News Brief

ENVIRONMENTAL LAW CENTRE

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204, 10709 Jasper Avenue
Edmonton, Alberta T5J 3N3

In This Issue

Whither "Polluter Pays"?

Introduction

The polluter pays principle will be violated if a proposed provincial government program goes ahead as planned. The *Petroleum Tank Site Remediation Reimbursement Program*, developed by the Petroleum Tank Management Association, under the direction of the provincial Departments of Environmental Protection and Labour, will reimburse owners of gas stations for the costs of cleaning up contamination at their sites. Funds for the program will come from an environmental surcharge on gasoline. The proposed program has recently undergone a public review and is now before the province for final approval.

Who Pays?

As currently designed, this program will be funded through an environmental surcharge on petroleum products at the wholesale level. The fund will total at least $213 million. The amount of the surcharge has not been finally determined, but it will be between .5 and 1 cent/litre; the greater the surcharge the shorter the time it will be collected. Because the program includes a deductible, retailers will pay for at least a part of their clean up costs.

Who Receives?

The amount for which a gas station will be eligible depends on whether it qualifies as an "orphan site". An orphan site is one where ownership has reverted to the municipality on tax recovery proceedings. With an orphan site, the program will cover the cost of a site assessment to a maximum of $10,000 plus all of the clean up costs, once a remediation plan has been approved. This program is retroactive for clean up of orphan sites undertaken since September 1, 1992.

For all other retail sites where a clean up has not been done as of the start date of the program, a maximum of $5,000 will be available for a site assessment and a maximum of 90% of clean up costs, up to $150,000. Those who cleaned up their gas station contamination after the tank upgrading provisions in the Alberta *Fire Code* came into force on August 31, 1992, can retroactively receive up to 50% of eligible expenses ($75,000). Payments are available for eligible expenses only as set out in the program. The program will not pay for storage tank upgrades or replacement.

Who's in Charge?

This program will be the responsibility of the Petroleum Tank Management Association of Alberta. The PTMAA, as it is more commonly known, is a delegated administrative organization[1] incorporated under the Alberta *Societies Act*. Under the *Storage Tank Management Regulation*, it has been delegated certain functions under the Alberta *Fire Code* (a regulation passed under the *Safety Codes Act*), including reviewing drawings and specifications for tank systems, granting permission for tank abandonment, and so on. The actual administration of the program will be assigned by the PTMAA to an independent contractor.

Why Now?

The program as proposed uses the

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EDITOR
Donna Tingley

ASSISTANT EDITORS
Arlene Kwasniak
Cindy Chiasson
Andrew Hudson

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204, 10709 Jasper Avenue
Edmonton, Alberta
Canada T5J 3N3

Phone: (780) 424-5099
Fax: (780) 424-5133
E-mail: elc@elc.ab.ca
http://www.elc.ab.ca

READER VIEWS

Do you agree or disagree with any points of view in *News Brief*? If so, then write down your thoughts and pass them on to the *News Brief* Editor for publication in an upcoming issue. To be published, all letters must be signed and they may be edited for length.

The Editors

(Whither "Polluter Pays"? ...continued from page 1)

requirements of the Alberta *Fire Code, 1992* as a threshold. That code requires that existing underground storage tank systems be removed, replaced or upgraded within a specified period of time, based on the sensitivity of the site. According to the code, all tanks would need to meet the requirements by no later than 7 years after the code came into force. These dates have been extended twice since 1992 by an *Exemption Regulation* passed under the *Safety Codes Act*. It is reasonable to assume that the extensions have been granted because the required tank improvements have not been instituted at some locations in Alberta according to schedule. Although the tank improvement and replacement requirements date back to 1992, it is important to remember that requirements in the *Fire Code* to recover any escaped gasoline and to remove or treat contaminated soil predate the 1992 requirements.

What's the Fuss?

Is there a problem with this plan? Yes and no. As a practical matter, if this program is implemented, it will likely result in quick clean up of existing sites contaminated by gasoline. This is good for the environment. There are also economic benefits. Especially in small towns, where some properties are virtually sterilized because no one can pay for the clean up, the land, sometimes referred as "brownfields" can be cleaned up and put back into commerce. As well, municipalities, who are always short of money, will now have access to funds to clean up sites which they own through tax recovery. Undercapitalized "Mom and Pop" operations will also have access to financial assistance to help with clean up costs. All of this will be achieved through a relatively painless surcharge on gasoline.

The problem is that this program is the antithesis of a polluter pays scheme. It is, in fact, a no-fault plan. It is a "consumer pays – polluter receives" plan. Payments will be made under the fund irrespective of the blameworthiness of the applicant. In fact, it might well be argued that the program has elements which reward polluters who have delayed action. Those who have not yet cleaned up their sites will have a higher maximum payment under the fund than those who met their lawful obligation and did a clean up.

The polluter pays principle is a fundamental to the Alberta *Environmental Protection and Enhancement Act* ("EPEA") which is the Act which will authorize this program. 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;

EPEA contemplates that those at fault will pay to clean up after their businesses. It contains provisions authorizing a declaration of a contaminated site and an environmental protection order issued in respect to its cleanup. Only four sites have been designated using these provisions, all dealing with contamination by petroleum products.

The establishment of a no fault scheme for cleaning up contamination at gas stations may send the wrong message to those who operate gas stations and other facilities whose operations can cause land contamination. They may be left with the view that if it is difficult or expensive to meet their legal obligation to clean up their land, the government will set up a consumer-supported fund to help them. How can the planners of this program be certain that future operators of polluting activities will comply with the law and undertake their own clean ups?

