News Brief
ENVIRONMENTAL LAW CENTRE

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In This Issue

Appellants Could Face "Mission Impossible" in Obtaining Costs from EAB

Note: the author wishes to thank Environmental Law Centre librarian Dolores Noga for her excellent research and assistance in preparing this article.

Introduction

For nearly seven years, the Alberta Environmental Appeal Board ("EAB") has been dealing with appeals of matters under the *Environmental Protection and Enhancement Act* ("EPEA") and, more recently, the *Water Act*. Over that time, the EAB has issued approximately a dozen decisions on costs applications, both interim and final. A review of these decisions reveals that the direction taken by the EAB in awarding costs has created significant difficulties for parties participating in the appeal process and may actually work as an impediment to public participation in that process.

Background

The EAB derives its jurisdiction from EPEA and the *Environmental Appeal Board Regulation*. The Act gives the Board its general jurisdiction to award costs in appeals before it, while sections 19-20 of the Regulation set out more detailed requirements related to awards of interim and final costs. Both sections list a number of discretionary criteria that may be considered by the EAB in dealing with costs and also enable the Board to consider any other criteria it considers appropriate.

Purpose of costs

Generally, the awarding of costs in environmental administrative proceedings can serve different purposes. Costs can be used as a tool to facilitate the participation of groups or interests that might not otherwise have the resources or ability to participate, in order to ensure that all relevant views are included in the proceedings. Awards of costs can also be used to ensure quality participation in administrative proceedings by reimbursing those participants whose involvement made a contribution to the proceedings, regardless of the outcome.[1] Costs can also be used to level the playing field by enabling parties with fewer resources to retain expert witnesses and compile necessary scientific or technical evidence to support their positions.

Neither EPEA nor the *Environmental Appeal Board Regulation* explicitly states a purpose for costs awards in EAB proceedings. However, one can hazard a guess as to the likely purposes. Section 2 of EPEA (the purpose section) sets out a number of objectives of that Act, and is often referred to by the EAB in its decisions. Objectives relevant to the appeal process include protection of the environment for the well-being of society, shared responsibility of all citizens for environmental protection through individual action, and provision of opportunities for citizen participation under the Act. The EAB process created by the Act and regulations provides for the participation of those who are or may be "directly affected" by decisions made under EPEA, as well as other participants the EAB considers

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appropriate. The EAB's own documents acknowledge the role of the public in the appeal process and the related need for a fair and accessible process.[2] Thus it seems reasonable to believe that the chief purpose of costs in EAB proceedings should be to facilitate public participation in the appeal process.

Difficulties faced in obtaining EAB costs

Parties who have thus far sought costs from the EAB have faced significant hurdles. One of the main problems has been the diametrically opposed tests that members of the public face first in establishing their standing before the Board and subsequently in establishing a claim for costs. To obtain standing, members of the public must show that they are "directly affected", in accordance with sections 84 and 87(5) EPEA. The test developed by the EAB requires these parties to show that they have a personal interest, beyond that of the general public, that relates specifically to the matter under appeal. However, in its costs decisions, the EAB has stated that a major consideration will be whether a party has served the public interest through their participation in the appeal.[3] While this is certainly a valid and worthy criterion, the EAB has applied it in a fashion that results in parties seeking costs being rejected where the EAB feels the appeal serves their own private interest, even if there is also a public interest served.[4]

This approach by the EAB will likely prevent parties in some types of appeals from ever being able to recover costs, since there will be a strong element of private interest in those appeals as a matter of course. For example, appeals of reclamation certificates, water licences or approvals for beverage container recycling depots are all matters which may by their nature be considered to be matters of predominantly private interest, but which may also deal with matters of public interest. However, the EAB has been reluctant to award costs in appeals where both private and public interests are served.[5] This certainly creates a dilemma for members of the public participating in appeals, who must attempt to meet such widely differing tests, as well as for counsel who represent and advise these individuals.

Possible solutions

One of the most obvious solutions to this problem is for the EAB to revise the emphasis they place on the public interest criteria when dealing with costs applications. While it is very valid to consider the contribution that parties make to the public interest through their participation in appeals, to use this criterion in a way that disqualifies parties who have any element of private interest in their participation is unreasonable and unjustified. Undoubtedly EPEA's drafters did not intend that some parties would be prevented from any possibility of recovering costs simply due to the nature of the matter being appealed.

Another solution would be for the EAB to broaden its test for standing beyond the narrow limitations that it currently applies. Allowing a broader range of parties to qualify as appellants would be more consistent with the public interest criterion that the Board has been applying to applications for costs. For example, the Environmental Law Centre has consistently advocated to the EAB that a more appropriate test would be to grant standing to any person or group who

(a) has a clearly ascertainable interest which ought to be represented in the appeal, or
(b) has an established record of legitimate concern for the interest it seeks to represent, or
(c) has a legitimate interest, representation of which is necessary for a fair decision.

Conclusion

This problem with respect to costs makes effective public participation in appeals more difficult and, in some instances, prohibitive. The ongoing application of inconsistent tests to participants will likely lead some parties with valid concerns to choose not to participate in an uncertain process. We are hopeful that the EAB will address and remedy these problems and make the EAB process one that is much more amenable to public interest participants.

