 corridors."

24 And the EnCana response to that is to -- is  
25 outlined in their Exhibit 002-013, pages 5106 to 5108.

1           Essentially, what they say at the conclusion of this  
2           discussion is that:

3                     [As read]

4                     "Pronghorn are resilient and  
5                     residual environmental effects of  
6                     the Project on the Pronghorn  
7                     antelope are rated as  
8                     insignificant/negligible, assuming  
9                     successful implementation of  
10                    mitigation measures as outlined  
11                    above."

12                   And this appears to be based on the conclusion  
13           that:

14                     [As read]

15                     "Surveys conducted in 2006 for this  
16                     Project showed a general tolerance  
17                     of antelope to single vehicle  
18                     passes. In 72 percent of  
19                     encounters with the observation  
20                     vehicle Pronghorn Antelope did not  
21                     respond by fleeing or running away  
22                     from the disturbance."

23                   So, although there is some study that suggests  
24           that with the increasing well densities fragmentation  
25           effect for antelope should be looked at, we know from

1 the EnCana EIS that it simply was not looked at and  
2 that this was based upon the notion that Pronghorn are  
3 resilient to vehicle traffic.

4 A similar kind of a professional judgment  
5 resides in the question of the Sprague's Pipit.

6 Now, the EnCana discussion of the Sprague's  
7 Pipit is in its EIS at page 5 -- Section 5 of  
8 Volume 3, I think it is, at page 583. And under the  
9 heading, 5.8.3.25, Sprague's Pipit, the following text  
10 appears:

11 [As read]

12 "The primary threat for this

13 species is habitat alteration.

14 The species requires relatively

15 large tracts, greater than 150

16 hectares of native grassland which

17 are increasingly rare in its

18 breeding range. Conversion of

19 prairie to cultivation is the

20 greatest threat and grazing other

21 than lightly of Dry Mixed-Grass

22 Prairie has negative

23 consequences."

24 So the statement appears at the top of the next  
25 sentence:

1 [As read]

2 "This species is area sensitive."

3 And so some of the rest of this goes on to cite  
4 the Dillon study. So at the end of that paragraph, at  
5 the top of page 584, the following statement appears:

6 [As read]

7 "Dillon (2006) found a significant  
8 decrease in Sprague's Pipit  
9 numbers from 1996 to 2004."

10 So, here we have an area sensitive species which  
11 is fine -- which we know is disturbed from the Dillon  
12 study by Military traffic and which we know is,  
13 according to EnCana's own material, is sensitive to --  
14 what's described as area sensitive, a point that  
15 Brenda Dale's evidence supported.

16 We know that there's increasing agricultural  
17 use outside of the Regional Study Area which is a  
18 negative effect on this because it affects its  
19 breeding range. So all the -- so for this species the  
20 significance of the National Wildlife Area becomes  
21 increasing and the species is not going to be surveyed  
22 for by EnCana.

23 Mr. Denstedt was critical of what was  
24 described as a 900-metre moving circle analysis, but  
25 if you look at Exhibit 002-110 at page 61, which is

1 EnCana's reply of August 13th, '08, a 908-metre radius  
2 amounts to 259 hectares, that's Exhibit 002-110,  
3 page 61. So if, if the species requires relatively  
4 large tracts, as EnCana's own environmental assessment  
5 says, greater than 150 hectares, the biological  
6 relevance -- I think this was the term used by  
7 Mr. Denstedt -- of a 900-metre radius is exactly that.  
8 It's looking for the area of large tracts of native  
9 grassland which is a primary habitat for this species.

10 Information about agriculture within the  
11 Regional Study Area can be found at page 4A-23, which  
12 I think is of the terrestrial study and it says as  
13 follows:

14 [As read]

15 "Agriculture is one of the primary  
16 contributors to the economy of the  
17 Regional Study Area. In 2001  
18 there were 2,933 farms in the RSA  
19 operating ..."

20 And this is -- this is outside of the Suffield  
21 area:

22 [As read]

23 "Operating on 7.7 million acres of  
24 land. This represents about  
25 5 percent of all the farms in

1                    Alberta and 15 percent of the  
2                    total area being farmed in the  
3                    Province."

4                    So the exercise of professional judgment to  
5                    dismiss fragmentation effect on antelope and on  
6                    Sprague's Pipit, in particular, with the greatest of  
7                    respect is deserving of the kind of comment that the  
8                    Panel's expert Dr. Whidden gave to that and I would  
9                    encourage the Panel to listen to its own expert  
10                   because I'm afraid what Mr. Denstedt would say if I  
11                   made that submission to you. I think you -- don't  
12                   take it from me, take it from your independent expert  
13                   on this point.

14                   Now, I'm going quicker than I thought and I  
15                   would like to turn to a discussion of the legal  
16                   framework for this, if I might.

17                   To me, what I want to try to cover from this  
18                   is the extensive reliance on the PDAs in an  
19                   environment where it seems clear that there is a  
20                   difference of view between EnCana and the Federal  
21                   crown, and indeed SEAC, about the governing regulatory  
22                   authority. I don't personally remember doing a  
23                   development case where the parties disagreed about the  
24                   regulatory authority that governed the Project and the  
25                   extent of the disagreement in this case is quite, is

1 striking.

2           Whatever this Panel recommends, at the end of  
3 the day, I would encourage it to commend Mr. Kennedy  
4 and his courage for coming forward and giving the  
5 submission that he did as an individual sitting on  
6 SEAC. That's not an easy thing to do and -- but it  
7 reflects I think, the reality of the situation which  
8 is that SEAC finds itself in the middle of this  
9 dispute between DND and EnCana without any clear terms  
10 of reference, without any clear authorities or  
11 enforcement capabilities, without any clear resources  
12 and indeed without the Alberta participants so they  
13 couldn't even speak as a committee to this Panel.

14           The suggestion that SEAC has the capability  
15 to bear the load that EnCana is proposing to place on  
16 it through the PDA and EEMP process is simply unsound.  
17 To use an architectural analogy, SEAC is incapable of  
18 bearing that load. That cannot be a weight bearing  
19 beam and Mr. Kennedy made this point, he said, we just  
20 can't do this.

21           EnCana's response is simply to say, well,  
22 give them more money and redefine it. Give them more  
23 money given them broader authorities. But underlying  
24 that, in my submission, is still some residual  
25 uncertainty about what the governing regulatory regime

1 is and that's really sort of fundamental.

2 So, as I conceptualize it, here is what I see  
3 as the situation: the essential position of the  
4 Department of National Defence is that the SEAC,  
5 Suffield Environmental Advisory Committee, advises the  
6 Base Commander, so that -- and that was indeed what  
7 Mr. Kennedy said the function of the committee was so  
8 that if you refer a matter to -- if the matter goes to  
9 SEAC it then goes to the Base Commander for decision  
10 so that you could sort of consider SEAC and the Base  
11 Commander as one. A reference to SEAC is a reference  
12 to the Base Commander because everything that goes to  
13 SEAC is going to go to the Base Commander.

14 And so instead of using the term "SEAC", it  
15 would be possible to say, we will refer these  
16 difficult cases to the Base Commander, but that's not  
17 what EnCana says. EnCana instead says that they will  
18 refer the matter to SEAC who may make a recommendation  
19 to the Base Commander and the Base Commander may only  
20 exercise authority on recommendation of SEAC.

21 So there's a parting of the ways here because  
22 the Federal interpretation of the authority of the  
23 Base Commander is that his authority is plenary and  
24 flows from the exercise of Federal regulatory power  
25 conferred on him by a number of regulations which I

1 will enumerate in a moment and cannot -- and that is  
2 reflected in the, in the plain words of the agreement  
3 as -- and we went through it and I don't want to take  
4 you through it again. We went through it with  
5 Mr. Protti at some length. We had a good exchange on  
6 what the differences of views are.

7 But the agreement essentially provides that  
8 although there will be dual use of the Base, Military  
9 use of the Base is primary, that EnCana has a limited  
10 right of access which is subject to a number of  
11 conditions including the preparation of an annual  
12 report and development plan which is approved by the  
13 Base Commander, none of which has been done here,  
14 which is subject to the general authority of the Base  
15 Commander flowing from all laws, and to a number of  
16 specific obligations; and that notwithstanding all of  
17 that, there are specific provisions for how oil and  
18 gas development would be regulated.

19 Within those specific provisions I would say  
20 that these so-called regulations, the *Oil and Gas*  
21 *Conservation Regulations* are a part of the overall  
22 agreement and are subject to the overall authority of  
23 the Base Commander.

