March 6, 1999 Our File: P-99-861

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Dear Bill:

RE: Proposed Remediation Program to Reduce the Contamination Risk at Gas Stations

Thank you for the invitation to attend the workshop on the *Proposed Remediation Program to Reduce the Contamination Risk at Gas Stations* ("Program") held in Edmonton on December 17, 1998. I appreciated the opportunity to learn more about the Program and to provide input on behalf of the Environmental Law Centre ("ELC").

Following the workshop, my colleagues, Cindy Chiasson and Andrew Hudson, both of whom have done extensive legal work in the area of contaminated land, met to review the Program and discuss its implications. Since the workshop was relatively brief, and only one of us could attend, we are taking this opportunity to provide you with more detailed comments.

The ELC's interest in submitting this letter is to make constructive comments respecting the Program consistent with our mandate which is to make the law work to protect the environment. We have written widely on both contaminated land and leaking underground storage tanks, the latter as early as 1985. At the invitation of previous environment ministers we have also participated in stakeholder committees, namely: the "Contaminated Sites Liability Issues Task Force", the "Contaminated Sites Implementation Advisory Group" and the "Financial Security Risk Assessment Working Group.

Introduction

It is apparent that the Program is a pragmatic solution to a serious existing problem. It is designed to achieve reasonably quick, efficient cleanup of contaminated service station sites. It will also achieve other commendable economic objectives: brownfields, especially in small towns, will be cleaned up and returned to productive use;

municipalities will be relieved of the costs of paying to clean up land which they own through tax recovery processes; and undercapitalized service station operators will have access to financial assistance that will allow them to preserve their equity in their investment. All of this will be achieved through a relatively painless environmental surcharge on consumers of gasoline. It is also apparent that a good deal of thought has been put into the design of the Program, especially in respect to issues such as eligible expenses.

Nonetheless, the ELC has concerns with the Program. The concerns arise from inconsistencies between the Program and principles of environmental protection and principles of legal accountability. While it may appear on its face that these are issues of philosophy which bear little relation to a program to deal with such a practical problem as contaminated soil at service stations, it is our view that proper attention to these issues at the design stage will result in a more effective and efficient program.

Polluter Pays

1. This Program

The "polluter pays principle" is admittedly a difficult one to define. Nonetheless, it is clear that the Program is not a polluter pays scheme. Rather, it is a form of a no-fault scheme. It is a consumer pay scheme. Other than payments to municipalities (orphan sites), payments under the fund will be made irrespective of the blameworthiness of the applicant. In fact, it might well be argued that the Program has elements which are the opposite of polluter pays in that it will reward those who have not yet cleaned up their sites by providing them with a higher limit for cleanup payments than for those who met their lawful obligation and have already cleaned up their contaminated service stations. In any no-fault scheme there will always be a windfall, almost by definition, for those who were actually at fault.

2. Government Policy

"Polluter pays" is a fundamental principle of the Alberta *Environmental Protection and Enhancement Act* ("EPEA") administered by Alberta Environmental Protection ("AEP"). Notably, the purpose section of EPEA says:

> 2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> …
>
> (i) the responsibility of polluters to pay for the costs of their actions;

The substantive provisions of EPEA give expression to the polluter pays principle in a number of areas. For example, s. 101, which creates a duty to undertake remedial measures imposes that responsibility on the "person responsible for the substance", a term which is defined in s. 1(ss) of the Act. As well, provisions in EPEA under which land can be declared a contaminated site and an environmental protection order issued in respect to its clean up deal expressly with the determination of who is responsible to undertake and pay for a cleanup of contaminated property.

Alberta has also supported the polluter pays principle on the national stage. The first principle in the *Canada-Wide Accord on Environmental Harmonization* which was signed by Alberta states:

> 1. those who generate pollution and waste should bear the cost of prevention, containment, cleanup or abatement (polluter pays principle)

3. Stakeholder Review

The issue of polluter pays was addressed by the two stakeholder committees referred to earlier: the Contaminated Sites Liability Issues Task Force and the Contaminated Sites Implementation Advisory Group. Both committees, it should be noted, had members from all interested sectors and produced consensus reports and recommendations. Both supported the polluter pays principle. As an active participant in both committees, I think that I can offer some history of the participants' thinking on this point.

