

## Government Fails To Consult Dene Tha' on Mackenzie Gas Project

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In November, the Federal Court ruled in favour of the Dene Tha' First Nation finding that the federal Ministers of the Environment, Indian and Northern Affairs Canada, Fisheries and Oceans, and Transport (the "Ministers") breached their duty to consult the Dene Tha' concerning the Mackenzie Gas Project ("MGP"). The Federal Court also ruled that the Joint Review Panel ("JRP") assessing the project's social and environmental impacts cannot review any aspect of the project affecting the Dene Tha' lands until a hearing on permanent remedies takes place.<sup>1</sup>

### ***The project***

The MGP is a massive industrial project. It proposes the creation of a 1220 km pipeline corridor originating in Inuvik in the far north of the Northwest Territories ("NWT") and terminating 15 metres south of the NWT-Alberta border. Facilities will be built in northwestern Alberta (the "Connecting Facilities") to connect the MGP with existing provincial pipelines in order to supply natural gas to the oil sands projects in northern Alberta, and to markets in southern Canada and the United States. Four major oil and gas companies and a group representing the aboriginal peoples of the NWT are partners in the MGP. Current estimates place the total project cost at over \$7 billion.<sup>2</sup>

### ***The regulatory process***

The magnitude and cross-jurisdictional scope of the MGP and Connecting Facilities meant that a unique regulatory regime was established to guide the process. In 2000, planning began regarding the design of the regulatory regime. The discussions included delegates from four Aboriginal groups with land claim agreements, either in place or being negotiated, in the area affected by the MGP.<sup>3</sup> The Dene Tha' were not included in these discussions. The discussions culminated in 2002 with the *Cooperation Plan for Environmental Impact Assessment and Regulatory Review of a Northern Gas Project Through the Northwest Territories* (the "Cooperation Plan"). The *Cooperation Plan* set in place the framework for the environmental and regulatory processes to follow, including the creation of the JRP which was tasked with conducting the environmental assessment for the MGP and the Connecting Facilities.

The JRP's mandate was formalized in an agreement signed in 2004 (the "*JRP Agreement*") by the Ministers and delegates from the four Aboriginal groups in the area. The Dene Tha' were not signatories to this agreement. The JRP began public hearings in 2006, which were scheduled to continue into 2007. Once the hearings are complete, the JRP will issue a final report to the National Energy Board ("NEB"); this report will be used to inform the NEB's decision whether to recommend that the MGP pipeline be constructed and operated. When the JRP issues its report, the NEB will stay its hearings

in order to review the report and allow the public an opportunity to respond to the report's contents.

Additionally, the federal government created a unique administrative body called the Crown Consultation Unit (CCU) to coordinate consultation with Aboriginal groups affected by the MGP. Despite its name, the CCU had no authority to consult, only to coordinate consultation by setting up meetings and directing issues to the appropriate bodies. In 2004, the CCU provided the Dene Tha' with copies of the draft *JRP Agreement* and a draft terms of reference for the Environmental Impact Assessment ("EIA"), giving the Dene Tha' a 24 hour deadline to provide comments. The Court found that this was the first time that the Dene Tha' were formally made aware of these agreements and the JRP process.

### ***The Dene Tha'***

The Dene Tha' are an aboriginal group with approximately 2,500 members, the majority of whom reside on seven reserves located in northwestern Alberta. The Dene Tha' define their "traditional territory" as lying primarily in Alberta, but also extending into northeastern British Columbia and the southern NWT.

The Dene Tha' are signatories to Treaty 8. Under the terms of this Treaty, the Dene Tha' agreed to surrender part of their land (south of the 60<sup>th</sup> parallel) to the government in exchange for payment and various rights to hunt, trap and fish. The portion of the MGP stemming from the Alberta border to its southern terminus runs through territory of the Dene Tha' defined by Treaty 8. The Connecting Facilities pass through a trap line owned by a Dene Tha' member and the pipeline connecting the southern terminus to existing provincial pipelines also runs through territory covered by the Dene Tha's Treaty 8 rights. In addition to treaty rights, the Dene Tha' claim to have aboriginal rights in the southern portion of the NWT (north of the 60<sup>th</sup> parallel) which are affected by the MGP.

The Dene Tha' argued that based on their treaty and aboriginal rights, the Ministers had a duty to consult with them with respect to the MGP and that the Ministers breached this duty. In particular, the Dene Tha' argued that the breach occurred in the initial decision to exclude them from discussions and decisions relating to the *Cooperation Plan*.

### ***Arguments of the Ministers***

The Ministers justified their exclusion of the Dene Tha' from consultation on two grounds. First, the Ministers argued that, unlike other Aboriginal groups which were consulted, the Dene Tha' did not have a settled land claim agreement and their uncontested territory was south of the NWT-Alberta border. Settled land claim agreements not only recognized Aboriginal rights in the area but also established a means by which Aboriginal peoples could provide ongoing input into what was done on the land. Input was provided through the creation of various Aboriginal regulatory boards which were able to consult meaningfully with the Ministers on the anticipated effects of the MGP. These Aboriginal boards provided input on agreements such as the *Cooperation Plan* and the *JRP Agreement*. Second, the Ministers argued that since the Dene Tha' were parties to Treaty 8, their aboriginal rights and title north of the NWT-Alberta border had been extinguished.

In any event, the Ministers argued that they fulfilled the duty to consult by including the Dene Tha' in a single media release inviting public consultation and by giving them a 24 hour deadline to comment on the draft *JRP Agreement* and EIA terms of reference.