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Enforcement Briefs

By Jillian Flett, *Alberta Environment*

Liability of Developers and Consultants

Three recent cases have resulted in Alberta Environment ("AENV") issuing administrative penalties to consultants and/or developers for operating without an approval or violating an approval issued to another party. The cases all involved the construction of municipal wastewater treatment and collection systems and storm drainage systems. These cases are interesting in that they find the developer (or developer's consultant), rather than the approval holder, liable for failing to obtain approvals or violating a term of the approval. In the past the approval holder has been looked to as the liable party, regardless of whether the holder actually was running the facility or actually had committed the contravention.

A land developer wishing to undertake a new development must obtain permission from the municipality and an authorization or amendment to the municipality's Environmental Protection and Enhancement Act ("EPEA") approval from AENV prior to constructing special features to tie into the existing municipal system. In many situations the developer's consultant will make the application to AENV for an amendment to the existing municipal approval. Often the municipality will not grant its construction completion certificate until the necessary approval has been received from AENV.

"These cases are interesting in that they find the developer (or developer's consultant), rather than the approval holder, liable for failing to obtain approvals or violating a term of the approval."

In the first case, the municipality's approval required an amendment for any extension to the storm drainage system. The consultant, on behalf of the municipality, made an application to AENV to amend the approval to allow for construction of the wastewater collection system and storm water drainage system. AENV informed the developer that an approval for the outfall would have to be issued prior to the approval for the extension. This would trigger the public consultation process. The developer was concerned that this requirement would delay the project so that it could not be completed before winter.

The developer gave the municipality a letter indemnifying it from future liability in return for the municipality granting permission to proceed with the project. The municipality acccepted and the developer commenced construction on the project without waiting for the EPEA approval.

AENV jointly issued the developer and the municipality an administrative penalty for $2500 for violating a condition of an approval. There was not sufficient evidence of liability on the action of the consultant to assess a penalty against it.

The second case involved an application for installation of service lines to a development. The municipality had an approval to operate a wastewater treatment plant, wastewater collection system and storm drainage system that required an authorization or amendment to the approval for an extension to the systems. The developer commenced construction of the services prior to an EPEA approval being issued. The municipality notified AENV that the developer had begun construction without authorization. AENV discussed the issue with the municipality who then directed the developer to cease construction until the approval was issued. The developer was under contract to deliver serviced lots at a specified time and therefore decided to recommence construction. The municipality issued a stop work order to the developer and the developer complied. The required authorizations were eventually obtained from AENV after which construction recommenced.

The developer was levied an administrative penalty for 2 counts of construction without an approval. The total penalty was $10,000 of which $6,500 reflected the economic benefit the developer received avoiding the equipment standby charges by constructing before obtaining an approval. This case is under appeal to the Environmental Appeal Board. The municipality was found to be diligent.

In the third case, the municipality had an authorization that required an approval for constructing a dry storm water pond. The consultant was aware the requirements must be met before the municipality would issue a construction completion certificate. Furthermore, the servicing agreement between the municipality and the developer and the municipal Servicing Standards Manual stated that the consultant was responsible for obtaining all necessary approvals. The consultant constructed the pond prior to applying for an EPEA approval.

The consultant admitted that the failure to obtain the approval was its responsibility but claimed that it had been merely an oversight. An administrative penalty of $1,500 was levied against the consultant for constructing the dry pond without an approval. Liability was not assessed against the municipality as it had exercised diligence in preventing the contravention.

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In Progress

In the Legislature...

Federal Legislation

On March 31, 2000, the bulk of the *Canadian Environmental Protection Act, 1999* came into force. On September 1, 2000 and September 13, 2001 other sections come into force.

Alberta Legislation

On May 30, 2000 the following came into force:

1. The *Wilderness Areas, Ecological Reserves and Natural Areas Amendment Act, 2000.* It creates a Heritage Rangeland classification of protected area.

2. The *Energy Statutes Amendment Act, 2000.* It expands the existing orphan well program for oil and gas wells to other facilities.

Federal Regulations

Amendments to a number of Regulations under the CEPA are in force. The amendments harmonize the wording of the Regulations with the new CEPA, 1999.

Two new Regulations under the *Canadian Environmental Protection Act, 1999* are in force; the *Persistence and Bioaccumulation Regulations* and the *Export Control List Notification Regulations*. The latter Regulation repeals the *Toxic Substances Export Notification Regulations*.

Alberta Regulations

Alberta Environment released two *Codes of Practice* under the *Water Act*: the *Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body*, effective April 1, 2000 and the *Code of Practice for Watercourse Crossings*, effective May 1, 2000.

Cases and Enforcement Action...

In *Tottrup* v. *Alberta (M of E)*, The Alberta Court of Appeal upheld the decision to strike a statement of claim against three of Alberta's Environment Ministers claiming damages to land over a period of years.

In *R.* v. *Starosielski* two convictions under the *Water Resources Act* of Alberta were quashed and a new trial ordered.

In the Alberta Court of Queen's Bench five fish poachers were found guilty on 24 charges under the *Fisheries Act* and sentenced to penalties totalling $28,000.

In *Western Irrigation District* v. *Mertz* the Alberta Court of Queen's Bench ruled in favour of the plaintiff in a dispute on the ownership, use and operation of an irrigation ditch.