24 EnCana, I think, on the other hand looks at  
25 it through the other end of the telescope they say,

1 well, we have contractual rights and notwithstanding  
2 that, that events have changed and the parties really  
3 are no longer governing themselves by the terms of the  
4 contract because, for a variety of reasons we haven't,  
5 for example, got the Base Commander's approval for  
6 this Project and we haven't referred these well  
7 licence applications to SEAC, even though it appears  
8 from the preliminary PDAs that they're going to fall  
9 in a Wetland area, two of them at least, and even  
10 though we're supposed to go to the ERCB but we've come  
11 to the EUB, nevertheless the Base Commander authority  
12 is limited by the contract.

13 And what this does is it, it does not have --  
14 it's an impoverished interpretation of the authority  
15 of the Base Commander at law because it does not have  
16 sufficient regard to regulatory authority conferred  
17 upon the Base Commander and legitimately exercised in  
18 the, in the interests of sustaining the ecological  
19 integrity of the Wildlife Area and the National  
20 Training Area.

21 The practical result is quite significant.  
22 EnCana's evidence, as I understand it, is that  
23 development applications go to the ERCB and if the  
24 Base Commander doesn't like it he can appeal. And so  
25 this sort of makes Provincial regulatory law paramount

1 over Federal regulatory authority which is getting it  
2 backwards, with the greatest of respect, not, not only  
3 contrary to the contract but contrary to some basic  
4 constitutional principles.

5 EnCana, in effect, got what it bargained for  
6 because when it took the assignment of this right of  
7 access, it knew that it was going to be operating on a  
8 Military Base, which was actively used for Military  
9 training, and had to have known, at some point, that  
10 there would be a threshold reached at which oil and  
11 gas activity might no longer be able to be carried  
12 out.

13 So to say that there is a right, an  
14 unfettered right of access under the agreement,  
15 flowing somehow from common law simply ignores the  
16 legal reality that common law has been supplanted, for  
17 many years now, by regulatory authority. In Alberta,  
18 the **Surface Rights Act** governs access to the, the  
19 rights and it is Provincial tribunals which grant  
20 approval for well licence applications.

21 In other words, you can't just go on to  
22 somebody's farmland and drill. You have to get  
23 approval of a regulatory authority. So there isn't  
24 even an unfettered right of access flowing from common  
25 law on private land in Alberta, much less on a

1 Military Base of, of irreplaceable value to Canada as  
2 one of the largest Military bases in the western  
3 world, actively used by one of our allies for Military  
4 training.

5 The result of EnCana's interpretation is that  
6 through the exercise of professional judgement they --  
7 and without looking, without going into the field and  
8 looking, they figure that 80 percent of the 14 -- of  
9 the 1275 wells can be characterized as what are  
10 routine and only 20 percent need to go to SEAC for  
11 review.

12 The position of DND is that it would treat  
13 all of these matters as non-routine and 100 percent of  
14 them would be subject to oversight through the Range  
15 Sustainability Section and that would involve  
16 consultation with SEAC in the normal course.

17 So we have a really fundamental difference of  
18 view between the parties in which SEAC is caught in  
19 the middle and this affects -- this has to affect the  
20 certainty and confidence that the mitigation measures  
21 which are proposed, can be effectively implemented.

22 As Mr. Woosaree pointed out, all hope seems  
23 to rest on the PDAs as mitigation measures and EnCana  
24 proposes that SEAC will oversee it, SEAC says it  
25 doesn't have that ability.

1                   So there is a significant problem here. I've  
2                   given it a lot of thought. I don't think this Panel  
3                   has to resolve the problem. This Panel has to take  
4                   account of the fact that there's a difference between  
5                   the parties of such a fundamental nature and consider  
6                   how that difference may affect the confidence with  
7                   which the mitigation measures, which are proposed  
8                   through the PDA process, can be effectively  
9                   implemented.

10                   Take reclamation, for example. Although  
11                   there has been drilling for over 30 years on Canadian  
12                   Forces Base Suffield, there has been very little  
13                   reclamation. The Base Commander described that as a  
14                   big problem. EnCana does not need to take any bonds  
15                   or take any, any other action to expend monies to  
16                   reclaim at the end of the lifecycle, wells which are  
17                   shut in and so -- and the standards for reclamation  
18                   are completely undefined.

19                   Now, my, my friend made some issues on this,  
20                   but my essential response to -- and I, I think what he  
21                   said is that EnCana would, would, in this instance,  
22                   submit to the final authority of the Base Commander.  
23                   But I remember cross-examining Mr. Protti on this,  
24                   asking Mr. Protti if he would agree with the exercise  
25                   of the Base Commander's authority over the final

1 exercise of the determination of reclamation standards  
2 and Mr. Protti's response was he would prefer a more  
3 consensus based decision-making model, as I recall it.

4 So it was less direct, but if the parties  
5 were -- I say this with the greatest of respect -- if  
6 the parties were communicating effectively, there  
7 would be reclamation standards that would be  
8 established and in place today. That matter, I called  
9 it vexed, continued to appear over and over and over  
10 again in the SEAC minutes as an agenda item put over  
11 to the next meeting and put over to the next meeting  
12 and put over to the next meeting and put over to the  
13 next meeting to today. So who is to say who has the  
14 final authority over the implement -- the  
15 establishment of mitigation standards and what those  
16 are?

17 And let me just touch briefly upon some of  
18 the regulatory structure of this. The **National**  
19 **Defence Act** indicates that regulations can prescribe  
20 the authority and powers of commanders. Section 49  
21 details the authority exercised by officers who are  
22 given a power by regulation or in accordance with the  
23 services of the custom of the service. *Queens*  
24 *Regulations and Orders* are issued. *QR and O 3.23*  
25 outlines the general powers of command of the Base

1 Commander. *QR and O 4.21* allows commanding officers  
2 to issue Standing Orders and we have what's called the  
3 Range Standing Orders tendered in evidence.

4 What you are seeing here is the assertion of  
5 the Federal regulatory authority in areas that  
6 otherwise -- particularly through the Range Standing  
7 Orders, something new that is going to affect EnCana's  
8 oil and gas operations. This is a legitimate exercise  
9 of Federal regulatory authority. In the event of  
10 conflict between Provincial laws where it is  
11 impossible to comply with both, the doctrine of  
12 paramountcy would generally provide that the Federal  
13 regulatory authority would prevail.

14 The *Defence Controlled Area Access*  
15 *Regulations*, or DCAARs as they are called in the, in  
16 the world of acronyms of the Department of National  
17 Defence, requires a person entering the Base to comply  
18 with every direction given by or under the authority  
19 of, of the Base Commander. And the ***National Defence***  
20 ***Act***, Section 288, creates an offence and gives a  
21 penalty for breaching orders dealing with access or  
22 conduct on defence establishments including bases.

23 So we have a very unique kind of a situation  
24 here because delegated authority to make these kind of  
25 regulations usually sort of goes to the Governor in

1 Council and sometimes is further subdelegated, but we  
2 have a situation here where the Base Commander is  
3 given regulatory authority to give full -- to have --  
4 to control what goes on on the Base. And that, of  
5 course, can include the exercise of regulatory  
6 authority; take care of lands and properties under his  
7 command.

8 And, in this instance, there has been a  
9 direct delegation of permit authority to the Base  
10 Commander under the **Canada Wildlife Act** and the  
11 *National Wildlife Area Regulations*. So it is to the  
12 Base Commander that the application for a permit is  
13 made.

14 Now, while unusual, this makes abundant sense  
15 with respect to Military Bases, which are very unique  
16 places. Of course, you want the Base Commander to  
17 have the final say over what goes on on a Military  
18 Base. That's just common sense. And that is the  
19 situation, and that is the situation that was  
20 recognized in the '75 Access Agreement.

21 Now, with respect to the three well  
22 applications, if I understand the situation, this is a  
23 part -- these three wells are a part of the 1275 well  
24 Project, if I understand it. Now, my understanding is  
25 that the whole Project will go -- the final report of

1 this Panel will go to Cabinet, which will make a  
2 recommendation regarding the whole Project.

3 It seems to me that splitting off three,  
4 three wells and making a direct application to a  
5 Provincial Tribunal is project-splitting and ought to  
6 be declined.

7 Moreover, if, as EnCana submits, the strict  
8 terms of the '75 Access Agreement are to be followed,  
9 then two of these proposed wells fall within Wetlands  
10 and should be referred to SEAC. And that has not been  
11 done.

12 So, moreover, for the reasons in which I've  
13 outlined, the species at risk or their residences have  
14 not been located yet and so really there has not --  
15 there isn't sufficient information to determine  
16 whether well licences should be issued in the public  
17 interest for the reasons that I've generally outlined  
18 with respect to the full Project.

