

Judicial Interpretation of EPEA at Odds with Pollution Prevention *R. v. Edmonton (City of)*, 2006 ABPC 56

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The case of *R. v. Edmonton (City of)*¹ ("*Edmonton*") provides the most recent judicial interpretation of the *Environmental Protection and Enhancement Act* (EPEA).² The case involved a much-publicized release of PCB-laden insulating oil in 2001 at the World Track and Field Games in the Commonwealth Stadium in Edmonton. The release resulted in charges being laid against the City of Edmonton and the trial sparked ongoing media coverage, illustrating the high profile nature of a PCB release in a public venue. The Court handed down its decision in 2006, absolving the City of all regulatory liability. Central to the reasoning of the Court was interpretation of various parts of EPEA and how it will be applied to releases of small amounts of known toxic materials.

This article explores how judicial interpretation in the *Edmonton* case and other EPEA cases have considered the statutory meaning of the phrase "may cause" in reporting requirements and substance release prohibitions under the Act. It is concluded that the judicial interpretation of EPEA to date continues to undermine the principles of pollution prevention and precaution when dealing with pollution, principles that the legislation and judiciary should aim to uphold.

Facts

The World Track and Field Games came to Edmonton in 2001 thanks to the financial contributions of various levels of government, including the City.³ During the course of the games it became apparent that insulating oil was being released from light fixtures, the ultimate cause of which (as would be found by the Court) was the extended use of the lights to facilitate media coverage of the event.⁴

The amounts of insulating oil released were not determined; however, some spectators reported being hit with oil during the course of the event. The releases resulted in an investigation by Alberta Environment and subsequent charges being laid under EPEA, including:⁵

- one count of unlawfully releasing or permitting the "release into the environment of a substance in the amount, concentration or level or a rate of release that causes or may cause a significant adverse effect" under section 98(2) (as it then was, currently 109(2)); and
- eight charges (with four possible convictions due to four charges being included offences) of failing to report the release as someone "who releases or causes or permits the release of a substance into the environment that has caused, is causing or may cause an adverse effect" and "a person having control of a substance" (section 99, as it then was, currently section 110).⁶

The Local Organizing Committee of the games ("LOC") was the body that administered the games and was not charged under EPEA. Commonwealth Stadium was leased to the LOC for a nominal fee, and services were provided to the LOC by the defendant's employees.⁷

The Court's decision

The Court dismissed all charges against the City of Edmonton. In finding that the Crown had failed to prove a number of elements of the offences the Court commented on a variety of provisions in EPEA. For the purpose of this article, the focus will be on the interpretation of the need to prove an actual probability of harm for both the release reporting and release prohibition provisions of EPEA.⁸

In particular the Court held that:

- the consequence of a release rather than the nature of the substance itself is the relevant factor in determining whether there is the potential to cause an adverse effect;⁹
- it must be proven that an adverse effect is a probable future consequence of the release;¹⁰ and
- the reporting requirement under EPEA is triggered by actual knowledge of the substance being of a nature that there is a future probability of causing an adverse effect.¹¹

Impact of EPEA interpretation

The conclusions of the Court in this case limit the applicability of reporting requirements and prohibitions of releases found in EPEA. In both instances, the requirement to prove, beyond a reasonable doubt, the causal link between the release and some harm effectively limits the application of EPEA. It is submitted that this interpretation not only undermines the legislation but that strong legal arguments exist to support the opposing interpretation of the Act.

Reporting requirements

The Court held that s. 99 (now s. 110) does not trigger a reporting requirement until the actual nature of the release is known and the probability of causing adverse effect is established.

The Court held that s. 99(2) does not require reporting of every release and cited in support of this proposition EPEA exemptions to the release reporting requirements.¹² However, this reasoning appears to ignore that the exemptions exist to reduce interdepartmental and inter-jurisdictional redundancy in release reporting. The Court cited the exemption for the *Oil and Gas Conservation Act*, which must be reported to the Energy and Utilities Board, and provincial and federal dangerous goods legislation, which again have their own reporting requirements.¹³

The Court further noted at paragraphs 626-630:¹⁴

...It is not enough that the substance be a substance which is known to be capable of causing a significant adverse effect. In terms of reporting, the Legislature has chosen to impose a duty to report under section 99 only

when the release “has caused, is causing or may cause” an adverse effect. It is not enough that the substance be a substance which is known to be capable of causing an adverse effect.

...

The words “causes” and “has caused, is causing” inform as to the meaning of the words “may cause”. The focus of the inquiry is on the results or consequences of the release, not on the substance of the release.

This interpretation is not inconsistent with the recognition that environmental protection legislation is by its nature broad and ambitious in scope....

The Court continued its analysis by referring to the Supreme Court of Canada decision in *R. v. Nova Scotia Pharmaceutical Society*¹⁵ for the principle that unconstitutionally vague interpretations of legislation should be avoided.¹⁶ Further, citing the *Ontario Water Resource Act*,¹⁷ the Court noted that the Legislature, if it intended to focus merely on the substance, could have limited the section solely to the phrase “may cause”.¹⁸

At paragraph 637 the Court noted:

In my view the Legislature signified a clear intention to focus on results and consequences in both section 98 and section 99 by using more or less the same form of expression on causation; each case requiring a standard or level of proof more than a mere possibility having regard only to the substance itself. Had the Legislature intended to focus in section 99 on the substance itself, rather than the results or consequences of the release, it would have so expressed itself by requiring reports when the release “may cause” an adverse effect, rather than the way it has been expressed. There would be no need for the words “has caused, is causing” in section 99.