In *Alberta Environment* v. *Environmental Appeal Board* the Alberta Court of Queen's Bench upheld the Environmental Appeal Board's jurisdiction to determine if a condition in an Approval is beyond the Director's legal authority.

In *AEC Oil and Gas Co.* v. *Alberta (Minister of Environmental Protection)* the Alberta Court of Queen's Bench ruled that the owner of a Forest Grazing Licence was an "occupant" as defined by the *Surface Rights Act* and consequently entitled to compensation.

A Provincial Court Judge sentenced Geon Canada Inc. to a $25,000 fine and a further $25,000 creative sentence for the release of vinyl chloride gas from their Scotford plant near Fort Saskatchewan in late 1996.

Penalties for fish and game infractions were imposed by Provincial Court Judges:

- $5,000 fine, forfeiture of a rifle and suspention of hunting privileges for three years for hunting moose out of season and giving misleading information to an Officer.
- $1,000 fine each to two men plus a suspention from sportfishing for unlawful possession of bull trout.
- $28,500 fine for unlawfully trafficking in fish.

The Alberta Environmental Appeal Board reconsidered its Cost Decision *re: Nurani and Virji-Nurani* and upheld their original decision.

Alberta Environment issued an Environmental Protection Order to two Calgary companies with regards to release of crude oil and salt water from a pipeline at a site near Morinville.

The Commission for Environmental Cooperation ruled in three recommendations from its Secretariat concerning the preparation of a factual record. The Commission:

- voted down a recommendation to develop a factual record on hog farms in Quebec,
- deferred a decision related to the Friends of the Oldman River submission re the protection of fish habitat in Alberta, and
- supported the development of a factual record on the effectiveness of Mexico's enforcement of environmental laws relating to an abandoned lead smelter in Tijuana.

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

Case Notes

FOIP Fee for Forestry Plans Waived in Public Interest

Alberta Order 99-015 (6 October 1999) Review No. 1480 (A.I.P.C.)

A decision of the Information and Privacy Commissioner ("the Commissioner") on a request for a fee waiver has created interesting implications for the access of information by non-governmental organizations. The Commissioner considered whether the records requested related to a matter of public interest, such that a fee waiver might be granted, and also addressed pointed remarks at Alberta Environment's practices regarding the accessibility of forestry-related information.

Background

In this case, the Applicant made a two-year ongoing request to Alberta Environment for the annual operating plans of Sunpine Forest Products Ltd. ("Sunpine"). Sunpine is required by the terms of its Forest Management Agreement with the Alberta Government to file an annual operating plan for approval. The Alberta Environment estimated a fee of $5,833.43 for the Applicant's access over the two-year period. The Applicant requested a fee waiver on the basis that the material requested related to a matter of public interest[1]. Alberta Environment denied the request. The Applicant then asked the Commissioner to review Alberta Environment's rejection of the fee waiver request.

The matter of access to Sunpine's forestry documents had been before the Commissioner previously. The Applicant had sought access to Sunpine's 1996 annual operating plan and a related fee waiver matter was to be heard by the Commissioner. The matter was resolved through an agreement between Alberta Environment and Sunpine that Sunpine would place copies of certain documents in the Rocky Mountain House library (the Applicant's vicinity and near Sunpine operations) for sign-out by members of the public. The failure of Sunpine to provide documents in accordance with the terms of that agreement sparked the Applicant's ongoing request.

Determination of "public interest" regarding fee waivers

The Commissioner reviewed whether Sunpine's annual operating plan relates to a matter of public interest, as required for a fee waiver, and made reference to a test of public interest applied in a previous fee waiver decision.[2] The test seeks to determine the weight of public interest by balancing the weights of broad versus narrow, with respect to "public", and curiosity versus benefit, with respect to "interest". This test also incorporates the consideration of thirteen criteria relevant to the determination of public interest and two principles that are relevant to the application of the criteria.[3]

A large part of the Commissioner's review dealt with the public availability of the annual operating plan. Evidence provided by the Applicant showed that the annual operating plan was not widely accessible. The Commissioner also determined that the Applicant should not be considered a limited public, holding that the Applicant's functions in providing public education and acting as an "environmental watchdog" benefit other members of the public. It was held that the watchdog function had special significance given cutbacks in Alberta Environment's monitoring abilities. In balancing all the factors related to this matter, the Commissioner found that the annual operating plan related to a matter of public interest.

Fee waiver sends a message

The Commissioner decided to give a full fee waiver, reducing the fee estimate to nil. The main factor in the total reduction of the fee was the lack of accessibility of the requested documents through Alberta Environment. Reference was made to the previous agreement between Alberta Environment and Sunpine that was to have made the annual operating plan publicly available. This practice was criticized by the Commissioner, who stated that Alberta Environment should not be relying on third parties to make records publicly available, especially through unenforceable agreements[4]. The Commissioner also listed means by which Alberta Environment should move to make its records publicly available[5].

Implications of this decision

This decision may facilitate future access to information by public interest organizations such as environmental groups. It is important, however, to keep in mind that each matter will differ with respect to the determination of public interest. Groups seeking access to government information should ensure that they have sufficient evidence to demonstrate both the lack of accessibility and how their gaining access will further the public interest.