Conclusion

Contamination at gas stations in Alberta is an environmental problem. At the present time, there are sites in Alberta

(Continued on Page 10)

Enforcement Briefs

By Jillian Flett, *Alberta Environmental Protection*

Pesticide Applicator Given Jail Term

R. v. McGlone, (28 November 1998) #70640-719 St. Albert (Alta. Prov. Ct.)

In this case the courts sentenced an individual to jail for failing to comply with an enforcement order. Contravening an enforcement order is considered a serious offence under the Enforcement Program for the *Environmental Protection and Enhancement Act* ("EPEA"). This is the second time a person has been sentenced to jail for violating EPEA.

The facts of the case are as follows. An enforcement order was issued to Richard McGlone on June 28, 1994 ordering him to cease all pesticide applications on land which he did not own, without a certificate of qualification or an approval as required under the EPEA. Although Mr. McGlone had no approval or certificate to apply pesticides, he aerially applied pesticides in 2 situations: one, between June 20 and 24, 1995, on oat and barley crops owned by the Pibroch Hutterian Brothers and two, on July 2, 1996, on lands owned by another farmer.

The accused was charged with the following contraventions of EPEA:

- 2 counts of contravening an enforcement order contrary to s. 213(g), (relating to the 1995 and 1996 incidents),
- 1 count of knowingly contravening an enforcement order contrary to s. 213(f), (relating to the 1996 spraying incident) and
- 1 count of applying a pesticide not in accordance with the Regulation and the pesticide label contrary to s. 156(1)(a), (relating to the 1996 spraying incident, where the label specified that it should be applied by ground equipment only and not by air.)

Mr. McGlone did not deny the spraying occurred but he raised a number of defences, one being that he was a "commercial agriculturalist" and was therefore not required to be an applicator, conditional applicator, or work under the supervision of an applicator, as specified under s. 3(1) of the *Pesticide (Ministerial) Regulation* (A.R. 127/93).

He was found guilty of 1 count of knowingly contravening an enforcement order and 1 count of contravening an enforcement order.

The court considered the following aggravating factors in sentencing:

- Mr. McGlone has been fined a total of $5,000 on 5 counts under EPEA just 5 months before the date of the first count,
- there were 2 spraying events,
- Mr. McGlone had been advised on numerous occasions that the enforcement order was still in effect,
- there was a commercial aspect to the incident in that Mr. McGlone invoiced for the spraying even though he chose not to collect until after the trial in one situation and applied the monies to the cost of the damages in the other.

There were 2 mitigating factors:

- Mr. McGlone has disposed of his spraying equipment so it is unlikely he will reoffend and
- Mr. McGlone has played an active role in the movement to curb agricultural water contamination.

The court was of the view that a jail sentence should be imposed on the "knowingly" (1996 charge) to deter others from offending environmental laws. The court sentenced him to 45 days imprisonment. The court considered the blatant and intentional disregard of the Act and the fact that Mr. McGlone paid little attention to the sentencing remarks of the judge in his previous trial by committing this offence within 5 months of the previous trial. In view of the prior recent environmental conviction and the conduct in the present offences, the court felt a custodial sentence was required to have the necessary deterrent effect. Therefore, Mr. McGlone was not permitted to serve his sentence in the community.

With respect to the count of contravening the enforcement order (the 1995 incident) he was fined $5,000, and in default 60 days. If he chose to do the jail time, this sentence was to run consecutively to the sentence for the "knowingly" (1996) count.

With respect to the charge related to s. 156(1)(a) Mr. McGlone argued that he did not know the chemical he was applying was not registered for aerial application. The court held the fact that he did not bother to ascertain what chemical he was working with amounted to willful blindness on his part and was no defense to the charge.

Mr. McGlone further argued that he did the aerial spraying as a favor for a farmer in distress because the land was too wet for ground application. The court held this provided no defense and found him guilty on this count. He was fined $2,500 and in default, 30 days in jail. If he chose to do jail time, this sentence was to run concurrently to the sentence for the "knowingly" count.

The fact that the offence was intentionally committed and showed a blatant disregard for environmental laws was a sentencing consideration.. Although the offence committed in this case may not have had as great a potential for major environmental consequences as some other cases, the court was prepared to order a custodial sentence. The sentence has been appealed and will be heard on March 25, 1999.

In Progress

In the Legislature...

Federal Legislation

The *Parks Canada Agency Act* received Royal Assent December 3, 1998 and, with the exception of some sections, came into force December 21, 1998.

Alberta Legislation

The new *Water Act* and regulations with related codes of practice came into effect January 1, 1999.

Federal Regulations

As of December 23, 1998 the *Regulations Amending the Plant Breeders' Rights Regulations* are in force. The amendment, prepublished June 20, 1998, extends Plant Breeders' Rights legislation to breeders of all species of plants, excluding algae, bacteria and fungi. (*Canada Gazette Part II*, December 23, 1998, pp. 3158-3161.)

As of January 1, 1999, the *Ozone-depleting Substances Regulations, 1998* are in force. With the new Regulations, the *Chlorofluorocarbon Regulations, 1989* (SOR/90-127), the *Ozone-depleting Substances Regulations* (SOR/95-576), and the *Ozone-depleting Substances Products Regulations* (SOR/95-584) are repealed. (*Canada Gazette Part II*, January 6, 1999, pp. 101-138.)

As of April 1, 1999 there will be new regulations concerning boating in Canada as both the *Regulations Amending the Boating Restriction Regulations* and the *Competency of Operators of Pleasure Craft Regulations* come into force. Both regulations are an attempt to promote boating safety. (*Canada Gazette Part II*, February 3, 1999, pp. 390-400.)

Alberta Regulations

AR 259/98, the *Athabasca Regional Waste Management Services Commission Regulation* was filed December 9, 1998 establishing the Athabasca Regional Waste Management Services Commission.

AR 74/92 the *Soil Conservation Notice Regulation*, under the *Soil Conservation Act* has been repealed and replaced by AR 272/98.