The Court therefore concluded that the causing of harm rather than the nature of the substance is the focus of the legislation. As a result the Court concluded that a polluter who releases a substance will only be required to report at the time of obtaining actual knowledge of the nature of the substance of the release, provided that knowledge is obtained in a duly diligent manner.¹⁹ This reflects the similar interpretation by the Court of Queen’s Bench in the case of *R. v. Shell Canada Limited (Shell Canada)*.²⁰ As in the *Shell Canada* case, the Court interpreted the need to have actual knowledge of the causative nature of the substance rather than the simple release of the substance itself.

The practical and potential consequences of this narrow interpretation are at least two fold:

- it encourages parties who have released substances to consider not reporting in the hope that the release will not cause an adverse effect;²¹ and
- it delays reporting releases to Alberta Environment until the polluter has actual knowledge of the contents of the release, potentially allowing irreparable harm to occur that could have been avoided if there was a quicker regulatory response.

Release prohibitions interpreted

Similarly, the Court found that proof of “results and consequences” applied to EPEA prohibitions in section 98. At paragraph 644 the Court noted:

It is not enough to establish culpability for the Crown to prove an effect. It must prove more. For instance, in the case of human health or safety, it is not enough that the Crown prove that a person’s body chemistry in some way changes or more likely than not in the future will change. The *Crown must prove that such change impaired or damaged or probably will impair or damage that person’s health or safety, even for a finding of a mere “adverse effect”*. Just as the taking of illegal drugs will probably impair or damage a person’s health or safety, so will the taking of properly prescribed drugs, while it may change the chemistry of the body of that person, probably not impair or damage that person’s health or safety. Indeed, one can presume that with respect to pharmaceuticals, the object of the effect intended is the very opposite. [emphasis added]

The Court went on to conclude, relying on the evidence of the defence’s expert and rejecting the Crown’s, that no adverse effect or significant adverse effect occurred.²²

As with the reporting requirements, this interpretation may lead to counter-productive environmental outcomes in relation to prohibiting releases. Namely, this approach to pollution may result in:

- ignoring scientific uncertainty by requiring an actual potential effect to be proven where contradictory and adversarial expert scientific evidence, which is often readily available, will rarely fail to raise some reasonable doubt; and
- ignoring the cumulative impacts of releases by allowing multiple incremental releases that need not be reported and are not prohibited because proof of cause and effect of each release remains elusive.

The implications of the “may cause” interpretation

The writer submits that the Court’s interpretation in relation to both reporting requirements and release prohibitions actually dismiss the plain meaning of the phrase “may cause” in sections 98 and 99 (as they then were). For the purpose of analysis these sections are restated below.²³

98(2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.

...

99(2) The person having control of a substance that is released into the environment that may cause, is causing or has caused an adverse effect shall, immediately on becoming aware of the release, report it to the persons referred to in subsection (1)(a), (b), (c) and (e) unless the person having control has reasonable grounds to believe that those persons already know of the release.

By focusing on the “results and consequences” of the release and interpreting the inclusion of “is causing or has caused” as limiting in nature, the Court appeared to read down the plain meaning of “may cause”. It is submitted that the Court read into the legislation that “may” actually means “is likely to” or “will” cause an adverse effect. Indeed, the use of the word “may”, read plainly, indicates that the release may or may not cause a significant adverse effect, and the fact that it “may not” does not absolve the polluter of reporting requirements.

The suggested plain reading would focus the analysis on the nature of the substance itself and more closely reflect the pollution prevention principle and the purpose of the Act, that of supporting and promoting “the protection, enhancement and wise use of the environment”.²⁴

This is a prudent interpretation particularly when one considers the uncertainty of environmental harms. This uncertainty of the cause and effect relationship has been recognized by the Court of Appeal in *R. v. Terroco Industries Limited (Terroco)* where it considered what constituted an appropriate sentence under EPEA.²⁵

At paragraph 47-48 the Court of Appeal noted:

In many environmental offences, harm is not easily identified. However, the absence of ascertainable harm is not a mitigating but merely a neutral factor: see *R. v. Domtar Specialty Fine Papers, a Division of Domtar Inc.* (2001), 39 C.E.L.R. (N.S.) 56 at para. 117 (Ont. S.C.J.). Difficulties in attribution and the gradual effect of cumulative actions often make the determination of actual harm an impossible exercise: see *R. v. Canadian Tire Corp.* (unreported July 21, 2004) (Ont. S.C.J.). I agree with Fradsham P.C.J. when he states that an actual, identifiable injury is an exacerbating factor, while the lack of an actual injury is not a mitigating factor: *Van Waters & Rogers* at paras. 27-28; see also *R. v. Panarctic Oils Ltd.* (1983), 43 A.R. 199 at para. 22 (N.W.T. Terr. Ct.).