### ***The court decision***

The core issue before the Court was whether there was a duty to consult the Dene Tha' and when that duty arose. The Court stated that the duty to consult arises when the Crown possesses actual or constructive knowledge of an aboriginal or treaty right that might be adversely affected by its contemplated conduct. In this case, the Court found that the Ministers had, at the very least, constructive knowledge of the fact that the setting up of the *Cooperation Plan* to coordinate the environmental and regulatory processes was an integral step in the MGP, a project that the Crown admitted had the potential to adversely affect the rights of the Dene Tha'. Accordingly, the Court found that the duty to consult crystallized some time during the contemplation of the *Cooperation Plan* between 2000 and 2002. At the very latest, the duty to consult crystallized before the *JRP Agreement* was executed in 2004.

The Court found that the fact that the Dene Tha' had no settled land claim agreement was not sufficient to exclude them from the duty to consult. As a signatory to Treaty 8, the Ministers had constructive knowledge of the existence of the Dene Tha's treaty rights in an area affected by both the MGP and the Connecting Facilities.

The Court took particular issue with the Ministers' submission that their consultation began when it asked for comments on the draft *JRP Agreement*. The Dene Tha' were only given 24 hours to provide comments. The Court held that such a short time frame did not constitute meaningful consultation and that the Dene Tha' had been deprived of the opportunity both to participate and to have their specific concerns incorporated into the environmental and regulatory processes.

### ***The remedy***

The Court noted that it would be a challenge to fix the issue of consultation since the environmental review process is already underway. The Court therefore decided to hold a remedies hearing where the following issues will be addressed:

- whether the Crown should be required to appoint a Chief Consulting Officer (similar to a Chief Negotiator in land claims) to consult with the Dene Tha';
- the mandate for any such consultation;
- provision of technical assistance and funding to the Dene Tha' for consultation;
- any role the Court should play in the supervision of the consultation; and
- the role that any entities including the JRP and the NEB should have in any such consultation process.

To preserve the current situation until the final remedy is issued, the Court stayed the JRP from considering any aspect of the MGP which affects either the treaty lands of the Dene Tha' or the aboriginal rights claimed by the Dene Tha'. The JRP is also stayed from issuing any report of its proceedings to the NEB.

In response to this case, the JRP has already delayed or modified selected scheduled hearing dates by sending letters to the parties.<sup>4</sup> The JRP indicated that some hearing dates may proceed as scheduled, but that such hearings would not address matters involving the Connecting Facilities in Alberta or the traditional territory in which the Dene Tha' has asserted aboriginal or treaty rights. One of the public hearings postponed includes the hearing that was scheduled to be held in Edmonton on December 11, 2006.

## Conclusion

This case should remind us of the Berger Inquiry that looked at similar issues in the 1970s.<sup>5</sup> Justice Thomas Berger was appointed to assess the social, environmental and economic impact of a proposed pipeline which would have run through the Yukon and the Mackenzie Valley of the NWT. In 1977, the Berger Inquiry recommended that no pipeline be built through the northern Yukon and that a pipeline through the Mackenzie Valley should be delayed for ten years because the pipeline posed significant environmental risks while providing few long-term economic benefits to northern communities. The Inquiry also expressed particular concern about the role of Aboriginal peoples in development plans and recommended any development in the area be preceded by land claim settlements with local Aboriginal peoples.

It has now been almost 30 years since the Berger Inquiry delivered its final report and the federal government has still failed to adequately consult with Aboriginal peoples on the development of this pipeline. Perhaps this signals that the time is still not right to open up the north to this type of development.

<sup>1</sup> *Dene Tha' First Nation v. Canada (Minister of Environment)* 2006 FC 1354.

<sup>2</sup> Online: Mackenzie Gas Project <<http://www.mackenziegasproject.com/theProject/overview/index.html>>.

<sup>3</sup> The Inuvialuit, Gwich'in and Sahtu First Nations all have land claims agreements with the Government of Canada, while the Deh Cho First Nation is the process of negotiating such an agreement; see *supra* note 1 at paras. 70-71.

<sup>4</sup> Online: Joint Review Panel for the Mackenzie Gas Project <[http://www.jointreviewpanel.ca/whats\\_new.html](http://www.jointreviewpanel.ca/whats_new.html)>.

<sup>5</sup> Thomas R. Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* (Ottawa: Minister of Supply and Services Canada, 1977).

Comments on this article may be sent to the editor at [elc@elc.ab.ca](mailto:elc@elc.ab.ca).

## **Initial Promise of *Fisheries Act, 2007* Not Substantiated**

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A Bill to revise the *Fisheries Act* was tabled before Parliament on December 13, 2006<sup>1</sup> and represents a general overhaul of the current *Fisheries Act*<sup>2</sup> (the "current Act"). Bill C-45 renames the Act as the *Fisheries Act, 2007* and coincides with the Department of Fisheries and Oceans (DFO) Environmental Process Modernization Plan (the "EPMP"). The EPMP is aimed at making the department's Habitat Management Program "more effective in the protecting and conserving fish habitat, efficient in its delivery of services, integrated with the interests and responsibilities of others, and relevant to Canadians".<sup>3</sup>

The current Act has evolved as one of the preeminent pieces of environmental protection legislation in Canada. This is in large part due to the broad provisions of sections 35 and 36 which respectively prohibit the harmful alteration, disruption or destruction of fish habitat (HADD) and the deposition of deleterious substances into water frequented by fish. Any revision to the Act therefore must maintain this high level protection to ensure effective protection of fish and fish habitat. The Bill's amendments deal primarily with the HADD provisions of the current Act and for this reason it is the efficacy of these HADD amendments that is the focus of the majority of this article. Central to this assessment is whether the amendments will ensure that fish habitat protection will be effective and whether public participation in decision-making is reflected in the legislation.

