News Brief

ENVIRONMENTAL LAW CENTRE

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Message from the New Minister

This province does not belong to us. We hold it in trust. Our shared responsibility is to manage that trust so future Albertans will have jobs, homes and a high standard of living. They will have clean water, pure air and opportunities for recreation. And they will inherit the richness of our natural heritage in all its diversity of life and land.

Obviously, our challenge is to achieve a balance between protecting the environment and building the Alberta economy. Policy documents, legislation and management plans are effective tools in meeting that challenge. However, our most powerful tool is our potential to work together.

To draft effective legislation and regulations, we must seek, address and incorporate the concerns and suggestions of Albertans, environmentalists and industrialists. To that end, a six-member M.L.A. review committee chaired by Janis Tarchuk, M.L.A. Banff - Cochrane, is seeking Albertans' input on new legislation to protect Alberta's parks and protected areas.

Environmental groups and business interests have been invited to discussions and workshops in both Edmonton and Calgary. The public consultation process will be announced shortly. The process will allow Albertans generally to phone or log on to the department web page to order the revised Proposed Policy Foundation and the Issues Workbook, a mail-in survey designed to gather their opinions and suggestions on key issues and the new legislation.

Hon. Gary G. Mar, Q.C

The committee will base its recommendations on this feedback. I will work with my government colleagues to ensure the new legislation delivers the protection Albertans want for their natural heritage while respecting the province's other legal responsibilities.

The new legislation continues Alberta's commitment to regulatory reform while maintaining legislated protection. To reflect the principles of sustainable development and integrated resource management, Alberta Environment will work with the departments of Resource Development, Agriculture, Food and Rural Development and Economic Development to co-ordinate current regulatory reform programs.

These departments also will work together to ensure Alberta's international trade initiatives do not impede or conflict with our environmental responsibilities. Our participation in the North American

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The opinions in News Brief do not necessarily represent the opinions of the members of the News Brief Advisory Committee or the Environmental Law Centre Board of Directors

(Message from the New Minister ...continued from page 1)

Agreement on Environmental Co-operation promotes strong environmental practices while pursuing economic goals.

On the national front, this year Alberta chairs the Canadian Council of Ministers of the Environment (CCME). We also are leading development of the Canada-Wide Standard on petroleum hydrocarbons in soil, one of six national standards underway. This important work comes out of the Canada-Wide Accord on Environmental Harmonization, and related sub-agreements on Environmental Assessment, Inspections and Canada-Wide Standards. All jurisdictions except Quebec signed the accord in January 1998.

Alberta Environment also is working to help develop four additional sub-agreements to the accord: Enforcement, Monitoring and Reporting, Research and Development, and Environmental Emergencies. Public consultation is an important component of all these initiatives.

We see that joint approach again in the new Canada-Alberta Agreement for Environmental Assessment Co-operation signed just this June. The agreement improves collaboration on environmental assessment for proposed projects within existing legislation. We also will work together to resolve some of the issues Alberta experienced with the *Canadian Environmental Assessment Act*. Alberta will provide input into the federal five-year review of this legislation, which starts in the year 2000.

Responsive legislation and high standards define the goals that effective management seeks to achieve. We recognize that resources are interdependent, and the use of one resource can affect other users and resources. Whether the user is a weekend snowmobiler, First Nations hunter or oil company, by working together all partners can better manage a region's ability to sustain multiple activities, and minimize the cumulative effects on the environment.

The recently-announced Regional Sustainable Development Strategy for the Athabasca Oil Sands is a model of this kind of partnership. Environmentalists, resource companies, First Nations and governments worked together to develop the first joint regional strategy to come out of Alberta's Commitment to Sustainable Resource and Environmental Management. This strategy provides a hands-on approach to regional issues management that is balanced with provincial direction. Similar regional strategies are planned for other areas of the province.

I plan to continue the Integrated Resource Management approach pioneered by my predecessors. It ensures we listen before we act. It requires communities and industries that are most directly affected to be involved in resource and environmental management decisions. It puts more responsibility on users for consulting on, planning and monitoring resource management and use. These are principles I believe in. I ask you to work with me. We share one future. We should build it together.

■ **Hon. Gary G. Mar, Q.C.**
Minister of Environment
M.L.A. Calgary Nose Creek

Enforcement Briefs

By Jillian Flett, *Alberta Environment*

Municipality Liable For Illegal Pesticide Spraying

Municipal District of Cardston No.6* v. *Director, Enforcement and Monitoring Division, Alberta Environmental Protection
(17 August 1999) 99-011 (EAB)

This decision was the result of an appeal to the Environmental Appeal Board (EAB) of a $5,000 administrative penalty issued to the Municipal District of Cardston (Municipality). A number of issues were raised including the liability of a Municipality for wrongful acts of its employees, due diligence and double jeopardy (i.e. being punished twice for the same wrongful act).

The penalty was levied for two contraventions of s.156 of the *Environmental Protection and Enhancement Act* (EPEA):

a) $3,500 for applying the pesticide Tordon 22K in a manner which causes or is likely to cause an adverse effect to the environment, which is a violation of s. 5(1)(a) of the *Pesticide Sales, Handling, Use and Application Regulation* (PSHUAR) and
b) $1,500 for using a restricted pesticide, Tordon 22K, within 30 meters of an open body of water without a special use approval, which is a violation of s. 9 of the *Pesticide (Ministerial) Regulation* (PMR).

The Municipality had obtained a special use approval as required under the PMR, for spraying some pesticides within 30 meters of a water body. However, this approval did not include Tordon 22K, a restricted use herbicide. An employee working for the Municipality sprayed Tordon 22K within 30 meters of the Belly River. Although the applicator was certified, the crew supervisor was not a certified applicator as required under the PMR. The applicator ceased working for the Municipality some time after this incident.