19 Again, EnCana appears to agree that it may  
20 require permits under the *Species At Risk Act* and it  
21 says that if it does require such permits it will make  
22 application for them. We've heard some evidence from  
23 the Environment Canada members of the Federal Panel  
24 about the process for issuance of those permits. It  
25 can be fairly restrictive. So it's not at all clear

1           how that permitting process might affect the Project  
2           that EnCana is proposing.

3                       It would have been preferable if the PDAs, as  
4           I mentioned earlier, had identified the species or  
5           areas for which permits would have been required  
6           because then this Panel would have had a more definite  
7           idea of the -- and been able to measure with much more  
8           sensitivity the accuracy of the assessments of  
9           significance. And EnCana might even have been able to  
10          give some information in its EIS about whether these  
11          permits might affect the economic viability or indeed  
12          the need for the Project.

13                      In other words, if there's going to be so  
14          many permits once people go out and look, they may  
15          very well find species everywhere, and that EnCana's  
16          best professional judgment is that that's not likely.  
17          It's maybe only going to occur in 20 percent of the  
18          cases, but nobody has really gone out and looked. And  
19          there's been no discussion of this contingency in the  
20          EIS.

21                      So to, to move towards a conclusion,  
22          Mr. Denstedt, as I understand it, suggested to the  
23          Joint Review Panel that it must decide a preliminary  
24          question as a matter of law. And if I understand the  
25          question, it is that mines and minerals and their

1 right to work these mines and minerals and to access  
2 the surface for the purpose of that, is not captured  
3 by the designation of the National Wildlife Area and  
4 by the *National Wildlife Area Regulations* and that the  
5 '75 access -- Surface Rights Access Agreement does not  
6 restrict the right of access to the surface but only  
7 defines how the right of access will be exercised.

8 My submission to you on that point, just to  
9 summarize it again, is that I don't think the Panel  
10 needs to decide that as a question of law. If  
11 questions this fundamental are in dispute between the  
12 parties and they are, then this Panel should take the  
13 depth and fundamental nature of that dispute into  
14 consideration when determining whether or not it has  
15 confidence that the mitigation measures proposed by  
16 the Proponent can be effectively implemented.

17 My submission to you on that is that there is  
18 a tremendous amount of uncertainty in this area and  
19 that that also contributes to the prevention of an  
20 articulation of a rationale for significance of  
21 environmental effects.

22 Now, if you might just give me one minute, I  
23 think I'll be able to wrap up by noon.

24 THE CHAIRMAN: Certainly.

25 MR. LAMBRECHT: All right, thank you.

1 Environmental assessment allows  
2 decision-makers to better integrate environmental  
3 goals with economic, social and cultural values. In  
4 other words, it is an indispensable tool for  
5 sustainable development.

6 Given the nature of our economy with its  
7 strong resource base, the pursuit of sustainable  
8 development is a day-to-day challenge in our country  
9 today in Canada. When you look at it strictly from a  
10 business perspective, from a dollars and cents point  
11 of view, environmental assessment makes tremendous  
12 sense. It doesn't cost that much in relation to the  
13 total cost of a project to conduct an environmental  
14 assessment and the environmental and socioeconomic  
15 benefits that can arise from an assessment far  
16 outweigh the cost of doing it.

17 So it's everyone's business because everyone  
18 benefits from high quality environmental assessments  
19 that contribute to informed decision-making.

20 I was trying to recall in my mind the number  
21 of man-years, or man-days I think it was, that would  
22 be required to complete the PDAs, to do the surveys  
23 and complete the PDAs. For some reason the number of  
24 175 pops into mind. I don't know if it's accurate but  
25 just let me use it for the purposes of illustration of

1           this point.

2                         Without evidence, Mr. Denstedt has said that  
3           EnCana has spent millions on this environmental  
4           assessment. Well, if, if at a thousand dollars a day  
5           it would have spent \$175,000 more, it would have been  
6           able to bring forward to this Panel specific direct  
7           evidence about where the species are that are  
8           protected under the *Species At Risk Act*, where the  
9           wells would go, where the pipelines would go, where  
10          the conflicts are, how they might be mitigated, how  
11          many SARA species, how many permits under SARA might  
12          be required and how that would affect their overall  
13          project.

14                        That's a relatively small increment to the  
15          amount that Mr. Denstedt says has been expended for a  
16          tremendous quantum leap in the quality of information  
17          that could have been brought forward and it's just not  
18          here.

19                        So environmental assessment should -- is not  
20          a barrier to development but it's an enabler of  
21          sustainable development both domestically and  
22          globally. It's not bad for business, it's how we  
23          should do business better in this century and, and my  
24          understanding is that EnCana, by its corporate  
25          policies, is committed to benchmark environmental

1 assessment practices.

2 Now, with respect to the Wildlife Area  
3 specifically, designations are, are critical to the  
4 conservation of Canada's national heritage. The -- in  
5 this case, not only is there the designation of the  
6 National Wildlife Area, but it turns out that that  
7 area contains species that, that are listed in  
8 schedules to the **Species At Risk Act**.

9 To protect those species and to pursue the  
10 objectives of both the **Canada Wildlife Act** and the  
11 **Species At Risk Act** is going to require support from  
12 all sectors, including EnCana, in order to ensure that  
13 these objectives are done. If the PDAs had been done  
14 rather than deferred, then there would be a further  
15 contribution to environmental understanding, an  
16 identification of ecologically and culturally  
17 sensitive areas, the location of wells and trails  
18 within those areas, and an identification of  
19 outstanding potential environmental issues.

20 Then, there would have been compliance with  
21 the environmental assessment law as it's articulated  
22 by the Supreme Court of Canada in the judgments that  
23 I've outlined for you, brought forward into the, into  
24 the Terms of Reference of this Panel and carried  
25 forward in the EIS. In other words, environmental

1 assessment could have been done at a time when all of  
2 the impacts could have been fully assessed.

3 There's just too much uncertainty and that's  
4 the respectful submission of the Responsible  
5 Authorities and the Federal Responsible Authority and  
6 the Federal Authorities to enable the articulation of  
7 significance in the manner that EnCana has done.

8 Now, one closing word on this question of  
9 waste of the natural resource if there is no  
10 extraction. I do not understand why it is that the  
11 EIS did not include well -- potential well densities  
12 of greater than 16 wells per section in this EIS. I  
13 know Mr. Denstedt's submission is that it's the  
14 evidence of the EnCana people that it's extremely  
15 unlikely, but we know that there is already some test  
16 drilling at that density going on in the southern part  
17 of Canadian Forces Base Suffield in the National  
18 Training Area. So obviously there is some exploration  
19 of this from a, from a resource engineer's point of  
20 view and it's a possibility.

21 Now, the logic of this to me seems  
22 inescapable. It is -- the logic of EnCana's position  
23 is it's necessary to drill the wells in order to  
24 contact the formation and Alberta law requires  
25 maximization of the recovery of the resource and the

1           minimization of waste.

2                         Now, there are already no well spacing  
3           restrictions in this area. That was the evidence of  
4           Mr. L'Henaff. As I understand it, after 16 wells per  
5           section, if I recall the numbers correctly, between  
6           40 and 50 percent of the natural gas in that formation  
7           is going to remain untapped. It is the position of  
8           EnCana that their minimal disturbance shallow gas  
9           infill drilling process enables them to access this  
10          gas without having any significant environmental  
11          effect. So -- and they don't even -- it's so minor,  
12          according to EnCana, they don't even need to consider  
13          fragmentation.

14                        If that's the logic, then why not bring  
15          forward a proposal for 32 wells per section density  
16          for drilling as a part of the cumulative effects  
17          assessment? I think the answer to that is it, it is  
18          not one of, well, we don't intend to do it today  
19          because it's not today that is important but what  
20          might, what might reasonably occur in future.

21                        And in -- we know from the past in that --  
22          those minutes of SEAC that are included and that were  
23          referred to before, that when SEAC was articulating a  
24          concern about cumulative environmental effects EnCana  
25          responded and said, by the way, we've sort of changed

1 our mind about what we need to do to extract the  
2 natural gas and now we want to go to 16 wells per  
3 section. And that change can certainly occur in the  
4 future, if that much gas in this tight a formation  
5 remains unextracted and it should have been brought  
6 forward in the EIS to be considered.

7 The logic of the EnCana position seems to me  
8 is that it doesn't matter if it's 16 or 32 or 48 or  
9 whatever, because there's no effects anyway because of  
10 minimal disturbance techniques.

11 Now, that does begin to strain credulity at  
12 some, at some point, but it simply reflects the  
13 underlying reality that there are some fundamental  
14 problems in the design and implementation of the EIS  
15 in this case, that leave irreducible uncertainties for  
16 this Panel and affect the ability to make assessments  
17 of significance of environmental effects.

