News Brief
ENVIRONMENTAL LAW CENTRE

Vol. 15 No. 1 2000
ISSN 1188-2565

204, 10709 Jasper Avenue
Edmonton, Alberta T5J 3N3

In This Issue

Water, water everywhere . . . The Proposed *Drinking Water Materials Safety Act*

The author gratefully acknowledges Health Canada, http://hwcweb.hwc.ca, as the source of the factual information contained in this article, except as otherwise noted.

Introduction

As concern over the quality of drinking water has blossomed in recent years, sales of water treatment devices (such as water filters) are on the increase in Canada. Although ideally one would hope that the quality of the water supply could be improved, the very processes by which drinking water is treated, and then transported on its way to the tap, can add new contaminants, and even point-of-use treatment devices can decrease, rather than increase, water quality. Presently, drinking water "materials" - treatment additives, plumbing and waterworks systems and treatment devices - are not regulated so as to require them to meet a health-based standard. The federal government proposes to address this concern through the *Drinking Water Materials Safety (DWMS) Act.*[1]

Isn't drinking water already regulated?

In 1983, a Federal-Provincial Subcommittee on Drinking Water was formed as a joint project of Health Canada, Environment Canada and the provincial and territorial governments. It developed a non-binding set of guidelines for drinking water quality that outline objectives for interim maximum acceptable levels of chemical, physical, microbiological and radiological contaminants (the "Guidelines"). These Guidelines are periodically updated (most recently in 1996).[2]

Although the Guidelines have been developed nationally, with Health Canada taking a leading role, jurisdiction over water treatment and supply systems is seen to rest with provincial governments. Thus, legislation to enact the Guidelines, if any, is done at the provincial level. For example, in Alberta the *Potable Water Regulation*[3] requires that the characteristics of water in any waterworks system "must be maintained to meet as a minimum the health related concentration limits for substances listed in the latest edition" of the Guidelines.

Information on what kinds of additives might be put into water for its treatment, and what sort of components might safely be used in waterworks systems to achieve the designated objectives were, until mid-1988, provided to the provinces by the U.S. Environmental Protection Agency. When that agency's advisory program ended, however, a number of provinces turned to Health Canada to "fill the gap", and the notion of developing federal regulations for parts of the drinking water treatment system (i.e., components and additives) was put in place. In the 1990s, with a surge in popularity of filters and other devices that allow individuals to further treat water before it is consumed, Health Canada added such devices to its "materials" initiative.

(Continued on Page 2)

(Water, water everywhere...continued from page 1)

Environmental Law Centre
News Brief
Volume 15 Number 1 2000

The Environmental Law Centre
News Brief (ISSN 1188-2565)
Is published quarterly by the
Environmental Law Centre
(Alberta) Society

EDITOR
Arlene Kwasniak

ASSISTANT EDITORS
Cindy Chiasson
Andrew Hudson

PRODUCTION EDITOR
Debbie Lindskoog

ADVISORY COMMITTEE
Ron Kruhlak,
McLennan Ross
Keith Ferguson,
Cruickshank Karvellas
Marta Sherk,
City of Edmonton
Law Department

One Year Subscription: $130 + GST
Non-profit Environmental
Organizations: $30 + GST

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

What is being proposed?

Health Canada's website[4] proclaims the DWMS Act "would prescribe national, health-based standards for drinking water materials, and would require them to be certified by accredited third-party organizations. Drinking water materials that are unsafe would be prohibited from sale or import into Canada." Reflecting what many see as the current timidity of the federal government on health and environmental issues, the original legislative model based on a government approval process has been abandoned in favour of a "minimally intrusive"[5] system that Health Canada promotes as "good for business," "good for trade," and "good for taxpayers," with "a positive impact on provincial governments."[6]

How will it work? There is presently a voluntary system to certify that drinking water "materials" meet a set of health-based standards, but it has achieved only a 30% compliance rate. There are also a number of standards set by trade associations through various other voluntary programs, but these deal primarily with business ethics, aesthetics and professional qualifications, while legal regimes such as the *National Plumbing Code* are primarily concerned with technical and mechanical standards. Thus, the central notion behind the DWMS Act is to make the voluntary health-based standards into mandatory, legally binding ones.

The standards will be set out in regulations. Then, the Standards Council of Canada will be designated as an accreditation organization. It, in turn, will decide what companies or groups will be accredited to do certification work. Additives, system components and treatment devices must then be certified by an accredited company to ensure they meet the legal standards, before being imported or sold in Canada. The legislation will also ensure health-benefits claims made for products are truthful, and the federal government will be in charge of inspections of drinking water "materials" as well as enforcement of the DWMS Act.

Do we need a drinking water treatment Act?

Unfortunately, there are a number of health issues raised by present drinking water treatment practices. Toxic materials can leach from both plastics and metals used as system components. As well, additives such as chlorine, while necessary to disinfect water by killing the bacteria that cause diseases, interact with naturally occurring organic matter to form by-products such as THMs, some of which have been linked to increased rates of bladder and other cancers.[7] Health Canada's Chlorinated Disinfection By-Products (CDBP) Task Group is further assessing the risks, but in the interim activated-carbon filters and other devices have been pressed into use by the general public to help remove such chemicals. Yet these devices also have problems; they can become saturated, and release highly concentrated contaminants back into the water, while the lack of chlorine favours excess bacterial growth.[8] Since voluntary certification of the materials, additives, components and devices has remained unacceptably low, there is little that consumers can do to ensure the adequacy of the systems they rely on. The proposed legislation was designed to address such re-contamination of treated water.

Is the DWMS Act enough?

Assuming the DWMS Act is reintroduced, rather than fading away altogether under continuing lobby pressure, it would certainly help reduce the risk of water quality health risks that enter the system during and after treatment. Unfortunately, it is a band-aid on a symptom, not a cure.

Within living memory, a fair portion of Canada's ambient water was drinkable without any sort of treatment. Inadequate sewage treatment and inadequate control of industrial effluents and chemicals have, within the 20th century, gradually eroded the drinkable quality of our rivers, lakes and streams. Yet polluted water is now so much the "norm" that "drinkability" as a possible ambient water quality standard seems like science fiction, except in some areas where groundwater remains uncontaminated.