The applicator reported the contravention to Alberta Environment who subsequently conducted an investigation and the Director of Pollution Control levied an administrative penalty for $5,000.

The Municipality appealed the penalty on the ground that the employee who sprayed the Tordon 22K was the same employee who reported the incident to Alberta Environment. They maintained that when the complainant employee sprayed within the 30 meter buffer she was acting outside the scope of her duties and therefore, the Municipality should not be liable for the deliberate and willfully disobedient act of a disgruntled employee.

There was conflicting evidence presented on the issue of where the applicator was instructed to spray. The EAB eventually decided the issue on the basis that the Municipality is vicariously liable for the action of its employees within their scope of duties. It was within the applicator's scope of duties to spray somewhere and therefore, the Municipality was vicariously liable. The EAB rejected the argument that the Municipality should be exempted from the EPEA provisions of vicarious liability for employee's actions.

The EAB also rejected the Municipality's argument that the defence available to public officials under s. 219 of the Act should also be available to the Municipality for actions of their employees. Section 219 states that a public official is liable for an offence of a person acting under them, if they knew or ought reasonably to know of the circumstances of the offence and had the influence to prevent its commission. The Municipality argued that because they could be vicariously liable they should also have the benefit of being found vicariously immune from liability where it could be shown that they did not know of the actions of their employee and had acted reasonably to prevent the offence from occurring.

The EAB also considered whether due diligence was a defence. The EAB did not accept that the Municipality had acted diligently in view of the fact that they had sprayed Tordon 22K and another pesticide within 5 meters of the water's edge in direct violation of the regulations and the condition of the special use approval. Fair and early notice had been given to the Municipality of the requirements for the restricted use of Tordon 22K and Alberta Environment had issued Guidelines to all municipalities providing them notice of what was required. The Municipality should have known of the offence and had the influence to prevent it from occurring.

The EAB also found that the careless conduct by one or more of the Municipality's employees was likely to cause an adverse effect to the environment. There had been little effort in controlling the application of the pesticides since the Municipality had sent out the spraying crew to apply Tordon 22K under the supervision of a person who was not certified and who had not read the special use approval. Further, the crew supervisor did not know where one of the spray crew was for the main portion of the day.

The Appellant also raised the issue of double jeopardy in that two penalties were assessed for the same act of spraying Tordon 22K. The EAB held that this argument applies only where there is no additional and distinguishing element contained in the second offence. In this case the distinguishing element is that s.9(1)(b) PMR only regulated the use or application of a pesticide listed in Schedule 1,2,or 3 within 30 meters of an open body of water while s. 5(1)(a) of PSHUAR prohibits any use or application of a pesticide in a manner or at a time or place that causes or is likely to cause an adverse effect. There is no spatial element to s.5. The careless conduct of the Municipal employees was likely to cause impairment or damage to the environment, human

(Continued on Page 10)

In Progress

In the Legislature...

Federal Legislation

Bill C-32, the *Canadian Environmental Protection Act*, which was passed June 1, 1999, has received first reading in the Senate. The Senate Standing Committee on Energy, the Environment and Natural Resources is holding public hearings on the Bill.

Federal Regulations

As of May 6, 1999 *Regulations Amending the Benzene in Gasoline Regulations* are in force. The amendment allows companies unable to meet the July 1, 1999 implementation date for the reduction of benzene in gasoline to meet a temporary alternative limit. (*The Canada Gazette Part II*, May 26, 1999, pp. 1298-1308.)

Alberta Regulations

The *Environmental Appeal Board Regulation* (AR 114/93) has been amended by AR 106/99. Among other changes, the amendment replaces the word "objection" with "appeal", provides for combining notices of appeal, and replaces s.7 "Notices".

The *Oil and Gas Conservation Regulations* have been amended to change the abandonment fund levy for each inactive well in each class.

There is a new *Forest Protection Area Regulation* which designates forest protection areas under the *Forest and Prairie Protection Act*. AR 149/99, was filed July 14, 1999 and expires on January 31, 2004 to ensure a review. (*The Alberta Gazette Part II*, July 31, 1999, pp. 633-664.)

Cases and Enforcement Action...

Alberta Environmental Protection issued an Emergency Environmental Protection Order to the Town of Strathmore requiring the town to take all necessary steps to ensure that treated municipal wastewater stored in the wastewater storage facility not breach the containment berm and flow into Eagle Lake. The Order was issued under s.103 of the *Environmental Protection and Enhancement Act*.

Alberta Environmental Protection issued an Enforcement Order to Smoky River Coal Limited of the MD of Greenview for releasing sediment from mine settling ponds in excess of their approval limits. The Order requires the Company to submit a plan for surface water management within 30 days, submit a schedule for implementation of the work and ensure the work is done according to the schedule, ensure no further substances are released in excess of the approval limits, and submit monthly progress reports. The Order was issued under s.97(2) of the *Environmental Protection and Enhancement Act*.

Alberta Environment issued an Environmental Protection Order to Hub Oil Company Ltd. of Calgary following the fire at the facility that released a number of substances into the environment that may cause an adverse effect contrary to s. 102 of the *Environmental Protection and Enhancement Act*. The Order requires Hub Oil to undertake and complete a study to determine the amounts, deposition rates and dispersion patterns of the emissions, and the impact on the surrounding environment, including assessment of the environmental and health risks of the pollutants identified. The study will have to include sampling and analysis of soil, vegetation, water and structural surfaces within the immediate area. The Order also requires the Company to prepare a plan and schedule of implementation to prevent further releases from the facility and implement the study and plan once they are approved. Bi-weekly written status reports summarizing progress undertaken are required.

