News Brief

ENVIRONMENTAL LAW CENTRE

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In This Issue

Message from the New Minister

Hon. Halvar C. Jonson

I am pleased to be the new Minister of Environment. Having a strong interest in Alberta's environment and being Alberta-born and raised, I am excited about the challenges and opportunities offered by this department.

I grew up on a farm west of Boyle and that upbringing provided valuable experience for my new portfolio. Our lives were affected by the health of our crops and animals, the productivity of our soil and the quality of our water. I believe I understand the connection of Albertans to our natural heritage.

My shared responsibility with all Albertans is to ensure that we have the best place to raise our children, now and in the future. In order to fully enjoy our natural environment, we need to work toward the best overall health of Albertans and of our natural heritage. This largely depends upon protecting our quality of air, water, land, habitat and wildlife.

One of the main reasons I became involved in public service was to try to meet the needs of all Albertans, both in rural communities and urban centres. I would like to be remembered for listening to the people of our province. My decisions on policies and legislation will continue to be based on informed discussions and input I receive from Albertans.

Today, there is a greater demand for Alberta's natural resources than ever before, both from people wanting to enjoy all areas of our province, as well as companies wishing to proceed with development.

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

A major challenge is achieving a balance between protecting the environment and building Alberta's economy. Some of our most important decisions will involve deciding whether development should proceed or not proceed, based on careful examination of environmental impacts of development.

We can have economic growth and prosperity provided we maintain or enhance our environment at the same time. Where adverse impacts of a development project or cumulative effects of many developments can not be mitigated, then we will not want that development to proceed. Our decisions and recommendations will reflect this philosophy.

Climate change is another major issue, nationally and internationally. Alberta is one of the provinces leading this work in Canada and we will continue to be proactive through Climate Change Central and other initiatives.

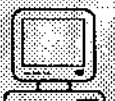
Environment Ministers before me have made excellent progress in many areas, including creating many parks and protected areas. I would like to continue this work, with the goal of preserving significant additional land for future generations of Albertans.

My department has numerous areas of responsibility, with the added challenge of responding to unforeseen emerging issues. At the same time, Albertans have a growing interest in environmental issues, especially with our strong economy and resulting economic development.

Alberta Environment's dedicated and committed staff will continue to work hard on behalf of Albertans.

I look forward to working with the people of our province and creating partnerships with communities, industry, stakeholders, environmental groups and individuals. Together, we will make decisions that are fair and beneficial for all Albertans.

■ **Hon. Halvar C. Jonson**
Minister of Environment
M.L.A. Ponoka-Rimby



What's New on the ELC Website?

Go to the "**What's New?**" link at our website – **www.elc.ab.ca** – and check the latest additions such as:

- ELC Comments on Alberta's Draft Industrial Release Limits Policy
- ELC Comments to the Standing Committee on Environment and Sustainable Development of the House of Commons on Bill C-33, An Act Respecting the Protection of Wildlife Species at Risk in Canada.
- ELC Presentation to The Standing Policy Committee on Agriculture, Environment and Rural Affairs on Municipal Taxation Treatment of Rural Lands Not Used in Agricultural Operations.
- ELC Comments on Guidelines under Section 46 of the *Canadian Environmental Protection Act.*

By Jillian Flett, *Alberta Environment*

Alberta Environment Approves New Compliance Assurance Principles

Alberta Environment (AENV) recently adopted department-wide Compliance Assurance Principles (Principles). These Principles set out the department's direction for a harmonized, effective approach to its compliance assurance business.

Alberta Environment uses a blend of education, prevention and enforcement activities to achieve its goal of ensuring regulated parties are in compliance with legislation. The Principles set out how AENV will and in many cases already does, use education, prevention and enforcement to achieve its compliance assurance goal.

The Principles build on AENV's existing "legislation specific" compliance assurance programs and set the foundation for a clear, co-ordinated and consistent department wide approach to all of AENV's compliance assurance activities. They set out minimum standards for the planning, delivery, measurement of and reporting on compliance assurance activities.

The following compliance assurance activities are included in the Principles:

- staff conduct and identification,
- staff training,
- education and prevention activities to promote compliance,
- reporting noncompliance,
- conducting investigations,
- enforcement responses,
- debts collection and cost recovery and release of information relating to compliance assurance activities.

