

**A Guide to Public Participation in
Environmental Decision-Making
in Alberta**

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April 2009**

ENVIRONMENTAL LAW CENTRE



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The Environmental Law Centre

The Environmental Law Centre (Alberta) Society is a registered charitable organization that was incorporated in 1982 to provide Albertans with an objective source of information on environmental and natural resources law. The Centre, which is staffed by four full-time lawyers, a librarian and a small support staff, provides services in environmental law education, assistance, research and law reform. The Centre maintains an extensive library of environmental law materials that is accessible by the public free of charge.

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Alberta **LAW**
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Introduction to the Environmental Law Centre's Guide to Public Participation in Environmental Decision-making in Alberta

Keywords: jurisdiction, terminology, legislation

For quick references to key words use the Adobe search function

You should not rely on this guide as legal advice. The information provided in this guide is current to April, 2009. Keep in mind that laws and policies are subject to change. Please contact Alberta Environment, the Alberta Environmental Appeals Board or the Environmental Law Centre for further information. For legal advice regarding the need for authorizations or permits contact the relevant government department or a lawyer.

1. Purpose of the guide

The purpose of this guide is to provide the public with information and strategies to effectively participate in government decisions relating to specific environmental authorizations issued by Alberta Environment and appeals before the Alberta Environmental Appeals Board (EAB). The guide focuses on assisting people who are self represented and wish to participate in approval and appeal processes.

If you are the proponent of an activity the guide will provide some insights into the legal process and the approaches that may be taken by a concerned member of the public.¹ For further information contact Alberta Environment, the EAB or the Environmental Law Centre (ELC).

2. How to use the guide

The guide is separated into four parts. Part I deals with authorizations issued by Alberta Environment and how the public can participate in its decision-making processes. Part II outlines the process to appeal certain Alberta Environment decisions made to the EAB. Part III discusses the environmental impact assessment process and opportunities to participate in this process. Part IV discusses the ability to challenge government decisions in court, a legal process referred to as “judicial review”.

This guide was prepared in a manner that allows the reader to go to a particular section of interest, rather than reading the entire guide. Some chapters have a summary document or “quick reference” document found in the Appendices. These quick references provide an outline of the most relevant information for specific topics.

This guide is available electronically allowing the use of search functions in Adobe Acrobat to find key items.

¹ For more information about applying for authorizations contact Alberta Environment or the Environmental Law Centre.

3. Scope of the guide

This guide focuses on two pieces of Alberta legislation, the *Environmental Protection and Enhancement Act (EPEA)* and the *Water Act*.² The guide also addresses appeals under these two statutes to the EAB. This legislation is administered by Alberta Environment, a department within the Government of Alberta.

3.1 What the guide does not cover

This guide does not deal with activities and authorizations that fall within the jurisdiction of other provincial government departments, or within federal or municipal government jurisdiction. Laws and policies regarding land use, resource extraction and wildlife remain important to environmental health but are largely outside the scope of this guide. This is discussed further in Part I of this guide.

An activity may also result in an environmental impact for which a civil action may be pursued in the courts. The topics of civil actions, specifically in the environmental context, are beyond the scope of this guide. For more information about civil actions related to the environment, please contact the ELC.

4. Terms and acronyms

In reading the guide it is important to have a common understanding of certain terms. For the purpose of the guide, the term **environmental authorization** refers to all authorizations that are issued by the government under *EPEA* and the *Water Act*. Of these environmental authorizations, the guide focuses on “approvals” and “licences” under *EPEA* and the *Water Act*.

The guide uses the term “proponent” to describe the party who is seeking the authorization from the government. The proponent is also referred to as the “applicant”.

Common acronyms used in this guide include:

- EAB – Alberta Environmental Appeals Board

² R.S.A. 2000, c. E-12 [*EPEA*], and R.S.A. 2000, c. W-3 [*Water Act*].

- EIA – Environmental Impact Assessment (sometimes referred to as an Environmental Assessment)
- ELC – Environmental Law Centre
- *EPEA – Environmental Protection and Enhancement Act*
- ERCB – Energy Resources Conservation Board
- NRCB – Natural Resources Conservation Board

5. Laws, authorizations and policies: what's the difference?

All levels of government exercise varying degrees of control over activities that have environmental impacts. The government control over an activity may take the form of laws or policies.

5.1 Laws – statutes and regulations

Laws consist of statutes (or acts) and regulations that provide legally binding standards and procedures. Federal and provincial laws, and municipal bylaws, prohibit or regulate hundreds of activities that affect the environment. The most straightforward of these laws are outright prohibitions on certain forms of pollution. However, prohibitions of this nature are the exception rather than the norm as most polluting activities are allowed to occur with varying amounts of restrictions; that is to say, these activities are regulated by government (not prohibited). Such activities are allowed to occur so long as the government authorizes them. Examples of regulated activities include the construction and operation of large industrial facilities, mines, oil or gas wells, boat docks, confined feeding operations, water treatment plants, and power plants.

The difference between statutes and regulations is important to understand. Both statutes and regulations can provide detailed standards, rules and requirements that are legally binding. While both are legally binding, statutes are typically more general in nature and outline powers of the government to create regulations of various kinds. These statutes enable the government specific powers to regulate an activity. Regulations are more detailed and are created by either the Minister named by the statute or by Cabinet (through the

Lieutenant Governor in Council). Regulations can be created and changed by unilateral government action whereas changes to statutes must go through the legislative process and are therefore open for public debate.

In terms of the binding nature of regulations and statutes it is important to note that statutes override regulations. That is to say, if a regulation is created that conflicts with a statute the statute trumps the regulation.

5.2 Authorizations

Certain activities can only be undertaken by obtaining a statutory authorization from the government. An authorization is an official document that permits an activity to proceed. Authorizations often contain specific terms and conditions that govern the activity.

Authorizations are required to construct or operate major industrial facilities, resource extraction, energy production, some tourism facilities and confined feeding operations. Authorizations are also commonly required to occupy Crown land, divert water from a natural source, interfere with the aquatic environment, and conduct activities that emit pollution into the environment.

Common forms of authorizations include approvals, licenses, permits, and certificates. The applicable statute will normally state that it is an offence to undertake the activity without the required authorization or to violate the terms and conditions of the authorization. If the proponent (the person or company carrying out the activity) proceeds with the activity without the authorization, they are acting unlawfully and can be prosecuted.

5.3 Policies

Policies are non-binding directions or guidance given by the government. Policies may provide further detail in relation to how an activity should proceed. Examples of the types of government policy that may exist include a policy setting out “best practices”, a policy for maintaining ambient air or water quality, or policies dealing with wetlands or fish habitat. As a general rule, policies are not legally binding or enforceable. Failure to comply with a policy may result in warnings from government or may be relevant to future discretionary decisions made by the government, such as issuing further authorizations to the non-compliant party.

A policy may become enforceable when it is referred to in a regulation or authorization. Even when incorporated into a legally binding document enforceability of the policy may remain uncertain. Often the wording of a policy is vague or discretionary, making enforcement difficult even when the policy is referred to in a binding instrument, such as an approval.

6. The importance of public participation in decision-making

Decisions about when, where and how activities will take place can result in significant impacts to the land, air, and water. Concerns regarding these environmental impacts often warrant your participation in the decision-making process. Reasons to participate in the approval and licencing processes include:³

- providing the decision-maker with full information;
- providing the decision-maker with perspectives other than that of the proponent;
- providing the decision-maker with ideas and alternatives to the proposed activity;
- providing a measure of accountability and monitoring of regulatory agencies and government decision-makers; and
- establishing awareness among your community about the potential impacts of an activity.

The ELC supports effective public engagement in decision-making processes that impact the environment. As part of its ongoing work, the ELC analyzes legal processes to determine whether they are effective at promoting participation. A recent analysis of the EAB process was conducted by the ELC in *Public Access to Environmental Appeals: A Review and Assessment of Alberta's Environmental Appeals Board*.⁴ As this publication suggests, the current legal and policy framework

³ See Cindy Chiasson & Jodie Hierlmeier, *Public Access to Environmental Appeals: A Review and Assessment of Alberta's Environmental Appeals Board* (Environmental Law Centre: Edmonton, 2006) [*Public Access to Environmental Appeals*].

⁴ See *Public Access to Environmental Appeals*.

around public participation in environmental authorizations can be improved. Continued participation in these processes will assist in decision-making and will provide ongoing justification to improve the laws and policies as they relate to public participation.

Failures to have adequate public participation are often a result of inadequate laws. Therefore remedying these failures requires changes to law and the political activity and lobbying this entails.

Part I: Public Participation in the Decisions of Alberta Environment

Keywords: statement of concern, public participation, Director, discretion, directly affected, approval, licence, conditions, process, jurisdiction

For quick references to key words use the Adobe search function

You should not rely on this guide as legal advice. The information provided in this guide is current to April, 2009. Keep in mind that laws and policies are subject to change. Please contact Alberta Environment, the Alberta Environmental Appeals Board or the Environmental Law Centre for further information. For legal advice regarding the need for authorizations or permits contact the relevant government department or a lawyer.

At a Glance

Part I of this guide describes the different types of authorizations under *EPEA* and the *Water Act*, the process for obtaining them and strategies for participating in the authorization decision.

Chapter 1: Alberta Environment's jurisdiction

Chapter 2: The environmental authorization system in Alberta

Chapter 3: Types of authorizations

Chapter 4: The decision to authorize: who makes it and what do they consider?

Chapter 5: Participation in *EPEA* and *Water Act* authorizations: an overview

Chapter 6: Results of participation

Chapter 7: Obtaining information about the project

Chapter 8: Participating in the Director's decision

Chapter 1: Alberta Environment's jurisdiction

1. Regulatory jurisdiction over the environment

All levels of government have decision-making powers that impact the environment. This includes federal, municipal and provincial governments.

The federal government has jurisdiction to regulate coastal and inland fisheries, fish habitat, species at risk, greenhouse gases and toxic substances.

Municipal governments are controlled by provincial legislation. The province directs how municipal governments operate and make decisions through the operation of the *Municipal Government Act*⁵. Currently the *Municipal Government Act* gives municipal governments significant control over what happens on land within their boundaries. They exercise this power through the creation of bylaws that prescribe allowable land uses.

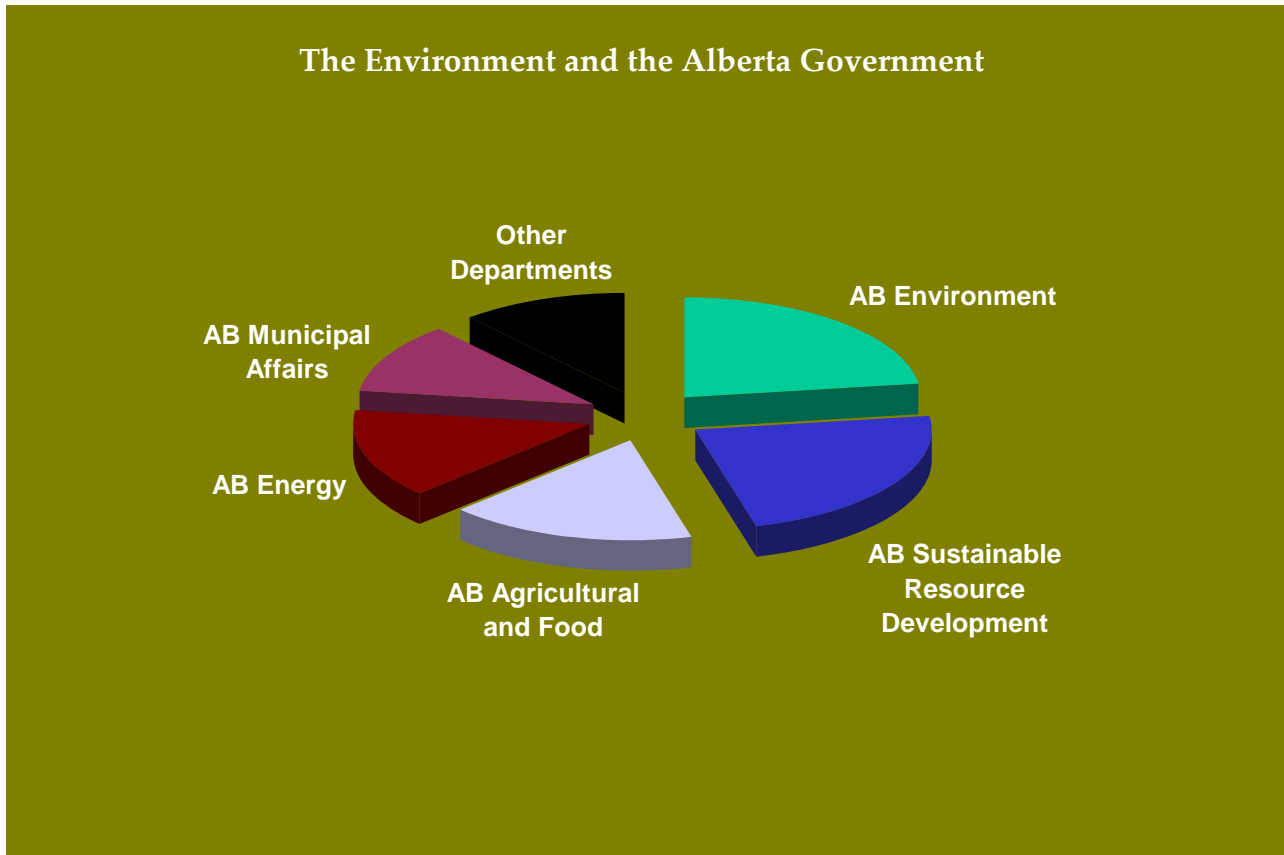
Provincial governments have broad powers to regulate activities that impact on the environment. This includes managing forestry, mining, water use, oil and gas development, and agriculture. Alberta Environment is just one department in the Alberta government that regulates activities that have environmental impacts. If there were a hierarchy of government departments that impact the environment, the departments of Alberta Environment, Alberta Sustainable Resource Development, Alberta Energy, Alberta Agriculture and Rural Development, and Alberta Municipal Affairs would top the list. Figure A illustrates how the activities and decision making are divided amongst provincial government departments.

An activity will often have a broad range of environmental impacts, resulting in jurisdictional overlap among various government agencies. This overlap can make effective regulation and enforcement of environmental impacts politically contentious and difficult.⁶ For instance, municipal government decisions will often have impacts on water quality that overlap Alberta Environment's general jurisdiction over water.

⁵ R.S.A. 2000, c. M-26.

⁶ This is particularly the case where departments and agencies have competing legislative mandates and purposes.

Figure A: The environmental pie and government decision-making



2. Jurisdiction of Alberta Environment

Alberta Environment is granted authority to regulate certain environmental impacts under the *Environmental Protection and Enhancement Act (EPEA)* and the *Water Act*. This legislation gives Alberta Environment jurisdiction over pollution generally, hazardous substances, pesticides, waste management, water diversions, drinking water, activities that affect the aquatic environment, and specified activities that affect the land and air, and reclamation and remediation of land. Beyond these broad areas, the department has limited, or in some cases no, regulatory authority. Table 1 outlines the limitations to Alberta Environment's jurisdiction.

Table 1: Alberta Environment's jurisdiction

Primary Jurisdiction	Limited or No Jurisdiction (Government or administrative body responsible)	Overlapping jurisdiction (Government or administrative body with overlapping responsible)
<ul style="list-style-type: none"> • pollution; • hazardous substances; • pesticides; • waste management; • water diversions or allocations; • drinking water; • activities that affect the aquatic environment; • specified activities that affect the land and air; and • reclamation and remediation of land. 	<ul style="list-style-type: none"> • land use planning matters, including the siting of provincially regulated facilities such as landfills (municipal responsibility); • parks, public land, wildlife and forestry management (Alberta Tourism Parks, and Recreation and Sustainable Resource Development responsibility); • oil and gas exploration (Alberta Sustainable Resource Development and Alberta Energy responsibility); and • intensive livestock operations (Natural Resources Conservation Board responsibility, although Alberta Environment regulates water use by these operations). 	<ul style="list-style-type: none"> • oil and gas development, production and pipelines (Energy Resources Conservation Board); • major tourism, pulp and paper, and mineral development projects (Natural Resources Conservation Board); • industrial and major infrastructure projects on provincial public land (Alberta Sustainable Resource Development); and • environmental concerns affecting public health (Alberta Health Service Board).

3. Frustrations that arise due to overlapping jurisdiction

Ideally the environmental “pie” would be regulated as a whole. The slicing up of the pie often results in frustration for those who wish to see the environment effectively protected. Departments may appear to be “passing the buck” by claiming that they do not have jurisdiction over an issue. In many instances, however, assertions of limited jurisdiction are accurate. Departments can only exercise powers directly delegated to them through legislation. If they exceed their jurisdiction, the decision may end up being reviewed by a court.

In some instances, the frustration felt by the participating public is well founded. Decision-makers often fail to consider the breadth of issues that they potentially could under their enabling legislation. Indeed, one can argue that a specific government department need only assert their jurisdiction more broadly to encompass other issues.

Frustration is most likely to be felt when dealing with **cumulative environmental effects** and how the government addresses these effects.⁷ There is currently no legislative or policy framework in Alberta that effectively deals with the cumulative effects of activities on the environment. The fact that environmental impacts touch on the mandates of multiple government departments is central to the difficulty posed by cumulative effects. Many government departments do not adequately consider the cumulative environmental impacts of their decisions.

Undoubtedly, another reason governments hesitate to deal with cumulative effects is that it may require acknowledging that thresholds need to be placed on development. Many government departments may claim that establishing environmental thresholds is beyond the scope of individual authorization decisions. Traditionally the government has avoided saying “no” to development solely on the basis of environmental impacts, although this may change as the cumulative impacts of development become more difficult to manage. Many departments, including Alberta Environment, need reminders that they do have the power to refuse authorizations to avoid exceeding an environmental threshold.

⁷ Cumulative environmental effects refer to the impact of an activity in light of the environmental effects created by all activities within a defined region and time. The accumulated impact on the environment may be significant where the individual impact of an activity may appear insignificant when viewed on its own.

Other common areas of frustration that arise due to jurisdictional constraints on Alberta Environment include:

- land use decisions, as the question of whether the area is appropriate for a specific land use is often within municipal jurisdiction and its planning powers;⁸
- public land use decisions, as consideration of whether specific activities are appropriate on public lands is within the jurisdiction of Alberta Sustainable Resource Development; and
- decisions related to oil and gas activities and whether they should take place in a particular area, as the decision about mineral rights is made by Alberta Energy (and a related committee), and the licencing of projects is within the jurisdiction of the Energy Resources Conservation Board.

You can avoid some of these frustrations by familiarizing yourself with the jurisdiction and decisions made by various levels of governments and government departments. Part of this process will include identifying where there are opportunities for participation in relation to specific decisions.

Frustration may still occur as some decisions do not allow for significant public participation. For example, legislation governing the management of public lands and parks lacks provisions for public participation.

For more information about jurisdictional constraints contact the Environmental Law Centre (ELC) or see *The ABC's of Environmental Jurisdiction: An Alberta Guide to Federal, Provincial and Municipal Responsibility*, published by the ELC in 2003. This guide can be downloaded from the Internet at <http://www.elc.ab.ca/publications/detailspage2.cfm?id=490> and is available to be borrowed or purchased from the ELC's library. To contact the ELC library, phone 780-424-5099 or 1-800-661-4238.

⁸ Some decisions of a municipality are trumped by decisions by the ERCB and the NRCB.

4. Introduction to relevant legislation, regulations, and rules of procedure

This guide focuses on two pieces of legislation, *EPEA* and the *Water Act*. These Acts and the related regulations are listed below in Table 2.

Table 2: Statutes and common regulations for environmental authorizations

Statutes	<i>Environmental Protection and Enhancement Act</i> , R.S.A. 2000, c. E-12.	<i>Water Act</i> , R.S.A. 2000, c. W-3.
Regulations	<p><i>Activities Designation Regulation</i>, Alta Reg. 276/2003.</p> <p><i>Administrative Penalties Regulation</i>, Alta. Reg. 23/2003.</p> <p><i>Approvals and Registrations Procedure Regulation</i>, Alta. Reg. 113/1993.</p> <p><i>Conservation and Reclamation Regulation</i>, Alta. Reg. 115/1993.</p> <p><i>Conservation Easement Registration Regulation</i>, Alta. Reg. 215/1996.</p> <p><i>Disclosure of Information Regulation</i>, Alta. Reg. 273/2004.</p> <p><i>Environmental Appeal Board Regulation</i>, Alta. Reg. 114/1993.</p> <p><i>Environmental Assessment (Mandatory and Exempted Activities) Regulation</i>, Alta. Reg. 111/1993.</p> <p><i>Environmental Assessment Regulation</i>, Alta. Reg. 112/1993.</p>	<p><i>Water (Ministerial) Regulation</i>, Alta. Reg. 205/1998.</p> <p><i>Water (Offences and Penalties) Regulation</i>, Alta. Reg. 193/1998.</p>

	<p><i>Environmental Protection and Enhancement (Miscellaneous) Regulation, Alta. Reg. 118/1993.</i></p> <p><i>Release Reporting Regulation, Alta. Reg. 117/1993.</i></p> <p><i>Substance Release Regulation, Alta. Reg. 124/1993.</i></p>	
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4.1 Finding and understanding legislation and policy

Unofficial versions of Alberta’s statutes and regulations are available on the Internet at the Queen’s Printer website (www.qp.alberta.ca). Official versions of the statutes and regulations are available at libraries located at the law courts, the provincial legislature and university law schools, as well as at some local libraries. The ELC library also has a significant number of law and policy documents.

Once you have the laws in hand reading them can prove to be a tedious, confusing and frustrating exercise. Nevertheless a good understanding of the statutes and regulations is required to understand your legal rights to participate and the government’s approach to authorizing activities.

Consider the following when you read legislation:

- Read the entire piece of legislation, or at least the entirety of the part or division of the legislation related to your concern. Reading one section on its own can be misleading or lead to mistakes in interpretation.
- Read both the statute and relevant regulations that deal with your concerns. Typically the details that you need to know are in the regulations so reading the statute alone is not sufficient. The statute will, however, provide a general framework and guiding principles that do not appear in regulations.
- Read the definitions. Definitions are often provided at the beginning of a piece of legislation or at the beginning of a “Part” of the legislation. The definitions are central to how the meaning of the legislation is interpreted.

- Read carefully and break the sentence into parts if it is overly convoluted. Legislation often expresses things with numerous conjunctions such as “and”, “or”, “but” and has exceptions written into single sentences. Breaking these sentences down can help simplify the meaning of the section. Reworking the legislation in this manner can be an effective way to get at the meaning. Remember, however, that each part of the legislation is worded as it is for a reason – no portions of the legislation can be ignored.
- Seek out policies or information documents produced by the government that explain the legislation. The Alberta Government has created companion documents that explain the legislation and authorization processes in a straightforward manner. Remember that these documents present the government’s view of the meaning of legislation and that a tribunal or court may interpret the meaning differently.

It is also helpful to remember that courts struggle to interpret legislation and lawyers are paid to argue that one interpretation is right and another is wrong. Often legislation is unclear and requires a court to decide what it means. If a government decision involves the interpretation of legislation and that interpretation appears to be incorrect you can challenge the decision in court.

4.2 Finding government documents, Environmental Appeals Board decisions and court decisions

Government reports, guidelines, directives or information letters can be helpful for understanding government processes and perspectives. Government reports and information documents are available at the Alberta Environment library at:

Alberta Government Library
 Great West Life Site
 6th Floor, 9920 - 108 Street
 Edmonton, Alberta, Canada
 T5K 2M4
env.library@gov.ab.ca
 Telephone: (780) 427-5870
 Fax: (780) 422-0170

Many documents can also be obtained through the Alberta Environment Information Centre on the main floor, 9820-106 Street, Edmonton, Alberta, T5K 2J6, Phone (780) 427-2700 (toll free 310-0000). For those with Internet access you can access many department documents and decisions of the EAB and the court online. The website for Alberta Environment is www.environment.alberta.ca .

The EAB has published a variety of guidance documents and previous decisions. The website for the EAB is www.eab.gov.ab.ca and this has a listing of all the EAB decisions and information documents regarding the EAB process.

The Alberta Court website (www.albertacourts.ab.ca) has many (but not all) Alberta court decisions since 1998. Alberta court decisions that are not reported online are available at the courthouse in the jurisdiction in which the case was heard.

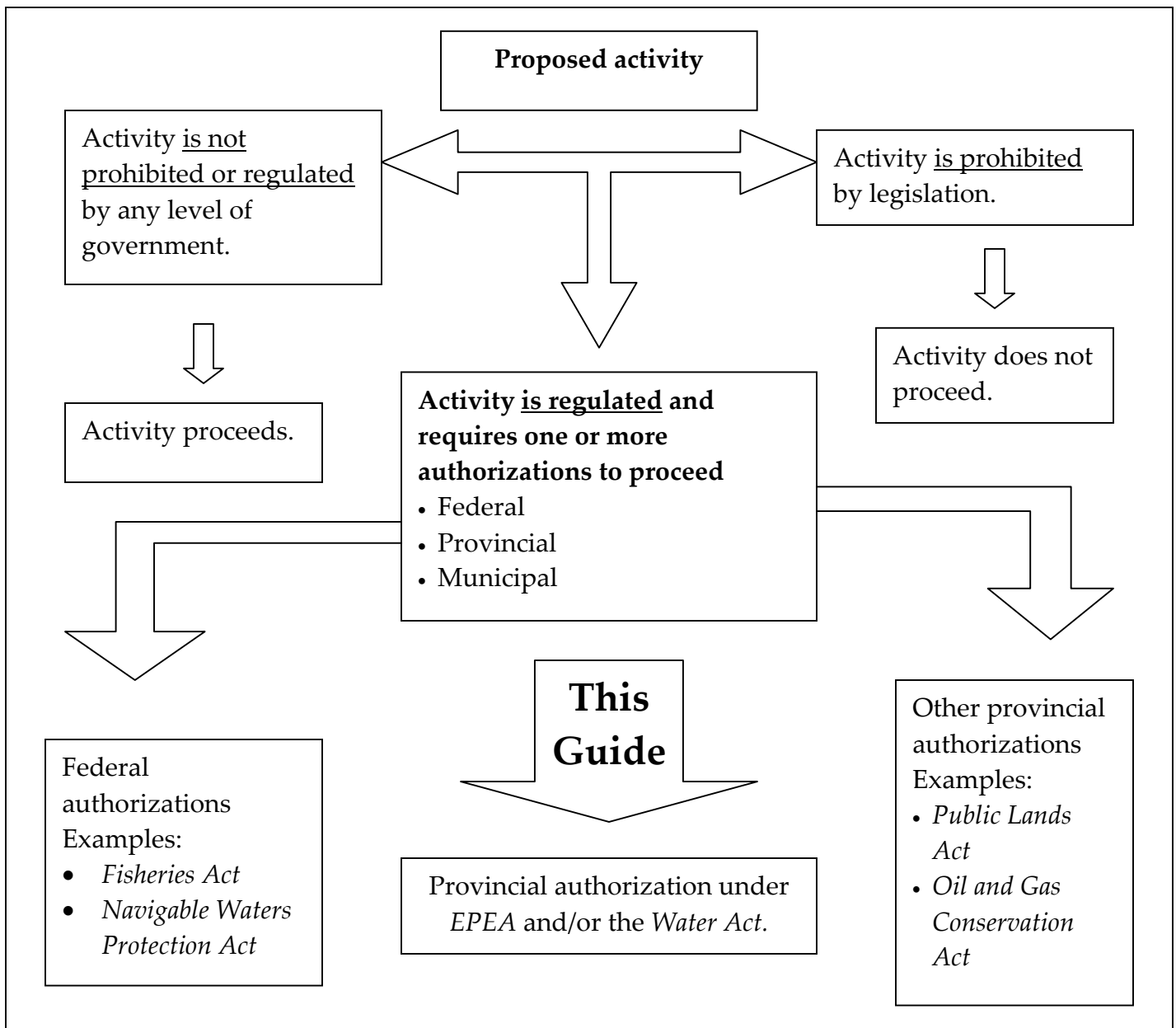
The process of obtaining documents or other information for a specific environmental approval or licence is described in Chapter 7 in Part I of this guide.

The library at the Environmental Law Centre also has many of the government publications on hand. The library's database is searchable online at www.elc.ab.ca/pages/Library/default.apx.

Chapter 2: The environmental authorization system in Alberta

This chapter describes the system of environmental authorizations in Alberta. Individual authorizations are described in Chapter 3. Figure B outlines the possible regulatory outcomes for activities that may impact the environment.

Figure B: Regulatory outcomes for a proposed activity



Some activities require multiple authorizations. For instance, a large facility in Alberta may require an *EPEA* approval, a *Water Act* approval and licence, and a federal *Fisheries Act* authorization. An activity may also require municipal authorization, including a rezoning of land, to allow it to proceed.

The value of environmental authorizations

An environmental authorization granted by Alberta Environment (under *EPEA* or the *Water Act*) gives an individual or corporation permission to carry out an activity that impacts the environment. Environmental authorizations are important because they allow:

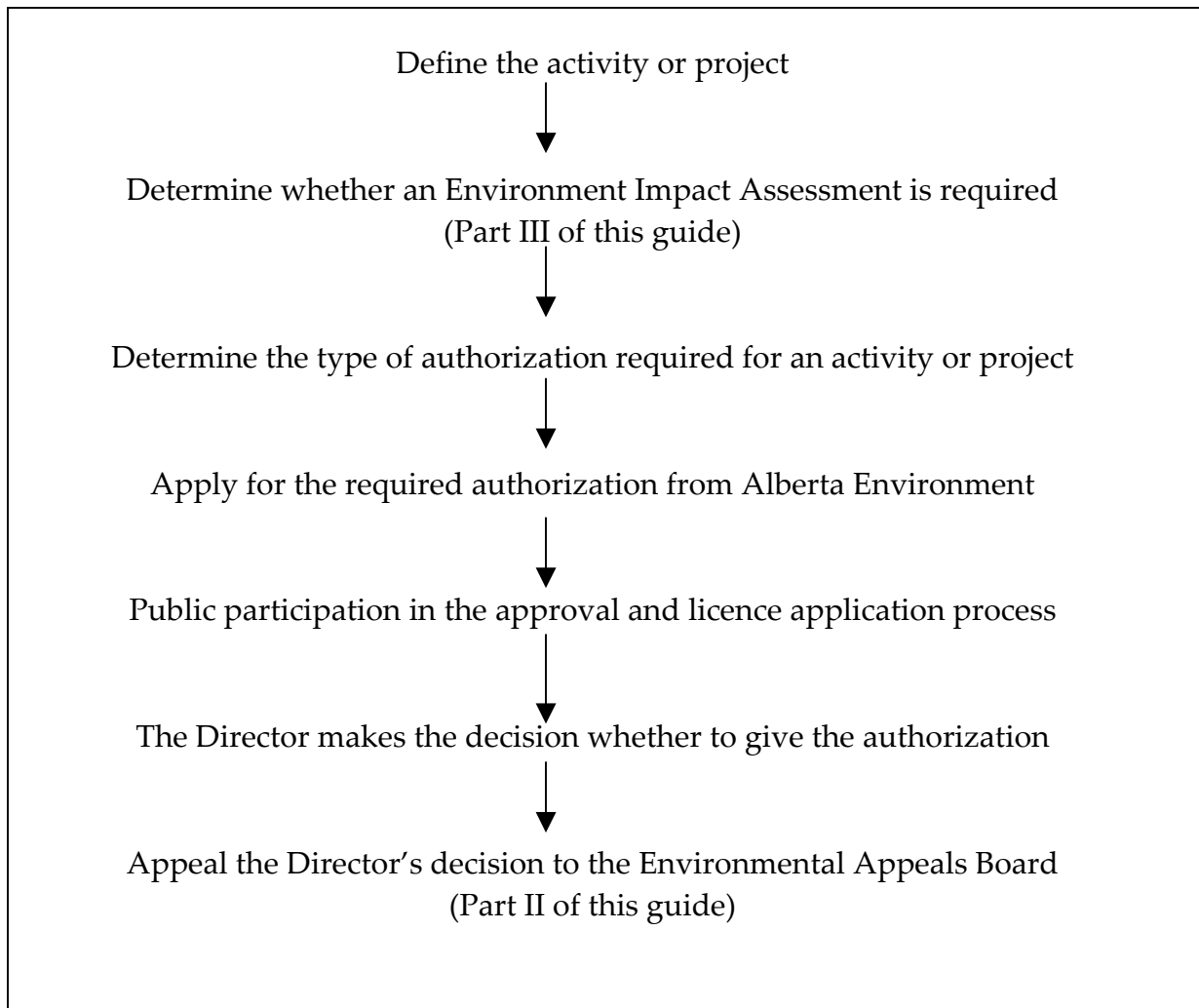
- for environmental impacts to occur while placing limits or conditions on those impacts;
- for public participation in the decision-making process, particularly for those who are directly affected;
- for case-by-case analysis of environmental impacts;
- the regulator (the government) and the public to track and measure impacts; and
- for continued improvement in project design, location, operation, decommissioning, and reclamation.

The Minister of Environment retains the discretion to prohibit any activity that is subject to a *Water Act* or *EPEA* authorization.⁹ The legislation indicates that the Minister may decide to prohibit an activity if it is in the public interest to do so. The “public interest” is not defined. This discretion is rarely exercised and it would likely take significant public outcry for the Minister to stop an activity using this power.

If an activity is “regulated” the process for obtaining an authorization and the degree of public participation in the government’s decision-making will vary with the nature of the activity. The steps in obtaining an authorization are outlined in Figure C.

⁹ *EPEA* at s. 64(1) and *Water Act* at s. 34(1).

Figure C: EPEA and Water Act regulatory system



Chapter 3: Types of authorizations

This chapter describes the various types of authorizations available under *EPEA* and the *Water Act*, outlines when these authorizations are required, and discusses the process for obtaining them. This chapter describes:

- Approvals
- Licences
- Registrations
- Notices
- Certificates
- Codes of practice

The focus of the chapter is on approvals and licences, as these authorizations have the greatest opportunity for public input.

1. Approvals

EPEA and the *Water Act* describe the activities that require “approvals”. An approval is the most detailed form of authorization under these statutes, and is reserved for activities that are most likely to have a significant impact on the environment.¹⁰

Approvals are site-specific, meaning that they are drafted and issued by Alberta Environment on a case-by-case basis. An approval normally contains conditions that the party must abide by when carrying out the activity. These conditions are aimed at measuring and minimizing environmental impacts.

Approvals provide a greater opportunity to participate in the decision-making process than other environment authorizations, with the exception of *Water Act* licences.

For information about participating in the approval process see Chapters 6-10, Part I.

Always contact the regulator or a lawyer prior to proceeding with an activity if it is not known whether government authorization is required.

1.1 *What activities require approvals under EPEA?*

Activities that require *EPEA* approvals are listed in Schedule I of the *Activities Designation Regulation*.¹¹ The list includes such activities as the construction, operation or reclamation of:¹²

- waste treatment facilities that deal with specified amounts of waste;
- chemical, fertilizer, pesticide, and explosives manufacturing facilities;
- food or food by-product plants, including rendering plants, meat plants, oil seed processing plants or distilleries;

¹⁰ *EPEA* at ss. 60-61; *Activities Designation Regulation*, Alta. Reg. 276/2003, s. 5 and Schedule I; *Water Act* at s. 36 and *Water (Ministerial) Regulation*, Alta. Reg. 205/1998.

¹¹ *Activities Designation Regulation*, Alta. Reg. 276/2003 at Schedule 1.

¹² *Activities Designation Regulation*, Alta. Reg. 276/2003 at Schedule 1.

- metal related plants, including foundries, lead smelters or metal manufacturing plants;
- power plants;
- oil refineries, sour gas processing plants, and oil sands processing plants;
- wood treatment plants, and pulp and paper manufacturing plants; and
- wastewater treatment plants that meet specific criteria.

An approval may also be required if the Director of Alberta Environment decides that an activity that normally requires a registration or notice under *EPEA* should be dealt with as an approval.¹³

For further information about the decisions of the Director of Alberta Environment see Chapter 5, Part I.

1.2 What activities require approvals under the Water Act?

Water Act approvals are required for all activities that affect water bodies and are not already governed by other authorizations under the Act. The *Water Act* approval system acts as a catchall by requiring an approval for activities that are not otherwise regulated.¹⁴ Approvals are not required for activities that require a licence, registration, or activities governed by a Code of Practice¹⁵ or those activities that are exempted from requiring an approval under the Act.¹⁶

Activities that likely require approvals under the *Water Act* include:¹⁷

- works or undertakings that may result in altering the flow of a water body;

¹³ *EPEA* at s. 66.1.

¹⁴ This is in contrast to *EPEA*, which has a regulation listing the specific activities requiring approvals.

¹⁵ See for example, *Code of Practice for Pipelines and Telecommunication Lines crossing a Water Body* [made under the *Water Act* and the *Water (Ministerial Regulation)*] Office Consolidation, online: Queen's Printer, <http://www.qp.gov.ab.ca/documents/Codes/PIPELINE.cfm?frm_isbn=9780779725786>.

¹⁶ See *Water Act*, particularly Division 1 of Part 3. Also see the *Water (Ministerial) Regulation*.

¹⁷ See *Water Act*, at s. 1, where "activity" is defined.

- activities that are causing or are capable of causing an impact on the aquatic environment;
- activities that may result in erosion or siltation in a water body; or
- activities that will cause a change in the amount of water flow or capacity of a water body.

An “activity” is broadly defined by the *Water Act* to include all actions in or around a water body that may result in an impact on flow, direction of flow, level of water or the aquatic and physical environment.¹⁸ The word “works” is defined in the *Water Act* as “any structure, device or contrivance made by persons, or part of it, including a dam and canal, and land associated with it, and mitigative measures associated with it, and includes anything that is defined as a works in the regulations for the purposes of this Act.”¹⁹

1.2.1 Approval exemptions under the *Water Act*

Some activities are exempt from the approval requirements under the *Water Act*. These activities are set out in Schedule 1 and Schedule 2 of the *Water (Ministerial) Regulation* and include (but are not limited to):²⁰

- placing, constructing, installing, maintaining, replacing or removing a floating platform, dock or boat launch in or adjacent to a water body;
- placing, constructing, installing, maintaining, replacing or removing of water crossings where specific ecological and hydrological criteria are met;²¹
- installing a portable pump where there is not significant alteration or disturbance to the bed and shore of the water body;

¹⁸ *Water Act*, at s.1(1)(b). An “undertaking” is defined at s. 1(1)(ddd) of the Act.

¹⁹ *Water Act*, at s.1(1)(mmm).

²⁰ *Water (Ministerial) Regulation* at Schedules 1 and 2.

²¹ These criteria include such things as whether the water body is frequented by fish, where there are no diversions from the water body and where the hydrological characteristics are not altered at flood events below the one in 25 year flood event.

- removing debris from a water body that is not frequented by fish where the individual removing the debris owns or occupies adjacent land to where the debris is located;
- removal of a beaver dam from a water body if you are owner or occupier of land that is adjacent to the water body where the dam is located or where the removal of the beaver dam is authorized by the Director;
- drilling a water well by the land owner for household purposes;
- reclaiming a water well; and
- those activities that are subject to a code of practice under the Act.

Also, diversions of set amounts of ground or surface water for household or traditional agricultural uses are exempt from approvals and licences, although traditional agricultural uses must be registered if they wish to be part of the priority system.²²

Many activities that impact waterbodies with fish (or of ecological importance to fish) require approvals under *EPEA* or the *Water Act* and federal approval under the *Fisheries Act*. This guide does not cover *Fisheries Act* processes or authorizations. For more information about *Fisheries Act* approvals contact the federal Department of Fisheries and Oceans or Environment Canada, which deal with destruction of fish habitat and substances released into water frequented by fish respectively. The ELC can also provide information relating to approvals under the *Fisheries Act*.

1.3 The Approval Process

Important aspects of the approval process are as follows:

- the application;
- the notice of the application;
- changes to an approval; and

²² *Water Act*, at ss. 19 & 21.

- the term or expiry of approvals.

The Director's consideration of approvals is discussed in Chapter 4, Part I.
Participation in the approval process is discussed in Chapters 6-10, Part I.

1.3.1 The application for an approval

The legal process for obtaining an approval begins when the proponent of the activity submits an application to Alberta Environment. *EPEA* and *Water Act* applications for approvals typically require similar information. *EPEA* applications are project specific, while the government has created standardized forms for *Water Act* applications.

1.3.1.a *EPEA* approval applications

The required contents of an *EPEA* approval application are dictated by *EPEA* regulations and the Director. Typically this will include:²³

- the name of the applicant;
- the nature of the activity;
- the location of the activity;
- information about other decisions in relation to the activity (from other relevant administrative bodies such as the NRCB and the ERCB);
- the proposed dates when construction will begin and end;
- whether an environmental impact assessment report has been required;
- a list of substances released, the amount released, their source and activities associated with minimizing their release;

²³ See *Water Act* at s. 37 and *EPEA* at s. 66. Certain of the application requirements can be waived at the discretion of the Director. Also see the *Approvals and Registrations Procedure Regulation*, Alta. Reg. 113/1993, at s. 3(2).

- justification for any releases;
- the impacts that will result from the activity;
- the conservation and reclamation plan; and
- a description of public consultation.

The Director has the discretion to request any other information viewed as relevant.

1.3.1.b *Water Act* approval applications

An application for an approval under the *Water Act* may be made using the form provided by Alberta Environment (available online at <http://environment.alberta.ca/1580.html>). The *Water Act* approval (and licence) form requires the following information:²⁴

- name and address of applicant;
- project description, including:
 - the proposed starting date;
 - the duration of construction or development;
 - the location of the activity;
 - a description of the activity;
 - the plans for carrying out the activity; and
 - a description of affected water sources.