Furthermore, the potential for harm is also a relevant consideration: *R. v. United Keno Hill Mines Ltd.* (1980), 10 C.E.L.R. 43 (Yuk. Terr. Ct.); *R. v. Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287 (Ont. C.A.); *General Scrap Iron and Metals* at para. 41; *Van Waters & Rogers* at para. 28. *The greater the potential for harm, the greater the warranted penalty.* The potential for harm is informed by the probability of the risk, the nature of the product, the likely magnitude of damage if the risk materializes and the sensitivity of the site including its proximity to population and fragile environments: see *R. v. Chem-Security (Alberta) Ltd.* 1998 ABPC 96 (CanLII), (1998), 233 A.R. 289 at paras. 12-14, 1998 ABPC 96; *Van Waters & Rogers*; *Fiesta Party Rentals*; see also *R. v. F. Howe & Son (Engineers) Ltd.*, [1992] 2 Cr. App. R. (S) 37 at para. 34; U.K. Sentencing Advisory Panel, *Environmental Offences: The Panel's Advice to the Court of Appeal* (Consultation Paper, March 1 2000). *An offender lucky enough to avoid actual harm should not benefit from the intervention of luck: see U.K. Sentencing Advisory Panel at para. 17. Where there is potential for harm that is avoided by fortuitous circumstances, that potential is a relevant factor. As many environmental protection statutes prohibit the creation of potential harm and not just actual harm, the potential may often be the focus of the harm principle.* [emphasis added]

While the case is not directly applicable to the *Edmonton* situation, the principles espoused should be equally relevant to the interpretation of EPEA itself. A polluter should not avoid penalty just because actual harm was avoided. The Court of Appeal indicated that the potential for harm is one of several questions to be considered in sentencing. The observation that "an offender lucky enough to avoid actual harm should not benefit from the intervention of luck" contrasts directly with obiter comments of the Court in the *Edmonton* case, where it noted at paragraph 681, in relation to reporting releases:²⁶

I am confident the Legislature did not intend that reports would be required to be made concerning all acts of release, including acts of release where, as it turns out in a particular case, there was no consequence. *While it may be objected that a polluter may escape liability for failing to report acts of pollution which have only a possibility or an unrealized potential for an adverse effect, only because as it happens in the end there is no consequence, that is a risk that the polluter must weigh.* [emphasis added]

The approach taken by the Provincial Court in *Edmonton* is supported by the case of *R. v. Chem-Security (Alberta) Ltd. (Chem-Security)* where the Court, in dealing with sentencing considered the potential impact on humans:²⁷

...The evidence of the testing and monitoring of large game animals and indeed people in the Town of Swan Hills did not demonstrate measurable damage or injury. *That there was from the release the potential to cause a significant adverse effect is clear; however, I am not satisfied beyond a reasonable doubt of actual demonstrable injury to people or animals (other than the voles) in the immediate vicinity of the Facility. The increased monitoring and testing now in place will, in the years to come, hopefully, confirm that my reasonable doubt was well-founded.* [emphasis added]

The last sentence in particular strikes at the crux of problematic interpretation of EPEA as an environmental protection piece of legislation. To view the offence as one dealing with the possible cause of a future harm rather than a plain meaning of "may cause" relies on the hope that the effect does not in fact occur. This is not in line with environmental law principles, such as pollution prevention and precaution.²⁸

Conclusions and recommendations

To date, few cases that interpret provisions of EPEA have been appealed. Unless such an appeal is forthcoming there is likely a need to revisit EPEA and make amendments to the reporting and release provisions to ensure that environmental protection is not merely legislative rhetoric.

The current interpretation of both the release reporting requirements and release prohibitions rely on causal links to harm that science is ill equipped to provide. Any prosecution is hobbled from the start as science is relied upon to provide the necessary evidence on a standard of proof of "beyond a reasonable doubt". Science, however, by its very nature, through open and continual testing and questioning of hypothesis, is not well placed to remove that doubt. As a result, there are rare instances where a polluter will not be able to raise some reasonable doubt that a future harm will occur. The focus of legislation and the courts on the need to establish the causation of harm or future harm, rather than the nature of the substance being released, thereby undermines our

society's ability to prevent pollution and deter activities that carry inherent risks to the environment.

¹ 2006 ABPC 56.

² R.S.A. 2000, c. E-12.

³ *Supra* note 1 at paragraph 67.

⁴ *Ibid.* at paragraphs 251-252.

⁵ *Ibid.* at paragraph 4-6.

⁶ Four counts related to section 99(1) while the other counts related to section 99(2), four of which would be stayed upon conviction as they would constitute an included offence (that being the failure to report).

⁷ The Court dealt with significant issues relating to control over the situation and how the City of Edmonton did not have significant control over the actions of the LOC which in the end likely caused the releases.

⁸ Of particular note, the Court held that humans should be interpreted to be included in the EPEA definition of "environment". This is in contrast to a previous Alberta Case (*R. v. Colt Engineering Corp.* (1999)) where the Court interpreted that humans were not "living organisms" within the meaning of the "environment" as defined by EPEA.

⁹ *Supra* note 1 at paragraph 629.

¹⁰ *Ibid.* at paragraph 632.

¹¹ *Ibid.* at paragraph 659.

¹² *Ibid.* at paragraph 665.

¹³ *Ibid.* at paragraph 663.

¹⁴ *Supra* note 1.

¹⁵ [1992] 2 S.C.R. 606.

¹⁶ *Supra* note 1 at paragraph 628.

¹⁷ R.S.O. 1990, c. O.40.

¹⁸ *Supra* note 1 at paragraph 627.

¹⁹ *Ibid.* at paragraph 689.

²⁰ 2000 AQB 459.

²¹ The Court at *supra* note 1, paragraph 689 indicated that a polluter who knows "with some degree of certainty or conclusiveness ...which would lead a reasonable person to conclude that there is a concern about" health or safety of individuals or the environment would be required to report and that parties must be duly diligent in this regard.

²² *Ibid.* at paragraphs 647-652.

²³ *Supra* note 2, now at ss. 109(2) and 110(2).