The Principles were developed in consultation with Alberta Justice and Alberta Agriculture Food and Rural Development, who also have a role in administering some of AENV's legislation. AENV's three Services (Natural Resources Service, Land and Forest Service and Environmental Service) and other agencies administering AENV legislation will follow the Principles in the development and delivery of their "legislation specific" programs.

Implementation of the Principles will be undertaken in a staged approach over the next few years. Some of the Principles are already being met, others can be implemented relatively easily by changing some program elements and still others may be implemented over a longer timeframe as legislative amendments are made.

The Compliance Assurance Principles are available on Alberta Environment's web page at *www.gov.ab.ca/env/ protenf.html*

In Progress

In the Legislature...

Federal Legislation

Bill C-27, the *Canada National Parks Act*, passed third reading June 13, 2000 and comes into force on proclamation.

Alberta Legislation

Sections 1 and 2 of the *Energy Statutes Amendment Act, 2000* were proclaimed into force June 30, 2000.

Federal Regulations

As of May 4, 2000, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* are in force. The Regulations set out provisions for violations of the *Health of Animals Act* and the *Plant Protection Act* as well as their corresponding regulations.

The Pest Management Regulatory Agency has amended the *Food and Drug Regulations* to approve the application for registration and/or establish Maximum Residue Limits for a number of pesticides.

A number of new regulations under the new *Nuclear Safety and Control Act* came into force on May 31, 2000.

As of July 27, 2000 amendments have been made to the *Law List Regulations* and *Inclusion List Regulations* to ensure that approvals of mining projects in the Yukon are subject to the *Canadian Environmental Assessment Act.*

Alberta Regulations

The *Oil and Gas Conservation Regulations* have been amended by AR 82\2000 to require the licensee to provide for additional existing abandonment payment for proper abandonment of a well.

There are several new regulations under the *Electric Utilities Act.*

Cases and Enforcement Action. . .

Alberta Environment issued Environmental Protection Orders to:

- T.M.T. Resources Inc., operators of a pipeline site near Swan Hills, related to the release of salt water and crude oil at three sites along a pipeline in 1999. The Order was issued after it was determined that remedial work had not been completed on contaminated soil and requires that it be done according to an approved plan.
- The Estate of A.R. Taylor of Calgary and C. Graham of Calgary, executor of the estate, regarding lands contaminated with hydrocarbons that exceed the Level III criteria of the Alberta Management of Underground Storage Tanks Guidelines. Contamination is believed to have spread to adjacent properties, the Parties have not investigated the extent of the contamination, on-or-off-site, and have not done any clean up. The Order requires the parties to remediate the site in accordance with an approved plan and schedule.

The Orders are issued further to s.102(1) of the *Environmental Protection and Enhancement Act.*

Lynn Steadman of the County of Thorhild was convicted in a prosecution concerning the application of a pesticide in a manner not in accordance with the regulations and the label for that pesticide, in violation of s.156 of the *Environmental Protection and Enhancement Act.* This resulted in a fine of $2,500 or 90 days incarceration plus a creative sentence of $2,500 to be paid to Lakeland College at Vermilion for the Environmental Research Account.

The Alberta Environmental Appeal Board issued a Report and Recommendations in *Ainsworth Lumber Co. Ltd. and Footner Forest Products Ltd.* v. *Director, Northwest Boreal Region, Alberta Environment.* The appeals concern an Approval and an Amending Approval issued to the respective companies for the construction, operation and reclamation of an oriented strand board plant. At issue was the Director's discretion to rely on technology-based standards when issuing approvals that were more strict than the emission limits specified in the appropriate regulation. The Board determined the "discretion exercised by the Director ... was within the Director's authority under the Act and was reasonable." Two Ministerial Orders were issued based on the recommendations of the Board.

The Alberta Natural Resources Conservation Board approved the application by United Industrial Services Ltd. to expand the quartz silica quarry operations of its subsidiary, Alberta Silica Corporation, near Peace River. The Board determined the application to be "in the public interest". The application did not require a public hearing.

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

In Progress reports on selected environmental activity actions of the legislature, government, courts and tribunals. A more complete report on these matters can be obtained by subscribing to the *Regulatory Review*, a monthly subscription report prepared by the Environmental Law Centre. To subscribe or obtain further information call (780) 424-5099 or visit our website at www.elc.ab.ca.