### **The good**

Bill C-45 starts relatively well in outlining some progressive principles in the preamble and section 6, aimed at guiding DFO administration of fisheries and fish habitat protection provisions. These principles include:<sup>4</sup>

- Recognition that "the conservation and protection of fish habitat and the prevention of the pollution of waters frequented by fish are essential elements of the management of Canada's fisheries";
- Sustainable management of the fisheries such that present and future generations benefit;
- A desire for greater and more direct public participation in decisions regarding Canada's fisheries;
- Effective deterrents to illegal fishing;
- An ecosystem approach to management of fisheries and fish habitat protection and conservation;

- The precautionary approach, qualified by the principle being applied when there is “high scientific uncertainty”, there is a “risk of serious harm” and that the precaution measure is cost effective; and
- Taking into account scientific information.

The enumeration of these principles is of value; however their location in the preamble and general guiding principles is indicative of their relative lack of importance to the exercise of discretion in specific decision-making under the Act. Indeed, a cynical lawyer might argue that the preamble sections of legislation are venues for political rhetoric and that actual application of principles requires having the principle stated directly in the provision dealing with the exercise of government discretion. Notwithstanding the failure to incorporate these principles in more detailed provisions within the main body of the Bill, enumerating the principles is beneficial and provides some basis for arguing a progressive interpretation of the legislation.

### **Alternate measures**

Sections 130-135 of the Bill provide the option of using “alternative measures” when seeking to enforce the Act. The Bill’s provisions outline a similar compliance mechanism to the Environmental Protection Alternative Measures (EPAMs) that are currently used under the *Canadian Environmental Protection Act, 1999*.<sup>5</sup> EPAMs can prove to be effective mechanisms that avoid costly and uncertain court proceedings, while ensuring that the accused party is penalized and makes appropriate reparations for violating the Act (whether it be depositing a deleterious substance or causing a HADD).

A *Fisheries Act, 2007* EPAM could prove effective in ensuring that violators of the Act are held accountable but it is important that full transparency and public access to information be maintained in any proposed alternative compliance and remediation process. In this regard, the Environmental Law Centre suggests that issues of confidentiality, found in section 135 of the Bill, should be construed narrowly, and that any science or technical information that relates to the violation of the Act or to the impacts of that violation must be publicly available. Further, any EPAMs that are entered into should be posted on a public registry and not merely made available as part of the court record, as is currently contemplated by the Bill.<sup>6</sup>

### **Making authorization conditions enforceable**

Bill C-45 significantly augments the HADD provision of the current Act by altering the exceptions to the HADD provision and legislating a requirement to provide the Minister with information relevant to HADD upon request.<sup>7</sup> Section 59(2) of the Bill provides exceptions to the general prohibition against HADD that is maintained in section 59(1), namely where the HADD is authorized by the Minister and is done in accordance with the conditions established by the Minister, or where the work or undertaking is carried out in accordance with the conditions set out in the regulations or with any other authorization under the Act.

The Bill makes violation of a condition of an authorization punishable by a \$200,000 fine.<sup>8</sup> Under the current *Fisheries Act*, contravention of the conditions of an authorization would only give rise to a prosecution where a HADD resulted. While the potential fine amount is low, the ability to enforce the conditions of the authorization

without having to prove a HADD has occurred is laudable, particular where enforcement of compensation, monitoring and reporting conditions is an issue.

### **The bad**

#### **Avoiding environmental assessments**

Bill C-45 fails to address the ongoing issue of works or undertakings that result in a HADD or a potential HADD avoiding environmental assessments. The current Act triggered an environmental assessment where an authorization was required to allow a HADD to occur under section 35(2). This section triggered the *Canadian Environmental Assessment Act*<sup>9</sup> (*CEAA*), being one of the enumerated authorizations under the *Law List Regulation*.<sup>10</sup> However, Bill C-45 is likely to minimize public scrutiny of HADD projects by setting up an alternative mechanism to gather information outside of the *CEAA* process. This is achieved by allowing works and undertakings that cause HADD to proceed under certain conditions set out in regulations or where the Minister orders certain mitigative measures be taken.<sup>11</sup>

In the first instance *CEAA* is avoided by allowing for regulations that may outline conditions that would allow a HADD to occur for works or undertakings of a specific nature or of a specific class.<sup>12</sup> Where a regulation exists for these works or undertakings compliance with prohibitions against HADD is not required and there appears to be no mechanism through which an environmental assessment would be triggered.

Further, section 61 of the Bill is framed to "enable the Minister to determine" whether a HADD is likely and what measures would prevent or mitigate the effects of activity. Section 61 empowers the Minister to gather information from the proponent of the work or undertaking.<sup>13</sup> The Minister is further empowered to make an order to "prevent the contravention" of the HADD prohibition or "*mitigate its effects*".<sup>14</sup> The key failure here is that the Minister has the sole discretion to allow a HADD to occur, albeit mitigated, without an environmental assessment being undertaken.

This discretionary power and the regulatory power would effectively allow DFO to proceed as they have been doing, avoiding environmental assessments of projects in favour of letters of advice.<sup>15</sup> Unfortunately, the amendments, like their predecessor letters of advice, remove public oversight and most of the potential for public challenge in relations to HADD activities that were possible through the *CEAA* process.<sup>16</sup>

*CEAA* avoidance, both under the current regime of letters of advice and operational statements and under Bill C-45, appears to be primarily an issue of capacity within DFO (and perhaps the Canadian Environmental Assessment Agency). The enabling of HADDs by operation of the Minister's discretion to allow for mitigation measures under section 61 represents a significant step away from a formalized environmental assessment process.