²⁴ *Ibid.* at s. 2.

²⁵ 2005 ABCA 141.

²⁶ *Supra* note 1.

²⁷ 1998 ABPC 96, paragraph 22.

²⁸ The impact of this interpretation of EPEA is illustrated in the *Chem-Security* case where future studies indicated that the release resulted in increased PCBs in wildlife and ongoing warnings against eating wild meat due to health concerns; see Alberta Health and Wellness, *Swan Hills Waste Treatment Center Long-term Follow-up Health Assessment Program 1997-2002* (June 2004) available online: <http://www.health.gov.ab.ca/resources/publications/SwanHillsReportJune_04.pdf>.

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Oilfield Injection of Fresh Water Policy and Guidelines Released

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The Government of Alberta released a new policy and guideline in April 2006 regarding the use of non-saline water for the enhanced recovery (ER) of oil in Alberta. The policy and guideline, entitled *Water Conservation and Allocation Policy for Oilfield Injection*¹ (the Policy) and *Water Conservation and Allocation Guideline for Oilfield Injection*² (the Guideline), are aimed at reducing the use of non-saline water for ER while minimizing leaving oil in place.

The Policy

The Policy replaced the 1990 policy *Groundwater Allocation Policy for Oilfield Injection Purposes*, and is effective January 2006.³ The Policy ties itself directly to the government's broader water policy initiative, *Water for Life*, and states the objective of "enhanc[ing] the conservation and protection of Alberta's water; and to reduce or eliminate, on a case-by-case basis, the use of non-saline water resources for oilfield injection purposes".⁴

The goals of the Policy include providing water for a sustainable economy, achieving the purpose of the *Water Act*, and implementing the recommendations of the Advisory Committee on Water Use Practice and Policy.⁵ The Policy further states its goal of achieving "significant reductions" in the use of the non-saline water for enhanced oil recovery and increased water availability for other users and for the aquatic environment.⁶

The Policy applies to all non-saline surface and groundwater allocations that are sought through licence applications or renewals of licences for the purpose of ER projects. It also requires investigation of alternatives and indicates that there will be application incentives (e.g., regulatory streamlining) where licences have met conservation and productivity targets.

The Guideline

The Guideline outlines the operational policy for water use for ER and includes criteria regarding cumulative effects, water-short areas, and risk-based assessments. The implementation of the Guideline describes a nine step process for ER water licences and renewals. In brief these steps involve:⁷

Step 1: Initial ER evaluation of economic and technical feasibility of a new ER project with identification of alternatives to non-saline recovery.

Step 2: Identification of ER projects using saline water sources. ER using saline water is governed on a project basis by the Energy and Utilities Board, with no further approval from Alberta Environment being required.

Step 3: Risk assessment through a "risk-based Tier selection process" for evaluating and assessing impacts of non-saline water use and the use of alternatives. (See description of Tier based selection below).

Step 4: Tiered technical, economic, and environmental evaluation. The Tier in turn determines the reporting and evaluation criteria that must be met. The process is largely project proponent driven although the Director maintains ultimate responsibility for evaluating environmental and economic criteria and for selecting the relevant Tier.

Step 5: *Water Act* licence application, which must include certain information specific to ER licences including:

- anticipated water use throughout the project life;
- technical assessment of alternatives to non-saline water;
- review and progress toward reduction of use of non-saline water sources;
- an economic assessment of options for water use;
- environmental net effects assessment;
- the natural variability of supply constraints and groundwater evaluation;
- an evaluation of cumulative effects and environmental impacts; and
- mitigation plans.

Steps 6 to 9 reflect steps common to all water licences, namely, public notice and review, licences decision, Environmental Appeals Board, and ER scheme approval.

Evaluation and reporting requirements under the Guideline are dictated by a risk-based tiered system. The tier determination is based on the nature of the potential impacts (minor, moderate, or major) and the probability of selected impacts (remote, unlikely, likely).⁸ The Guideline gives direction regarding the reporting and evaluation requirements in relation to:⁹

- selecting alternatives;
- economic aspects;
- cumulative effects;
- environmental net effects evaluation;
- water supply offsets; and
- water-short areas.

Licences that have a remaining life expectancy of less than five years or “pilot type projects” may be exempt from the evaluation requirements.¹⁰

Monitoring and reporting requirements continue to be dealt with through licence conditions¹¹ and reporting on non-saline and saline water use and state of the environment is continued by Alberta Environment.¹²

Comments

The Policy and Guideline outline important objectives and goals of conserving non-saline water and reducing non-saline ER. Importantly, the Policy recognizes that where areas are subject to water shortages, including undermining a water body's instream flow needs, a higher evaluation and reporting requirement is needed. The Policy also states that impacts to the aquatic environment may require rejecting certain licence applications or renewals or deferring licence withdrawals.

However, the majority of the Policy provisions appear to be weighted to justifying continued use of non-saline water for ER projects, contrary to its stated goal of reducing water use. In particular, the system of evaluating economic aspects of an ER project and the use of Authorization of Expenditure approach proposed by the Guideline appears to promote continued use. This is particularly the case where the valuing of "environmental cost", as proposed in the balancing decision of the Director, largely lacks definitions. In effect the economic justification, (the apple), may be seen as always justifying the environment impact, (the orange) because the two impacts are not readily comparable within the framework of the Guideline. Fundamentally the question that must be answered is how we value non-saline water for other uses and ecological integrity. Failing this, it appears that only incremental reductions in the use of non-saline water for ER will be realized.