(Continued on Page 9)

Enforcement Briefs

By Jillian Flett, *Alberta Environment*

Administering Environmental Administrative Penalties: Alberta's Experience

It has been nearly 5 years since administrative penalty provisions were introduced into the Alberta *Environmental Protection and Enhancement Act* (EPEA) (effective July 28, 1995). During that time other provinces (for example Ontario, New Brunswick and Newfoundland) have also incorporated or are considering incorporating administrative penalties into their environmental protection legislation. This article reviews how the administrative penalty provisions have been used in Alberta.

The key reason for introducing administrative penalties was to provide deterrence in those situations where there had been a minor contravention and where there had been no or a minor environmental impact associated with the contravention. Administrative penalties were seen as a simpler, less costly way to deter future noncompliance. Cases were to be reviewed quickly and parties were to be provided with an opportunity to present their position to the decision maker before a final decision was made on the amount of the penalty. The decision maker would also advise the party how the amount of the assessment was calculated. In the event the party felt that they had not been treated fairly there was an opportunity to appeal the penalty to the Environmental Appeal Board

A *News Brief* article by Elizabeth Swanson at the time of the introduction of administrative penalties stated "on the face of it, the administrative penalty scheme established by the Act and Regulations seems to be a fair, efficient and effective way of addressing noncompliance in some circumstances, by some offenders, so long as it is administered in a manner described in the enforcement program document." She also commented that administrative penalties should not be arbitrarily or routinely substituted for prosecution. (Vol. 10, #3 1995 "New Regulations Promise Quick Response to Non-Compliance")

The key advantage of administrative penalties was that they provided an enforcement tool for contraventions that could not be appropriately addressed by prosecution.

It appears that the availability of administrative penalties has not resulted in a major change in the number of prosecutions. The annual number of prosecutions has increased during the 5 year period since the introduction of the administrative penalties. This suggests that the penalties have not been used to replace prosecutions, but instead to complement the tools available to deal with contraventions.

During the time period from the introduction of administrative penalties to December 31,1999 there were 391 charges concluded under EPEA totaling over $1.9 million in fines. The amount of the fines ranged from $4,500 to $625,000.

During the same time period there were 112 administrative penalties issued, beginning with 8 in the first year (1995-96) and increasing to 34 in 1998-99. The total amount of the assessments to the end of 1999 was over $645,000 with individual assessments ranging from $750 to $30,000.

The contraventions that have resulted in administrative penalties can be classified into 3 basic categories:

1) "paper" contraventions (e.g. late submission of a report),
2) offences relating to minor releases to the environment, and
3) offences relating to operating parameters (e.g. conducting necessary tests).

There were no cases where administrative penalties were used for contraventions that caused serious environmental impacts. These cases were referred for prosecution.

"Paper" contraventions, are the most frequent type of contravention for which administrative penalties have been issued. They comprise approximately half of the administrative penalties issued. The most common paper contravention was failure to submit a report within the required time period.

These results are in line with the original expectation that administrative penalties would be used for minor contraventions wherein there were minor environmental impacts.

The *Administrative Penalty Regulation* sets out a number of factors that can be taken into account in determining the amount of the penalty. These include:
-the importance of compliance to the success of the regulatory scheme,
-the degree of willfulness or negligence in the contravention,
-whether or not there was any mitigation of the consequences of the contravention,
-whether or not the person has a history of noncompliance,
-whether or not the person has derived any economic benefit and
-any other relevant factors.

(Continued on Page 7)

In Progress

In the Legislature...

Federal Legislation

A private members' bill, Bill C-425, the *National Environmental Standards Act*, was introduced February 11, 2000. The Bill is intended to provide for the harmonization of environmental standards throughout Canada.

Alberta Legislation

Among the changes with the coming into force of parts of the *Miscellaneous Statutes Amendment Act, 1999 (No. 2)*, is the designation of Alberta's Fish and Wildlife Officers and Park Rangers as 'Conservation Officers'. The new classification integrates the work of the two groups. Changes to regulations to incorporate the change have also been made.

Federal Regulations

The Minister of the Environment issued an *Order Amending the DomesticSubstances List and the Non-domestic Substances List* further to s.25 and ss.30 (1) of the *Canadian Environmental Protection Act*. (*Canada Gazette Part II*, January 5, 2000, pp. 125-130.)

Alberta Regulations

The *Activities Designation Regulation* (AR 211/96) under the *Environmental Protection and Enhancement Act* has been amended by AR 14/2000. The amendment adds a definition for "borrow excavation" as a Conservation and Reclamation activity requiring an approval. (*The Alberta Gazette Part II*, February 15, 2000, p. 97.)

The *Petroleum and Natural Gas Tenure Regulation* (AR 263/97) has been significantly amended by AR 11/2000. (*The Alberta Gazette Part II*, February 15, 2000, pp. 81-93.)

Cases and Enforcement Action...

The Alberta Energy and Utilities Board issued Decisions in:

- *Canadian 88 Energy Corp. Application to Amend the Approval for a Sour Gas Processing/Sulphur Recovery Facility Garrington Field.* This was an application for a review of previous Board Decision 98-13 and an associated Amended Approval. In part of the previous application, the company had agreed to reduce its sulphur emissions. In this application, Canadian 88 wished to delay plans to cut emissions, however, the Board upheld their previous decision and set some timing and conditions which Canadian 88 must comply with.
- *Stampede Oils Inc. Application for a Well Licence Turner Valley Field.* This application for a well licence for a sour gas well was denied. In its decision, the Board noted that while it believed there is a need for the well and that the well could be drilled and operated safely, "there are substantial issues of public consultation and planning that Stampede needs to address before its well could proceed."

Two Alberta Provincial Court cases to report on are:

- *R.* v. *Colt Engineering Corp.* Colt was charged under s.98(2) of the *Environmental Protection and Enhancement Act* with the release of mercaptan from a vessel at a Calgary shop. The Judge dismissed the charges on the grounds that odour is not a "substance" and there was no "adverse effect" as defined by the Act.
- *R.* v. *Fisher*. This case centres on three Ministerial Orders issued under s.60 of the *Water Resources Act*. Judge Plosz ruled the Orders were valid and that licences were required as mandated by s.11 of the Act.