AR 278/98, the *Market Surveillance Regulation* under the *Electric Utilities Act*, is in force as of December 18, 1998.

The *Procedures Regulation* (AR 233/89) under the *Provincial Offences Procedure Act* has been amended by AR 271/98. The amendment adds the *Dangerous Goods Transportation and Handling Act* to the list of enactments under which proceedings may be commenced.

Cases and Enforcement Action...

A Provincial Court Judge sentenced Air Agro Limited of Wainwright to a total penalty of $30,000. The Company plead guilty to five counts of applying the pesticide Roundup on lands owned by another person in a manner contrary to the regulations and label in violation of s.156 of the *Environmental Protection and Enhancement Act* and s.5 (1) of the *Pesticide Sales, Handling, Use and Application Regulation*. The Company was fined $3,000. on each count. The Court assessed an additional fine of $3,000. per count further to s.216 of the Act due to the monetary benefit accrued as a result of the offence.

Alberta Environmental Protection has issued an Environmental Protection Order to Sahara Sandblasting and Painting Ltd. of Edmonton. The company operates a painting and sandblasting facility, from which air contaminants have been released, causing an adverse effect. The Order requires the company to cease sandblasting and painting activities, submit a plan with a schedule of implementation indicating what measures have been taken and will be taken to prevent the release of air contaminants, and implement the plan once it is approved. Written progress reports are required every 28 days as well as a final report.

The Alberta Environmental Appeal Board issued Decisions in:

Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection, re: Beaver Regional Waste Management Services Commission. This was a group of four appeals filed objecting to an Approval issued to Beaver Regional Waste Management Services Commission for the construction, operation and reclamation of a Class II landfill near Ryley. In its decision from a preliminary meeting, the Board ruled that three of the four parties were "directly affected" by the Approval and that a hearing will be held to discuss "litter and waste spillage, noise, odour, surface and ground water quality, health and quality of life and buffer zone."

Kozdrowski request for reconsideration, re: Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection. The request asks that the EAB reconsider whether the clay liner allowed by the Director met the conditions of the Board's report of June 12, 1997. The Board dismissed the reconsideration request on the basis the Appellant "failed to meet her burden of proving that reconsideration is warranted."

■ **Andrew Hudson**, *Staff Counsel*
Dolores Noga, *Librarian*
Environmental Law Centre

Alert: New Limitation Period Added To EPEA

A recent Amendment to the Alberta *Environmental and Protection Enhancement Act* allows a Judge to extend a limitation period for the commencement of a civil proceeding where the basis of the proceeding is an alleged adverse effect resulting from an alleged release of substances into the environment. This article raises questions about the interpretation of this new provision.

The new section 206.1 provides that an application to extend the limitation period may be made to a Judge of the Court of Queen's Bench before or after the expiry of the limitation period. There is no limit to the time within which a limitation period can be extended.

In deciding whether he or she should extend the limitation period, the Judge must consider the following:

a) When the alleged adverse effect occurred;

b) Whether the alleged adverse effect ought to have been discovered by the claimant had the claimant exercised due diligence;

c) Whether the claimant had, in fact, exercised due diligence;

d) Whether extending the limitation period would prejudice a proposed defendant's ability to maintain a defence; and

e) Any other criteria the Judge considers relevant.

This Amendment appears to introduce the concept of discoverability into environmental offences with no ultimate limitation period. It precludes the ultimate limitation period of ten years provided by the *Limitation of Actions Act*.

This Amendment should be a concern to lawyers practising in both the litigation and solicitor field. In determining whether and how to use this section, a barrister must first determine the nature of the offence - it must be an adverse effect arising from the release of a substance into the environment. There will, in all likelihood, be extensive litigation about what is meant by "a substance" and what is meant by a "release of a substance".

The application for extending the limitation period can be made either before or after the expiry of the limitation period. A lawyer would only bring an application before the expiration where he or she knows the client has a cause of action but does not know who the defendants are. If the client knows who the defendants are, it would make sense to file your action right away and later amend it to include any new information.

The Amendment is not clear on whether the applicant should give notice of the application to the proposed defendant(s). Because of the nature of the criteria the court must consider and the possible finality of the decision, the court will in all likelihood require notice be given of the application to all

defendants is known. However it may be worthwhile to bring an ex parte motion and obtain directions as to who should be given notice so that you are not wasting time or be accused of dragging your feet while you are attempting to serve.

It is not clear whether a decision to extend the limitation period is a final determination and therefore not subject to challenge at the trial. The wording of the amendment allows a judge to extend the limitation period and once that is done it is questionable whether that ruling can be changed in subsequent proceedings in the action. It may depend on the wording of the order and the nature of the proceedings leading to the order. The more thorough the process the more likely it will be a final determination. For example, if a full trial has been held with respect to extending the time with all parties present, it is arguable that it is a final determination. However if the order is obtained ex parte or without the benefit of all relevant evidence then the argument is stronger that the limitation defence can still be raised at the trial.

The criteria the Judge must consider can be very involved from an evidentiary point of view. The first criterion is when did the adverse effect occur. A great deal of evidence may be tendered as to when and how the release occurred and the nature of the resulting effect. The earlier it occurred, the more likely the Court is to refuse to extend the period.

The second criterion of due diligence could also be in dispute. Firstly, what is due diligence and secondly, what should the claimant have done.

The last specified criterion is prejudice. It is not clear who has the onus of proving prejudice. It is difficult for the plaintiff to prove no prejudice if they are not aware of all of the circumstances. It would appear to be similar to the previous rule for leave to take the next step where the applicant would allege there is no prejudice. The onus would then shift to the respondent to prove otherwise.

The Amendment also provides that the Court can consider any other criteria it considers relevant. It is not clear whether this subsection allows the Court to extend the limitation period in situations where the causal link was discovered outside the usual limitation period. For example, a party may be aware that a problem has occurred but cannot determine the cause. When the science is able to show causation, can the limitation period be extended?