18 Mr. Connelly, Panel Members, it's noon and  
19 that -- I would like to take a break. I'll speak with  
20 my colleagues over the break, but I don't think I'll  
21 have anything further to add. And with that  
22 privilege, the ability to take a break maybe and speak  
23 to colleagues, I'm finished my conclusion. If you  
24 want to go to reply now and finish early, I'm fine  
25 with that and I can indicate to you that I'm wrapped

1 up.

2 THE CHAIRMAN: I think at this point,  
3 Mr. Lambrecht, we, we should take a lunch break.  
4 Would it be possible to shorten it a little bit to,  
5 say, 45 minutes and return? Mr. Denstedt, any  
6 comments on that?

7 MR. DENSTEDT: A couple things,  
8 Mr. Chairman. I would like to know if my friend is  
9 done or not and if perhaps we could take five minutes  
10 now, he could sort that out.

11 There's a lot of things I need to respond to,  
12 so I would prefer the full hour here this -- for the  
13 lunch break but I, I'd like to know whether we're in  
14 fact done with final argument or not.

15 THE CHAIRMAN: I think, Mr. Denstedt, that's  
16 a reasonable request.

17 Mr. Lambrecht, do you want to discuss that  
18 with your colleagues and, and give us an answer to  
19 that?

20 MR. LAMBRECHT: I think I'm done, sir. Thank  
21 you.

22 THE CHAIRMAN: Okay. Well, in that case we  
23 will take an hour lunch break, return at 1:00. At  
24 that point there will be an opportunity for the  
25 Coalition, if it wishes, to respond to the Government

1 of Canada and, of course, EnCana to respond to both  
2 the Coalition's argument and, and to the Government of  
3 Canada's argument.

4 I thank you, Mr. Lambrecht, for the  
5 presentation of your arguments this morning and with  
6 that we will break and return at 1 o'clock. Thank  
7 you.

8 (NOON RECESS)

9 (PROCEEDINGS ADJOURNED AT 12:04 P.M.)

10 (PROCEEDINGS RECONVENED AT 1:01 P.M.)

11 THE CHAIRMAN: Ladies and Gentlemen, welcome  
12 back, and I'll turn to -- right away to Ms. Klimek.

13 **FURTHER CLOSING ARGUMENT BY THE COALITION, BY MS. KLIMEK:**

14 MS. KLIMEK: Good afternoon, Mr. Chair,  
15 Panel Members. My response to Canada's submission  
16 will be extremely brief. For starters, we'd like to  
17 say we reinforce most of what they said and the fact  
18 that you see Canada taking such a strong stand I think  
19 is telling because I've been to many hearings where  
20 they haven't done so.

21 And one other point I would like to add to  
22 the PDA process is, as it's structured, the public,  
23 i.e., my clients and others would be pushed out of  
24 that process. They don't have an opportunity to  
25 comment or have input. The one point I would like to

1 make is that what is apparent, looking at -- from the  
2 outside looking in as the public, from listening to  
3 EnCana's and Canada's position, is there are some  
4 fundamental differences on several issues. And, in  
5 particular, there's the issue of the right to access.  
6 What does the NWA characterization or declaring this  
7 area an NWA do to that? The routine versus  
8 non-routine, the reclamation and the authority on the  
9 Base, and I'm not going to go into details. You've  
10 heard lots of this. But it is apparent from listening  
11 at the back to those two submissions that there are  
12 some fundamental differences.

13 Now, you've been advised that it's an  
14 interpretation of contract or law and I would agree  
15 with that, but I -- our position is that I don't think  
16 this Panel has the authority or the jurisdiction to  
17 make decisions. If you say the contract says this,  
18 with all due respect, so what? Those are generally  
19 what Courts have to do with contracts. Now, hopefully  
20 the parties would listen to your recommendations, but  
21 there's no guarantee.

22 So I think it is fundamental to making any  
23 decisions and I think it's premature for you to be  
24 going down that until those issues are resolved and  
25 they should be resolved prior to the application being

1 reviewed. I think there is at most, at its best it  
2 shows an uncertainty which you have to consider and  
3 once that uncertainty, what happens to it if this is  
4 approved?

5 I also think on the ongoing current status  
6 a recommendation from this Board is that these issues  
7 should be resolved for what is there and I think  
8 particularly of enforcement and authority. If the  
9 Base Commander does not have authority, then who does?  
10 And I think that's a fundamental question. Any  
11 conditions that are imposed, who is going to monitor  
12 them, who is going to ensure? And I don't think you  
13 have anyone that you can clearly put that on in light  
14 of the submissions that were made to you.

15 Those would be all my submissions in response  
16 to Canada's position.

17 THE CHAIRMAN: Thank you, Ms. Klimek. Also  
18 thank you for your contribution to the hearing.

19 Mr. Denstedt, you have the last word.

20 **REBUTTAL CLOSING SUBMISSIONS BY ENCANA, BY MR. DENSTEDT:**

21 MR. DENSTEDT: Thank you, Mr. Chairman.

22 First of all, I would like to thank the Court  
23 Reporters for their extreme diligence and their  
24 patience over the course of the hearing. I think it's  
25 appropriate that I do that now instead of at the end

1 of my speech because I'm trying to end with a big  
2 flourish, so ...

3 THE CHAIRMAN: Save the fire works, are you,  
4 sir?

5 MR. DENSTEDT: Absolutely. So let me start  
6 with the, what my friend just mentioned in respect of  
7 the law. She's wrong on that. The Energy Resources  
8 Conservation Board, which you are sitting as a Panel  
9 as, has the absolute authority and jurisdiction to  
10 determine and decide on matters of law. That's clear.  
11 It's in the legislation that governs the Energy  
12 Resources Conservation Board. So let me deal with  
13 that first.

14 The second thing, Mr. Chairman, we are also  
15 conscious of the Government of Canada's participation  
16 in this process and the method with which they've  
17 chosen to participate and we would suggest,  
18 Mr. Chairman, that your job is to look at the evidence  
19 and decide on the quality of the evidence that has  
20 been submitted and not on the status of the players  
21 who are participating.

22 So let me turn to Ms. Klimek's argument, and  
23 I'll deal with her first. I have a few things at the  
24 end that I will deal collectively and in the middle  
25 I'll deal with Mr. Lambrecht's comments.

1           So, first of all, the recommendation from  
2           the, the Coalition that the application be denied with  
3           prejudice, Mr. Chairman, one comment in respect of  
4           that. If that is the path that you choose, to deny  
5           the application with prejudice to EnCana's right to --  
6           to re-apply, then I think you must also make the  
7           recommendation that the Government of Canada enter  
8           into negotiations to acquire EnCana's rights. It  
9           would be absolutely unfair to expropriate EnCana's  
10          rights by way of the regulatory process.

11           So if you agree with the Coalition about  
12          their suggestion, it carries with it a corollary  
13          recommendation that the Government of Canada acquire  
14          EnCana's rights.

15           So let me move on to our specific submissions  
16          which are, I would start with a series of what I would  
17          call factual errors, and I will try to be brief.  
18          First of all, Ms. Klimek indicated that the Great Sand  
19          Hills Area Study indicated that Crested Wheatgrass was  
20          invading the native Prairie. That's incorrect. In  
21          the appendix to that study, Ms. Anne Gary's (phonetic)  
22          report, she in fact indicated that they could not  
23          conclude what the Crested Wheatgrass was doing. They  
24          couldn't conclude whether it was planted or invaded  
25          and so they ignored it.

1                   Now, I would also refer you to the  
2                   recommendation on page 223 of the Great Sand Hills  
3                   Study which says that management and restoration are  
4                   mitigations that will likely improve the native  
5                   Prairie and reduce the effect of Crested Wheatgrass.  
6                   That is the exact actions that are being recommended  
7                   by Dr. Walker in his Rangeland Assessment Protocol.

8                   In respect of Ms. Klimek's comments on the  
9                   full right-of-way stripping, read my lips: That's not  
10                  happening. Mr. Heese testified to that at page 536 of  
11                  the, of the record, line 14.

12                 In respect of Mr. Didiuk, and I'll try to  
13                 deal with him at once because my friend also mentioned  
14                 him, Mr. Didiuk's testimony, and I'll refer you  
15                 directly to it, he referenced that study from Ontario  
16                 as being -- and these are his words, not mine -- "a  
17                 most excellent study." And if you look at that study,  
18                 the mitigation of 60 kilometres per hour was the  
19                 recommended mitigation. EnCana is proposing 50  
20                 kilometres per hour as the mitigation, so I suggest  
21                 that Mr. Didiuk's reliance on that report is actually  
22                 of assistance to EnCana.