Alberta Environment was involved in a prosecution in which a Provincial Court Judge sentenced Northern Weld Arc Ltd. of Edmonton to a $35,000 fine after the company pled guilty to two charges related to the improper disposal of waste. The company was convicted of dumping solvents on company property in violation of ss. 182.1 and 168.1 of the *Environmental Protection and Enhancement Act*.

A decision June 18, 1999 by Mr. Justice J.S. Moore of Alberta Queen's Bench in Grande Prairie quashed the Environmental Appeal Board decision denying costs in *Penson v. Inspector of Land Reclamation, Alberta Environmental Protection re: Pembina Corporation*. The Environmental Appeal Board must now reconsider the cost application.

In a recent decision of the British Columbia Supreme Court, *Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw* et al., a solicitor and his firm were sued by their client for failing to discover a Pollution Abatement Order which had been issued by the Ministry of Environment, Lands and Parks on land that the client bought. The Court found "the defendants breached the standard of care of the reasonably prudent solicitor in that he should have searched and discovered the Pollution Abatement Order" but awarded no damages as it also found "no causal connection between the breach of standard of care by the defendants and the damages suffered by the plaintiffs."

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

Trade Agreements and Bulk Water Exports

Introduction

The Canadian federal government currently is developing strategies to deal with the potential for trade agreements being used to either compel Canada to export large quantities of fresh water to the United States or other trade partners, or be subject to financial penalties. By "trade agreements" this article means the 1947 General Agreement on Tariffs and Trade (GATT)[1], the 1989 Canada/United States Free Trade Agreement (FTA), and the 1993 Canada/United States/Mexico North American Free Trade Agreement (NAFTA).

News Brief will present a series of articles addressing bulk water exports and trade. This article considers the potential for trade agreements jeopardizing Canadian legislation that prohibit water exports. Future issues will address other topics relevant to water exports, including the forthcoming International Joint Commission Report on water exports, federal government's strategies, and the use of the investor provisions of NAFTA.[2]

Laws Prohibiting Bulk Water Exports

Ignoring trade agreements, there is little doubt that any province can validly pass legislation that would have the effect of barring bulk water exports from the province to a country outside of Canada in the absence of overriding federal legislation. This could be done through a province properly using its constitutional authority over its property (since provinces own water within their boundaries except where on federal lands) and its authority to legislate over property and civil rights (s.92 (13)). To date, at least three provinces (Alberta, British Columbia and Ontario)[3] have passed legislation prohibiting bulk water exports outside of Canada.

As well, still ignoring trade agreements, there is little doubt that the federal government could validly pass legislation applying throughout Canada that would in effect prohibit water exports to a country outside of Canada. Relevant federal powers include constitutional authority over its ownership of federal waters, navigation (s.91 (10)), or fisheries (s.91 (12)), and more directly under trade and commerce (s.91 (2)), and possibly under peace, order and good government (s.91, preamble). In fact, in 1988, the federal government tabled Bill C-156, the *Canada Water Preservation Act*, a bill that specifically prohibited bulk water exports. With the federal election, it died on the order table.

National Treatment Provisions

The "national treatment" provisions of trade agreements require each party to treat other parties no less favorably than accorded domestically in respect of all laws, regulations and requirements governing goods in commerce.[4] In GATT the national treatment provisions and corresponding prohibition on quantitative restrictions apply only to imports. The FTA national treatment provisions apply to both imports and exports. By explicitly adopting the GATT version, NAFTA's national treatment provisions arguably only apply to imports.

National Treatment and Water Export Prohibitions

If the national treatment provisions apply to water then no party can commercially trade bulk water within its boundaries while prohibiting trade in bulk water with other parties. Do the national treatment provisions apply to water? They apply to bulk water if (a) bulk water is a good in commerce domestically and (b) no exception applies to national treatment requirements.

Regarding (a) there seems to be little doubt that under trade agreements water is a good.[5] But is it in commerce? A case can be made that water already is in commerce.[6] As more sales are made, it is more likely that a trade panel might find it to be in commerce[7].

Regarding (b) under trade agreements, a party may place a quantitative restriction on a good in trade if it is necessary to protect human, animal or plant life or health, relates to the conservation of exhaustible natural resources or is temporary to relieve critical shortages.[8] While any of these could be used to justify export controls if a true emergency exists, they could not be invoked simply to generally prohibit exports in export prohibition legislation.[9]

Effect of Trade Agreement Violations on Legislated Water Export Prohibitions

If a party has grounds to believe that another party has violated a trade agreement, then it may ask a trade panel to determine the matter. If a trade panel finds a violation, then it will make recommendations that likely would require that the offending party come into compliance. If the parties cannot reach resolution after the panel's report then the offending party could be subject to financial and other penalties.[10]

To illustrate, assume that the United States attempted to obtain a water export license from a province and was refused solely on the basis of legislation prohibiting water exports out of Canada. As a trade partner the United States could ask a trade panel to determine the matter. Assume that the panel found that the refusal to issue the license was an unjustifiable quantitative restriction. The trade panel recommends that Canada remedy the violation in the circumstances. What would happen?

Trade panels cannot repeal or amend domestic legislation. However, trade agreements require parties to take all necessary measures to ensure compliance. If the maligned legislation were federal (of which there is none at present) then presumably to come into compliance the federal government would have to start the process for repealing or appropriately amending the offending prohibitions. If the legislation were provincial and the province has signed onto the trade agreement in question, the province would be

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Case Notes

FOIP Act's Litigation Privilege Prevents Disclosure of Environmental Assessment Report

Alberta Order 98-017 (25 February 1999) Review No. 1441 (A.I.P.C.)