The Court of Appeal of Manitoba released a decision in *Westfair Foods Ltd.* v. *Domo Gasoline Corp.* This case deals with soil contamination from underground storage tanks on leased property. The Court upheld the trial judge's decision that Domo had met all its obligations under the lease.

The Commission for Environmental Cooperation has not yet decided if a factual record will be prepared on the submission filed in October 1997 by the Friends of the Oldman River. Commission Alternates met in Montreal, February 10-11, 2000. The submission centred on the federal government's policy of providing 'letters of advice' under the *Fisheries Act*, to facilitate projects affecting fisheries habitat rather than triggering environmental assessments under the *Canadian Environmental Assessment Act*.

The Federal Court of Appeal dismissed Cardinal River Coals appeal of the 1999 ruling that struck down the federal authorization for the proposed Cheviot Mine. The appeal was dismissed because the company did not submit its arguments or evidence within the specified time period. A new hearing before the assessment panel is scheduled for early March 2000.

The Alberta Energy and Utilities Board issued the following:

- a decision in *PanCanadian Resources, Heavy Oil Business Unit Application for a Steam-Assisted Gravity Drainage (SAGD) Recovery Scheme Christina Lake Thermal Project.* The Board approved the application, subject to a number of specified requirements and conditions, as being in the public interest.
- an Examiner Report in the *Bearspaw Petroleum Ltd. Application for a Well Licence LSD 12-25-29-20W4M Drumheller Field.* The examiners recommended the application be denied.

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

Alberta's Municipal Taxes and Habitat Loss

Introduction

Under Alberta property tax law, starting this year, landowners who choose not to farm a taxable parcel of Alberta rural land most likely will have to pay higher property taxes than those who farm land. This rule applies to land that is not farmed because landowners consciously choose that their land support public interest ecological values over their private interest economic gain, or if landowners, including farmers, simply decide not to farm parcels, for whatever reason. Although this legislative direction has been around for five years, only recently have municipalities been compelled to carry it out. Unless this law is quickly changed, the result almost certainly will be loss and fragmentation of habitat and biodiversity, including by development of marginal lands which best serve ecological values and not agricultural ones.

History behind the law

Prior to January 1, 1995, under the Alberta *Municipal Taxation Act* and regulations, rural lands that were left unfarmed to serve conservation purposes, or lands that simply were not used at all, were to be assessed for their agricultural use, or productive value and taxed as farmland.[1] By contrast, non-farmland parcels were to be assessed at "fair actual value" and taxed in a non-farm category such as residential or industrial. In 1995 the property taxation provisions of the *Municipal Government Act*[2] repealed and replaced the *Municipal Taxation Act*. The *Standards of Assessment Regulation*[3] under the later Act directs the assessor to assess property that is "used for farming operations" at agricultural use value, and all other land at market value.[4] Unlike the repealed legislation, there is no exception for conservation lands or lands not put to any use. Accordingly, if rural land is not actively used for farming, our law requires a market value assessment and taxation in a non-farm category.

Effect of the legislation

This change from the earlier legislation can make a considerable difference to taxpayers who own rural lands that are not actively farmed. To illustrate, a Government discussion paper notes that a certain parcel of treed land in Wetaskiwin at market value would be taxed at $2000, but at agricultural use value, the same parcel would be taxed at only $50.[5] Numerous similar examples are being generated owing to recent municipal assessment notices based on market value instead of agricultural use value.[6] Upset landowners have contacted the Environmental Law Centre regarding these notices. They cannot understand why they are being penalized for choosing not to develop their land when they just want to support ecological values. Some have said that they cannot afford the higher taxes and that they will have to farm their lands or otherwise develop them.

Government committee looking at property taxation issues

In 1997, the Minister of Municipal Affairs established a MLA Committee (the "Committee") to investigate issues related to assessment and taxation of farm property in Alberta. The Committee identified nine issues for review and in 1998 distributed a discussion paper[7]. Although the discussion paper did not specifically raise the matter of assessment and taxation of conservation lands, it did address the issue of assessment of land not used for farming operations. A number of conservation organizations and affected landowners have used this opportunity to seek proper legislative changes so that landowners will not be penalized for maintaining public values on their land. Although the Committee's work has led to some regulatory changes, the requirement for market value assessment for rural lands that are not actively farmed was not altered.

Legislative changes needed

In our view legislation changes are needed now. We hope that readers who agree that landowners who choose not to farm land should not be penalized, will bring this matter to Government's attention without delay. Until this year most lands serving conservation purposes have been assessed as land used for farming and taxed as farmland. Now, there is no tax revenue loss to municipalities by virtue of the 1995 change in law. However, once municipalities start collecting higher taxes from market value assessment of unfarmed lands, they legitimately can claim that a change back to the pre-1995 situation would result in lost revenue. In addition, as municipalities start to send out market value assessments, affected owners understandably will be tempted to change the land use. The most common change likely will be conversion to an agricultural use. Such use may be more or less intensive, but there is little doubt that habitat and other natural values will be lost, and in many cases, forever lost. As well, some parcels owned by developers could hastily be developed without municipalities and conservationists having adequate opportunity to negotiate preserving at least some ecological values. Developers might well reason that if they have to pay taxes on unfarmed rural lands based on market value assessment they should realize some revenue from them. This too will result in unrecoverable loss of habitat and other destruction of natural values. We hope these needless consequences will be avoided through quick Government action.

■ Arlene Kwasniak
Executive Director
Environmental Law Centre

1 *Municipal Taxation Act*, R.S.A. 1980, c. M-31, R & S 1994, c. M-26.1, eff. Jan. 1, 1995 and the *Assessments Standards Regulation*, Alta. Reg. 394/75.
2 *Municipal Government Act*, S.A. 1994, c. M-26.1.
3 *Standards of Assessment Regulation*, Alta. Reg. 365/94.
4 *Ibid.*, s.2(1).
5 MLA Farm Assessment Review Committee, *Discussion Paper on Farm Property Assessment* (1998) at 9.
6 For example, last fall Strathcona County mailed out notices to potentially affected landowners advising them of the amount their property taxes would rise unless they carry out agricultural operations on their lands. This County is in a particularly awkward position since it encourages landowners to maintain lands for habitat yet the provincial law requires it to charge more taxes if landowners do so!
7 *Supra*, note 5.