²⁴ See Alberta Environment, *Application under the Water Act for Approvals and/or Licences*, Form GA1 (September 2002), online: Alberta Environment <http://www3.gov.ab.ca/env/water/legislation/Approvals_Licences/WAApplication.doc>.

The Director may dictate that additional information be provided.²⁵

1.3.1.c Guidelines for Approvals

Alberta Environment has published guidelines to the approval process for some activities. Examples include:

- *A Guide to Content of Industrial Approval Applications*²⁶; and
- *Applications for Sour Gas Processing Plants and Heavy Oil Processing Plants: A Guide to Content*.²⁷

1.3.2 Notice of an application for an approval

Public notice of the application is required once the application has been submitted to the Director.²⁸ This notice is important because it triggers the time period for the public to provide their concerns to the Director, through the submission of a “statement of concern”.

Public notice triggers the time one has to submit a statement concern – see Chapter 8, Part 1.

Both *EPEA* and the *Water Act* outline the type of notice that must be given.²⁹ Typically notice occurs by publishing an advertisement in one or more newspapers (with daily or weekly circulation) in the area where the activity will occur.³⁰ However, Alberta Environment has broad discretion over the type of notice given and, depending on the potential impact of the proposed activity, a notice may not appear in a local paper.

²⁵ See *Water (Ministerial) Regulation*, at s. 13(2), *Water Act* at s. 37(2) and *EPEA* at s. 66(2).

²⁶ Alberta Environment, Industrial Program Development Branch, Environmental Sciences Division, September 1999.

²⁷ Alberta Environment, Environmental Sciences Division, issued August 1996, revised September 1999.

²⁸ *EPEA* at s. 72 and *Water Act* at s. 108.

²⁹ As required by section 72 of *EPEA* and section 108 of *Water Act*.

³⁰ *Environmental Protection and Enhancement (Miscellaneous) Regulation*, Alta. Reg. 118/1993 at s. 2 and *Water (Ministerial) Regulation* at s. 13.

Notice may appear only in the office of the municipality or in a general bulletin.³¹ It is therefore important to monitor activities in your area.

The notice itself must contain the following information:³²

- the applicant's name;
- a description of the diversion or activity;
- the location of the activity;
- a statement that a directly affected person can submit a statement of concern;
- the location to obtain further information; and
- any other information that the Director requires.

There are certain instances where **notice may be waived** or an activity is **exempt from the notice requirement**. This can occur when the Director is of the opinion that:³³

- there is an emergency;
- the activity or diversion will result in minimal or no adverse effect on the aquatic environment or to other users;
- where specific amendments are sought to an existing licence that
 - add a rate of diversion condition to a licence, or
 - alter the end point of use or point of diversion of water; and

³¹ *Environmental Protection and Enhancement (Miscellaneous) Regulation* Alta. Reg. 118/1993 at s. 2 and *Water (Ministerial) Regulation* at s. 13. The other possible ways of providing notice include (but are not limited to) notice through a registry established by the Government, through a telecommunication system or electric media, or to persons determined by the Director and the local authority of the municipality.

³² *Water (Ministerial) Regulation* at s. 13(2) and *Environmental Protection and Enhancement (Miscellaneous) Regulation* at s. 2(3).

³³ *EPEA* at s. 72 and *Water Act* at s. 108.

- the amendment does not change the parcel of land to which the approval or licence relates; and
- the Director is of the opinion that there will be no adverse effect on other users or the conservation and management of water;³⁴
- the activity is considered “**routine**” under *EPEA* (see Chapter 8 regarding public participation for a description of what is considered routine); and
- where notice has already been given in relation to the activity under *EPEA*.³⁵

1.3.3 Changes to an approval

Often an approval that has been granted requires modifications or changes to adapt to an unforeseen or changing set of circumstances. Some changes or amendments are considered significant enough to trigger the approval process and notice requirements, while other changes do not require notice. The question is “what changes will trigger the approval and notice process?”

Notice and the approval process will be triggered under *EPEA* when:³⁶

- there is a change to the **activity** that is the subject of the approval;
- there is a change to the **manner** in which the activity is carried on; or
- there is a change to the **equipment or processes** related to the carrying out of the activity.

Notice and the approval process will NOT be triggered in the following instances:³⁷

- changes to an activity where the activity is considered a **routine repair, replacement or adjustment** made in the normal course of operations;

³⁴ *Water (Ministerial) Regulation* at s. 14 and the *Water Act* at ss. 54(1)(b)(i),(ii), (v), or (vi).

³⁵ *EPEA* at s. 72(3)(c).

³⁶ *EPEA* at s. 37(1).

³⁷ *EPEA* at s. 67(3).

- changes that **do not** result in an **increase** in substance releases;
- **short term or temporary** changes that do not cause an adverse effect;
- changes in **equipment** for the **conservation or reclamation** of land; or
- **minor changes** to conservation and reclamation plans where the intent of the approval is maintained.

Similarly, some changes to an activity or to a structure in a water body may not require that the proponent go through the full approval process under the *Water Act*.

Amendments to an approval may not need to go through the approval process where:

- the change to the activity is to make an adjustment, repair or replacement or to have maintenance done during the course of normal operations of the structure or work,³⁸ or
- the plans or specifications are changed or added to but the nature of the activity or the substantive terms and conditions are not changed.³⁹

1.3.3.a Notice of approval amendments

The type of notice required for an approval amendment varies greatly. If Alberta Environment views the amendment as relatively minor, the extent of public notice may be minimal. If you are concerned with the original approval you should ensure Alberta Environment knows that you wish to be notified of any proposed changes to the approval. If a change is made that directly affects you and no notice is given there may be an opportunity to challenge the amendments in court.

1.3.3.b Certificate of variance – changing approval activities in certain instances

EPEA provides a mechanism to alter how an approved activity is undertaken. The Minister of Environment can issue a “certificate of variance” for a prescribed time to allow an activity to be conducted in a manner that is contrary to the approval.⁴⁰ The

³⁸ *Water Act* at s. 42.

³⁹ *Water Act* at s. 42(5).

⁴⁰ *EPEA* at ss. 77-78.

party seeking the variance must indicate what consultation was conducted with those who might be directly affected by the variance.⁴¹

The variance will only be granted where the activity cannot go ahead as planned due to factors outside the proponent's control, where there will not be a significant adverse effect, and where economic hardship would be created if the certificate was not issued.⁴²

1.3.4 Expiration of an approval

EPEA approvals typically have a term of 10 years.⁴³ Approvals may have shorter terms where the Director decides it is appropriate.⁴⁴ Approvals granted under the *Water Act* must include an expiry date (although some licences granted under previous legislation do not expire).⁴⁵

1.3.4.a Extending the expiry date of approvals

The expiry date of an *EPEA* approval can be extended for up to one year, one or more times.⁴⁶ Any extensions beyond the first year must be accompanied by public notice as though the approval was being amended. Any extensions beyond the first year can only be made if the Director is of the opinion that the extension is required to allow for effective public review of the approval.⁴⁷ This gives the Director the power to extend approvals repeatedly although this must be based on allowing the public more time to review the approval prior to a renewal being granted.

Under the *Water Act*, the Director has the discretion to extend the expiration date of an approval, or to extend the time that a term or condition of an approval will apply.⁴⁸

⁴¹ *EPEA* at s. 77(2).

⁴² *EPEA* at s. 78(1).

⁴³ *Environmental Protection and Enhancement (Miscellaneous) Regulation* at s. 7(1).

⁴⁴ *Environmental Protection and Enhancement (Miscellaneous) Regulation* at s. 7 and *EPEA* at s. 68(5).

⁴⁵ *Water Act* at s. 38.

⁴⁶ *EPEA* at s. 69.

⁴⁷ *EPEA* at s. 69(2).

⁴⁸ *Water Act* at s. 41.

1.3.4.b When activities or works cease

An approval under *EPEA* expires when the term of the approval has passed without renewal or when a final reclamation certificate is issued.⁴⁹ Under the *Water Act*, once an activity is completed the proponent must submit a “certificate of completion” confirming that the activity has been completed in accordance with the approval.⁵⁰

Director’s discretion to place conditions on approvals – see Chapter 4, Part I.

Public participation in the approval process – see Chapter 8, Part I.

⁴⁹ Alberta Environment issues a final reclamation certificate when an operator reclaims land to the standards set by the Department following the conclusion of the activity. See *EPEA* at s. 138(6).

⁵⁰ *Water Act* at s. 40.

2. *Water Act Licences*

Water Act licenses authorize the diversion of ground and surface water, as well as the construction and operation of structures, such as dams or canals, which interfere with the flow of water.⁵¹ Alberta Environment issues licenses to divert or obstruct water on a case-by-case basis.

Public participation in the water licence process – See Chapter 8, Part I.

2.1 *What activities require licences?*

Licences are required for the diversion of water or any operation of “works”.⁵² Licences are not required for diversions of water for household purposes, or for diversions that were commenced or continued under a registration or approval, or if the activity is otherwise authorized or exempt under the legislation.⁵³ Licence exemptions are dealt with further below.

The *Water Act* broadly defines “diversions of water” as “impoundment, storage, consumption, taking or removal of water except the taking or removal for the sole purpose of removing an ice jam, drainage, flood control, erosion control or channel realignment”.⁵⁴

The operation of works is broadly defined to include “any structure, device or contrivance made by persons” which are used to divert water. This includes such things as dams, canals or other structures used to divert water. It can include land itself or other measures used to mitigate the impacts of a water diversion, for example, a fish ladder.⁵⁵

This means that when something is constructed to change water flow or otherwise divert water from one place to another a licence is typically required.

⁵¹ *Water Act* at s. 49 and the definition of “works”, s. 1(1)(mmm).

⁵² *Water Act* at s. 49.

⁵³ *Water Act* at s. 49.

⁵⁴ *Water Act* at s. 1.

⁵⁵ *Water Act* at s. 1.

Licensed diversions are given a number which sets the licence's priority relative to other water users. Those who obtained a licence earlier have priority over those who obtained a licence later. In times of water shortage the senior or older licence gets its entire licensed allocation prior to a junior licence. This system is commonly referred to as the "first in time first in right" ("FITFIR") or prior allocation system.

2.2 *Licence exemptions*

Some diversions of water and works are exempt from requiring a licence.⁵⁶ These exempt activities are listed in Schedules 3 and 4 of the *Water (Ministerial) Regulation*⁵⁷ and include (but are not limited to):⁵⁸

- diversions of up to 1250 cubic metres of water per year for the purpose of supplying a camp;
- a water well equipped and operated by a manual pump;
- dugouts within specific regulatory criteria;
- the dewatering of a gravel or sand site within specific regulatory criteria;
- diversions for the purpose of fire fighting; and
- temporary diversions of water in the Green Area (i.e., the forested public lands) for use related to oil and gas wells.

⁵⁶ See *Water (Ministerial) Regulation* at s. 5.

⁵⁷ *Water (Ministerial) Regulation* at s. 5.

⁵⁸ See Schedules 3 and Schedule 4 of the *Water (Ministerial) Regulation* for details regarding activities and diversions that are exempt from the licence requirement.

2.3 *Household and traditional agricultural licence exemptions*

Licences are not required, with certain qualifications, where the water diversion is conducted for a household or traditional agricultural purpose.⁵⁹ A water diversion for household use is exempt as long as it does not exceed 1250 cubic metres of “water per year per household for the purposes of human consumption, sanitation, fire prevention and watering animals, gardens, lawns and trees”.⁶⁰ If water is diverted in excess of 1250 cubic metres per year or used for a non-household purpose a licence is required.

For agricultural use, those owning land prior to January 1, 1999 can divert up to 6250 m³ per year (or greater if allowed by an approved water management plan) from adjoining water bodies or groundwater.⁶¹ This diversion must be for the “purpose of raising animals or applying pesticides to crops, as part of a farm unit”.⁶² Farms purchased or started after January 1, 1999 require a *Water Act* licence, unless the farm’s water use had already been registered under the *Water Act*, as described below.

2.4 *The licence application process*

Any person can apply for a water licence by submitting an application to the Director. Alberta Environment has produced a standard application form for *Water Act* licences (available from Alberta Environment or online at <http://environment.alberta.ca/1580.html>).⁶³ These forms require the name and address of the applicant and a project description, which includes:

- the proposed starting date;
- the duration of construction or development;
- the location of the activity;

⁵⁹ *Water Act* at s. 49(2).

⁶⁰ *Water Act* at s. 1(1)(x).

⁶¹ *Water Act* at s. 19.

⁶² *Water Act* at s. 19. Diversions for agricultural purposes have no priority in relation to other agricultural users unless the diversion was registered with Alberta Environment. If the person did not register their diversion prior to January 1, 1999, the diversion is allowed so long as they own the land. New diversions for agricultural purposes, i.e., those after January 1, 1999, require a licence under the *Water Act*.

⁶³ Also see the *Water Act* at s. 50(1)(a).

- a description of the activity;
- plans for carrying out the activity; and
- a description of affected water sources.

2.4.1 Notice of the licence application

Public notice is required when an application for a licence is submitted to Alberta Environment.⁶⁴ As with approvals, notice of a licence application triggers the time period for providing a statement of concern (see Chapter 8). Notice is also required for an amendment of a licence but is not required for a temporary diversion licence.⁶⁵ Notice will be provided by the applicant for the licence and will generally include publication of the required information in one or more newspapers, having a daily or weekly circulation in the area where the activity will be carried out.⁶⁶ Notice of a licence application may also be provided through a government registry, an electronic medium, the Alberta Gazette, posting at branch offices, or to individuals or the local authority directly (at the discretion of the Director).⁶⁷

The notice must contain:⁶⁸

- the applicant's name;
- a description of the diversion or activity;
- the location of the activity;
- a statement that a directly affected person can submit a statement of concern;
- the location to obtain further information; and
- any other information that the Director requires.

⁶⁴ *Water Act* at s. 108(1)(b).

⁶⁵ *Water Act* at s. 108(1)(d)(iii) and s.108(3).

⁶⁶ *Water Act* at s. 108 and *Water (Ministerial) Regulation* at s. 13.

⁶⁷ *Water Act* at s. 108 and *Water (Ministerial) Regulation* at s. 13.

⁶⁸ *Water (Ministerial) Regulation* at s. 13(2).

2.4.1.a Waiving notice

The Director may **waive the notice requirements** and thereby limit public participation where the Director is of the opinion that:⁶⁹

- there is an emergency;
- the activity or diversion will result in minimal or no adverse effect on the aquatic environment or the other users;
- changes or amendments to a licence will not have an adverse effect and relate to:
 - a change in the rate of diversions increased or decreased;
 - adding a rate of diversion where none existed in the original licence;
 - a change in the point of use of the water where the use is still on the same parcel of land; and
 - a change in the point of diversion where the diversion is still from the same source of water and the diversion point is on the same parcel of land.⁷⁰
- where notice has been given in relation to the subject matter under the Act.

Director's discretion to place conditions on licences – see Chapter 4, Part I.
Public participation in the licence and approval process – see Chapter 8, Part I.
Filing of statements of concern – see Chapter 8, Part I.

2.4.2 Amending licences

Changing the terms and conditions of a licence requires an application to amend the licence. This triggers a requirement to provide public notice. The Director may waive notice requirements for applications to amend a licence.⁷¹

⁶⁹ *Water (Ministerial) Regulation* at s. 14 and *Water Act* at s. 109.

⁷⁰ *Water (Ministerial) Regulation* at s. 14.

⁷¹ *Water Act* at s. 108(6).

2.4.3 Licence expiration and terms

All water licences issued by the Director under the *Water Act* (i.e., since 1999) must include an expiry date.⁷² This marks a significant change from some licences that were issued under previous legislation which do not expire. The duration of licences issued under the *Water Act* will vary with the circumstances. The starting point is a term of 25 years for municipal, agricultural, and irrigation licences or licences implementing water conservation objectives, and 10 years for all other licences.⁷³ Expiration dates or terms for licences (that have yet to be issued) may also be set out in an approved water management plan, ministerial order or water guideline.⁷⁴

As a licence nears expiry the licence holder can apply to the Director for renewal.⁷⁵ The Director can decide against a renewal only in specific circumstances and must give reasons for his/her refusal to renew a licence.⁷⁶

2.5 *Temporary diversion licence*

Temporary diversion licences under the *Water Act* are issued at the discretion of the Director.⁷⁷ These can only be granted for one year or less with the possibility of one year extension.⁷⁸ Temporary diversions are not subject to the priority system nor can they be assigned to someone else.⁷⁹ The Director has broad discretion to suspend, amend, cancel or place conditions on any temporary diversion.⁸⁰

⁷² *Water Act* at s. 51(5).

⁷³ *Water (Ministerial) Regulation* at s. 12.

⁷⁴ *Water (Ministerial) Regulation* at s. 12.

⁷⁵ *Water Act* at s. 59.

⁷⁶ *Water Act* at s. 60. Some of the reasons why a Director may refuse to renew a licence include the Director being of the opinion that the licence is not in the public interest, the licence is inconsistent with an approved water management plan, or the licence renewal would cause a significant adverse effect to the aquatic environment.

⁷⁷ *Water Act* at s. 63(1).

⁷⁸ *Water Act* at ss. 63(2)&(3).

⁷⁹ *Water Act* at s. 63(5).

⁸⁰ *Water Act* at ss. 62 and 64.

2.6 Preliminary certificates under the Water Act

Alberta Environment may issue a “preliminary certificate” to an applicant who has applied for a licence.⁸¹ The preliminary certificate will set out conditions that the applicant must satisfy before the licence will be issued, and commits Alberta Environment to issuing a licence on specific terms once the conditions are fulfilled. Upon fulfilling the conditions the holder of the preliminary certificate can submit a certificate of completion to the department. If the conditions have been met, the licence will be issued.⁸² The preliminary certificate thereby provides the licence applicant with some assurance that the licence will be issued (assuming all the conditions are met).

The preliminary certificate must have a date by which the certificate of completion must be submitted. If the party fails to submit the certificate of completion by the expiry date, both the preliminary certificate and the licence application will be void.⁸³

2.7 Ownership and transferring of licences, registrations and preliminary certificates

Licences, registrations, and preliminary certificates “run with the land”. This means that if someone sells the land the licence, registration or preliminary certificate will be transferred with the land title. If the seller of the land wishes to retain the rights to the water after the land is sold there is a need to transfer the water allocation. This process is discussed briefly below.

Also, when land is sold that has a licence or registration related to it the Director must be notified.⁸⁴ If notice is not given, the seller will be liable for the obligations set out in the licence.

The *Water Act* allows licences to be severed from the land in some circumstances by applying to “transfer” the licence. Transfers of water allocations are only allowed where there is an approved water management plan that allows for transfers or where

⁸¹ *Water Act* at s. 66. This excludes temporary diversion licences.

⁸² *Water Act* at ss. 67 and 68.

⁸³ *Water Act* at ss. 66(4) and 68(5).

⁸⁴ *Water Act* at s. 80.

there has been an order of the Lieutenant Governor in Council allowing for the transfer.⁸⁵

If transfers are allowed the process begins with applying to the Director to transfer the water allocation. The government has the option of holding back 10% of the licenced allocation of water.⁸⁶ Public notice of the transfer application is required, providing an opportunity for public participation.

2.7.1 Temporary Assignment of Water

Water can also be temporarily assigned from one licence holder to another. There is no public participation in the assignment process. For further information regarding transfers and assignments of water please contact the ELC.

⁸⁵ *Water Act* at s. 81(7).

⁸⁶ *Water Act* at ss. 81 & 83.

3. Registrations, Notices, Certificates, and Codes of Practice

Unlike approvals or licences, other environmental authorizations do not allow for public participation. These authorizations include registrations, notices, and certificates, all of which are described briefly below. Codes of Practice are more regulatory in nature but since they are relevant to certain registration activities they are also described.

3.1 Registrations

Both *EPEA* and the *Water Act* designate certain activities as requiring “registration”. The application procedure for registrations is more streamlined than the approvals process. Registrations also do not include site-specific terms or conditions.⁸⁷

Examples of registration activities include construction, operation, and reclamation of:⁸⁸

- a small incinerator;
- a landfill with less than 10,000 tonnes of disposal capacity per year;
- a facility for energy recovery;
- a compressor and pumping station;
- a concrete producing plant;
- a foundry;
- a sweet gas processing plant;
- the storage and sale of specific pesticides; and
- specific waterworks systems.

⁸⁷ *EPEA* at ss. 60-61; *Activities Designation Regulation* at s. 5 and Sch. 2.

⁸⁸ *Activities Designation Regulation* at s. 3.

The complete list of registration activities is in Schedule 2 of the *Activities Designation Regulation*.⁸⁹ A registration activity is governed by an industry-specific Code of Practice published by Alberta Environment.⁹⁰ Any activity requiring a registration is subject to complying with the relevant Code of Practice, which sets out standard terms and conditions; this replaces the site-specific terms and conditions that would be imposed in an approval.

Public participation in decisions regarding “registration” activities is limited. The Director can decide that an activity that is usually subject to a registration requires an approval. If the Director decides that an approval is required, public notice of the application will be required and members of the public can file statements of concern.⁹¹

“Registrations” under the *Water Act* differ significantly from registrations under *EPEA*. Where registration activities under *EPEA* deal with a wide range of activities, *Water Act* registrations deal with diversions of ground and surface water for traditional agricultural purposes. A *Water Act* registration allows the agricultural user to continue to use a specified amount of water and gives them priority among other registrants.⁹² “Registrations” only apply to traditional agricultural use of water that occurred prior to January 1, 1999.⁹³ If an agricultural user has not registered their use they can continue to divert water to a maximum of 6250 cubic metres, but they have no priority of use over other users.⁹⁴ Agricultural diversions that began after January 1, 1999 or that require more than the 6250 cubic metres require a licence. There is no public input into registrations under the *Water Act*.

For more information regarding the registration process contact the Environmental Law Centre.

⁸⁹ *Activities Designation Regulation* at s. 3.

⁹⁰ *EPEA* at s. 83.1.

⁹¹ *EPEA* at ss. 72(1)(a.1) and 73(1).

⁹² *Water Act* at s. 73(3). Diversions cannot exceed 6250 cubic metres per year or a maximum amount specified in an approved water management plan, whichever is greater.

⁹³ *Water Act* at s. 73.

⁹⁴ *Water Act* at s. 19.

3.2 Notices

Some activities require that the proponent notify Alberta Environment that the activity is going to happen.⁹⁵ These activities are subject to the general provisions of *EPEA* and the *Water Act*, the regulations, and any other applicable legislation. Activities that require notification under *EPEA* are listed in Schedule 3 of the *Activities Designation Regulation*. The notice must contain the name and address of the person responsible for the activity, the location and description of the activity, and the project's start and end dates.⁹⁶ There is no public participation in this process.

3.3 Certificates

Certificates are regulatory instruments or authorizations that recognize that certain prerequisites to an activity or a party carrying out an activity have been met.

Certificates under *EPEA* include:

- Certificate of variance

A certificate of variance is an authorization that can be issued by the Minister of Environment to vary a term or condition of a registration or approval or to vary a requirement of a regulation.⁹⁷ In effect, the certificate allows the regulated party (whether it is an approval holder, a registration holder or another party governed by the regulations) to avoid meeting the regulatory requirements.

The Minister can only issue a certificate of variance where: (a) the activity is likely to contravene a term, condition or other regulatory requirement due to factors beyond the control of the applicant; (b) the variance is not likely to cause a significant adverse effect; and (c) the economic cost of not issuing the variance significantly outweighs any benefits.⁹⁸

⁹⁵ *EPEA* at ss. 87-88.

⁹⁶ *Activities Designation Regulation* at s. 7.

⁹⁷ *EPEA* at s. 77.

⁹⁸ *EPEA* at s. 78.

An application for a certificate of variance must be accompanied by information regarding the nature of consultation undertaken with parties who may be directly affected by the proposed variance.⁹⁹

- Certificate of qualification

A certificate of qualification recognizes the qualifications of an individual undertaking a certain activity.¹⁰⁰ Several regulations require certification for different activities. For example, “certified operator[s]” of waste treatment facilities generally require the qualifications and certification prescribed by the *Waste Control Regulation*¹⁰¹ and the *Wastewater and Storm Drainage (Ministerial) Regulation*,¹⁰² and commercial pesticide applicators must be certified pursuant to the *Pesticide (Ministerial) Regulation*.¹⁰³

- Remediation certificate

The Director may issue a remediation certificate when there has been a release into the environment that has caused, is causing or may cause an adverse environmental affect and the impact has been remedied (or the land has undergone remediation).¹⁰⁴ Remediation certificates have yet to be used because a regulation has not been passed which enables their use. Regulations for remediation certificates may be coming in the future.

- Reclamation certificate

Reclamation certificates may be issued by the Director where an “operator” has reclaimed “specified land” once an activity is completed. Reclamation certificates are required for oil and gas wells, pipelines or batteries, oil production sites, municipal pipelines, transmission lines, mine and quarry operations, roadways, exploration operations, railways and plants.¹⁰⁵

⁹⁹ EPEA at s. 77(2).

¹⁰⁰ EPEA at s. 79.

¹⁰¹ Alta. Reg. 192/1996.

¹⁰² Alta. Reg. 120/1993.

¹⁰³ Alta. Reg. 43/1997.

¹⁰⁴ EPEA at s. 117.

¹⁰⁵ See the definition of “specified land” in the *Conservation and Reclamation Regulation*, Alta. Reg. 115/1993.

The reclamation requirements may be set out in the approval, in Codes of Practice, in the terms of an environmental protection order, the directions of the Director or an inspector, and under *EPEA* itself.¹⁰⁶

3.4 Codes of Practice

Codes of Practice under the *Water Act* and *EPEA* are commonly tied to activities that require a registration. Under the *Water Act* the Codes of Practice apply to activities that are exempt from licence or registration requirements but subject to the Codes pursuant to the *Water (Ministerial) Regulation*.¹⁰⁷ Finally, some temporary diversions of water are also subject to the Codes under the *Water Act*.¹⁰⁸

The Codes of Practice dictate how certain activities are to take place and are often incorporated into regulations. By incorporating these codes into regulations they become enforceable.

Table 3: Codes of Practice under *EPEA* and the *Water Act*

The Codes of Practice under <i>EPEA</i>	
<ul style="list-style-type: none"> • Code of Practice for Compressor and Pumping Stations and Sweet Gas Processing Plants • Code of Practice for Foundries • Code of Practice for Concrete Producing Plants • Code of Practice for Asphalt Paving Plants • Code of Practice for a Waterworks System Consisting Solely of a Water Distribution System 	<ul style="list-style-type: none"> • Code of Practice for Exploration Operations • Code of Practice for Hydrologic Tracing Analysis Studies • Code of Practice for Land Treatment of Soil Containing Hydrocarbons • Code of Practice for Waterworks Systems Using High Quality Groundwater • Code of Practice for Tanker Truck Washing Facilities

¹⁰⁶ *EPEA* at s. 137.

¹⁰⁷ *Water (Ministerial) Regulation* at s. 3.

¹⁰⁸ *Water (Ministerial) Regulation* at s. 6.

<ul style="list-style-type: none"> • Code of Practice for the Release of Hydrostatic Test Water from Hydrostatic Testing of Petroleum Liquid and Gas Pipelines • Code of Practice for Wastewater Systems Consisting Solely of a Wastewater Collection System • Code of Practice for Compost Facilities • Code of Practice for Wastewater Systems Using a Wastewater Lagoon • Code of Practice for Energy Recovery 	<ul style="list-style-type: none"> • Code of Practice for Small Incinerators • Code of Practice for Pits • Code of Practice for Landfills • Code of Practice for Pesticides • Code of Practice for Forage Drying Facilities • Code of Practice for Sawmill Plants
<p>The Codes of Practice under the <i>Water Act</i></p>	
<ul style="list-style-type: none"> • Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body • Code of Practice for Watercourse Crossings 	<ul style="list-style-type: none"> • Code of Practice for Outfall Structures on Water Bodies • Code of Practice for the Temporary Diversion of Water for Hydrostatic Testing of Pipelines

Chapter 4: The decision to authorize: who makes it and what do they consider?

Alberta Environment administers *EPEA* and the *Water Act*. This chapter describes who makes the decisions in Alberta Environment and how these decisions are made. Understanding how the government makes a decision is essential to effective public participation. Decisions made under *EPEA* and the *Water Act* are highly discretionary but there are some considerations that must be taken into account in the decision-making process.

1. Who is the “Director”?

The Director is a government officer responsible for administering different aspects of *EPEA* and the *Water Act* including decisions about approvals and licences. While a different Director could be named under both *EPEA* and the *Water Act*, currently the same individual fills the role of the Director under both pieces of legislation.

There is currently one Director for each of the three regions of Alberta: the Northern Region, the Central Region and the Southern Region. These Directors operate under the Environmental Management Branch of Alberta Environment.¹⁰⁹ The Minister appoints the Directors, while their responsibilities and obligations are set out in the *EPEA* and *Water Act* and related regulations.¹¹⁰ Directors are also appointed to deal with specific tasks such as environmental assessments.

2. The Role of the Director (Alberta Environment)

The Director has many roles within Alberta Environment, including:

- receiving and reviewing applications;
- giving or ensuring proper notice of the application;

¹⁰⁹ A full organizational chart for Alberta Environment may be found on their website at <http://environment.alberta.ca/documents/dep_org.pdf>.

¹¹⁰ *EPEA* at s. 25; *Water Act* at s. 163.

- facilitating and reviewing public input;
- making the decision, giving notice of that decision, and issuing environmental authorizations with or without set terms, conditions, and security deposits;
- disclosing of information related to environmental authorizations and other aspects of *EPEA* and the *Water Act*; and
- ordering and administering Environmental Impact Assessments (EIAs) under *EPEA*.

In most circumstances communications regarding an application will be dealt with by the Director's staff and not the Director him or herself.

2.1 Receipt and review of applications

The Director receives and reviews applications for authorizations. The Director can prescribe what information must be included in an application. This is in addition to existing regulatory requirements. Once the Director receives an application for an approval or licence, he or she will decide whether the application is complete or if there is a need for further information.

Under the *Water Act* the Director can request additional information from the applicant.¹¹¹ Under *EPEA*, the Director may request additional information from the applicant, a directly affected party, a municipality or anyone else deemed appropriate.¹¹²

2.2 Ensuring that proper notice of the application is given

Under *EPEA*, the Director is responsible for providing notice of an application to the public either directly, or by directing the proponent to provide notice to the public.¹¹³ *EPEA* and the *Water Act* prescribe the contents of the notice.

¹¹¹ *Water Act* at ss. 37 and 50.

¹¹² *Approvals and Registrations Procedure Regulation* at ss. 5 and 6.

¹¹³ *EPEA* at s. 72.

The Director decides when and where the notice should occur and can require the notice to include specific information (see Chapter 3).¹¹⁴

Notice of an application is important as it dictates how much time there is to provide the Director a statement of concern.

2.3 Facilitating and reviewing public input

The formal mechanism for public input on a proposed activity is through the filing of a “statement of concern” with the Director. The Director will consider the statement of concern of individuals, groups or organizations he or she deems to be “directly affected”. The Director may also require that the proponent hold public information sessions relating to the application for *EPEA* approvals.¹¹⁵

For further information regarding the statements of concern and being directly affected see Chapter 8, Part I.

2.4 Making the decision and giving notice of that decision

Government decisions are not made in a vacuum. The enabling legislation and its underlying principles guide the Director’s decisions. Whether it is a decision under *EPEA* or the *Water Act*, the Director must make the decision within the legislative framework and must consider certain criteria set out in the legislation and regulations.

2.4.1 Decision making under EPEA

Decisions concerning *EPEA* authorizations are guided by the purpose of *EPEA* itself and more directly by the *Approvals and Registrations Procedure Regulation*. Neither the regulation or the Act impose mandatory considerations on the Director but they are still relevant to the decision being made under the Act.

Section 2 of *EPEA* states:¹¹⁶

¹¹⁴ *Environmental Protection and Enhancement (Miscellaneous) Regulation* at s. 2.

¹¹⁵ See the *Approvals and Registrations Procedure Regulation* at s. 5(2).

¹¹⁶ *EPEA* at s. 2.

The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
- (e) the need for Government leadership in areas of environmental research, technology and protection standards;
- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
- (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
- (i) the responsibility of polluters to pay for the costs of their actions;
- (j) the important role of comprehensive and responsive action in administering this Act.

For *EPEA* approvals the Director may also consider:¹¹⁷

- (a) proposed methods of minimizing the generation, use and release of substances;
- (b) any available alternative technologies;
- (c) design plans and specifications for the activity;
- (d) site suitability, including soils, air and water quality, groundwater conditions, site drainage, water supply quantity and wastewater disposal alternatives;
- (e) proposed monitoring programs to determine emissions and their effect on the environment;
- (f) proposed methods of management of the storage, treatment and disposal of substances;
- (g) the adequacy of the quality and quantity of the potable water used in or produced by the activity;
- (h) proposed plans to complete the conservation and reclamation in connection with the activity;
- (i) the past performance of the applicant.

If, in making the decision, the Director requires a more thorough examination of the application it can be sent to a “referral committee”.¹¹⁸ This referral committee must make recommendations to the Director within 90 days of receiving the referral.¹¹⁹

The Director may also circulate a draft decision or parts of the decision to anyone the Director thinks should receive it, including the proponent or anyone who submitted a statement of concern.¹²⁰

¹¹⁷ *Approvals and Registrations Procedure Regulation* at s. 6.

¹¹⁸ *Approvals and Registrations Procedure Regulation* at s. 7.

¹¹⁹ *Approvals and Registrations Procedure Regulation* at s. 7.

2.4.2 Decision making under the Water Act

Decisions under the *Water Act* are guided by the Act's purpose at section 2, which states:¹²¹

The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta's economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to trans-boundary water management;
- (f) the important role of comprehensive and responsive action in administering this Act.

Section 38 of the *Water Act* also outlines other considerations for granting an approval:¹²²

In making a decision under this section, the Director

¹²⁰ *Approvals and Registrations Procedure Regulation* at s. 8.

¹²¹ *Water Act* at s. 2.

¹²² *Water Act* at s. 38(2).

- (a) must consider...matters and factors...specified in an applicable approved water management plan,
- (b) may consider any existing, potential or cumulative
 - (i) effects on the aquatic environment,
 - (ii) hydraulic, hydrological and hydrogeological effects, and
 - (iii) effects on household users, licensees and traditional agriculture users,
 that result or may result from the activity, and
- (c) may consider
 - (i) effects on public safety, and
 - (ii) any other matters applicable to the approval that, in the opinion of the Director, are relevant.

These considerations apply to *Water Act* licences as well.¹²³ In addition, the Director may consider “the suitability of the land for irrigated agriculture” where the licence is for irrigation and, if relevant, applicable water guidelines, water conservation objectives and water management plans.¹²⁴

The Director is not required to give reasons for a decision which makes it difficult to assess what the Director actually considered and whether the consideration given was adequate. Nevertheless, by referring to these provisions of the legislation the Director will relate your comments to their legislative mandate, adding relevance to your concerns.

In addition, the Director may consider specific policies and guidelines of relevance to an application. These guidelines and policies are available from Alberta Environment and on its website (<http://environment.alberta.ca/3.html>). Examples of such guidelines

¹²³ *Water Act* at s. 51(4).

¹²⁴ *Water Act* at s. 51(4). Water guidelines are published by the Department and may deal with surface water quality, potable water and aquatic ecosystems. Alberta Environment, *Surface Water Quality Guidelines For Use in Alberta: 1999* (November 1999) are available online: Alberta Environment <<http://environment.gov.ab.ca/info/library/5713.pdf>> or can be obtained through the Information Centre (780) 427-2700 (Toll Free by first dialing 310-0000). Water conservation objectives are set by the Department or through Approved Water Management Plans. Water management plans are produced by the government or designated third parties. Currently water management plans are being developed regionally by Watershed Planning and Advisory Councils.

include:

- *Alberta Tier 1 Soil and Groundwater Remediation Guidelines*;¹²⁵
- *Alberta Tier 2 Soil and Groundwater Remediation Guidelines*;¹²⁶
- *Water Quality Based Effluent Limits Procedures Manual*;¹²⁷
- *Groundwater Evaluation Guideline*;¹²⁸
- *Surface Water Quality Guidelines for Use in Alberta*,¹²⁹ and
- *Administrative Guide for Approvals to Protect Surface Water Bodies Under the Water Act*.¹³⁰

2.4.3 The over-riding discretion of the Minister

If the Minister of Environment is of the opinion that a proposed activity is not in the public interest the Minister may prohibit the issuance of an approval or licence.¹³¹ This provision has not been used and is not likely to be used except in instances of very strong public opposition to an activity.

¹²⁵ Alberta Environment, (Edmonton: Alberta Environment, 2008), available online: Alberta Environment, <<http://environment.gov.ab.ca/info/library/7751.pdf>>.

¹²⁶ Alberta Environment, (Edmonton: Alberta Environment, 2008), available online: Alberta Environment, <<http://environment.gov.ab.ca/info/library/7752.pdf>>.

¹²⁷ Alberta Environment, (Edmonton: Alberta Environment, 1995), available online: Alberta Environment, <<http://environment.gov.ab.ca/info/library/7255.pdf>>.

¹²⁸ Alberta Environment, (Edmonton: Alberta Environment, 2003), available online: Alberta Environment, <<http://environment.gov.ab.ca/info/library/7508.pdf>>.

¹²⁹ Alberta Environment, (Edmonton: Alberta Environment, 1999), available online: Alberta Environment, <<http://environment.gov.ab.ca/info/library/5713.pdf>>.

¹³⁰ Alberta Environment, (Edmonton: Alberta Environment, 2001), available online: Alberta Environment, <<http://environment.gov.ab.ca/info/library/6208.pdf>>.

¹³¹ *Water Act* at s. 34 and *EPEA* at s. 64.

2.5 *Conditions on approvals, licences and registrations*

The Director can place a variety of terms and conditions in an approval or licence.¹³² Conditions may deal with standards or levels of emissions, monitoring and reporting of emissions, impacts on the environment, or with requirements to restore the environment when the activity is concluded. Some typical conditions are outlined in Table 4 below.

¹³² *Water Act* at ss. 38(3) & s. 51(3) and *EPEA* at s. 68(2).

Table 4: Common conditions on approvals and licences

Nature of condition	Standards	Monitoring and reporting	Post activity issues
<p>Typical condition on approval or licence</p>	<ul style="list-style-type: none"> ○ limits on operations to minimize air, land and water emissions ○ technical requirements to minimize pollution ○ management conditions for substances (use, storage, and disposal) ○ conditions to minimize impacts (continuous improvement mechanisms) ○ emergency plans and management systems ○ location of the activity ○ site requirements 	<ul style="list-style-type: none"> ○ monitoring requirements for air, water, and land ○ reporting requirements for emissions produced by the activity ○ sampling techniques and criteria to be used ○ timeline for reporting ○ when reporting is required (incident based and/or regular timing) ○ what substances are being sampled or monitored 	<ul style="list-style-type: none"> ○ standards to be followed in decommissioning a facility ○ standards of reclamation to be followed ○ follow up monitoring for a concluded activity ○ remediation requirements ○ the amount of security required for effective reclamation and follow up monitoring

2.5.1 Term of authorizations

The Director can set the term for which authorizations will be valid, but generally the terms of authorizations are a standard length (as described in Chapter 3). If you want the Director to limit the term of the authorization granted you will need to justify why this should occur. For instance, where an approved project is set to be completed by a certain date you may be able to justify an earlier expiry date based on minimizing impacts on you, your business or the environment.

2.5.2 Financial security requirements

A proponent must provide financial security for the reclamation or remediation of specific activities.¹³³ Security is required for certain activities including:¹³⁴

- construction, operation or reclamation of a mine;
- construction, operation or reclamation of a transmission line;
- construction, operation or reclamation of a quarry;
- construction, operation or reclamation of a peat operation; and
- construction, operation or reclamation of a coal processing plant.

The Director determines the nature and amount of security required. The amount of security must be sufficient, in the Director's opinion, to ensure conservation and reclamation work will be completed.¹³⁵ Where security is required, the Director will not issue the approval until security or insurance has been provided.¹³⁶ For activities that are governed by Codes of Practice, security is provided in the manner set out in the Code.

¹³³ *Water Act* at ss. 44 and 57 and *EPEA* at s. 84.

¹³⁴ *Activities Designation Regulation* at Division 3 of Schedule 1. See also the *Conservation and Reclamation Regulation* at Division 2; section s. 17.1 provides some exemptions to the security requirement, including where the activity is undertaken by a local authority (i.e. typically a municipality) or for operators who apply for an approval in relation to pipelines and oil production sites.

¹³⁵ *Conservation and Reclamation Regulation* at s. 18.

¹³⁶ *Approvals and Registrations Procedure Regulation* at s. 9. It is important to note that security provisions of *EPEA* do not apply to the Government or Government Agencies.

All security taken under *EPEA* and the *Water Act* must be deposited in the Environmental Protection Security Fund. The amounts placed in the fund must be publicly reported every year.¹³⁷

The Director does not provide information as to how the amount of security is determined. It is therefore difficult to determine whether the security required is adequate.

The amount of security required by the Director may be a concern where it appears that it is inadequate to effectively deal with probable reclamation costs.

2.6 Disclosure of Information

The Director is responsible for decisions relating to the disclosure of certain information under *EPEA*, the *Disclosure of Information Regulation*¹³⁸, and the *Water (Ministerial) Regulation*.¹³⁹ Under the legislation the Director must disclose certain types of information that may assist you in preparing a statement of concern. The Director can, however, refuse to disclose information that he or she deems confidential.¹⁴⁰

For additional information about obtaining information see Chapter 7, Part I.

2.7 Ordering and administering Environmental Impact Assessments under EPEA

The Director has the discretion to order that an environmental impact assessment (EIA) be conducted for various activities.¹⁴¹ EIAs are described further in Part III of this guide. Where an EIA is required the Director is responsible for coordinating the creation of terms of reference that dictate what the environmental assessment should cover.

¹³⁷ *EPEA* at ss. 31-34.