The closing comments of the Commissioner may move Alberta Environment to make forestry-related information, and particularly plans and other documents requiring government approval under forest management agreements, more publicly accessible. This would answer growing public interest and concerns about forestry matters in Alberta.

■ **Cindy Chiasson**
Staff Counsel
Environmental Law Centre

1. *Freedom of Information and Protection of Privacy Act* (S.A. 1994, c.F-18.5), s.87(4)(b).
2. Alberta Order 96-002 (21 March 1996) Review No. 1043 (A.I.P.C.)
3. Alberta Order 99-015 (6 October 1999) Review No. 1480 (A.I.P.C.), paragraphs 50-52.
4. *Ibid.*, paragraph 88.
5. *Ibid.*, paragraphs 89-90.

Case Notes

EUB Demands More Effective Public Consultation

Re: Stampede Oils Inc. Application for a Well Licence, Turner Valley Field
(14 December 1999), Decision 99-30 (Alberta Energy and Utilities Board) Application 1031511.

The Alberta Energy and Utilities Board ("EUB" or "Board") decision to deny Stampede Oils Inc. ("Stampede") a well licence demonstrates the EUB's "get tough" policy on ensuring effective communication.

Stampede applied to the EUB for a licence to drill a sour gas well near Millarville. The EUB received objections to the application from area residents and landowners near the proposed well location and directed that a public hearing be held to consider the application and the objections of the residents.

The key issues considered by the Board with regard to the application were the need for the well, the surface impact of the well, potential environmental effects, and Stampede's public consultation efforts, emergency response planning, and capability to drill and maintain the well.

While the Board found that there was a real need for the well and that the proposed location was reasonable, they denied the application on the basis that the company's public consultation and emergency response planning efforts were deficient.

The decision is important in that it signifies the Board's commitment to consultation. The Board is making a renewed effort to promote and ensure effective communication between industry and landowners. The Board believes, rightly, that meaningful dialogue will improve landowner-industry relations. While promoting the consultation process the Board is also prepared to use the hearing process as the "stick" to enforce meaningful consultation. The Board did so in Stampede's case by denying its application.

The Decision is also significant from a planning perspective as it suggests the EUB will impose higher standards when evaluating licence applications near rural residential areas. It is clear from this decision that under such circumstances an applicant is expected to consult with the public with regard to well-site location and any general fears and concerns (real or perceived) the public might have. Above all, a corporation's consultation efforts must provide the public with a sense of trust and confidence and those efforts must continue throughout the application process. It is also important to note that in some circumstances the Board will adjust its application information requirements so that a more detailed emergency response plan (ERP) is submitted at the application stage. In most situations the practice of providing only a general draft ERP at the application stage will no longer be sufficient.

Public Consultation

The Board's decision to deny the licence is interesting because Stampede had exceeded the minimum public consultation guidelines. Stampede's efforts were evidenced by the holding of a public meeting when there was no requirement to do so and having extended the notification zone to 1.6 km from the required 188 m. The public meeting was held after circulation of an information package, which gave rise to numerous statements of concern from area residents and landowners. After the public meeting, Stampede was of the view that the residents and landowners concerns could not be resolved and subsequently filed its application for a well licence with the EUB. Stampede indicated in its application that unresolved public issues warranted the scheduling of a public hearing into the matter.

Stampede's application, however, was for a gas well while Stampede's future development plans were based on potential oil production, that had not been communicated to the public, on the basis that any issues with oil production would be less significant than those associated with a sour gas well. The Board noted that Stampede at no time discussed the potential for oil production in its information package or at the public meeting. Stampede's decision not to advise the area residents of its expectations and plans for an oil development until after the conceptual development plan was requested served to confuse and anger the residents and to alienate them from the proposed well.

The Board found that Stampede should have informed the public that its primary intention was oil and not gas, regardless of the likelihood of recovering either. In doing so, it was the Board's hope and belief, that the impacts associated with both scenarios would be disclosed. In its conclusion the Board decided that there was a lack of meaningful, well-intentioned public consultation or involvement on behalf of the corporation. It was further noted that Stampede's reliance on the minimum public guidelines as being the test for adequate public consultation was unacceptable and that the proper course is for the corporation to decide in each circumstance the level of consultation appropriate to the situation. While all companies know that the Board's guidelines are just that, - guidelines, it may not always be easy to tell under what circumstances any particular guidance should be exceeded. The Board provided little practical guidelines to industry on this point.

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(Re: Stampede Oils Inc. continued from Page 6)

With respect to well-site placement, the corporation consulted with the landowner on whose land the well was to be placed, however gave no opportunity for consultation to the public. In the Board's opinion, the public as well as the landowner should have an opportunity to provide input as to the preferred surface location for a well. While generally that is appropriate, the landowner's preferences should be given considerable weight.

Perhaps the most important factor leading to the Board's rejection of the application was that Stampede's consultation process failed to provide the public with a sense of trust or confidence. In this instance, Stampede recognized that the area in which it was drilling had in recent years undergone a significant change in residency and was currently occupied by a large number of urban residential landowners. In the Board's opinion, Stampede, having recognized this change, should have approached the consultation process with this knowledge in mind. Finally, the Board criticized Stampede for failing to continue with the consultation and negotiation process once it appeared that the application was headed for a hearing. The EUB made it clear that ongoing communication is essential in meeting the application requirements and stated that it is the responsibility of both parties to ensure that communication continues.