Case Notes

EAB's Approach for Determining Aboriginal Issues Incomplete

Whitefish Lake First Nation v. *Director, Northwest Boreal Region, Alberta Environment, re: Tri Link Resources Ltd.*, November, 1999 99-009-EAB

At issue in this appeal was the extent to which the Environmental Appeal Board (the "Board") must consider aboriginal issues when aboriginal rights are raised in an appeal of an otherwise valid approval. The decision suggests an approach for decision-makers when faced with aboriginal issues in these circumstances. However, in the writer's view, the approach is not sufficient to satisfy the fiduciary duty owed by the Crown to First Nations.

The appeal arose out of the issuance by the Director of an amended approval to Tri Link Resources Ltd. (Tri Link), allowing Tri Link to add an additional compressor to its gas processing facility. To accommodate the compressor, the Director also approved an increase of 20% in the plant's overall emissions of nitrogen oxides.

The Whitefish Lake First Nation, who claims as their traditional territory the area surrounding the facility, appealed the amended approval. The First Nation claimed Treaty, constitutional, and aboriginal rights to the area, including rights to hunt, trap, fish, gather plants, and hold sacred ceremonies. The Appellant asserted that increased air pollution and other environmental impacts from the implementation of the amended approval potentially would impair these rights. The Appellant also argued that, given these potential effects, the Director was required to consult with it prior to making his decision.

The Director asked the Board to dismiss the First Nation's appeal on the basis that it was not properly before it, pursuant to clause 87(5)(i.2) of the *Environmental Protection and Enhancement Act* (EPEA). The Director argued that the consultation issues raised in the appeal were issues of constitutional law and had little to do with the substance of the amended approval. In addition, the Director argued that those issues lay outside the jurisdiction of the Board, as they were outside the scope of the EPEA.

The Board disagreed with the Director's suggestion that the only issues properly before it were those found within the four corners of the EPEA. It noted that although the Act restricts the types of decisions that are appealable to the Board, it does not expressly limit the range of grounds for appeal. It found that "the Board has discretion to accept a wide scope of appeal grounds, *as long as* those grounds relate directly to an otherwise appealable decision under [EPEA]." However, the Board agreed that the only issues that it can reasonably determine are those that relate to the EPEA's broad environmental protection objective. Refining that conclusion the Board stated that the widest scope of appeal grounds "properly before it" are those factors: (1) that relate to the environmental, "public interest" objectives of the EPEA, *and* (2) that the Director considered, or ought to have considered, in making the decision at issue.

Applying the first part of the test, the Board concluded that although the First Nation's claim rested on legal sources outside of the EPEA, it was connected directly to concerns over the environmental impacts of the Tri Link gas plant and thus was related directly to the Act's environmental objectives. In applying the second, the Board advocated an approach whereby the Director should only consider aboriginal claims that have been recognized by the Government of Alberta. In effect, the Board concluded that the consultation and infringement of rights issues are not valid considerations where the Alberta Government does not recognize the claim. The Board presumed that the Director inquired as to the Government's position and found that the Government disputed the claim. Accordingly, the Board found that the Director properly did not take those issues into account. Since the Director did not need to consider the claim, the Board concluded that it would be inappropriate for it to consider it.

The Board thus advocated an approach to determine whether claimed aboriginal rights are properly before it whereby the Director asks the Alberta Government whether it recognizes the claim in question. If no, that is the end of the matter and neither the Director, nor the Board in an appeal of the Director's decision, needs to consider the potential impacts on claimed rights. If yes, then the Director must consider the impacts on the claimed rights, including consultation with the First Nation, and they will be properly before the Board on appeal.

This approach is generally consistent with the framework for decision-makers that is developing in the jurisprudence. That framework arises from the Crown's fiduciary duty to First Nations, and starts with an assessment as to the claim's validity. The process only continues if it appears more likely than not that a claim is valid. The next step is predicting the extent to which the claimed right will be infringed by the proposed activity. If not at all, the activity may proceed with no qualifications, but if so, it is then determined if the infringement is justifiable. Only if justified may an infringing activity proceed.

The Board's approach in this case focussed on the first step: the determination of the claimed right. The Board was quite correct in stating that the determination of the validity of claims to aboriginal rights is largely beyond a Director's, and its, expertise. Aboriginal peoples as a whole are not served, and the fiduciary duty is probably not discharged, if their rights are determinable by inexpert tribunals unequipped to deal with the myriad of issues that arise in establishing aboriginal rights. Relying on a determination made by another Government department having more expertise is a reasonable step. However, it is submitted that both the reliance on an expert and the decision relied upon also must be reasonable.

(Continued on Page 9)

(Administrative Penalties...continued from Page 3)

It is interesting to examine how these factors have been applied.

The most common factor used to increase the administrative penalty was the compliance history of a party. This factor was used in 22 penalty assessments against 20 different parties. When applying this factor, any recent previous enforcement action against the party resulted in an increased penalty. In approximately 10 situations a party received more than one administrative penalty at the same facility. The highest number of administrative penalties issued against a single party at a single facility has been 3. In only 1 situation a party received a second administrative penalty for repeating the same type of offence.

Compliance history has also been used to recognize regulated parties that had no enforcement record, by reducing the amount of the penalty for otherwise good performance.

The most common factor used to decrease the amount of the penalty is the "mitigation" factor. In 64 cases, it has been applied to reduce the amount of the penalty. In 3 cases this factor was used to increase the amount of the penalty because the regulated party could have prevented the offence from becoming as serious as it did, had they taken basic steps.