¹³⁸ Alta. Reg. 273/2004.

¹³⁹ *Water (Ministerial) Regulation* at Part 4.

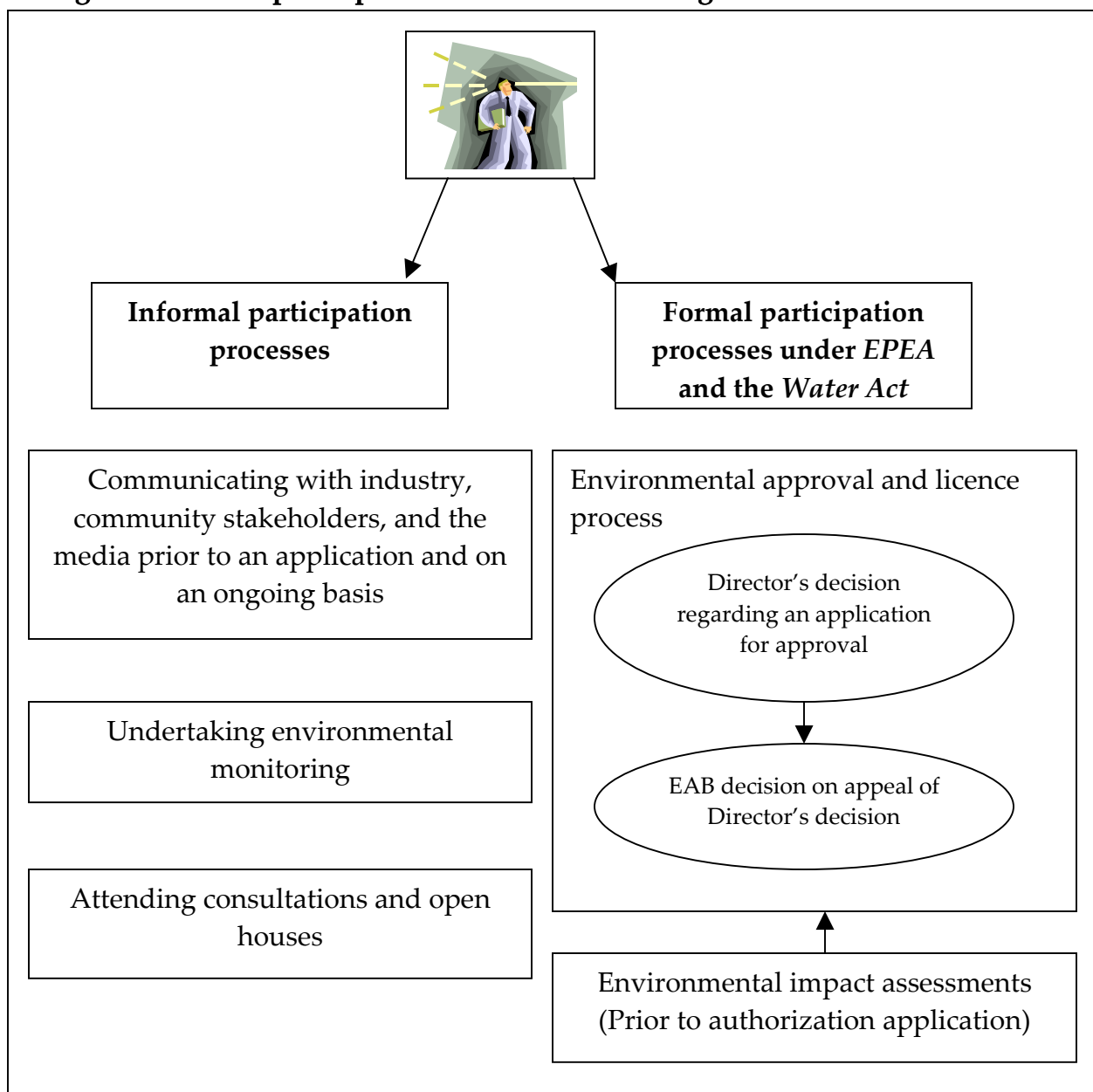
¹⁴⁰ *EPEA* at s. 35(5) and *Water (Ministerial) Regulation* at s. 15(5).

¹⁴¹ *Water (Ministerial) Regulation* at s. 15(5), *EPEA* at s. 41 and the Schedule of Activities.

Chapter 5: Participation in *EPEA* and *Water Act* authorizations: an overview

Public participation in authorization processes may be categorized as formal or informal. The type of participation you wish to pursue will often depend on the nature of the impact an activity has on you or your interests. Legislative rights to participate are limited to those who have standing, something which will be discussed later in Chapter 8.

Figure D: Public participation and decision-making



1. Participation in informal processes

Opportunities to participate informally in decision-making processes include:

- attending consultations and public open houses;
- participating in or interacting with advisory bodies;
- participating in monitoring bodies;
- monitoring and providing comments on policy and law;
- communicating on a regular basis with industry and stakeholders; and
- communicating concerns and issues to the media.

The importance of being involved in these informal processes goes beyond the immediate benefit of being informed. Being involved in your community translates into a record of concern and interest in environmental issues. This gives you credibility and builds relationships that will serve you well when an application comes before the Director for an authorization.

1.1 *Consultations and public open houses*

Informal participation in events such as open houses and consultations, whether held by government or industry, is a good source for information about future project plans and proposals. Proponents will often plan to consult with the public if an activity will have significant impacts on the environment. These consultation processes or open houses do not follow any formal guidelines, although the Director may consider how public consultation was conducted in the authorization process. These consultations are often held before the proponent applies for the authorization and present an important opportunity to begin communicating any concerns you may have to the proponent directly.

Government consultations may also be held for specific projects or policy initiatives. In either instance providing your concerns early is the best way to impact a process. In all of these cases, however, it is difficult to determine how much these informal participation avenues influence decisions, but this does not mean that they should be ignored.

1.2 Participating in or interacting with advisory bodies

On occasion the government and/or industry will create advisory bodies. These advisory bodies will usually be given a mandate or terms of reference aimed at providing advice regarding specific issues. Some proponents will create advisory bodies or groups to provide an ongoing link with the community. There may be opportunities to sit on the advisory body or at very least to communicate your concerns to the body.

Advisory bodies in Alberta have been set up to look at issues of emergency responses to environmental releases, coal bed methane development, and the use of potable water for enhanced recovery of hydrocarbons. Membership in government initiated advisory bodies usually occurs through government appointments but even if you are not appointed there are usually various opportunities to provide input to these bodies.

1.3 Participating in formal or informal monitoring bodies

The monitoring of environment impacts is typically conducted by the government, industry, and specific bodies set up for this purpose. Some are formal bodies such as those that conduct air quality monitoring in Alberta. Others are less formal and can be created by interested citizens.

Opportunities to participate in government or industry monitoring may be limited, however these monitoring activities are important for providing relevant information about environmental impacts of an activity. Where monitoring occurs as part of an authorization, that monitoring data should be made publicly available (see Chapter 7 regarding obtaining information). Learning about monitoring techniques and possible advantages or disadvantages with specific techniques is important to understanding potential gaps in information. This knowledge may be relevant in formal participation processes as well.

Citizens may also undertake monitoring activities. These activities may be aimed at ambient environmental quality or specific facilities. Depending on the level of monitoring you wish to pursue there are a variety of tools and protocols that should be used. Obtaining laboratory results for your monitoring activities will cost money. To minimize costs, monitoring activities may be carried out by a group of concerned citizens.

1.4 Monitoring and providing comments on policy and law

The government's policies and laws change from time to time. Often they will consult with the public on specific issues related to law and policy. This is largely a reactive process where comments are provided following a proposed law or policy that is put forward by government. Alternatively you may wish to be more proactive and lobby the government for specific changes to law and policy.

1.5 Communicating on a regular basis with industry and stakeholders

Communication is central to all aspects of participation. Informal communications should be ongoing with industry and other interested citizens in your area. Ongoing communication is of value because you will learn who you should be talking to within individual companies and generate a rapport with the employees of the company. This rapport may assist in avoiding conflicts and entering into formal legal processes.

Communicating within your community is also important for gauging support on issues, creating networks of interested citizens and creating awareness of the issues.

1.6 Communicating concerns and issues to the media

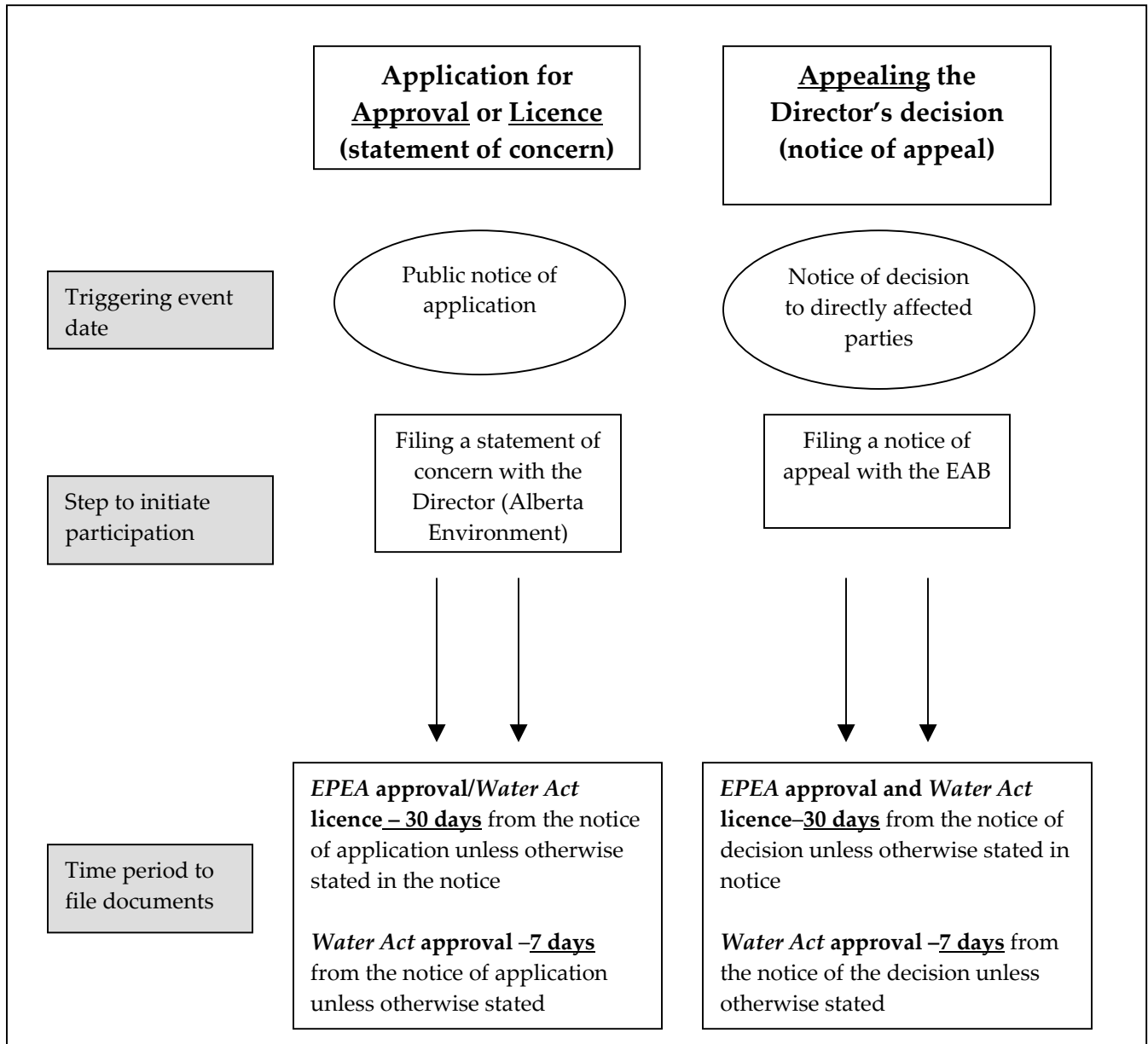
Communicating with the local and regional media can be part of a broader participation strategy. Media involvement generates awareness and interest about the issues and can act as a strong motivator for the proponent or government to address concerns. Obtaining media contacts and keeping them up to date on issues will generate relationships that may be of assistance when contentious activities are proposed.

2. Participation in formal, legal processes

The broadest rights to participate in environmental decision-making in Alberta exist for *EPEA* and *Water Act* approvals and licences. The public right to participate includes the ability to submit a statement of concern regarding an approval or licence and to appeal the decision to the EAB. The remainder of this

guide deals with the statutory rights and processes to participate in these formal processes. Figure E below outlines the timelines and triggering of public participation opportunities under *EPEA* and the *Water Act*.

Figure E: Timelines and triggers for public participation



Chapter 6: Results of participation

The goal of this guide is to encourage and facilitate effective public participation in the approval and licence processes. However, participation in decision-making does not guarantee a satisfactory result. It is important to be realistic about how much influence you will have in the decision making process. This Chapter describes what you can expect in terms of how much you will be consulted and what the substantive results might be.

1. The level of consideration or consultation to be expected

The level of consultation or consideration you will be given by the government or by the proponent is directly linked to whether you have a legal right to participate in the decision-making process. The more legal rights you have, the more leverage you will have with the government and the proponent. This legal right to participate in a process is often referred to as “standing” which refers to your legal right to be heard before a tribunal or court.

In environmental authorizations standing is tied to how an activity affects you. If you are “directly affected” by a proposed activity you have broader rights to participate than if you are not “directly affected”. Thus, determining whether you are “directly affected” is central to your legal right to participate and this is discussed further in Chapter 8. If you are directly affected by an activity you can expect that the applicant and the government will discuss your concerns, respond to questions you might have, and disclose information relevant to the impacts of the authorization.

If you are not considered “directly affected” you should be prepared for some frustration in having your voice heard. The degree of consultation and communication by both the government and the proponent may vary depending on the circumstances but when you are not “directly affected” there are minimal legal requirements to motivate consultation.

It is important to note that the determination of whether you are “directly affected” may be contentious but you should not give up on your right to participate. For instance, just because the Director does not consider you directly affected does not necessarily mean that the EAB will also find that you are not directly affected.

For a full discussion of what it means to be “directly affected” see Chapter 8, Part I.

2. The substantive results you can reasonably expect

You can expect that the government will approve most activities; the government will rarely refuse to issue an approval or licence outright. Instead the government imposes conditions on the approval or licences to deal with concerns and mitigate impacts.

Participation in the environmental authorization process does not guarantee that the results will satisfy all parties. In fact, government decisions may result in everyone being unhappy. The proponent may be unhappy with conditions that it feels are unreasonable or costly and anyone not wanting the authorization to be granted may be similarly upset.

2.1 Stopping the authorization from being granted

Instances when the Director will refuse to grant an approval or licence are very rare. As a starting point, you should expect that the Director will grant the authorization. Where the impacts of the activity are significant and cannot be mitigated or where the proponent has failed to adequately gather information and consult, there may be a better chance that the government will refuse to grant an authorization. If, however, the proponent has taken reasonable steps to present information and consult with those concerned, authorizations will most often be granted. For this reason it is important to think of a fallback position if the approval or licence is issued. This fallback position may include having the approval or licence issued with specific conditions (see page 62 for discussion of common conditions).

Refusals based on the cumulative effects of a particular activity in combination with other activities are unlikely. Notwithstanding the fact that cumulative impacts are real and significant, most authorizations tend to isolate the activity from other impacts on the environment.

Whether there exists an institutional government bias toward granting approvals is an open question. The government has broad powers to refuse to issue an approval or licence but has rarely exercised this power. Continued public

participation in the process remains important because it informs the government about the public's views of the approval system and may result in changes to policy over the longer term.

It is important to note that although few approvals or licences are refused, this should not keep you from objecting to applications and providing supporting evidence to substantiate why an activity should not proceed. Remember as well that having a critical mass of public opposition to a project is often the most likely way of having the project stopped.

The few times authorizations have not been issued there have been coinciding factors, including broad public opposition, effective media campaigns and strong lobbying efforts both at local and provincial levels.

2.2 Placing conditions on the authorizations

In most instances, you can reasonably expect that conditions will be placed on the authorization in question. While it is solely a government decision whether or not to place conditions on an authorization, the inclusion of specific conditions is the most telling indication that there has been effective participation in the process.

Asking for reasonable conditions relating to the monitoring of environmental impacts, changing how an activity is carried out to minimize impacts, and requiring ongoing consultation and continuous improvement in operations is always appropriate. Indeed, the entire life cycle of the project can be dealt with through conditions on the approval, from how construction takes place, to ongoing emission allowances, to how the approved facility will be decommissioned and reclaimed.

When deciding upon the conditions that you will ask for, remember that the Director will generally only apply conditions to an authorization that are reasonable in terms of associated costs to the proponent and the benefits of the conditions to the environment and to the party requesting the conditions.

See Table 4 on page 62 regarding types of conditions that may be found in approvals and licences.

2.3 Better results through broader participation

No matter the amount of collaboration and consultation, many people will be of the view that the only reasonable outcome is to refuse the authorization. In this regard the concerns you have may not be dealt with through the approval process but through changes to how the laws and policies operate in Alberta.

The fact of the matter is the bureaucracy reflects the front line and operational side of government policy. Policy is driven by politics. Changing government policies, in most cases, requires engaging in the political process. Policy change requires getting politically active, either in the formal political process or by lobbying politicians and bureaucrats.

Chapter 7: Obtaining information about the project

The proponent or the government should disclose most or all information that is relevant to an application. This does not mean there will not be gaps in information. In fact a lack of information is a good reason to become involved in the decision-making process.

Quick reference: Obtaining information - Appendix A.

1. Disclosure under *EPEA* and the *Water Act*

Disclosure of information is similar for both approvals under *EPEA* and the *Water Act*. *EPEA* and the *Disclosure of Information Regulation*¹⁴² outline the process and the nature of disclosure for approvals under *EPEA*. Relevant information that must be disclosed includes:¹⁴³

- Environmental Impact Assessment reports;
- information submitted as part of an application for approval, registration or certificate of variance;
- environmental and emissions monitoring data provided by an approval holder;
- any reports or studies provided under the terms and conditions of an approval;
- statements of concern;
- notices of appeal;
- notice of a decision of a Director; and
- decisions of a Director provided to an applicant, approval holder, registration holder, licensee, preliminary certificate holder or statement of concern filer.

¹⁴² Alta. Reg. 273/2004.

¹⁴³ *EPEA* at s. 35.

You may also wish to pursue other sources of information to assist in determining if there are any compliance issues with the proponent or other approvals as points of reference. Such information can be found in the following documents:

- copies of any approvals, registrations, certificates of qualification and certificates of variance;
- remediation and reclamation certificates;
- enforcement orders;
- environmental protection orders;
- administrative penalties or prosecutions;
- written warnings;
- notices of administrative penalty;
- specified penalty violation tickets under the *Provincial Procedures and Offences Act* for an offence of *EPEA*;
- inquiry reports prepared under the *Conservation and Reclamation Regulation*;
- records intended as statements of concern; and
- directions of an Inspector or a Director.

This list is not exhaustive. For the entire list, see section 35 of *EPEA*, available online at

http://www.qp.gov.ab.ca/documents/Acts/E12.cfm?frm_isbn=0779748611 or at a library with the statutes and regulations of Alberta.

Many documents are considered public documents under the *Water Act*. The following are some relevant documents that will be provided to the public:¹⁴⁴

¹⁴⁴ *Water (Ministerial) Regulation* at Part 4.

- information (including plans and specifications) that is provided to the Department as part of an application;¹⁴⁵
- verified monitoring data that is provided by an approval holder or licensee in accordance with a term or condition of the approval or licence, or the legislation (including any processing information necessary to interpret that data);
- any reports or studies that are provided to the Department in accordance with a term or condition of an approval, preliminary certificate or licence, or the legislation;
- statements of concern;
- certificates of completion;
- emergency preparedness plans;
- flood action plans; and
- operation, maintenance and surveillance manuals.

Other documents that are created by Alberta Environment that are also available for public review include:

- approved water management plans; and
- approvals, preliminary certificates, licences, registrations, verified monitoring data and the processing information that is necessary to interpret that data, reports with respect to water conservation objectives and water guidelines, emergency plans, plans relating to floods, water management orders, and enforcement orders.

¹⁴⁵ This includes information regarding applications for amending approvals, licences, and preliminary certificates.

1.1 *The process for obtaining information under EPEA and the Water Act*

If an application for an approval or licence has already been submitted to government see section 1.3 below.

Step 1: Ask the proponent for specific information you would like.

Step 2: If the proponent refuses or does not produce the information within 30 days, ask Alberta Environment

Step 3: If Alberta Environment refuses, consider proceeding with a request under the *Freedom of Information and Protection of Privacy Act (FOIP)*.

The regulations require that you first ask the proponent of the project for information. This step encourages early dialogue between the proponent and the public while avoiding the use of government resources.

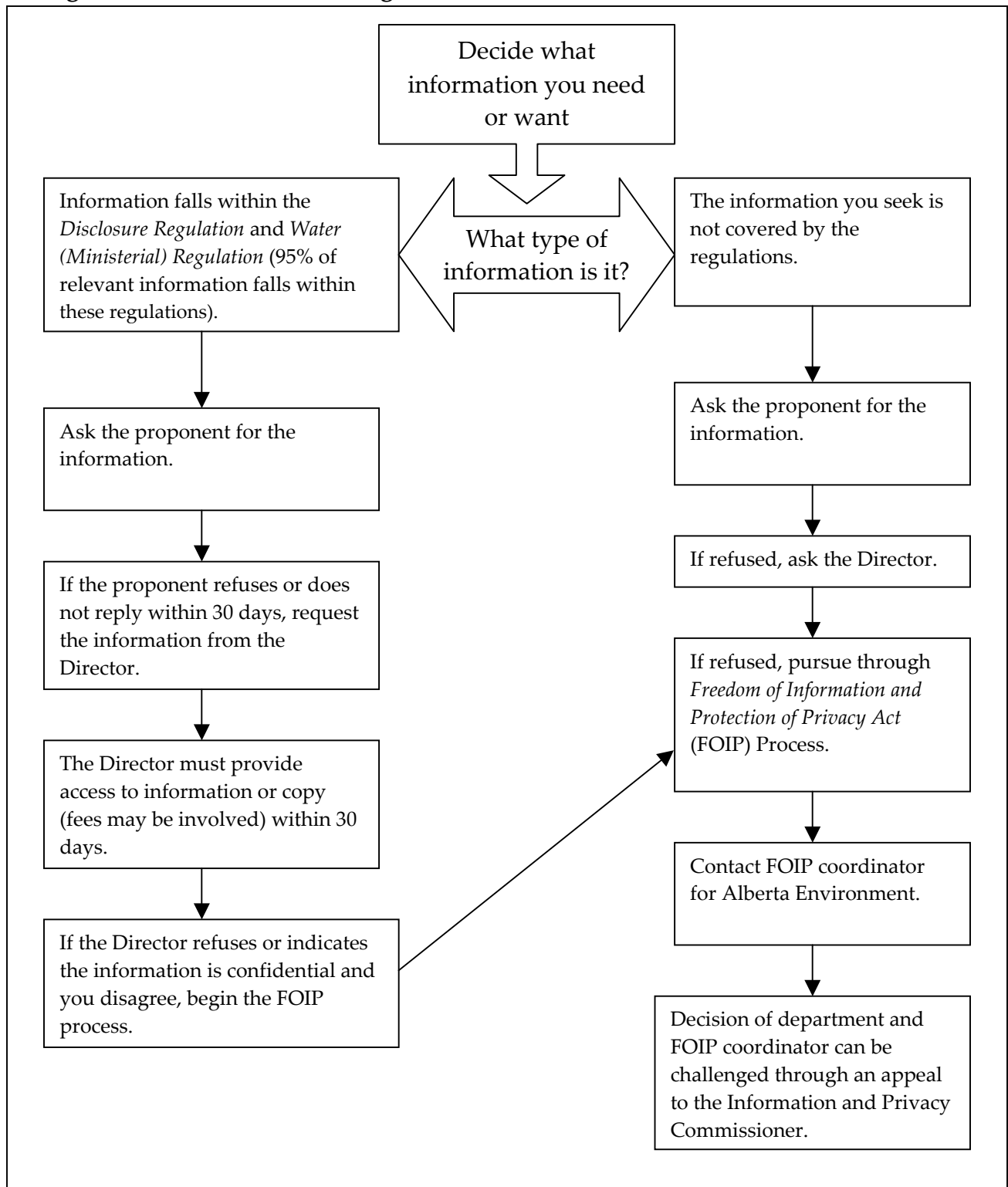
If you need to request information from Alberta Environment, your request should contain your name, mailing address and phone number, details of the document or information being requested and the date and result of the request you made to the proponent. Alberta Environment will notify you within 30 days of receiving your request whether you can obtain the information you seek. The Director will decide the form that disclosure will take and whether a fee is associated with obtaining the information.¹⁴⁶

One problem with this process is that it fails to recognize that there may be significant animosity between the parties. A refusal to disclose information may trigger greater suspicion and animosity. Sometimes dealing with the proponent in writing is a way to avoid direct conflict but this can be time consuming. If there is a refusal to provide the information there is no need to argue with the proponent; simply move on to request the information from Alberta Environment.

Figure F provides a summary of the process for obtaining information.

¹⁴⁶ *Water (Ministerial) Regulation* at s.15. Also *Disclosure of Information Regulation*, Alta. Reg. 273/2004 at s. 2.

Figure F: Process for obtaining information



1.2 *What will not be disclosed?*

Alberta Environment will not disclose information regarding an open or ongoing investigation. Disclosing information prior to the conclusion of an investigation may compromise the conduct of the investigation or a prosecution.

Also, the government may refuse to disclose “confidential” information. The proponent can apply to the government to have certain information characterized as confidential.¹⁴⁷ If the government agrees with the claim of confidentiality will not be disclosed.

If you still want to pursue information and documents that are not covered by the regulations or that are considered “confidential” you can seek the information through a *Freedom of Information and Protection of Privacy Act* request. A FOIP request will first go through the FOIP coordinator for Alberta Environment. This decision can subsequently be appealed to the provincial Privacy Commissioner. For information about FOIP requests, you can go to the FOIP website at <<http://foip.alberta.ca>> or call the FOIP office (780) 427-5848.

The FOIP process does not typically provide timely responses to issues. You may wish to ask that the Director to delay (or “stay”) his/her decision until the issue of disclosure is dealt with. Indicate to the Director that the information is relevant and should be disclosed.

The Director is not likely to stay a decision for this purpose so a decision about how to proceed is needed. One option is to challenge the decision of the Director through an application for judicial review. Alternatively, one can opt to challenge the Director’s decision through the appeal process. Renewed efforts at disclosure may occur at that point.

Always submit your statement of concern on time even if you don’t have the information you want. State the fact that information was lacking and that additional information may raise further concerns.

¹⁴⁷ *EPEA* at s. 35 and *Water (Ministerial) Regulation* at Part 4.

1.3 Information related to the application

The public notice of an application will usually state where information relevant to the proposed activity can be viewed or obtained. In the event you feel more information should be disclosed and the timeline for filing a statement of concern is short, the process described above is not appropriate. If deadlines are imminent seek a direct and quick answer from the proponent about disclosure of information. If the information won't be provided seek the information from Alberta Environment. If both the government and the proponent refuse other legal options may need to be considered. Regardless, always submit your statement of concern on time.

Chapter 8: Participating in the Director's decision

An application has been placed before Alberta Environment for an approval or licence. The application information and input from affected members of the public will now guide the Director in reviewing and making the decision about the proposed activity. This is when formal participation begins.

Quick reference: Participating in the Director's decision - Appendix B.

The legal right to participate is accompanied by strict (and often short) timelines in which you must act. You must be organized and proactive in preparing documents and obtaining evidence. Public participation in the process is discussed under the following headings:

- The notice
- The application
- Strategize
- Communicate
- Identifying concerns
- The statement of concern
- Being directly affected
- The decision

1. The notice

The notice of an application starts the time running in which you can participate in the Alberta Environment decision-making process. Notices must include specific information, as described in Chapter 3. Sample notices are included below.

Public Notice for *Water Act* licence, Alberta Environment.

<p style="text-align: center;">PUBLIC NOTICE [PROJECT PROPONENT NAME] WATER ACT NOTICE OF APPLICATION</p> <p>Notice is given that NAME has filed an application for licence under the provisions of the <i>Water Act</i> to divert water up to a maximum of 168,500 cubic metres annually from the Red Deer River on the NW XX-XX-XX-WX for Agricultural (feedlot) purposes.</p> <p>Any person who is directly affected by the application may submit a statement of concern to:</p> <p style="text-align: center;">Alberta Environment Central Region – Red Deer Room 304, Provincial Building 4920 - 51 Street Red Deer, AB T4N 6K8 Phone: (403) 340-7052 Fax: (403) 340-5022</p> <p>within 30 days of the providing of this notice.</p> <p>Please quote file number: XXXXX</p> <p>Statements filed regarding this application are public records which are accessible by the public.</p> <p>Failure to file statements of concerns may affect the right to file a notice of appeal with the Environmental Appeals Board.</p>

Sample notice for a bitumen upgrader

Notice

NOTICE OF APPLICATION

COMPANY NAME

PROJECT NAME

ALBERTA ENERGY RESOURCES CONSERVATION BOARD APPLICATION NO.

ALBERTA ENVIRONMENT

ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT APPLICATION NO.

WATER ACT FILE NO.

Take Notice that [company name] has applied to the Alberta Energy Resources Conservation Board (ERCB) and Alberta Environment (AENV) for approval to construct, operate, and reclaim a (x) cubic metres per day oil sands bitumen upgrader, the [project name]. The project will be located in Sturgeon County, approximately 45 kilometres northeast of Edmonton.

This Notice of Application is being distributed to advise interested persons that the applications are available, and that the ERCB, AENV and other government departments are now undertaking a review of the applications.

Nature of the Application

In support of their proposal, [company name] has prepared and submitted the following applications:

- Application No. to the ERCB, pursuant to Section 11 of the *Oil Sands Conservation Act*. In support of its proposal and as part of this application to the ERCB, [company name] has also submitted an Environmental Impact Assessment (EIA) report to AENV. The EIA report forms part of the application to the ERCB.
- An application (File No.) to AENV, pursuant to Sections 37 and 50 of the WA, to authorize the following:
 - License to divert (x) cubic metres of water per year from the North Saskatchewan River;
 - Approval of the site water management plans for the construction and operation of the upgrader;
 - Approval to divert an existing water course around the plant site; and
 - Approval for construction of an intake in the North Saskatchewan River.

Further Take Notice that pursuant to Section 73 of EPEA, and Section 109 of the *Water Act*, any person who is directly affected by EPEA Application No. or the *Water Act* application, may submit a written statement of concern to:

Alberta Environment,
Director, Northern Region
AENV Regulatory Approvals Centre

To File a Statement of Concern

Statements of concern under EPEA and the *Water Act* must be submitted by April 26, 2006. Failure to file a statement of concern may affect the right to file a Notice of Objection (on appeal) with the Environmental Appeal Board. Please quote Application No. (EPEA) or File No. (*Water Act*) when submitting a statement of concern. If no statements of concern are received, the EPEA and *Water Act* applications may be approved without further notice.

Note: In accordance with Section 12 of the Alberta Energy and Utilities Board Rules of Practice, and Section 35(1) of the Environmental Protection and Enhancement Act all documents filed in respect of these applications must be placed on the public record.

Additional Information

To obtain additional information or a copy of the applications (CD version also available), contact:

[contact person for copies] Copies of the application are available for viewing at the following locations: [locations]

Notice is important because it dictates the amount of time you have to submit a statement of concern with the Director. This timeline will be (a) the date set out in the notice, or where a date is not set out in the notice, (b) the timeline set out in *EPEA* or the *Water Act*. The statutory timeline starts from the last notice of the application.

Most notices will appear in a local newspaper so it is important to review your local paper regularly. Missing the notice and subsequently missing the deadline to file a statement of concern will likely end your right to participate in the process.¹⁴⁸ This is because your right of appeal is tied to filing a statement of concern within the prescribed time.¹⁴⁹

Newspapers will generally be used to give notice as they have broad distribution and will be considered reasonable notice for almost all parties who may be impacted by an approval or licence. If the mechanism chosen to give notice has no reasonable chance of reaching you and you are directly affected by the proposed activity the lack of proper notice may be grounds to challenge the decision through judicial review (see Part IV).

1.1 When notice is not required – emergencies, routine matters

Notice of an application for approval will not occur in every instance. The Director may waive a notice where:¹⁵⁰

- there is an emergency;
- the activity is or relates to a routine matter (under *EPEA*);
- there will be minimal effects on the aquatic environmental or other users (under the *Water Act*);¹⁵¹ or

¹⁴⁸ Failure to read a notice is not considered to be a valid reason to appeal a decision, notwithstanding that you are directly affected.

¹⁴⁹ *EPEA*, s. 91(1)(i). Both the Director and Environmental Appeals Board have discretion to allow for late statements of concern but rarely do so.

¹⁵⁰ *EPEA*, s. 72(3) and *Water Act*, s. 108(6).

¹⁵¹ See *Water Act*, s. 108(6). Section 108 states that the Director can waive notice where the “activity or diversion of water specified in the application for the approval or licence or the

- where the Director is of the opinion that there has already been sufficient notice.

A routine matter is “an activity that, in the opinion of the Director, will result in minimal or no adverse effect to the environment.”¹⁵² This may include changes to activities or amendments to approvals. A “routine” change to an activity involves “minor alteration, addition, relocation, expansion, change or extension to the activity”.¹⁵³ The key issue in relation to routine changes or amendments is that the Director must be of the opinion that the change will not result in more than a minimal adverse effect on the environment.¹⁵⁴

proposed amendment will result in a minimal or no adverse effect on the aquatic environment or on household users, licensees and traditional agriculture users”.

¹⁵² *Environmental Protection and Enhancement (Miscellaneous) Regulation* at s. 1 lists activities that will be considered routine.

¹⁵³ *Environmental Protection and Enhancement (Miscellaneous) Regulation* at s. 1.

¹⁵⁴ *Environmental Protection and Enhancement (Miscellaneous) Regulation* at s. 1.

2. The application

An application has been submitted to the Director. Its contents are relevant to how the activity might proceed. Consider the following questions when reading applications:

1. Will the activity have a direct affect on you? Being directly affected discussed later in this chapter.
2. Is the application complete?

The application should answer the major questions of who, what, where, when, and why:

- Who is carrying on the activity?
- What activity or activities are being proposed?
- What releases or impacts will they have on the environment?
- Where is the activity going to take place and where will the impacts be felt?
- When will the activity take place and how long will it occur for?
- When will monitoring and reporting take place? and
- Why is the activity proposed as it is and why are alternatives not considered?

See Chapter 3 for further information about what must be included in an application. Identify and request any information that is missing.

3. Review all of the materials to determine the answer to the following questions.
 - Are any potential impacts of the project overlooked or omitted? This may require advice from outside experts;

- Are there any assumptions made in the materials that can be challenged?
- Are there purely subjective statements made? Are opinions of the applicant presented rather than facts or objective analysis?
- Has the information been gathered in an appropriate fashion? Was the timing of information gathering appropriate? Are the sources of information reliable?
- Is the data statistically supportive of conclusions? Is the statistical significance and power provided?
- Does the information provided support the conclusions made?

3. Strategize

Having reviewed the information there are some key decisions to be made early in the process, including deciding whether to form a group, whether to hire an expert and whether to hire a lawyer.

3.1 Forming a group

If several individuals have common concerns with a proposed activity it may be worthwhile to form a group.

Advantages of forming a group are:

- Sharing resources.
 - When several individuals combine forces it lessens the pressure on each individual in terms of resource expenditure. These resources include information, time and money. Sharing resources may allow the group to retain an expert, an expense which may have been out of reach for a lone individual.
- Increased support and knowledge base.

- Groups can provide the support to be proactive and to persevere through adverse situations. Entering into regulatory or government processes can be daunting, particularly when it seems that the other side has lots of resources.
- Individuals in your community may also have significant knowledge about the impacts of an activity or the nature of the proposed activity itself. Broadening your knowledge base is essential to effective participation.
- Increased efficiency.
 - Forming groups can increase the efficiency of the process, not only for the individuals but for the government as well. Decision-makers tend to look favourably on efficient processes where there is minimal duplication.
- Stronger public voice.
 - A unified voice of several affected individuals can be stronger than individual voices. A critical mass of individual opposition is likely to exist for any project and forming a group indicates the strength and determination of all the individuals involved.
 - Forming a group also avoids confusion that can be created by numerous individuals' submissions with similar issues and concerns.
 - Groups are often able to create more public pressure and effectively use the media.

Possible disadvantages of forming a group include:

- Having your concerns lost in the group's issues.
 - As with any group process an individual's concerns may be overridden by the group's agenda. This may occur even in cases where the individual's issue is the most pressing and relevant issue.

- In presenting yourself as a group, the decision-maker will assume that the decisions of the group reflect full agreement of all the individuals. Your group could arrive at a conclusion that an individual member of the group disagrees with; this may curtail that individual's rights in the long run.
- Stronger voice –the flipside
 - Sometimes many independent voices have more impact than one group's voice. Strength in numbers may sometimes equate to a high numbers of concerned individuals submitting a statement of concern with the Director. For example, 300 concerned citizens providing statements of concern may be more effective than the one statement of concern from a group of 300.
 - All individuals involved in a group may still wish to submit a statement of concern. This is particularly the case if the group as a whole is unlikely to be considered "directly affected".
- Control over outcomes and preserving your rights
 - You may be the only individual who is recognized as directly affected by the proposed activity. Joining in a group in such an instance may undermine your ability to ensure that your concerns are met.

A balance must be weighed between your personal issues and concerns and those of the broader group or community. This is particularly relevant in relation to the EAB where it may find that a group is not directly affected because only a few members of the group meet the test (see Part II).

3.2 Finding an expert

Consider finding someone with specialized or expert knowledge to review the materials. Some information requires specialized knowledge to review and critique. Experts may include hydrologists, limnologists, engineers, biologists and epidemiologists. Experts are typically found in environmental consulting firms and in colleges and universities.

Because many consultants work for industry finding an expert to give evidence can be difficult. Seeking out an expert should be undertaken early in the process.

3.3 Hiring a lawyer

At this early stage you may wish to consider hiring a lawyer. Usually people do not hire lawyers, particularly at this early stage of the process but if you are concerned about the fairness of the process or having someone with experience negotiating on your behalf retaining a lawyer may be appropriate.

The costs of legal counsel can be prohibitive so the ability or need to retain a lawyer may depend on the nature of the impact on your land or any economic hardship an authorization may cause you. Each party will typically be required to cover the costs of their own legal counsel. You may wish to negotiate with the proponent to see if they will agree to cover your costs for advice, legal or otherwise. There is no obligation for the proponent to do this and typically the proponent will refuse to cover these costs.

If the matter goes before the EAB, the Board has the discretion to order payment of costs. When the Board grants costs it is usually only for a portion of the actual costs and will be limited to preparing for and participating in a hearing. The costs related to participating in the Director's decision and preparing a statement of concern are not considered part of the "hearing" process.

3.4 Communicate

Communication is very important to effective participation. This includes communicating with other concerned parties, the proponent, the government, and possibly the media.

3.4.1 Communicating with other concerned parties

Communicating with neighbours and others having similar concerns may result in the formation of a group and the resulting support a group can provide. Community groups and other non-government organizations, such as environmental groups, may also be able to offer assistance.

3.4.2 Communicating with the government and the project proponent

The earlier you initiate communication with the Director and the proponent the better off you will be. By identifying issues and developing a dialogue early you can avoid being in a position of having to challenge decisions about an activity that have already been made. Once the proponent has spent a significant amount of time and money planning an activity the likelihood of changing the activity's design or location is significantly diminished.

Providing input at the earliest stages means being proactive in the decision-making process. Raising concerns early in the process, before an application is filed if possible, also enables better participation by giving you more knowledge of the project, by reflecting the seriousness of your concerns, and by indicating your willingness to resolve issues collaboratively.

Admittedly, if you are outright opposed to a project, discussions with the proponent may be less effective. However, informing the proponent of your intent to oppose the authorization and providing reasons for your opposition can encourage the investigation of alternatives.

Communicating with the Director and the project proponent should not be excessive, to the point of badgering. Keep in contact often enough to be kept up to date about any new information that is available. Sometimes information will emerge between the time of the original application and the decision. All parties should be aware that you expect to receive all relevant information as it becomes available.

3.4.3 Practical aspects to communicating with the proponent and Alberta Environment

Document your communications. Do not rely on verbal promises. If the Director or a proponent indicates that the project is going to proceed in a certain way, ask for it in writing. Similarly, if you are given verbal commitments, be certain to send a letter or fax to both the regulator and the project proponent specifically outlining and confirming those commitments. Ensure that you have hard copies of all correspondence and related documents.

If the proponent is treating you unfairly or undermining the process this should also be documented.

Ensure any gaps or confusion regarding information about the project are addressed by the Director or the proponent. If you are presented with information that you do not understand or that seems unsubstantiated, ask for clarification or for information that supports the assertions that have been made.

Avoid personalizing the process or displaying disrespect and anger towards the regulator or the project proponent. While emotions may run high, particularly where environmental impacts may affect your property or your health or that of your family, it is important to realize that expressing anger or acting in a threatening manner is not likely to get you far with either the Director or the proponent.

3.4.4 Communicating with the media

Contacting the media to more broadly broadcast your concerns can be an effective means of building broader support in the community and, in turn, may make parties more open to compromise. Consider developing a strategy to best communicate with the media, identifying relevant media (television, radio, newspaper or online) and outlining the advantages and potential disadvantages. Some non-governmental organizations may be able to assist with media training or contacting the media. For more information please contact the ELC.