The Alberta Information and Privacy Commissioner once again has refused to allow the disclosure of information held by Alberta Environmental Protection (the Public Body), because of a litigation privilege. In Order 98-017, the Commissioner blocked the release of a Phase II Environmental Assessment Report (the Report) to an Applicant, at the request of a Third Party (the Third Party), which party owns the subject property and submitted the independently prepared Report.

This decision resonates a decision handed down in 1997.[1] Then, as now, the Commissioner's refusal to allow disclosure was based on the application of the litigation privilege extended under sections 26 (1)(a) and 26(2) of the *Freedom of Information and Protection of Privacy Act* (the Act). This recent decision is unique in its consideration of the paramountcy issue raised by the interplay of the Act, the *Freedom of Information and Protection of Privacy Regulation* (the Regulation) and the *Environmental Protection and Enhancement Act* (EPEA).

Litigation Privilege

The Third Party argued that a litigation privilege should apply to the Report to prohibit disclosure under section 26 (2) of the Act. The Public Body opposed the application of the privilege to this Report, arguing that the Report was not "produced for the dominant purpose of reasonably contemplated litigation" as required by the Act; specifically, that the Report was not produced during the course of investigation of the Third Party under EPEA .

The Commissioner held, with reference to an earlier decision[2], that the privilege did extend in this case and that the litigation contemplated was between the Third Party and other third parties. A litigation privilege will apply where the following circumstances exist:

- the information or document held by the Public Body was produced following a third party communication (e.g. between a lawyer and a third party) "to assist with the giving of legal advice";
- the document is intended to be confidential;
- the dominant purpose for production of the document is submission to a legal advisor for use in present or contemplated litigation.

Waiver of Privilege?

The Third Party did not waive its litigation privilege merely by submitting the Report to the Public Body. The Commissioner reviewed and followed the decision in Order 97-009, which determined that waiver depends upon intention, or similarly, that waiver exists for a limited purpose; here, that purpose was satisfaction of the Public Body's request for submission of the Report "under penalty of enforcement proceedings for non-compliance".

The Public Body raised the issue of waiver, arguing that neither EPEA nor the *Release Reporting Regulation* (the Reporting Regulation) requires submission of a report the style of which was submitted by the Third Party. The Third Party had therefore voluntcered the Report and waived any privilege which otherwise would have attached. However, the Commissioner examined the combined force of the reporting requirements under EPEA's sections 99 - 101, and section 3(1) of the Reporting Regulation and concluded that these sections allow the Public Body to request the submission of an assessment report. Furthermore, where such a report is requested, any privilege attached to the report will remain intact.

Thus, the Commissioner concluded that section 26 (2) applies and the Public Body must refuse to disclose the Report, which is subject to a litigation privilege that has not been waived.

Paramountcy Issue Considered

The Third Party also opposed the release of the Report based on the combined effect of section 33 (9) of EPEA, section 5 (2) of the Act (the paramountcy section) and section 15 (1) of the Regulation, which the Third Party argued should prevent disclosure of information such as the Report. However, the Commissioner decided that for section 33 (9) to apply, the Report must fall within the ambit of sections 33 (1) or (3), though only subsection (1) was at issue in this case. The Commissioner held that the Report could not be considered within the ambit of subsection (1) - neither as information required as part of an "approval" application, nor as a report or study required by regulation to be released to the public - and that 33 (9) would not prevent disclosure.

This decision buttresses the strength of the litigation privilege as a block to the release of publicly held information. Although in this and previous cases it has thwarted efforts of genuinely interested parties to obtain contamination information, perhaps such privilege furthers the public interest by ensuring that full disclosure is made to the Public Body.

■ **Seanna Rohatyn**
Research Assistant
Environmental Law Centre

1 See Alberta Order 97-009 (28 October 1997) Review Nos. 1177, 1178 and 1179 (A.I.P.C.); also discussed in *News Brief*, Vol.13, No 1 (1998), at p.8.

2 See Alberta Order 96-015 (24 April 1997) Review No. 1045 (A.I.P.C.).

Narrow Interpretation of Appellant Status Leaves Public Interest Out in the Cold

Chalifoux v. *Director of Chemicals Assessment and Management* (9 July 1999) 95-023-DOP (EAB)

In a decision released July 9, 1999, the Environmental Appeal Board (EAB) ruled that intervenors could not prolong a case after the appellant has withdrawn a notice of appeal.

Background

On November 30, 1995, Chem-Security (Alberta) Ltd. received a renewal of approval from Alberta Environmental Protection to operate the Alberta Special Waste Treatment Centre near Swan Hills. Soon after, the Lesser Slave Lake Indian Region Council (LSLIRC), Ed Graham, acting on behalf of the Alberta Trappers Association (ATA) and Charlie Chalifoux, a local trapper acting on his own, filed appeals with the Environmental Appeal Board (EAB) claiming that the renewal should be revoked because the recommendations, conditions and concerns raised in the original Approval had not been adequately addressed. Concerns were also raised about the escape of emissions from the plant, which they claimed would be excessive and harmful to the wildlife around the plant.

The Board determined that the proximity of Chalifoux's trapline to the treatment centre and his dependence upon the wildlife resources in the area that may potentially be adversely affected by the centre made him a person directly affected by the Approval. However, the Board found that Graham and the trappers he represented through the ATA and the LSLIRC were not directly affected. Chalifoux was the only appellant named.[1]

The Board received requests for intervenor status from several parties. Some of these requests were granted, others were denied based on the Board's view that Chalifoux's interests were similar to the interests of certain parties and therefore these parties would have their views and concerns represented without being added as intervenors or as formal parties.[2]

One week before the hearing Chem-Security and Chalifoux reached a settlement and Chalifoux withdrew his appeal. Chem-Security then requested that the Board discontinue the appeal. However, a number of the intervenors requested that the appeal continue. They argued that some directly affected parties did not submit a personal statement of concern because they believed that their interests would be dealt with in the appeal. They claimed that to discontinue the appeal because only one of the directly affected parties withdraws is to violate the intent of the legislation.