Emergency Response Planning

In its efforts to meet the Board's emergency response planning requirements, Stampede prepared a draft generic Environmental Response Plan ("ERP") and stated at the hearing that the details of the plan were to be updated once a well licence was issued. In the opinion of the corporation, it was not appropriate to develop or discuss emergency response procedures or address special concerns with residents until it had obtained a licence. The Board noted that although Stampede was aware of some very specific public concerns, it did not attempt to address those concerns through any discussions with the residents. This treatment of residents concerns was unacceptable to the EUB as industry is expected to discuss special needs and concerns with all residents within an Environmental Planning Zone ("EPZ").

The Board also expected that companies would develop acceptable procedures for addressing special needs in its draft ERP as well as during the public consultation process, and prior to submitting an application to the EUB. Following this decision, a company is expected to adjust the size and configuration of the EPZ if necessary to respond to public concern. An applicant should also work to establish reasonable site-specific emergency response procedures in consultation with the public. In this instance, Stampede failed to address any site-specific matters in its draft ERP or even to identify all special needs of the community prior to submitting its application.

The decision re-emphasizes the necessity for meaningful consultation. Effective consultation requires a consultation strategy be developed prior to "going public". At the same time, the Board has injected some uncertainty into the process about the sufficiency of its own guidelines on consultation and when they should be exceeded with the level of detail required for ERPs.

■ **Shawn Denstedt**
Bennett Jones

Administrative Penalties

The following administrative penalties over $3,000 were issued under the *Environmental Protection and Enhancement Act* since the last issue of *News Brief*:

- $4,000 to Sherritt International Corporation of Fort Saskatchewan for the release of untreated wastewater from the overflow pipe of the catchment basin into a nearby creek. As well, the catchment basin's submersible pump had been damaged and water was not being pumped for nine days. Water samples from the creek indicated elevated levels of certain substances. The penalty was issued under s.213(e) of the *Environmental Protection and Enhancement Act*.
- $4,500 to the Town of Strathmore for irrigating with treated wastewater contrary to their approval conditions and failing to report the contravention. The penalty was issued under s.213(e) of the *Environmental Protection and Enhancement Act*.
- $12,000 to the Town of Canmore for failing to operate their wastewater treatment facilities to comply with potable water limits and for failing to immediately report contravening their approval. The penalty was issued under s.213(e) of the *Environmental Protection and Enhancement Act*
- $10,000 to ABL Ventures Ltd. of Strathmore for construction of an extension to the water distribution and wastewater collection systems without an approval, amendment to the approval, or letter of authorization, in violation of s. 59 of the *Environmental Protection and Enhancement Act*. The penalty has been appealed.

The following administrative penalties over $1,000 were issued under the *Public Lands Act* and *Forests Act* since the last issue of *News Brief*:

- $2,500. to Olympia Energy Inc. of Calgary for contravening terms and conditions of their lease contrary to s.47.1 of the *Public Lands Act*.
- $1,100. to Post Energy Inc. of Calgary for unauthorized use and contravening terms and conditions of their lease in violation of s.47(1) and s.47.1 of the *Public Lands Act*.
- $1,252.24 to Sunshine Gas Co-op Ltd. of Blackie for unauthorized use of public land contrary to s.47(1) of the *Public Lands Act*.
- $1,412. to Northstar Resources Ltd. of Calgary for unauthorized use of public land contrary to s.47(1) of the *Public Lands Act*.
- $7,860. to 274599 Alberta Ltd. of High Prairie for unauthorized use and contravening terms and conditions of their lease contrary to s.47(1) and 47.1 of the *Public Lands Act*.
- $1,500. to Altana Exploration Limited of Calgary for contravening terms and conditions of their lease in violation of s.47.1 of the *Public Lands Act*.

Action Update

The Species at Risk Act

The federal plan for protecting species at risk was announced by Minister Anderson in December, 1999. The plan intends to build upon the existing *Accord for the Protection of Species at Risk* and to promote voluntary stewardship efforts through incentive programs and funding. In addition, the plan provides for introduction of federal legislation designed to protect Canada's species at risk.

Federal legislation - Bill 33, *An Act Respecting the Protection of Wildlife Species at Risk in Canada* ("SARA") – was tabled by Minister Anderson in April of this year. The intention of SARA is to provide a balanced approach to protection of species at risk by promoting cooperation among federal, provincial and territorial governments, and by promoting voluntary stewardship efforts by individuals. In the event such efforts fail to provide adequate protection of species and their critical habitat, SARA is intended to provide a "safety net".

Powerful legislation is required to support the commendable intentions of the federal plan for protecting species at risk. However, our view is that SARA fails to provide strong legislative support for the federal plan. This legislation is weakened by a political listing process, a restrictive application of prohibitions, a discretionary critical habitat safety net and the use of landowner compensation.

Listing

In Canada, the scientific assessment and identification of species at risk is determined by the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") composed of representatives from federal, provincial, territorial and private agencies, as well as, independent experts. The list of species at risk prepared by COSEWIC will not be adopted under SARA. Rather, a political decision as to which species should be considered at risk for the purposes of SARA will be made. COSEWIC will merely act as an advisor to the federal government on the issue of species at risk.

