

Environmental Disasters and Lake Wabamun: A Review of the Government's Response

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Much media attention has been drawn to the oil spill that affected Lake Wabamun, west of Edmonton. On August 3, 2005, a freight train belonging to the Canadian National Railway Company (CN) derailed causing bunker C oil and a toxic pole-treating preservative to leak into Lake Wabamun. The province has used a number of strategies to deal with the spill, but it remains to be seen whether the response will satisfy Wabamun residents or lead to a better government response to future environmental disasters.

Regulatory tools

The cleanup of Lake Wabamun and the surrounding area has been regulated by an environmental protection order (EPO). On August 5, 2005, Alberta Environment issued an EPO directing that CN immediately take all necessary steps to clean up the spill and report daily on their progress to the department and the public. The EPO was amended on August 12 to more specifically detail the actions and deadlines required of CN. The amended EPO outlined specific timelines for both short and long term actions, including the submission of plans addressing water surface management, shoreline cleanup, monitoring, a communications strategy, and remediation. CN submitted its final plans, as required by the amended EPO, on October 28, 2005.

EPOs are the main tool used by Alberta Environment to ensure action is taken to address environmental problems. CN has met all the deadlines in the amended EPO, and Alberta Environment has not indicated that further orders will be issued against CN. Alberta Environment is limited in seeking costs for cleanup against CN unless CN fails to comply with the terms of the EPO.¹

Prosecution

To date, no charges have been laid against CN. However, Alberta Environment and the Transportation Safety Board of Canada are currently conducting separate investigations into the incident.² Under the *Environmental Protection and Enhancement Act* (EPEA) it is an offence to release or permit the release into the environment of a substance that causes or may cause a significant adverse effect.³ If prosecuted and convicted under EPEA, CN could be subject to a maximum fine of \$500,000, which could be levied for each day on which the offence occurred or continued.⁴ Creative sentencing orders could also be used to provide sentencing options beyond the traditional use of fines.⁵

If CN is prosecuted, it would be open for the company to raise a due diligence defense. This means that CN would not be convicted under EPEA if it established on a balance of probabilities that it took all reasonable steps to prevent the release.⁶ If the option of prosecution is not pursued, the only fines that could be issued to CN would be an administrative penalty under EPEA. This amount is capped at \$5,000.⁷

Environmental protection commission

While Alberta Environment issued an EPO to deal with the Wabamun cleanup, a vocal public was critical of a perceived delay on the part of the government to respond to the spill. Accordingly, Alberta's Environment Minister, Guy Boutilier, established an Environmental Protection Commission (the "Commission") to review and recommend changes to the Alberta government's ability to respond to environmental disasters. The creation of the Commission was the first of its kind in response to an environmental incident in Alberta. The Commission's final report and recommendations were released December 14, 2005.⁸

The Commission's work was aimed at improving the government's response to future disasters; its mandate was not directed at reviewing the Wabamun incident specifically. In its final report, the Commission made ten recommendations. Some of the key recommendations included creating a central government agency to deal with all disasters and a non-governmental institute to provide research support. It was also recommended that Alberta Environment create its own emergency response team within the department to provide advice and assistance in disaster situations.

Many of the Commission's recommendations were based on common sense. It is better to overreact to a disaster than under-react, and an effective response to disasters requires better training, communication and coordination amongst all parties involved. Unfortunately, the Commission's report fell short of strongly recommending or ensuring that those affected by an emergency receive immediate and on-going information. This was an issue for Wabamun residents who were not aware that hazardous pole treating preservative was spilled until five days after the derailment. The recommendations also did not specifically address the jurisdictional issues between the province and municipalities with respect to emergency response. Municipalities are often the first responders to emergencies and, in particular, smaller municipalities may not have the capacity to adequately respond in all situations. Further clarity from the Commission on how to coordinate and support municipalities during emergency response situations would have been useful.

Conclusion

The effectiveness of government's response to the Wabamun spill lies, in part, with the willingness to charge and prosecute CN. Alberta's environmental laws set out clear rules and obligations for the protection of the environment and ensuring compliance with these laws is an important part of Alberta Environment's obligations. Seeking a conviction against CN might provide some retribution for those residents affected by the Wabamun spill and general deterrence for others. A lack of response to violations of EPEA only fosters disrespect for the law and decreases the law's deterrent effect.

As noted, the Commission's role is proactive not reactive, and its recommendations will not offer any specific help to Wabamun residents affected by the August spill. The Commission's recommendations may result in improvements to Alberta's emergency response plans. Unfortunately, we will have to wait until the next environmental disaster occurs to put these improvements to the test.

¹ *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 245.

² Telephone conversation with Albert Poulette, Regional Compliance Manager, Alberta Environment (20 October 2005). As CN is currently under investigation, no information regarding any possible prosecution can be released.

³ *Supra* note 1, ss. 109(2), 228(2).

⁴ *Supra* note 1, ss. 228(2), 231.

⁵ *Supra* note 1, s. 234. Creative sentences may include prohibitions against specified activities, remediation of the harm caused, publication of the facts of the offence, payment of security, provision of information to the Minister, compensation for remedial actions taken by the Minister, community service or any other conditions designed to secure the good conduct of the offender.

⁶ *Supra* note 1, s. 229.

⁷ *Supra* note 1, s. 237. *Administrative Penalty Regulation*, Alta. Reg. 23/2003.

⁸ Alberta Environmental Protection Commission, *A Review of Alberta's Environmental and Emergency Response Capacity* (Edmonton: Alberta Environment, 2005), online: Alberta Environment <<http://www3.gov.ab.ca/env/dept/epc/pubs/RecommendationReport.pdf>>.

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