¹ 2006, Government of Alberta, available online:

<http://www.waterforlife.gov.ab.ca/docs/Oilfield_Injection_Policy.pdf>

² 2006, Government of Alberta, available online:

<http://www.waterforlife.gov.ab.ca/docs/Oilfield_Injection_GUIDELINE.pdf>

³ *Supra* note 1 at p. 2

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Supra* note 2 at pp. 12-16.

⁸ *Ibid.* at pp. 17-19.

⁹ *Ibid.* at pp. 27-39.

¹⁰ *Ibid.* at p. 11.

¹¹ *Ibid.* at p. 40.

¹² *Ibid.*

Comments on this article may be sent to the editor at elc@elc.ab.ca.

New Rules for Water Well Testing for CBM Wells

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Effective May 1, 2006, the province of Alberta requires companies to offer to test water wells before drilling shallow coalbed methane (CBM) wells. This requirement comes amidst concerns over the significant development potential of CBM in Alberta as well as the potential for groundwater contamination from CBM extraction.

Background

CBM refers to natural gas found in coal seams. According to the Alberta Energy and Utilities Board (EUB), Alberta has extensive CBM reserves which are predominately found in three coal formations, namely, the Horseshoe Canyon/Belly River formation, the Mannville formation and the Ardley formation.¹ As of March 2006, more than 6,000 CBM wells have been drilled in the province mostly in the Horseshoe Canyon formation, which is an area of the province located primarily between Calgary and Edmonton.²

Some coals seams must be "dewatered" in order to reduce the pressure in the coal seam and release the gas. The concern is that the extraction of groundwater may negatively impact water well users because coal seams containing water are considered aquifers in their own right and may be used as water wells. There are also concerns about the potential for gas migration through interconnected aquifers.

Complaints of gas migration and water well contamination have been reported in the Rosebud area, northeast of Calgary, and in Wetaskiwin, south of Edmonton.³ The reports occurred in areas with CBM activity but, to date, investigations have not found a direct link between the contamination and CBM production.

New testing requirements

Mandatory water well testing was one of the recommendations made by the CBM multi-stakeholder advisory committee (the MAC), which was appointed by the government to review CBM regulation in Alberta.⁴ Although the MAC's final report was only released to the public in May 2006, the recommendations were submitted to the government in January.

Before the MAC's final recommendations were made public, Alberta Environment released the *Standard for Baseline Water-Well Testing for Coalbed Methane/Natural Gas in Coal Operations* (the Baseline Standard).⁵ The Baseline Standard requires companies to offer and complete baseline water well testing before CBM drilling begins. The testing applies only to shallow CBM wells with perforations above the base of groundwater protection. In other words, it only pertains to CBM wells that may impact fresh water.

As of May 1, 2006, companies must test all active water wells within a 600 metre radius of a proposed CBM well prior to drilling or re-completing existing wells that involve fresh water. If no water wells are located within the 600 metre radius, the company must offer to test at least one water well within an 800 metre radius. The Baseline Standard sets out procedures for testing water quantity and quality, which include gathering information on the well's water production capability and water quality, including bacteria and the presence or absence of gas.

The company must obtain the landowner or occupant's permission before testing the well and obtain written confirmation from the landowner or occupant if he or she refuses to have the well tested. If a landowner or occupant observes any changes in the quantity or quality of their well after drilling, they should report the incident to Alberta Environment prior to retesting and then ask the company to retest the well. Landowners remain responsible for keeping their wells clean through shock chlorination and routine chemical and bacteria testing done by the regional health authorities.

Companies must provide the test results to the landowner or occupant and to Alberta Environment within two months of testing. The data submitted to Alberta Environment will form part of the new water well testing information database. This database will be used to evaluate the Baseline Standard after six months, and again at 12 and 18 months to determine if the Baseline Standard requires improvement.

The Baseline Standard indicates that these new requirements will be implemented and enforced by the EUB.

Comment

The Baseline Standard is an initial positive step toward the protection of groundwater in Alberta. Assessing whether CBM activity is responsible for water well contamination is difficult, if not impossible, without baseline testing. In fact, it would be preferable to extend baseline testing to all oil and gas development, not just for shallow CBM wells.

Since the EUB is tasked with enforcing the Baseline Standard, it would be helpful if the EUB outlined how it plans to deal with non-compliance with the Standard. It would also be helpful for Alberta Environment to provide further details on what steps it will take to investigate and respond to complaints of water well contamination.

Even with the Baseline Standard in place, the issue remains whether companies will be required to compensate landowners for any losses or damage incurred to water wells and how the compensation will be determined. There is currently no regulatory compensation process in place to account for any deficiencies or contamination that may occur as a result of CBM development. Although landowners may seek compensation for water related losses or damage through the civil litigation process, this process is often prohibitive for landowners due to the expense and burden of proof associated with civil suits. Specifically, the legal burden remains with the landowner to prove, on a balance of probabilities (or greater than a 50 percent chance), that the CBM development caused their well contamination. It is unclear whether baseline water well data alone will be sufficient to establish the causal link between CBM production and water well contamination on a balance of probabilities. Perhaps the next step in the CBM regulatory process should be to set up some parameters dealing with the issue of compensation for contamination. Such a step could better ensure that those who develop the resource are held financially responsible for any loss or damage caused as a result of that development.