Both the regulatory approach and the discretion provided in section 61 of the Bill also run directly contrary to the proposed principle of involving the public in decision-making.

To ensure participation requires transparency, but this is bypassed by both avoidance of an environmental assessment process and the Bill's failure to indicate whether the information and representations provided to the Minister for the purpose of Section 61 will be made publicly available.

### **New regulation-making powers**

A further concern with the Bill arises regarding the regulation making powers under section 63. Certainly regulatory and industrial efficiencies are created by having conditions that would allow for classes of works and undertakings to proceed notwithstanding the HADD they might create; however, the effectiveness of habitat protection may be completely undermined.

There is no indication in the Bill how and when classes of works and undertakings will be assessed and how cumulative impacts of specific classes of undertakings will be managed. Several questions arise from the regulation of classes of works and undertakings that are not addressed in the Bill, namely:

- What types of classes will be regulated?
- What impacts on fish habitat will be allowable?
- What type of assessments will be done of the class?
- How will cumulative impacts of a class be monitored?
- How will the regulations address the need to alter works and undertakings if significant impacts on fish habitat, whether foreseen or unforeseen, occur?

Failure to answer these questions may allow for the escalation of environmental and fish habitat impacts with minimal legislative oversight or redress. The regulation-making power appears to be general enough to enable a regulation that could effectively create an "exclusion list" of works and undertakings that could proceed with minimal regulatory oversight, notwithstanding the activity's impact on fish habitat. To truly be effective, class authorizations of works and undertakings that have HADD impacts must be constantly reviewed for cumulative or unknown impacts on fish habitat and must also be adaptive to allow for review and amendments to the conditions to that class. Further, full transparency and full public participation, including a power to challenge and review the conditions of a class, must be included in any new Act if class authorizations are to be effective.

In the absence of significant amendments guiding class authorizations it appears that the only thing gained by establishing them is regulatory efficiency. However, the efficiency and efficacy of fish habitat protection is currently better served by proper application of the existing legislative framework. The major strength of section 35 in its current form is that it prohibits activities that can be scientifically shown to create a HADD. The regulation-making power may effectively do away with the relevance of science to the decision-making process, something that is again contrary to a stated principle of the Act.



### Legislative additions still required

Bill C-45 falls short by failing to incorporate other progressive habitat protection mechanisms. Namely, a definition of “work and undertaking” for the purpose of section 59 should be included in the new Act encompassing general “activities”, to ensure that the judiciary understands the scope of protection given to fish habitat.<sup>17</sup> The application of the Act to the broad range of activities that impact fish habitat will ensure that all activities that impact on fish habitat are properly regulated.

### Conclusion

Bill C-45 amendments related to HADD are focused at codifying what has been the DFO practice of avoiding the environmental assessment trigger found in section 35(2) of the current Act. On a practical level, the amendments proposed by Bill C-45 appear to be primarily focused on maintaining the status quo. Few amendments proposed by the Bill appear focused on increasing the effectiveness of fish habitat protection, opting rather for increased efficiency.

While the new enforceability of conditions on HADD authorizations and inclusion of progressive environmental concepts in the preamble of the proposed new Act are laudable, the Bill falls short in terms of public participation and transparency in decision-making processes. Further, even if the proposed amendments are more effective at protecting fish habitat, this will be nearly impossible to determine as the Bill is also missing provisions aimed at ensuring proper monitoring of impacts on fish habitat.

<sup>1</sup> Bill C-45, *An Act respecting the sustainable development of Canada's seacoast and inland fisheries*, 1st Sess., 39<sup>th</sup> Parl., 2006, online: Parliament of Canada, <<http://www.parl.gc.ca/legisinfo/index.asp?Language=E&List=list&Type=0&Chamber=C&StartList=2&EndList=200&Session=14>> (*Fisheries Act, 2007*).

<sup>2</sup> R.S.C. 1985, c. F-14, as amended.

<sup>3</sup> Department of Fisheries and Oceans, *Environmental Process Modernization Plan*, undated, available online: Department of Fisheries and Oceans <[http://www.dfo-mpo.gc.ca/canwaters-eauxcan/epmp-pmpe/index\\_e.asp](http://www.dfo-mpo.gc.ca/canwaters-eauxcan/epmp-pmpe/index_e.asp)>.

<sup>4</sup> Bill C-45, *supra* note 1, preamble and s.6.

<sup>5</sup> R.S.C. 1985, c. 33, as amended, ss. 295-309. Also see Jason Unger “Flexible Federal Enforcement and Compliance Tool Would be of Value Provincially”, *Environmental Law Centre News Brief*, 21:3 (2006), pp. 6-9, online: Environmental Law Centre <<http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?ID=989>>.

<sup>6</sup> Bill C-45, *supra* note 1, s. 135(1).

<sup>7</sup> *Ibid.*, ss. 59 - 61.

<sup>8</sup> *Ibid.*, s.66(2).

<sup>9</sup> S.C. 1992, c. 37, as amended.

<sup>10</sup> SOR/94 – 636, Schedule I, Part I, Item 6.

<sup>11</sup> Bill C-45, *supra* note 1, ss. 59(2)(b) and 61(3).

<sup>12</sup> *Ibid.*, ss. 59(2) and 63(c).

<sup>13</sup> *Ibid.*, s.61(1).

<sup>14</sup> *Ibid.*, at s.61(3) (emphasis added).

<sup>15</sup> See Jason Unger, “DFO Sets New Policy Course for *Fisheries Act* Enforcement”, *Environmental Law Centre News Brief* 20:4 (2005), pp. 4-7.

<sup>16</sup> See *CEAA*, *supra* note 9, ss. 18-21, which deal with public participation in the environmental assessment process.