The EAB Decision

The Board ruled against the intervenors, citing a number of reasons. First, while the legislation allows the Board to permit any person it feels appropriate to make representations, it does not enable non-appellant parties to exercise any powers over the appeal, nor does it grant the right to object to the appeal's withdrawal or carry that appeal forward themselves. Second, the fact that some citizens may be directly affected but do not appeal, instead seeking to intervene in other parties' actions, does not grant those citizens the status of appellant. Third, the Board felt bound by the narrow confines of s. 87(7) of the Alberta *Environmental Protection and Enhancement Act* (EPEA) which reads:

> 87(7) The Board shall discontinue its proceedings in respect of a notice of appeal if the notice of appeal is withdrawn.

Although the Board expressed appreciation for the sincerity of the intervenors' desires to have their concerns heard, the Board felt it had no choice but to dismiss the appeal.

Intervenors Denied

The case raises two interesting questions. The first of these is whether the Board interpreted s. 87(7) too literally in dismissing the appeal. Was the spirit of the law sacrificed for the letter of the law? Given the circumstances of the case, the Board made the right decision in dismissing the appeal. It does not make sense to allow an intervenor to take over and continue an appeal if the appellant no longer wishes to proceed. An intervenor has a limited set of rights in an appeal, and can not obtain further rights because an appellant drops out of the case.

The second question that is raised is whether the Board was correct in limiting the appellants to only Chalifoux. At the outset of the hearing, the Board appears to have ruled narrowly on who was directly affected by the Approval and could thus be granted appellant status. The Board indicated that it was not necessary to add certain persons and groups as formal parties because Chalifoux's appeal adequately represented those persons' and groups' interests. The result of this exclusion of other parties is that when Chalifoux withdrew the appeal those interests were no longer represented before the Board. This suggest that lawyers whose clients want their interests to be heard would be well advised to ensure that they obtain appellant status rather than take a risk on intervenor status that could evaporate in the event of a settlement.

■ **Andrew Bachelder**
Research Assistant
Environmental Law Centre

1. Ed Graham et al v. Director of Chemicals Assessment and Management (June 2, 1996) 95-025 (EAB).
2. Letter, 30 July, 1997 (EAB), referred to in Chalifoux v. Director of Chemicals Assessment and Management (9 July 1999) 95-023-DOP (EAB) at 6.

Action Update

The Latest from the Livestock Regulations Stakeholder Advisory Group

Alberta Agriculture, Food and Rural Development ("AAFRD") is continuing to develop regulations for intensive livestock operations. This process began in early 1998[1]. A stakeholder advisory group is working with officials from AAFRD, Alberta Health and Alberta Environment to prepare the outline for legislation, regulations and standards. That group published a discussion paper in early 1999[2] that was criticized by many.

The Stakeholder Advisory Group took to heart the criticisms that were received and has amended its recommendations. It is circulating a package containing a draft act, regulations and standards.[3]

All new or expanding livestock operations over the threshold will require an approval from AAFRD in addition to the municipal development permit. These are defined as "intensive livestock operations". The threshold number will be the total number of animals in confinement on the farm that equals or exceeds the equivalent of 300 animal units. Animal units provide a way to compare different species based upon the nitrogen contained in manure. One animal unit is roughly equivalent to a 1000-pound steer. Using animal units as the threshold number handles farms that raise more than one species of livestock.

In this framework, the developer, prior to submitting its application to AAFRD, must notify neighbors within a defined radius of a facility. As well, these defined neighbors will be able to submit their concerns to AAFRD and will have the ability to appeal the decision.

A radius has been developed to determine which neighbors must be notified and who may appeal a decision. This radius is designed to include affected people and is on a sliding scale where the greater number of animal units, the greater the radius and thus the number of people notified. Any person who resides or owns land inside these parameters will be notified of an application for an approval, or an application to amend an approval. Those individuals within that radius who submit a concern to AAFRD will be notified of the decision made and will have the ability to appeal. The notification radius measurements are from the livestock facility to the neighbouring property line.

There will still be a municipal development approval and appeal process, consistent with municipal land use bylaws. All technical decisions, such as determining if a development meets the provincial Standards, will be made through the provincial process. The province and municipalities will coordinate their approval processes.

In this revised legislative proposal, a distinction is made between the requirements that new and expanding operations must meet and the requirements that existing operators must meet. All of the requirements for manure spreading have been placed in the Regulations and all operators, including existing operators, are required to meet them. To protect water, operators must comply with some Regulations immediately, including incorporation of manure within 48 hours of spreading. Other Regulations, such as nitrogen limits, soil salinity and spreading manure on frozen ground, will phase in over a five-year period.

Intensive Livestock Operations must also comply with the standards contained in the Standards Document. An Expert Committee met numerous times to develop this document. The group includes academic specialists in the following fields: hydrology, engineering, health, air quality, environmental risk assessment, aquatic biology, infectious diseases, soils and agronomy along with health, municipal and producer representatives.

The Standards Document can be changed by AAFRD in consultation with stakeholders. Before any changes are made to the document, producers and the public will be consulted.

The applicant can appeal a refusal to issue an approval, the conditions placed on the approval, the cancellation or suspension of an approval and the issuance of an Administrative Order. Parties can initiate an appeal if they demonstrate that they will be adversely affected by the decision to issue an approval, or by the conditions placed on the approval. (It is recommended there be a $100.00 administrative fee to file an appeal.)

