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EVALUATION OF THE ENVIRONMENTAL APPEAL BOARD

COMMENTS AND SUGGESTIONS

Submitted to the Environmental Appeal Board

By the Environmental Law Centre

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Introduction

We appreciate the opportunity to provide our comments to the Environmental Appeal Board (EAB) with respect to its operation, procedures and practices. We feel that the EAB provides an important function with respect to environmental law and regulation in Alberta, and we commend the EAB for seeking comments from others in assessing and improving its operations.

Format of our comments

Previously, we have commented on the development of the EAB and its role through law reform briefs and direct comments to Alberta Environment over the course of enactment of the *Environmental Protection and Enhancement Act* (EPEA) and its related regulations.[1] Those briefs have contained detailed, section by section analysis of the proposed legislation, as well as general comments and recommendations. For the purposes of this evaluation, we are submitting more general comments, with specific references to the proposed EAB *Rules of Practice and Procedure*, the *Environmental Appeal Board Regulation* and amendments thereto, and EPEA, as required. This approach is similar to that taken in a previous brief commenting on the EAB's practice, submitted in 1997. We have attached a copy of this brief for your reference.

Unless otherwise indicated, all comments and suggestions within this brief reflect the position of the Environmental Law Centre. Over the course of our regular activities and programs, we hear comments and concerns about the EAB from a wide range of interests, including industry, appellants, members of the public and legal practitioners. It is indicated in this brief where we refer to these interests and the comments made by them to us.

The proposed *Rules of Practice and Procedure*

We commend the EAB for its thorough approach to the revision of its rules. We feel that, overall, these changes will facilitate the participation of all interests and parties in the EAB process. Any comments we have on specific provisions of the proposed rules follow in the balance of this brief.

The *Environmental Protection and Enhancement Act*

As mentioned in our previous brief in 1997, we have commented extensively on the provisions of EPEA that create the EAB and set out its powers. However, we feel that this consultation provides us with a valuable opportunity to raise two concerns that we have with these provisions of the Act.

First, we wish to raise our continued strong opposition to the privative clause that applies to the decisions of the EAB and the Minister of Environment under Part 3 EPEA. We believe that the privative clause weakens Alberta's environmental laws, and in particular the regulatory appeal process under the EAB. As we have stated in our previous brief, judicial review of decisions can provide helpful clarification of the laws in Alberta. In fact, there have been judicial review proceedings undertaken following the enactment of the privative clause. We read with interest in recent department literature the following statement: "The board does not replace or eliminate the right of

[1] In particular, see *In Response to the Discussion Draft of the Proposed Alberta Environmental Protection and Enhancement Legislation* (1990) and *In Response to Bill 53: The Alberta Environmental Protection and Enhancement Act and the Draft Regulations* (1992), both of which are available from the Environmental Law Centre.

Albertans to seek judicial review in the courts consistent with normal common law practice."[2] Indeed, we are hopeful that this statement foreshadows the ultimate removal of the privative clause from EPEA.

Second, we wish to register our strong objections to section 87(5)(b)(ii), which obliges the EAB to dismiss a notice of appeal where "the Government of Alberta has participated in a public review under the *Canadian Environmental Assessment Act* (Canada) in respect of all of the matters included in the notice of objection". We feel that this restriction on appeals is grossly unfair and unjustly deprives Albertans of the right to pursue otherwise validly established appeals of decisions under EPEA. We note the contrast between this clause and the preceding clause (i) of the same section, which requires actual or possible involvement of the person submitting the notice of appeal in a review by the Natural Resources Conservation Board or the Energy and Utilities Board. We do not believe that a reasonable basis exists for making a distinction between clauses (i) and (ii).

As clause (ii) is worded, all those who might be directly affected by approvals or other appealable decisions taken under EPEA are effectively denied their opportunities to appeal to the EAB where the Province of Alberta has participated in a public review under the *Canadian Environmental Assessment Act*. Indeed, the participation of the Province in such a public review as the **proponent** of a project could be sufficient to trigger the application of clause (ii). For example, assuming that Mr. Parry and Ms. Ladouceur would have been found to be directly affected in *Parry et al* v. *Regional Director, Northern East Slopes, Alberta Environmental Protection, re: Cardinal River Coals Ltd.*,[3] the EAB could well have been obliged by section 87(5)(b)(ii) to subsequently dismiss these appeals due to the fact that the Province took part in the joint review panel on the Cheviot mine.