<sup>17</sup> See *Ecology Action Centre Society v. Canada (Attorney General)*, 2004 FC 1087, online: Canadian Legal Information Institute <<http://www.canlii.org/ca/cas/fct/2004/2004fc1087.html>>.

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## **New Reporting Requirements for Pesticides**

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Pest control products (pesticides) are regulated under the federal *Pest Control Products Act (PCPA)*. A new *PCPA* came into force on June 28, 2006.<sup>1</sup>

The *PCPA* has always required a pesticide to be registered with the federal Minister of Health before it can be used in Canada. However, a new provision under the *PCPA* now requires certain parties to submit "incident reports" of adverse effects that involve pesticides to Health Canada's Pest Management Regulatory Agency (PMRA) within a set time frame.<sup>2</sup> This requirement is intended to assist the PMRA to monitor adverse impacts of pesticides and to review a pesticide if there are reasonable grounds to believe that the risks or value of the pesticide are no longer acceptable. The new reporting requirements are detailed in the *Pest Control Products Incident Reporting Regulations (IRR)*.<sup>3</sup>

The *IRR* specifies mandatory reporting requirements for registrants of pesticides and applicants wishing to register new pesticides in Canada. Registrants and applicants will be required to report "incidents" whose effects relate to health or environmental risks, or the value of their pesticide to the PMRA. Incidents are classified into the following six major categories:

- effects on humans;
- effects on domestic animals;
- effects on the environment;
- residues in food;
- packaging failures; and
- effects identified in scientific studies.

Incidents are then further classified by severity: minor, moderate, major or death. For example, in the case of humans, incidents range from minor effects such as skin rashes and headaches, to moderate effects where the symptoms are more pronounced or prolonged, to major effects such as reproductive or developmental effects, to death.

The time frames for reporting range from 15 days to 12 months, depending on the subject of the exposure (human, domestic animal, or the environment) and the severity of the effect. Registrants must also provide the PMRA with any information required for the purposes of responding to a situation that endangers human or domestic animal health or the environment within 24 hours of the PMRA's request for information.

The mandatory reporting requirement for registrants and applicants is complemented by a voluntary reporting system. The voluntary reporting system, although not formalized in regulations, provides a mechanism by which the medical and research community, government, non-governmental organizations and individuals can report incidents related to the use of pesticides directly to the PMRA by calling 1-800-267-6315.

Incident reports will be placed in the Register of Pest Control Products established under the *PCPA*.<sup>4</sup> The public will have access to any information in the Register that is not confidential or private through the PMRA's website at <<http://www.pmra-arla.gc.ca/english/pubreg/pubreg-e.html>>.

<sup>1</sup> S.C. 2002, c. 28.

<sup>2</sup> *Ibid.*, s. 13. The PMRA administers the *PCPA* and regulations made under this Act on behalf of the Minister of Health.

<sup>3</sup> S.O.R./2006-260.

<sup>4</sup> *Supra* note 1, s. 42.

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## ***Action Update***

### **Consultation on Land Use Framework Proceeding**

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As previously reported in *News Brief*, the Government of Alberta has undertaken public consultation preceding the development of a draft Land Use Framework for the province.<sup>1</sup> Spearheaded by the provincial Sustainable Resource and Environmental Management (SREM) office, the second stage of public consultation, a cross-sector forum, took place on December 4 – 6, 2006. This three-day forum, attended by representatives from the agricultural, forestry and energy industries, non-governmental organizations, First Nations and Métis organizations, and urban and rural municipalities, was held for the purpose of building on the individual sector stakeholder input received through focus group meetings held in the summer and fall of 2006. Participants were asked to provide advice to the Government of Alberta on identifying key elements of the Land Use Framework, such as its vision, scope and outcomes, as well as suggesting potential strategies and actions the framework might implement to deal with land use conflicts.

Broad issues such as the outcomes and scope of the Land Use Framework, the role of the framework and the various levels of government in managing growth, the potential for priority land use to deal with land use conflicts, and the governance or decision-making processes that the Land Use Framework might implement, were all discussed. SREM advises that the comments received from participants are to be compiled into a report to be issued in early 2007 that will form the foundation for broader public consultation to occur in the early spring.

This public consultation and SREM's efforts to develop the Land Use Framework are, of course, occurring within the political context of a new premier and a significantly overhauled provincial government that includes, among other things, new Ministers of Energy, Environment, and Sustainable Resource Development. Given these changes, it is uncertain whether the development of the Land Use Framework will proceed on schedule.

<sup>1</sup> See Dean Watt, "Initial Public Consultation Begins on Alberta Land Use Framework", *Environmental Law Centre News Brief*, Vol.21:3 (2006); online: Environmental Law Centre <<http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?id=988>>.

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## Information Please: *IL 93-9* and the Development of the South Eastern Slopes

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### Introduction

The Alberta Energy and Utilities Board (the Board) released *Information Letter 93-9: Oil and Gas Development, Eastern Slopes (Southern Portion)*<sup>1</sup> (*IL 93-9*) in December 1993, to confirm its expectations for oil and gas applications in the environmentally significant south Eastern Slopes area. Recently, the Board's *Decision on Requests for Consideration of Standing Respecting a Well Licence Application by Compton Petroleum Corporation-Eastern Slopes Area*<sup>2</sup> (*Decision 2006-052*) considered *IL 93-9* in the context of requests by individuals and groups for standing to participate in Compton's application for a licence to drill and operate an exploratory sweet gas well (the 16-28 well). In that case, the Board noted that all parties to the proceeding had expressed concerns about the lack of clarity of *IL 93-9* and undertook to recommend clarification of *IL 93-9*.<sup>3</sup>

This article uses *Decision 2006-052* as a lens through which to view *IL 93-9* and discuss the expectations of the Board. This article concludes by recommending changes to *IL 93-9* to clarify the requirements that document imposes on companies proposing to engage in oil and gas activities in the south Eastern Slopes area.