The specific numerical standards in the Standards Document cannot be the basis for an appeal unless AAFRD includes a condition in the approval that is different from what is in the Standards Document. Any standards that are within the discretion of the regulation may be appealed. The Standards Document will be regularly reviewed and people who have information to support changing a standard may contact AAFRD technical staff at any time.

The Appeal Board will be made up of 3 - 7 members appointed by the Minister. It is anticipated that the board will have mixed membership, with scientists, producers and the general public represented.

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

1. *News Brief*, Vol. 13, No. 3, 1998 at 5.
2. *News Brief*, Vol. 14, No. 1, 1999 at 6.
3. For a copy of the latest proposal contact Alberta Agriculture, Food and Rural Development, Policy Secretariat at (780) 422-2070 or visit website <http://www.agric.gov.ab.ca/economic/policy/ilo/main.html>.

Environmental Law Centre Donors - 1998

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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
McLennan Ross
Mobil Resources Ltd.
Petro-Canada
Suncor Energy Foundation
Titan Foundry Ltd.
Weyerhaeuser Canada Ltd.

ASSOCIATES $500 - $999
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Ronald Kruhlak
Lucas Bowker & White
Mactaggart Third Fund
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Linda Duncan
David Duggan
Dr. Mary Griffiths
Brian R. Harris
Thomasine Irwin
Frank Liszczak
MacKimmie Matthews
W.G. Milne
Professor Ian Rounthwaite
Dr. Dixon Thompson

Adios Amigos

Fifteen years is not a lifetime; it is not even a career. But fifteen years in the field of environmental law is a pretty long time and I have seen some interesting developments during my term at the Environmental Law Centre.

In 1984, when I started, environmental law was not new. There were many federal and provincial environmental laws: the federal *Environmental Contaminants Act*, the provincial *Clean Air Act, Clean Water Act, Hazardous Chemicals Act, Land Surface Conservation and Reclamation Act* and *Water Resources Act*, the latter whose antecedents date back to 1894, before Alberta was even a province. Some good rules were in place, but implementation was half-hearted and enforcement virtually non-existent.

Environmental law changed dramatically within a few short years as both the federal and provincial governments responded through their legislative processes to a growing public concern with the environment, especially the effect of toxic chemicals on human health. In addition to passing new, stronger environmental laws, governments strengthened their bureaucracies and enforcement policies, giving teeth to their legislative requirements. They also opened the door to the views of public, and invited their involvement in policy making and regulatory processes. Environmental organizations thrived.

Things are not so easy at this point for public interest environmental law. Both environmental protection and lawyers and their tools are out of vogue, at least in Alberta. Doors previously opened have started to shut by way of amendments to laws, judicial decisions limiting access to regulatory and court processes, and reduced funding of environmental activities.

This is disappointing to me. I believe that the use of the courts and other legal processes is one of the least antisocial strategies available to environmentalists looking to effect change. Being "dragged into court" is not a happy situation for anyone. However, the law and its processes serve to protect fairly all interests in the environmental debate, governments, resource developers and the public. The alternative is unthinkable.

Nonetheless, I am perpetually optimistic for the future of environmental law in Alberta. This faith is grounded in the many committed people I have worked with at the Environmental Law Centre, staff, Board and volunteers; the numerous law students with a strong environmental ethic who are the future of our profession; the anonymous public servants in government departments who support good environmental laws and policies; and the brave environmentalists and their counsel who stand by their convictions against considerable odds. It has been an honour for me to work at the Environmental Law Centre and to pursue such a worthy cause. I am very proud of our many achievements. My support will continue – I will not be far away.

Donna Tingley

(Trade Agreements and Bulk Water Exports... continued from page 5)

compelled to initiate the appropriate legislative changes. If the province is not a signatory, or if it otherwise refuses to act, presumably the federal government would be obliged to use its constitutional authority (e.g. over trade and commerce) to attempt to strike down the offending legislative provisions. In either case, legislation prohibiting exports might not survive.

One Set of Rules for All

In closing it is important to note that even if domestic legislation prohibiting exports did not survive a trade agreement challenge, it does not follow that the export taps would just be turned on fully. To illustrate, consider the water transfer provisions of the Alberta *Water Act*. National treatment would mean that a potential foreign recipient of an Alberta water transfer could not be treated differently from a potential domestic recipient. So, if a holder of an Alberta water license wants to transfer a quantity of water to California, the potential transaction would be subject to the same rules as if the water were to remain within Alberta. The Alberta *Water Act* fairly rigorously regulates transfers. So much so that one commentator has remarked "[i]t will be interesting to see whether the transfer provisions are ever utilized".[11] Perhaps so, but many Albertans may be thankful for the rigorous regulation in view of the spectre of potential water exports.