A Pesticide Primer and the Need for Federal Action

Elaine L. Hughes, *Faculty of Law, University of Alberta*

In May 2000 the House of Commons' Standing Committee on Environment and Development released a report entitled *Pesticides: Making the Right Choice for the Protection of Health and the Environment*. (1) It is an important document which is bound to be influential on the ongoing efforts to modernize Canada's 30 year old pesticide legislation.

This brief article will review some of the background to the Report and point out a few of its major findings and recommendations.

What s Happened So Far?

Canadian pesticide legislation in the 1920s and 30s controlled the labeling of agricultural 'poisons' primarily to "...ensure product efficacy and to avoid fraud."(2) Then, sparked by chemical weapons research in the World War II era which discovered the insecticidal properties of many compounds, (3) the use of synthetics for agricultural purposes became widespread in post-war North America. (1) The virtually unregulated use of organochlorine, organophosphate and carbamate insecticides and phenoxy herbicides was largely accepted until the 1962 publication of *Silent Spring*, (3) when Rachel Carson's stunning indictment of synthetic pesticide misuse became one of the major triggers for the environmental movement in North America.

In Canada, the government response to the dawn of environmentalism was, in the early 1970s, to establish basic regulatory control over waste discharges. (4) On the pesticide issue, the federal government moved to increase its regulatory control over the handling, use and manufacture of pesticides, passing major amendments to the *Pest Control Products Act*, RSC c. P-9, in 1969, and establishing the *PCP Regulations*, CRC c. 1253, in 1972. The core of the system is that pesticides cannot be imported or sold in Canada unless they are registered and properly labeled. (1,2) Registration applications must be supported by industry data that permits the government to assess the public health and environmental risks, as well as the value and efficacy, of the 'control product.'

By the mid-1980s many inadequacies of the first generation of general environmental legislation were becoming apparent. For example, the need to prevent as well as to control persistent, bioaccumulative toxic substances, and to deal with transboundary pollutants, as well as the need for more sophisticated enforcement mechanisms, and a recognition of the need for public participation in decisions, were all factors that government sought to include in a second generation of laws. (4) On pesticides, a 1987 study by the Law Reform Commission (2) examined the need to update the *PCP Act*, citing a litany of problems with which the statute was failing to cope, such as the agonizingly slow safety re-evaluation of older chemicals. (2) However, instead of updating the legislation (as was done for other pollutants), the federal response was to create a 'multi-stakeholder team' to study the situation further. (5) In 1990, after two years of cross-country public consultation and negotiation, the Review Team majority agreed to a set of reform ideas now known as the 'Blue Book.'(5)

In 1994, a proposal for implementing the Blue Book was developed; this 'Purple Book'(6) plan centered on the creation of a new branch of Health Canada to take over the current Act from Agriculture. Known as the Pest Management Regulatory Agency (PMRA), (9) it came into existence in 1995 with an obscure legal foundation, and has since been running the entire pesticide system (see: SI/95-44, pursuant to the *Public Service Rearrangement and Transfer of Duties Act*, RSC 1985, c. P-34.) Amazingly, these changes were done without amending the *PCP Act* itself, so although the legislation has been tinkered with, the 1969 statute has never been substantially revised, (1) virtually skipping the entire second generation of environmental law in Canada.

Since its inception the PMRA has been largely inscrutable. (1,7) Environmentalists, other government departments (8) and even the chemical industry have complained about being "left in the dark" over its activities, (1) citing examples such as the inability to discern the basis for risk assessments or for decisions about product registrations. (8)

The PMRA did produce a five-year strategic plan (9) which contains a useful comparison of the Blue Book recommendations, the Purple Book plans for how to proceed, and the PMRA implementation activities to date. In early 1999 it also produced a two page document outlining its own *Proposed Amendments to the Pest Control Products Act and Regulations*; (9) a draft Bill of the new Act has reportedly also been produced, but is not publicly available.