### Background

#### *South Eastern Slopes*

The southern portion of the Eastern Slopes area referred to in *IL 93-9* begins at the United States border and extends as far north as approximately Cochrane.<sup>4</sup> This area is characterized by vast connected areas of rough fescue, a native grass that is relied upon by cattle ranchers as it is drought tolerant and has tough stems that rise above winter snow for winter feeding. However, rough fescue is almost impossible to re-establish once disturbed by road-building or other development that accompanies oil and gas activities.<sup>5</sup>

#### *Decision 2006-052: the application and objections*

Compton, who holds mineral rights in 110 contiguous sections in and around the south Eastern Slopes area, applied to the Board for a licence to drill the 16-28 well. Individual area residents, landowner groups, wildlife groups and the municipality sought standing to participate in the application, noting that the 16-28 well was just the beginning of Compton's larger energy development project and was the first of what could amount to approximately 800 wells in the south Eastern Slopes area. These parties expressed concerns about a number of issues including land fragmentation, adverse impacts on native grasses, air quality, and surface and groundwater quality. Concerns were also raised about the negative impact large scale development could have on the traditional ranching lifestyle and property values in the area.<sup>6</sup>

Neither the individuals nor any member of the groups seeking standing before the Board lived on the land upon which the 16-28 well was to be located. However, two families had residences approximately 1.2 to 1.5 kilometres from the proposed site. They expressed concerns about the visual impact and the potential for the well to adversely affect their water well. The landowner groups were of the opinion that they may be directly and adversely affected by the larger project, which was contingent upon the information expected to be obtained through this exploratory well.<sup>7</sup>

Compton, who had obtained the consent of the landowner upon whose land the well would be located, contended that none of the other parties met the test for standing as established by section 26 of the *Energy Resources Conservation Act (ERCA)*.<sup>8</sup> Compton stated that the nearest residents were not entitled to consultation as their residences were outside the consultation and notification area required by *Directive 056: Energy Developments and Schedules (Directive 056)*.<sup>9</sup> It further argued that its ownership of leases under 110 sections of land within the Eastern Slopes did not mean all sections would be developed and that any current development plan was highly speculative in nature.<sup>10</sup>

## **Discussion**

### ***IL 93-9***

The Board developed *IL 93-9* to “to confirm to all oil and gas operators the information required for developments along the southern portion of the Alberta’s Eastern Slopes”.<sup>11</sup> In *IL 93-9* the Board recognized the environmental significance of the south Eastern Slopes area and expressed its belief that the public interest in the region presented a need for a “somewhat broader regulatory review than may be typical in the more developed areas of the province.”<sup>12</sup>

The “broader regulatory review” is, according to *IL 93-9*, to be conducted through the imposition by the Board of four expectations upon oil and gas operators applying to conduct operations in the south Eastern Slopes. These four expectations can be identified broadly as relating to: (i) increased public consultation; (ii) the provision of development plans to the Board; (iii) the provision of environmental assessments to the Board; and (iv) the consolidation of plans amongst operators.<sup>13</sup> The first three of these expectations are the focus of this article.

### ***Increased public consultation***

*IL 93-9* expresses the Board’s expectation that applicants will engage in early and open consultation with “interested parties” as well as with the Board and Alberta Environment for the purpose of identifying stakeholders, specific issues, baseline environmental data and other data requirements. It provides that:<sup>14</sup>

[b]ecause of the potential sensitivity of the area it is expected that proponents would go *well beyond the normal consultation process*. Whereas public hearings may be necessary, the Board believes mutual resolution of the issues outside the hearing process remains the preferred route...

The “normal consultation process” referred to in *IL 93-9* is the process required by *Directive 056*. The 16-28 well is a sweet gas well. *Directive 056* provides a smaller

radius of consultation for sweet gas facilities than for sour gas facilities and requires a consultation and confirmation of non-objection radius of only 0.2 kilometres for a sweet gas well.<sup>15</sup>

In the proceedings leading up to *Decision 2006-052*, certain of the parties seeking standing argued that consultation without a corresponding right to participate was meaningless, as concerns and comments could be ignored by an applicant. These parties argued that as the *IL 93-9* expectation for applicants to go “well beyond the normal consultation process” led to the promise that Compton would consult on a broader basis, any person entitled to be consulted under *IL 93-9* had a reasonable expectation of being allowed to participate in the hearing.<sup>16</sup> Otherwise, it was argued, Compton would be free to continue to develop the oil and gas resources in the area by locating wells on the lands of willing landowners and ignoring immediately adjacent neighbors.<sup>17</sup> Compton argued that the expectation and act of consultation of a particular person does not preclude a determination that a person does not have standing under the *ERCA*.<sup>18</sup>

*IL 93-9* does not expressly state that persons consulted under *IL 93-9* are entitled to standing nor that the Board may use *IL 93-9* as a tool to broaden standing. Neither does *IL 93-9* identify what “well beyond the normal consultation process” means.