4. Identifying concerns

Identify and describe your concerns. The following questions may assist in this process:

1. What is the nature of your concerns with the project?
 - a. Are they general issues and concerns? (e.g., water quality, air quality, or cumulative impacts); or
 - b. Are they specific? (e.g. the impact of air emissions on my children's health or the impact of changing the hydrology near my land).
2. Do you have a hierarchy of concerns? As the authorization process continues it may be necessary to focus on you primary concerns. It can be easy to let smaller concerns dominate the process but this leads to less optimal results. Ensure that your primary concerns are clearly understood by the proponent and the government.
3. Are your issues open to a give and take or are they absolute? Knowing your bottom line makes for more efficient negotiations and discussions. Decide where you will draw the line as early as possible. Part of this process includes identifying if your concerns can be dealt with through operating or monitoring conditions being placed in the approval or licence.
4. What information or evidence do you have that supports your concern? What information is missing? Focus on concerns that have good supporting evidence to add to your bargaining power and credibility.
5. Are there any concerns with the process? Has the proponent been candid and upfront in dealing with you and do you feel you have sufficient information to participate? The government is concerned both about the substantive result and the fairness of the process. The Director will likely consider not issuing an authorization if he or she is of the opinion that the proponent did not respect your procedural rights or treated you unfairly. For this reason it is important to keep all documentation and notes from communications with the proponent.

6. Are your concerns relevant to the decision being made by the Director?
Raise those concerns that are relevant to environmental impacts of the proposed activity. Be prepared to justify how your concern is relevant to the authorization and why Alberta Environment should consider the matter in the authorization. At the same time, recognize when your concerns relate to decisions of other government departments or the municipality. (For a discussion of jurisdictional issues see Chapter 1).

5. The statement of concern

To participate in the Director's decision you must formally submit your concerns in a document referred to as your "statement of concern".

5.1 *What is a statement of concern and why is it important?*

A **statement of concern** is the written document, often in a letter format, that you submit to Alberta Environment that indicates your concerns regarding an application. Submitting a statement of concern with the Director is the main tool that ensures that Alberta Environment hears your concerns. The legislative appeal process relies on the filing of a statement of concern. For this reason your statement of concern should be the subject of considerable thought and preparation.

5.2 *Deadlines for filing a statement of concern*

Statements of concern must be submitted to the Director within a specified time. The Director and the Board will generally disregard statements of concern that are not submitted within the legislated timeline.

For **EPEA approvals** statements of concern must be submitted within **30 days** of the last posting of the notice of the application **or** within the timeline indicated in the notice itself.¹⁵⁵

For **Water Act approvals** you only have **7 days** from the last notice (or a longer time if indicated in the notice) to file a statements of concern.¹⁵⁶ For a **Water Act licence**, you have **30 days** from the last notice of the application or if a longer time is stated in the notice, from that stated time.¹⁵⁷

When determining the "due date" for your statement of concern consider the following:

¹⁵⁵ EPEA at s. 73 (2).

¹⁵⁶ Water Act at s. 109(2)(a).

¹⁵⁷ Water Act at s. 109(2)(b).

- If the date when the statement of concern must be submitted falls on a holiday, it must be submitted the next day that is not a holiday.¹⁵⁸
- If the date when the statement of concern must be submitted falls on a day in which Alberta Environment is not open during regular business hours you must submit it by the next day when Alberta Environment is open during regular business hours.¹⁵⁹
- When counting days you do not need to count the last day of the notice.¹⁶⁰

It is always better to submit your statement of concern early when possible. You should also ensure you have documentary or personal proof of when the statement of concern was received by Alberta Environment.

5.3 Extension of time for filing a statement of concern

There is no legislative provision that allows for the extension of time to submit a statement of concern to the Director. Submitting your statement of concern within the prescribed time is essential to a determination of whether you may be able to appeal the decision to the EAB.

5.4 Multiple authorizations and multiple statements of concern

Larger projects or activities with significant impacts will often require both an *EPEA* approval and a *Water Act* approval. If the activity requires a diversion or allocation of water a *Water Act* licence may also be required. Where multiple authorizations are required the published public notices will often cover all the authorizations. This can create confusion as the legislative timelines for filing a statement of concern for a *Water Act* approval and *EPEA* approval. Often the notice will state that all statements of concern are due by a certain date. If not, it is important to remember the different timelines.

For example, if the notice does not state a timeline and you file a statement of concern for both approvals 10 days after the notice, your ability to appeal the

¹⁵⁸ *Interpretation Act*, R.S.A. 2000, c. I-8 at s. 22(1).

¹⁵⁹ *Interpretation Act* at s. 22(2).

¹⁶⁰ *Interpretation Act* at s. 22(7).

Water Act approval will be lost because the legislated time to submit this statement of concern is 7 days. Filing a separate statement of concern for the *Water Act* approval and the *EPEA* approval will minimize this confusion.

Where multiple authorizations are required be sure that your statement of concern deals with issues specific to the licence or approval in question. This will enable you to focus your arguments in relation to the specific authorization.

5.5 Preparing your statement of concern

There is no mandatory form that a statement of concern must take. Typically, the statement of concern is a letter in which one describes the issues and concerns with the project that is proposed and a description of how the project is likely to impact you. Remember that your goal should always include showing how you are directly affected by the authorization. When preparing your statement of concern keep the following in mind:

5.5.1 The preferred outcome.

Be clear about your preferred outcome or the result you are seeking in relation to the proposed activity. Do you want the authorization to be refused outright? Do you want conditions placed on the authorization or a change to how the activity takes place? This helps focus on the issues of highest relevance and assists you in determining what information is most supportive of your position.

5.5.2 Illustrate how the activity directly affects you.

A statement of concern must outline how the proposed activity (or change in activity) is likely to directly impact you. Being “directly affected” is crucial to how your participation is considered by the Director (and by the EAB). What it means to be directly affected is described in detail later in this Chapter.

5.5.3 Outline your concerns.

Provide the Director with both your general and specific concerns. Defining your issues too narrowly in a statement of concern can create problems later on, as the Director and the EAB can limit the discussion to the issues raised in the statement of concern. Describe your concerns both generally and in a more

detailed manner. This can help preserve your ability to address issues or include new information that arises later.

For example, if you are concerned with emissions into the water in general and the temperature of the water in particular, be sure to structure your statement of concern to include both. This preserves your ability to later address other emissions issues that you may not have known about at the time of filing the statement of concern. That said, if you only have a very specific concern with the project focusing on that concern alone may allow for a quicker resolution of your concerns.

5.5.4 Provide evidence demonstrating the validity of your concerns.

Provide information that demonstrates your concerns are valid. This information may include personal and expert knowledge, information supplied by the proponent in support of their application, government information and reports, or other scientific reports regarding environmental impacts. This information should illustrate that you have cause for concern.

5.5.5 Identify gaps in information or uncertainties.

Often approvals and licences are granted notwithstanding significant uncertainty about the activity's impacts on the environment. It is important to target these uncertainties, as this illustrates that the necessary baseline information to discern project impacts is lacking. These knowledge gaps and uncertainties support arguments that the approval or licence should be denied or accompanied by significant conditions that must be satisfied prior to the activity commencing.

5.5.6 Relate your concerns to the relevant piece of legislation and the government's mandate.

The purpose sections of the legislation (that are outlined at pages 55-57 of this guide) may assist in linking your concerns to the government's mandate. You may want to state how your issues relate directly to a stated legislative purpose.

Also there may be policy or guideline documents that apply in certain situations. These documents can be obtained from Alberta Environment and are usually

available on the government's website. Some examples of matters dealt with in policy include:

- Ambient air quality;
- Surface water quality guidelines;
- Provincial wetland restoration and compensation;
- Water quality based effluent limits; and
- Soil and groundwater remediation guidelines.

Ask the Director whether there are any standards, guidelines or other policy related documents that relate to the proposed activity.

The ELC can also provide you with some information regarding where to find government guidelines and how they might impact how an authorization is approached.

5.5.7 Provide recommendations for conditions on the approval.

Conditions on an approval are common and are a primary method of addressing concerns about the environmental impact of an activity. If you wish to have specific monitoring conditions, reporting conditions, or any other condition on the approval, include them in your statement of concern, along with justification for why the conditions should be considered. The Director will consider whether a condition is justified and whether it is too onerous in a given circumstance.

For ideas about possible conditions see page 62.

5.6 *What should not go in a statement of concern?*

In drafting a statement of concern it is important to consider the jurisdictional constraints of Alberta Environment and to target issues that the department has the power to address. It can undermine your submission if you linger on issues that Alberta Environment has no legislative power to regulate.

For example, issues that are typically cited in statements of concern that Alberta Environment has no control over include:

- wildlife management and preservation (although it may be relevant to environmental impacts);
- public land use and access;
- forestry or mining practices; and
- municipal zoning or planning.

Alberta Environment is not able to place conditions on an approval related to these matters. Indeed, if the department attempted to regulate these issues the proponent could challenge such conditions on the basis that Alberta Environment exceeded its jurisdiction.

This jurisdictional limitation on government action is frustrating since it can mean that environmental concerns go unaddressed. This is a result of problems with the legislation governing these other areas and not of the department itself. Frustration will be heightened further because many decisions regarding resource extraction activities, land use planning, zoning and subdivision decisions, and forestry decisions do not have the same participation opportunities as the *Water Act* and *EPEA*.

Alberta Environment has the discretion under *EPEA* to refuse to issue an approval or licence based on a broad range of environmental impacts. Section 68 of *EPEA* states that “the Director may issue or refuse to issue an approval or registration”. Since the purpose of the legislation includes protection of the environment it is logical to conclude that any impact on the environment can be used to justify a refusal to issue an approval, as long as it is reasonable. The department should be reminded of its broad mandate.

6. What does it mean to be “directly affected”?

Your legal right to participate in the authorization process depends on whether you are “directly affected.” Both the Director and the EAB will make this determination; each will decide your “directly affected” status independently and each body may come to a different conclusion. A finding that you are not directly affected strongly limits your ability to participate in the decision being made.

6.1 *Establishing being “directly affected” before the Director*

In preparing your statement of concern be sure to outline how you are “directly affected”. The Director’s decision is guided by government policy on “directly affected” status, but this policy is not binding. Current policy regarding the “directly affected” determination is focused on residency and whether you live near the area of possible impact.¹⁶¹ Organizations or groups with concerns about impacts will usually only be recognized as being “directly affected” if some of their members live within the area of possible impact. Visiting an area periodically will not generally be considered sufficient; having a residence in the area is usually required.

Some factors relevant to being considered “directly affected” include:

- How the activity will likely impact you as an individual.
 - This impact may be based on your residency or geographic location or it may be a result of a specific impact. Indicate how the activity will impact you in a manner that is different from its impact on the general public.
- Describe your interests (legal or otherwise) that are affected.
 - If you reside in the area that might be impacted indicate where you live (with your legal land description) relative to the proposed activity.

¹⁶¹ Alberta Environment, Program Policy, Environmental Sciences Division. Policy No. ES-99-PP3, February 2000.

- Outline the frequency and nature of your activities in the area where impacts may occur.
- Outline how the activity will have a likely impact on any economic interests you may have.
- Outline how the project may impact any of the air, land and water, particularly where you use or rely on these resources. This can include impacts on your property or impacts on your ability to access water for household or other authorized uses.¹⁶²

If you are not considered directly affected it is current government policy to send you a letter indicating that you have not met their criteria and that no further information about the decision-making process or the decision itself will be provided to you.¹⁶³

6.2 Directly affected status frustrations

If you are unable to establish that you are directly affected, your legal rights to participate in the process are limited. Alberta Environment and the proponent may minimize or stop communication with you because all legislative requirements to include you in the process will no longer apply.

Common sources of frustration with the directly affected determination arise in several areas, including:

- where the impacted interest is of a recreational and cultural nature,¹⁶⁴
- where the interest involves public land, unless you have a lease (or some other disposition) on the land in question; and

¹⁶² Economic interests that are more general, such as municipal or provincial taxes, will not be enough to establish directly affected status. See *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar Development Company*, December 28, 2001, Appeal No. 01-074-D (A.E.A.B.).

¹⁶³ See Alberta Environment, Program Policy, Environmental Sciences Division. Policy No. ES-99-PP3, February 2000, at s. V.

¹⁶⁴ Arguments against a more liberal approach to interpreting who is “directly affected” by an activity relate to claims that public participation would be too open ended, frivolous and unsubstantiated concerns would be raised, that efficiency would be lost and that general environmental concerns should be dealt with on a political level.

- where the impacts are the result of the cumulative effects of development.

The Director's determination that you are not "directly affected" by an activity ends your ability to effectively participate in the initial authorization process but does not mean you are restrained from appealing the decision to the EAB or, in limited instances, challenging the Director's decision in court.¹⁶⁵ (For information about the possibility of court challenges see the discussion regarding Judicial Review at Part IV of this Guide). Keep in mind, however, that even if you are not deemed "directly affected" you can still participate in informal processes to make your concerns known, including participating in political activity and generating media pressure around the activity.

7. The decision

Individuals who are directly affected and have filed a statement of concern will be given notice of the decision regarding the approval or licence application.¹⁶⁶ This notice triggers the timeline for filing an appeal with the EAB.

The legislation only requires that notice be given to directly affected parties who have submitted statements of concern within the prescribed time. Where it has been determined that you are not directly affected or where you filed a statement of concern late, the Director will likely not provide you with a notice of his/her decision.

This creates a problem because without notice of the approval or licence decision the deadline for an appeal to the EAB may pass without you being aware of it. Since the EAB may consider you directly affected even though the Director did not, this notice can be very important. One of the only ways to ensure you get notice of the decision is to continue to contact the Director on a regular (weekly) basis to see if his or her decision has been made yet.

¹⁶⁵ While the determination of whether you are directly affected is discretionary there are limits to that discretion, as a decision regarding "directly affected" status is reviewable by the courts. The Director must ensure that the decision about whether you are "directly affected" is not "patently unreasonable" in the view of the court. This means that, if the Director's decision is clearly irrational or "not in accordance with reason", the court may quash or nullify that decision. See *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, 1993 CanLII 125 (S.C.C.) and *McDonald v. Calgary (City of)*, 2003 ABCA 103 (CanLII).

¹⁶⁶ *EPEA* at s. 74 and *Water Act* at s. 111(2)-(3).

Some attempts have been made to appeal the Director's decision regarding directly affected status (which is made early on in the process) to the EAB but this has been unsuccessful. Only the final decision of the Director may be appealed to the EAB.

A sample statement of concern is provided in Appendix E.

8. Costs of participating in the Director's decision

Participating in the Director's decision can be costly, particularly if you have hired a lawyer or other experts to assist you. These costs are not generally recoverable. This is in contrast to appeals of the Director's decision where some costs may be awarded to the appellant by the EAB.

In certain instances you may wish to request that the proponent of the activity cover some of your costs, however the proponent is not obliged to do so.

Part II:

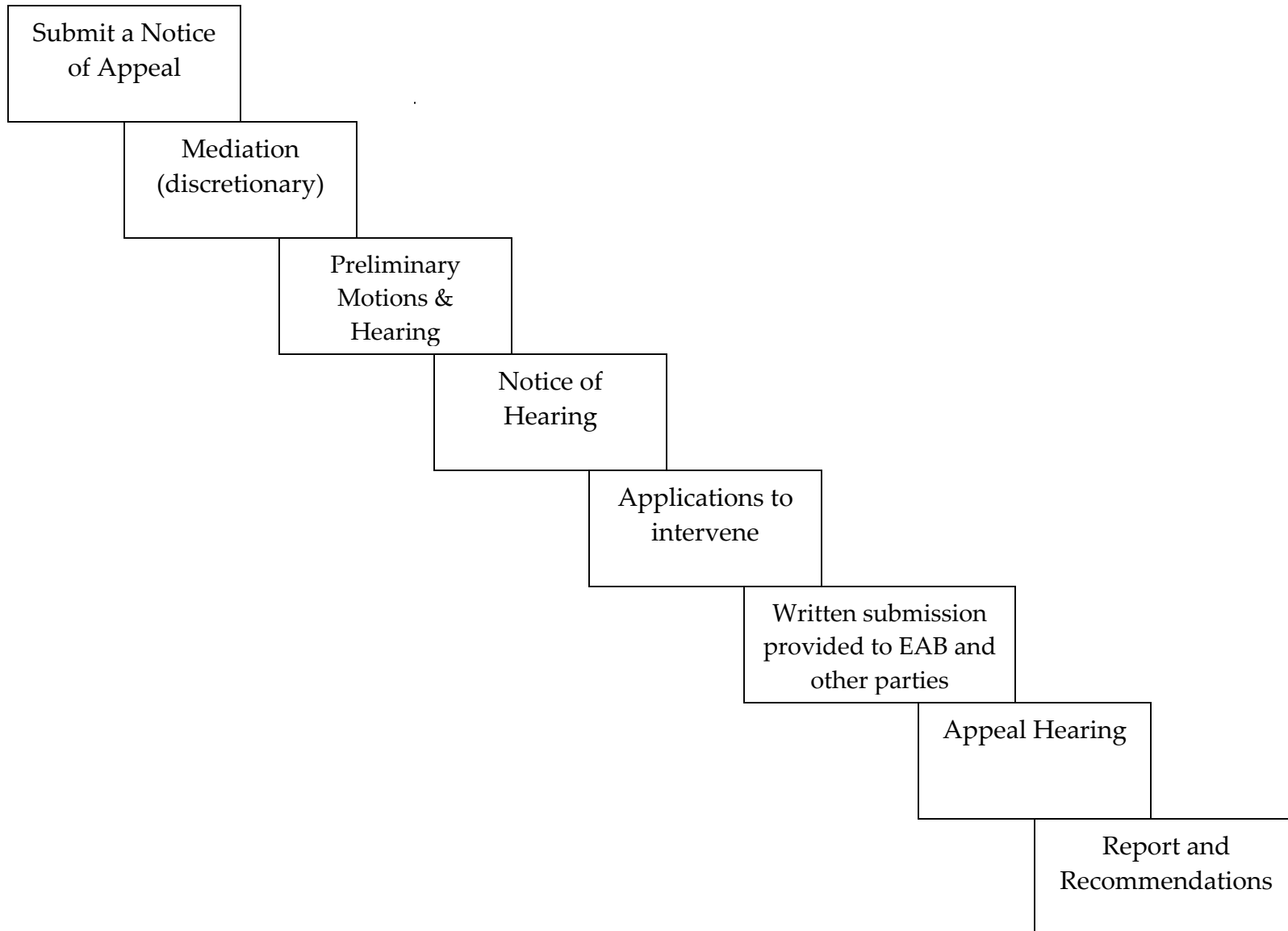
Appealing an Approval or Licence to the Environmental Appeals Board

Keywords: appeal, Environmental Appeals Board, EAB, directly affected, notice of appeal, statement of concern, hearing, preliminary motion, costs, intervening, mediation

For quick references to key words use the Adobe search function

You should not rely on this guide as legal advice. The information provided in this guide is current to April, 2009. Keep in mind that laws and policies are subject to change. Please contact Alberta Environment, the Alberta Environmental Appeals Board or the Environmental Law Centre for further information. For legal advice regarding the need for authorizations or permits contact the relevant government department or a lawyer.

Steps in an Appeal



Chapter 1: Introduction to the Environmental Appeals Board (EAB)

Quick reference: Appeals -Appendix C.

1. What is the EAB?

The Alberta Environmental Appeals Board or EAB is an administrative board created by the *Environmental Protection and Enhancement Act (EPEA)*. The EAB deals with appeals of a variety of government decisions under *EPEA*, the *Water Act*, the *Government Organizations Act*, and the *Climate Change Emissions Management Act*. *EPEA* and its regulations govern how the EAB conducts appeals and gives effect to its decisions.¹⁶⁷ The Board is made up of members that are appointed by the provincial Cabinet (through the Lieutenant Governor in Council) and sits as a panel of 3-5 members.¹⁶⁸

2. What power does the EAB have?

The EAB's powers vary depending on the decision that it is reviewing. If decisions deal with appeals of *EPEA* approvals or *Water Act* approvals or licences, the EAB makes recommendations to the Minister regarding the authorization in question. It is up to the Minister to adopt or reject these recommendations. In most cases, the Minister adopts the recommendations of the EAB.

The EAB can make final decisions in relation to administrative penalties and regarding the confidentiality of documents submitted by an applicant for an authorization.

The EAB also hears appeals involving reclamation certificates, environmental protection orders, enforcement orders and water management orders.¹⁶⁹ For these appeals the EAB provides the Minister with a report and recommendations that are only advisory in nature. The Minister usually adopts the Board's recommendations into his or her decision.

¹⁶⁷ The most relevant regulation for this section is the *Environmental Appeal Board Regulation*, Alta. Reg. 114/1993 (*EABR*).

¹⁶⁸ See *EPEA* at s. 90, and *EABR* at s. 6.

¹⁶⁹ See *EPEA* at ss. 99 and 91.

3. What decisions may be appealed?

The decisions that are most commonly appealed are those of the Director in relation to the issuance, amendment or termination of an approval or licence. Decisions regarding enforcement orders, environmental protection orders, administrative penalties, and reclamation certificates can also be appealed.

The type of decision being appealed also dictates who can appeal. For decisions about approvals and licences, only the proponent and those parties who are considered directly affected and have filed a valid statement of concern with the Director can appeal.

See directly affected discussion at Chapter 3, Part II.

4. What decisions may not be appealed?

The EAB will not allow an appeal of a decision to go ahead in certain instances. An appeal will not proceed if the issues on appeal have already been considered in a hearing before the Energy Resources Conservation Board (ERCB), the Alberta Utilities Commission (AUC) or the Natural Resources Conservation Board (NRCB).¹⁷⁰ Similarly, if the government has participated in a public review of the issues through a federal environmental assessment, the EAB will dismiss the appeal.¹⁷¹

5. The role of past EAB and court decisions: case precedents

The EAB is not bound by previous decisions it has made.¹⁷² However, previous EAB decisions are still relevant because the principles and rules outlined in the

¹⁷⁰ See *EPEA* at s. 95.

¹⁷¹ See *EPEA* at s. 95. There are other decisions of the Director that are not subject to an appeal. For instance, decisions regarding notices and registrations do not have a right of appeal associated with them.

¹⁷² Where an administrative body or court makes a decision it may become binding on future decisions. It is said that the previous decision takes “precedence” over subsequent decisions, indicating how decisions will be made in the future. The value of precedence is that it gives the participants in the hearing an understanding of what to expect. Whether a decision-maker is

decisions will often be applied in subsequent decisions. The EAB has, for the most part, maintained consistent approaches to dealing with issues. Therefore you can often rely on the EAB's historical approach to a given issue.

Decisions by Alberta courts concerning EAB process or a particular EAB decision are binding on the EAB. Subsequent EAB decisions must follow the court's decisions unless the circumstances can be distinguished from the court decision.

EAB decisions are available from the ELC library, the EAB office (phone: (780) 427-6207) or on the EAB's website <www.eab.gov.ab.ca>. Alberta court decisions are available on the Alberta Courts website <www.albertacourts.ab.ca> or from the courthouse where the decision was made. Some court decisions are available on a free online database administered by the Canadian Legal Information Institute <www.canlii.org>.

6. Information the EAB can consider

The information presented to the EAB in a hearing is not limited to that received by the Director. The appeal to the EAB is one that is "*de novo*" or "of anew." This means that the EAB can consider things that the Director did not, or was not able to consider in the initial decision. Typically the EAB will consider the information that the Director possessed to make the decision and any other information the Board determines as relevant. The EAB has the discretion to disallow new evidence and may do this if it feels that there is some prejudice created by the new information.

7. Roles of different parties in the appeal

An EAB appeal hearing is based in a traditional adversarial process and each party's role reflects this fact. It is important to understand the role of all parties to the appeal.

7.1 The role of EAB staff and counsel

The role of the EAB staff and counsel is to have the hearing proceed in a fair and balanced manner and in accordance with the Board's own rules of procedure.

bound by previous decisions (whether their own or others) varies between administrative Boards and Courts.

The EAB staff and counsel should not advocate a specific position, including your position. The EAB's counsel can describe the legal processes, the basis for specific motions being made, and give you information relating to your rights in the process. The EAB's counsel is not able provide you with strategic or legal advice or direction. Advice on strategy is only obtained through hiring a lawyer on your own.

7.2 The role of counsel for the proponent

The role of proponent's counsel is to ensure that the interests of their client are protected to the greatest extent possible. This means that they will negotiate on some issues and not on others, depending on what they conclude as being the best result for their client in the situation. The proponent's counsel may use the process and Board precedent to challenge the validity of the appeal, the standing of parties, and attack the credibility of witnesses appearing for the opposing side.

7.3 The role of Alberta Environment and its counsel

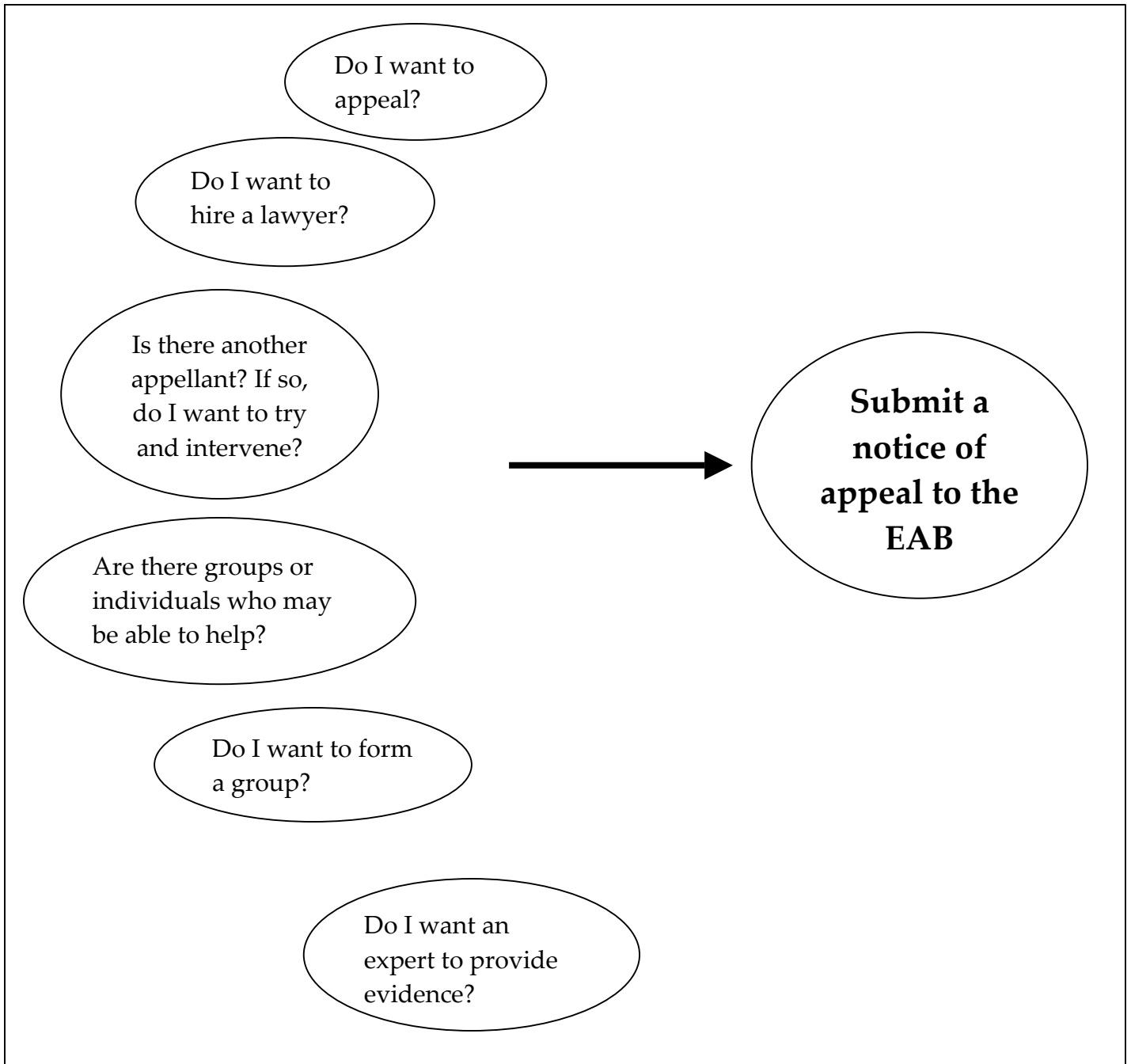
The role of Alberta Environment during the appeal is to provide information about the legislative framework of the decision and to outline the process and substance of the Director's decision. Alberta Environment may challenge a person's standing to participate in an appeal based on the fact that Alberta Environment did not recognize the person as having standing. The government may therefore seem to advocate for a certain position.

The government's legal counsel will always accompany staff from Alberta Environment to the hearing. This counsel will play the same role as other counsel at the hearing, namely asking direct and cross-examination questions of witnesses, raising procedural motions, and submitting oral or written arguments. The government's legal counsel cannot give you strategic advice. They represent the interests of the government.

Chapter 2: Your role in the appeal and being effective

This chapter discusses the role you can play in an appeal and some approaches to mounting an effective appeal. Some of the key preliminary decisions you must make are outlined in Figure G.

Figure G: Preliminary questions – deciding to appeal



1. Deciding whether to appeal

The Director has made a decision regarding an approval or licence. Now what? If you disagree or object to all or part of the Director's decision you need to decide whether you will appeal the decision or, if others are appealing the decision, whether you want to try to intervene and give evidence before the EAB.

If you want to appeal the decision yourself, you will be required to file a **notice of appeal**, discussed in **Chapter 3, Part II**. If other individuals are appealing the decision and you do not want to be a party to the appeal but still want to try and present evidence on the issues you may choose to try to "intervene" in the hearing.

2. Intervening on an appeal

Intervening on an appeal means that you are not considered a true appellant of the decision but that you feel you have relevant information to provide the EAB on the issues being heard in the appeal. Intervenors are typically parties who have an interest in the outcome of the appeal for financial, environmental, social or personal reasons. To be recognized as an intervenor you need to apply to the EAB. See Chapter 4, Part II for more details regarding applying to be an intervenor.

3. Appealing as a group or an individual

Participating on your own or with a group will change your role in the appeal considerably. Appealing as a group carries similar advantages and disadvantages as participating in the Director's initial decision. These advantages and disadvantages are discussed in Chapter 8, Part I of this guide and are summarized in Table 5.

Table 5: Advantages and disadvantages of forming a group.

Advantages	Disadvantages
<ul style="list-style-type: none"> • sharing costs • sharing information • sharing preparation time • power in numbers • ability to network and get media involvement 	<ul style="list-style-type: none"> • giving up a level of control in the appeal • having your issue lost in the group’s issues • the appearance of fewer parties with concerns

The EAB will often recognize the efficiency gains by like-minded citizens forming groups. If the evidence that you are going to present to the EAB is similar to that of another group, it is a good idea to join forces. If you attempt to go it alone and have evidence that is similar to others, the EAB may be less likely to award costs of bringing your evidence.

If you form a group it will be worthwhile choosing someone to be the primary contact person with any experts and/or legal counsel you may have retained. This “point” person provides some protection against various instructions making their way to your experts and promotes thorough discussion among the group prior to directions being given. This will also make the life of your expert or lawyer much easier and minimize costs.

3.1 Group standing: a potential barrier to participating in a group appeal

When considering whether to appeal as part of a group you should consider whether the members of the group will be recognized as having standing (or being “directly affected”). The EAB has taken the position that a group will only be recognized as having standing if the majority of its members meet its “directly affected” test as individuals.¹⁷³ The EAB will often require that individuals of a group each file separate notices of appeal to establish that they are directly affected.

You may want to advocate that Alberta Environment and the EAB alter their approach to group standing to encourage the efficient participation of groups in

¹⁷³ See *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).

environment decision-making process.¹⁷⁴ Until the approach to groups changes you may wish to bring an appeal as an individual rather than as a group in cases where few individuals in a group are “directly affected” by the Director’s decision. Members of your community who are not considered “directly affected” may want to form an informal group to assist in information gathering, witness recruitment, cost sharing and preparation for the hearing. This informal group may also wish to intervene in the hearing.

See Chapter 4, Part II for a discussion of being an intervenor.
See Chapter 3, Part II for a discussion of being directly affected.

4. Deciding whether to hire a lawyer

The decision whether to hire a lawyer is not an easy one as lawyers are often expensive. Some lawyers may be willing to assist you on a reduced rate or, in rare cases, for free (pro bono). Also, while the EAB has the discretion to award costs to assist in covering the expense of a lawyer this is not usually enough to cover all the costs associated with having legal representation at the hearing.

See Chapter 11, Part II for a discussion of costs.

The cost of hiring legal counsel should be viewed in light of some advantages gained by doing so. Namely, in hiring a lawyer you gain:

- experience with direct and cross-examination of witnesses;
- experience and expertise in structuring and presenting written and oral arguments;
- knowledge of procedures and rights associated with board processes;
- a direct advocate pursuing your interests; and

¹⁷⁴ This is a recommendation of the ELC. See Cindy Chiasson & Jodie Hierlmeier, *Public Access to Environmental Appeals: A Review and Assessment of Alberta’s Environmental Appeals Board* (Environmental Law Centre: Edmonton, 2006) at 29-32.

- a leveling of the playing field (as the project proponent and government typically have legal counsel).¹⁷⁵

4.1 Finding legal counsel and expert assistance

There are a variety of ways to find legal counsel. If you have a lawyer you deal with already you may wish to ask them if they have experience appearing before boards like the EAB. You can also get a lawyer referral through the Law Society of Alberta (Referral Service – Phone Number: 1-800-661-1095 or 403-228-1722) or through the ELC lawyer referral service (1-800-661-4238 or 780-424-5099). The ELC maintains a list of lawyers who have volunteered to be listed. These lawyers have experience with various aspects of environmental and natural resources law.

Most larger law firms also have a regulatory or environmental law practice with lawyers who may be able to represent you. In all cases a lawyer is prevented from representing you if their firm is acting (or has recently acted) on behalf of another party that is a party to the appeal.

4.2 Working with your lawyer

Consider the following when working with your lawyer:

- be open and frank about all the facts and issues;
- be succinct but thorough when sharing information;
- provide information requested by your lawyer in a timely manner;
- focus on your issues and information of greatest relevance;
- ensure directions and advice are clear and well understood;
- organize your evidence;

¹⁷⁵ Cindy Chiasson & Jodie Hierlmeier, *Public Access to Environmental Appeals: A Review and Assessment of Alberta's Environmental Appeals Board* (Environmental Law Centre: Edmonton, 2006) at 52-58.

- be prepared when it comes to giving evidence; and
- help with leg work, such as finding experts and other relevant information.

When working with your lawyer it is important to be conscious of the costs that may be accumulating. Lawyers typically bill by the hour (although not in all cases) so you should use the lawyer's time wisely. If your lawyer has to travel to visit you the costs of travel and travel time will likely be charged to your account. If possible, minimize the travel expenses for all involved.

It is important that you are completely candid with your lawyer about your issues and concerns and that you disclose all information relating to the application process, interactions with the proponent, interactions with the government, and with any other parties that may have an impact on the issues that form the appeal.

Be thorough in the information you provide your lawyer but also be succinct and to the point. Not only will this minimize legal costs it will ensure that the lawyer can focus on the key aspects of your appeal.

Doing some legwork on your own in relation to research and finding relevant information, witnesses and documents can be helpful and can minimize legal costs. Your lawyer will review all this information and advise you as to its relevance to the issues on appeal. Again, make an effort to only bring documents that are relevant to the issues and concerns you have (to minimize costs). If you are uncertain of the relevance of specific issues or documents, ask.

4.3 Keeping things in perspective

Recognize the limits of both your appeal and the ability of your lawyer to "win". The outcomes of an appeal are often not fully satisfactory to any party. Hiring a lawyer does not guarantee that this will change. Hiring a lawyer will assist you in organizing and presenting your case, particularly in relation to legal issues that may need to be addressed by the EAB (or a court). The EAB itself states that appellants should not be discouraged from representing themselves. To a significant degree, the decision to hire a lawyer will be a financial one. The decision will also be based on how comfortable you are with meeting the requirements of the appeal process.

5. Deciding whether to hire an expert witness

As with lawyers, expert witnesses cost money. Nevertheless, the knowledge and expertise of an expert witness is often worth it. An expert can:

- provide the necessary evidence to the EAB by proving how an approval may adversely impact you;
- outline viable alternatives to the proponent's proposal;
- describe complex and technical issues to the EAB in an effective manner; and
- review and critique technical information provided by the proponent and/or Alberta Environment.

In deciding whether to retain an expert remember that the credibility of the witness will likely be questioned. An expert that is an outspoken advocate on a specific issue may not hold as much sway with the EAB when compared to an expert that is seen as more objective.

Experts can be found in universities, colleges and consulting firms. Finding an expert to hire can be frustrating as many consulting firms hesitate to work for landowners for fear of losing future business opportunities with industry clients.

6. Making your appeal effective

Bringing an effective appeal requires being organized, networking and persevering when faced with conflict.

6.1 *Being organized*

It is very important to be organized, to ensure that all deadlines are met and to gather all relevant evidence and present it in an instructive and straightforward manner. Be sure that deadlines given by the EAB are put into a day timer and that you are well prepared for meetings and the hearing.

6.2 *Record Keeping*

It is important to keep all records dealing with the hearing. Keep a log of time spent on the appeal and the expenses incurred related to the appeal. Keep records of written and oral communications with the approval holder and the government. If the approval holder or the government gives oral promises, confirm them in writing.

6.3 *Dealing with costs*

Whether you are an individual or a group the costs of an appeal can be daunting. Whenever possible, seek free assistance. Ask experts or lawyers if they can work for a reduced fee or pro bono. Canvass others in your community with similar concerns to see if they wish to form a group and provide resources to appeal the Director's decision. The group can, if necessary, pursue other fundraising efforts in the community.

Also, identify any groups or organizations that may be able to assist you in your appeal. Several non-governmental organizations have experience in the hearing process and often know of experts that may be contacted. These organizations may look at the issues in your appeal to determine whether getting involved fits with their goals and objectives.

If you need funds to hire an expert who is central to your participation, you can seek interim costs from the EAB.

For more information on applying for interim costs see Chapter 4, Part II.
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6.4 *Networking*

It is important to have as many people as possible who submitted statements of concern to the Director to communicate their concerns to the EAB. Connecting with people with similar concerns is also a good way to share resources and the workload. Consider contacting non-governmental organizations (NGOs) who may have similar concerns and may have expertise. NGOs and individuals who have not submitted a statement of concern who are not considered "directly affected" may not be able to directly participate in the hearing but they may be able to intervene or provide other assistance on the appeal.

Consider contacting the media to get some local or regional coverage of your concerns. This can be an effective way to make further contacts with concerned citizens and to foster greater participation.

6.5 *Persevere*

Participating in an appeal is a lot of work. The process can be frustrating and drawn out but the results can be worth it. Sometimes others in your community may be against you participating and they may attempt to pressure you to withdraw your appeal. Persevere in conveying your concerns to others in your community so that there is a broader and more thorough understanding of the concerns you have.

Part of this perseverance is recognizing the need to comply with the EAB's procedural rules. This requires responding to questions from the EAB and other parties, writing letters to the EAB, and allowing other parties sufficient time to respond.

Chapter 3: Initiating the appeal

1. Who can appeal a decision?

Your ability to appeal the Director's decision depends on the nature of the decision being made. Appeals regarding the issuance or amendment of an approval or licence can be initiated by the proponent or a person who:¹⁷⁶

- is recognized as being “directly affected” by the authorized activity; and
- has submitted a statement of concern to the Director within the required time.

For more information regarding a statement of concern see Chapter 8, Part I.

Other decisions of the Director, like those dealing with enforcement orders, reclamation certificates or environmental protection orders, can only be appealed by the person who is the subject of the order.¹⁷⁷ These types of appeals are not covered in this Guide; the focus of this guide is on appealing approval or licence decisions and on appellants who are or may be directly affected.

2. How is the appeal initiated?

An appeal is initiated by submitting a “notice of appeal” to the EAB. The notice of appeal must be submitted within a set time after the Director has given notice of an approval or licence decision. This is only the first step in the process and does not necessarily mean an appeal hearing will be held.

2.1 *Timeline for filing a notice of appeal*

A notice of appeal must be submitted to the EAB within the following times:

¹⁷⁶ EPEA at ss. 91(1)(a).

¹⁷⁷ EPEA at ss. 91(1)(e) & (h).

- **An approval under EPEA – within 30 days** from receipt of notice of the decision or from the last date on which the notice was provided.¹⁷⁸
- **An approval under the *Water Act* – within 7 days** from receipt of notice of the decision or from the last date on which the notice was provided.¹⁷⁹
- **A licence under the *Water Act* –within 30 days** from receipt of notice of the decision or from the last date on which the notice was provided.¹⁸⁰

Failing to file a notice of appeal within the time prescribed will usually prevent an appeal from proceeding.

2.2 EAB’s discretion to extend the time to file a notice of appeal

The EAB has the discretion to extend the time for submitting a notice of appeal.¹⁸¹ The EAB may grant an extension on its own accord or in response to an application to extend the time for filing.¹⁸² An application for a time extension should be made as early as possible. The EAB has the ability to extend the appeal at any time, but the earlier you apply the better.¹⁸³

The EAB will only grant an extension of time where there are “sufficient grounds” to do so.¹⁸⁴ Extensions of time are rare and will only be allowed where there is some significant intervening issue that makes the timeline unreasonable.

The EAB has found that an extension of time was *not* warranted in the following instances:

¹⁷⁸ EPEA at s. 91(4).

¹⁷⁹ *Water Act* at s. 116(1)(a)(ii).

¹⁸⁰ *Water Act* at s. 116(1)(b). Other timelines include an enforcement order pursuant to the *Government Organizations Act* – within 7 days after receipt of a copy of the enforcement order, R.S.A. 2000, c. G-10, Schedule 5 at section 6(2); a compliance order under the *Climate Change Emissions Management Act* – within 7 days of receipt of the order, S.A. 2003, c. C-16.7, section 42(2)(a); and an administrative penalty under the *Climate Change Emissions Management Act* –within 30 days of receipt of the order, *Climate Change Emissions Management Act* at section 42(2)(b).