We strongly urge that section 87(5)(b)(ii) EPEA be amended to similar wording as that found in section 87(5)(b)(i), for example:

> "(T)he person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in a public review under the *Canadian Environmental Assessment Act* (Canada) in respect of all of the matters included in the notice of appeal."

We believe that leaving this provision as it is currently worded could potentially cause grave injustice to Albertans with valid environmental concerns and could subject the EAB to otherwise unnecessary judicial review proceedings.

Consistency

We have heard from various interests that substantial concerns exist with respect to the consistency of the EAB on two matters. The first relates to the consistency of decisions made by the EAB. Members of the practicing bar have expressed concern and frustration with what they perceive to be a lack of consistency on the part of the EAB in its decisions. This has included the view that the EAB is making conflicting decisions on very similar fact situations. Some members of the bar have stated that the lack of consistency is making it extremely difficult for them to advise clients contemplating proceedings before the EAB. We have heard these concerns for some time and have ourselves perceived some inconsistency in decisions rendered by the EAB. While we realize that administrative

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[2] *1998-99 Annual Report*, Ministry of Environment (Government of Alberta), p.9.
[3] (18 January 1999) 98-246 & 98-248-D (Environmental Appeal Board)

tribunals are not subject to a duty of consistency, we would suggest that it would be good practice for the EAB to seek consistency in all of its decisions and thus avoid confusion on the part of all those who are affected and do or may appear before it.

The second matter relates to concerns about consistency in the application by the EAB of its rules and processes. Some parties feel that, without greater consistency in this area, a level playing field does not exist as between all participants in appeals. As we do not appear before the EAB on appeals, we have no comments of our own to offer on this point, aside from observing that we have heard some real concerns on this point from parties who have appeared before the EAB.

Standing

As mentioned in previous Environmental Law Centre briefs, we feel that the definition of "directly affected" used by the EAB is much too narrow and thus excludes parties who are affected by decisions made under EPEA or the *Water Act*. Looking to the purposes of both Acts, we believe that both intend that persons who will be adversely affected by decisions and activities with environmental consequences should be able to make their case before an independent tribunal. By using an unnecessarily narrow interpretation of directly affected, the EAB has deprived genuinely affected parties of the opportunity to have their concerns fully heard. An example of this was the EAB's decision earlier this year in relation to the discontinuance of the appeal by Charlie Chalifoux.[4] The narrow application of directly affected, in the preliminary finding that various parties' interests would be represented by Mr. Chalifoux, led to these parties not having their interests represented or their concerns heard by the EAB once Mr. Chalifoux chose to discontinue his appeal.

We support the following test for standing in environmental hearings:

> Standing should be granted to any person or group who
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> (a) has a clearly ascertainable interest which ought to be represented at the hearing, or
> (b) has an established record of legitimate concern for the interest it seeks to represent, or
> (c) has a legitimate interest, representation of which is necessary for a fair decision.

We believe that this test should be used to determine those who are directly affected and thus eligible to appeal matters to the EAB. As well, we encourage the EAB to follow the lead of the Energy and Utilities Board, which is currently reviewing its intervener funding process and intends to broaden its interpretation in determining those parties who are affected by matters before it.

Public confidence in the EAB

We have grouped several of our comments under this heading, as we feel that they ultimately affect the confidence that the public will have in the EAB.

We have heard concerns from some parties about the process that is being used for this evaluation of the EAB. Some are very reluctant to make critical comments directly to the EAB, and feel that a more accurate and representative evaluation could be achieved through the use of third party consultants,

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[4] *Chalifoux* v. *Director of Chemicals Assessment and Management* (9 July 1999) 95-023-DOP (Alberta Environmental Appeal Board)

similar to consultations carried out by the Energy and Utilities Board, the Natural Resources Conservation Board and Alberta Environment, which contact stakeholders and provide the feedback to the relevant board or agency without tying names to comments. We understand the concerns of these parties and would support the use of a third party consultant to carry out future consultations and evaluations on behalf of the EAB.

We are concerned with the wording used in point 14 of the proposed *Rules of Practice and Procedure*, dealing with applications for reconsideration. The last paragraph of that section states: "Upon receipt of an application for reconsideration, the Board *may* allow other parties to respond to the submissions made." (our emphasis) Our concern lies with the discretionary nature of that sentence. It is our view, particularly in light of the decision of Wilson J. in *Chalifoux* v. *Environmental Appeal Board (Alberta)*,[5] that all parties must be given the opportunity to respond to submissions made on an application for reconsideration. We suggest that the "may" in the sentence quoted be changed to "shall".