An audit of PMRA operations in 1999 by the Commissioner for Environment and Sustainable Development was highly critical of both management deficiencies, and its record of "inaction and unfulfilled commitments" on issues such as the re-evaluation of older chemicals. (7) The current Standing Committee study reached similar conclusions, criticizing not only the PMRA as an institution, but also describing its proposals for actions, policies and new legislation as deficient and far too limited. (1) The Committee has thus put forward its own collection of reform proposals. In the process, it has if nothing else bested the PMRA by putting together a clear, understandable, publicly available explanation of the current pesticide control system, including a very good discussion of the current methods of assessing health and environmental risks, and an explanation of the role of more obscure influences on decision-making (such as various advisory bodies and interdepartmental 'MOUs'). (1)

(Continued on Page 10)

Case Notes

Liability of Companies for Land Contamination upon Amalgamation and Retrospectivity in British Columbia's *Waste Management Act.*

The British Columbia Hydro and Power Authority v. *The Environmental Appeal Board* (6 April 2000), Vancouver A992600 (B.C.S.C.)

Introduction

Under the Alberta *Environmental Protection and Enhancement Act*[1] the definition of "person responsible" for either a spilled substance or contaminated land includes the owner or prior owner of the substance or the land. It is sometimes difficult to find or identify prior owners. Sometimes prior corporate owners have merged with or been taken over by another corporation. Is the new corporation a prior owner? This issue was recently addressed by the British Columbia Supreme Court in the context of the B.C. *Waste Management Act* in *The British Columbia Hydro and Power Authority* v. *The Environmental Appeal Board* (6 April 2000), Vancouver A992600 (B.C.S.C.).

At issue in this judicial review is whether the British Columbia Hydro and Power Authority (BC Hydro), the product of an amalgamation of the British Columbia Electric Company (BC Electric) and the British Columbia Power Commission (BC Power), should be held responsible for BC Electric's actions of land contamination, which are now contrary to the British Columbia *Waste Management Act*[2]. This issue arose as a result of British Columbia Environmental Appeal Board's decision where it was decided that *The British Columbia Hydro and Power Authority* v. *The Environmental Appeal Board* (6 April 2000), Vancouver A992600 (B.C.S.C.)

> the Deputy Director of Waste Management erred in law when he found that BC Hydro could not be named as a 'responsible person'... [Therefore], ... BC Hydro can be liable for the pre-amalgamation actions of BC Electric and may be named a responsible person under ... the *Waste Management Act.*[3]

Background

The Environmental Appeal Board's decision was partially based on a clause of the amalgamation agreement which reads:

> [BC Hydro] shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, ... and shall be liable for all duties, liabilities and obligations, ... of each of [BC Hydro], [BC Electric], and [BC Power Commission] *immediately before the amalgamation* (emphasis added).[4]

BC Hydro argued that the Environmental Appeal Board's finding was

> wrong in law because of the words 'immediately before the amalgamation' that appear at the end of [the clause]... [T]he plain meaning of those concluding words is that [BC Hydro] assumed only those duties, liabilities and obligations of BC Electric that existed prior to the amalgamation. Because the *Waste Management Act* did not become law until 1997, there was no responsibility of BC Electric under that statute for [BC Hydro] to assume as of the date of amalgamation.[5]

However, the Supreme Court of British Columbia agreed with the Environmental Appeal Board's reasoning that the purpose of 'immediately before the amalgamation' in the clause was

> to identify the date on which the petitioner became the beneficiary of all the property of BC Electric and on which it assumed all of that company's duties, liabilities and obligation. Those duties, liabilities and obligations ... were ongoing and it was the clear intention of the Legislature that they be assumed by the petitioner. Therefore, any legal responsibility under the *Waste Management Act* that would have fallen on BC Electric falls on [BC Hydro].[6]

Successor Responsibility

One concept at play in this case is the responsibility of the amalgamated company for the 'sins' of its predecessors. This concept is not a new one. "A successor company that has been merged or amalgamated with a responsible person will, itself, become a responsible person."[7] This is "a fundamental principle of corporate law that, in an amalgamation or merger, all liabilities of the pre-existing companies survive in the amalgamated or merged company."[8] As stated in the case at hand, the court's conclusion is in keeping with *R.* v. *Black and Decker Manufacturing*[9], which "sets out the nature of an amalgamation between corporate persons and the legal responsibilities that pass to the surviving entity as a result of the pre-amalgamation conduct of one of its components."[10]

(Continued on Page 7)

(Liability of Companies for Land Contamination...continued from Page 6)