Generally, the largest penalty increase occurred for the factor that considers the importance of the contravention in the overall regulatory scheme. This factor was most commonly used for "paper" contraventions. Although these contraventions do not directly affect the environment, they are considered important in the overall regulatory scheme. Obtaining the necessary approvals, using the appropriate manifests for waste and submitting the required monitoring reports are cornerstones to the success of the overall regulatory scheme. Typically $1,000 to $1,500 was added to the penalty because of this factor, in these cases.

The opportunity to meet with the decision maker was provided in every case and in almost every case, meetings were held. These meetings are beneficial in that they provide an opportunity for the decision maker to explain the administrative penalty system and the opportunity for the regulated party to give their version of the facts, provide a defence, or explain their mitigation plan for the contravention.

These meetings resulted in reductions in the preliminary assessment in approximately half of the cases. The amount of the penalty was often reduced as a result of additional information being brought forward which may not have been available at the time the penalty was originally assessed.

The recent restructuring of the Environmental Service towards more regionalized decision making has provided the opportunity for quicker decisions as there is now more than one decision maker issuing the administrative penalties.

The opportunity to meet with the decision maker may in part explain the relatively few number of appeals of administrative penalties in comparison to the total number of penalties assessed. Appeals are readily accessible to the regulated party in that they are relatively inexpensive and legal representation is not necessary. In 9 cases an appeal was filed after the final penalty was assessed. Of these situations, 6 appeals resulted in a change in the original assessment. Three appeals were decided without any change in the original assessment.

In summary, the number of administrative penalties issued has gradually increased each year and it is expected that trend will continue. Overall administrative penalties are considered to be a valuable enforcement tool and seem to have met the need for a fair, but effective, method of deterrence for those contraventions which do not warrant prosecution.

Note: The author wishes to thank Renée Craig for her assistance in this article.

Administrative Penalties

The following administrative penalties were issued under the *Environmental Protection and Enhancement Act* since the last issue of *News Brief:*

- $1,500 to Square Butte Ranches Inc. in the M.D. of Foothills No. 31 for constructing a waterworks system without first obtaining the required approval.

The following administrative penalties of $1000 and over were issued under the *Public Lands Act* and *Forests Act* since the last issue of *News Brief:*

- $1,000. to Northstar Energy Corp. of Calgary for contravening terms and conditions of their lease contrary to s.47(1) of the *Public Lands Act.*
- $1,264. to Northstar Energy Corporation of Calgary for unauthorized use of public land contrary to s.47(1) of the *Public Lands Act* and $2,264. for contravening terms and conditions of their licence in violation of s.47.1 of the *Public Lands Act.*
- $3,700. to Regent Resources Ltd. of Calgary for unauthorized use of public land and contravening terms and conditions of their lease in violation of s.47(1) and 47.1(1) of the *Public Lands Act.*
- $1,736.50 to Spruceland Millworks Inc. of Spruce Grove for wood wastage contrary to s.100(e) of the *Timber Management Regulation.*
- $1,500. to Vanderwell Contractors Ltd. of Slave Lake for contravening terms and conditions of their annual operating plan in violation of s.100(a) of the *Timber Management Regulation.*
- $1,000. to 744863 Alberta Ltd. of High Prairie for contravening terms and conditions of their SME in violation of s.47.1(1) of the *Public Lands Act.*

Action Update

Canadian Environmental Assessment Act: Five-Year Review[1]

Introduction

The *Canadian Environmental Assessment Act* (CEAA) provides the basis for federal environmental assessment (EA). The Act is designed to compel federal authorities to exercise decision-making powers to effect and promote a healthy environment and environmentally responsible sustainable development. Such powers include deciding whether to issue a permit under federal law such as to do something that could harm fish habitat or migratory birds, or deciding whether federal land or money should be used to carry out activities that could harm our environment.

A legislatively required five-year review of CEAA is now taking place. The review process includes public meetings and regional workshops, as noted on the website of the Canadian Environmental Assessment Agency (the agency) at www.ceaa.gc.ca. It also involves a report of the Regulatory Advisory Committee (a multi-stakeholder group formed to advise on regulatory and policy matters), written submissions, and separate processes of the provincial governments and aboriginal communities.

Documents are available to help with the review. The agency has published and posted on its website, the *Discussion Paper for Public Consultation* and a number of background studies. The Paper identifies issues and options. The Canadian Environmental Network EA Caucus has posted *A Citizen's Briefing Kit for the Five-Year Review* on its website at www.cen.web.net, to assist the public and environmentalists.

Five-Year Review themes and issues

The agency has identified three review themes: making the EA process more predictable, consistent and timely; improving the quality of environmental assessment; and strengthening opportunities for public participation. Discussion, however, is not limited strictly to these themes. For example, at review meetings some industry and province stakeholders have called for less federal involvement in EA processes alleging duplication and overlap between federal and provincial or territorial processes. They also recommend limiting scope of federal EA to matters strictly within federal legislative jurisdiction. Some industry advocates have asked that a full privative clause be added to CEAA. Such clauses purport to oust the right of superior courts to review the legality of actions taken by statutory delegates and would declare all decisions of delegates final and unappealable. Some contend CEAA should include a privative clause because of the number of CEAA court cases initiated by environmental groups.

Our views on issues

First, in our view, the claims regarding overlap and duplication generally are not justifiable. An agency commissioned background paper[2] summarizes a review of projects subject to CEAA review from April 1995-March 1996 as follows:

> A large majority of projects (98 percent) subject to the Act [CEAA] were not subject to provincial EA legislation. Both levels of government assessed only about two percent of projects. Overall 7.5 percent of projects subject to EA under provincial legislation also were subject to review under the Act.

In any case where both federal and provincial processes apply to a project, agreements could apply so that each level of government carries out its legislative EA requirements with one joint EA.