¹⁸¹ EPEA at s. 93.

¹⁸² EPEA at ss. 91(5) and 93.

¹⁸³ EPEA at ss. 91(5) and 93.

¹⁸⁴ EPEA at ss. 91(5) and 93.

- the appellant was out of the country or away from home during the notice period and responded when they returned; and¹⁸⁵
- the appellant received fresh evidence, in the form of an engineering report, revealing environmental concerns that would adversely affect them.¹⁸⁶

Typically, failure to receive actual notice of the Director's decision will generally not be viewed as a sufficient reason for an extension.¹⁸⁷ In one case, however, it was found that the failure to have actual notice was sufficient to extend the time for an appeal where there was ongoing consultation with Alberta Environment, although the reason for granting the extension is unclear.¹⁸⁸

2.3 Required contents of a notice of appeal

The easiest way to file a notice of appeal is to use the form available from the EAB. It can be downloaded or printed from the EAB website and can be submitted online <<http://www3.gov.ab.ca/appeal2.htm>>.

If you chose to draft your own Notice of Appeal it must contain the following information:¹⁸⁹

- reference to the section of the legislation under which the appeal is made. (Typically this is section 91(1)(a) of *EPEA* for approvals, or for the *Water Act*, s.115(a)(i) for approvals and s. 115(c)(i) for licences);¹⁹⁰
- the name and title of the party whose decision is being appealed (typically the name of the Director and his or her region);

¹⁸⁵ *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) and *Salsauler v. Director, Prairie Region, Alberta Environment, re: The Owners Condominium Corporation 9311680* (11 February 2000) Appeal No. 99-168 (AEAB).

¹⁸⁶ *North Springbank Water Co-op Limited, Municipal District of Rocky View No. 44 v. Director of Southern East Slopes and Prairie Regions, Alberta Environmental Protection* (17 April 1998) Appeal No. 98-012 (AEAB).

¹⁸⁷ See *Rew v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (30 October 2003) Appeal No. 03-138-D (AEAB).

¹⁸⁸ See *Métis Nation of Alberta Zone II Regional Council v. Director, Bow Region, Environmental Service, Alberta Environment re: AEC Pipelines Ltd.* (20 March 2001) Appeal No. 00-073 (AEAB).

¹⁸⁹ *Environmental Appeal Board Regulation* at s. 5.

¹⁹⁰ Appeals may also be made under the see the *Government Organizations Act*, R.S.A. 2000, c. G-10 and the *Climate Change Emissions Management Act*, S.A. 2003, c. C-16.7.

- the result you would like to see from the appeal. For example, you could seek new conditions on the approval, or you could seek to overturn the approval in its entirety;
- the signature of the party appealing (or their lawyer or agent); and
- an address for service, that is either your address or that of your lawyer or agent.

2.4 Participating effectively - drafting a notice of appeal

The contents of a notice of appeal have significant implications on how the appeal will proceed. The notice of appeal form asks you to answer the following questions:¹⁹¹

- What parts of Alberta Environment's decision do you not like?
- What are your concerns with respect to Alberta Environment's decision?
- How is Alberta Environment's decision affecting you?
- Why do you not like the decision made by Alberta Environment?
- What would you like the Board to do to resolve your appeal?

2.4.1 Identifying your concerns

It is important to clearly identify your concerns in the notice of appeal. This is because the concerns or issues raised in the notice will dictate what the EAB will consider on appeal. The EAB is unlikely to deal with issues and concerns that you do not raise in your notice of appeal. Identify both general concerns and specific concerns in preparing your notice. The narrower your concerns are described in the notice of appeal the narrower the issue that will be dealt with on appeal.

¹⁹¹ Environmental Appeals Board, *Appeal Online*, online: Environmental Appeals Board, <<http://www.eab.gov.ab.ca/appeal2.htm>> at parts III-V.

Take some time to identify, describe and prioritize the issues and concerns you have with the Director's decision. Detail how the Director's decision is inadequate, both generally and specifically, in dealing with your concerns.

2.4.2 Establishing how the decision affects you – “directly affected” status

The notice of appeal is the main tool used to demonstrate to the EAB that you are directly affected. To be directly affected you must show that you have a private interest of an economic, personal, or environmental nature that will be directly or closely impacted by the approval that was issued or amended by the Director.¹⁹² This means you need to communicate:

- the type of interest being impacted or potentially being impacted by the approval or licence (i.e. environmental degradation, economic, social);
- the nature of the impact (or potential impact) on that interest, including:
 - the directness of the impact on the economic or environmental interest;
 - the amount or size of impact that the approval will have on your interest; and
 - the likelihood that the impact will occur.

“Directly affected” questions to be answered in your notice of appeal

- What are the interests I have that will be impacted?
- Will the approved activity have an environmental impact on my land?
- Will the approved activity have an economic impact on my land?
- Will the approved activity have an environmental impact on my health, that of my family or that of animals on my property?

¹⁹² See *Dr. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection* (23 August 1995) Appeal No. 94-017 (AEAB).

- Might the approved activity give rise to emergencies that may impact my interests?
- Will the approved activity interfere with the use and enjoyment of my land?
- What is the proximity of the approved activity to my land?
- What is the likelihood my interests will be impacted?

Remember that the EAB's view of who is "directly affected" may differ from Alberta Environment's but both typically approach the issue in a similar way; the further away you are from the activity the less likely you are going to be considered "directly affected". Also, the more general in nature the interest that is being affected, the less likely you are to be considered directly affected.

Examples of being directly affected:

- ❑ The activity will alter surface water run off on your land.
- ❑ The activity may reduce the water supply to your land.
- ❑ The activity will result in air pollution that will directly impact your land or residence.
- ❑ The activity will result in you, your family or animals being exposed to pollutants or other materials that are not naturally present.
- ❑ The activity has certain risks that may result in unforeseen emissions that might affect your land, water or air, or the health of you and your family.
- ❑ The activity will have a direct impact on your livelihood; for instance, emissions will compromise crops or the activity interferes with your ecotourism business.

Examples of where you are not likely to be found directly affected:

- Your concern relates solely to cumulative impacts of a development.
- You live in the region and have general concerns about air or water quality.
- You fish in a river recreationally and have concerns about the impacts of a development on the fish.
- You hike in the area regularly but have no direct economic ties to the area.

Also see the discussion regarding “directly affected” in relation to the Director’s decision in Chapter 10, Part I.

2.4.3 Make recommendations

Present recommendations to the EAB so that it can adopt these recommendations to resolve your concerns. If you are asking the EAB to recommend overturning a decision, provide reasons why the Director’s decision was inappropriate. If your concerns can be remedied by adding conditions to the approval or licence, state what those conditions are and how they will address your concerns.

Notice of appeal checklist

- The inadequacy of the Director’s decision
- Specific concerns
- General concerns
- Concerns regarding information if any
- How the Director’s decision impacts you
- The extent to which your interests might be impacted
- Recommended resolution (and conditions)

Chapter 4: Preliminary motions

You have filed a notice of appeal. Prior to the appeal hearing there may be the need to bring a “preliminary motion” to deal with the various aspects of the appeal. Preliminary motions may be brought by any party to the appeal.

1. Deciding whether to bring a preliminary motion

1.1 *What is a “motion”?*

A motion is a request made of the EAB to decide a procedural matter relating to an appeal. Common motions include requesting an adjournment, challenging the standing of a party, and requesting disclosure of certain documents. Motions may be preliminary, which means they are conducted prior to the hearing, or they can occur during the hearing itself.¹⁹³ Preliminary motions are usually made in writing while motions during the main hearing are usually made orally.

The list of possible motions is as long as the various procedures that govern the Board’s activities and is beyond the scope of this guide. If the opposing side starts making motions that are confusing, request that the EAB and its counsel explain the motion so that you can properly respond to it. When a motion is brought prior to the hearing there will often be a “preliminary motions hearing” where the EAB will decide on the preliminary issue that has been raised.

The EAB may decide the preliminary motion without an in-person hearing being held or it may have people attend to present arguments regarding a specific motion.

1.2 *How do I bring a motion?*

Motions are typically made in writing to the EAB and must be accompanied by written notice to all the other parties involved in the appeal process.¹⁹⁴ A preliminary motion is initiated by way of a letter (copying all parties to the appeal). The EAB will then canvass the parties for appropriate dates to hold the

¹⁹³ A couple of examples of hearing related motions include a motion to recall a witness or objections during direct and cross-examinations.

¹⁹⁴ Environmental Appeals Board, *Rules of Practice* (Edmonton: Queen’s Printer, November 2007) at s. 10, online at <<http://www.eab.gov.ab.ca/rules.htm>>.

preliminary motions hearing and indicate if and when written submissions or evidence must be submitted in relation to the preliminary motions hearing.

When preparing a preliminary motion you must include a statement of what you want and the reason why the relief should be given. For example you may wish to seek a two-week adjournment of the hearing to deal with further evidence gathering and for time to confer with an expert that you had retained. There may be a need to provide sworn evidence for the hearing and this will take the form of an affidavit. See Chapter 8 for a discussion of affidavit evidence.

1.3 Participating effectively - preliminary motion

Before bringing a preliminary motion, take the time to articulate all your reasons why the motion should be granted.¹⁹⁵ A motions hearing is like a mini hearing where the EAB will decide which side's position should succeed, therefore the clarity and strength of your argument is important.¹⁹⁶

The timing of a motion is also very important to consider. For instance, if you know that the other party has relevant documents or information, you should not wait until the hearing to request those documents. You should first request the documents from the party or the party's lawyer. If they refuse to provide you with the documents then you may bring a motion to have the information disclosed prior to the hearing.

Several motions that are typically considered at the preliminary stage include:

- “staying” the Director’s decision;
- applying for interim costs;
- requesting disclosure of information;
- applying to be an intervenor; or
- requesting a site visit.

¹⁹⁵ See Andrew J. Roman, *Effective Advocacy Before Administrative Tribunals* (Toronto, 1989: Carswell) at page 178.

¹⁹⁶ See Andrew J. Roman, *Effective Advocacy Before Administrative Tribunals* (Toronto, 1989: Carswell) at page 178.

1.4 *Costs of motions*

Bringing a motion may have cost implications as the EAB has broad discretion to award costs related to all parts of a proceeding.¹⁹⁷ This means that if you bring a motion and it is unsuccessful the EAB may order that you pay some of the other side's costs. If you are successful in your motion, the EAB may order that some of your costs may be covered. Costs are usually determined at the conclusion of the hearing process.

For a discussion of costs see Chapter 11, Part II.

2. “Staying” the Director’s decision

2.1 *What is a stay?*

A stay acts to suspend the decision of the Director. A stay effectively halts the activity that was authorized pending the outcome of an appeal process. For instance, if the Director issues a *Water Act* licence, an appeal is launched, and the EAB grants a stay, the person who was granted the *Water Act* licence cannot divert water as authorized by the licence until the appeal is resolved.¹⁹⁸

An appeal does not act to automatically stay the Director’s decision. If you wish to have the decision stayed you must apply to the EAB.¹⁹⁹ Stays are not available in all circumstances.²⁰⁰

2.2 *Applying for a stay*

The EAB has the discretion to grant a stay. To apply, you must file a written application with the Board, signed by yourself or your agent. You must deliver (or serve) the application on all those parties who were a part of the original

¹⁹⁷ *EPEA* at s. 96.

¹⁹⁸ No stays are possible in relation to administering the priorities of diversions under the *Water Act* or in relation to a water management order. See *EPEA* at s. 97(4).

¹⁹⁹ *EPEA* at ss. 97(1) and (2).

²⁰⁰ *EPEA* limits when stays will be available in relation to enforcement orders, environmental protection orders, or a water management order. *EPEA* at ss. 97(3) and (4)).

proceeding.²⁰¹ When you apply for a stay it is important to clearly indicate why the stay is required and what type of effect will be felt if the activity that was approved is allowed to commence or continue. As outlined below, a stay will only be granted where it is shown that “irreparable harm” will result if the stay is not granted.

2.3 The test for a stay

The EAB has adopted the approach to stay decisions that was outlined by the Supreme Court of Canada in *RJR MacDonald Inc. v Canada (Attorney General)*.²⁰² When assessing whether a stay will be granted, the EAB will look at three issues:²⁰³

1. whether there is a serious question [before the board],
2. “whether the applicant would suffer irreparable harm if the application for the stay were refused”, and
3. “an assessment ...[of] which party would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits”.

The first part of the test requires that the evidence and issues before the Board support the need for a hearing. Put another way, the EAB must decide whether the notice of appeal raises serious issues that warrant the EAB’s consideration.

The second part of the test requires that you show that the nature of the harm you will suffer if the stay is not granted can not be reasonably compensated for or otherwise addressed in a court of law. For example, if you have evidence that an approval may contaminate the sole water source for your property, you can argue that this harm would not be alleviated by anything a court could do, nor would the harm be readily addressed by monetary compensation. In such an instance, it is likely that this would constitute irreparable harm.

²⁰¹ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 7.

²⁰² [1994] 1 S.C.R. 311 (*RJR MacDonald*) as adopted in the EAB decision of *Spaans et al v. Director, Northern Region*, (11 January 2005) Appeal No. 04-024, 02-026-030, 04-35-040-ID1 (AEAB) at page 23.

²⁰³ *RJR MacDonald* at paragraph 43.

Finally, the EAB will look at the relative harm suffered by the parties. The EAB will look at the harm done to the person who holds the approval or licence and what type of impact they will suffer if the activity is delayed. This detriment is then measured against the benefit that the applicant would receive from the granting of the stay. This analysis is often referred to as a “balance of convenience”. This means that the decision-maker will balance the harm and benefit that would be felt by both sides.

3. Requesting interim costs

A request for “interim costs” can be made to the EAB. This means requesting that some money be provided prior to the hearing to cover anticipated or actual costs of preparing for the hearing. Interim costs are focused on providing an appellant the financial means to effectively participate in the hearing. The decision by the EAB to award interim costs is discretionary. Unfortunately, the EAB only awards interim costs on rare occasions. Generally, costs are awarded after the hearing, if at all.

Interim costs were awarded in one appeal, involving:²⁰⁴

- issues that were very complex;
- “a high public interest element”;
- several appellants being represented; and
- appellants that were a part of a group that the EAB recognized as having financial difficulties.

For a discussion of costs see Chapter 11, Part II.

4. Requesting disclosure of information

You may find that you do not have all the relevant information necessary to participate in the appeal process, but the government or the proponent may hold

²⁰⁴ *Interim Costs Decision: Oxtoby et al. v. Director, Central Region, Regional Services, Alberta Environment* Re: *Capstone Energy* (29 December 2004) Appeal Nos. 03-118, 120-121 and 123 –IC (A.E.A.B.) [Oxtoby].

this information. If you have requested information from the proponent or the government and that information has not been produced, consider bringing a motion to have the information disclosed. In deciding whether to order disclosure the EAB will determine whether the information is relevant to the issues under appeal. Relevant information should be disclosed whereas less relevant information may not warrant disclosure.

Where a party to an appeal promises to provide information at some future date it is often referred to as an “undertaking”. Undertakings are used to deal with information that may not be currently available for disclosure. Failure to comply with an undertaking will be considered a failure to comply with the EAB process and may prejudice the party who failed to comply. Failing to complete an undertaking can have serious consequences. If the undertaking is to provide extremely relevant information, failing to provide the information may undermine an argument.

Where an undertaking has not been met the EAB may order that the information be produced. If the information is still not produced the EAB may decide that the evidence of the party who has failed to produce the information has no weight or that any objections of that party have been waived.

5. Applying to be an intervenor

Intervening on an appeal or being an “intervenor,” means that you are not considered a true appellant of the decision but that you feel you have relevant information to provide the EAB on the issues being heard in the appeal. Intervenors are typically parties who have an interest in the outcome of the appeal for financial, environmental, social or personal reasons.

If you decide that you want to intervene on an appeal, you need to submit a request to be an intervenor to the EAB. This typically occurs after the Notice of Hearing has been published. If the proponent objects to you being an intervenor, there may be written submissions to the EAB to determine whether you will be able to participate in the hearing. Applications to be an intervenor must be filed with the EAB by the date specified in the Notice of Hearing. In rare occasions the EAB may reconsider an intervenor’s application at the beginning of the hearing.

5.1 *Scope of participation as an intervenor*

An intervenor does not have a right to participate in the hearing without first being granted “intervenor” status by the EAB.²⁰⁵ In being granted intervenor status, the intervenor may or may not be considered a full participant to the appeal. The EAB has the discretion to allow an intervenor either full or partial rights to participate in the appeal. A key point to keep in mind is that an intervenor cannot continue with an appeal if the original appellant withdraws his/her appeal.

The rights that the EAB may grant an intervenor may include the right to present evidence at the hearing, the right to cross examine witnesses and the right to participate in preliminary motions.²⁰⁶ Intervenors also have the right to apply for costs. The granting of costs is a discretionary decision made by the EAB. For more information about **costs** see **Chapter 11**.

5.2 *Applying for intervenor status*

To become an intervenor you must apply in writing to the EAB after the Notice of the Hearing is published. It is important that parties who want to intervene apply to the EAB at the earliest possible time, and no later than the date stated in the notice of hearing.

The EAB’s *Rules of Practice* indicate that an application to be an intervenor must include the following information:²⁰⁷

- the applicant’s name, address, phone number and fax number;
- the applicant’s intent to be represented by a lawyer or agent, and the contact information (name, address, contact numbers) of their representative;
- a summary of the nature of the applicant’s interest in the issues that are under appeal; and

²⁰⁵ *EPEA* at s. 95(3).

²⁰⁶ *EABR* at s. 14. See *Chalifoux v. Director of Chemicals Assessment and Management, Alberta Environmental Protection re: Chem-Security (Alberta) Ltd.* (9 July 1999) Appeal No. 95-025 (AEAB).

²⁰⁷ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 14. (*ROP*), online: Environmental Appeals Board <<http://www.eab.gov.ab.ca/pub/Rules-August-2008.pdf>>.

- the applicant's signature.

When the EAB decides whether a party is allowed to intervene, they will give that person or group written notice of this decision. The EAB has broad discretion to allow third parties to intervene in a hearing.

5.3 When will an intervenor be allowed? – EAB criteria for intervenor status

Generally, the criteria that an applicant must meet to be accepted as an intervenor are:²⁰⁸

- the intervenor's participation will assist the EAB in deciding the appeal, by providing evidence, cross-examining witnesses or offering argument relevant to the issue under appeal;
- the intervenor has a tangible interest in the subject matter of the appeal;
- the intervention will not unnecessarily delay the appeal;
- the intervenor is generally in favour of one side over the other, so the EAB may know whether the intervenor should be considered as an appellant or respondent in the appeal;
- the intervention will not repeat or duplicate evidence presented by other parties; and
- if the intervention request is late, there are documented and sound reasons why the intervenor did not file earlier for such status.

Generally, the EAB is quite open to allowing intervenors to participate in hearings because it recognizes the value gained from having evidence presented by parties with particular experience and expertise.

²⁰⁸ ROP at s. 14.

5.4 *Guidance on applying for intervenor status*

When applying to be an intervenor the main point you will want to convey to the EAB is the value you will bring to the appeal. The main question you must answer for the EAB is “what evidence will you bring to the hearing that will inform the EAB’s decision and not repeat other participants’ evidence?” To this end, inform the EAB of:

- your knowledge and experience regarding the issue under appeal;
- how your knowledge and experience is unique among parties giving evidence at the hearing;
- the relevance of your perspective considering the side of the appeal you are supporting. For example, the proponent has a hydrologist and you are a hydrologist that is in support of the appellant; and
- facts establishing you as having an interest in the appeal. For example, you have monitored the area for a long time; the impact is relevant to your work or recreation.

5.5 *Costs for intervenors*

Cost awards by the EAB are discretionary. Costs are rarely awarded and when they are, the amount usually does not cover the actual cost of participating in the hearing. The general test for the awarding of costs is set out in Chapter 11.

The criteria the EAB uses for awarding costs is whether the intervenor’s evidence and argument “substantially contributed to the hearing”, was “directly related to the matters contained in the Notice of Appeal” and made “significant and noteworthy contributions to the goals of the Act.”²⁰⁹

²⁰⁹ Cost Decision re: *Ducks Unlimited* (May 8, 2002), E.A.B. Appeal No. 00-035-CD, at para 23, citing Cost Decision re: *Cabre Exploration Ltd.* (January 26, 2000), E.A.B. Appeal No. 98-251-C at para 9.

6. Requesting a site visit from the EAB

The impacts that an activity may have on your land and water may be best illustrated through a site visit. You can request that the EAB visit the site or it may decide to do so on its own.²¹⁰ The site visit will occur prior to or during the hearing. The EAB will prepare a “terms of reference” that will dictate the process for the site visit. A site visit can be useful to show the EAB the nature of the land or water that may be impacted by the approval or licence under appeal. A site visit will often give the EAB a more detailed understanding of evidence provided at the hearing. If making a request for a site visit, be sure to explain why the visit will assist the EAB in understanding and deciding the issues at the hearing.

²¹⁰ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 12.

Chapter 5: Mediation

1. What is mediation?

Mediation is a conflict resolution process where the parties to a dispute attempt to resolve their differences in the presence of the a third party, the mediator. The EAB promotes mediation to settle the concerns raised in the notice of appeal instead of going to a hearing. The mediation may also be used to settle procedural matters prior to the hearing. Mediation occurs prior to the EAB deciding whether to proceed with the hearing and determining what issues will be dealt with in the appeal.

The idea behind mediation is to have full, open and frank discussions about the concerns, issues, and impacts of the approval or licence. Mediation discussions are considered “without prejudice.” This means that nothing the parties say can be used against them in a hearing if it proceeds. If disputes remain and the appeal hearing goes ahead, you cannot rely on agreements, offers or proposals made during the mediation.²¹¹ Also, you cannot call the mediator or staff who may have been present during the mediation to be witnesses at the hearing.

2. Is mediation required?

Participation in mediation is voluntary and requires agreement from both sides to proceed. A mediation meeting may be requested by the parties or may be suggested by the EAB.²¹²

3. When is mediation appropriate?

Mediation is appropriate when parties are prepared to negotiate on the issues. If neither party is open to compromise, then mediation has limited use. Even if parties are open to the idea of negotiation, be aware that mediation brings both advantages and disadvantages over a public hearing.

²¹¹ See *Participants’ Agreement to Mediate*, Environmental Appeals Board, online: Environmental Appeals Board

<<http://www.eab.gov.ab.ca/pub/Participants%20Agreement%20to%20Mediate.pdf>>.

²¹² *Environmental Appeal Board Regulation* at s. 11 and Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 11.

The main advantages of mediation are that its save time and money. Mediation can also be a flexible tool for resolving the concerns you have with the authorization. Mediation is flexible because the results of a mediated agreement may include issues that are outside the scope of the EAB's jurisdiction.

Disadvantages to a mediated settlement include the absence of public oversight that a hearing provides, and the fact that the terms of resolution through mediation are usually treated as confidential (except to the extent those terms form part of the recommendation to the Minister or the Minister's decision).²¹³

Consider the following when deciding whether to participate in mediation:

- whether you feel comfortable in negotiating a resolution on your own;
- whether both sides have equal bargaining power;
- whether there are reasons that an open and public forum (i.e., the hearing) will be better at resolving your concerns; and
- whether you prefer that the negotiations and agreement be confidential or whether you prefer that all issues are captured in an open forum and are dealt with "on the record".

4. Who is the mediator?

The EAB will designate a member of its staff with mediation experience as the mediator. The EAB member that acts as the mediator on the file cannot be a member of the panel that hears the appeal if the mediation fails. Occasionally a third party mediator will be used.

²¹³ See *Participants' Agreement to Mediate*, Environmental Appeals Board, online: Environmental Appeals Board
<<http://www.eab.gov.ab.ca/pub/Participants%20Agreement%20to%20Mediate.pdf>>.

5. Procedure

Before the mediation process begins, the EAB must determine whether mediation is viable in the circumstances.²¹⁴ Once the EAB has decided mediation is appropriate they will canvass the parties to see whether everyone agrees to mediation. If parties agree to mediate, the EAB will then notify them of the date, time and location of the mediation meeting.²¹⁵ They will also prepare a terms of reference that will guide the meeting.²¹⁶

The mediation is typically held in person, but it can also be held via telephone. The EAB member who is mediating will try to facilitate a resolution to the issues. If the mediator thinks that it is appropriate the mediation meeting can be adjourned to a later date.²¹⁷

Where the mediation results in resolution of the issues in the notice of appeal, the EAB will prepare a “Report and Recommendations” within 15 days of the meeting which includes a resolution signed by all the parties.²¹⁸ The Report and Recommendations are given to the Minister of the Environment, who then decides whether to implement the recommendations into an amended approval or licence.²¹⁹ The Minister generally follows the recommendations with rare exceptions.

6. What is on the table?

A wide variety of issues can be on the table during mediation, from substantive issues with the approval or licence to process issues that are relevant to the appeal hearing. The list of items open for discussion at the meeting will be

²¹⁴ In certain instances mediation will not be appropriate, for instance where an enforcement order is issued. Enforcement orders are issued where there has been a violation of the act or of an authorization and mediation is used to achieve mutually beneficial results, not compliance.

²¹⁵ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 17.

²¹⁶ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 11.

²¹⁷ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 17.

²¹⁸ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 17.

²¹⁹ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 17.

guided by the terms of reference and will depend on what the parties feel they can resolve. The mediation may result in resolving only some of the issues, leaving the others to be dealt with in the hearing.

Unlike the hearing, the issues and remedies that may be discussed and incorporated into a mediation agreement are quite broad. This means that terms and conditions that are typically outside the EAB jurisdiction and the approval or licence of Alberta Environment can become part of the settlement of the dispute. This is in contrast to the hearing where the issues raised in the appeal and settlement opportunities are constrained by the jurisdiction of the EAB to place conditions on the approval or licence in question.

7. What if mediation fails?

If mediation fails the appeal will proceed as normal. It will still be subject to any other preliminary motions that could successfully end the appeal. A failure to reach a mediated settlement does not impact other legal rights, although the use of evidence presented at mediation may be limited during the hearing.

If the initial mediation meeting fails or does not deal with all of the issues raised in the notice of appeal the EAB may:²²⁰

- attempt to book another mediation meeting (if needed);
- get agreement about facts or evidence between the parties;
- determine the matters to be included in the appeal and the procedures of the appeal;
- get the parties to exchange documents and written submissions and determine the order of witnesses and the hearing schedule; and
- deal with any other matter necessary for the hearing.

²²⁰ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 18.

8. Need for expert or legal assistance during mediation

If you are comfortable negotiating on your own you may not need expert or legal assistance at the mediation. Parties may even agree that lawyers be excluded from the mediation. However, if you think that you are at a disadvantage because the other side is using experts or has their lawyer(s) present, you should consider hiring a lawyer for this purpose. Unfortunately, the costs of a lawyer for mediation are not covered by the EAB cost awards, but you may seek to have your legal costs covered by the approval or licence holder as part of a settlement.

9. Effect of a mediated settlement and subsequent procedure

Mediated settlements are typically treated as confidential. An exception to this are the terms and conditions that are incorporated into the approval or licence (and therefore appear in the EAB Report and Recommendations).

The mediated settlement itself can have two distinct aspects, a regulatory aspect and a contractual aspect. The regulatory aspect will deal with the approval or licence and any proposed changes arising from the mediation. These changes are not enforceable until the Minister makes an Order officially amending the authorization. The Minister has the discretion to reject any recommendations made by the EAB, whether the recommendations are a result of the mediation or a hearing. Enforcing the regulatory terms and conditions on the authorization is typically the responsibility of Alberta Environment.

The contractual aspects of a mediated settlement include any agreements that are solely between the parties and do not involve the authorization or the government. The contractual terms and conditions arising from the mediation must be put into a written agreement that is then enforced between the parties in the courts. Legal advice should be obtained prior to signing any contractual agreement. If a lawyer did not go through the negotiation with you be sure to carefully and fully review the documents. Consider contacting a lawyer prior to signing any contractual agreement.

For example, a mediated settlement may result in regulatory requirements to set up monitoring wells and to report monitoring data to Alberta Environment within specified periods of time. A contractual obligation may also be set up to require monitoring of a “directly affected” party’s well on their private land both

prior to and following the proposed activity. This contractual obligation may deal with the costs of monitoring and outline responsibilities of the parties should there be an impact and may involve the payment of money. The breadth of contractual obligations that might be part of negotiating a settlement of the issues is very flexible.

Enforcing contractual obligations is done through the courts. Court processes can be costly, uncertain and create delays in getting a remedy. These issues should be kept in mind when contracts of this nature are entered into. The EAB will generally not get involved in enforcing the obligations made in a mediated agreement.

For more information about mediation process contact the EAB office.

Chapter 6: Withdrawing an appeal

1. How to end an appeal

To end an appeal you simply notify the EAB that you wish to withdraw your notice of appeal. This will result in the EAB issuing a “discontinuance,” which officially signals that the appeal is no longer going ahead (if you are the only appellant).²²¹ The EAB may also discontinue an appeal if the holder of the authorization that is subject to an appeal decides they no longer wish to go ahead with the activity that required the authorization.²²²

The EAB may also discontinue the appeal if the appellant does not respond or comply with EAB requests.

2. What is the legal effect of withdrawing an appeal?

The legal effect of withdrawing the notice of appeal and the subsequent discontinuance is that the legal right to appeal to the EAB ceases to exist. Your rights to object or have input into the authorization are then over.

The only way to continue any challenge of an authorization is if the facts support a challenge in court or a revisiting of the issues by the EAB. This may occur where the notice of appeal was withdrawn and there was fraud or misrepresentation that occurred. This has yet to occur so it is unclear whether the EAB would reconsider an issue on this basis or if you would have to bring the issue to court first.

For more information see the discussion of judicial review in Part IV.

²²¹ *EPEA* at s. 95(7).

²²² The approval holder must request that the approval or licence be cancelled prior to the EAB ending an appeal. The cancellation of the approval or licence effectively makes the hearing irrelevant.

2.1 The effect of a withdrawal on intervenors who want to proceed

Where an appellant withdraws the notice of appeal the appeal is discontinued. Intervenors who may wish to see the appeal go forward have no say in the matter. Appellants should remember that once they withdraw the appeal the hearing will end even if intervenors still have concerns.

2.2 What happens if a group is appealing and part of the group withdraws?

If the directly affected parties leave the group it is likely that the group will no longer be recognized as a valid party and the appeal may be discontinued. If there is another formal appellant that is directly affected, the remaining group members may be accepted as intervenors. This is all at the discretion of the EAB.

There is a legal question as to whether party status can be revoked in this manner once it has been given. Granting rights to participate to a group creates a legitimate expectation of participation. This is especially a concern if the EAB is unclear as to who in the group actually has formal standing. If this issue arises it may need to be resolved by a court.

Chapter 7: Preliminary decisions of the EAB

The EAB will deal with various issues before hearing an appeal. These preliminary matters often include:

- Determining whether other administrative boards have already dealt with the issues.
- Deciding the appellant's standing or right to appeal.
- Hearing any preliminary motions.
- Requesting information from parties to the appeal.
- Identifying the issues to be dealt with on the appeal.
- Deciding whether a notice of appeal is frivolous, vexatious or without merit.
- Deciding how and when the appeal will go ahead.

1. Determining whether other boards have already dealt with the issues

The EAB will not hold a hearing if the issues (as indicated in your Notice of Appeal) were previously considered by the NRCB, the ERCB, the AUC or dealt with through an environmental assessment hearing under the *Canadian Environmental Assessment Act*.²²³ The question of whether an issue has been dealt with by these other Boards is not always easy to answer but the EAB has the discretion to decide whether the issues have been covered. If the issues have already been covered the appeal will be discontinued.

2. Standing

One of the first determinations the EAB will make is whether you are "directly affected". If the EAB does not consider you "directly affected," the EAB will

²²³ EPEA at s. 95(2).

dismiss the notice of appeal and the appeal will not proceed.²²⁴ If another party challenges your standing the EAB will hold a preliminary hearing to deal with the issue.

For a discussion of what it means to be “directly affected” see Chapter 3, Part II.

3. Deciding preliminary motions

Prior to the hearing there may be a variety of preliminary motions that the EAB will deal with in one or more preliminary hearings. Typical preliminary motions may include challenges to standing, issues about disclosure, and applications for interim costs. For a description of motions and their various uses see Chapter 4 of Part II of this guide.

4. An EAB request for information

After you have filed a notice of appeal the EAB may ask that you provide it with more information.²²⁵ The request will outline what information the EAB is looking for and when it must be submitted.²²⁶ Providing this information in the time given is mandatory. Failure to comply with the EAB direction may result in a dismissal of the appeal.²²⁷ If you need an extension of time to provide the information, you should request it from the EAB prior to the deadline.

5. Identification of issues

Prior to the hearing the EAB will look at the contents of the notice of appeal and may decide which issues should be considered during the appeal. In making this decision, the EAB will consider if there is new information relevant to the decision that was not available when the Director’s decision was made.²²⁸ Generally the EAB views new information to be “relevant” only if it has “the potential to significantly influence [the] decision”.²²⁹

²²⁴ EPEA at s. 95(5).

²²⁵ EPEA at s. 92.

²²⁶ EPEA at s. 92.

²²⁷ EPEA at s. 95(5).

²²⁸ EPEA at s. 95(2).

²²⁹ See *Smulski et al v. Director, Northern Region, Regional Services, Alberta Environment re: Agrium Products Inc.* (29 April 2005), Appeal Nos. 04-074-082-D (A.E.A.B.) at para. 48. The case further

The EAB will typically seek to minimize the issues at the hearing by attempting to:²³⁰

- get the parties to agree to certain facts that are relevant to the hearing (an “agreement to admit facts”);
- get the parties to agree to certain evidence that is relevant to the hearing (an “agreement to admit evidence”);
- arrange the order in which witnesses will be called;
- decide the matters that will be dealt with during the hearing; and
- have the parties exchange documents and written submissions.

6. Deciding whether the appeal is frivolous, vexatious, without merit, or not properly before the EAB

There are certain instances where the EAB can simply dismiss an appeal, even when the appellant is directly affected. Appeals that are “frivolous, vexatious or without merit” may be dismissed by the EAB.²³¹ This means that if an appeal is not based on fact or is used to harass a holder of an authorization the Notice of Appeal may be dismissed by the EAB.

The EAB may also dismiss an appeal it views as not being properly before it. Examples of when the EAB may decide an appeal is not properly before it include when it finds that the appeal is not timely or when the issues of the appeal are no longer of relevance due to the circumstances.²³²

notes that “[n]ew information will have the potential to significantly influence decisions when it raises a serious risk of adverse effects that were not previously dealt with by the decision maker, or when it changes a material fact that, if known at the time of the decision, would have, in the opinion of the Board, affected the conclusions and recommendations in that decision”.

²³⁰ *Environmental Appeal Board Regulation* at s. 13.

²³¹ *EPEA* at s. 95(5)(a)(i). Also see *Fred J. Wessley v. Director, Alberta Environment Protection*, (2 February 1994) Appeal No. 94-001 (AEAB).

²³²For example, if the approval holder has decided that it no longer needs the approval and cancels it, there would be no point to hold the hearing.

Appeals may be dismissed by the EAB on its own accord or a party can bring a motion to dismiss the appeal based on these arguments.

7. Outlining the process

The EAB has significant discretion over the process of an appeal hearing and preliminary matters. The EAB may hold a preliminary motions hearing, will set the hearing date and schedule, and determine the location of the hearing.

7.1 Attending a preliminary motions hearing

A preliminary motions hearing (or more than one) may be held to address any process issues. Once a motions hearing is set the EAB can continue with the preliminary hearing even if a party to the appeal is not present. If you do not attend, the EAB can hear a motion in your absence and may view your absence as a waiver of any objections you had to the motion.²³³

Failure to attend meetings may result in waiving your rights.²³⁴

7.2 Setting the hearing date and deciding how the hearing will be conducted

Once the EAB has decided that the appeal hearing will go ahead they will set a hearing date and decide how the hearing will proceed. The first assumption is that the appeal hearing will be an oral hearing where people attend in person and give evidence. The hearing may also be based solely on written submissions or it may be conducted electronically. Conducting an oral hearing electronically (either by telephone conference or videoconference) requires agreement of all the parties.²³⁵ The only additional requirement for an electronic hearing is that parties are able to respond to comments at the time they are made.²³⁶ In effect, the electronic hearing is the same as a regular hearing, only it is administered through electronic means.

²³³ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 32.

²³⁴ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 32.

²³⁵ *Environmental Appeal Board Regulation* at s. 17.1.

²³⁶ *Environmental Appeal Board Regulation* at s. 17.1.

The EAB may also decide that the matter will be dealt with through written submissions alone.²³⁷ If this is the case the EAB will give notice to parties to the appeal and set a date when the written submissions must be filed.²³⁸

The procedures that will be followed in the hearing will be outlined in a “procedure letter” that you will receive from the EAB. A sample procedure letter is provided at Appendix F.

The EAB will also ensure that a “notice of hearing” is given to the parties and is published.²³⁹ The notice will be posted at least 21 days prior to an *EPEA* hearing and at least 7 days prior to a *Water Act* hearing.²⁴⁰

The “notice of hearing” will outline:²⁴¹

- the time, date and place of the hearing;
- a summary of the subject matter of the appeal;
- an indication that anyone who is not a party and wants to apply for intervenor status in order to make representations to the Board must make a written request of the EAB to do so, and the date that such requests must be filed with the EAB; and
- the mailing address of the EAB and the place and time where filed materials can be viewed by interested parties.

If the EAB considers the situation an emergency it can shorten or alter these notice requirements.²⁴²

²³⁷ *Environmental Appeal Board Regulation* at s. 7(1)(b).

²³⁸ *Environmental Appeal Board Regulation* at ss. 7(1)(a) and (b).

²³⁹ *Environmental Appeal Board Regulation* at s. 7(1)(a)(ii) and Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 13.

²⁴⁰ *Environmental Appeal Board Regulation* at s. 7(1)(a)(ii).

²⁴¹ *Environmental Appeal Board Regulation* at s. 7(2).

²⁴² *Environmental Appeal Board Regulation* at s. 7(3).

7.3 Location of the hearing

Typically a hearing will be held at a place that is most convenient for the parties and near where the activity will occur.²⁴³

8. Expenses and costs of preliminary hearings

The Board may award costs for expenses that “are reasonable and that are directly... related to the matters contained in the notice of appeal, and the preparation and presentation of the party’s submissions”.²⁴⁴ As preliminary hearings can be considered incidental to the hearing, the expenses you incur may be claimed when you seek costs. The EAB has broad discretion regarding costs and it may decide that costs associated with preliminary hearing (or the hearing as a whole) should not be covered. For a discussion of costs see Chapter 11.²⁴⁵

9. Legal assistance with preliminary matters

Many preliminary hearing issues can be resolved without the assistance of a lawyer; however, a lawyer may be of significant assistance where preliminary issues deal with legal procedures and rights.

See the discussion of motions in Chapter 4, Part II.

²⁴³ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 20.

²⁴⁴ *Environmental Appeal Board Regulation* at s. 18.

²⁴⁵ *EPEA* at s. 96.

A summary of why your appeal may be dismissed

- You have missed a deadline to submit a notice of appeal, to provide information to the EAB following a request or to file written submissions.
- Your appeal is frivolous, vexatious or without merit.
- Your appeal is not properly before the EAB.
- You have failed to establish that you are directly affected in the view of the EAB.
- You have missed a meeting or hearing without providing notice of your absence or requesting an adjournment prior to the meeting.
- The NRCB, the ERCB, the AUC or a hearing pursuant to the *Canadian Environmental Assessment Act*, dealt with all the issues raised in the Notice of Appeal.

Chapter 8: Preparing for the Hearing

This chapter outlines the hearing process and provides information about how to effectively participate in the hearing. An EAB hearing is governed by *EPEA*, the *Environmental Appeal Board Regulation*²⁴⁶ and the EAB's *Rules of Practice*.²⁴⁷

This chapter discusses:

- gathering evidence and determining what is relevant;
- preparing written submissions;
- reviewing the proponent's and Alberta Environment's submissions;
- preparing witnesses and exhibits;
- preparing oral evidence, the opening statement and argument; and
- assisting your lawyer (if you have one).

1. Gathering evidence and determining what is relevant

Preparing for a hearing is key to participating effectively. The EAB will make its decision based on evidence presented during the hearing so it is essential that you have all the relevant information ready to present.

1.1 *What evidence do you need?*

The evidence you need to bring before the EAB will depend on the nature of your concerns and the nature of the potential impacts of the activity. The key issue to consider is how relevant your information is to the issues that you have raised. The more relevant the evidence the more weight it will carry with the EAB.

Evidence consists of facts and witness opinion. Relevant facts will be aimed at proving the various impacts of the proposed activities on air, water and land.

²⁴⁶ *Environmental Appeal Board Regulation*, Alta. Reg. 114/1993.

²⁴⁷ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007).

This will usually be scientific evidence available from the government, the proponent or your own witnesses. Relevant facts will also demonstrate the type of harm or potential for harm that will result from the activity. This harm should be linked to people, property and the environment.

Some framing questions include:

- What is the impact (or possible impact) on my property?
- What is the impact (or possible impact) on any economic interests?
- What is the impact (or possible impact) on my or my family's health?
- What is the impact (or possible impact) on the environment (including animal health, water quality and quantity, air and land quality)?

The evidence you provide should indicate:

- The degree of impact;
- The link between the activity and the impact;
- The likelihood of the impact;
- Evidence regarding alternatives that are likely to cause a smaller impact;
- Any gaps, erroneous or unsupported conclusions, or mistakes in the evidence provided by the proponent of the activity;
- The adequacy of the proponent's assessment of possible impacts; and
- Why the Director's decision will not be effective in dealing with the impacts.