Another procedural possibility is to initiate the claim and wait to see if the defendant raises the limitation period as a defence. If a limitation defence is not raised it is not an issue at the trial. If it is raised, the Court can then be asked to extend the time.

There is also the question of whether the issue should be decided before the trial on the merits or whether it should be part of a trial. This section seems to contemplate a Judge making that determination prior to a trial but this may entail

Action Update

A Proposed Regulatory Framework For Livestock Feeding Operations In Alberta

Last spring the Alberta Department of Agriculture, Food and Rural Development ("AAFRD") produced a discussion paper called *Regulatory Options for Livestock Operations*[1]. To assist in reviewing the comments arising from this paper and to help sort out the options, the Minister of the department formed the Livestock Regulations Stakeholder Advisory Group. The Advisory Group consists of representatives from several farm producer groups and from the Alberta Association of Municipal Districts and Counties, the Alberta Urban Municipalities Association, the Provincial Health Authorities of Alberta and the Environmental Law Centre.

Using the results of the public consultation, the Advisory group established some guiding principles. They included:

- The production system must be environmentally sustainable
- Human health must be protected
- Land use decisions must remain with the municipality
- Drinking and recreational waters must be protected
- The system must allow the industry to prosper
- Technical requirements must be based on consistent scientific based standards
- The process needs to build public confidence
- The process must be effective, streamlined, timely and consistent across the province
- Existing operations must be included and they should be provided a reasonable amount of time to comply
- The industry must be able to continue to farm and ranch in a responsible and practical fashion.

In January of this year the Advisory Group published *A Proposed Regulatory Framework for Livestock Feeding Operations in Alberta*. The framework contemplates legislation and regulations administered by the Department of Agriculture, Food and Rural Development. A multi-layered approval process was proposed similar to that contained in the *Environmental Protection and Enhancement Act*. New or expanding intensive livestock operations would be required to:

- for smaller operations, give notice to the regulators that the operation has begun and abide by certain minimum provincial regulations,
- for larger operations, obtain a simplified approval called a registration and abide by additional mandatory regulations, or
- for the largest operations, obtain a formal approval after public notice and subject to rights of appeal by the proponent or others directly affected by the proposed operation.

The requirements for registrations will be set by regulation. Registrations do not require public input unless the operation proposes to vary the conditions set out in the regulations or if the development is in an environmentally sensitive area. In these cases the proponent would be required to obtain an approval.

The proposal suggested certain threshold numbers for various species of livestock and requested comments on those thresholds and on other aspects of the proposal.

This provincial regulatory scheme would be in addition to the municipal development permit process. In other words, a proponent would be required to obtain the appropriate level of provincial approval as well as a development permit from the municipality. It is contemplated that municipalities be limited in their ability to add conditions to a development permit for anything other than planning considerations.

The standards that would apply to the various levels of operations have not been completed.

The regulations would include provisions for compliance and enforcement with a fine structure for non-compliance consistent with amounts in other legislation administered by AAFRD.

The Advisory Committee is receiving a number of submissions on the Proposal. It is reviewing them and intends to produce a package of material for public review by the summer. This package will include the legislation, regulations, standards and enforcement policy.

Anyone wishing to receive a copy of the proposal can contact Alberta Agriculture, Food and Rural Development, Policy Secretariat at (780) 422-2070.

■ **Andrew Hudson**
Staff Counsel
Environmental Law Centre

[1] *News Briefs*, Vol 13, No 3, 1998 at 5.

WEB SITE UPDATE

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CEPA Review Update

1994 – 1996

The 1988 *Canadian Environmental Protection Act* ("CEPA") amended or replaced six federal statutes dealing with aspects of water or air pollution. Although capable of broader application, CEPA focuses on "cradle to grave"– from manufacturing or import to final disposition – control of toxic substances. Central to the statute is its definition of toxicity, for only if a substance is determined to be "CEPA toxic" may it be regulated or otherwise controlled under the statute.

CEPA directs that within five years of enactment, a House of Commons Committee comprehensively review it and report recommended changes to Parliament. In June 1994, the House of Commons referred the review to the Standing Committee on Environment and Sustainable Development. A year later the Committee produced its report after holding hearings and listening to or reading hundreds of witnesses' submissions.

The Committee's report titled *Its About Our Health! Towards Pollution Prevention* contained 141 recommendations. Generally, the recommendations urged the federal government to redefine and strengthen the federal government's role in environmental protection. Among other recommendations, the Committee advocated caution in harmonisation, supported strong citizen suit provisions, and urged that CEPA require the elimination of persistent, bioaccumulative organic pollutants ("POP's") and mandatory pollution prevention planning. Especially significant among recommendations was that CEPA's definition for toxicity be amended to specifically allow for hazard assessment for toxicity in addition to CEPA's current risk assessment. With hazard assessment, the intrinsic or inherent toxicity of substances may be sufficient for CEPA control measures. With risk assessment, CEPA toxicity cannot be found without first determining and quantifying what amount of a substance would constitute harmful exposure. Public interest advocates, including environmental and health organizations, have strenuously argued that because of the exposure requirement, risk assessment alone will not facilitate federal regulation of a host of substances or combinations of substances that are obviously toxic.

The federal government issued its formal response to the Committee's report in December of 1995. The response report titled *Environmental Protection Legislation Designed for the Future – A Renewed CEPA*, rejected many of the Committee's key recommendations. For example, it declined to support specific amendment to incorporate hazard assessment, supported harmonisation, suggested that CEPA require only "virtual" and not complete sunsetting of POP's, and recommended only discretionary, not mandatory pollution prevention planning. As might be expected, industry hailed the Government response, whereas environmental, health and labour organizations were highly critical of it.