Second, regarding the scope of federal EA, suffice it to say that our courts, including the Supreme Court of Canada, have confirmed the right and obligation of federal authorities to consider all relevant effects in carrying out federal EA regardless of whether the effects concern something under provincial jurisdiction.[3]

Finally, we do not support a privative clause being added to CEAA. For one, most of the CEAA litigation has occurred because statutory delegates did not carry out CEAA duties; they failed to follow the law. We believe that no persons are above the law. Instead of adding a privative clause to CEAA, we believe that CEAA should be amended to make statutory delegates accountable to compel their compliance with statutory duties. Where duties are unclear, CEAA should clarify them. As well, adding a privative clause to CEAA would not only severely limit environmental organizations from asking a court to review CEAA decisions, it would also limit industry and others affected by such decisions. Those advocating such a clause should think through the ramifications for their sector. Finally, privative clauses normally are used only where it is appropriate to confer an extreme degree of deference to the decisions of statutory delegates because of their unique, technical expertise. Although in a democratic society privative clauses might never be justified, they certainly are not appropriate where the statutory delegates in question do not possess unique, technical expertise. Although authorities responsible for issuing permits or granting federal interests may be experts in their areas (e.g., fisheries, navigable waters, migratory birds), they normally are not trained EA specialists.

■ Arlene J. Kwasniak
Executive Director
Environmental Law Centre

1 A version of this article originally occurred in Alberta's Magazine on the Environment *Encompass Magazine*, Vol. 4., No. 3, Feb. 2000. Visit the *Encompass* website at <http://www.encompass.org>.

2. *Multi-Jurisdictional Environmental Assessment* by David Lawrence, available on the agency website.

3 *See Friends of the Old Man River v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3 at 69 ff, foll'd in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, 1999, 31 C.E.L.R. (N.S.) Part 3, 239 (Fed. C.A.). In the latter, at 256, the Court found that the Coast Guard erred in law by declining to exercise discretion under CEAA in determining cumulative effects when it excluded consideration of effects from projects or activities outside of federal jurisdiction.

Environmental Law Centre Donors - 1999

The Environmental Law Centre extends its gratitude to those individuals, companies and foundations that made a financial contribution to support the Centre's operations in 1999. They are:

BENEFACTORS - $5,000 +

Alberta Ecotrust
Alberta Environment
Alberta Law Foundation
Alberta Real Estate Foundation
Alberta Sports Recreation Parks and Wildlife Foundation
Austin S. Nelson Foundation
Ducks Unlimited Canada
Edmonton Community Foundation
Edmonton Community Lottery Board
The EJLB Foundation
Environment Canada - Americas Branch
Friends of the Environment Foundation (Canada Trust)
Mountain Equipment Co-op
Shell Canada Limited
TransCanada Pipelines
Western Economic Diversification Canada

PATRONS $2,500 - $4,999

Amoco Canada Petroleum Company Ltd.
Code Hunter Wittmann
Fraser Milner
Luscar Ltd.
Telus Corporation

PARTNERS $1,000 - $2,499

Agrium Inc.
Alberta Pacific Forest Industries
ATCO Electric
Canadian Hydro Developers, Inc.
Canadian Occidental Petroleum Ltd.
Canadian Pacific Charitable Foundation
Dow Chemical Canada Inc.
Environmental Advocates Society
Mobil Oil Canada
Petro-Canada
Suncor Energy Foundation
Syncrude Canada Ltd.

ASSOCIATES $500 - $999

Garry Appelt
Cheryl Bradley
Crestar Energy
Cruickshank Karvellas
Lorne Fitch
Judith Hanebury
David Ho
Ronald Kruhlak
Lucas Bowker & White
Sherritt International Corporation
Dennis Thomas, Q.C.
Donna Tingley

FRIENDS $250 - $499

ATCO Ltd.
Ackroyd, Piasta, Roth & Day
Chevron Canada Resources
Keith Ferguson
Arlene Kwasniak
Al Schulz
Elizabeth Swanson

CONTRIBUTORS $125 - $249

Tammy Allsup
Renee Craig
Thomas Dickson
Paul Edwards
Patricia Langan
Debra Lindskoog
Parlee McLaws
Dr. Mary Richardson
Kim Sanderson
Valentine Volvo
Wotherspoon Environmental Inc

UP TO $125

Tom Beck
Brownlee Fryett
Gerald DeSorcy
Linda Duncan
William Fuller
Thomasine Irwin
Frank Liszczak
Letha MacLachlan
McCuaig Desrochers
Roberta Robinson

(Water, water everywhere...continued from page 2)

In many parts of the country, water quality is now so poor that even the "swimmability" or "fishability" of the water is gone.[9]

Such losses are not inevitable. For many pollution problems, the technology exists to put "used" water back into our waterways cleaner than it came in. All that is needed is the willpower and the spending priority, and the decline of the past century could be reversed in this century. Perhaps in such a future the DWMS Act will fade in importance. Until that time, however, such legislation can be seen as a useful interim measure to protect us from our own devices.

Call your MP and the Minister of Health to urge the reintroduction of the Bill.

■ **Elaine Hughes**
Faculty of Law, University of Alberta

1 Bill C-14, 1st session, 36th Parliament, 46 Eliz II, 1997, (formerly Bill C-76 of 1996) was tabled in Parliament in October 1997 and died on the Order paper. As of December, 1999 it has not been re-introduced.
2 Health Canada, *Guidelines for Canadian Drinking Water Quality*, 6th ed. (Ottawa: Supply and Services Canada, 1996); guidelines for ambient surface water quality (for swimming, other recreation, aquatic life protection, agricultural use, etc) have been developed by the Water Quality Guidelines Task Group of the CCME; see CCME, *Canadian Water Quality Guidelines*, (Ottawa: Inland Waters Directorate, 1999)
3 Alta. Reg. 122/93, s.6(1), enacted pursuant to the Environmental Protection and Enhancement Act, S.A. 1992, c. E-13.3
4 http://hwcweb.hwc.ca/ehp/ehd/bch/water_quality/dwmsa.htm
5 http://hwcweb.hwc.ca/ehp/ehd/bch/water_quality/dwmsa_let.htm
6 http://hwcweb.hwc.ca/ehp/ehd/bch/water_quality/handout.htm
7 THMs are trihalomethanes. See: http://hwcweb.hwc.ca/ehp/ehd/bch/water_quality/chlorinated_water.htm
8 http://hwcweb.hwc.ca/ehp/ehd/catalogue/general/iyh/water_treat/taste.htm
9 For general information on Canadian water quality, see Environment Canada, *The State*).