1.2 Where do I get evidence?

The evidence presented to the EAB will consist largely of your testimony and that of other witnesses. The EAB will also look at reports produced by the proponent, the government or by your own experts.

You can find evidence relevant to your position in:

- the application and supporting information that was submitted to the Director;
- government studies done in the area;
- lay-witness testimony, including your own, relating to the likely impacts of a proposed activity;
- expert reports and testimony; and
- reports prepared by third parties, either specifically prepared for the hearing or general reports on the impacts of development.

1.3 Obtaining information

When obtaining information for the hearing you will want to communicate directly with Alberta Environment, the proponent, and the EAB. A great deal of the information will be provided to you through the authorization process (described in Part I of this Guide). If information was provided to the Director later in the authorization process you may not have been given a copy. Contact the Director or the EAB to ensure that you have all relevant information.

As you review the information you may find that there is more information you need from the proponent. You can seek this information directly from the proponent by requesting the information in writing. Provide a copy of the request to the other parties (Alberta Environment and the EAB). If the information is not disclosed, you can request a preliminary motions hearing to deal with the disclosure of information.

See Chapter 4, Part II regarding preliminary motions.

2. Expert evidence

If you plan to consult an expert and have them testify, retain them as early on as possible. The expert will need time to review the information provided and you will need time to incorporate the expert's findings into your written submissions. Your expert may need time to conduct some testing or monitoring in the field

and time to produce a report. You may need to request that the hearing be held later to allow your expert to fully conduct their work. The EAB should provide a reasonable time for expert witnesses to gather information and do their analysis.

Finding an expert can be difficult as there are generally no publicly available listings of experts, particularly experts with hearing experience. Finding an expert involves canvassing university and college professors and environmental consulting firms to see who may have the appropriate expertise and then retaining them.

An expert witness will be under oath during the hearing and will be cross-examined. Therefore it is helpful (but not essential) that the expert have experience in tribunal or court proceedings. Remember that experts can be expensive and that you must pay the costs associated with the expert's opinions. In certain instances the EAB may award you a portion of the costs, including costs associated with experts, but cost awards, if given, do not typically cover all costs.

3. Sworn written evidence: affidavits

An affidavit is a written document that outlines the facts that constitute a person's evidence. The evidence in the affidavit is sworn or affirmed as the truth before a commissioner for oaths. Documents that are referred to in the affidavit are usually attached as exhibits. These affidavits will typically accompany your written submission for both the appeal hearing and for a preliminary motions hearing. The sample of the structure of a typical affidavit is provided at Appendix G.

For more information about the format or structure of an affidavit contact a lawyer or the ELC.

4. Preparing written submissions

Part of the appeal process includes providing written submissions to the EAB.²⁴⁸ Written submissions are an important first step in framing your evidence and

²⁴⁸ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 19.

providing the EAB with the factual basis for your arguments as to why the Director's decision should be altered.

Written submissions must contain:²⁴⁹

- a summary of the facts and evidence you plan to rely on in the hearing;
- a list of witnesses that you will call and a summary of each witness' evidence;
- the name, address, telephone and fax number of your agent or lawyer; and
- your signature or that of your agent or lawyer.

The EAB's *Rules of Practice* also require that you provide a copy of your written submissions to all other parties.²⁵⁰ This means that you must provide a copy of the submission to:²⁵¹

- the EAB (who will often require numerous copies to be submitted);
- any other appellants;
- the person whose decision is the subject of the notice of appeal (in most instances, the Director who made the authorization under the *Water Act* or *EPEA*);
- any person the EAB has decided can make representations (often the approval or licence holder) and intervenors; and
- any other person the EAB decides is a party.

You must submit the written submissions to the EAB and distribute copies to all parties within a **filing deadline**.²⁵² If the EAB does not set a timeline for filing,

²⁴⁹ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 19 and *EABR* at s. 10.

²⁵⁰ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 19.

²⁵¹ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 1 where "party" is defined and *EABR* at s. 10.

²⁵² Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 19. Also see *EABR* at s. 10.

the written submissions must then be filed and distributed **at least 7 days before the date of the hearing.**²⁵³

Typically all parties submit written submissions at the same time. In certain instances, the EAB may decide to stagger the written submissions and allow parties to respond to the other submissions (i.e., a written rebuttal).

The EAB has significant control over its own process and will indicate the process to be followed for submitting written submissions. Typically the EAB will provide an outline of the hearing procedure and dates for providing written submission in a “procedure letter”. A sample procedure letter can be found at Appendix F.

4.1 Preparing an effective written submission

The following tips can assist in preparing effective written submissions:

- written submissions should be concise but thorough;
- use headings and a table of contents to separate topics and organize materials; and
- make your case while anticipating the other sides’ arguments.

You, as the appellant, bear the burden of proving that the Director’s decision should be altered. Do not get caught up in countering all the other parties’ evidence. You must provide evidence of your own to support your position.

1.4.1 Structuring a written submission

Cover page

A sample cover page is included in Appendix H. Your cover page should contain a reference to the relevant section of legislation, your name, the approval being appealed, the title of the document, and your contact information or that of your lawyer or agent.

²⁵³ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 19.

Table of contents

A table of contents allows you to effectively organize the document and assists those reading the document.

Introduction

Introduce yourself, what you are appealing (i.e., the nature of the appeal), the geographic and environmental context, and a brief statement of your position.

The approval

Frame the approval – describe the approval, the appellants who are impacted, and the issues around the approval.

The nature of the area and impacts

Outline the nature of the area that is being impacted. Discuss issues that are specific to the area and the nature of the impacts.

The approval process

Outline the approval process including the original application for the approval or licence.

Environmental effects

Provide information about the environmental impacts of an activity as it was authorized and outline additional ways to mitigate or avoid these environmental impacts. Impacts and issues you might discuss include:

- the impact of air emissions, particularly emissions of heavy metals, other toxic emissions, and green-house gases;
- land impacts, including potential release of contaminants to the land; the ability to reclaim land to its former state; the removal of vegetation, particularly sensitive or rare species;
- impacts on water, including the impacts of diversions on water supplies nearby; the hydrologic connection of the water bodies; the impact on the aquatic environment; and the impact of effluent released into water bodies, including the impact on water quality, the toxicity of effluent, and the impact of effluent on fish and fish habitat;
- monitoring that is currently in the authorization as well as other monitoring that would assist in determining the environmental effects;

- effects of emissions on human health or that of other animals; and
- the use of pollution-controlling technologies and whether there are other alternative technologies that would be applicable.

Argument

This portion of the written submission involves tying the environmental effects to the legislative framework and justifying why specific recommendations should be made by the EAB. In this section you will want to set out:

- the values that need to be preserved;
- the provisions of the legislation that are relevant to the appeal (including the purpose sections of relevance and provisions outlining what the Director must consider); (See Part I, Chapter 4.)
- the process followed by the Director and the matters considered in coming to the decision;
- the gaps or errors in reasoning that the Director made; and
- your discussion of why a different decision is justified by the facts that you have provided.

Relief sought

Outline what you would like to see happen with the approval or licence, whether you would like to see specific amendments or a recommendation that the approval or licence not be issued. Outline proposed amendments to the approval or licence you wish to see, including any terms or conditions that would deal with your concerns.

Remember that you can always outline a main position, and then include a “fall back” position. You can ask for a recommendation that the authorization not be issued, but also outline the important amendments, terms and conditions that you believe are necessary should the EAB allow the approval or licence to stand. This type of argument is practical, as it can help ensure a minimum of environmental protection; however, by stating that you will accept amendments you risk that the EAB will ignore your request to recommend against the authorization. While the EAB can recommend that an approval not be granted in

its current form they cannot revoke an authorization; only the Minister has this power.

Proposed witnesses

List the witnesses you are going to call during the hearing and provide a brief summary of their evidence.

5. Reviewing the submissions of the proponent and Alberta Environment

A copy of the other parties' written submissions will be provided to you. Reviewing these submissions is an important step to ensure that you are going into the hearing fully aware of the other parties' positions. It will also allow you to respond to questions in a manner that emphasizes your position while indicating how the other parties' positions fail to adequately deal with an issue.

Identify areas of their argument that are most relevant to your issues. The time available for presenting oral submissions and evidence to the EAB is limited so it is important to have concise arguments about the inadequacy of the proponent's or Alberta Environment's submission.

If you have not been provided information that is referenced in a party's written submission, you should seek the information from that party. If this fails, you can seek the information through the EAB, by bringing a motion for disclosure of information if necessary. If you are concerned that another party's failure to disclose relevant information harmed your ability to properly prepare, you may wish to seek an adjournment of the hearing from the EAB to allow more time to review and respond to the information. Ideally issues of disclosure should be resolved prior to the setting of a hearing date.

6. Preparing witnesses

If you are calling witnesses during the hearing it is important to fully discuss the issues with them prior to them testifying. It is also a good idea to go over the questions you will ask your witness with them prior to the hearing. The witness should understand that their evidence should be based on their first hand knowledge and be factual in nature.

In preparing your witness you should be careful not to “coach” them, meaning you must not tell them what to say or what not to say. It is the witness’s task to give their version of the facts and their opinion under oath, not your version of the facts. If it appears that the witness has been coached the EAB will likely give the evidence of the witness little, if any, weight and this will be detrimental to your position.

7. Preparing exhibits

When you refer to a document at the hearing or in the submission a copy of the document must usually be provided to the EAB and to other parties. Your written submission will be given exhibit numbers but if additional documents are presented at the hearing the EAB will likely have them entered as exhibits. To do this you should organize all the items in the order that you wish to have them admitted and have notes for yourself regarding why they are being submitted and why they are relevant. Submitting new documents during the hearing may give rise to some objections depending on the nature and content of the document.

If copies of the exhibits have not already been given to the other parties, have copies on hand to provide everyone with the documents. Typically the exhibits of each party will be given a number as they are submitted during the hearing.

8. Preparing your oral evidence, opening statement and argument

If you are self represented your oral presentations to the Board can be separated into three distinct parts, the opening statement, your evidence, and your closing argument. The contents of these presentations are discussed further in the next chapter. You will be under oath when you give your evidence and otherwise you will be presenting an outline of your evidence and your position as to why the authorization should not be issued or how it should be changed.

Prepare your oral submissions or evidence prior to the hearing. Depending on your style of presentation you may wish to write out speaking notes or to speak from an outline. While you may change parts of your final oral argument prior to the end of the hearing preparing an outline early will assist in focusing your arguments.

Practice, practice, practice. You should practice your presentation out loud and in front of someone or in front of mirror. Practicing your submissions and knowing your material will allow you to relax during the hearing and assist in making a clear and concise presentation to the EAB.

Chapter 9: The Hearing

The hearing itself is a somewhat formal affair, where evidence is provided and witnesses are questioned. This chapter discusses the following:

- An overview of what to expect at a hearing;
- Your conduct at hearings;
- Failure to appear;
- Communicating with the proponent, Alberta Environment, counsel, and witnesses;
- Procedural and evidentiary rules;
- The order that people present their evidence and arguments;
- Effectively presenting a case;
- Witnesses;
- Closing argument and briefs;
- Adjournments;
- Closing of the record; and
- Reconsideration.

1. An overview of what to expect at a hearing

The EAB hearing process is a formal proceeding based on the adversarial system. The EAB, the Director, and the approval or licence holder will often have lawyers and experts present at the hearing. This can be intimidating, but an appellant who is well organized and has done the proper preparation need not feel anxious.

You can expect that the hearing itself will be quite formal. This means that relatively stringent rules apply to the process. These principles are found in the legislation, the EAB's *Rules of Practice*, and some common law principles about fair process. The common law principles have evolved through time and can be summed up in the idea that a person's rights should not be impacted unless there has been a fair process in which a decision-maker considers the impacts. Determining what is fair will vary with the circumstances, with greater impacts on a person's rights raising the bar requiring more thorough and comprehensive procedures.

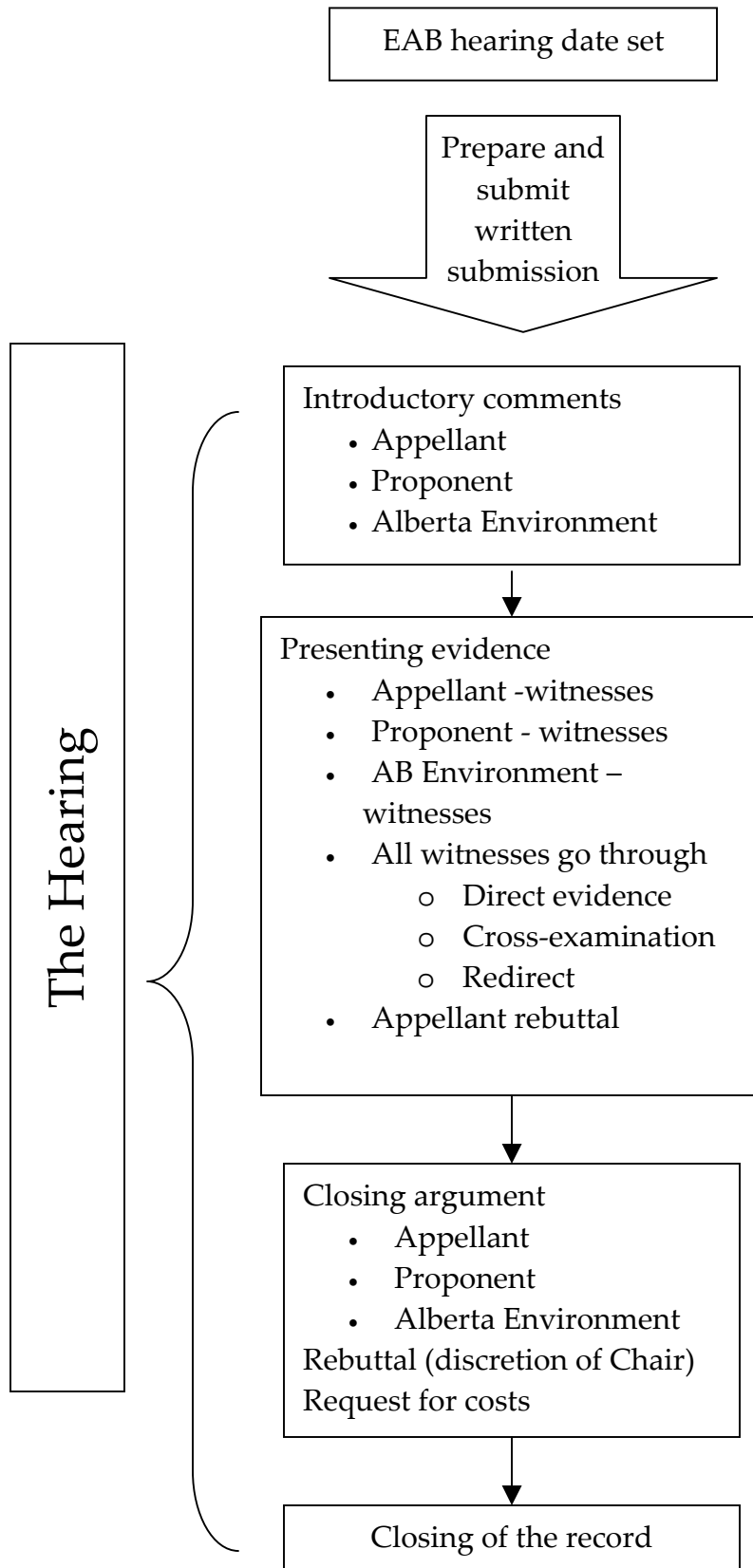
The EAB has the power to create its own procedure and rules and broadly manage the hearing process.²⁵⁴ The *Rules of Practice* describe the EAB's powers over the hearing. These powers include: making decisions about the admissibility of evidence; subpoenaing and questioning witnesses; the pursuit of alternative settlements; disposing of procedural motions; and the ability to seek full disclosure of the evidence.²⁵⁵

While the EAB has broad discretion over its own procedure there may be instances where a question of the legality of an EAB decision is raised. This is done by bringing an application for judicial review and is discussed in Part IV of this guide. The hearing process will generally follow a set order. This order is set out in Figure H below.

²⁵⁴ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 2 and *EPEA* at ss. 95(1) & (8). The EAB's powers include all those powers of a commissioner under the *Public Inquiries Act*, R.S.A. 2000, c. P-39.

²⁵⁵ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 2.

Figure H: The hearing process



2. Your conduct at hearings

Your conduct at a hearing may impact how you are received by the EAB. Be respectful in discussions with the EAB and other parties and be prepared to answer tough questions.

Be professional. It is to your advantage to respond to questions in a calm, collected and reasoned manner. This will be difficult when you feel your property, health or livelihood may be directly threatened and when the person asking the question seems to be bullying or manipulative.

Avoid interrupting others in the hearing process. Be respectful of the process and recognize the legal constraints on the EAB. Attacking the process (without reason) or the Board's inability to deal with particular issues is counterproductive. If issues arise around the choice of members for the panel or the hearing process, the remedy is to go to the courts (see Part IV).

Ask questions. The hearing may involve technical, complex and confusing information. Do not hesitate to ask the EAB for clarification on its process or any of its rules. Similarly, if the EAB or opposing counsel asks you an unclear question be sure to ask for clarification before answering. The EAB should also provide clear reasons for deciding motions.

Be prepared. Effective participation requires a significant amount of preparation so that all the relevant evidence is obtained and presented to the EAB in a logical and coherent manner.

2.1 *Communicating with lawyers during the hearing*

During the hearing discussions with the project proponent and Alberta Environment are usually conducted through the lawyers present for each party. This reflects a common formality in a regulatory hearing as any negotiation between the parties should have been conducted prior to the hearing. The purpose of the hearing is to present evidence "on the record", not to continue a private dialogue with other parties.

2.2 *Communicating with witnesses*

When one of your witnesses is under oath and giving evidence there is a general rule that you should not be communicating with them “off the record”, i.e., in private. The EAB’s *Rules of Practice* state that this rule applies to counsel and it is best to avoid talking with witnesses off the record while they are under oath.

A witness is considered to be under oath from the time of swearing or affirming to tell the truth for the duration of time that they are presenting evidence to the EAB, including during breaks (including overnight if the hearing is more than a day). To communicate with a witness “off the record” when they are under oath first obtain the consent of the EAB and the other parties.²⁵⁶

3. **Failing to appear at the hearing**

If you are unable attend the public hearing it is important that you have an agent or lawyer attend on your behalf and give notice to the EAB that you will be appearing by agent alone. At very least, notice should be given to the EAB stating the reason for your absence. Failing to appear at the hearing, without providing a good reason for your absence, may result in your objection being waived and an end to further correspondence related to the hearing.²⁵⁷ The EAB can choose to proceed in your absence.²⁵⁸

4. **Order of argument and presentation of evidence**

The EAB has the discretion to determine the order in which you and the other parties will give evidence. Typically the order in which parties give their evidence is as follows:²⁵⁹

²⁵⁶ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 15.

²⁵⁷ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 32.

²⁵⁸ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 32.

²⁵⁹ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 23.

- First the Appellant of the Director's decision (the person challenging a government or judicial decision usually presents their argument first) and his/her witnesses;
- Second other parties who have similar interests to the appellant (the similarity is determined by the Board); this includes other parties opposing the authorization or intervenors who are supportive of the appellant;
- Third the approval or licence holder;
- Fourth Alberta Environment;
- Fifth the Board's witnesses, if any; and
- Sixth the Appellant, in rebuttal (at the discretion of the Chair).

4.1 Time restrictions on giving evidence and argument

Prior to the hearing the EAB will provide the parties with an indication of the time you will have to present your evidence and your argument. This information will be included in a procedure letter from the EAB (see Appendix F). The Board has the ultimate discretion to adhere to or relax these timelines. If the EAB allows you more time than originally expected, you may wish to request a short adjournment to organize the use of this extra time. Also if new information arises during the hearing you may wish to request more time to review and consider the evidence to determine whether additional questions arise from the evidence.

5. Effectively presenting a case

There is an art to effective public speaking and effective cross-examination and a need to be organized to present your evidence effectively. Be strategic in deciding which of your issues are most important and most likely to succeed. Emphasize evidence that is most supportive of these issues. Avoid argument and evidence regarding issues unlikely to influence the result.

5.1 Opening statement

Each hearing begins with an opening statement from the appellant, Alberta Environment and the other parties.²⁶⁰ The *Rules of Practice* indicate that the opening statement should include “an outline of the evidence the party intends to introduce, a list of witnesses, the topics to be covered, and the amount of time required”.

The importance of the opening statement (and the closing statement) should not be underestimated. Have a clear, concise outline of the evidence, the witnesses you will be calling and the issues you will be focusing on. This is an opportunity to clearly present your case and prepare the EAB for what you will be illustrating through your evidence.

6. Recording of evidence

Evidence must be “on the record” to be considered by the EAB. This means that it must be captured during the formal sitting of the hearing either through testimony, through entering exhibits, or through written and oral submissions to the EAB. The hearings will usually be taped or a stenographer may transcribe the hearing in some proceedings.

7. Evidence

Evidence can be described as facts and opinion. Evidence may be presented in oral, visual or documentary form. The primary purpose of the hearing is to present evidence to the EAB, by providing facts and opinion so that the EAB can make a fair and equitable decision regarding the Director’s decision.

7.1 Written testimony

Evidence in a public hearing is usually given orally. The EAB has the discretion to accept written testimony as well. Written testimony must be sworn to be true

²⁶⁰ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 22.

and the person swearing it must be available for cross-examination.²⁶¹ Written testimony typically takes the form of a sworn statement or affidavit.

7.2 When is evidence presented?

Evidence is presented during the hearing. Evidence provided to the EAB and other parties prior to the hearing must be referred to at the hearing or included with your written submissions to become part of the record. Once the hearing process is completed further evidence can only be submitted to the EAB at its discretion.

7.3 The importance of having direct knowledge of the evidence presented

The role of a witness is to present credible and relevant evidence. For this reason it is important to have witnesses that have direct, first-hand knowledge of the information that they will present at the hearing.

Evidence presented by a witness that is based on second hand information, referred to as hearsay evidence, can have its admissibility challenged (see the discussion of admissibility of evidence below). The EAB will ultimately decide whether information is admissible. It will also determine what weight will be given to the information submitted by each party.

7.4 Documents that were created by individuals other than those appearing at the hearing

Where documents are submitted as evidence, the original document should be used and its author should be available for cross-examination. If the author is not present for cross-examination the EAB may decide to exclude the document or limit the amount of weight it is given. Documents authored by third party experts may be allowed if they provide relevant information for the hearing.

²⁶¹ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 27.

7.5 What is the “burden of proof”?

The burden of proof refers to a party’s obligation to prove their case. The person submitting the evidence has the burden of providing the factual support for their position.²⁶² The appellant has the burden of proving that the Director’s decision should be changed.

The *Rules of Practice* indicates that the EAB will make decisions “on the preponderance of the evidence”.²⁶³ This means that, as an appellant, you must give the EAB sufficient evidence to convince it that your position (when considered with other parties’ evidence) is justified and that changes to the Director’s decision are required.

7.6 The distinction between evidence and argument

When presenting evidence it is important to avoid argument. Evidence is submitted first by all parties, followed by argument. Evidence is based on the facts and witness opinion while argument relates to whether the activity or someone’s actions are legally or practically appropriate.

7.7 Undertakings

Where a party to an appeal promises to provide information later in the hearing it is often referred to as an “undertaking”. Undertakings are used to deal with information that is not on the record or has yet to be marked as an exhibit. Failure to comply with an undertaking will be considered a failure to comply with the EAB process and may impact how the party is treated by the EAB. For example, the EAB could minimize the weight given to particular evidence or indicate that certain evidence is inadmissible due to the failure to follow up on an undertaking related to that evidence.

²⁶² Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 29.

²⁶³ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 29.

8. Admissibility of evidence

The phrase “admissibility of evidence” refers to rules (both in legislation and common law) governing whether a decision-maker will accept evidence. The admissibility of evidence relies heavily on what the decision-maker considers relevant.

The EAB’s *Rules of Practice* indicates that the Board shall admit any “relevant oral or documentary evidence” that is not privileged.²⁶⁴ Relevant evidence is described as any evidence that “has the tendency to make the existence of any fact that is of consequence to the determination of the appeal more probable or less probable than it would be without the evidence”.²⁶⁵

Privileged information will generally not be found to be admissible. Privileged information includes legal advice a party received (solicitor-client privilege), evidence created in anticipation of litigation (litigation privilege), or certain types of privilege that the government enjoys (public interest immunity or Crown privilege).²⁶⁶

The EAB can also exclude evidence if there is “the danger of unfair prejudice; confusion of the issues; or considerations of undue delay, waste of time, or needless presentation of repetitious evidence.”²⁶⁷ Prejudicial evidence may include evidence that is used to surprise the proponent and or that which has limited relevance but is damaging for other reasons (such as portraying the other party in a negative light).

The discretion of the EAB to admit or exclude evidence is very broad. The EAB will measure the “probative value” of the evidence, meaning that the EAB will look at the extent to which evidence proves or disproves a fact. They will weigh that value against any potential adverse outcomes, such as prejudicing a party, confusion or delay.

²⁶⁴ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 25.

²⁶⁵ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 25.

²⁶⁶ Crown privilege or public interest immunity refers to both legislative powers and common law right of the Crown to prevent disclosure of certain documents, particularly as they relate to Cabinet discussions.

²⁶⁷ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 25.

The EAB's rules regarding evidence are generally less strict than that of a court but parties may still raise objections about the admissibility of evidence based on common law and legislative principles. For instance, the EAB will likely accept "hearsay" evidence (evidence not based on first hand knowledge) if it is relevant and may simply weigh the evidence differently depending on the credibility of the source of the evidence. Parties can still object to the evidence being admitted, citing the inability to test the evidence on cross-examination and claiming that they will be prejudiced in some fashion by the admission of the evidence.

8.1 Evidence that may be confidential or sensitive

The EAB can also deem confidential or sensitive information to be inadmissible. This is different from privileged information. The EAB has the discretion to determine what types of sensitive information will be introduced as evidence and this may include information regarding national security, or information of a business, personal or proprietary nature.²⁶⁸ The EAB can direct the disclosure of this information in an edited form and has general control over disclosure.²⁶⁹

The issue of disclosure of confidential information can be a source of frustration in the hearing process. While the majority of information is disclosed, you may believe that specific information that has not been disclosed is of particular relevance to the hearing. If the EAB decides that some information should not be disclosed and you are of the opinion that it is central to your argument you may wish to seek advice from a lawyer and possibly seek disclosure through other legal means. You may seek to have the hearing adjourned for this purpose.

Because the EAB has broad discretion over its own process its decisions regarding disclosure are typically not reviewable in the courts. However, there may be instances where the lack of disclosure effectively undermines your right to a fair and full hearing of the issues. A court could review this procedural fairness issue.

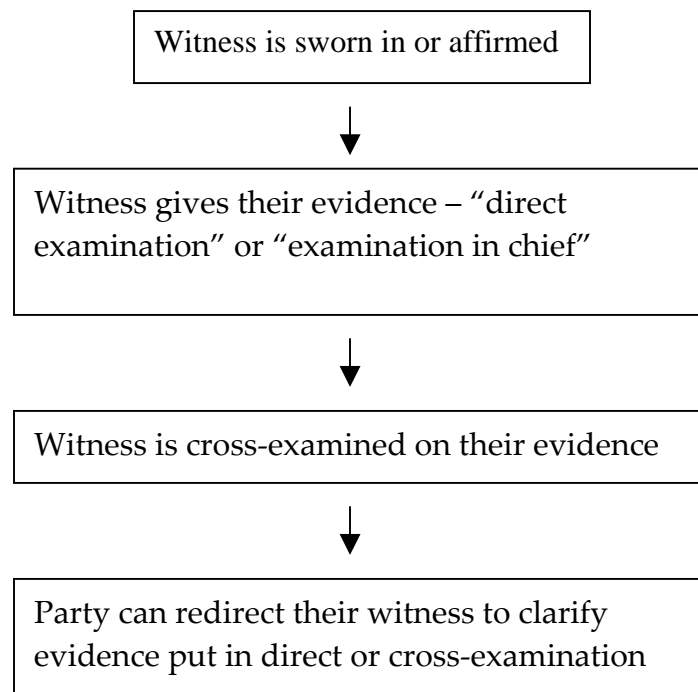
²⁶⁸ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 26.

²⁶⁹ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 26.

9. Giving evidence and asking questions

Giving evidence and asking questions of witnesses is essential to effective participation in the process. Depending on the circumstance, you may be the only one giving evidence or you may have a variety of witnesses, both experts and non-experts. The process is the same for any witness giving evidence.

Figure I: The hearing process for witnesses



9.1 *Swearing in witnesses*

When witnesses give evidence at a hearing they do so under oath or affirmation.²⁷⁰ This involves swearing or affirming that you will tell the truth in all aspects of your evidence. Failure to tell the truth under oath may constitute perjury, which is a crime.²⁷¹ Also, a party that is perceived to be lying will have lost all credibility with the EAB.

²⁷⁰ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 21.

²⁷¹ Perjury is considered an indictable offence under section 131 and 132 of the *Criminal Code*, R.S.C. 1985, c. C-34.

9.2 *Direct examination*

“Direct examination”, or what is referred to as “examination-in-chief”, is the terminology used when you are directing questions to one of your own witnesses. The main purpose of “direct examination” is to have your witness present all relevant information in their oral testimony. In formal, legal processes you are not allowed to ask your own witnesses “leading” questions. This means that you should not ask questions that lead the witness to a specific answer. For example, asking a witness “You found that this approval will have a negative impact on my land, didn’t you?” is a leading question. The purpose of direct examination is to allow a witness to present facts and their perspective, and so it is important to ask open-ended questions.

The rules about what questions can be asked of your own witness before the EAB are less strict than in a courtroom. The EAB may nevertheless ask that you not lead your witness to specific answers. This is one reason why your witnesses should be well prepared to give their evidence. You want your witness to tell their story and describe the relevance of documents they may have prepared as evidence.

9.2.1 **Expert and non-expert witnesses**

In court processes there is a distinction between expert and non-expert or lay witnesses. While the EAB does not follow a strict court-like approach to witnesses it is still relevant to know how different witnesses will be viewed by the EAB in the hearing.

9.2.1(a) **Expert witness testimony**

Expert testimony is valuable in a hearing as it is usually carries more weight with the decision-maker. In a court process an expert witness goes through a process of being “qualified” as an expert to validate that they can give professional advice to the court within their area of expertise. The EAB will consider the witness’ qualifications when deciding how much weight to give to their testimony.²⁷² For this reason the EAB requires that a curriculum vitae or resume

²⁷² Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 24.

be filed with the EAB.²⁷³ All parties can challenge the credibility or expertise of witnesses presented as having special or expert knowledge.

The choice of your experts can have a significant impact on the credibility of your evidence. For instance, if an expert has an obvious agenda and is on the fringe of science or speaks outside of his/her area of expertise the weight the EAB may give the evidence may be diminished.

Taking an expert's credibility to task occurs during cross-examination and is discussed below.

9.2.1(b) Non-expert or lay witness testimony

Most witnesses that appear before the EAB will be lay witnesses or non-expert witnesses. Lay witnesses provide their personal perspective and concerns relating to the activity. The weight given to these witnesses may be minimal where the evidentiary issue is technical in nature and the witness has no experience specifically dealing with those issues.

9.2.2 Giving oral evidence

Your oral evidence will want to paint the picture of who you are, how the approval or licence impacts you and factual information that supports your position regarding having the approval refused or granted with specific conditions.

Your oral evidence may include:

- An introduction that:
 - Introduces you to the board
 - States what you want to happen and why
 - The Board should recommend that the approval or licence be refused; or
 - The Board should recommend conditions be added to the approval or licence

²⁷³ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 24.

- Your history in the area, including:
 - What you do
 - How long you have been there
 - The legal land description of land you own and where you reside
 - The activities that you (or your family) carry out there

- Your concerns with the approval, including:
 - Specific impacts
 - General impacts
 - How those impacts directly affect you

- Facts that support your concerns, including:
 - Specific observations about existing impacts that are likely to be made worse with the approved activity
 - Specific risks that have been identified in the application documents
 - Specific risks that you have found in literature (and included in your written submission)

- Reasons why the impacts or risks are unacceptable

9.3 Presenting physical evidence (exhibits)

Entering written evidence, such as reports, or other documents, generally occurs by attaching them to written submissions and referring to the documents and their relevance in the submission. Exhibits can also be entered as evidence by placing them before a witness during their testimony. To present documents during the hearing process you will need enough copies for all parties, including several copies for the EAB. You will need to ask that the document be made an exhibit. Typically, each party presenting at a hearing will then have a list of exhibits that are noted on the record.

It is important to have your exhibits organized to facilitate presenting them into evidence. Track the exhibits by labeling them with the number indicated by the EAB. This will avoid confusion if the document is referenced later in the hearing. Most, if not all, of your documentary evidence will have been outlined and referenced in your written submission. Do not hide information to the last moment; the EAB does not look kindly upon attempts to ambush the other parties with new evidence. There are no strict rules about such behavior but it

can cause delays and the EAB may exclude the evidence if it appears to be aimed at surprising the other side and was not referred to in the written submission.

9.4 The use of visual aids

The use of visual aids can be effective in illustrating the evidence and the impacts of the approved or licenced activity. If you will be using visual aids indicate to the parties prior to the hearing of your intent and outline the purpose for the visual aid.

10. Cross-examination

Cross-examination questions are directed at witnesses for the opposing side.²⁷⁴ As the appellant you will be able to cross-examine witnesses for the government and witnesses for the approval holder. Cross-examination questions are typically very leading and aim to raise doubts as to the value of the witness' testimony, undermine the credibility of the witness, or provide further clarity on issues that support your position.

10.1 Scope of questions that can be asked

The EAB's *Rules of Practice* indicates that the scope of cross-examination will be limited to the scope of the direct evidence presented.²⁷⁵ This means that you cannot cross-examine a witness on issues that are unrelated to what the witness presented in their direct evidence. The EAB has the discretion to allow other evidence to be raised through cross-examination but will limit cross-examination to the extent of getting "full and true disclosure of the facts".²⁷⁶

²⁷⁴ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 28. An exception to this rule is where one of your own witnesses is considered "hostile", however this is very unlikely to occur in an EAB hearing process.

²⁷⁵ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 28.

²⁷⁶ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 28.

10.2 Cross-examination when you are the witness

When being cross-examined you may find that the opposing side is manipulating your words. Be sure to answer clearly and concisely. Giving long answers or telling stories may cause confusion, or unnecessarily give the opposing side additional areas to attack your case. If questions are unclear or ambiguous ask for clarification. For instance, some questioners (particularly lawyers) will combine questions in an attempt to create confusion. A confusing answer allows for multiple interpretations of your answer. Remember that the oral evidence is on the record and will be referred to by other parties in their closing arguments.

Give complete and concise answers. Answer questions briefly but also ensure that you qualify your answer if required. If you are asked for a “yes” or “no” answer and that is not possible to answer the question completely in this manner state why a “yes” or “no” answer would not be accurate. Remember the questioner will intentionally be framing the questions to get the answers they want from you. Generally cross-examination is used to get admissions about gaps or uncertainties in the evidence, or to put into question the witness’ credibility.

In responding to questions keep in mind the key points of your evidence. Knowing your evidence and the main points you wish to make will enable you to respond to questions in a meaningful and clear manner.

10.3 Cross-examination of other witnesses

As a self represented party you will want to keep the following in mind.

- Be prepared; know the issues and the facts that you need to support your argument.
- Read about and prepare for each witness that you will be cross-examining. Preparing questions beforehand helps ensure you do not miss any relevant questions. As you ask the questions you can then check them off once you have obtained the answer you are seeking.
- Persevere in asking a question if the answer you receive is vague or ambiguous. If a witness does not answer the question or avoids the question

by giving a generic answer, ask the question again in a more directed manner. At the same time be conscious of time constraints. If a straight answer is not being given you may wish to move on to other questions.

- Target areas of uncertainty in the witness's testimony. Getting admissions that an impact or model has some uncertainty may result in the EAB being more likely to apply specific conditions.
- Focus on asking questions to which you know the answer. Asking open-ended questions when you do not know the answer provides an open opportunity for the witness to simply strengthen their case and evidence.
- Challenge the witness' credentials where the witness has evident biases or speaks to issues beyond the scope of their expertise. While it can be an uncomfortable process, questioning their credentials or their expertise to talk about a specific subject (which is beyond the scope of their professional experience) can be relevant and may assist in minimizing the weight given to their evidence.

10.4 EAB questions

The EAB itself will often ask witnesses a lot of questions regarding their evidence and other matters of interest. The EAB may ask questions of a witness at any time but will generally ask most of their questions after all the witnesses for a particular side have been cross examined.

11. Redirecting a witness

After a witness is cross-examined the party who called the witness has the opportunity to "redirect" them to clarify any issue that arose during cross-examination. Redirection is used to clarify a position and should not be used as an attempt to enter new evidence. Following the redirect questions or if there are none, the witness testimony is concluded. The next party in the process is then sworn in and gives their evidence. The appellant may be given the opportunity following the testimony of all other witnesses to give rebuttal evidence.

12. Rebuttal evidence

If you are the appellant, you may have the opportunity to rebut or provide further evidence to counter the evidence of the other parties. This rebuttal happens after all the other parties have presented their evidence, giving you the chance to hear the other parties' evidence and determine whether you have further information that provides clarification or a counterpoint. You cannot, however, use this time to simply restate the evidence you gave in the first instance or provide new information that does not relate to the other parties' evidence. If you have no rebuttal evidence, simply indicate this to the EAB.

13. Closing argument and briefs

After all the evidence is submitted through the hearing process you have the opportunity to make a closing oral argument and may have the opportunity to file a written closing argument. Typically the EAB limits hearings to oral closing arguments but may decide to allow for written arguments in specific circumstances. Both the argument and brief should propose findings of fact and draw conclusions of law.²⁷⁷ The final remarks and any briefs submitted will be part of the record. The structure of the closing argument and written submission can be dictated by the EAB. The EAB may, for example, limit the time for final remarks or limit the length of written briefs.

13.1 Contents of closing arguments and written briefs

This is your final opportunity to persuade the EAB of your position. Your closing argument and written brief should:

- concisely state the remedy or outcome you would like;
- briefly restate how the project impacts you directly and summarize evidence in this regard;
- summarize relevant evidence about impacts of the project and relate this evidence to the remedy you are seeking;

²⁷⁷ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 30.

- cite precedents where appropriate, including decisions of the EAB or the courts;
- restate how the principles of the statutory scheme are supportive of your position;
- outline what facts and what interpretation of the law should be accepted by the EAB;
- outline evidence or positions of the other side that are untrue, misrepresent the facts or are fallacious;
- outline evidence of the other side that is inconsistent or unclear; and
- seek costs from the EAB.

Try to avoid exaggeration. Use summaries and bullets to concisely convey your key points.

14. Adjournments

The EAB can adjourn the hearing at its discretion.²⁷⁸ You can also ask for an adjournment. There are no set criteria for when the EAB will agree to adjourn the hearing.

15. Closing of the record

At the end of the hearing the EAB will close the record.²⁷⁹ Once this occurs no further evidence will be accepted. For this reason it is important that you get all your evidence to the EAB during the hearing process. If you believe there is still relevant information that has yet to be placed on the record, whether it is from you or other parties you can request that the record not be closed until this information is provided. For instance, there may be undertakings to provide information to the EAB that require the record to remain open.

²⁷⁸ *Environmental Appeal Board Regulation* at s. 16.

²⁷⁹ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen's Printer, November, 2007) at s. 31.

16. Reconsideration of its decision

The EAB has the discretion to reconsider, vary or revoke a decision it has made.²⁸⁰ This discretion is subject to the principles of natural justice and the EAB has indicated that it will reconsider a decision “in situations where there are exceptional and compelling reasons”.²⁸¹

In determining what are “exceptional and compelling” circumstances the EAB will consider the public interest, delays, the need for finality, whether there was a substantial error of law that would change the result and whether there is new evidence not reasonably available at the time of the previous decision.²⁸² The fact that new evidence has arisen is not enough to justify reconsidering a decision. The new evidence must be of a nature to change the result.²⁸³

In the past the EAB found that reconsideration was not warranted because a party was not represented at the original hearing.²⁸⁴ Similarly, it will not reconsider a decision where no new evidence is provided.²⁸⁵ To reconsider a decision “[t]here must be a reasonable possibility the decision could be altered”.²⁸⁶

²⁸⁰ EPEA at s. 101.

²⁸¹ *Covey and Barlem v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (13 January 2006), Appeal Nos. 05-022 and 23-D (A.E.A.B) at paragraph 41 (*Covey*), citing *Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri Link Resources Ltd.* (28 September 2000), Appeal No. 99-009-RD (A.E.A.B.)

²⁸² *Covey* at paragraph 42.

²⁸³ *Reconsideration Request: Wood Buffalo First Nation v. Director, Northern Region, Regional Services, Alberta Environment re: OPTI Canada Inc./Nexen Canada Ltd.* (17 November 2004), Appeal No. 03-148-RD (A.E.A.B.).

²⁸⁴ *Reconsideration Request: Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Blodgett* (14 June 2002) Appeal No. 01-074-RD (A.E.A.B.).

²⁸⁵ *Covey*.

²⁸⁶ *Covey* citing *Laidlaw Environmental Services (Ryley) Ltd. Request for Reconsideration, re Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (7 April 1998), Appeal No. 96-059 (A.E.A.B.)

Chapter 10: The results of an appeal - EAB report and recommendations

1. The hearing results

The results from a hearing will be outlined in the EAB's "report and recommendations". If an EAB panel member dissents, or comes to a decision that is not the same as the other two members, the decision or recommendations of the majority are considered the decision of the Board.²⁸⁷

Generally, the written report and recommendations will be submitted to the Minister of Environment within 30 days after completing the hearing.²⁸⁸ The Minister has the option of allowing the EAB more time to submit its report and recommendations.