Retrospectivity

The second concept at play in this case is retrospectivity in statutes. This is a more recent concept that is being used more and more in environmental legislation. A retrospective statute is one which "... operates forward in time, starting only from the date of its enactment, but from that time forward it changes the legal consequences of past events."[11]

Retrospective laws are generally considered objectionable because we feel that a person is entitled to know in advance what legal consequences his or her acts have.[12] Consequently, traditionally there was a presumption against retrospectivity in statutes. However, if Legislatures used sufficiently clear language, they could overcome this presumption and implement retrospective statutes. Now, following the adoption of the *Canadian Charter of Rights and Freedoms*[13], one must be able to justify the use of retrospectivity in a statute under section 1.[14] As stated by Edinger, in the case of the British Columbia *Waste Management Act*, the validity of imposing retrospective liability will turn on a classic confrontation between the public interest and private rights.[15]

Conclusion

This decision is consistent with the "polluter pays" principle, ensuring that the companies that pollute, and not the public, take responsibility for indiscretions committed in the past. Furthermore, this is aligned with the notion that, although actions in the past were not illegal at the time, they were morally wrong because they put the public at risk. As judges, politicians and the public in general become more aware and accept the importance and value of maintaining a healthy environment for present and future generations, perhaps the importance of the public's interest (abstract rights) will prevail over private (material) rights.

■ **Catherine Beaudoin**
Research Associate
Environmental Law Centre

1 S.A. 1992, c. E-13.3 as amended s. 1(ss), 96 (c).
2 *Waste Management Act*, R.S.B.C. 1996, c. 482.
3 *North Fraser Harbour Commission General Chemical Canada Ltd. and Thomas Lawson* v. *Deputy Director of Waste Management* (28-29 April 1999), Vancouver (Environmental Appeal Board) at 35, online: BC Environmental Appeal Board homepage: <http://www.eab.gov.bc.ca/waste/98Was14b_28a.htm>.
4 *The British Columbia Hydro and Power Authority* v. *The Environmental Appeal Board* (6 April 2000), Vancouver A992600 (B.C.S.C.) at 3.
5 *Ibid.* at 5.
6 *Ibid.* at 6.
7 L.J. Griffiths, ed., *Contaminated Property in Canada*, looseleaf (Ontario: Carswell, 1998) at 4-18.
8 *Ibid.* at 4-18
9 *R.* v. *Black and Decker Manufacturing* (1975), 1 S.C.R. 411.
10 *Supra* note 3 at 6.
11 *Hornby Island Trust Committee* v. *Stormwell* (1988), 53 D.L.R. (4th) 435 at 441 (B.C.C.A.).
12 S. R. Munzer, "Retroactive Law" (1977) 6 J. Legal Studies 373 at 391 in M. McDonald, "An Inquiry into the Ethics of Restrospective Liability: The Case of British Columbia's Bill 26" (1995) 29 UBC Law Review 63 at 70
13 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
14 D. Saxe, "Retrospective Liability for Environmental Contamination" (1992) 71 Canadian Bar Review 492.
15 E. Edinger, "Restrospectivity in Law" (1995) 29 UBC Law Review 5 at 25.

Administrative Penalties

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

- $1500 to Stantec Consulting Ltd. of Edmonton for constructing a stormwater pond without obtaining the necessary prior approval, contrary to s. 59 of the *Environmental Protection and Enhancement Act*.
- $1,500 to Canadian Abraxus Petroleum Limited operating in Saddle Hills County for failing, in 1999, to submit five monthly air emission summary reports in the time period required, contrary to s.213(e) of the *Environmental Protection and Enhancement Act*.
- $7,000 to the Fishing Lake Metis Settlement for failing to have a certified operator supervising the Water Treatment Plant, failing to take emergency actions in consultation with the Regional Engineer when chlorine levels were below their required level, and failing to immediately report the contraventions of their Approval.
- $6,000 to Newalta Corporation of Redwater for contravening their Approval by exceeding their waste storage limit and failing to immediately report the contraventions.
- $6,500 to Syncrude Canada Ltd. of Fort McMurray for contravening their Approval by improperly disposing of liquid waste, hazardous waste, and barrels containing substances at concentrations that exceed the levels specified in the *Alberta User Guide for Waste Managers* and deemed to be hazardous waste

The following administrative penalties over $2000 were issued under the *Public Lands Act* and *Forests Act* since the last issue of *News Brief*:

- $2,214. to Orval Hayes of Smith for unauthorized use of public land on a grazing lease in violation of s.47(1) of the *Public Lands Act*.
- $5,000. to Rio Alto Exploration Ltd. of Calgary for contravening terms and conditions of their lease contrary to s.47.1 of the *Public Lands Act*.
- $6,933.10 to Berkley Petroleum Corp. of Calgary for unauthorized use and contravening terms and conditions of their lease in violation of s.47(1) and 47.1 of the *Public Lands Act*.
- $5,000 to Player Petroleum Corporation of Calgary for unauthorized use of public land in violation of s.47(1) of the *Public Lands Act*.
- $6,035.22 to Anderson Exploration Ltd. of Calgary for unauthorized use of public land contrary to s.47(1) of the *Public Lands Act*.
- $8,777.55 to Star West Forest Management Inc. of Spruce Grove for unauthorized timber harvest contrary to s.10 of the *Forest Act*.
- $10,295. to Brett Poisy of Wildwood for contravening terms and conditions of the annual operating plan in violation of s.100(a) of the *Timber Management Regulation*.

Action Update

EUB Consultation on Costs

The Alberta Energy and Utilities Board (EUB) is in the process of reviewing its costs policies for energy and utilities proceedings. This update focuses on the portion of the review dealing with costs in energy proceedings.

Process

The EUB sought stakeholder participation in the review of its costs policies through written submissions and subsequent participation in workshops. Discussion papers were issued by the EUB in advance of each of these steps. A preliminary discussion paper that raised a number of issues related to costs in energy proceedings[1] was circulated. Stakeholders were asked to respond to those issues and raise other costs issues of concern to them. After reviewing written submissions, the EUB issued a paper that summarized the written submissions and set out its preliminary position on issues raised in the initial discussion paper, in preparation for a stakeholder workshop held in June 2000.[2] The EUB plans to complete its review process this fall and will seek to implement any changes soon after completion of the review.[3]

Issues raised

The most significant matter raised for consideration is the possible expansion of the meaning of "local intervener" under the *Energy Resources Conservation Act*[4]. The current definition of that term allows only those persons with an interest in property that is or may be directly and adversely effected the possibility of recovering costs. Other issues raised included:

- possible increases in reimbursement for organizers of local intervener groups;
- enabling the EUB to provide for interest on costs awards;
- restriction of cost recovery to the period following issuance of a notice of hearing; and
- responsibility for local intervener costs at public inquiries.

The EUB's approach

The discussion papers and workshop proceedings indicate willingness on the EUB's part to liberalize its costs policies. It seems quite possible that the EUB will expand the definition of "local intervener" to enable those participants in its proceedings who do not have an interest in affected property to seek costs. This approach would recognize the valid role that groups and individuals without property interests can play in EUB proceedings and assist them to effectively participate. However, the extent of any expansion of the definition will depend in large part on what interests the EUB decides should be represented within the scope of "local intervener" and the parameters it will use in determining qualified interveners. As well, any change to the definition of "local intervener" must be achieved by amendment of the *Energy Resources Conservation Act*. Of necessity, this will make proposed changes in EUB costs policy subject to the legislative process and its inherent political review.

Other issues raised and preliminary positions taken by the EUB point towards greater appreciation by it of the concerns of participants in EUB proceedings. Much of this relates to very practical matters, such as delays in the recovery of costs awards and expenses incurred in organizing group participation in EUB proceedings. Resolution of these matters by the EUB will facilitate more effective participation by parties with relevant interests and should also enable increased participation by these parties. None of these changes should require amendment of the *Energy Resources Conservation Act*; most can likely be achieved by changes to EUB policy or the *Local Intervener's Costs Regulation*.[5]

Conclusion

While the approach taken by the EUB gives some hope to both individuals and groups participating in EUB proceedings, concerns have been raised by operators that their project development costs will increase as a result of more liberal EUB costs policies. These concerns were raised at the workshops as particularly relevant for small operators with limited budgets. However, some operators indicated that they provided funding to assist interveners' participation in EUB proceedings without the necessity of a cost order by the EUB. The EUB seems to be moving towards greater recognition of public interests and increased facilitation of public participation in its processes as a means of obtaining a full review of matters before it. The true test will be whether and to what extent any of these proposed changes survive the process of political review and any necessary regulatory or legislative amendment.