(EAB's Approach. . .continued from Page 6)

In this appeal, the Board fell short of both. It admitted that it was unclear on what advice, if any, the Director had received from the Government. Nonetheless, it assumed that the Director had made inquiries and inferred that the Government disputed the validity, based on a reference to "discussions with Indian Affairs" and a one-sentence reference in a document. With respect, such inferences and assumptions are not sufficient to determine whether the Crown's fiduciary duty has been discharged. In fact, the writer submits that if the Board is not certain that the Crown has adequately fulfilled its duty, the opposite inference should be drawn. If the Crown cannot show reasons why a claim is not recognized, and that it is reasonable in relying on those reasons, then the Director cannot be said to have made a reasonable decision in determining that the Government disputes the claim. Thus, in the writer's view, in this appeal, the Board should have found consultation and infringement issues properly before it. At a minimum, the Board should have solicited more information from the Crown before drawing any adverse inferences. More generally, the provision of adequate information upon which a Director could reasonably rely must become a part of the Board's approach. In doing so, it will provide an effective tool for environmental decision-makers to address the aboriginal issues they increasingly face, and to do so in accordance with the fiduciary duty owed to First Nations.

■ **Mike Calihoo**
Student at Law, Bennett Jones

Special Guest Editorial

The Tragedy of Little Mountain - by Edmonton Councilor Michael Phair

On December 1, 1999 Brintnell Joint Ventures leveled the trees, vegetation and prairie grasslands at Little Mountain. The question that needs to be asked is why?

In one day, landscape, which had never been ploughed, was scraped bare. Biological diversity of over 200 species of flowering plants, including 3 provincially rare plants, was destroyed. 38 species of birds and many of the wildlife species common to Edmonton were left homeless.

Why did the developer not attempt to save some of the natural area as municipal reserve? When the company submits an area structure plan to Council, it will be required to set aside 10% of the land for future parks and schools.

Is what occurred just part of the development process? I don't think so. The earthmovers will have to be brought in again to perform the normal geotechnical preparation of the site for subdivision. There were no elevation control stakes in place on Little Mountain when the bulldozers did their work. The machines were observed only scraping vegetation down to the surface of the soil.

So what then panicked the developer into making such a rash decision? The scraping of all vegetation down to sterile clay seems to have had no other purpose than to negate the potential of having any part of the site removed from development.

So where do we go now? Is there a way, the development industry, citizens and Council can work together so that a tragedy like Little Mountain can be averted in the future?

Years ago Council, developers and the community experienced similar ongoing battles and frustrations in regards to the preservation of historical buildings. In 1988, Council passed the Heritage Conservation policy and committed to placing dollars aside each year to achieve this end. Since then, there have been few confrontations and preservation of historical buildings has moved ahead fairly smoothly.

In 1995, Council approved a policy to encourage the conservation and integration of environmentally and significant natural areas into Edmonton's future urban environment. It is an excellent policy, but unfortunately Council did not provide the mechanism and resources to enact the policy.

Last fall, in order to address this problem, the city's administration submitted the Natural Areas Acquisition and Conservation report. It has been endorsed by both the environmental community and by the Urban Development Institute, the voice of the development industry.

The natural areas strategy proposes to annually set aside $750,000 to assist in preservation acquisition. Only 1/3 of this money will come from the property tax base. The other 2/3 will come from community partnerships and the sale of surplus lands.

I'm happy to report that as part of our budget debate, City Council decided to begin the Natural Areas Acquisition and Conservation Reserve and has set aside $250,000. This is less than the $500,000 City contribution the Natural Areas Acquisition and Conservation report envisioned, but it is a start. The tragedy of Little Mountain must not be repeated.

If you have any questions or want more information about the preservation of natural areas in Edmonton, please contact me. I can be reached by phone 496-8146, email michael.phair@gov.edmonton. ab.ca or fax 496-8113.

ELC Extends its Services to Small Businesses in Western Canada

Through a three-year grant from **Western Economic Diversification** over the next two years the ELC is extending its Information and Referral services reach to small and medium sized businesses in the four western provinces.

This ELC service is called "**Business Connections**". Through it, business personnel may speak with one of our lawyers about legal rights, obligations and the environment, access our Public Library of Environmental Law and get answers to frequently asked questions. For more information on this service contact ELC staff counsel Andrew Hudson or Brenda Heelan Powell at (780) 424-5099, or toll free at (800) 661-4238.

Seminar of Interest to Business – April 6, 2000

In connection with this service, the Centre is holding Seminars of Interest to Business. The next one, presented by staff counsel Cindy Chiasson, is ***Get the Real Dirt – Protecting Yourself from Liability for Contamination when Buying, Selling or Leasing Property in Alberta*** on Thursday, April 6, 2000 at the Business Link - Business Service Centre, #100, 10237-104 Street, Edmonton, AB at 12:00 to 2:00 p.m. The cost is $25.00 + GST (lunch included). Contact Fran Schultz at the ELC to register.

Practical Stuff

By Martin J. Chamberlain, *Alberta Justice - Environmental Law Section*

Security - Don't Leave It On The Table

You arrive at your lawyer's office with a deal you have cooked up with someone we'll call "Underfunded". The deal could be anything: a lease, a purchase of land, or a sale of a business. What is important is that Underfunded is committing to do something that involves an environmental issue like a clean up, reclamation or contamination indemnity.

Your lawyer will ask you what security Underfunded is giving? If Underfunded doesn't perform you may be faced with substantial damages and no recourse. You want to look to someone or something to either perform the obligation or pay you. This is security.

I propose to summarize some issues with the basic types of security. Please remember there are lots of types of security, they are subject to different laws, some are better than others, and the choice is a matter for negotiation.

- In what instances should I take security? Whenever you can get it. If you can't, is it worth the risk?
- When should I take it? Take security when you first do the deal.
- Can I take more than one type of security and how much should I take? Yes, take as much as you can get both in kind and amount. Reduce your risk.
- Can I realize on all or only part of the security? This depends on the security and the agreement and should be negotiated at the outset.
- What types of security are available? This depends on who you are, who you are dealing with, what jurisdictions you are in, and the nature of the deal. I will describe the basic forms but the bottom line is, be creative, and talk to your lawyer first.