23                 Ms. Klimek indicated that cumulative effects  
24                 had not been dealt with in the EIS. Not sure how she  
25                 arrives at that conclusion. I would recommend you

1 look at the EIS and decide for yourself. It's, it's  
2 in there and it's in the reply evidence and it is the  
3 sum of all the evidence that's been filed before this  
4 Panel. I think there's no shortage of information in  
5 respect of cumulative effects on the record.

6 Ms. Klimek also indicated, when she looked at  
7 the evidence, she said that in respect of the three  
8 well licences that EnCana chose to relax the buffer  
9 or relaxed the buffer. They did no such thing. They  
10 presented evidence to this Panel that demonstrates the  
11 PDA process actually works. They presented it in a  
12 fair and transparent manner that showed that, indeed,  
13 two of the three wells that are proposed for approval  
14 here are caught by that buffer. 80 percent weren't.  
15 It's a fair and transparent way of doing this and the  
16 fact is those two wells that may encroach on buffers  
17 they'll either be resited if this Project is approved  
18 and the PDA process is a condition of that approval  
19 or they will go to SEAC in accordance with the process  
20 that's been enunciated by EnCana. I think that's an  
21 appropriate way to do this and in no way indicates  
22 that EnCana chose to or relaxed the buffer. They did  
23 no such thing.

24 Ms. Klimek also indicated that weather and  
25 templating had not been considered in the -- in how

1 the PDA process will work and that would thus create  
2 a difficult time frame within which they could be,  
3 could be achieved. Well, I would refer you to  
4 Mr. L'Henaff's testimony on the record, sir. He,  
5 he specifically dealt with those two issues under  
6 cross-examination.

7 Let me move on to Ms. Klimek's comments on  
8 Dr. Power and you will recall under cross-examination  
9 with Dr. Power he agreed with me that his assumptions  
10 of the costs associated with any impacts on the NWA  
11 were entirely reliant on the other experts on his  
12 Panel that had told him there will be these effects.  
13 Those included the effects of buffers that Mr. Stelfox  
14 or Dr. Stelfox had included in his simulations which  
15 I would point out were just simulations, just that.  
16 He could have picked out a 50-metre buffer, 500-metre  
17 buffer. He could have picked no buffer. He could  
18 have picked 50 metres less because of recovery of  
19 the native Prairie. It was just a simulation. So  
20 Dr. Powers' evidence in respect of the effects on the  
21 NWA is simply based on information that is not  
22 reliable.

23 Furthermore, Dr. Power, I understand what he  
24 is saying and personally I agree with some of his  
25 considerations, but this Panel has a job to do and

1           that job is to determine whether there are any likely  
2           significant adverse effects associated with the  
3           Project, not to do a cost benefit analysis of the --  
4           of the process. So that's Dr. Power.

5                       Perhaps I can move on to -- actually, I'll  
6           deal with this because my friend also raised it about  
7           the, the well in the Wetland, the Nishimoto well, and  
8           I would refer you to Mr. Heese's response to that  
9           and -- on the record. But, furthermore, yes, there  
10          were three letters going back and forth. EnCana was  
11          trying to do what it's supposed to do. It said: We  
12          believe on scientific evidence that there is a  
13          reasonable, there's a reason to leave the well as  
14          it is for environmental protection measures. And  
15          there was a disagreement and the Base Commander said:  
16          No, thou shalt remove that well.

17                      EnCana said: We think you should send this  
18          to SEAC. That's what the agreement says. The  
19          agreement says for environmental issues, that's where  
20          you get your advice.

21                      I don't think in this country someone can be  
22          criticized for attempting to enforce their legal  
23          rights. I just, I just -- that boggles my mind, quite  
24          frankly, that someone could be criticized for  
25          attempting to enforce their legal rights. It seems

1           that those basic things, the things that we take for  
2           granted, the things that we take for granted date back  
3           800 years, 800 years of precedent to the Magna Carta  
4           that says that we have certain rights that we should  
5           be able to enforce in a fair and reasonable way before  
6           an unbiased adjudicator. Those things seem  
7           fundamental to me and that is one of the issues that's  
8           at stake here.

9                         So let me move on to Mr. Binder and I think  
10           it's quite simple. I'm not sure that I understood  
11           Mr. Binder's evidence the first time he gave it and  
12           I'm not sure I understood it yesterday, but I think  
13           what can be said is that Mr. Sedgwick agreed with us  
14           that he didn't have all the information. He didn't  
15           have information on when wells were drilled. He  
16           didn't have information when wells were refrac'd. He  
17           didn't have information on when wells were swabbed.  
18           He didn't agree that interference -- or interference  
19           was, was actually just pressure, a pressure change  
20           when lower producing wells were backed out when higher  
21           pressure wells came on.

22                         And I guess the question, Mr. Chairman, is  
23           this: Do you believe the evidence of the parties who  
24           have the information or do you believe the evidence  
25           of the parties who don't have the information? I

1 think that's the test to apply here. And when you're  
2 considering that test, you might also look at the GLJ  
3 study Appendix H of the Great Sand Hills Study that  
4 Mr. Binder brought up yesterday where GLJ said in  
5 their report, and they're the only party that seems  
6 independent of this process, that there would be  
7 118 million cubic feet of incremental reserves  
8 associated with wells with the D6/D8 Suffield pilot.  
9 That's what they said.

10 Mr. Chairman, I think I can move on to  
11 Mr. Lambrecht now and I have a few what I would call  
12 short-snappers to start with and then I have a few  
13 themes to deal with. So let me start with the short  
14 snappers and I'll start at the end and work my way  
15 back. And the first was with relation to what I took  
16 from Mr. Lambrecht's comments as a failure to do a  
17 cumulative effects assessment because EnCana did not  
18 look at 32 wells. Well, there is a, there's a law  
19 that applies here. It's Section 16 of the *Canadian*  
20 *Environmental Assessment Act* and in respect of  
21 cumulative effects, the test is: Will that project  
22 be carried out? That's the test. It's not: May it  
23 be carried out? Is it possible that it will be  
24 carried out? Is there a potential for it to be  
25 carried out?

1           It's: it will be carried out. Those are the  
2 words of the legislation.

3           Mr. L'Henaff testified it's extremely  
4 unlikely that that will occur. The evidence on the  
5 record is that there will be no incremental reserves  
6 associated with 32 wells. That's the simulation that  
7 was run by EnCana. To suggest that they ignored 32  
8 wells per section is, first of all, inaccurate and,  
9 second of all, an assessment of it is not required by  
10 the, by the legislation.

11           Let me now move on to critical habitat, and  
12 I'm not going to re-argue what I argued yesterday.  
13 It's clear what EnCana's position is, clear I think  
14 what the evidence is that we've based our submissions  
15 upon, but first let me say this: When my friend gets  
16 up and suggests to you that there is a scheme in place  
17 for critical habitat with which this Panel is somehow  
18 bound, I'm going to tell you there is no such scheme.  
19 There is no such law that applies.

20           In the absence of critical habitat being  
21 identified, you are left with the determinations that  
22 are required under the *Species At Risk Act* which is  
23 Section 79(2) that requires you to consider the  
24 adverse effects on listed species and that then falls  
25 over into the CEAA and, by the way, I did not read out

1 the definition of environmental effect under CEAA. I  
2 read out a piece of it as part of the express test,  
3 but go ahead and read that definition. I'm happy for  
4 you to do that. It requires an assessment of the  
5 impacts on species at risk. EnCana did that.

6 In respect of the tempo of pace and -- the  
7 tempo and pace of development, my friend seems to  
8 suggest that because EnCana did not commit to a three  
9 to five-year program or a pilot program that somehow,  
10 therefore, closed or you, more importantly, are  
11 foreclosed from suggesting making that as a  
12 recommendation. Let me suggest to you that is legally  
13 incorrect.

14 The, the fact of the matter is you are an  
15 expert Panel. You can look at the evidence before you  
16 and decide what is in the best interests of the  
17 environment and what is in the public interest based  
18 on the information that is before you.

19 You heard Mr. Protti testify that he agreed  
20 that a pilot was acceptable to EnCana. He said that.  
21 It's on the record. There's a case called **Flamber**  
22 **(phonetic) v. The National Energy Board** where it  
23 was -- where the -- that case said that if you intend  
24 to impose a recommendation or a condition on a  
25 Proponent, you put it to him. Mr. DeSorcy and others

1 put that question to Mr. Protti. He said it was  
2 agreeable to him. You have absolute and complete  
3 jurisdiction and authority to do such a thing and if  
4 that's your, your choice, you should feel no  
5 compunction about imposing that recommendation on  
6 EnCana.