1.1 *Contents of the report and recommendations*

The report and recommendations will include:²⁸⁹

- a summary of the evidence, including all material facts, law and discussion that was presented during the hearing and the EAB's findings on evidentiary issues;
- a statement of the issues to be decided;
- recommendations, including any dissent; and
- the reasons for the recommendations.

All the panel members who heard the appeal must sign the report.²⁹⁰

²⁸⁷ *Environmental Appeal Board Regulation* at s. 17(1).

²⁸⁸ *EPEA* at s. 99.

²⁸⁹ *Environmental Appeal Board Regulation* at s. 17(3).

²⁹⁰ *Environmental Appeal Board Regulation* at s. 17(2).

1.2 What happens with the report and recommendations?

The report and recommendations are submitted to the Minister of Environment who then decides what to do with the approval or licence. The Minister may decide to confirm, reverse or vary the decision that was appealed and may make any order to implement the decision.²⁹¹

Typically if the EAB recommends additional conditions for the authorization and the Minister will amend the authorization accordingly. Once the Minister has decided what to do with the EAB's recommendations, the EAB will be notified of that decision.

1.3 Public notice of the report and recommendations

The report and recommendations are made available to the public following the Minister's decision regarding the report. Once the EAB receives the Minister's decision, it will contact the parties to the appeal, those who submitted a notice of appeal, and anyone who the EAB considers it appropriate to notify.²⁹²

There is no legislative deadline stipulating when the Minister must issue his or her decision once he or she has received the EAB's report. Typically the Minister will decide on the recommendations within a month. This means that the decision of the Minister and the report and recommendations are often sent to parties within two months of the appeal. However, it has taken longer in some cases.

1.4 The Minister's discretion

The Minister does not always follow the EAB's recommendations. When this occurs the Minister has to provide reasons as to why the recommendations were not adopted.²⁹³ In most instances the Minister will follow the EAB's recommendations.

²⁹¹ *EPEA* at s. 100.

²⁹² *EPEA* at s. 100(2).

²⁹³ See *Imperial Oil Limited and Devon Estates Limited v. HMQ and the City of Calgary* (2003), 2 C.E.L.R. (3d) 236, 2003 ABQB 388, online: Environmental Appeals Board <<http://www.eab.gov.ab.ca/judicial/Imperial%20Oil%20JR.pdf>>. If the reasoning of the Minister seems absurd or made in bad faith the decision may be judicially reviewed (see Part 4).

1.5 Influencing the Minister's decision

The Minister's decision regarding the EAB's report and recommendations is generally not open to influence. While the decision may be swayed by grassroots or public pressure in certain instances the Minister will not typically canvass or consult with parties to the appeal. If the Minister were to do so it could be viewed as undermining the appeal process.

2. Compliance with the Minister's decision

The Minister's decision to adopt or amend the recommendations of the EAB has the force of law when it is put into a Ministerial Order. Once the Ministerial Order has been issued the approval or licence in question is governed by the new terms that are outlined in the Order. These orders can be filed with the Court of Queen's Bench at which point they become like a court judgment.²⁹⁴ The Ministerial Order typically states that the approval is confirmed subject to the amendments outlined in the Order. If someone violates a condition in the Ministerial Order the government can enforce the terms of the order in Alberta's Court of Queen's Bench.

²⁹⁴ *EPEA* at s. 104.

Chapter 11: Costs

This chapter discusses the costs of an appeal, the potential to recover some of the costs incurred in participating in the appeal process, and the possibility of having to pay another party's costs.

1. Interim and final costs

The EAB has broad discretion over the awarding of costs related to an appeal. Costs may be awarded on an interim or final basis. An interim award of costs may be granted where a party can demonstrate that such an award is necessary for that party to be able to effectively participate in the appeal. In coming to a decision on interim costs the Board may consider some of the following:

- what the submission will contribute to the hearing or meeting;
- the clarity of the proposal for interim costs;
- whether there is a demonstrated need for interim costs;
- whether other funding sources have been sought;
- whether issues and resources have been consolidated with other parties (to minimize their cost); and
- any other information the Board considers appropriate.

Final costs are awarded after the conclusion of the hearing and may cover all or part of the costs incurred.²⁹⁵ Factors the EAB will consider in deciding whether to award final costs include:²⁹⁶

- whether there was a preliminary meeting or mediation;
- whether interim costs were awarded;
- whether an oral hearing was held;

²⁹⁵ *Environmental Appeal Board Regulation* at s. 20.

²⁹⁶ *Environmental Appeal Board Regulation* at s. 20(2).

- whether the appropriate information was included in the application for costs;
- whether the party was in need of financial resources to adequately participate;
- whether the submission made a substantial contribution to the hearing;
- whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party's submission; and
- any further criteria the EAB considers appropriate.

2. Who pays costs?

The EAB may order that costs be paid by any other party to the appeal, including Alberta Environment, or the EAB itself.²⁹⁷ In most instances where there are cost awards the proponent will be the one paying costs.²⁹⁸ Generally costs will not be awarded against Alberta Environment unless the Director acted in bad faith.²⁹⁹

3. Costs ordered against appellants

Costs will usually not be awarded against an appellant so long as the appeal raises legitimate concerns regarding the approval.³⁰⁰ It is nevertheless within the powers of the EAB to award costs against you, as an appellant. Typically this occurs if the appeal is of a frivolous or vexatious nature or is being brought for a collateral purpose such as appealing an authorization in order to expose a party to negative publicity or simply to inconvenience the other party. Costs may be awarded in these types of appeals as a way to discourage parties from bringing appeals where there is no legitimate basis for the appeal.

²⁹⁷ *Environmental Appeal Board Regulation* at ss. 19(4) and 20(3).

²⁹⁸ The Board finds that "costs are more properly fixed upon the body proposing the project, filing the application, using the natural resources and responsible for the project's financing, than upon the public at large as would be the case if they were to be assessed against the Department". See *Costs Decision: Northcott v. Director, Northern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.* (23 December 2005), Appeal Nos. 04-009, 011 and 012-CD (AEAB) at para 72.

²⁹⁹ *Costs Decision: Northcott v. Director, Northern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.* (23 December 2005), Appeal Nos. 04-009, 011 and 012-CD (AEAB) at para. 69.

³⁰⁰ See *Costs Decision re: Ouellette Packers (2000) Ltd.* (10 May 2002) Appeal No. 01-076-CD (AEAB) and *Cost Decision re: Pembina Corporation* (5 October 1998) Appeal No. 98-005 (AEAB).

Appellant behaviour that could attract an award costs against them include:

- wasting the time of the EAB and other parties by attempting to argue irrelevant matters;
- raising issues that are aimed at delaying or frustrating the process; and
- raising or arguing issues that might be characterized as frivolous or vexatious.³⁰¹

4. Applying for final costs

It is very important that you make your application for costs at the conclusion of the appeal hearing.³⁰² To apply you simply request that the EAB make a ruling as to costs. Provide the EAB with a log of your time spent on the appeal and a listing of other expenses that were incurred. In making your submission for costs it is important that you have invoices and receipts and that you are able to outline how the expenses were reasonable and necessary for your preparation and participation in the hearing.

The EAB may make a costs decision at that time or it may set another hearing date to deal with the issue of costs.³⁰³ Determining the costs that were incurred and calculating the costs that you wish to request can take some time; you may wish to seek a later meeting to deal with the issue of costs. If you fail to apply for or request costs at the time of the hearing or at another prescribed time set by the EAB, the costs application may be rejected.³⁰⁴

³⁰¹ “Frivolous” is defined as “lacking a legal basis or legal merit; not serious; not reasonably purposeful” and “vexatious” is defined as “without reasonable or probable cause or excuse; harassing; annoying” in *Black’s Law Dictionary*, 7th ed., (St. Paul, Minnesota: West Group, 2000) at 535 and 1264 respectively.

³⁰² Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 33.

³⁰³ Environmental Appeals Board, *Rules of Practice*, (Edmonton: Queen’s Printer, November, 2007) at s. 33.

³⁰⁴ *Cost Decision re: Nurani and Virji-Nurani* (March 6, 2000), Appeal No. 97-026 (AEAB).

5. What costs might be covered?

If the EAB does award costs the amount awarded is not likely to cover the actual cost of the appeal. The costs that are recoverable are those costs that are reasonable and those costs that are incurred directly and primarily related to matters contained in the notice of appeal and the preparation and presentation of the party's submission.³⁰⁵

In other words, if costs are awarded, they will only cover the cost associated with those issues dealt with in the Notice of Appeal. For example, if an expert witness is called and primarily gives evidence unrelated to the issues on appeal, the cost award is unlikely to cover the expense for the expert.

The costs being applied for may be covered in part or in full. The EAB often starts from the premise that 50% of the costs may be covered.³⁰⁶ The EAB may vary from the 50% if they find reason to do so. For instance, the EAB has awarded costs to cover:

- 40% - 50% of a lawyers fee;³⁰⁷
- a portion of an expert's or retained witness' fees;³⁰⁸
- procuring relevant documents;³⁰⁹

³⁰⁵ *Environmental Appeal Board Regulation* at s. 18(2).

³⁰⁶ *Interim Costs Decision: Oxtoby et al. v. Director, Central Region, Regional Services, Alberta Environment* Re: *Capstone Energy* (29 December 2004) Appeal Nos. 03-118, 120, 121 and 123 –IC (A.E.A.B.) and *Costs Decision: Northcott v. Director, Northern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.* (23 December 2005), Appeal Nos. 04-009, 011 and 012-CD (AEAB). [Northcott].

³⁰⁷ *Costs Decision: Northcott v. Director, Northern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.* (23 December 2005), Appeal Nos. 04-009, 011 and 012-CD (AEAB) at pp. 16-17, and *Interim Costs Decision: Oxtoby et al. v. Director, Central Region, Regional Services, Alberta Environment* Re: *Capstone Energy* (29 December 2004) Appeal Nos. 03-118, 120, 121 and 123 –IC (A.E.A.B.).

³⁰⁸ *Costs Decision: Maga et al.* (27 June 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047. and 074-CD (AEAB) at 37 [Maga].

³⁰⁹ *Interim Costs Decision: Oxtoby et al. v. Director, Central Region, Regional Services, Alberta Environment* Re: *Capstone Energy* (29 December 2004) Appeal Nos. 03-118, 120-121 and 123 –IC (A.E.A.B.) at para. 37.

- general disbursements such as parking, courier charges, faxing and photocopying;³¹⁰ and
- travel, in certain instances.³¹¹

6. What costs are not likely to be covered?

The EAB will not generally award costs for:

- travel or the time to travel of legal counsel or experts;³¹²
- travel costs generally;
- the preparation of reports that are not relevant to the appeal;³¹³
- taking time off work to attend a hearing;³¹⁴
- an hourly rate to cover time spent doing general research in preparation for the hearing;³¹⁵ and
- witness costs associated with organization of an appeal or where technical information and advice were not submitted to the Board.³¹⁶

³¹⁰ *Costs Decision: Maga et al.* (27 June 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047. and 074-CD (AEAB) at para. 109. Also see *Costs Decision: Paron et al.* (8 February 2002) Appeal Nos. 01-002, 01-003 and 01-006-CD (A.E.A.B.) at 21.

³¹¹ *Cost Decision re: Mizeras, Glombick, Fenske, et al.* (29 November 1999) Appeal No. 98-231, 232 and 233-C (AEAB).

³¹² See *Interim Costs Decision: Oxtoby et al. v. Director, Central Region, Regional Services, Alberta Environment Re: Capstone Energy* (29 December 2004) Appeal Nos. 03-118, 120, 121 and 123 –IC (A.E.A.B.) and *Costs Decision: Maga et al.* (27 June 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047. and 074-CD (AEAB).

³¹³ *Costs Decision: Monner v. Director, Southern Region, Regional Services, Alberta Environment re: New Dale Hutterian Brethren* (5 January 2006), Appeal No. 03-010-CD (AEAB).

³¹⁴ *Costs Decision: Maga et al.* (27 June 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-CD (AEAB) at 106.

³¹⁵ *Costs Decision: Maga et al.* (27 June 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-CD (AEAB) at 107.

³¹⁶ *Costs Decision re: Kievit et al.* (12 November 2002), Appeal Nos. 01-097, 098 and 101–CD. (AEAB).

7. Record-keeping for a costs application

Ensure you have all your expenses properly recorded. Itemized invoices and receipts should be kept and the purpose of each expense should be clearly indicated. Also, keep a log of the time you spend preparing for the appeal. This log should accompany your application for costs

Part III:

Public Participation in Environmental Impact Assessments

Keywords: environmental impact assessment, public participation, discretion, terms of reference, screening, regulations, mandatory, exempt

For quick references to key words use the Adobe search function

You should not rely on this guide as legal advice. The information provided in this guide is current to April, 2009. Keep in mind that laws and policies are subject to change. Please contact Alberta Environment, the Alberta Environmental Appeals Board or the Environmental Law Centre for further information. For legal advice regarding the need for authorizations or permits contact the relevant government department or a lawyer.

1. Environmental Impact Assessments

This Chapter describes when an Environmental Impact Assessment (EIA) may be required for an activity, what is involved in the EIA process, and the opportunities to participate in the process. A formal EIA is not required for most environmental authorizations in Alberta.

Quick reference: EIA -Appendix D.

2. EIAs and environmental authorizations: how they relate

An EIA is a government-mandated process for gathering information about an activity's impacts on the environment. The information gathered is then considered by the government agency charged with deciding if and how an activity should proceed. In Alberta the EIA process is outlined in *EPEA*.³¹⁷ Where an activity requires a federal authorization there may be a federal environmental assessment triggered under the *Canadian Environmental Assessment Act*.³¹⁸ If both federal and provincial environmental assessments are triggered there may be "joint review" of a project.

In Alberta, the EIA process begins with a "proposed activity" under the legislation and a determination of whether an EIA is required. If an EIA is required then an EIA Report is produced. Once the report is produced it is forwarded to government. If the government decides the EIA is satisfactory the proponent of the activity can apply for the required authorization.

3. Activities that require an EIA

An activity will be required to undergo an EIA in three instances:

1. When the activity is listed as a "mandatory" activity in Schedule 1 of the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*,³¹⁹

³¹⁷ *EPEA* at Part 2, Division 1.

³¹⁸ S.C. 1992, c. 37, as amended.

³¹⁹ Alta. Reg. 111/93.

2. Where the Director has determined that further assessment is required for an activity that is listed in the Schedule of Activities (found at the end of *EPEA*) but is not a mandatory or exempted activity (referred to as a “non-mandatory activity”),³²⁰ or
3. Where the Minister of Environment directs that an EIA report be prepared.³²¹

When an activity falls within the **mandatory list** (#1 above) there is no choice but to conduct an EIA. Where an activity is not listed on the mandatory list it will be considered a “non-mandatory activity” or an exempt activity. For “non-mandatory activities” an EIA will only occur if the government decides that one is needed. The Director may order an EIA of non-mandatory activities which include:

1. Activities (not listed as “mandatory”) that are listed in the Schedule of Activities under *EPEA*;³²²
2. Activities that are “reviewable projects” under the *Natural Resources Conservation Board Act*;³²³ and
3. Activities that require an approval by the ERCB.

Activities may be listed as **exempt** from the EIA process in Schedule 2 of the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*.³²⁴ The Minister retains the discretion to order that an EIA be conducted for an exempt activity.³²⁵

4. The decision of whether to order an EIA

The process of deciding whether a non-mandatory activity should be subjected to an EIA begins with the Director doing a “screening” or initial assessment of

³²⁰ *EPEA* at ss. 44, 45 and the Schedule of Activities.

³²¹ *EPEA* at s. 47.

³²² *EPEA* at s. 39 where the definition of “proposed activity” includes those that are subjected to approvals, registrations, and *Water Act* licences.

³²³ R.S.A. 2000, c. N-3.

³²⁴ *Environmental Assessment (Mandatory and Exempted Activities) Regulation* .

³²⁵ *EPEA* at s. 47(b).

the activity's environmental impacts and evaluating the public concern regarding the project.³²⁶

Following the screening decision the Director must prepare a screening report and decide whether a full EIA will be required.³²⁷ The decision to order an EIA is guided by a review of potential impacts from the proposed project and determining whether the impacts and mitigation of those impacts warrant the triggering of the formal EIA process.³²⁸ A screening may require the proponent to model the impacts of the project and address shortcomings in the project site, operation or design. The public concern around a project will also assist the Director in determining whether an EIA is required. Public participation in the process is dealt with further below.

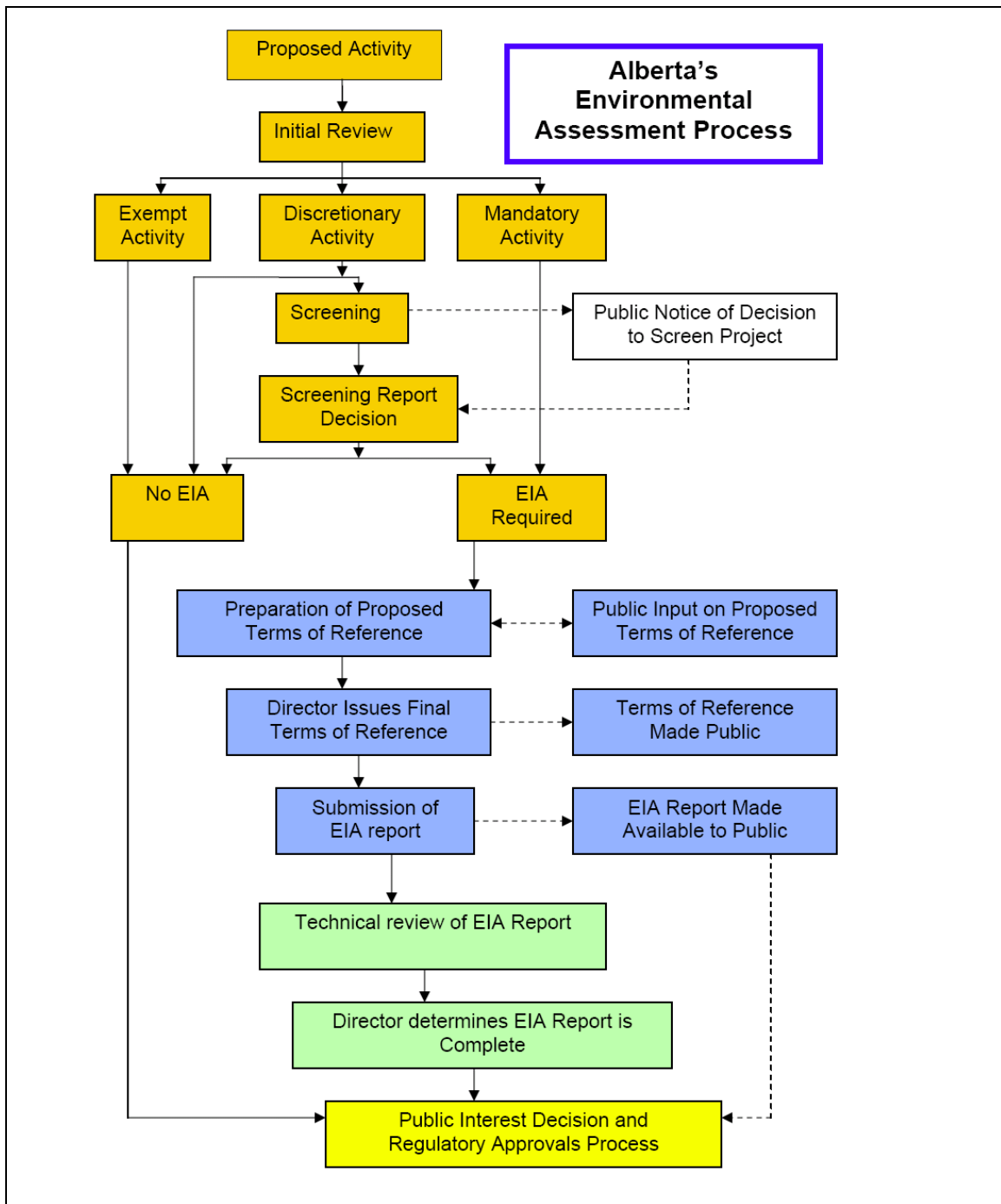
Figure J is a reproduction of Alberta Environment's flowchart that outlines the EIA process in Alberta (as part of *Environmental Assessment Program: Alberta's Environmental Assessment Process*).

³²⁶ *EPEA* at s. 44. The Director must consider the location, size and nature of the proposed activity; the complexity of the proposed activity and the technology to be employed in it; any concerns in respect of the proposed activity that have been expressed by the public of which the Director is aware; the presence of other similar activities in the same general area; any other criteria established in the regulations; and any other factors the Director considers to be relevant when determining whether to order an EIA.

³²⁷ *EPEA* at s. 45.

³²⁸ Personal communication with Larry Williams, Regional Director, Alberta Environment, June 13, 2006.

Figure J: Environmental Impact Assessment Process in Alberta



Alberta Environment, *Environmental Assessment Program: Alberta's Environmental Assessment Process*, Edmonton: Alberta Environment, 2008), online: Alberta Environment <<http://environment.gov.ab.ca/info/library/6964.pdf>>.

5. The EIA report

The contents of an EIA report are dictated by *EPEA* and by the “Terms of Reference” that are prepared for the assessment. The Terms of Reference are prepared by the proponent and are submitted to the Director. The Director can require that certain issues be addressed in the Terms of Reference.³²⁹ Further, *EPEA* requires that the report include a description of the activity, analysis of the need for the activity, identification of baseline environmental conditions and the plans for public consultation.³³⁰

Once the Terms of Reference are approved the preparation of the EIA report is undertaken and submitted to the Director. If the EIA is completed to the satisfaction of the Director it is published and submitted to the Minister.³³¹ The Minister then decides whether to allow an application for an environmental authorization to be submitted to Alberta Environment.³³² The Minister also has the discretion to recommend to Cabinet (through the Lieutenant Governor in Council) that an order be made to subject the activity or project to a review by the NRCB.³³³

If the report relates to a project under review by the NRCB or ERCB the report is submitted to the respective Board and becomes a part of its decision whether to approve the project or activity.

6. Public participation in the EIA process

The EIA process allows for public participation in the following instances:

- the decision whether to order an EIA report if you are considered directly affected;
- the drafting of the Terms of Reference, and
- the government’s consideration of the final EIA report.

³²⁹ *EPEA* at s. 48

³³⁰ *EPEA* at s. 49.

³³¹ *EPEA* at s. 53. EIAs related to the Natural Resources Conservation Board or the Energy Resources Conservation Board approvals are submitted to the respective Boards.

³³² *EPEA* at s. 54.

³³³ *EPEA* at s. 54.

To facilitate this public participation the Director is responsible for creating and maintaining a register for information related to the EIA.³³⁴ This information includes the proposed Terms of Reference, all comments received relating to the Terms of Reference, the final approved Terms of Reference, and any other documents created or issued in relation to EIAs under *EPEA*.³³⁵ The information in the register is held by the Director can be viewed during regular business hours and can be viewed online at <<http://environment.alberta.ca/1274.html>> .³³⁶ One copy of the information is also available free of charge.³³⁷

6.1 Participation in the decision whether to order an EIA

When the Director is considering whether an EIA report is required for a non-mandatory activity (referred to as a “screening”), there is an opportunity for those who are “directly affected” by a proposed activity to submit a “statement of concern”. (For a discussion of being directly affected and the statement of concern see Part I of this Guide. A notice that a screening is taking place will be published in at least one newspaper having general circulation in the area of the proposed activity.³³⁸ This notice triggers the time for providing a statement of concern regarding the activity. A statement of concern must be submitted to the Director within 30 days of receiving the last notice of the proposed activity or by the time indicated in the notice, whichever period is longer.³³⁹

Your statement of concern should outline your concerns regarding the project, and identify specific, direct impacts of the activity upon you and why a full EIA should be conducted. The statement of concern should also outline the scope and extent of EIA you expect. In making the decision about whether to order an EIA report the Director will consider input from the proponent of the activity, the public and from government staff (both in and outside of Alberta Environment). It is also government policy to consider “the complexity of the project, the nature of the technology involved, the sensitivity of the location, the presence of other similar activities, public interest and any other factors the

³³⁴ *EPEA* at s. 56.

³³⁵ *EPEA* at s. 56 and *Environmental Assessment Regulation*, Alta. Reg. 112/93 at s. 2 (*EAR*).

³³⁶ *Environmental Assessment Regulation* at s. 2.

³³⁷ *Environmental Assessment Regulation* at s. 2(3).

³³⁸ *Environmental Assessment Regulation* at s. 3. The newspaper and notice must be approved by the Director and the notice must contain certain information set out in the regulation, including the location of the activity, brief details of the activity, and an indication about the ability to file a statement of concern.

³³⁹ *EPEA* at s. 44(6).

Regional Environmental Manager sees are significant”.³⁴⁰ These factors should guide the content of your statement of concern.

The Director and Minister have broad discretion to order an EIA. They will consider the amount of public concern expressed about a project to determine whether a full EIA would be in the public interest. It is therefore important to encourage others who are concerned with the project to voice those concerns to the Director and the Minister of Environment.

6.2 Participation during the drafting of the Terms of Reference

When an EIA is required there is an opportunity to provide input during the drafting of the Terms of Reference. The Terms of Reference determine the scope of the assessment that must be conducted and this provides an early opportunity to guide what the EIA will cover.

6.2.1 The Terms of Reference process

Public notice of proposed Terms of Reference must appear in one issue of a general circulation newspaper approved by the Director in the area in which the activity is proposed.³⁴¹ The notice must outline the name of the proponent, the nature and location of the activity, where a copy of the Terms of Reference and related information will be available, when submissions to the Director must be submitted, and any other information the Director may require.³⁴²

After allowing “reasonable time” for comments and “giving due consideration” to comments received, the Director must issue the final Terms of Reference for the EIA report.³⁴³ The proponent must make the proposed Terms of Reference available and provide a copy to anyone who requests the Terms of Reference.³⁴⁴

The final Terms of Reference are also made available in the Alberta Environment registry.³⁴⁵

³⁴⁰ Alberta Environment, *Alberta’s Environmental Assessment Process*, (September 2004) at page 5.

³⁴¹ *Environmental Assessment Regulation* at s. 6.

³⁴² *Environmental Assessment Regulation* at s. 6(2).

³⁴³ *EPEA* at s. 48(3).

³⁴⁴ *Environmental Assessment Regulation* at s. 6(4).

³⁴⁵ *Environmental Assessment Regulation* at s. 7.

6.2.2 Providing input on the Terms of Reference

The Terms of Reference determine the scope of environmental assessment that will be conducted. If your specific issues are not dealt with in the Terms of Reference it is important that you identify these in your comments to the Director. This will ensure that the Director has adequate information in deciding on the final Terms of Reference. The Director may decide not to include your issues in the Terms of Reference but it is still important to establish your concerns at an early stage in the EIA process.

The Terms of Reference should cover:

- the current state of the environment in the area;
- evaluating alternatives to the activity;
- alternative means of carrying out the activity and justifications why alternatives that have less impact are not appropriate;
- an outline of mitigation measures proposed;
- a description of how the proposed mitigation will be effective;
- an outline of monitoring that will be undertaken if the activity proceeds;
- information about the activity's likely impact on air, water and land resources;
- cumulative effects of the project in conjunction with current and probable future developments;
- any information regarding emergency situations or accidents and plans to respond to such occurrences;
- projected impacts on socio-economic factors;
- projected impacts of the activity on health; and
- projected impacts of the activity on wildlife.

The scope of the Terms of Reference should address impacts on the environment generally and this may include wildlife issues, cumulative effects, including oil and gas and forestry impacts, and all other relevant impacts on the environment. This broader analysis is justified in the wording of *EPEA* where it states:³⁴⁶

The purpose of the environmental assessment process is

- (a) to support the goals of environmental protection and sustainable development,
- (b) to integrate environmental protection and economic decisions at the earliest stages of planning an activity,
- (c) to predict environmental, social, economic and cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the proposed activity, and
- (d) to provide for the involvement of the public, proponents, the Government and Government agencies in the review of the proposed activities.

The Terms of Reference should include enough detail to capture likely impacts but should also have some flexibility to encompass impacts on the environment that become evident through the consultation and assessment process. The Terms of Reference should also outline the process of public consultation and the process through which information will be provided to the public.

Sample Terms of Reference can be viewed on the internet at the Register of Environmental Assessment Information <<http://environment.alberta.ca/1274.html>> or by visiting the Alberta Environment Library (6th Floor, Great West Life Building, 9920-108 Street, Edmonton (780) 427-5870

³⁴⁶ *EPEA* at s. 40.

6.3 *Participation in review of the EIA report*

The Director will make the completed EIA report available for public review. A notice of the report's completion must be published within 10 days of submitting the report to the Director and will appear, at a minimum, in a newspaper of general circulation.³⁴⁷ The report, or a summary of it, must be made available for inspection and a copy provided to anyone requesting it and will generally be posted online at <<http://environment.alberta.ca/1274.html>>.³⁴⁸

Providing comments regarding the final EIA report occurs during the authorization process. The EIA report will be included as part of the proponent's applications for an authorization. Providing input at this time occurs by submitting a statement of concern with the Director. Submitting a statement of concern is dealt with at Chapter 8 of Part I of this Guide. The EIA reports are also considered by the ERCB (formerly the Energy Utilities Board) and the NRCB in their decision-making processes.

EIA reports are often highly technical and you may require the assistance of experts to analyze the content. The report, typically prepared by an environmental consulting firm, often consists of information about the current state of the environment and the projected impacts resulting from the activity.

Models are often used to determine the potential impacts of an activity. These models often make various assumptions about the current and future impacts. Concerned groups or individuals may have to hire experts to critically analyze these reports.

In formulating comments about the EIA consider the following questions:

- Does the EIA address alternatives and mitigation in a meaningful way?
- Does the EIA miss or omit alternatives that should be considered?
- Are the parameters set around the studies and modeling appropriate?

³⁴⁷ *Environmental Assessment Regulation* at s. 8.

³⁴⁸ *EPEA* provides that where a summary of the report is provided, it must include certain information such as a summary of the proposed activity, the potential positive and negative impacts, and plans to mitigate the impacts.

- Are the outcomes of the proposed mitigation measures substantiated?
- How can the impacts be further mitigated?
- Is the site for the project appropriate? What are alternative sites? Are there sensitivities in relation to the proposed site?
- Are the modeling techniques used effective and accurate?
- Is there sufficient data on which conclusions can be based?
- Do the conclusions reflect a subjective assessment of impacts and if so how are these conclusions justified?
- Are there impacts that are ignored in the EIA?

If there are gaps in knowledge or many uncertainties about an impact it is important to point out that a decision should not be made until those uncertainties are addressed. The reason behind an EIA is to ensure that decisions are made with the full knowledge of the impacts of the activity and ways to mitigate the activity's impacts if it is approved.

6.4 What to expect from the EIA process

The EIA process is focused on providing information to the government decision-maker. In theory, the EIA process is used to determine whether a project should proceed, what alternatives exist to the project as proposed, and how the impacts on the environment might be mitigated. In practice, it is uncommon that an authorization is refused based on the information in the EIA. The EIA process is still useful as it may highlight a project's environmental impacts and may establish specific terms and conditions for an authorization that may not have been imposed if the EIA had not been undertaken.

6.5 Costs of participating in the EIA process

As outlined in Part I of this guide the costs of participating in the Director's decision is usually the responsibility of the participant. This can be problematic in the case where an EIA has been prepared because experts are often needed to review and critically assess the report. Often experts are retained later on in the

process, once the Director's decision is appealed to the EAB. The EAB has broad discretion to allow for cost recovery for participation in the appeal although it is rare that all costs are covered.³⁴⁹

³⁴⁹ Where an EIA is part of the ERCB or NRCB decisions directly affected party's costs are often covered.

Part IV: Going to Court: Judicial Review

Keywords: judicial review, discretion, error of law, abuse of discretion, procedural fairness

For quick references to key words use the Adobe search function

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1. A Court's review of government decisions: judicial review

Decisions of government officials and administrative bodies (such as the EAB or the NRCB) must be made in accordance with a variety of legal principles and legislation. Part of administrative law is the court's power to review government decisions in a process called judicial review.

1.1 *Judicial review defined*

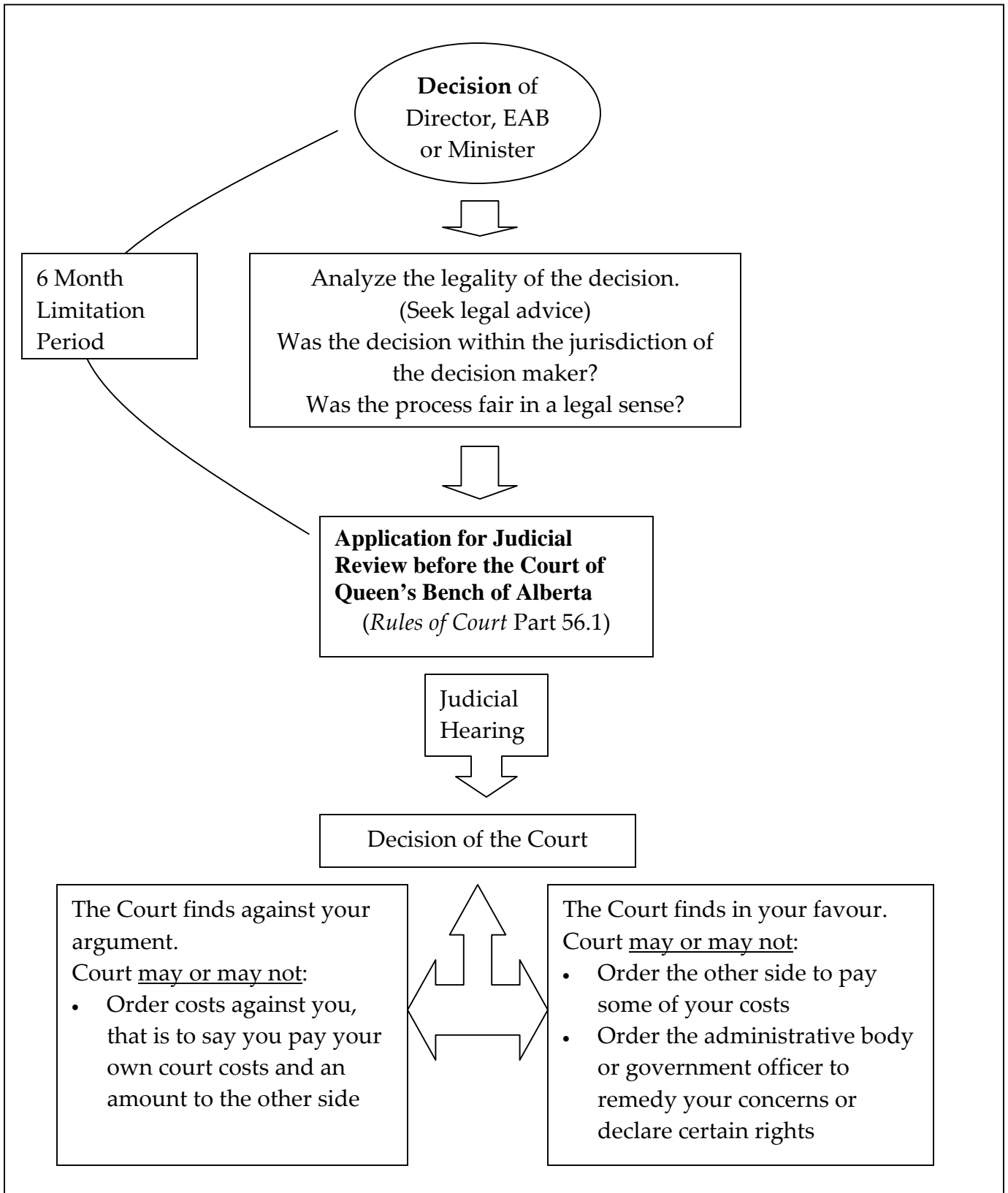
The process of reviewing a Board, a Minister, a Director or other government decision by the court is a "judicial review". A judicial review is not an appeal but an inherent power and function of superior courts in Canada to ensure that administrative decisions are made in a legal fashion. This is distinct from a statutory right of appeal. Most, if not all, decisions made by government are reviewable by an Alberta court.³⁵⁰ In Alberta, judicial review of Alberta Environment's decisions or EAB decisions is heard at the Court of Queen's Bench.³⁵¹

An application for judicial review should not be confused with an appeal on the substance or merits of the case. The intent of bringing a judicial review application is to review whether a decision-maker made an overriding legal error in how they came to a decision. Further, even where a decision-maker makes an error, the court has the discretion to impose or deny the remedy that you seek. This is to say that even if the law is on your side the court may, for a variety of reasons, deny you the remedy you seek.

³⁵⁰ Legislation plays a role in relation to how much deference the Court will give a decision maker. Often legislation includes a clause that limits the Court's ability to review the decision of the administrative body. These clauses are referred to as "privative clauses" and typically indicate that the Court has limited jurisdiction to review administrative decisions. For instance, s. 102 of EPEA has a clause that limits the ability of the court to review the decisions of both the EAB and the Minister.

³⁵¹ Provincial Courts in Alberta are unable to provide the remedies that are sought through judicial review applications. The *Alberta Rules of Court* at Part 56.1 outlines the procedural rules for an application for judicial review.

Figure K: Judicial review flowchart



2. The types of decisions that are “reviewable”

An application for judicial review is founded in a determination of whether the decision-maker has acted within the power of its enabling statute or has committed a procedural error in administering their decision. The legal principles that may be used to challenge a decision include (but are not limited to) the following:³⁵²

a. Defects in jurisdiction

All government or administrative decisions are made within the framework of the enabling legislation. If a decision-maker makes a decision that is beyond the scope of the enabling legislation it is reviewable by a court. A defect in jurisdiction may also relate to improperly delegating legislative authority to other parties. Historically these decisions have been referred to as being “*ultra vires*”, meaning that the decision was made beyond the power or legal authority of the administrative body.

b. Abuse of discretion

An abuse of discretion may occur where the decision-maker acts in bad faith, relies on irrelevant considerations, ignores relevant considerations, or acts or makes a decision for an ulterior purpose. The decision may also be challenged if the decision-maker has fettered his or her discretion. This means that the decision-maker has, in some manner, bound themselves to a decision, often by improperly ignoring relevant information.

c. Natural justice and the duty to be fair (procedural fairness)

Natural justice and procedural fairness are legal principles that have evolved over time and relate to procedural rights. These rights may include a right to have notice of decisions that effect an individual, a right to a hearing, a right to have full information, and a right to have written reasons for a decision.

³⁵² D.P. Jones, Q.C., and A. de Villars, Q.C., *Principles of Administrative Law*, (4th Ed.) (Scarborough, Ontario: Thomson Canada Limited, 2004) at 424 [Jones].

The procedural rights that are required in a given situation will differ from case to case. Sometimes you may only have a right to be notified of a forthcoming decision while in other instances a hearing may be appropriate.

In some (limited) circumstances the common law may provide you with broader rights to process than what is stated in the legislation. This may occur where your rights are directly and immediately affected by a government decision but there are no legislative procedures set up to deal with your concerns in a fair manner.

The duty to be fair also means that a biased decision-maker should not make decisions that impact your interests. However, proving someone is biased may be quite difficult.

d. Errors of law

Errors of law are those errors that indicate a misapplication or misinterpretation of the law.

3. Who can seek a judicial review of a decision?

A court will hear a judicial review application where it is satisfied that:³⁵³

- there is a serious issue as to the validity of the administrative decision;
- the party is directly affected or has a genuine interest; and
- there is no other reasonable and effective manner in which the issue may be brought before the court.

A person or group who meets these criteria will be given standing to bring a judicial review application. This “standing test” will dictate whether you can continue with the judicial review. Establishing that you are directly affected or have a genuine interest in the application or subject matter is very important. While the first and third factors are equally relevant a review of these factors is beyond the scope of this guide.

³⁵³ *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* (1992), 88 D.L.R. (4th) 193, at 201-204 (SCC).

The “directly affected” or “genuine interest” test applied by the court is different from the Director’s or EAB’s determination of “directly affected” described earlier in this guide. A genuine interest can be established by showing that an individual or group has a long standing concern and continued interest in an issue that is being impacted by the government decision. This includes recreational and environmental interests. In this respect public interest groups or individual may try to bring a judicial review application when they would not have been recognized as being directly affected by the Director or the EAB.

4. The timing of a judicial review application

The *Alberta Rules of Court* state that judicial reviews must be brought within 6 months of the decision that is being challenged.³⁵⁴ The next question is when the time starts running.

The time will start running when a “final” decision has been made by the decision-maker. What is considered “final” may vary in the circumstances but in relation to environmental authorizations this means that a judicial review may be initiated within 6 months after the Minister’s decision following receipt of the EAB’s report and recommendations.

If you try to bring a judicial review too early the Court may turn you away. For instance, challenging the EAB’s decision that you are not “directly affected” (in the early part of the hearing) must wait until after the final decision of the EAB on the matter and this may be after the full hearing, if one proceeds. Attempting to bring a judicial review of the preliminary standing decision of the EAB will be not be heard by a court.³⁵⁵ This approach is based on the fact that the impacts on an individual will not be known until the EAB and Minister makes a final decision.³⁵⁶

Bringing a premature application just adds additional costs and time to the process. While causing delays may be seen as a strategic tactic, the issue of costs

³⁵⁴ *Alberta Rules of Court*, Alta Reg. 390/68 at section 753.11 [*Rules of Court*].

³⁵⁵ See *Cardinal River Coals Ltd. v. The Environmental Appeals Board and Ben Gadd*, Action No. 0403 18462 (Alta. Q.B.). This case involved a finding by the EAB that Ben Gadd was directly affected and therefore could trigger a hearing before the EAB. The proponent of the activity, Cardinal River Coals Ltd. brought a judicial review application challenging the legality of the Board’s “directly affected” determination.