1. Asset Based Security

By this I mean an actual asset. Examples include a land mortgage, a charge on Underfunded's car, and an assignment of receivables. Asset based security can take many forms. This can be good security but you need to consider how valuable is the asset, where is the asset, can you protect your interest, who owns it, what is your priority, and how do you realize on the asset. Your lawyer should set up and register the security, and you will need to do some due diligence. Consider practical things like taking a mortgage on contaminated land isn't going to help if Underfunded fails to reclaim it.

2. Guarantees

A guarantee is a third person's promise to honour Underfunded's commitment and can take many forms. A guarantee is only as good as the person giving it so do some due diligence. A guarantee can also be supported with asset security. So Underfunded's spouse holds all the assets including the house, you can get a guarantee and mortgage on the house from the spouse.

There are lots of pitfalls in guarantees and they have to be drafted properly. Always discuss them with your lawyer.

3. Letters of Credit

A letter of credit ("LC") is a commitment from a financial institution to pay money on demand. It is a good idea to agree on the terms of the LC ahead of time. Things to consider include:

- the amount;
- the term.
- Is it renewable?
- Are partial drawings allowed?
- Is it irrevocable?
- Is it subject to any conditions?
- How and where can it be called?
- Who is issuing it? (the LC is only as good as its grantor);
- Is it really a letter of guarantee?

Generally, LC's are good security, however you should have them reviewed by your lawyer for suitability and any deficiencies.

4. Cash

Cash in hand is always good however even cash has its problems. Some of these include:

- Do other creditors have claims to the money?
- Where did the money come from (i.e. do the money laundering rules apply)?
- What are your obligations - are you a trustee - do you have to pay interest - can you invest it?
- How and when can you apply money to obligations?
- What happens if one of your creditors seizes it?

These and other issues should be discussed with your lawyer.

5. Performance Bond

A performance bond is an undertaking from a surety company to complete work, or pay for the completion of work if Underfunded fails to perform. Performance bonds are akin to insurance policies and often contain tight timelines, expiry dates, and conditions under which they can be called. Their main advantage is that they are relatively inexpensive. Their disadvantages include the timing and process under which claims can be made and the control over the project exercised by the surety company. Performance bonds can work nicely to provide security for a construction type obligation, but are less effective to cover reclamation situations where scope and timing are not always clearly defined.

Security is a complex issue and it is prudent to get legal advice before you sign the deal on the cocktail napkin. Just don't leave it on the table.

Ask Staff Counsel

Heritage Seeds Plant an Idea

Dear Staff Counsel:
For years I have been growing plants, including several types of vegetables and grains, from the seed used by my parents and grandparents. The wheat that I grow makes very delicious bread. In fact, the bread has become so popular amongst my friends and neighbours that many want to get seeds from me to make their own bread. This has inspired an idea for a small business. I thought I might start selling the seeds, including the wheat seeds that have been passed down through the generations of my family. One of my friends mentioned to me that Agriculture Canada might have to be informed of this business or give me a permit or something. Is this true?

Yours truly, Sarah Eydie

(P.S. As a thank you, I have sent some bread along so that you can taste for yourself how delicious it is!)

Dear Ms. Eydie:
It may be necessary to consult with the Canadian Food Inspection Agency (the "CFIA") before commencing your heritage seed business. The CFIA is a departmental corporation that reports to Parliament through the Minister of Agriculture and Agri-Food.

The *Seeds Act* and the *Seeds Regulations* regulate the sale, import and export of seeds in Canada. Pursuant to its mandate, the seed activities of the CFIA include:

a. establishment of seed standards;
b. seed certification;
c. registration of establishments and licensing of operations;
d. accreditation of graders, seed analysts and seed labs; and
e. enforcement of the *Seeds Act* and *Seeds Regulations*.

While the Minister of Health is responsible for establishing policies and standards relating to the safety and nutritional quality of food sold in Canada and assessing the effectiveness of the CFIA's activities related to food safety, the responsibility for enforcement of the *Seeds Act* and *Seeds Regulations* lies with the CFIA.

The *Seeds Act* establishes a general prohibition against the sale of any seed variety that is not registered in the prescribed manner. Exemptions from this general prohibition do exist. Most notably, section 65 of the *Seeds Regulations* provides that every variety – except a variety of a species, kind or type listed in Schedule III – is exempt from this general prohibition.

This means that unregistered seed varieties may be sold in Canada unless it is a variety of a species, kind or type listed in Schedule III. If a seed variety is a variety of a species, kind or type listed in Schedule III, then the seed must be registered before it can be sold in Canada.

The plants listed in Schedule III are primarily grains. But others plants such as field beans, faba beans, field peas and sunflowers appear on Schedule III. Generally, plants which are flowers or garden vegetables are not included in Schedule III. Before you commence your business, you should ensure that you are not selling an unregistered seed variety of a species, kind or type listed in Schedule III.

In addition to the seed registration requirements, the release of seed into the environment (which includes growing seeds) is regulated. Prior to undertaking a release of seed, a person must provide written notification to and receive authorization from the Minister of Agriculture and Agri-Food.

However, there is an exemption from these notice and authorization requirements. Seeds grown in Canada before the date of the relevant part of the *Seeds Regulations* in such a manner that the seed constitutes a distinct, stable population in the Canadian environment are not subject to these requirements. It is possible that this exemption will apply to your seeds.

It would be prudent to consult the CFIA to ensure that the seeds you intend to sell are exempt from the registration and release authorization requirements. Under the provisions of the *Seeds Act*, it is an offense to sell unregistered seeds or to grow seeds contrary to the *Seeds Regulations*. The penalty for this offense is a fine not exceeding $50,000.

Finally, if you need useful information and assistance in starting your business, I suggest you contact *The Business Link* Business Service Centre, located in Edmonton at 100, 10237-104 Street, T5J 1B1. Most of its services are free of charge though some publications and specialized services involve a fee. You can contact the Centre at (780) 422-7722 (Edm.), 1-800-272-9675 (Toll Free), (780) 422-0055 (Fax) and visit its website at <http://cbsc.org/alberta>.

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