7 Let me turn to the issue of water and it's  
8 taken on a bit of a life of its own and despite the  
9 attempt by Mr. Fudge to clarify that in rebuttal and  
10 try and draw the lines between the various pieces of  
11 evidence, my friend either disagrees with Mr. Fudge  
12 or didn't follow Mr. Fudge's line drawing. So let me  
13 suggest this to you, Mr. Chairman.

14 First of all, go back and look at what  
15 Mr. Fudge actually said in rebuttal and I think it  
16 will be clear to you, once you look at that and you  
17 look at Exhibit No. 003A-031, you will understand  
18 that, in fact, there is a -- based on what Mr. Fudge  
19 said, his lack of confidence was based around the  
20 conservativeness of the numbers, and he said that. He  
21 said that in his testimony that these numbers are  
22 conservative which means that there's not much  
23 confidence in them so they were -- they were  
24 deliberately made conservative to make sure that we  
25 were careful. That's the precautionary approach.

1 That's how I understand his evidence.

2 He also went on to say that there would be  
3 a surplus of water after the Project, so the  
4 groundwater impact is, is on this -- the Project's  
5 impact on groundwater is negligible. Again, go back  
6 and read that. In particular, I would refer you to  
7 page 3951 of the, of the transcript.

8 So let me move on to some of my themes, now  
9 that I've got the short-snappers out of the way, and  
10 I will try and walk you through my reply to -- to my  
11 friend.

12 My friend went on at some length about  
13 professional judgment and fragmentation and, first of  
14 all, let me -- let me say this: All you need to do is  
15 look at the amount of evidence, the data that's been  
16 filed by EnCana, the surveys that have been filed,  
17 the reports that have been filed and understand that  
18 professional judgment and professional opinion is  
19 based on that information. So when Mr. Kansas or  
20 Mr. Collister say "it's in my professional judgment I  
21 decided this or I concluded this", it's not something  
22 that has appeared out of thin air, sir. Indeed, it's  
23 based on what Environment Canada itself calls our  
24 comprehensive databases, surveys that were replicated  
25 by EnCana, contrary to my friend's assertion that

1           there was one survey for birds for two weeks. That's  
2           incorrect. Look at the EIS. There were two surveys  
3           over two years. So, again, don't believe me, read the  
4           EIS on that point.

5                        So when my friend suggests that the entire  
6           EIS is built on some house of cards professional  
7           judgment, he is simply incorrect. It's built upon  
8           the detailed data and surveys that were compiled by  
9           EnCana with the application of professional judgment  
10          by professionals who are actually active in the area,  
11          who know how the Prairie works, who works there all  
12          the time. Mr. Kansas, I have a hard time getting  
13          ahold of him because he's out in the field so much.  
14          He is not an ivory tower scientist. He's a guy that  
15          gets out there and feels the ground and understands  
16          how things work.

17                       And my friend, in dealing with fragmentation,  
18          cited a couple of species and that was the, the  
19          Pronghorn and Sprague's Pipit. And let me deal first  
20          with the Pronghorn. He said it was never -- no  
21          fragmentation was considered by EnCana. Well, I think  
22          my friend has a misconception of what an EIS is  
23          because the EIS is not a document frozen in time.  
24          The EIS is the culmination of all the efforts and  
25          information that's been put before the Panel. It's

1 EnCana's initial Environmental Impact Statement. It's  
2 the responses to Information Requests, 800 or more.  
3 It's the reply evidence.

4 You'll recall I asked Dr. Whidden about that,  
5 "fragmentation has been dealt with by EnCana in its  
6 reply, would you agree with me?" And he said: Yes.  
7 I know he said "No" to Mr. -- to my friend  
8 Mr. Lambrecht, and I think that says more about  
9 Dr. Whidden than it does about the evidence.

10 And in respect of Ms. Dale, my friend said,  
11 "well, Ms. Dale has the most experience in respect of  
12 Sprague's Pipit of anyone here." And I don't disagree  
13 with that. She may, in fact, have the most experience  
14 of anyone here. I have no reason to doubt his  
15 statement, but when I asked her if she could name  
16 one paper, one paper that would suggest that 908  
17 metres had any biological relevance to Sprague's  
18 Pipit, the leading expert couldn't name one. Again,  
19 that's pretty telling, sir.

20 My friend Mr. Lambrecht also started off his  
21 comments by walking through a little bit of history  
22 about what's been done at the NWA and what was or was  
23 not appropriate and the message I took away from that  
24 was that "Well, EnCana's done nothing in the NWA.  
25 There's been no cumulative effects assessment.

1           There's been no environmental assessment and they've  
2           been at it for 30 years in the NWA and they've done  
3           nothing on the environmental side." Well, nothing  
4           could be further from the truth. Nothing could be  
5           further from the truth.

6                        EnCana, its predecessor AEC conducted an  
7           Environmental Assessment in 1976 and 1977, the  
8           evidence is on the record by Mr. Fudge, he cited those  
9           reports, 30 years before the Government of Canada  
10          even had Environmental Assessment legislation and  
11          to suggest that EnCana has done nothing flies in the  
12          face of reality, and it flies in the face of the fact  
13          that in 2003 the Government of Canada created an NWA,  
14          calling it undisturbed native Prairie when EnCana  
15          had been working away in the NWA for 30 years. I  
16          think that says volumes about the environmental  
17          efforts of EnCana.

18                       So let me move on to the RSA and I'm going to  
19          ask my friend Mr. James to put up the picture of the  
20          RSA, and my friends seem to suggest that there was  
21          some nefarious plot to cut off the oil access area.

22                       Well, I would refer you to a few documents,  
23          Mr. Chairman, and first of all, you can look at the  
24          EIS 002-012, page 3-8, and I would refer you to the  
25          transcripts at pages 85 and 86. This is what

1 Mr. Kansas said:

2 "The study area chosen for the  
3 terrestrial biophysical Valued  
4 Ecosystem Components was  
5 apparently based on wet sheds,  
6 water sheds, ecodistricts and  
7 topographical features in the  
8 area. The Local Study Area  
9 includes the entire NWA and  
10 Koomati with the western boundary  
11 being the Lethbridge pre-glacial  
12 valley, the western and northern  
13 boundaries of the Regional Study  
14 Area, RSA, or the watershed  
15 boundary between the South  
16 Saskatchewan and Red Deer Rivers."

17 It is absolutely and completely appropriate  
18 to select boundaries for an RSA and LSA based on  
19 ecological parameters when the things you are studying  
20 are ecological. And my friend seems to suggest that  
21 because the socio-economic area was different that  
22 somehow the -- that should have also been the same  
23 Regional Study Area for environmental issues. That's  
24 incorrect.

25 Regional study areas and local study areas

1 should be selected based on the VEC that you're  
2 looking at. The Great Sand Hills Study has been  
3 brought up here many times. The socio-economic study  
4 area for that study was 10,000 square kilometres. The  
5 environmental study area was about 1900, comparable to  
6 what we've done here.

7 And if you want a reference for the Great  
8 Sand Hills Study, that's on page 8 where it talks  
9 about the study area for the socio-economic baseline  
10 which was 10,016 square kilometres. I was out by 16,  
11 I apologize. And the study area for the environmental  
12 aspects was 1,942 square kilometres.

13 Let me now turn to the agreement and I don't  
14 have a lot to say about the agreement. I think it's a  
15 bit of a red herring, quite frankly, for this Panel,  
16 but let me talk to you about it. And there seems to  
17 be some confusion including my friend Ms. Klimek at  
18 the end here talking about, well, it doesn't seem  
19 clear whose -- who's in charge at the Base and there  
20 are -- different people are in charge of different  
21 things, that's the purpose of the 1975 agreement, to  
22 provide some measure of certainty around who does what  
23 because of the shared jurisdiction because of the,  
24 the -- the interplay between mineral rights and  
25 surface rights.

1                   And let's suggest this. Let's come up with a  
2                   scenario, sir, to use in respect of what might happen  
3                   if the Base Commander was unhappy with how reclamation  
4                   was proceeding on a specific well site. Let's just  
5                   assume that that is the, is something that has  
6                   occurred. And if we then go to page 19 of the  
7                   agreement, I don't think anyone needs to turn it up.  
8                   You can go and check the transcript afterwards to make  
9                   sure I've done this correctly. And it would be  
10                  Section 12(7) and so what it would say, if that was  
11                  the case, if the Base Commander had a problem with a  
12                  specific reclamation issue, notwithstanding any  
13                  provisions of the Suffield Oil and Gas Environmental  
14                  Protection Regulations:

15                         "The Base Commander may, in the  
16                         case of the reclamation problem at  
17                         that site, but only upon the  
18                         recommendation of the Committee  
19                         order the cessation of such act or  
20                         thing as the Committee in the  
21                         particular case may recommend."