This listing process is rationalized as being necessary to consider the social and economic implications of listing a species. However, this rationale is flawed. The determination of whether a particular species is at risk is a scientific matter. Once this determination has been made, social and economic concerns can be addressed in formulating a response to this fact.

Failure to list a species that has been scientifically determined to be at risk means that it will derive no benefit from SARA. There will be no prohibition against killing the species, no recovery plan to canvass protection alternatives and no financial support for conservation. In addition, the public awareness and voluntary efforts that follow upon listing will be curtailed.

Prohibitions

SARA prohibits the killing, harming, possessing, collecting, selling or trading of a species that is listed as endangered, threatened or extirpated. In addition, the destruction of the residences of endangered or threatened species is prohibited.

However, the scope of application of these provisions is limited by the overly restrictive approach to federal jurisdiction adopted in SARA. These prohibitions apply only to aquatic species, migratory birds and species on federal lands. Unlike Bill C-65, the proposed *Canada Endangered Species Act* that died on the order table in 1997, there is no provision made for the protection of transboundary species.

In our view, there is a good argument that these prohibitions could be applied to all species at risk wherever they are located in Canada given the Supreme Court of Canada decision in *R.* v. *Hydro-Quebec*.[1] This expanded application of the prohibitions could be justified as a legitimate assertion of federal jurisdiction over criminal matters.

Critical Habitat Safety Net

SARA provides that where the cooperation of governments and the voluntary stewardship efforts are not sufficient to protect critical habitat of species at risk, the federal government has the discretion to cast the critical habitat safety net. This safety net would allow the federal government to protect critical habitat on non-federal lands where other effective means are not in place or cannot be put into place.

Given the intimate link between habitat loss and species extinction, obligatory critical habitat protection for *all* listed species would be the most effective legal means to protect species at risk. At the very least, SARA should mandate critical habitat protection for all listed species on federal lands and for all species under established federal jurisdiction. An express obligation, not a discretion, to invoke the critical habitat safety net when all possible stewardship incentives and other efforts are insufficient to protect critical habitat should be imposed by SARA.

Compensation

Under SARA, landowners will be entitled to apply for compensation for any extraordinary impacts caused by application of the federal safety net. Landowner compensation for limitations on land use could have several grave consequences.

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(Appellants Could Face "Mission Impossible"...continued from Page 2)

If not, we fear we may see more appeals like the recent *Haugen et al* v. *Director, Parkland Region, Alberta Environment re: ADM Agri-Industries Ltd.*[6] In that appeal, more than 100 citizens who had been working as a group discontinued their appeals in protest over being rejected on applications for interim costs and a time extension to deal with a lengthy submission received from another party just before the deadline for submissions. These unrepresented parties felt that they could not effectively continue with their appeals in those circumstances. Given that one of the main focuses of the appeal process under EPEA is to enable public participation in environmental decision making, it is regrettable that the process appears to be moving in the opposite direction.

■ **Cindy Chiasson**
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1. M. Valiante and P. Muldoon, "A Foot in the Door: A Survey of Recent Trends in Access to Environmental Justice" in S. Kennett, ed., *Law and Process in Environmental Management* (Calgary: Canadian Institute of Resources Law, 1993) 142 at 165.
2. See, for example, the Board's 1998 annual report, available on the Internet at <http://www.gov.ab.ca/eab/eab98rep.pdf>.
3. *Cost Decision re: Bernice Kozdrowski* (7 July 1997) 96-059 EAB at 16.
4. *See Cost Decision re: Nurani and Virji-Nurani* (6 March 2000) 97-026 EAB and *Stelter* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection re: GMB Property Rentals Ltd. (Cost Decision)* (18 June 1998) 97-051 EAB.
5. *Ibid.* See also *Cost Decision re: Cabre Exploration Ltd.* (26 January 2000) 98-251 EAB.
6. (26 April 2000) 99-012-016, 99-019-126 and 00-001-002-DOP (EAB).

(Liability of Developers . . .continued from Page 3)

These cases are interesting in that they are the first in what could become a trend towards looking at the relationship of parties to the approval holder, in addition to the actual approval holder, when considering liability for operating without an approval (or violating conditions of an approval). AENV considers the facts of each case to determine the specific role each party played in the contravention and the degree of their culpability and diligence.

The approval holder cannot divest itself of liability simply by hiring an "expert". However, the party that actually required the approval, (the municipality), may not be the one who is penalized for the failure to obtain the approval or operating in contravention of the approval. One of the factors that may be considered is whether the municipality advised the developer or consultant of the approval requirements and took steps to prevent the construction without the approval.

These cases also are interesting in that the administrative penalty included an assessment reflecting the economic benefit obtained from committing the contravention. This is especially applicable in situations where the economic benefit is easily quantifiable and there is evidence to show it was a relevant factor in the commission of the contravention, (e.g. avoiding the cost of standby charges).

(*The Species at Risk Act*...continued from Page 8)

Firstly, this approach could create a legal entitlement that does not exist at common law. In Canada, cases indicate that compensation is a legal requirement only if property rights are expropriated, but not for mere regulation of land use. Further, this approach implies that property rights grant landowners the inalienable entitlement to forever destroy habitat on which species at risk depend on for survival. Our view is that, in the absence of regulation to the contrary, if such an entitlement exists it is not a property right but rather a civil entitlement.