■ **Arlene J. Kwasniak**
Executive Director
Environmental Law Centre

1 GATT was incorporated into the World Trade Organization (WTO) in 1994.
2 Also see earlier *News Brief* articles on water exports: Irene McConnell, "The Draft Alberta Water Conservation and Management Act: Implications for International Trade" *News Brief*, Vol.9, No.4, 1994, at 4, and David Percy, "Provincial Water Law and International Trade", *News Brief*, Vol.11, No. 2, 1996 at 8.
3 Ss 4-7 of the *Water Protection Act*, R.S.B.C. 1996, c. 484, ss 46 and 47 of the *Water Act* S.A. 1999, c. W-3.5 and s. 6 of the *Water Transfer Control Act*, R.S.O. 1990, c. W-4.
4 Article III GATT, Articles 105 and 407, and 501 FTA and Article 301 NAFTA.
5 GATT tariff heading 22.01 includes all natural or artificial mineral waters, aerated waters (not flavored), also ice, and snow. Both the FTA (chapter seven, definition of "Agriculture" goods and NAFTA Article 201.1 incorporate GATT tariff items under 22.01 (among others) as goods for the purposes of these agreements. Some argue that even though water is on the GATT tariff heading, it is not a good unless it is a "product". *See* for example, Don Gamble, "Water Exports and Trade: Another Perspective", in Rawson Academy, *Canadian Water Exports and Free Trade* (Toronto: 1988) at 25.
6 Many businesses sell water in fairly large quantities for cisterns, hot tubs, etc. The Canadian Environmental Law Association (CELA) has reported that Ontario annually issues water-taking permits cumulatively for 18 billion litres of water for use as bottled water. *See* Fact Sheet, Bottling Ontario's Ground Water" at <http://www.web.net/cela>. CELA also reports that in 1992-3 BC Hydro engaged in ad-hoc sales of large quantities of water to the U.S. Bonnyville Power Administration under the Columbia River System Non-Treaty Storage Agreement. *See* CELA *NAFTA and Water Exports* (Toronto 1994) at 67.
7 In Alberta, and other provinces, under water legislation water consumers and users usually pay only for the delivery of water and not for the water itself. However, the fact cannot be hidden that more people are buying water from distributors. Moreover, the new Alberta *Irrigation Districts Act* (Bill 21, Royal Assent April 29, s.122 (1)) authorizes irrigation districts to impose a surcharge based on volume of water used. This welcome conservation measure would seem to amount to pricing water itself, and not just the delivery of it.
8 GATT exceptions to quantitative restrictions occur in Articles XI and XX. The three mentioned ones are particularly relevant to controls on water exports. They are found in Article XX (b), (g) and (j).
9 GATT Article XX states that exception measures shall not be applied so as to be "... arbitrary or unjustifiable discrimination" or a " . . disguised restriction on international trade".
10 Article XXIII GATT, Article 1806 FTA, Article 2019 NAFTA.
11 Thomas MacLachlan, "The Water Act, Implications for Agriculture, and Irrigation Perspective" Proceedings, LESA Water Act Seminar, (Calgary: 1998) at 6-12.

New Executive Director Named

Arlene J. Kwasniak

Denny Thomas, Q.C., President of the Environmental Law Centre, is pleased to announce the appointment of Arlene Kwasniak as Executive Director. Ms. Kwasniak replaces Donna Tingley, who has taken on the position of Executive Director with the Clean Air Strategic Alliance.

Ms. Kwasniak had been Staff Counsel with the Centre from 1991 until her appointment. She has extensive experience in environmental and natural resources law and policy, particularly in the area of conservation easements and land use. The Centre recently released her newest publications, *Occupiers' Liability, Trails and Incentives*, and edited proceedings from the conference *A Legacy of Land: Conservation Easements and Land Stewardship*. Ms. Kwasniak holds an LL.B. from the University of Alberta and an LL.M. from Lewis and Clark Northwestern School of Law in Portland, Oregon.

With Ms. Kwasniak's appointment, Cindy Chiasson and Andrew Hudson remain as Staff Counsel. The Centre plans to hire another lawyer in the near future to round out its program staff.

(Municipality Liable For Illegal Pesticide Spraying... continued from page 3)

health or safety or property regardless of whether they were within or outside the 30 meter zone. The Applicant had contravened the regulations by using a restricted pesticide in a manner likely to cause an adverse effect which is separate from the failure to have the appropriate approval. Therefore double jeopardy does not apply.

The EAB upheld the $5,000 administrative penalty and ordered the Municipality to pay the penalty by September 20, 1999.

By Marta Sherk, *City of Edmonton Law Branch*

Don't Ignore those Municipal Bylaws

Your environmental management plan covers the requirements of federal and provincial environmental legislation – but have you remembered to check municipal bylaws to make sure that you are in compliance with them as well? What are the potential penalties for ignoring these bylaws?

Discharges to Sewers

In Alberta, municipalities have authority under section 7 of the *Municipal Government Act* to pass bylaws for municipal purposes respecting public utilities and services provided by or on behalf of municipalities. Drainage and sewage disposal are included in the definition of a "public utility" in section 1(y) of the *Municipal Government Act*. Municipalities typically provide storm and sanitary sewers throughout the municipality and operate treatment plants that are licensed under the *Environmental Protection and Enhancement Act* in order to process this waste.

It is no surprise that municipalities are aware of the need to regulate what goes into the sewer system in the first place. Discharges into the sewer system can be either intentional, as in the "midnight dumping" of chemicals into a storm sewer, or unintentional, as in a discharge from a tanker truck that has been damaged in an accident. All of these discharges concern municipalities since municipalities may be in breach of their environmental approvals if they release unacceptable discharges to the river. Municipalities also face the possibility of incurring extra costs to treat discharges containing dangerous chemicals and of damaging expensive wastewater treatment facilities while treating these discharges.

As a result, many municipalities have passed sewers use bylaws that regulate the type of wastewater that can be released into a storm or sanitary sewer. Ignoring these bylaws can prove very costly. Under section 7(i)(ii) of the *Municipal Government Act*, contravention of municipal bylaws may carry fines not exceeding $10,000 or imprisonment for not more than one year, or both.