22                         So I don't think there's much confusion with  
23                         the words that are used in the contract and if you  
24                         have any doubt, simply read the contract. It's not  
25                         that long, and satisfy yourself that the contract

1 contemplated that the Base Commander would take advice  
2 and follow the advice of SEAC.

3 And some of the only, only new things that  
4 I heard today on the, from the legal perspective was  
5 a little bit about the Base Commander's authority and  
6 I, and I do want the Panel to understand some more  
7 about that and so I will provide some of the  
8 information or my view of what the law is on this  
9 issue because I think it's quite helpful.

10 And, first of all, we are in agreement, the  
11 Base Commander takes his authority from the **National**  
12 **Defence Act** and he flows through the **Queen's**  
13 **Regulations and Orders** and what the **Queen's**  
14 **Regulations and Orders** say is that:

15 "The Base Commander may make Range  
16 Standing Orders that are peculiar  
17 to the Base."

18 And when you look at the Canadian military  
19 law annotation it suggests in that, that annotation  
20 that Range Standing Orders are routine matters that  
21 the Base Commander is allowed to make Range Standing  
22 Orders about.

23 And here are some of the cases that have  
24 considered what those things are: For example, **R v.**  
25 **Hirter (1998)**, one of the Range Standing Orders

1 considered the angle of fire during live training  
2 exercises. That was something that was supposed to be  
3 the subject of a or could be the subject of a Range  
4 Standing Order; **Ronan v. Canada**, the necessary  
5 qualifications for electrical work to be done on the  
6 RMC campus; **Pringle v. R**, it was in regard to a Range  
7 Standing Order on booklets for driving and maintenance  
8 and convoy instructions to army drivers and **R v.**  
9 **Billiard** was a procedure to be followed when the Base  
10 was attacked.

11 All things, Mr. Chairman, I would suggest to  
12 you, are within the, the competence and the -- and the  
13 ambit of authority of the Base Commander in respect of  
14 military matters.

15 I could see nowhere in the **Queen's Orders and**  
16 **Regulations** or in the case law that considered them  
17 any reference to the ability to regulate in any  
18 meaningful way oil and gas operations which are the  
19 ambit, within the ambit of the Province of Alberta  
20 having jurisdiction over natural resources. I won't  
21 say the C word because Mr. Mousseau would be very  
22 unhappy if I did.

23 So let me then move on to the last few things  
24 I want to speak about today. And my friend went -- I  
25 find myself in agreement with my friend in respect of

1 the principles around Environmental Assessment, that  
2 at its simplest form it's a planning tool. I agree  
3 with that. EnCana agrees with that. It was part of  
4 my opening submissions that it's a planning tool and  
5 it should be used to make good informed decisions.  
6 That's what it's here for.

7 Environmental Assessment is, is not new.  
8 It's about good decision making and that's what it  
9 should be about and I agree with my friend that the  
10 case law he cited stands for a flexible and manageable  
11 approach to the methodologies for conducting EA. That  
12 goes without saying. It should be, and that's what  
13 EnCana suggested in their evidence. Their EIS and the  
14 methodology they used is reflective of specific and  
15 unique circumstances that arise with the NWA. They  
16 have the ability to look back and see what the  
17 environment was, see what the impacts were of going  
18 from 8 to 16 wells and they used that approach and  
19 that was the appropriate approach and the methodology  
20 and the cases my friend cites stands for that as being  
21 appropriate.

22 So let me tell you where I think my friend  
23 goes wrong. Despite his concerns with the Express  
24 Pipeline case for being -- I think his word was  
25 "antiquity" which struck me as strange because the

1 case he cited, the *Old Man River* case was from 1992  
2 which I suspect if it expresses antiquity, then  
3 there's some other adjective I might apply to that.

4 The *Inverhuron* case was decided in 1997 as  
5 was the *Quebec* case, so we're all in the same ballpark  
6 at that. But that's quite apart from the story. I  
7 think that's more of a, of a side bar and for even me  
8 perhaps a red herring.

9 But let me talk about the test because the  
10 test is important and my friend says: "Well,  
11 Mr. Denstedt has misunderstood the test. He's trying  
12 to tell you there is this incredibly narrow and tight  
13 test that you must apply." And I'm not suggesting  
14 that to you that's something I created, sir. I can  
15 tell you who did, though, if you want to know who  
16 created it. It's not from *Express Pipeline*. It's  
17 from the Government of Canada. They're the ones who  
18 created that test.

19 The Government of Canada created that test in  
20 their guide, and I'll refer you to it. It's called  
21 the "CEAA Agency Reference Guide Determining Whether  
22 a Project is Likely to Cause Significant Adverse  
23 Environmental Effects". It's their test. It's their  
24 test, sir.

25 And not only is it their test, the Courts

1 have looked at their test. That's in **Bow Valley**  
2 **Naturalists Society v. Canada [2001] 2 F.C. 461**  
3 and agreed with it. So it's their test. The Courts  
4 have agreed with it. I'm just telling you what the  
5 test is.

6 So I'm not sure where my friend got the idea  
7 it came from **Express**. Maybe it was the draft argument  
8 he found some place, but that's not where it comes  
9 from. I can guarantee you where it comes from.

10 So maybe where my friend got confused was  
11 in respect to the cumulative effects test because the  
12 cumulative effects test does, in fact, come from the  
13 Express Pipeline process, the Joint Review Panel  
14 process that decided it and that test was clearly  
15 enunciated by the Joint Review Panel and that's been  
16 considered with approval, by the way, and that test  
17 is: There must be an effect of the Project. It must  
18 act cumulatively with an effect of some other project  
19 or activity that will be carried out, can't be  
20 hypothetical and it's likely to occur.

21 And the **Express Pipeline** case has been  
22 considered and followed in the following cases:  
23 **Environmental Resource Centre v. Canada [1996];**  
24 **Inverhuron Ratepayers' Association v. Canada [1999];**  
25 **Bow Valley Naturalists Society and Canada [2000];**

1           *Lavoie v. Canada [2001]; Alberta Wilderness*  
2           *Association v. Cardinal River Coals [2001]; Union of*  
3           *Nova Scotia Indians v. Canada [2001]. Express*  
4           *Pipeline*, the case of *Express* is no antiquity. It is  
5           a case that has been followed with approval in a  
6           number of cases.

7                         And so let me move on to the actual quote  
8           my friend used from *Express* and I had the good fortune  
9           to be part of that process and I'm proud of the, the  
10          work I did on *Express* and I'm proud of the law that  
11          arose as a result of that.

12                        And the case, the cite he quotes to you is  
13          clear where it comes from. What the Court was  
14          considering, what Mr. Justice Hugesson was considering  
15          in that case was whether you considered a  
16          determination of significance prior to looking at  
17          mitigation and he said: Of course you don't do that.  
18          It's not sequential in that manner. You consider them  
19          together. That's what you do, and that's why he says:

20                        "In our view, logic and common  
21                        sense point the same way. There  
22                        can be no purpose whatsoever in  
23                        considering purely hypothetical,  
24                        environmental effects when it is  
25                        known and proposed that such

1 effects can and will be mitigated  
2 in the appropriate circumstances."

3 That's exactly what EnCana is proposing,  
4 exactly what they're proposing.

5 My friend said, "Well, you didn't do an EIS."  
6 Well, I'm going to get to that in a minute because  
7 that's just wrong. But what EnCana is proposing is  
8 we're going to find -- we're not going to have a  
9 significant impact because we're going to find  
10 species, we're going to find rare plants, we're going  
11 to find environmentally sensitive areas, apply a  
12 setback and make sure we avoid an impact. That's  
13 exactly what Mr. Justice Hugesson was talking about  
14 and that's what we're recommending to this Panel.

15 So since we're there, let me move to it. If  
16 there is any blame to be taken for not making myself  
17 clear in final argument, I'll take all that blame, but  
18 let me be clear here. EnCana has completed an  
19 Environmental Impact Assessment that considers the  
20 impacts on species at risk, Wetlands, vegetation,  
21 habitat suitability and it's all in the evidence, all  
22 in the documents. All you have to do is go and read  
23 it. It has nothing to do with the PDA process. The  
24 PDA process is not an Environmental Impact Assessment.  
25 It's not part of the Environmental Impact Assessment

1 that EnCana has filed. That's all on the record and  
2 I would just say: Just read it. Just read it.