1996 – Present

The first CEPA renewal bill, Bill C-74 was introduced into the House of Commons in December of 1996. Bill C-74 died on the order paper with the dissolution of the House for the June, 1997 federal election. The Bill was re-introduced into House of Commons in March 1998 as Bill C-32. Bill C-32 reflects many of the positions in the government response. The Bill retains risk assessment for determining CEPA toxicity, requires that CEPA be administered consistent with harmonisation agreements, contains weak, and arguably illusory citizen action suit provisions, only authorizes, not mandates, pollution prevention planning and addresses only virtual elimination of POPs, and not complete cessation from production and use. Second reading and debate of the Bill ensued in April 1998. At the end of April the Bill was referred to the Standing Committee on Environment and Sustainable Development.

The Committee once again held hearings. Numerous witnesses, including the Environmental Law Centre, addressed the Committee in Ottawa. (The ELC brief may be accessed through the ELC homepage at <www.elc.ab.ca>.) Following witnesses, the Committee commenced its clause by clause review. In this process, the Committee has proposed a number of amendments. (The Committee's proceedings including proposed amendments may be accessed at <www.parl.gc.ca/36/1/parlbus/commbus/house/CommitteeMinute>. The Committee is now completing this task (there are 356 clauses) and then will prepare a report. In due course, the Committee's Report will be presented to Parliament. Debate and the amendment procedure will follow. *News Brief* will keep readers posted on new developments.

■ **Arlene Kwasniak**
Staff Counsel
Environmental Law Centre

Case Notes

Coal Mine Opponent Turned Down

Bildson v. *Acting Director of North Eastern Slopes Region Alberta Environmental Protection*
(8 December 1998) #98-230-D2 (EAB)

Seeking to appeal Alberta Environmental Protection ("AEP") approvals permitting Smoky River Coal to extend an existing surface coal mine into a new area, and alleging deficiencies in the mitigation plans for mountain caribou and water quality, Brian Bildson had managed to clear two hurdles. Bildson had established that he was directly affected and that his appeal was launched in a timely fashion, but he failed to match AEP's argument that the issues raised in his appeal had already been adequately addressed by the Energy and Utilities Board ("EUB"). The Environmental Appeal Board ("EAB") dismissed Bildson's appeal on this third ground, advanced by AEP under Section 87 of the *Environmental Protection and Enhancement Act* ("EPEA"), that Bildson had the opportunity to participate in an EUB review process that dealt adequately with the issues Bildson raised.

Like statutory appeal deadlines, laws like this can really jump out and bite an unwary appellant. Provisions denying the right to contest a matter before one board, on the ground that the matter was already considered by another board, are not well known.[1]

In dismissing Bildson's appeal, the EAB found that (1) the appellant "received notice of," "participated in," or had the "opportunity to participate in" an EUB review of the project, and (2) that the EUB's review "adequately dealt with" matters raised by the appellant before the EAB. Of particular interest are the circumstances of Bildson's participation in the EUB review process, and the manner in which the EUB dealt with the issues raised by Bildson before the EAB.

The EUB originally issued a notice inviting statements of concern to AEP, without inviting public participation in the EUB review. Nevertheless, Bildson and others submitted letters expressing concerns to the EUB. Notably, Bildson's letter indicated he was "not materially affected," and the EUB determined to proceed without a public hearing on the ground that none of the interested parties were "directly and adversely affected." After the hearing, Bildson then indicated that he was "directly affected" and requested a hearing. The EUB denied Bildson's request.

The EAB found that although the EUB did not actually consider Bildson's written submission, the EUB had considered an AEP report which considered Bildson's concerns. Degrees of separation aside, the EAB ruled that Bildson's views were shared with the EUB through the AEP submission.

The EAB proceeded to find that the EUB had adequately dealt with Bildson's concerns, stressing that the issue was the adequacy of the EUB process for the purposes of EPEA, and not the adequacy of that process in terms of EUB legislation. The EAB ruled that the EUB decisions were consistent with the public interest considerations demanded by Section 2 of EPEA, and dismissed Bildson's appeal.

■ **Shawn Munro**
Bennett Jones

1. See Section 9 of the *Expropriation Act* (headed "no inquiry when previous hearing" under any other Act) and *Re Calgary Power Ltd. and Henkel* (1976), 10 LCR 136 (CA), upon which Section 87 of EPEA was modeled in response to concerns over possible duplication of proceedings. See also *Slaunwhite* v. *Alberta (EAB)* (1995), 33 Alta. L.R. (3d) 336 (Alta. QB), where the Court quashed the EAB's decision that it was precluded by Section 87 from hearing a landowner's objection.

Office of the Information and Privacy Commissioner

Recent decisions from the Office of the Information and Privacy Commissioner that are of note are:

- Order 98-014 which is a review of a decision by Alberta Environmental Protection to give an applicant access to a grazing lease. The Commissioner ruled that disclosure of the leaseholder's personal information was not an unreasonable invasion of personal privacy because the grazing lease was a "discretionary benefit" granted to the leaseholder and upheld the decision to disclose the lease. In the Order, the Commissioner noted that the information regarding the lease would also have been available from the Land Status Automated System client registry for public lands.

- Order 98-018 is a review of a request for access to the names of Alberta residents who received a licence to hunt grizzly bears in Alberta during the 1998 hunting season. The Commissioner did not uphold the decision of Alberta Environmental Protection and ordered the Applicant be given access to the list of names. As in Order 98-014, the review was based on s.16(4)(g) of the *Freedom of Information and Protection of Privacy Act* which provides that disclosure of personal information is not an unreasonable invasion of privacy if the disclosure reveals details of a licence, permit, or other "discretionary benefit".

