

April 12, 2005

Our File: 33

Doug Boyler, Executive Manager
Corporate Compliance
Alberta Energy and Utilities Board
640 – 5 Avenue SW
Calgary, AB T2P 3G4

Dear Mr. Boyler:

RE: Comments - Draft Directive XXX: EUB Compliance Assurance – Enforcement

I am writing to provide the Environmental Law Centre's comments with respect to the Alberta Energy and Utilities Board's ("the Board") draft *Directive XXX: EUB Compliance Assurance – Enforcement* ("Enforcement Directive"), as posted on the Board's website. We appreciate the opportunity to provide input to the Board on this important initiative.

About the Environmental Law Centre

The Environmental Law Centre ("ELC") is a charitable organization incorporated in 1982. It employs four full-time lawyers who offer public interest environmental law programming in education, information and referral, research and law reform. The ELC's mission is to ensure that laws, policies and legal processes protect the environment. In support of our mission, we seek to ensure the enforcement of sound environmental laws and policies, and effective and informed public participation in the law and decision making process.

The Enforcement Directive

Our comments on the Enforcement Directive are set out in the same order as the directive, with references to specific tables and appendices as required.

Risk Assessment Matrix: Appendix 1

We generally view the risk matrix as an improvement in determining the appropriate action for a non-compliance event. However, we believe that further clarity and instruction is required on how the risk matrix is used, particularly with respect to how the qualitative measures of consequences correspond to risk level. For example, it is not clear if a non-compliance event rated as a level D(4) in environmental impact, but as a

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level A(1) in all other qualitative measures would be designated overall as a D(4) consequence or rated at a lower level. Generally, the interaction of these qualitative measures needs further explanation.

Low Risk and High Risk Enforcement: Tables 1 and 2

Our comments with respect to Tables 1 and 2 relate mainly to the level of discretion accorded to EUB officials in applying enforcement actions against non-compliant companies. Tables 1 and 2 provide that “[t]he EUB group may also apply one or more of the following enforcement actions as applicable...” While we agree that flexibility is important in order to respond effectively to compliance problems, we believe that it is equally important that the enforcement actions have some “teeth”. We suggest that mandatory language be used with respect to all enforcement actions to provide clear, measurable enforcement standards. This will still provide the EUB with flexibility in choosing enforcement actions appropriate for the specific circumstance, while ensuring that there are concrete consequences for those companies who fail to comply.

Additionally, Table 1 does not provide for the mandatory escalation of enforcement actions when a company receives a second noncompliance notice or fails to respond to low risk enforcement actions. Given that the escalation of enforcement is key to preventing persistent non-compliance, we suggest that this be re-worded to ensure that additional enforcement is a mandatory consequence of repeated noncompliance. Moreover, we suggest that companies who fail to comply with low risk enforcement should automatically be subject to the high risk enforcement process.

We also note that the Enforcement Directive does not consistently impose time limits on companies to respond to noncompliance events. Often, timing is left to the discretion of EUB officials. For instance, Table 1 does not specify time limits for companies to correct low risk non-compliance. This is a step back from the Enforcement Ladder approach where levels one and two (relating to minor noncompliance events) required corrective action within 30 days of receiving notice. Generally, low risk or minor noncompliance should be correctable in a discrete time frame. We suggest that the Board consider adding time requirements to address low risk noncompliance, to provide a measure of certainty and timeliness to this process.

Furthermore, Table 2 does not specify a time limit for a company to develop and implement a written action plan under High Risk Enforcement Action 3. Since there are time limits specified for action plans under High Risk Enforcement Actions 1 and 2, for the sake of consistency and clarity, we suggest that a time limit be imposed for Action 3 as well.

Voluntary Self-Disclosure

We generally applaud the inclusion of voluntary self-disclosure in the Enforcement Directive. However, we note that there is no provision for notifying the public in the case of a self-disclosed non-compliance event. Particularly when self-disclosing high risk

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noncompliance, we suggest that the company be required to notify those potentially affected by the event.

Compliance Performance Information

The Enforcement Directive provides a very limited range of information that is accessible to the public. It appears that the disclosure of enforcement actions, aside from enforcement orders, will be lumped into an annual compliance report. This will not make it easy for the public to obtain information on specific enforcement actions such as fines, suspensions or the cancellation of a license. The process of obtaining this information through a formal request under the *Freedom of Information and Protection of Privacy Act* can be cumbersome and time consuming.

To ensure transparency in the EUB enforcement regime and public confidence in that system, enforcement related information should be available and easily accessible to the public. Given the general legislative trend towards public availability of information and the Board's duty to regulate in the public interest, we believe that the disclosure of enforcement related information should be much broader. As a model, the Board should consider the disclosure provisions under the *Environmental Protection and Enhancement Act* (EPEA). For example, sections 35 and 237.1 of EPEA provide for the public disclosure of information relating to orders, administrative penalties and prosecutions issued under the Act.

General Comments

While we appreciate the opportunity to comment on the draft rules of practice, we feel we must also comment on the inadequacy of the time period provided for comments. The date of posting on the website was stated to be March 21, 2005, while the deadline for comments was April 8, 2005. This gave any interested party only 13 working days (excluding Easter) to review the Enforcement Directive and provide a response, assuming that they found the notice and rules immediately after their posting. In the future, we would appreciate having more time allocated for public consultation on Board initiatives.

We would like to thank the Board for allowing us to provide comments on the Enforcement Directive. Please contact the writer should you have any questions about our comments or require clarification.

Yours truly,

Jodie Hierlmeier
Staff Counsel

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