3 See what we said about, what EnCana said  
4 about Sprague's Pipit. See what EnCana said about  
5 Ord's Kangaroo Rat. The Environmental Impact  
6 Assessment is there. See what EnCana said about  
7 impacts on native vegetation and the ratings they gave  
8 them, whether it was significant or not significant  
9 or negligible. See what they said.

10 You have to understand, sir, there's a big  
11 difference between Environmental Impact Assessment and  
12 the implementation of mitigation. And that's where my  
13 friends have run afoul. They haven't distinguished  
14 between those two things. Look at the Environmental  
15 Impact Assessment. You'll make a decision on whether  
16 you agree with it or not, but don't confuse it with  
17 the PDA process. The PDA process is not Environmental  
18 Impact Assessment by anyone's definition or by any  
19 stretch of the imagination.

20 What it is is this: It's the process by  
21 which the mitigation will be implemented. That's it.  
22 It's the process by which the mitigation proposed will  
23 be implemented. So look at the documents, the  
24 Environmental Assessment that EnCana has done. Look  
25 at the mitigate they propose, the *Environmental*

1           *Protection Plan*, the technology of minimal  
2           disturbance, their plans for avoidance. That's the  
3           mitigation.

4                     The PDA process takes that mitigation,  
5           applies it and ensures that the predictions that were  
6           made in the Environmental Impact Assessment are  
7           correct. It's quite simple. It's quite simple. And  
8           that's, by the way, is also in accordance with  
9           documents that are produced by the Government of  
10          Canada. The operating policy statement on follow-up  
11          and monitoring directly talks about the implementation  
12          of mitigation and how that works and you can look at  
13          Section 37 and 38 of the *Canadian Environmental*  
14          *Assessment Act* in respect of mitigation and the  
15          implementation of that, of mitigation and the  
16          follow-up and monitoring plans and understand how it  
17          fits together. It's not inconsistent, sir, at all.

18                     And so my friend says there's lots of  
19          uncertainty, though, about the PDA process and he went  
20          through a number of lists, went through a number of  
21          things and he said: What happened if you encroach on  
22          a Wetlands? What happens? Well, it goes to SEAC.  
23          That's my answer.

24                     What happens if a pipeline impacts on a  
25          species at risk? What happens then? It goes to SEAC.

1 And what happens if there's an access road impacts  
2 on a species at risk? If it's one of those 20 percent  
3 that does that, it will go to SEAC. That's the  
4 process. It's open, it's transparent. There are no  
5 loopholes. There are no escape hatches. I can't be  
6 any clearer.

7 So let me finish on this note, and a couple  
8 things I need to talk about. First of all, Ms. Klimek  
9 quoted Dr. Stelfox and there's a couple things from  
10 Ms. Klimek and Mr. Lambrecht that I need to finish  
11 with. And her comment or quote was: "Panel", she  
12 looked at you and she said, "you can't have it both  
13 ways." "You can't do it. It's yes or no."

14 And Mr. Lambrecht says: You've got to look  
15 at the values here and all these land use policies and  
16 make the decision that, that accords the value to  
17 those above all else. And I never said and EnCana has  
18 never said that they have an unfettered right of  
19 surface access because of their mineral rights. They  
20 never said that.

21 What they did say is they have rights, they  
22 have mineral rights and attached to those mineral  
23 rights are the right to use and access those rights,  
24 again, another bit of precedent that goes back 800  
25 years to the Magna Carta that people with rights have

1 a right to access them. Seems simple to me.

2 But they never said they have unfettered  
3 rights. They understand they have to have an NWA  
4 permit. That's why we're here, right. That's why  
5 we're here. We need an ERCB licence. That's why  
6 we're here, right. They understand all of that. If  
7 they thought they had unfettered rights, we wouldn't  
8 have went through this. Lord knows I could have used  
9 my time over the last four weeks differently, right.  
10 So they're not saying that, understand that.

11 And so when my friends say that, it's not  
12 accurate. But here's what the answer is when my --  
13 when Ms. Klimek points out and says "you can't have it  
14 both ways" or my friend Mr. Lambrecht suggests that  
15 EnCana thinks they have unfettered rights. That's not  
16 true. But let me tell you this: It's a false  
17 question and don't believe it. That suggestion is  
18 contrary to why we do EA. I've been in this game too  
19 long to -- to misunderstand this. We do EA to make  
20 good decisions, all right, and it's contrary to that  
21 to suggest that this is an either/or situation. It's  
22 contrary to the law where we're supposed to promote  
23 sustainability, promote economic sufficiency and  
24 economic development in an environmentally sensitive  
25 way. That's important. That's what the law requires

1 us to do.

2 What we have to agree on is that, and I think  
3 we all agree on this, is your decision is very  
4 important. It is very important because these are  
5 important issues. It's an important issue for Canada.  
6 It's an important issue. It's a turning point in the  
7 road perhaps because it demonstrates a commitment to  
8 sustainable development, real sustainable development  
9 that does protect the environment, does promote the  
10 economy and does so in a meaningful way and work  
11 together to do that.

12 Mr. Chairman, my submission is that EnCana  
13 has worked hard to put together a project that does  
14 just that, that balances those things and we're asking  
15 you to make the right decision here. And it may be  
16 the hard decision, but it's the right decision to  
17 approve this Project and let it to proceed in the  
18 manner that we've suggested it can.

19 EnCana worked and has worked in the NWA for  
20 30 years and in 2003 the Government of Canada said:

21 "In Western Canada, CFB Suffield is  
22 a sole large block of intact  
23 Prairie grassland where the  
24 ecological integrity remains  
25 noticeably unimpaired and

1                   consequently where the diversity  
2                   and abundance of native plant and  
3                   animal species have not declined."

4                   Thirty years of working. That's the  
5                   response. And we're suggesting to you that what is  
6                   being proposed cannot only preserve that as it existed  
7                   in 2003, it can build on it and provide information  
8                   that will be useful for the future.

9                   Mr. Chairman, those are my remarks. If you  
10                  have any questions, I'm more than happy to answer  
11                  them.

12                THE CHAIRMAN:                   Thank you, Mr. Denstedt.

13                  I think the Panel has no questions, Mr. Denstedt.

14                  We thank you for your closing arguments and for the  
15                  response to the other arguments this afternoon.

16                MR. DENSTEDT:                    Thank you, sir.

17                THE CHAIRMAN:                   We are now at the point where  
18                  it is time to close these hearings and I would like to  
19                  take the opportunity to thank all of the parties and  
20                  the Interveners for the excellent participation in  
21                  this review process. Your input will be of great  
22                  benefit to us as we work towards reaching a conclusion  
23                  on the important matter that is before us.

24                  In accordance with our terms of reference,  
25                  this Joint Review Panel will now review all the

1 evidence submitted by the parties and prepare our  
2 report.

3 We will provide our recommendations to the  
4 Minister of the Environment on the proposed EnCana  
5 Infill Project and will make a decision regarding  
6 EnCana's application to the EUB for the three wells.

7 The report will set out the rationale,  
8 conclusions and recommendations of the Panel relating  
9 to the overall Project and the reasons for the  
10 decision associated with the three wells.

11 The Joint Panel report will be issued within  
12 90 days following the close of the hearing, so 90 days  
13 from today, and this will take us approximately to the  
14 end of January, 2009. We do plan to take Christmas  
15 Day off, I might add.

16 Copies of the Panel report will be forwarded  
17 to counsel for the registered parties or directly to  
18 registered parties for those not represented by  
19 counsel.

20 An electronic version of the report will also  
21 be provided to our list of interested parties and will  
22 be available on the Public Registry.

23 Please note that the Panel will not accept or  
24 consider any further documents, submissions or letters  
25 of opinion from this point onwards.

1                   And, finally, we would like to thank the  
2                   Panel Secretariat, the Court Reporters, our sound  
3                   system person and all the technical support team.  
4                   Without the assistance of all of these dedicated  
5                   people, these hearings would not have been possible.

6                   Ladies and Gentlemen, the hearing for the  
7                   EnCana Shallow Gas Infill Development Project is now  
8                   closed.

9                   Thank you very much.

10                   **(PROCEEDINGS CONCLUDED AT 1:47 P.M.)**

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**REPORTER'S CERTIFICATION**

I, Tambi Balchen, CRR, CSR No. 9166, Official  
Realtime Reporter in the Provinces of British Columbia  
and Alberta, Canada, do hereby certify:

That the proceedings were taken down by me in  
shorthand at the time and place herein set forth and  
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correct and complete transcript of said proceedings to  
the best of my skill and ability.

IN WITNESS WHEREOF, I have hereunto subscribed my  
name this 1st day of November, 2008.

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**Tambi Balchen, CRR, CSR No. 9166**  
**Official Realtime Reporter**