³⁵⁶ *Siksika First Nation v. Director Southern Region (Alberta Environment), the Alberta Environmental Appeals Board and the Town of Strathmore*, Oral Decision No. 0601-06100, September 6, 2006, online: <<http://www.eab.gov.ab.ca/judicial/Siksika-QB.pdf>>. (*Siksika*)

should not be overlooked.³⁵⁷ This includes your own costs of the application but also the costs of the other side, which you may have to pay if the court finds that the application is premature.

5. Results and remedies

Judicial review remedies include nullifying an administrative decision (*certiorari*), ordering that a certain administrative action be taken (*mandamus*) or prohibiting certain administrative actions (prohibition).³⁵⁸ The Court also has the power to make “declarations” as to the relative legal rights of two parties. The court has the discretion to not order a remedy as well, even when it recognizes that a party has a valid legal argument.

The remedies or results of a judicial review may not be effective in attaining the result you seek. Some remedies are more likely to be ordered by the court following a successful judicial review. Nullifying the government of EAB decision is more likely than ordering that the decision-maker take a particular course of action (*mandamus*). Where the court nullifies or quashes a decision it is usually sent back to the decision-maker to deal with it again, taking into account the court’s direction. This may not change the final result in any substantive way.

If you are seeking more clarity as to the relative rights and obligations of the decision-maker as it relates to you this may be provided through seeking a declaration by the court.

6. Legal help with judicial review

Administrative law is a complex and specialized area of law. Legal tests around standing, how much discretion the decision-maker should be given, as well as a variety of procedural requirements make bringing an application for judicial review on your own difficult.

The judicial review process deals primarily with the interpretation of the law and how it relates to the scope of powers of government decision-makers, such as the

³⁵⁷ For example the court in *Siksika ibid* ordered the applicant to pay costs to the three respondents, the government, the EAB and the Town of Stathmore.

³⁵⁸ D.P. Jones, Q.C., and A. de Villars, Q.C., *Principles of Administrative Law*, (4th Ed.) (Scarborough, Ontario: Thomson Canada Limited, 2004).

Director or the EAB. The legal tests the court will apply in the judicial review application can be confusing. Retaining a lawyer to assist you with a judicial review application may be necessary.

7. Potential costs and expenses

The costs involved in bringing a judicial review application can be significant. Retaining a lawyer to carry out a judicial review from start to finish can be costly and even if the application is successful not all costs will be recovered. Also, if you are unsuccessful and the court decides in favour of the decision-maker you may have to pay the costs of the other party. These costs are dictated by the *Alberta Rules of Court*.³⁵⁹

Since the costs associated with a judicial review can be high it is important to determine the merits of the application as early as possible, and this again is likely best done by a lawyer. The initial payments to a lawyer to determine that your judicial review has little likelihood of success are likely significantly less than proceeding with a judicial review with little merit where you may end up paying the other party's costs.

8. Judicial Review of EAB and Alberta Environment decisions

The likelihood of a successful judicial review application in relation to a decision of the EAB or Alberta Environment is small. This is due to the fact that there is significant discretion given to these decision-makers.³⁶⁰

Decision-makers do make errors on occasion but even then the courts may hesitate to alter the status quo if the impacts of the decision are not great. Where the law is misapplied, where decisions have some form of bad faith associated with them, or where the decision is very unreasonable there may be a chance of success. Even when an error is found the court will usually send the matter back to the EAB or the Director to consider again, taking into account the finding of the court. This may or may not change the result.

³⁵⁹ *Rules of Court* at Schedule C.

³⁶⁰ *EPEA* at s. 102.

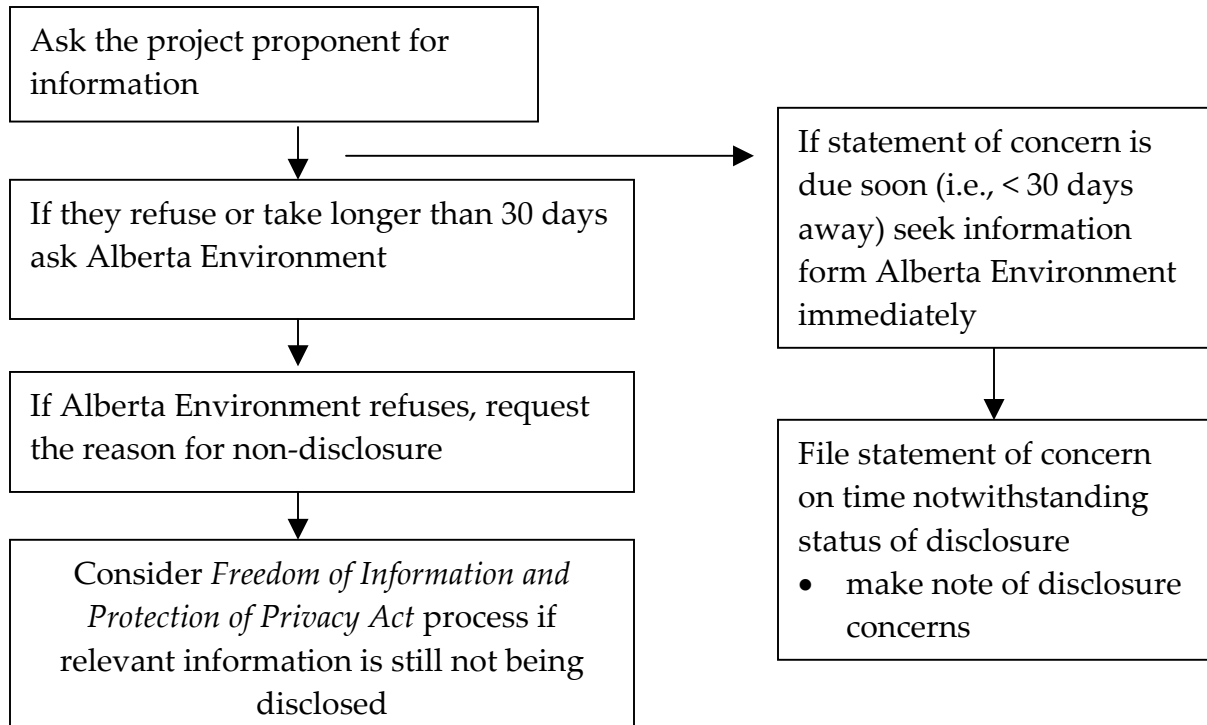
9. Conclusion

Judicial review is used to “fix” errors made by decision-makers. These errors are often procedural or relate to how enabling legislation is interpreted by the decision-maker. Judicial review is a legalistic and complex area of law that carries with it significant uncertainty in terms of success. Proceeding with a judicial review will often require the assistance of a lawyer and may entail significant costs. The result of the judicial review, even when an error is found, may not alter the substantive outcome of the decision being made.

Appendices

Appendix A: Quick Reference - Obtaining information about the project

Process



Include in your request to Alberta Environment:

- Your name and address,
- Details of the document or information being requested, and
- The date and result of the request to the proponent.

Information that will not be public:

- Confidential information (for proprietary, business or privacy reasons),
- Privileged information (litigation, solicitor-client or crown privilege), or
- Where an investigation is ongoing.

If information is relevant and should be disclosed but Alberta Environment refuses on grounds of confidentiality or otherwise begin the *Freedom of Information and Protection of Privacy Act* process (FOIP).

- Submit FOIP form to FOIP coordinator for the department regarding the information you seek,
- Pay fees associated with disclosure or seek waiver of fees if information is in the public interest, and
- If disclosure is still refused consider appealing decision to the Information and Privacy Commissioner.

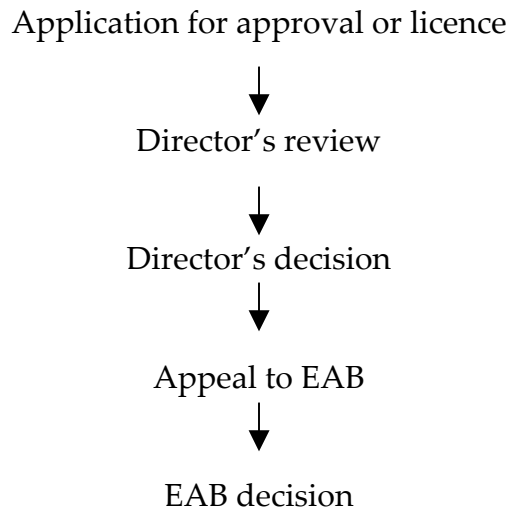
For more information see <www.oipc.ab.ca>.

Legislation

<i>EPEA, R.S.A. 2000, c. E-12</i>	<i>Disclosure of Information Regulation, Alta Reg</i>
<i>Water Act, R.S.A. 2000, c. W-3</i>	<i>Water (Ministerial) Regulation, Part 4.</i>
<i>Freedom of Information and Protection of Privacy Act, R.S.A. 2000, C. F-25</i>	<i>Freedom of Information and Protection of Privacy Regulation</i>

Appendix B: Quick Reference - Participating in the Director's decision

Process



Public Participation

When can you participate?

- Upon the filing of an application for an approval or licence with the Director
- On appealing the Director's decision to authorize to the EAB

How to participate?

- File a statement of concern with the Director
- File a notice of appeal with the EAB
- Establish that you are directly affected

What to look for?

- Alternatives to the project or operations
- Mitigation measures
- Impacts on social, economic and environmental well being
- Emergency plans
- Impacts on health
- Impacts on wildlife
- Monitoring and reporting conditions

What are the timelines?

- Filing a statement of concern (See *Part I*)
 - *EPEA* approval – 30 days or as stated in the notice
 - *Water Act* licence – 30 days or as stated in the notice
 - *Water Act* approval – 7 days or as stated in the notice

- Filing a notice of appeal (See *Part II*)
 - *EPEA* approval – 30 days or as stated in the notice
 - *Water Act* licence – 30 days or as stated in the notice
 - *Water Act* approval – 7 days or as stated in the notice

Legislation/Issue	Section
<i>EPEA</i> Approvals -Part 2, Division 2	
Application	<i>EPEA</i> , s. 66
Notice of an application for an approval	<i>EPEA</i> , s. 72 <i>Environmental Protection and Enhancement (Ministerial) Regulation (EPEMR)</i> , s. 2(3)
Notice exemptions	Waiver – <i>EPEA</i> , s. 72 Emergencies and routine matters defined– <i>EPEA</i> , s. 72, <i>EPEMR</i> , s. 1
Changes requiring approvals	<i>EPEA</i> , s. 67
Filing a statement of concern	<i>EPEA</i> , s. 73
Approvals and registration process	<i>Approvals and Registrations Procedure Regulation</i>
<i>Water Act</i> Approvals	
Notice	<i>Water Act</i> , s. 108 <i>Water (Ministerial) Regulation</i> , s. 13(2)
Where notice not required	Waiver - <i>Water (Ministerial) Regulation</i> , s. 14 Emergencies and Routine Matters – <i>Water Act</i> , s. 108
Filing a statement of concern	<i>Water Act</i> , s. 109.

<i>Water Act</i> licences	
Application	Form – see Appendix A of this Guide
Licence exemptions	<i>Water Act</i> , ss. 49 - 50 <i>Water (Ministerial) Reg</i> – s. 5, Schedule 3 and Schedule 4
Notice	<i>Water Act</i> , s. 108 <i>Water (Ministerial) Reg</i> , s. 13
Notice exemptions	Waiver - <i>Water (Ministerial) Regulation</i> , s. 14 Emergencies and Routine Matters – <i>Water Act</i> , s. 108
Statements of concern	<i>Water Act</i> , s. 109
Disclosure of information	
<i>EPEA</i>	<i>Disclosure of Information Regulation</i>
<i>Water Act</i>	<i>Water (Ministerial) Regulation</i> , Part 4
Appeals	
EAB	<i>EPEA</i> , Part 4
Appeal of <i>EPEA</i> approval Filing of the notice of appeal	<i>EPEA</i> , s. 91
Appeal of <i>Water Act</i> approval or licence Filing of the notice of appeal	<i>Water Act</i> , s. 115
Deadlines and Counting Days Computation of Time	
<i>Interpretation Act</i> , s. 22	
Need for Financial Security	
<i>Water Act</i> , ss. 44, 57 and <i>EPEA</i> , s. 84. <i>Approvals and Registrations Procedure Regulation</i> , s. 9. <i>Activities Designation Regulation</i> , Division 3 of Schedule 1. <i>Conservation and Reclamation Regulation</i> , at Division 2.	

Appendix C: Quick Reference - Appeals

Preparation of the notice of appeal

- ❑ Form available on the EAB website <www.eab.gov.ab.ca>.
- ❑ Reference the section of the legislation under which the appeal is made.
 - Most often s. 91(1)(a) for approvals under *EPEA*, s. 115(1)(a)(i) for approvals under the *Water Act* and s. 115(1)(c) for licences under the *Water Act*.
- ❑ Name and title of decision-maker whose decision you are appealing (typically the name of the Director and his/her region).
- ❑ What you want the EAB to do to resolve your issues or concerns.
- ❑ Signature of the party appealing (or your lawyer or agent).
- ❑ An address for service (either your address or your agent's or lawyer's).
- ❑ For those appeals that arise under sections other than s. 91 of *EPEA* the section must be cited.
- ❑ Submit the notice of appeal to the EAB.
- ❑ Keep a record of communication with other parties.
- ❑ Keep a record of expenses.

Process considerations on appeal

- ❑ Do I want a “stay” of the approval (i.e. do I want to try and stop the activity until the appeal is heard)?
- ❑ Do I want to participate in a mediation?
- ❑ Are there any preliminary motions that need to be dealt with?
 - Is there a standing issue with any of the participants?

- Have the issues on appeal been dealt with by other boards, such as the ERCB, AUC or NRCB?
- Is there information that has not been disclosed?
- Is there a need to alter the proposed timelines for the appeal?
- Do I want to appeal the decision directly or do I want to let others appeal the decision and provide the EAB with evidence as an “intervenor”? Invitation for applications to intervene will be set out in Notice of Hearing.

Mediation

- Decide whether to participate in mediation
 - Are the parties entrenched in their positions? If so, mediation is not likely to be successful.
 - Is public oversight of the hearing a key concern? If so, mediation is not likely the route you wish to take.
 - Do you feel comfortable with negotiations?
- EAB appoints a Board member (or third party) to mediate.
- Organize yourself for mediation meeting
 - Decide what is on and off the table for the mediation meeting.
 - Consider all possible ways to resolve your concerns (i.e., unconstrained by jurisdiction).

Preparation for the appeal

- Ensure deadlines are clearly marked and met.
 - Notice of Hearing and EAB procedure letter will set out timelines that must be met. Motions may be brought to extend these timelines.
 - File written submissions, as per EAB requirements (well ahead of oral hearing).

- Attend the hearing.
- Gather all relevant information – seek full disclosure and provide full disclosure to other parties.
- Retain an expert to deal with technical issues.
- Consider who will be the most relevant witnesses.
- Review EAB process letter and be aware of the time available for submissions during the hearing.
 - If you feel you need it, request more time to provide evidence and reasons why it should be granted.
- Prepare written submissions.
 - Outline the facts.
 - Outline your concerns.
 - Outline your position.
 - Include relevant documents.
 - Indicate who will be your witnesses and why their appearance is relevant to the appeal.
- Prepare oral opening statement.
 - Evidence you intend to introduce.
 - Name your witness(es).
 - Identify the topics you will cover.
- Prepare questions for cross-examination.
- Prepare witnesses.
- Prepare oral closing argument. On rare occasions written briefs will be allowed.

During the appeal hearing

- ❑ Comply with EAB timelines.
- ❑ Ask questions about the process if you do not understand.
- ❑ Minimize communication with witnesses “off the record.” Once sworn in, a witness’ comments and communications must be recorded.
- ❑ Focus on communicating your evidence to the EAB.
- ❑ Submit an application for costs.

Appendix D: Quick Reference - Environmental Impact Assessments (EIA)

Process

Screening report (needs assessment) → Terms of Reference → EIA preparation → EIA review → Application for approval or licence

Public Participation

When can you participate?

- The screening decision (determining the need to order an EIA)
- Terms of Reference
- Consideration of the final report

How to participate?

- Contact the Director
- Indicate how you are directly affected
- Indicate your unique position
- Indicate your concerns

What to look for?

- Impacts missed by EIA
- Alternatives to the project or operations
- Mitigation measures
- Impacts on social, economic and environmental well being
- Emergency issues
- Impacts on health
- Impacts on wildlife

Timelines?

- Comments on screening report – 30 days
- Comments on Terms of Reference – “a reasonable time” – dictated by Director
- EIA Report – depends on timing of application for approval or licence (or ERCB and NRCB hearing)

Legislation	Topic and Section
<i>Environmental Protection and Enhancement Act</i>	EIAs generally Part 2, Division 1
<i>Water Act</i>	Part 2, Division 2 (triggers <i>EPEA</i>)
<i>Environmental Assessment (Mandatory and Exempt Activities) Regulation</i>	Schedule 1. Mandatory Activities Schedule 2. Exempt Activities
<i>Environmental Assessment Regulation</i>	Notice of screenings, Terms of Reference and EIA reports and registration of information
<i>Natural Resources Conservation Board Act</i>	Section 4 - Discretionary activities

Appendix E: Sample (Fictional) Statement of Concern

October 29, 2008

Regional Director - Central Region
Alberta Environment
Red Deer District
3rd Floor, 4920 – 51 Street
Red Deer, Alberta T4N 6K8
Telephone: 403-340-7052
Fax: 403-340-5022

Re: Application #14592 – Statement of Concern regarding the licence application to divert groundwater submitted by AntiELC Ltd.

Dear Mr./Mrs. [Director's name],

My name is Jason Unger and I reside in Lacombe County, legal land descriptions x-y-z-W5. The proponent, AntiELC Ltd., proposes to drill a water well and withdraw water in land directly adjacent to my residence. I have significant concerns regarding this application as the water table has decreased significantly in the last 8 years and I rely heavily on this water for raising breeder stock. Further, we rely on the aquifer for household use. I am requesting that the application for the licence be denied because the likely impact on my livelihood would be significant.

The proposed well is to be drilled a mere 100 meters from my property line and only approximately 300 metres from an existing water well. The proposed well depth is 140 metres, the same level as my well, and therefore it seems clear that the proposed well will be tapping the same aquifer and impact the hydrology of the aquifer. Please find attached to this letter the location and well information related to my lands. As stated earlier I rely on these wells for raising livestock which provide my livelihood. The water level and recharge rates of my wells have been significantly diminished over the last 8 years. I will try and gather additional well data for the area to illustrate this point however it is clear to me that recent climatic conditions have resulted in a continued diminishing of the water table to a point where additional withdrawals would be unsustainable.

The proponent, AntiELC Ltd., proposes to divert significant amounts of water continuously over a three-year period for enhanced oil recovery. Nothing in the

application indicates whether this well will be sustainable or impact the surrounding groundwater level. There is no monitoring of surrounding wells proposed. The amount of water proposed in the withdrawal is significant. If the long-term sustainability of my wells is compromised it will negatively effect my livelihood.

It also appears that the proponent has failed to meet the *Groundwater Evaluation Guideline* and provide information regarding what alternatives to potable water were considered for the enhanced recovery program and why these alternatives were not chosen. Potable groundwater is of the utmost importance to humans and agriculture and should not be used for enhanced oil recovery when alternatives exist.

My family has been farming here for 3 generations and has supported the Alberta economy when oil and gas has faltered in the past. The sustainability of Alberta's economy means fostering those industries and jobs that use the land sustainably. Using potable water for injection into oilfields is counter to sustainable living.

For these reasons I would request that you refuse to grant the water application. If you must consider the application further you should not do so until a full assessment of hydrology has been conducted and independently confirmed and this information has been shared with all surrounding landowners.

I look forward to your response and if you should have any questions regarding my concerns please contact me directly at 780-xxx-xxxx.

Sincerely,

Jason Unger

Appendix F: Sample EAB Procedure Letter

NOTE: The procedure letter below involves a proponent appealing the cancellation of a reclamation certificate. The process is the same for an appeal of a licence or approval although the proponent will also be given the opportunity to present evidence and cross examine witnesses.



ALBERTA
ENVIRONMENTAL APPEALS BOARD

January 10, 2008

Via Fax and Mail or Courier

Mr. Nevin Wolf
Talisman Energy Inc.
Suite 3400, 888 – 3 Street SW
Calgary, AB T2P 5C5

Mr. Jeff Biegel
Sharp Environmental (2000) Ltd.
Box 319
Fairview, Alberta T0H 1L0

Ms. Erika Gerlock
Alberta Justice
Environmental Law Section
8th Floor, Oxbridge Place
9820 – 106 Street
Edmonton, AB T5K 2J6

Dear Gentlemen and Ms. Gerlock:

**Re: Talisman Energy Inc./Cancellation of EPEA Reclamation Certificate No. 00226501-00-00/Our File No.: EAB 07-133; and
Talisman Energy Inc./Cancellation of EPEA Reclamation Certificate No. 00224089-00-00/Our File No.: EAB 07-134**

Further to the Board's letters of January 8, 2008, the Board confirms the Hearing for these appeals is scheduled for **February 19, 2008**, beginning at **8:30 a.m.** until approximately **4:30 p.m.** The Hearing will be held at the **Environmental Appeals Board, 306, Peace Hills Trust Tower, 10011 – 109 Street, Edmonton.** Please see the attached in relation to parking near the Board's office.

Panel Members:

The Board Members assigned to hear this appeal are Dr. Steve Hrudehy, Chair, Mr. Ron Peiluck and Dr. Dan Johnson. The Environmental Appeals Board is an independent Board, which is required to hear appeals under the *Environmental Protection and Enhancement Act* and the *Water Act*, and the *Climate Change and Emissions Management Act*. Although the members of this Board are appointed by the Provincial Cabinet of Alberta, they are not employees of the Ministry of Environment or any other government department.

Notice of Hearing and Intervenor Applications:

The Board will provide notice of this Hearing to such other persons as, in the Board's opinion, may have potential interest in this matter. For your information, an advertisement is being placed in the Fairview Post on January 22, 2008 and the High Prairie South Peace News on January 23, 2008 regarding the Hearing. A news release is also being forwarded to the Public Affairs

Bureau, placed on the Alberta Government website, and distributed to 95 daily newspapers, radio stations and television stations within Alberta. The Board will provide newspaper copies of the advertisement to the parties in due course.

The Board's Notice of Hearing (attached) contains a deadline of January 29, 2008 for applications from others to make representations before the Board. In this regard, you have the option of providing names of other persons who in your opinion may have an interest in participating in these appeals. Once the Board receives submissions, we will notify you and provide an opportunity to comment in writing on their *potential* involvement. For further information on intervenors, please see the attached information sheet "Hearing Procedures."

Written Submissions:

The Environmental Appeal Board Regulation and the Board's Rules of Practice provide that each party to an appeal must file a written submission with the Board at least 7 days before the date of the Hearing. The content requirements for such submissions and any supporting documents are set out in section 10(3) of the Regulation, which has been provided to you. Parties may include their legal argument with their written submissions.

If the parties are providing reports containing scientific or technical information specific to the project under appeal, as part of their submission, they are strongly encouraged to call as a witness either the author of the report or another person that has the capability of explaining the report to the Board and under cross-examination. The name of scientific or technical witnesses along with their resumes should be provided to the Board with your written submission.

The parties are required to provide six copies of their written submissions and any supporting documents for the Board's use and to provide a copy to all parties to these appeals on or before **February 5, 2008**.

Written submissions must be provided to the Board in their entirety by the due date. It is not acceptable to provide written submissions with supporting documents to follow. Please do not cerlox or bind the written submissions. Please see the attached information sheet "Hearing Procedures."

Costs:

If the Parties intend to ask for final costs, they **must indicate so in their written submissions and in their closing arguments, prior to the close of the Hearing.** The Board will establish a submission process to address the cost applications after the Minister has made his decision in this matter. Please see the attached information sheets "Hearing Procedures."

Hearing Procedures:

1. The Hearing will be held at the Board's office in Edmonton, 306, Peace Hills Trust Tower,

10011 – 109 Street, Edmonton, and will begin at 8:30 a.m. on February 19, 2008. The Hearing will continue, with appropriate breaks from time to time until approximately 4:30 p.m. There will be a lunch break of approximately 1 hour and you are responsible for providing your own lunch. The Board may also recess the Hearing from time to time as it deems appropriate.

2. The Board will open the Hearing with a brief presentation outlining the procedures for the Hearing. **Mr. Nevin Wolf**, on behalf of Talisman Energy Inc., and **Ms. Erika Gerlock** on behalf of Alberta Environment, will each be permitted to give a brief opening comment for up to **5 minutes**.
3. **Mr. Wolf** will be permitted to present direct evidence for up to **1 hour and 20 minutes**, followed by up to **30 minutes** of cross-examination by **Ms. Gerlock**.
4. **Ms. Gerlock** will then be permitted to present direct evidence for up to **1 hour and 20 minutes**, followed by up to **30 minutes** of cross-examination by **Mr. Wolf**.
5. All parties will then have an opportunity to make closing comments. **Mr. Wolf** and **Ms. Gerlock** will be each permitted **up to 20 minutes**. Finally, as the burden of proof lies on the Appellant, **Mr. Wolf** will be permitted to make a final comment for up to **10 minutes**. As noted above, if the parties (intend to ask for final costs, they **must indicate so in their written submissions and in their closing arguments, prior to the close of the Hearing**. The Board will establish a submission process to address the cost applications after the Minister has made his decision in this matter.
6. The Board will consider granting rebuttal evidence from the Appellant upon receipt of a request from Mr. Wolf. Please see the attached information sheet "Hearing Procedures".
7. Redirect evidence will be permitted where appropriate and at the discretion of the Panel Chair.
8. **Time limits will be strictly enforced by the Board and a timer will be used**. The parties should prepare their presentations and questioning with these time limits in mind. **The above time limits are subject to change upon receipt of intervenor requests and the determination of their participation**.
9. During direct evidence parties may call their witnesses (testimony will be sworn) and present their case. The names of witnesses (along with their resumes where they are providing scientific and technical evidence) are to be provided to the Board by **February 5, 2008**.
10. Cross-examination will only be permitted between parties that are adverse in interest to each other. Please see the attached information sheet "Hearing Procedures."
11. At each stage in the proceeding the Board may ask questions of the parties.

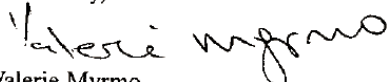
12. Any party requiring audiovisual equipment is to make its request to the Board. The Board will endeavour to obtain the equipment required. The Board is to be notified of your equipment needs by **February 5, 2008**.
13. The Board will be recording the proceedings for its own use. Any party having its own court reporting service at the Hearing, must notify the Board in writing by **February 5, 2008**. The Board is to be provided with an electronic copy of the transcript as well as a hard copy of the transcript to maintain a full and complete record. The cost of providing the transcript to the Board will be borne by the person requesting the court reporting service.
14. The Board requests the parties remain in the Hearing room for the duration of the proceedings in order to maintain procedural fairness, and in consideration of those giving their presentations. Should any of the parties require a break they are requested to indicate this to the Panel Chair.
15. The parties must turn off any cell phones and pagers while in the hearing room.
16. The Hearing will be open to the public for viewing only, once intervenors have been determined.
17. If you have any questions or concerns with the procedures specified by the Board, please advise the Board by **January 17, 2008**.

Once the Hearing is concluded, the Board will issue its Report and Recommendations to the Minister of Environment in accordance with section 99 of the *Environmental Protection and Enhancement Act*. The Minister will then make the final decision with respect to this appeal by issuing a Ministerial Order. Once the Minister has made his decision, the Board will ensure that all parties to this appeal receive a copy of the Board's Report and Recommendations and a copy of the Minister's Order.

Please note that if you do not attend the Hearing on February 19, 2008, the Board may proceed to make a decision with respect to this appeal without your input, and without further notice to you.

Please do not hesitate to contact me directly if you require further information or clarification. You may call toll-free by first dialing 310-0000, followed by 780-427-6569, or e-mail valerie.myrmo@gov.ab.ca.

Yours truly,


Valerie Myrmo
Registrar of Appeals

Encl.

Environmental Appeals Board Hearing Procedures

Written Submissions:

The Environmental Appeal Board Regulation and the Board's Rules of Practice provide that in preparation for a hearing, each party to an appeal must file a written submission with the Board at least 7 days before the date of the hearing. As set out in section 10(3) of the Regulation written submissions for a hearing must contain:

- a summary of the facts and evidence you intend to rely upon at the hearing;
- the name, address and telephone number of the lawyer or other agent acting on your behalf; and
- a list of witnesses you intend to call at the hearing.

It is also very helpful to provide the legal arguments that you intend to rely upon to support your case.

In order for the Board to prepare for the hearing, the parties must provide six copies of their written submission and any supporting documents for the Board's use, and to provide a copy to all parties to this appeal by the date set by the Board. Written submissions must be provided to the Board in their entirety by the due date. It is not acceptable to provide written submissions with supporting documents to follow. Please do not bind or cerlox the written submissions.

Scientific and Technical Witnesses:

If you are providing reports containing scientific information specific to the project under appeal, as part of your submission, you are strongly encouraged to call as a witness either the author of the report or another person that has the capability of explaining the report to the Board, and to answer questions under cross-examination. The names of scientific and technical witnesses along with their resumes are to be provided to the Board with your written submission.

Exhibits for Hearing:

Exhibits may take the form of photographs, objects, documentation or other evidence that you may wish to provide to the Board, additional issues arise in the other parties' written submissions that you feel you must address. Please note that the Board's file including the Records of Alberta Environment and the written submissions of the parties form part of the Board's file and shall not be introduced as exhibits.

In the event that additional issues arise following your review of the other parties' written submissions, you must provide the Board and the other parties with any exhibits a minimum of seven days prior to the hearing, or by a date set by the Board. When providing your additional exhibits, you are again requested to provide six copies to the Board and to provide copies to the other parties.

Intervenors:

Further to the Environmental Appeal Board Regulation and the Board's Rules of Practice, once the Board sets the date for a hearing it publishes a Notice of Hearing. The Notice of Hearing will be published in local news papers, town offices and municipal district offices. The Notice of Hearing will also be sent to the Public Affairs Bureau to be placed on the Alberta Government website and distributed to various daily newspapers, radio stations and television stations within Alberta.

The Notice of Hearing contains information regarding the appeal and provides members of the public, who may have an interest in the appeal, but are not parties to the appeal, with information on filing an application to make a representation before the Board.

If the Board receives applications, it determines whether the person submitting the request should be allowed to make representations at the hearing. Should the Board grant such an application, it will also determine the manner in which the intervenor will be permitted to participate (for example, an intervenor may be permitted to make representation before the Board orally, at the hearing or by written submission). The test for determining intervenor status, in relation to a hearing, is stated in Rule 14 of the Board's Rules of Practice.

Rule 14 states:

"As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties...."

The parties to the appeal will have an opportunity to comment on the participation of potential intervenors, prior to the Board making its final decision.

Opening Comments:

Parties are permitted time to provide a brief opening comment to the Board at the beginning of the hearing. The opening comment should consist of a brief summary of the case you intend to present to the Board during the hearing.

Direct Evidence:

After opening comments, all parties will be permitted to present their direct evidence to the Board. During this time you will be permitted to present your witnesses to the Board, and to question your witnesses. All parties and witnesses, with the exception of legal

counsel, will be sworn or affirmed prior to giving their direct evidence.

Cross-Examination:

Once you have completed your direct evidence, the other parties will be allowed to cross-examine you and your witnesses. Cross-examination is only permitted between parties that are adverse in interest to each other. There are two main purposes of cross-examination. The first is to give you an opportunity to ask questions of a witness adverse in interest to you, based on their testimony or statements, in order to support your position. The second purpose is to challenge the validity or accuracy of that witness' statements or testimony.

Re-direct Evidence:

Re-direct evidence may be permitted after you and your witnesses have been cross-examined, should clarification be needed, or if anything arises from the cross-examination of you or your witnesses that you feel needs to be explained to the Board. Re-direct evidence will only be permitted where appropriate and is at the discretion of the Panel Chair.

Questions by the Board:

Once you have provided your direct evidence to the Board, and once cross-examination and any re-direct evidence are complete, the Board may ask questions of you and your witnesses in order to obtain a complete understanding of your case.

Rebuttal Evidence:

Rebuttal evidence may be permitted at the end of the hearing, before closing arguments, by the Appellant. The purpose of rebuttal evidence is to respond to any evidence presented by the other parties that could not reasonably have been anticipated at the start of the hearing. The presentation of new evidence that does not respond to the evidence of the other parties is not permitted. The Board will consider granting rebuttal evidence from the Appellant upon receipt of a request from the Appellant. It will only be permitted where appropriate and is at the discretion of the Panel Chair. Rebuttal evidence is subject to cross-examination by the other parties, and questioning by the Board.

Please note that "case splitting" is not permitted. That is, the parties must provide all of their evidence during the time allotted to them for direct evidence. This is a standard approach the Board uses which treats all of the parties in a fair and consistent manner.

Closing Comments:

The final stage of the hearing is where the Board will ask you for your closing comments. This is an opportunity for you to summarize your case and to tell the Board why the issues covered in the appeal are important to you.

Final Comments:

Finally, as the burden of proof lies on the Appellant, the Appellant will be permitted to make a brief final comment and to respond to the closing comments of the other parties.

Costs:

If you intend to ask for final costs, you must do so in your written submission for the hearing and in your closing comments prior to the end of the hearing. Once the Board's Report and Recommendations is issued, the Board will set a schedule for receiving costs applications and submissions. Costs application matters are typically conducted via written submission.

In considering applications for final costs, the Board requires the parties to clearly outline the actual costs incurred in the preparation of the party's submission. Where possible, invoices, receipts and other necessary documentation should be attached. A detailed breakdown of all costs should be provided. In addition, the party should indicate the reasons why the funds are needed to meet their financial obligations and if attempts were made to seek other sources of funding. Other considerations the Board may take into account when contemplating a cost application include: whether the parties made a substantial contribution to the hearing; whether they focused on matters contained within the Notice of Appeal; whether the presentations were made in a timely and efficient manner so as not to unduly delay or prolong the hearing; whether the costs requested are reasonable and reflect only the actual expenditures incurred in the preparation of the submission; whether the party indicated an intention to pursue a cost application prior to the conclusion of the hearing (as required in section 20 of the Environmental Appeal Board Regulation 114/93); and whether the parties acted in good faith in all phases of the proceeding. Any decision to award costs to a party is at the discretion of the Board.

Further information on costs can be found in the *Environmental Protection and Enhancement Act*; the Environmental Appeal Board Regulation; and the Board's Rules of Practice.

Timing of Presentations:

The Board allocates each party to a hearing a specific time frame in which to provide opening statements, present direct evidence, cross-examine, provide re-direct evidence, rebuttal evidence and closing comments. This is to ensure that each party gets equal and fair time in which to present their case to the Board. The parties should prepare their presentations and questioning with these time limits in mind. The Board refers you to the attached Hearing Schedule which will give you an approximate breakdown for the hearing of this appeal. Parties should ensure their witnesses are available and, should be prepared to present their direct evidence at any time during the hearing, when called upon by the Board.

Please note that the time allocated to you may vary if intervenor applications are received and accepted. Allocated times may also vary during the hearing. Any changes to the allocated times will be at the discretion of the Panel Chair.

During the hearing, the Board will use a timer. The timer will be set for the amount of time allocated. The timer has three lights – green, yellow, and red. The timer will start out green, and when you are three minutes from the end of your allocated time, it will switch to yellow. When your allocated time is up, it will switch to red. The Board will attempt to avoid asking questions during your allocated time as much as possible. Where

the Board asks questions or where a witness is unresponsive during questioning, the Panel Chair has the right to extend the amount of time allocated to any particular party.

During the Hearing:

The Board requests the parties remain in the hearing room for the duration of the proceedings in order to maintain procedural fairness, and in consideration of those giving their presentations. Should any of the parties require a break they are requested to indicate this to the Panel Chair.

You are required to turn off your cell phones and pagers during the hearing.

Public Viewing of the Hearing:

Once all parties to an appeal and intervenors have been established, the hearing will be open to the public for viewing only. The Board's file is also available to the public for viewing at the Board's office in Edmonton, and at the Library specified in the Notice of Hearing.

Decision:

Once the hearing is concluded, the Board will issue its Report and Recommendations to the Minister of Environment in accordance with section 99 of the *Environmental Protection and Enhancement Act*. The Minister will then make the final decision with respect to this appeal by issuing a Ministerial Order. Once the Minister has made his decision, the Board will ensure that all parties to this appeal receive a copy of the Board's Report and Recommendations and a copy of the Minister's Order.

Failure to attend the Hearing:

Please note that if you do not attend the hearing, the Board may proceed to make a decision with respect to this appeal without your input, and without further notice to you.

Information collected in relation to the hearing of an appeal is necessary for the Environmental Appeals Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of an appeal. The information you provide will be considered a public record. If you have any concerns with your information being made part of the public record, please contact the Board.

Attachment

S:\WPDOCS\Appeals 2007\07-133 Talisman (8-15-82-6 well)\Procedures for a Hearing PARTIES.doc

Environmental Appeals Board

Hearing Schedule

February 19, 2008

**Talisman Energy Inc./Cancellation of EPEA Reclamation Certificate No. 00226501
00-00/Our File No.: EAB 07-133; and
Talisman Energy Inc./Cancellation of EPEA Reclamation Certificate No. 00224089-
00-00/Our File No.: EAB 07-134**

Order of Presentation	Time Allocated	Approximate Start Time	Approximate End Time
Hearing Start Time			8:30 AM
Opening Comments by Board Chair	0:15	8:30 AM	8:45 AM
Opening Comments by Talisman Energy Inc.	0:05	8:45 AM	8:50 AM
Opening Comments by Alberta Environment	0:05	8:50 AM	8:55 AM
Direct Evidence by Talisman	1:20	8:55 AM	10:15 AM
BREAK	0:15	10:15 AM	10:30 AM
Cross Examination of Talisman Energy Inc. by Alberta Environment	0:30	10:30 AM	11:00 AM
Re-Direct Evidence by Talisman Energy Inc.	0:05	11:00 AM	11:05 AM
Board's Questions for Talisman Energy Inc.	0:30	11:05 AM	11:35 AM
LUNCH	1:00	11:35 AM	12:35 PM
Direct Evidence by Alberta Environment	1:20	12:35 PM	1:55 PM
Cross Examination of Alberta Environment by Talisman Energy Inc.	0:30	1:55 PM	2:25 PM
Re-Direct Evidence by Alberta Environment	0:05	2:25 PM	2:30 PM
Board's Questions for Alberta Environment	0:30	2:30 PM	3:00 PM
Rebuttal by Talisman Energy Inc. (If permitted)	0:05	3:00 PM	3:05 PM
Cross Examination of Talisman Energy	0:05	3:05 PM	3:10 PM

Inc. by Alberta Environment			
Re-Direct Evidence by Talisman Energy Inc.	0:05	3:10 PM	3:15 PM
Board's Questions for Talisman Energy Inc.	0:05	3:15 PM	3:20 PM
BREAK	0:15	3:20 PM	3:35 PM
Closing Comments by Talisman Energy Inc.	0:20	3:35 PM	3:55 PM
Closing Comments by Alberta Environment	0:20	3:55 PM	4:15 PM
Final Closing Comments by Talisman Energy Inc.	0:10	4:15 PM	4:25 PM
Closing Comments by Board Chair	0:05	4:25 PM	4:30 PM
Hearing End Time			4:30 PM

- Schedule is an estimate only. Allocated times may vary during the hearing and any changes to the times will be at the discretion of the Panel Chair.
- The times for lunch and breaks may vary and will be decided by the Panel Chair.
- Time for questioning of the parties by the Board may vary because the length of time required for questioning cannot be determined until the Board has heard all of the evidence.
- The parties should prepare their presentations and questioning with these time limits in mind, however the parties should be prepared to present evidence at any time during the Hearing when called upon by the Chair.

S:\WPDOCS\Appeals 2007\07-133 Talisman (8-15-82-6 well)\Schedule for Hearing PARTIES.doc

Appendix G: Common Affidavit Structure

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 [or section s.115 of the *Water Act*]

- and -

IN THE MATTER OF Notices of Appeal filed by [appellant's name] with respect to Approval [or licence] No. [X] issued by the Director, Northern Region, Regional Services, Alberta Environment to [name of approval holder]

AFFIDAVIT OF [NAME OF PERSON SWEARING THE AFFIDAVIT]

Name (or name of agent or lawyer)
Address – or address of agent/lawyer
Phone and fax number

I, [Name of Affiant], of the [place of residence], the Province Alberta,
MAKE OATH AND SAY THAT:

1. I am....[describe the person's role in the appeal, residency or relationship with the appeal]
2. [Describe interactions with the appeal process, i.e. a brief history of the interaction with the appeal)
3. [Describe and attach relevant documents] I received a letter from the proponent that describes [impacts x] a copy of which is attached hereto and marked Exhibit A.
4. [Expert witnesses will append their reports] I have prepared a hydrologist report which is attached hereto and marked Exhibit B.

...

I swear this Affidavit in support of the appellant, [appellant's name], in relation to [approval or licence number].

SWORN BEFORE ME at)	
_____)	
, in the Province of Alberta, this)	
22 rd day of September, 2009.)	
)	
_____)	_____
A Commissioner for Oaths in and for		[Name of affiant]
The Province of Alberta.		

Appendix H: Sample cover page for written submissions

**IN THE MATTER OF sections 91, 92, and 95 of the
Environmental Protection and Enhancement Act, R.S.A. 2000,
c. E-12 [or section s.115 of the *Water Act*]**

- and -

**IN THE MATTER OF Notices of Appeal filed by [appellant's
name] with respect to Approval [or licence] No. [X] issued by
the Director, Northern Region, Regional Services, Alberta
Environment to [name of approval holder]**

**APPELLANTS' SUBMISSION FOR THE EAB HEARING
WITH RESPECT TO [approval holder's name]**

**Name (or name of agent or lawyer)
Address – or address of agent/lawyer
Phone and fax number**

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