Secondly, because evidence of intent to develop critical habitat will likely be required to obtain compensation, this approach may promote development planning that would not otherwise occur. Without doubt, implementation of some development plans would prove more lucrative than federal compensation.

Finally, this approach will burden the excellent work of conservation agencies. These agencies depend heavily upon landowners choosing not to develop habitat for reasons other than economic gain.

Conclusion

Powerful legislation is required for the effective protection of species at risk and their critical habitat. However, SARA is not a powerful piece of legislation. This legislation will not protect all species that are scientifically determined to be at risk throughout Canada. Nor will SARA ensure the protection of the critical habitat of species at risk.

■ **Brenda Heelan Powell**
Staff Counsel
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[1] *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213.

Journal of Environmental Law and Practice – Call for Papers

Environmental Law Centre Staff Counsel, Andrew Hudson, edits the *Journal of Environmental Law and Practice*, which is published by Carswell in association with Gowling, Strathy & Henderson. The Journal presents a wide range of articles on Canadian environmental law and serves as a forum for commentary and dialogue.

We welcome responsible comment from all sides of any environmental legal issue. In addition to full articles we encourage submission of practice notes, case comments and book reviews on environmental law and policy in Canada.

Papers to be considered for publication should be sent or emailed to the Editor in Chief.

In general, articles should not exceed 10,000 words, 3,000 words for practice notes or case comments and 1,500 words for book reviews.

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Environmental Law Centre Brown Bag Lunch Seminars - Call for Speakers

The Environmental Law Centre has revived its popular Brown Bag Lunch Seminars. At these lunch hour events, Environmental Law Centre staff counsel make informal presentations at the Centre premises on an environmental law or policy topic. The seminars attract members of the local legal community as well as other interested persons.

The Centre is interested in opening up this forum to speakers from the larger legal or legal related community. If you have environmental law or policy information or ideas you would like to share and are interested in discussing volunteering your time to make a presentation at a Brown Bag Lunch Seminar, please contact Brenda Heelan Powell.

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Practical Considerations for Insolvency Professionals when Dealing With Environmentally Contaminated Lands

Perhaps the first consideration for any insolvency professional is how to limit their personal liability. Section 14.02 of the *Bankruptcy and Insolvency Act*[1] ("BIA") provides that an insolvency professional is not personally liable for any environmental condition that arose or damage that occurred (i) before their appointment or (ii) after their appointment unless it results from their gross negligence or willful misconduct. The conduct required to meet a gross negligence or willful misconduct standard is case specific. However, it is highly advisable to consider maintaining the debtor's environmental inspection and monitoring programs, especially when dealing with facilities which have the potential to release a substance.

Unless a debtor has a recent assessment in its records, an insolvency professional may wish to consider commissioning an environmental site assessment to establish an environmental baseline as at the time of appointment. Such an assessment could provide an evidentiary basis to dispute liability for any environmental matter alleged to have occurred or arisen after appointment. It will also assist in prioritizing reclamation projects and inspection and monitoring programs, as well as ensuring compliance with reporting and disclosure requirements.

An insolvency professional is required to comply with the debtor's regulatory reporting and disclosure requirements.[2] Such requirements are found strewn throughout numerous statutes, regulations and the terms and conditions of the debtor's regulatory approvals. It is advisable to compile a checklist of all such reporting and disclosure requirements and to confirm that checklist with the appropriate regulators.

It is also advisable to consider retaining the debtor's former environmental and/or operations personnel, subject to labour law issues. Such personnel have site specific experience that will assist in continuing environmental inspection and monitoring programs, compiling regulatory reporting checklists and advising of any outstanding orders issued against the debtor. Hopefully, such personnel will also bring credibility and a good working relationship with the regulators.

Section 14.06(4) of the BIA allows an insolvency professional to shield a debtor's estate from the costs associated with cleaning up environmental conditions and damages. That section applies if an order is issued against the debtor (or an insolvency professional in their appointed role) which "*has the effect of* requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in the bankruptcy, proposal or receivership". The order need not be an "environmental order" on its face, such as an Environmental Protection Order issued pursuant to the *Environmental Protection and Enhancement Act*. A typical facility abandonment order issued by the Alberta Energy and Utilities Board would likely fall within section 14.06(4) given its resource conservation and pollution control mandates.[3]

Less certain, however, are orders issued by other regulators. For example, section 7(b) of the *Occupational Health and Safety Act* empowers an occupational health and safety officer to "order the person responsible for the work being carried out... to take measures as specified in the order... necessary to ensure that the work will be carried out in a healthy and safe manner". Similarly, section 45(1) of the *Safety Codes Act* provides that a safety codes officer may issue an order requiring specified work to be undertaken if they believe that "the design, construction, manufacture, operation, maintenance, use or relocation of a thing or the condition of a thing, process or activity...is such that there is danger of serious injury or damage to a person or property". It is conceivable that such orders, if drafted to avoid having the effect of requiring the remedy of an environmental concern, could fall outside of BIA section 14.06(4).