¹ Alberta Geological Survey, Alberta Energy and Utilities Board, "Alberta coal occurrences and potential coalbed methane (CBM) exploration areas" online: Alberta Geological Survey <http://www.ags.gov.ab.ca/activities/CBM/coal_and_cbm_intro.shtml>.

² Online: Alberta Environment <<http://www.waterforlife.gov.ab.ca/coal/faqs.html>>.

³ See Hanneke Brooymans, "Tainted water lights fire under gas fears" *Edmonton Journal* (13 December 2005) A1; Ruth Sanders, "Farmer's water tainted by methane" *Wetaskiwin Times Advertiser* (13 March 2006).

⁴ The CBM/NGC Multi-Stakeholder Advisory Committee, *Coalbed Methane/Natural Gas in Coal Final Report* (January 2006) at p. 26, online: Alberta Energy <http://www.energy.gov.ab.ca/docs/naturalgas/pdfs/cbm/THE_FINAL_REPORT.pdf>.

⁵ Online: Alberta Environment <<http://www.waterforlife.gov.ab.ca/coal/index.html>>.

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Emissions Trading Regulation Now in Force

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The Government of Alberta has released a new *Emissions Trading Regulation* (the Regulation) under the *Environmental Protection and Enhancement Act*.¹ The Regulation addresses emission trading for nitrogen oxides (NOx) and sulphur dioxide (SO₂). The Regulation does not address emission trading for carbon dioxide.

The Regulation is part of Alberta Environment's implementation of the recommendations of the Clean Air Strategic Alliance's Electricity Project Team.² The Electricity Project Team recommended new annual limits for NOx and SO₂ emissions as well as an emission trading program for these substances for components of power plants (defined as "units") fired by natural gas or coal.³ The purpose of the emissions trading program is to create an incentive for unit operators to meet emission reductions before the new annual emission limits must be met. If a unit emits less than its baseline emission rate, it will generate credits. Unit operators can also receive credits for shutting down their unit or meeting the annual emission limit earlier than required.

The Regulation establishes an emissions trading registry to track the creation, transfer and retirement of credits. The Regulation also sets out who may and who must participate in the emissions trading system and outlines when and how credits are issued or used.

Information in the registry will be available to the public through the registry's website. The only information that will not be publicly available will be current holdings of emissions credits by a particular account holder and individual transfers of emission credits.⁴ The registry operator will prepare a public annual report that summarizes the credits created, used, transferred and discounted throughout the year.⁵

Failure to comply with the Regulation carries a maximum fine of \$50,000 for individuals and \$500,000 for corporations.⁶

¹ Alta. Reg. 33/2006.

² Alberta Environment, *An A to Z Guide to Emissions Trading* (December 2005) online: Alberta Environment <<http://www3.gov.ab.ca/env/air/pubs/AtoZTrading.pdf>>.

³ "Unit" refers to separate components of a power plant facility that result in production of electrical energy. One power plant may have several units, *ibid.* at s. 2.

⁴ *Supra* note 1 at s. 14.

⁵ *Ibid.* at s. 15.

⁶ *Ibid.* at s. 58.

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Centre Reviews Access To EAB Process

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The Environmental Appeals Board (EAB) is a quasi-judicial administrative tribunal that hears appeals from the *Environmental Protection and Enhancement Act (EPEA)*¹ and the *Water Act (WA)*.² A purpose of both of these statutes is to provide a voice for members of the public about activities that may have an adverse effect on the environment, and to this aim, a wide range of appeals are permitted by the Acts.³ The Environmental Law Centre recently completed a project reviewing the EAB to assess how accessible it is to the public; the project report is titled *Public Access to Environmental Appeals: A Review and Assessment of Alberta's Environmental Appeals Board*.⁴

A basic assumption of the project, and its assessment of access by individuals and groups, is that public participation is an important and necessary element of environmental appeals before the EAB.⁵ Public participation is broadly mandated by the legislation governing the EAB and directing appeals to it, namely *EPEA* and the *WA*. It serves as a means of balancing the "agendas" of all parties appearing before the EAB. Public participation gives decision-makers a greater range of ideas and information to consider in making decisions, by bringing forward important facts and submissions and presenting perspectives not otherwise available to the decision-makers. It can also enhance public acceptance of agency decisions and provide broader bases of political support for regulatory agencies. Additionally, increased public participation enables the presentation of alternate views, leading to more thorough analysis and clearer reasons in agency decisions.