- Order 99-001 upheld a decision by Alberta Environmental Protection not to release certain records relating to the Kananaskis Country recreational development policy review process which was begun in late 1995. The Commissioner affirmed that ss.23(1)(a), (b), and (g) of the *Freedom of Information and Protection of Privacy Act* dealing with the public body's ability to develop policy in confidence, were applied correctly.

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O'Connor Associates Environmental Inc.
Weldwood of Canada Limited

PATRONS $2,500 - $4,999
Alberta Environmentally Sustainable Agriculture Program
Amoco Canada Petroleum Company Ltd.
Athabasca University
Code Hunter Wittmann
Fraser Milner
Luscar Ltd.
Mountain Equipment Co-op
Shell Canada Limited
TransAlta Corporation

PARTNERS $1,000 - $2,499
Agrium Inc.
Alberta Pacific Forest Industries
ATCO Group
Canadian Bar Association, Southern Office
Canadian Hydro Developers, Inc.
Canadian Occidental Petroleum Ltd.
Dow Chemical Canada Inc.
Enbridge Inc.
Howard Mackie
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AN GEO Environmental Consultants Ltd.
Garry Appelt
Association of General Council of Alberta
Cheryl Bradley
Crestar Energy
Field Atkinson Perraton
Judith Hanebury
Ronald Kruhlak
Lucas Bowker & White
Mactaggart Third Fund
Sherritt International Corporation
Dennis Thomas, Q.C.
Donna Tingley
Zeidler Forest Industries Ltd.

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Ackroyd, Piasta, Roth & Day
Chevron Canada Resources
Paul Edwards
Keith Ferguson
Steve Ferner
Letha MacLachlan
Matrix Solutions Inc.
Al Schulz

CONTRIBUTORS $125 - $249
Ed Brushett
Thomas Dickson
J.W. Kozina Professional Corporation
Patricia Langan
McCuaig Desrochers
Ogilvie and Company
Dr. Mary Richardson
Wendell Samoil
Kim Sanderson

UP TO $125
Tammy Allsup
Brownlee Fryett
Carolyn Carlson
Gerald DeSorcy
Linda Duncan
David Duggan
Dr. Mary Griffiths
Brian A. Harris
Thomasine Irwin
Frank Liszczak
MacKimmie Matthews
W.G. Milne
Professor Ian Rounthwaite
Dr. Dixon Thompson

Riparian Rights a Factor in EAB Decision

Stelter v. Director of Air and Water Approvals Division, Alberta Environmental Protection (22 May 1998) #97-051 (EAB)

In *Stelter*, the appellant, Mr. Richard Stelter, filed an appeal with respect to an approval issued to GMB Property Management by the Director of Air and Water Approvals Division, Alberta Environmental Protection. The approval allowed GMB, the owner and operator of a mobile home park, to discharge treated sewage once per year between May 15 and July 15, and also a one time discharge at any time. The discharges were to be from the park's second lagoon into an unnamed creek, which eventually made its way to the McLeod River via a drainage channel across Mr. Stelter's land.

Mr. Stelter objected to the approval on five grounds, three of which were accepted by the Environmental Appeal Board to one degree or another. First was the fact that the period when the discharges were allowed was selected to coincide with spring runoff, as the creek was an intermittent one, with negligible flow after the runoff period. Evidence presented at the hearing showed, however, that the spring runoff was essentially done by mid-April, leading to the conclusion by the Board that undiluted treated sewage would be flowing down the channel if the time period in the approval was followed. Secondly, this conclusion, in conjunction with an admission by the Director's witness, led the Board to find that, as the sewage would be undiluted, there was a likelihood of harm to fish near the creek's confluence with the McLeod River.

Thirdly, and perhaps most importantly, the Board found that, as the sewage would be essentially undiluted, this could have an adverse effect on the value of Mr. Stelter's property; as well, his riparian rights may have been infringed. Counsel for the Director argued that such matters were beyond the Board's authority, while counsel for GMB argued that no actual harm to the property value was proved. The Board agreed that riparian rights may be beyond its authority, but stated nonetheless that it thought it had the responsibility to ensure that the Director did not infringe common law rights when making environmental quality decisions. In addition, the Board seemed to sidestep the issue of actual harm, saying that it was "simply a common sense argument" that the once per year discharge of undiluted treated sewage across Mr. Stelter's land would reduce it's value.

These three findings led the Board to allow the appeal, and to recommend that the approval be varied to force GMB to find an alternative means of discharge to the river that would not infringe the property interests of Mr. Stelter, while also avoiding the fisheries concerns. An Order implementing these recommendations was subsequently signed by the Minister of Environmental Protection.

■ **Mike Callihoo**
3rd Year Law
University of Alberta

(Alert: New Limitation Period Added to EPEA ... continued from page 5)

two trials; one to establish that the limitation period should be extended and then, if successful, one on the merits. The same evidence may be required for both.

Solicitors must also be concerned with this Amendment as they must advise people when they are free from causes of action, especially when they buy or sell property and in providing general corporate advice. It was once thought that after a certain period of time a party could raise a limitation defence to a lawsuit. It is difficult to advise clients with respect to the destruction of files; should they be kept for a defence or destroyed to create a prejudice. If the evidence is that they were destroyed in the normal course of business the client may be safe in doing so. However if the evidence is that they were destroyed to create a prejudice the court may not view them favourably.

The first few cases on this section are extremely important, as they will define the limits of the Amendment and therefore should be watched carefully. Hopefully good facts will come before the Courts so that we obtain clarity.

■ **Jennifer Klimek**
Barrister & Solicitor

(Whither "Polluter Pays"?...continued from page 2)

that have not been cleaned up because they are "orphans" – they are owned by municipalities or there is no one responsible for the contamination who can pay for a clean up. Admittedly, clean up of orphan sites may require a fund. However, there are options for the creation of a fund; a possibility is contributions from the industry that caused the contamination.