In order to rely on BIA section 14.06(4) to the greatest extent possible, a receiver or receiver/manager should ensure that their court appointment order expressly empowers them to "abandon, dispose of, otherwise release or renounce" interests in real property. Further, they may wish to consider an appointment order which *requires* them to do so if an order within the meaning of section 14.06(4) is issued. Such a provision makes it clear that the costs of reclaiming environmentally contaminated lands will not be borne by the debtor's estate. Another useful provision to include in an appointment order is an automatic stay of any order within the meaning of section 14.06(4) as at the time of appointment. Such a provision avoids the difficult task of the receiver or receiver/manager having to determine, within 10 days of appointment, whether any orders have been issued against the debtor.[4]

A cooperative working relationship with the regulators is invaluable, especially in circumstances where contaminated lands will eventually be released or renounced. Under a liquidation scenario, the insolvency professional may need access to the environmentally contaminated lands for a number of purposes, including site security, inspection and monitoring and preparing the debtor's personal property for sale. Regulators will want to ensure that any security granted to them by the debtor for reclamation costs is dealt with concurrent with the release or renouncing of the contaminated lands. A third party may require access to the debtor's contaminated lands, and as such access has historically been pursuant to the debtor's surface rights, the third party will require its own surface rights when the debtor's interest is released or renounced.

1. See also *EPEA*, s. 226(3).
2. *BIA*, s. 14.06(3).
3. *Oil and Gas Conservation Act*, R.S.A. 1980, c. O-5, s. 4(a) and (f); *Coal Conservation Act*, R.S.A. 1980, c. C-14, s. 4(d) and (e); *Oil Sands Conservation Act*, S.A. 1983, c. O-5.5, s. 3(a) and (e).
4. *BIA*, s. 14.06(4)(b).

Ask Staff Counsel

When Public Consultation Becomes *Pulp Fiction*...

Dear Staff Counsel:
A large paper company is proposing to build a pulp mill near the community where I live. The company has scheduled meetings with the public in order to describe the project and its potential impacts, and address community concerns. Many people in my community are concerned about the possible negative environmental effects of the proposed mill. The meetings are scheduled to take place on three consecutive weekday afternoons. I feel that this schedule will make it impossible for many to attend. Is the company obliged to schedule the meetings so that everyone can attend? Are they required to obtain public input on the design of the public consultation program?

Sincerely, N. Earnest

Dear N. Earnest:
The public consultation program that has been set up by the company is a required component of the environmental impact assessment ("EIA") imposed on certain proposed pulp mills under the *Environmental Protection and Enhancement Act* ("EPEA") and the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*. EPEA provides that the proponent (in your case, the company) is responsible for carrying out the EIA. Although the Act sets out minimum procedural requirements for the public consultation program, the design, scope, and timeline of the program are left to the proponent's discretion. The paper company is not specifically required under the Act to schedule the meetings so that all concerned citizens can attend. Nor must they involve the public in the design of the program.

The news is not all bad, however. A proponent that fails to carry out a comprehensive and effective public consultation program may face serious practical consequences. Firstly, the sufficiency of the program will be reviewed as part of the EIA report, which the proponent must submit to the EIA director. The director is a designated official with Alberta Environment, and is responsible under EPEA for reviewing EIA reports. According to Alberta Environment, factors to be considered by the EIA director include:

-whether those directly affected have been notified and adequately informed,
-whether all relevant issues and potential effects have been identified, and
-whether the public has had a reasonable opportunity to participate in the EIA process.

The determination of the adequacy of the program is within the EIA director's discretion. If the EIA director finds it inadequate, he or she may suggest or require that the company contact other stakeholders, hold additional meetings, or take other specific steps. Most proponents are eager to avoid such surprises, and design effective programs in order to reach an early and broadly based consensus. In your case, the company may be unaware of the problems you have identified. Contact the company, and inform them of your concerns over the adequacy of the program. They may be receptive to suggestions for more convenient meeting times.

Once the EIA director is satisfied with the EIA report as a whole, the report and the company's application for an approval to build the mill will be forwarded to the Natural Resources Conservation Board ("NRCB") for review, as required by the EPEA and the *Natural Resources Conservation Board Act*. Under the NRCB Act, the company cannot proceed with the pulp mill without an approval from the NRCB (s. 5). The Act also requires that the Board hold a hearing if written objection is received from a person directly affected, and the objection has merit (s. 8(3)). The Board may also elect to hold a hearing on its own initiative (s. 6(b)).

Any proponent that has not attempted to reach a consensus through an effective public consultation program before its application reaches the NRCB could face unwelcome consequences. These include the possibility of expensive delays and increased public hostility as a result of an acrimonious and drawn out hearing before the Board.

As a result, many proponents seek public input into the design of public consultation programs, even though the law does not specifically require them to do so. Public input is often essential to win public confidence in the program, reach an early consensus on the proposal itself, and ease the approval process.

In your case, the company is likely keen to promote goodwill and avoid regulatory delays. Alert them to the program's deficiencies, and remind them that early consensus is in their best interest. A wisely directed company would jump at the chance to establish a strong rapport with concerned citizens in the surrounding community. If the company's response is not to your satisfaction, contact Alberta Environment. Looking ahead, you may consider submitting a written objection to the NRCB, and presenting your concerns to the Board at the subsequent hearing.

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