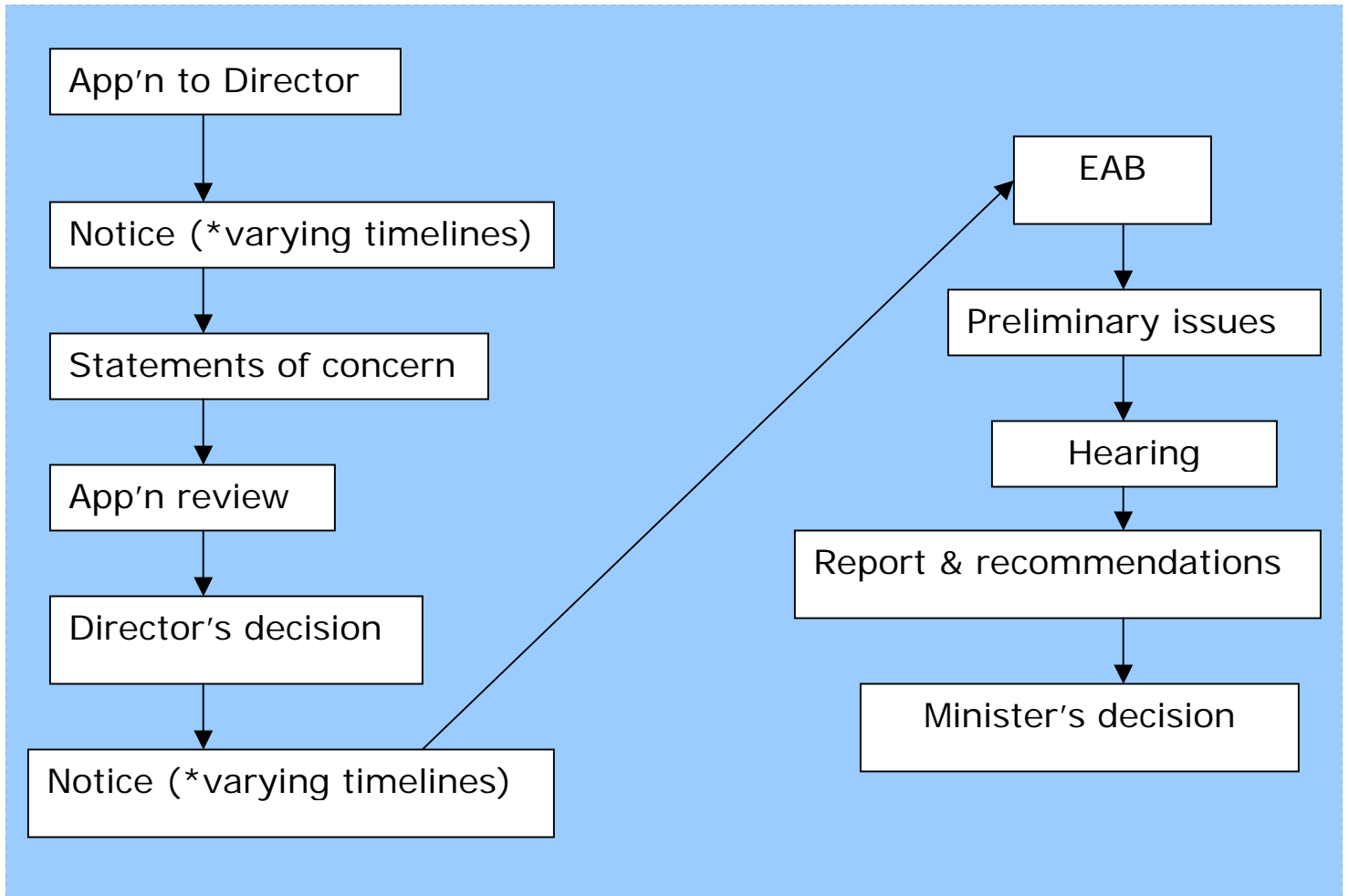
The project included a review of applicable legislation, regulations, and rules, as well as EAB decisions and related judicial reviews from 1993 to 2004. The report focused on three areas key to effective public participation in the appeal process: standing, practice and procedure, and costs. Several appellants and counsel were interviewed to gain their perspective on the accessibility and fairness of the EAB process. Overall, most interviewees thought that the EAB process was beyond the reach of the average citizen because of the financial and personal burdens, complexity of the process, and the need for legal counsel.

Major concerns

The project research uncovered some significant concerns about public access to the EAB process. Many of these concerns involve not only the EAB, but also Alberta Environment, which is tightly tied to the appeals process as the regulator whose decisions are under challenge.

One of the most notable concerns is that imposition of the "directly affected" criterion at both the statutory authorization and appeal stages effectively creates two different tests for standing that must be met by members of the public before two different decision-makers. The current regulatory process enables determinations by both Alberta Environment and the EAB, but practice and policy have resulted in the application of

different tests by these two bodies.⁶ The following diagram sets out the regulatory process and the roles of Alberta Environment and the EAB.



A related concern is that both Alberta Environment (through the Director) and the EAB impose narrow qualifications for standing. Alberta Environment focuses on geographic proximity through either residence or land ownership.⁷ The EAB looks to personal direct effects and causal connections, with an emphasis on effects on economic interests. While health effects have been given some consideration by the EAB, recreational interests are generally not given any weight unless combined with economic interests.⁸ Additionally, it has been very difficult for groups to obtain standing in the EAB process. The EAB's current test requires that at least half of a group's membership must be individually directly affected for that group to gain standing.⁹ The EAB has also tended to favour groups created to address a specific issue or the appeal in question over groups with a longer history that have dealt with a range of issues.¹⁰

Procedural matters are of concern in relation to accessibility of the EAB's process. Differing appeal periods create confusion and procedural problems for appellants, particularly in instances where one published notice applies to multiple appeal periods.¹¹ While the EAB has discretion to vary requirements, it has chosen instead to rigidly apply procedural requirements, which has prevented many appeals from proceeding.¹² These concerns are further complicated by a broad lack of public understanding of the EAB and its process, with limited tools available to improve this situation. There is a real need for broad, basic public education on the regulatory processes of both Alberta Environment and the EAB.