Ultimately, without directly addressing the argument that expanded consultation requirements translate into a broadened test for standing, the Board denied the requests for standing. The Board found that the 16-28 well would be about 1.2 to 1.5 kilometres from the residences of the nearest parties seeking standing and would not have a visual impact on those parties nor any impact on their water well. The Board further found that none of the members of the landowner groups resided close enough to the proposed 16-28 well to be directly and adversely affected. The Alberta Wildlife Association was found to not be affected to any greater or lesser degree than any member of the general public. The municipality’s concerns were found to be general rather than specific to the 16-28 well.<sup>19</sup>

### ***Provision of development plans***

*IL 93-9* contains the expectation that applicants will submit applications as a part of a development plan, rather than on a piece-meal or single well approach. It provides that different amounts of information are to be expected at different stages of exploration, pool delineation and development. While the Board recognized in *IL 93-9* that a definitive development plan is not usually possible at the outset, applicants are expected to provide “even with the first exploration well some outline of the conceptual development...”.<sup>20</sup> *IL 93-9* indicates that the Board’s expectation for development plans at the initial stage is intended to “establish whether development in the area is appropriate and, if so, what issues must be addressed in subsequent development plans.”<sup>21</sup>

The parties seeking standing noted that Compton had not provided a development plan for development of its Eastern Slopes interests as expected by *IL 93-9* and that they relied on the proposed development concept provided on Compton’s website.<sup>22</sup> Compton asserted that the 16-28 well was exploratory and that any related plan was highly conceptual and speculative in nature.<sup>23</sup> The Board, noting that the drilling of a small number of exploratory wells would result in a more accurate and realistic area

development and environmental impact plan, stated that *IL 93-9* does not preclude the approval of individual exploratory wells without area development plans.<sup>24</sup>

To the Board's credit, *Decision 2006-052* indicates that the Board intends keep a close watch over Compton's developments in the area. The Board's reference to "a small number of exploratory wells" being drilled prior to the preparation of a development plan and its specific comments that Compton would be required to provide an area development plan and environmental assessments in the event that Compton applies for any additional wells between the 16-28 well and existing wells located to the north are some indication of the Board's intention.<sup>25</sup>

### ***Provision of environmental assessments***

Environmental impact assessments are not normally required for oil and gas wells. *IL 93-9* provides that the Board will nevertheless require applicants to provide "quality environmental data to properly assess the overall cost/benefit of [a] proposal." It lists the types of information that may be required, including an analysis of baseline environmental conditions and major areas of concern, and a description and analysis of the significance of environmental, economic and cultural impacts including regional and temporal effects.<sup>26</sup>

The detail of the environmental information required by *IL 93-9* is not necessarily the same in all cases. *IL 93-9* recognizes that the level of detail would vary depending on the phase of development being proposed, specifically noting that a full comprehensive assessment may not be possible or even necessary at the initial delineation stage. Further, *IL 93-9* recognizes that the environmental sensitivity of regions within the Eastern Slopes varies and the level of detail required would vary accordingly. However, *IL 93-9* does state that where a full assessment is not necessary at the early delineation stage, "it may be necessary...to conduct sufficient environmental baseline analyses to determine what specific sensitivities exist and also to determine whether some form of development is appropriate within the project area".<sup>27</sup>

In this case, parties seeking standing expressed concerns about the environmental impacts of the larger energy development project. They noted that the 16-28 well would be located in the Porcupine Hills Environmentally Sensitive Area and as such should be reviewed under more stringent guidelines than had been undertaken by Compton. Compton asserted that it had met the requirements of *IL 93-9* by completing a site-specific environmental impact assessment for the 16-28 well. The Board found that the proposed 16-28 well and a further small number of wells for exploration purposes and delineation of the play would constitute "minimal development" that "would not necessitate the cumulative impacts assessment contemplated by *IL 93-9*".<sup>28</sup>

### ***Lack of clarity in IL 93-9***

The Board noted, in *Decision 2006-052*, that all of the participants expressed concerns about the implementation of *IL 93-9*. The Board stated that "[t]he Board believes that there is a need to clarify some aspects of *IL 93-9*, including: the circumstances under which development plans are required, public consultation requirements, and environmental assessment requirements."<sup>29</sup> That there is some confusion is not surprising. *IL 93-9* imposes informational requirements over and above those set out in *Directive 056*, but where *Directive 056* is clear in its requirements, *IL 93-9* is vague and there exist many opportunities for Board discretion in its application.



To begin with, *IL 93-9* is introduced as being generally intended to apply only to undeveloped or minimally developed areas, though in some cases it may be applicable to more developed areas.<sup>30</sup> In this case, the Board noted that the proposed 16-28 well was not within an area of extensive and continuous native prairie. The Board did not assert that this fact rendered *IL 93-9* inapplicable; rather, the Board directed that further Compton wells to the north would require a development plan and environmental assessments as contemplated by *IL 93-9*.<sup>31</sup>

Once it is determined that *IL 93-9* is applicable, the consequence of that determination is uncertain. *IL 93-9* contains no firm requirements; rather, it expresses Board "expectations". As *Directive 056* makes clear, these are very different in the Board's eyes.<sup>32</sup> The Board made this distinction clear when it noted that it was not precluded from issuing a licence for an exploration well in the absence of an area development plan.<sup>33</sup>

Recent conversations with Board counsel indicate that Board staff is currently reviewing the document but the results of that review have not yet been presented to the Board; consequently, Board counsel was not able to comment on the content or result of that review.<sup>34</sup> The following are brief recommendations for possible clarifications to *IL 93-9*.

### **Recommendations**

Regarding consultation, *IL 93-9* should be clarified to explain the expectation for consultation "well beyond the normal consultation process". Applicants and interested parties need to know what this means. Where the expectation changes based on the phase of development or the type of project applied for, i.e., sweet or sour gas, *IL 93-9* should make these distinctions clear. In addition, the Board should clarify in what circumstances, if any, the application of expanded consultation under *IL 93-9* would have the effect of broadening the Board's test for standing.