We also have concerns about the process set out in point 6 of the proposed rules for applications to disqualify a Board member. Clause (b)(i) provides that the party seeking removal of a Board member shall file its application with that Board member, even though the application will be dealt with by a panel that will not include that Board member. We feel that the requirement, as it stands, will act as a disincentive for parties who may feel that a Board member should not be participating in an appeal, as they may be reluctant to make a motion for disqualification directly to the Board member affected for fear of prejudicing their position should their application be unsuccessful. This is particularly likely where applicants and other parties are not represented by legal counsel. We suggest that clause (b)(i) of point 6 be changed to provide that the application for disqualification be provided to the Board rather than the particular Board member.

Point 39, clause (c) deals with the admission of confidential and sensitive information into evidence. This clause appears to us to be in spirit contrary to the intent of EPEA and in particular section 33, which tends to presume that material is not confidential and puts the onus on the party seeking confidentiality to make its case for non-disclosure. We are concerned that clause (c) seems to create a presumption of confidentiality, which may lead to unnecessary restriction of access by all parties to an appeal to evidence, and thus potential unfairness. We believe that the proposed *Rules of Practice and Procedure* should set out specific requirements that must be met by a party claiming confidentiality, similar to those found in section 33 EPEA.

Formality of EAB processes

Following the course of ongoing changes to the EAB processes through legislation, rules and Board decisions, we are concerned that increasing formality will render the process less accessible to the average Albertan who may wish to participate. Although this increasing formality may be an advantage to those legal counsel who appear before the EAB, we believe that the same trend acts as a disincentive for members of the public to appear on their own behalf. More and more the processes are couched in language and requirements foreign to average citizens, many of whom do not have the resources to pursue appeals with the assistance of legal counsel.

[5] (2 October 1997) Edmonton #9703-15182 (Alta. QB)

While this creates somewhat of a dilemma, we feel that the EAB must remain mindful of the intent and purposes of EPEA and the appeal process created by it, and must ensure that all participants are able to participate in the EAB processes on a level playing field. This can in part be addressed by the matter of costs, which could be used effectively by the EAB as a means of balancing inequities of resources between parties to appeals. Rarely will environmental and public participants have access to the kinds of resources that are available to industry and government participants. We believe that the EAB has been overly restrictive in dealing with costs matters, to the detriment of environmental and public participants, and urge that it take a broader and more equitable approach to costs issues. We also feel that the EAB must ensure that its practices and procedures are amenable to those members of the public who choose to represent themselves in the appeal process.

In this vein, we are concerned by the recent amendment to the *Environmental Appeal Board Regulation*, which shortens the minimum notice period for hearings from 45 days to 21 days[6]. Given that parties seeking intervener status are not able to do so until this notice has been given, we feel that this shortening of the notice period creates a hardship for these parties. Is it really reasonable to expect that parties seeking to intervene in an appeal will be able to make their application, have it heard and determined by the EAB, and, if successful, properly prepare their submissions within 21 days? We strongly urge that the regulation be amended to create a more realistic notice period that will not put interveners at a disadvantage as compared to the other parties to the appeal.

Mediation

Mediation has advantages in what is otherwise an adversarial system. In fact, there are a number of matters that have been before the EAB and have been settled at an early stage through mediation with either a Board member or an independent mediator. However, the proposed *Rules of Practice and Procedure* and recent decisions seem to give the impression that the EAB is moving to make mediation a mandatory step in all appeals before it, with potential adverse consequences to those parties who do not agree to mediate. For example, it would appear that the initial costs decision in *Penson* v. *Inspector of Land Reclamation, Alberta Environmental Protection, re: Pembina Corporation*[7] stands as an example of this. Should the EAB's intent be that mediation be a mandatory step within the appeal process, this should be made explicitly clear within the proposed *Rules of Practice and Procedure* and section 11 of the *Environmental Appeal Board Regulation*, in order to avoid any confusion or misconceptions amongst participants in appeals.

References to *Canadian Environmental Assessment Act*

There is one point in particular within the proposed *Rules of Practice and Procedure* which we feel requires clarification. The definition of "notice of appeal" in point 4(f) of the proposed rules makes reference to a notice of objection filed pursuant to section 17.1 of the *Canadian Environmental Assessment Act*. We have been unable to find such a section within that Act, in spite of a thorough search of our legislative resources. As a result, we do not clearly understand to what this reference pertains.

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[6] *Environmental Appeal Board Regulation*, A.R. 114/93, as amended, section 7(1).
[7] (October 5, 1998) Appeal No. 98-005-C (Alberta Environmental Appeal Board)