Whether public or consumer funds should be available to clean up gas stations that are not true orphans is another question. While there obviously have been problems enforcing clean up requirements to date, the question for government decision-makers is whether the need to clean up contaminated gas stations should override public policy requiring polluters to pay to clean up any contamination for which they are responsible.

■ **Donna Tingley**
Executive Director
Environmental Law Centre

[1] For further discussion on delegated administrative organizations, see "Delegated Organizations and Environmental Protection" 13 *News/Brief* 2 (1998), at 1.

Admin Penalties

Alberta Environmental Protection issued the following administrative penalties under EPEA:

- $2,000. to the Town of Elk Point for failing to immediately report the discharge of partially treated sewage from the wastewater treatment plant to the North Saskatchewan River and for failing to take weekly effluent samples as required by their Approval to operate in violation of s.213(e) of the *Environmental Protection and Enhancement Act.*
- $3000. to Amoco Canada Petroleum Co. Ltd. operating in the MD of Greenview No. 16, for exceeding their Approval limits for sulphur dioxide concentration and mass emission rates at the Kaybob gas plant contrary to s.213(e) of the *Environmental Protection and Enhancement Act.*
- $9,000. to Amoco Canada Petroleum Company Ltd. for exceeding, on two occasions, their Approval limits for sulphur dioxide concentration and mass emission rates for the sulphur recovery process unit incinerator stack at the West Whitecourt facility, contrary to s.213(3) of the *Environmental Protection and Enhancement Act.*
- $2,000. to Amber Energy Inc. for constructing and operating a new compressor at the Hoole sour gas plant without first obtaining an amendment to their Approval to do so. This is contrary to s.64 (1) of the *Environmental Protection and Enhancement Act.*
- $1,000. to Novagas Canada Ltd. operating as TransCanada Midstream for failing to conduct a second manual stack survey of the sulphur recovery process unit in 1997 as required by their Approval to operate the Zama 1 sour gas plant. The offence violates s.213 (e) of the *Environmental Protection and Enhancement Act.*
- $1,000 to Chevron Canada Resources Ltd. for failing to submit a stack survey report within the timeframe specified in their approval to operate the Medicine Lodge sour gas plant. This omission violates s.213 (e) of the *Environmental Protection and Enhancement Act.*
- $2,000. to Penn West Petroleum Ltd. for exceeding their permitted sulphur dioxide emissions from the Sedgewick sour gas plant contrary to s.213(e) of the *Environmental Protection and Enhancement Act.*

The Land and Forest Service of Alberta Environmental Protection issued the following administrative penalties of $1,000. or more for offenses under the *Timber Management Regulation:*

- $1,500. to Weyerhaeuser Canada Ltd., Grande Cache,
- $1,000. to Alberta-Pacific Forest Industries Inc. of Boyle,
- $1,500. and $300. to Sunpine Forest Products of Sundre,
- $1,900. to Millar Western Industries Inc. of Boyle,
- $1,000. to Daniel Winfield of Wildwood,

and the following administrative penalties for $1,000. or more for offenses under the *Public Lands Act*:

- $2,803.05 to Northrock Resources Ltd. ,
- $2,250. to CanNat Resources Inc. of Calgary,
- $2,500. to Caravan Oil & Gas Ltd. of Calgary,
- $1,000. to Anderson Exploration Ltd. of Calgary,
- $2,000. to Corporax Canada Ltd. of Calgary,
- $1,000. to Crestar Energy Inc. of Calgary,
- $1,000. to Marathon Canada Ltd. of Calgary,
- $2,000. to Pelican Peak Resources Ltd. of Calgary,
- $2,000. to Talisman Energy Inc. of Calgary,
- $2,000. to The Wiser Oil Company Ltd. of Calgary,
- $1,000. to Baytex Energy Ltd. of Calgary,
- $1,250. to Northstar Energy Corporation of Calgary.

Practical Stuff

By Andrew R. Hudson, *Environmental Law Centre*

Brownfields Development

For Sale:
Prime Commercial Property
Great Location Low Price!

You have always wanted to be a developer and this looks like the chance of a lifetime. This is land that is already serviced by roads and utilities; land that is near downtown; land that is zoned for intensive valuable development. The only problem is contamination.

Even the suspicion of contamination can devalue land or make it impossible to sell because of fear of expensive clean up and of liability to others.

The United States Environmental Protection Agency has coined the name "brownfields" for these types of sites.

The EPA defines brownfields as "abandoned, idled, or underutilized industrial or commercial properties where expansion or redevelopment is complicated by actual or perceived environmental contamination."[1] These sites are thus impaired by a negative environmental stigma.

If this stigma scares you, you are not alone. Often sites contaminated by past industrial activity are bypassed for development in favour of raw land without the checkered past. "Greenfields" are used instead of "brownfields." This is so even though the brownfields may have better transportation links, employment base, and infrastructure foundation.

If you are planning to bring new life to brownfield land, here are some of the challenges that await you.

Your logical first stop is to Alberta Environmental Protection ("AEP"). Under the *Environmental Protection and Enhancement Act*, ("EPEA") AEP will be directly involved if:

- your site is designated as a "contaminated site,"
- the operator who caused the contamination must obtain a reclamation certificate,
- the contamination is the result of a "release" under EPEA.

However, AEP does not need to be involved in plans for the large number of sites that do not fit within these categories.

That does not mean that AEP is not interested in what you will be doing. If, during the redevelopment, contaminants are released to the air, water or land you must report them. AEP could then issue an environmental protection order requiring clean up or designate your site as contaminated.

In those rare cases when a site has been designated, the Act provides some protection to brownfield development. Once a director has designated a site as contaminated, you (as one of many possible "persons responsible for the site") could prepare a remedial action plan for the land. If the Director approves the plan and the work is done, you are protected from future orders under the contaminated sites provisions.