Regarding the expectation for the provision of development plans, the Board is correct in noting that *IL 93-9* does not preclude the approval of individual exploratory wells without area development plans. *IL 93-9* does not impose strict requirements to provide an area development plan, nor does it strictly require applicants to avoid making single well applications in piece-meal fashion. However, a general tone is created in *IL 93-9*, by the presence of terms like "the Board expects", "this phase should include" and "a plan should address". The tone of *IL 93-9* may lead parties to believe that higher informational requirements exist; however, because the Board has a great deal of discretion in its application of the expectations in *IL 93-9*, these may not necessarily exist in a given case.

*IL 93-9* should be clarified to specify the type of development plan information that is expected at different stages of exploration and development. It should also clarify the impacts that the provision of a development plan has on the expectation for consultation and the determination of standing. Using *Decision 2006-052* as an example, no landowners resided closer than 1.2 kilometres from the 16-28 well, a factor cited by the Board in its denial of standing. Compton was directed to provide a development plan in the event that it applies for further wells to the north.<sup>35</sup> *IL 93-9* does not make clear whether any person residing within the area identified in a development plan would be entitled to be consulted and would be entitled to standing or whether the Board would

determine standing, as in this case, based on proximity to individual wells that together make up the larger development project.

With respect to environmental assessments, *IL 93-9* should provide certainty about the type, amount and detail of environmental assessment information required at the different stages of development. Specific to this case, there was uncertainty respecting at what point a cumulative impacts assessment would be required. *IL 93-9* does provide for a wide range of environmental information to be included in an application and the Board has discretion not to require a cumulative impacts assessment; however, as with development plans the general tone of *IL 93-9* would seem to suggest that more than a site-specific assessment might be appropriate. *IL 93-9* should be clarified in this respect.

<sup>1</sup> Alberta Energy and Utilities Board, *Information Letter 93-9, Oil and Gas Development, Eastern Slopes (Southern Portion)*, 13 December 1993 (*IL 93-9*).

<sup>2</sup> *Decision on Requests for Consideration of Standing Respecting a Well Licence Application by Compton Petroleum Corporation Eastern Slopes Area* (8 June 2006) Decision 2006-052 (Alberta Energy and Utilities Board) (*Decision 2006-052*).

<sup>3</sup> *Ibid.* at page 9.

<sup>4</sup> *IL 93-9, supra* note 1, Figure 1.

<sup>5</sup> Finberg Wilson, "The Rancher's Revolt", *Alberta Venture* 10:7 (September 2006) 114 at 120. Also available online: Alberta Venture <[www.albertaventure.com/abventure\\_4935.html?ID=4935&doc\\_id=6932](http://www.albertaventure.com/abventure_4935.html?ID=4935&doc_id=6932)>.

<sup>6</sup> *Decision 2006-052, supra* note 2, pp. 2-3.

<sup>7</sup> *Ibid.*, pp. 1-5.

<sup>8</sup> R.S.A. 2000, c. E-10.

<sup>9</sup> Alberta Energy and Utilities Board, *Directive 056, Energy Development Applications and Schedules*, 12 September 2005 (*Directive 056*).

<sup>10</sup> *Decision 2006-052, supra* note 2, p. 6.

<sup>11</sup> *IL 93-9, supra* note 1, p. 1.

<sup>12</sup> *Ibid.*, p. 3. Applications for Board authorizations would otherwise be subject to the review and information requirements of the Board's *Directive 056, supra* note 9.

<sup>13</sup> *IL 93-9, supra* note 1, p.1.

<sup>14</sup> *Ibid.*, p. 3 (emphasis added).

<sup>15</sup> *Directive 056, supra* note 9, Table 7.1 at p. 163.

<sup>16</sup> Submission of the Livingstone Landowners Group (the LLG), to the Alberta Energy and Utilities Board, 13 January 2006, p. 4.

<sup>17</sup> *Decision 2006-052, supra* note 2, p. 4.

<sup>18</sup> Submission of Compton Petroleum to the Alberta Energy and Utilities Board, 1 December 2005, p. 7.

<sup>19</sup> *Decision 2006-052, supra* note 2, pp. 7-8.

<sup>20</sup> *IL 93-9, supra* note 1, p. 3.

<sup>21</sup> *Ibid.*, p. 4.

<sup>22</sup> *Decision 2006-052, supra* note 2, p. 5; *Exhibit "F" to Submission of the Livingstone Landowners Group to the Alberta Energy and Utilities Board*, 4 November 2005.

<sup>23</sup> *Decision 2006-05, supra* note 2, p. 6.

<sup>24</sup> *Ibid.*, p. 7.

<sup>25</sup> *Ibid.*, p. 9. The Board directed that Compton would be required to provide an area development plan or demonstrate to the satisfaction of the Board why a plan and assessments should not be required for further exploratory wells.

<sup>26</sup> *IL 93-9, supra* note 1, p. 4.

<sup>27</sup> *Ibid.*, pp. 3-4.

<sup>28</sup> *Decision 2006-052, supra* note 2, pp. 5-7.

<sup>29</sup> *Ibid.*, p. 9.

<sup>30</sup> *IL 93-9, supra* note 1, p. 2.

<sup>31</sup> *Decision 2006-052, supra* note 2, pp. 8-9.

<sup>32</sup> *Directive 056, supra* note 9, p. 2. The Board differentiates between a requirement and an expectation, noting that "expectation" denotes a recommended practice to which consideration should be given. No enforcement action will flow from a failure to fulfill an expectation.

<sup>33</sup> *Decision 2006-052, supra* note 2, p. 7.

<sup>34</sup> Telephone conversation with Giuseppa Bentivegna, Board Counsel, 14 December 2006.

<sup>35</sup> *Decision 2006-052, supra* note 2, pp. 7-9.

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