Alberta Environment has often taken an adversarial role in the EAB process, particularly with respect to questions of standing and is often perceived by appellants as favoring industry in the preceding regulatory processes.¹³ However, jurisprudence indicates that it is generally more appropriate for a decision-maker whose decision is under review to explain the relevant legislation and policies, rather than take a partisan role in the proceedings.¹⁴

Another concern is that the EAB has infrequently awarded costs to appellants. During the period reviewed in the project (1993 – 2004), the EAB made seven awards of final costs and one award of interim costs; over a similar time period, the EAB made 96 reports and recommendations to the Minister of Environment.¹⁵ The EAB has not developed a consistent approach to costs applications and has been quite subjective in its consideration of these applications.¹⁶

Key recommendations

The report contains a broad range of recommendations aimed at improving the accessibility of the environmental appeals process and, consequently, the quality of environmental decision-making. Due to the close links between that process and the statutory authorizations (approvals and licences) issued under *EPEA* and the *WA*, several recommendations affect Alberta Environment.

Important recommendations related to standing include:

- elimination of the requirement to file statements of concern as a prerequisite to filing an appeal. Practically, this would leave the determination of standing wholly to the EAB and reinforce Alberta Environment's responsibility to gather a broad range of information in making decisions on statutory authorizations;
- failing this recommendation, broader acceptance of statements of concern by Alberta Environment, consistent with their information-gathering role, and removal of the "directly affected" criterion;
- applying a broader standing test that eliminates the use of "directly affected" and looks instead to legitimate interests that should be heard, and established records of concern for the environmental interests affected by an appeal; and

- taking a liberalized approach to standing for groups that is more consistent with the realities of public involvement in environmental matters in Alberta, such as the statutory emphasis on public and group involvement in environmental decision-making and provincial government reliance on such groups in policy development processes and consultations.

With respect to practice and procedure, both the EAB and Alberta Environment should take a functional approach and incorporate more flexibility as decision-makers. In particular, the EAB should exercise its discretion to take into account the adequacy of notice and public consultation when dealing with procedural requirements. The EAB, and Alberta Environment where relevant, should take steps to develop better public education and awareness of the EAB and its process. This should include the creation of liaison officer positions to provide independent assistance in the appeal process, particularly to unrepresented parties.

The EAB should also develop greater clarity and consistency with respect to costs. This should include creation of a purpose statement for costs and development of a detailed costs guideline. As well, the EAB should abandon its use of the "shared responsibility" approach to costs.

Conclusion

Wide-ranging accessibility issues in the EAB process have increased over time, and have begun to affect not only the EAB's operations, but its public perception as well. Overall, *EPEA* and the *WA* are sound and have provisions for increased public participation, but these areas have been neglected in implementation. Both Alberta Environment and the EAB have taken and continue to maintain a narrow and inflexible approach to implementation of the legislative processes in relation to public participation. Where opportunities for public participation exist, a lack of information has made it problematic for the general public. Groups in particular have found it extremely difficult to gain standing before the EAB, which has marginalized them in the environmental appeals process in Alberta. Efforts towards greater flexibility, functionality, and public education in the EAB process and at Alberta Environment will improve the public's perception of both agencies, and improve the environmental appeals process in Alberta as a whole.

¹ R.S.A. 2000, c. E-12.

² R.S.A. 2000, c. W-3.

³ *Supra* note 1, s. 91, and note 2, s. 115.

⁴ Cindy Chiasson and Jodie Hierlmeier, *Public Access to Environmental Appeals: A Review and Assessment of Alberta's Environmental Appeals Board* (Edmonton: Environmental Law Centre, 2006).

⁵ For further discussion of public participation in environmental decision-making, see Chris Tollefson, "Advancing an Agenda? A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation" (Paper presented to the Citizenship and Citizen Participation in the Administration of Justice Conference, October 2001), online: Canadian Institute for the Administration of Justice <http://www.ciaj-icaj.ca/english/publications/2001/TOLLEFSON_Chris-2001.pdf>, and Raj Anand and Ian G. Scott, Q.C., "Financing Public Participation in Environmental Decision-Making" (1982) 60 Can. Bar Rev. 81.

⁶ With respect to "directly affected" as determined by Alberta Environment, see *supra* note 1, s. 37, *supra* note 2, s. 115, and Alberta Environment, Environmental Sciences Division, *Acceptance and Acknowledgement of Statements of Concern*, Policy No. ES-99-PP3 (Edmonton: Alberta Environment, February 2000). With respect to "directly affected" as determined by the EAB, see *supra* note 1, s. 95(5)(a).

⁷ *Ibid.*, *Acceptance and Acknowledgement of Statements of Concern*.

⁸ *Supra* note 4, pp. 17-18.

⁹ *Jericho v. Director, Southern Region, Regional Services, Alberta Environment re: St. Mary River Irrigation District* (4 November 2004) Appeal Nos. 03-145 and 03-154-D (AEAB).

¹⁰ *Supra* note 4, p. 19.

¹¹ *Ibid.*, pp. 36-41.

¹² *Ibid.*, pp. 36-43.

¹³ *Ibid.*, p. 61.

¹⁴ *Imperial Oil Limited and Devon Estates Limited v. HMQ and the City of Calgary*, 2 C.E.L.R. (3d) 236, 2003 ABQB 388; *CAIMAW v. Paccar of Canada Ltd.* [1989] 2 S.C.R. 983; *Northwestern Utilities Ltd. v. City of Edmonton* [1979] 1 S.C.R. 684.

¹⁵ *Supra* note 4, p. 63.

¹⁶ *Ibid.*, pp. 63-65.

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The Centre's newest publication, *Public Access to Environmental Appeals: A Review and Assessment of Alberta's Environmental Appeals Board*, is now available for purchase (cost \$15.00 + GST). To purchase the report, contact the Centre at 1-800-661-4238 or visit <www.elc.ab.ca/publications/Books.cfm>.