Whether or not AEP is involved, you will be required to obtain municipal approval of your development. This may involve obtaining a development permit or applying for a rezoning.

Both of these processes can bring the public into your plans. Those nearby may be worried that your plans will not protect them or the environment. You can expect these people to make representations at any hearings or meetings before the decision-makers.

The municipality can bring AEP back into the picture. Several municipalities, including Edmonton and Calgary, refer all applications for development of brownfields property to AEP and to public health authorities. Comments received are considered before decisions are made.

All of this is against the backdrop of the finances for the project. If you have an unlimited budget you could just pay whatever it costs to clean up the site. Unfortunately, the clean up cost can often be more than the value of the land after clean up. It is more likely that there is not an unlimited budget.

Since you are doing the public a favour by reducing contamination you think that you should be able to access public funds. No such program exists in Alberta although a limited one is being proposed.[2]

At the least you will require financing to help you with the development. When you apply for this financing you will find that potential lenders will want some assurance that your development will be in harmony with environmental laws. They will want Alberta Environmental Protection to approve of the plans and indicate that it is satisfied with the result. AEP is authorized to issue remediation certificates for this purpose but has not done so in the absence of regulations. These are being prepared. In the meantime, AEP does issue "comfort letters" regarding their acceptance of what has been done. These letters have no statutory authority but are nevertheless valued by both lenders and municipalities.

In any clean up one must determine how clean is clean. There are standards published by AEP and by the Council of Canadian Ministers of the Environment. These standards are constantly being reviewed and their application can often cause disputes.

All of this makes brownfield development as difficult as it is welcome.

1 E.P.A. Website<http://www.epa.gov/swerosps/bf/glossary.htm>.

2 For further information on the proposal, see "Whither Polluter Pays?" this issue at 1.

Farming, Well Water and Water Rights

Dear Staff Counsel:
My husband and I raise pigs for the pork market on our farm in central Alberta. Between what we need to run the house and to water our livestock we use about 7 to 8 acre feet of well water per year. We don't have a water license since we never figured we needed one. We inherited this land from my parents, and my parents inherited the land from their parents. The generations have used well water for the household and the livestock and none of us ever had a license. Our neighbor's now telling us that because of a new water law we have to get one. Is this right?

Yours truly,
Well within rights?

Dear Within:
The Alberta *Water Act* came into force on January 1, 1999. This Act replaced the *Water Resources Act*. The *Water Resources Act* required ground water users, just like surface water users, to obtain a license, unless the only water used was for domestic purposes. Unfortunately, the *Water Resources Act* did not very clearly define "domestic purposes", especially as that term applied to agricultural operations. The *Water Act* sought to remedy the uncertainty by clarifying when a water user needs a license or other written statutory authorization, and when a user does not. Here are the new rules.

1. The *Water Act* allows riparian or ground water users to divert water for household purposes, but only up to 1250 cubic metres (1 acre foot) of water per year (s.21). This amount may not be licensed, though the Act declares this use to have first priority in times of shortages (s.27).

2. The *Water Act* permits riparian and ground water users to divert up to an additional 6,250 cubic metres (5 acre feet) of water per year without a license or other written statutory authorization provided that the user uses the water for "traditional agricultural purposes", meaning for raising animals or applying pesticides (s.19 (1)). Such use has no priority over any other use, whether past or future. The 5 acre feet limit per year may be increased if local water management plans have been approved by the government in accordance with the Act.

3. As an alternative to 2 above, the *Water Act* offers traditional agricultural users some legal protection for their use by enabling them to register or license it. Here are the distinctions:

- **Registration**:
Owners or occupiers of riparian lands, or lands under which groundwater exist who use water for traditional agricultural purposes may apply for a registration. To qualify for a registration, water must be used for a traditional agricultural use on January 1, 1999. A registration of a traditional agricultural use of up to 5 acre feet per year (or more if allowed in an approved water management plan) carries a priority date of the date of first known diversion for that use on the land. It is up to the applicant to provide required documentation, including the date of first use. The registration process is meant to be simpler and quicker than the regular licensing process. Registrations will be available only for three years from January 1, 1999 (ss.24-26 and 73).
- **License**:
A traditional agricultural user, or any other qualifying user, may apply for a water license. A license carries a priority date of government receipt of a completed application (s.29).

4. By virtue of the above, a traditional agricultural user has the right to a total of 6 acre feet per year; that is, 1 acre foot per year for household purposes (unlicensed but with top priority) and an additional maximum 5 acre feet per year (either unlicensed with no priority, registered with a priority of first known use, or licensed with a prior date of receipt of complete application). Unless an applicable approved management plan increases the 5 acre feet per year maximum, any additional amount of water required will need to be licensed.

Applying these rules to your situation, assuming no approved water management plan has increased the agricultural use maximum, 6 acre feet of the water you use currently is legally used. To get the best priority you should look into obtaining a registration for 5 acre feet. You will need a license for the remaining 1-2 acre feet of water per year.

To apply for a registration or a license you should contact your regional office. If you don't know your regional office, call Alberta Environmental Protection at (780) 427-8985, or consult the list of regional offices on the web at <http://www.gov.ab.ca/env/water/legislation.html>.

Ask Staff Counsel is based on actual inquiries made to Centre lawyers. We invite you to send us your requests for information c/o Editor, Ask Staff Counsel, or by e-mail at elc@elc.ab.ca. We caution that although we make every effort to ensure the accuracy and timeliness of staff counsel responses, the responses are necessarily of a general nature. We urge our readers, and those relying on our readers, to seek specific advice on matters of concern and not to rely solely on the information in this publication.

Ask Staff Counsel Editor:
Arlene Kwasniak

Alberta Law Foundation