Every municipality has its own unique requirements. You should check with the municipalities in which you are doing business to find out what substances you can safely release to a sewer, what substances are either prohibited or restricted, and what substances can be released only if an additional treatment surcharge is paid. It is best to discuss your company's discharges to the sewer system with the municipality in a proactive way rather than waiting for a bylaw enforcement officer to issue a ticket. Municipalities will work with businesses in providing this information and in approving pre-treatment or other processes that will allow discharges to meet bylaw requirements. Municipalities have recognized that businesses may need some time to determine the best available treatment technology and to install any plant modifications. In order to allow businesses this time, some municipalities have phased in compliance programs that allow businesses a period of time to make equipment modifications in order to bring themselves into compliance with the sewers use bylaws.

In addition to monitoring discharges into the sanitary and storm systems, municipalities also monitor storm outfalls for evidence of cross connection of sewers. Cross connections occur when a property owner has mistakenly connected the sanitary sewer line to the storm sewer line. If this occurs, municipalities require property owners to correct these cross connections so that untreated sewage is not discharged directly to the river.

The Planning Process

The *Municipal Government Act* gives municipalities the authority to prepare and adopt plans dealing with land use matters in order to maintain and improve the quality of the physical environment. For example, section 632 of the *Municipal Government Act* requires municipalities to adopt a municipal development plan that, among other things, may address environmental matters within the municipality. Since each municipality has different plans, you should check with the Planning Departments of municipalities in which you do business to find out any particular requirements.

Each municipality has a land use bylaw dealing with various land uses allowed in municipalities. Subdivisions, plan amendments, redistrictings and lane closures all are changes in land use. An application for a proposed change of land use will include information that may cause a development officer to require further environmental investigation of the lands. This investigation may include historical information, environmental testing and possible remediation before a permit is issued. Ultimately, City Council considers environmental issues when making decisions respecting land use changes.

Municipalities may have specific environmental concerns such as protecting river valleys and preserving trees. For example, the City of Edmonton's North Saskatchewan River Valley Area Redevelopment Plan requires developers to provide information about and submit environmental assessments for the development of certain types of projects within the river valley. The extent of the assessment depends on the magnitude of the project.

Ask Staff Counsel

Is Municipality Spraying by the Rules?

Dear Staff Counsel:
I am concerned about the way my municipality applies pesticides. It applies harsh ones, and in my review, too close to waterbodies. Local officials seem to turn a blind eye to my concerns and so I have united a group of interested citizens to document the city's spraying patterns. Now the municipality has refused to reveal to any of us the location of spraying from day to day. Can the municipality do this? How can we ensure that they are only spraying what and where they are authorized to spray? Is there anything I can do?
Sincerely, Bugged by Pesticides

Dear Bugged:
It is surprising the municipality does not give out the information you and others request since some people are pesticide sensitive. It is very important that they know where pesticides are to be applied and what will be applied. Regarding what you can do, several laws or policies are relevant. First, consider the *Environmental Protection and Enhancement Act* (EPEA) and its pesticide regulations, the *Pesticide (Ministerial) Regulation* and the *Pesticide Sales, Handling, Use and Application Regulation*, and the Environmental Code of Practice for Pesticides (the Code). These, in combination, govern the use of pesticides in Alberta and set out the approval requirements.

Approvals, legally enforceable documents issued by Alberta Environmental Protection to individual applicants, set out which pesticides may be applied, where and how they may be applied and who may apply them. An approval may vary (or bypass) the restrictions set out in the Regulations or Code. For example, the Regulations and Code prohibit the application of certain types of pesticides within 30 metres of an open body of water *unless otherwise specified in an approval*. Thus, you must review the approval in order to ascertain what requirements apply.

You can request a copy of the approval issued to your municipality by contacting Alberta Environment's Regulatory Approvals Centre at the following address:

Alberta Environmental
Regulatory Approvals Centre
Main Floor, 9820 - 106 Street
Edmonton, AB T5K 2J6
Phone: (780) 427-6311
(toll-free within Alberta 310-0000)
Fax: (780) 422-0154

Alberta Statutes and Regulations and the Code are available to the public at many public libraries, and are also available on the Government of Alberta's website at <http://www.gov.ab.ca/qp/>. Unfortunately, none of the documents noted above (except *perhaps* the approval) address your other concern, which is the mandatory disclosure of spraying locations. Government publications and the practices of some municipalities recommend and encourage candidness in pesticide application both by private and public users, even though, as noted, mandatory disclosure is not legislated. As an example, Alberta Agriculture, Food and Rural Development recommends voluntary notification of pesticide application by farmers/landowners. A website article states, "notification is simply a good neighbor policy that helps eliminate potential risks". Furthermore, the article notes, "notification is about cooperation and mutual respect"". This article can be viewed at: <http://www.agric.gov.ab.ca/pests/pesticide/pesticide_notification.html>.

The City of Edmonton also makes a point of disclosing spray locations. It has a daily updated phone line that residents can call to find out where spraying will occur that day. The City has also instituted several "avoidance programs", one of which allows citizens of any community to opt out of City spraying programs by majority vote. Another such program offers mechanical removal as an alternative to spraying where this alternative is reasonable. The City proclaims to prefer working with, rather than in opposition to, environmental groups and it is committed to keeping communication channels with its residents open.

Unfortunately, these preferred practices of other bodies cannot force your municipality to release spraying information. However, they do indicate that your municipality's stance may be out of line with other bodies. Perhaps calling attention to these friendlier practices will bring your officials around.

You also might refer your municipal authorities to the *Municipal Government Act*, Part 7, "Public Participation - Access to Information". Section 217 instructs municipalities to release information in their possession upon the request of any person. Be warned, however, that some information is exempt. It is possible that the municipality could attempt to justify its refusal to reveal spraying locations by choosing to include this information within one of the excluded groups.

Finally, it should be noted that even in the absence of specific regulatory disclosure requirements, a municipality could be open to civil action if injury resulted by virtue of a failure to disclose.

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