Pollution legislation predating EPEA relied on the principle of joint and several liability to ensure that necessary cleanups were done. The principle of "fairness" available through the contaminated sites provisions in EPEA represented a bold experiment in allocating responsibility for the cleanup on a proportional basis to those who actually caused the contamination. In the course of discussions, it was apparent that the success of the "fairness" principle depended on the development of a fund that would pay for the cleanup of orphan sites and orphan shares. Indeed, the report of the Contaminated Sites Implementation Advisory Group addressed the revenue sources for this fund, recommending:

> Revenue sources for such a fund should be broadly based, and could include public funds from the existing tax system, consumer taxes or surcharges, sectoral funding from private enterprise, and funding from industries that have caused contamination problems. **The fairest approach to financing a fund is to access a wide range of revenue sources.** As well, this approach would be consistent with the promotion of environmental responsibility in various sectors of the population, including government, industry, consumers and the general public. **If revenue for a fund is received from a broad range of sources, consideration should be given to a shared system of administration, which would actively**

involve major contributors in decision-making and expenditure of the monies. Other important considerations, particularly where public monies are used, are the availability of information and full public access to the fund's records. (at pp 17-18, emphasis in the original document)

3. Conclusion on Polluter Pays

Our basic question is: is the gasoline contamination problem such that it requires the government to abandon the polluter pays principle? There will be consequences. Will the Program send the wrong message to those who contribute to the contamination of land – they do not need to pay to meet their lawful obligations to clean up property which they have contaminated? What assurances are there that the program will not be needed in the future to clean up continuing problems? Will service station owners cancel their insurance? Give up their due diligence? Will lenders who have previously not foreclosed on contaminated property now do so and reap the windfall from the sale of cleaned up property?

Environmental Protection

The details for the Program set out in the Report to Ministers dated April, 1998, state that the paramount principle of the Program is the "protection of the health, safety and the environment of Albertans". If this is indeed the objective of the Program, there are inconsistencies in the details which are not justified. They are the following:

1. The Program is available to retail service station sites only. PTMAA's own figures indicate that there are a total of 4,700 sites in Alberta with underground gasoline tanks. Of those, 3,000 are at retail sites. This leaves just over one-third of sites that are not eligible for funding under the Program. If the objective is indeed one concerned with "health, safety and environmental protection", this distinction between the two types of sites cannot be rationalized, especially given the no-fault nature of the Program.

2. The Program indicates that the fund is available for service station contamination only. Given that the Program will be funded entirely by current consumers of gasoline, not those who caused the contamination, why is it not available for other forms of contamination from sources such as municipal landfills and old wood preservative plants whose contamination may be a more immediate threat to public health, safety and the environment. Who will pay to clean up those sites?

3. It is not clear from the details of the Program whether it will fund the cleanup of gasoline contaminated property adjacent to service stations. If

the funding is available in respect to the service station sites only, this is a grave oversight in the Program. Those third parties whose property has been contaminated as a result of leaking tanks at service stations may well be most affected according to the Program's criteria: health, safety and environmental protection.

Legal Accountability

1. The DAO

The ELC has a number of questions with respect to issues of legal accountability respecting the Proposal. It is our understanding that the revenues for the fund will come from an environmental "surcharge" authorized by a regulation under EPEA. A DAO, the PTMAA, will collect the surcharge, and distribute the funds, albeit through an agent, to those who meet the criteria set out in the Program. Given the fact that the entire scheme is authorized by legislation, it establishes a "tax" on consumers, the DAO will be making a determination as to the eligibility of applicants for funding, and the size of the fund, we believe that the Program should incorporate the legal protections afforded the public as if the fund were administered directly by the government. They include:

1. annual audit of the DAO by the Alberta Auditor General
2. application of the *Freedom of Information and Protection of Privacy Act*
3. availability of judicial review
4. an open appeal process which meets the test of fairness
5. accessible rules of operation

2. Relationship to EPEA

In reviewing the Program, we had questions as to the relationship between the cleanup funded by the surcharge, and the requirements of EPEA respecting the cleanup of contaminated land. Specifically, we predict that those undertaking a cleanup may want to receive a remediation certificate under s. 105.1 of EPEA (once regulations have been passed). Will a remediation certificate be available in these circumstances? If so, how will AEP determine that the cleanup has been sufficient to meet its standards?

On a related matter, what will be the nature of the relationship between the PTMAA and its agent and AEP in respect to enforcement matters? If the PTMAA determines that an offence has been committed under EPEA, what will it do? What will it do if it discovers an environmental emergency?

These comments are necessarily brief. Please feel free to contact me if you have any questions or require any additional information.

Yours truly,

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Executive Director

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Peter Kruselnicki, Alberta Labour
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