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

1 Alberta Energy and Utilities Board, *General Bulletin GB 99-18: Stakeholder Consultation Discussion Papers for the Review of Costs Procedures for Energy and Utility Proceedings* (Calgary, AEUB, 12 October 1999), Discussion Paper 1.
2 Alberta Energy and Utilities Board, *General Bulletin GB 2000-13: Public Forum Workshops on Costs, Policies and Procedures for Energy and Utility Proceedings* (Calgary, AEUB, 17 May 2000).
3 E-mail communication from J.P. Mousseau, Alberta Energy and Utilities Board, August 18, 2000.
4 R.S.A. 1980, c. E-11
5 Alta. Reg. 517/82.

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An Environmental Law Centre Business Connection Seminar

Topic:	Enforcement of the *Water Act*
By:	Arlene Kwasniak, Executive Director Environmental Law Centre
Date:	Wednesday, December 6, 2000
Time:	12:00 to 2:00 p.m.
Where:	The Business Link – Business Service Centre 100, 10237 – 104 Street Edmonton, Alberta
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(A Pesticide Primer...continued from Page 5)

So What's New?

In the broader arena, Canada is entering a third generation of environmental legislation. New initiatives have an emphasis on concepts such as sustainable development, the precautionary principle, pollution prevention, expanded public participation, transparency, cost-effective enforcement and international harmonization. Multilateral treaties on persistent organic pollutants, such as the 1998 Aarhus Protocol (http://www.unece.org/env/lrtap) and other international activity (such as the work of the OECD, http://www.oecd.org/ehs/ehsmono/#pesticides) is moving the world toward 'virtual elimination' targets for many substances, including several pesticides, as does modern domestic toxics legislation like *CEPA 1999*, SC 1999, c. 33. Pressure from such initiatives has already contributed to the voluntary withdrawal of some pesticide use in Canada. (8)

The new Committee report is clearly sending a message to Canadian pesticide regulators to 'get with the program.' Although it is impossible here to review the lengthy report in detail, the Committee was explicitly guided by four main principles: (1)

(i) protection of human and environmental health should be an "absolute priority" and public safety should *not* be traded off against industrial "needs;"

(ii) preventive measures should be "taken where there is reason to believe that a pesticide is likely to cause harm," even without conclusive evidence of causation;

(iii) society should prevent "the generation of polluting substances in the first place, rather than minimizing or managing the risks associated with their use;" and

(iv) the public must not only be educated and informed about pesticides and the regulatory process, but should participate in decision-making.

These four principles then formed the foundation for more specific recommendations, including the need to: define a more rigorous risk assessment process; require an assessment of all components of pesticides (not just active ingredients); use vulnerable populations (i.e., children) in assessing risk; conduct more research; substantially increase the safety margins for pesticide use; create databases on adverse effects; disallow the registration of any substance put on Track 1 of the Toxic Substances Management Policy (http://www.ec.gc.ca/toxics/toxic1_e.html); develop and promote pesticide reduction and alternatives to synthetics; promote organic agriculture; ban urban cosmetic pesticide use within five years; develop better worker safety provisions; and, conduct an urgent, mandatory re-evaluation of all pre-1995 registrations. (1)

In short, the Committee recommends moving to a system where "the use of pesticides must come to be regarded as a measure of last resort."(1) This, in its view, will require not only new legislation, but "aggressive public education" to change attitudes about pesticide use, adequate government funding and care that international harmonization processes do not become a "race to the bottom" of the standards scale. (1)

What's Next: More Talk, or Real Action?

Mounting medical and scientific concerns, coupled with growing international pressure, are contributing to a climate which pesticide use is being re-thought. (8) If government moves toward the recommended ban on cosmetic uses of pesticides, public attitudes about the acceptability of pesticides may well change. Oddly enough, eventual industry disinterest in pesticide promotion also seems possible as it shifts its focus to biotechnology. Unfortunately, however, pesticide exposure continues to grow (1) even as chemical conglomerates refashion themselves as 'pharm' companies, and our agriculture ministries devote themselves to 'agri-food.'

In the interim, while we keep on finding new ways to talk about pesticides, there is still no new Bill before Parliament to change our domestic law. Don't be content to wait for change: buy organic, eliminate cosmetic uses of pesticides from your home, and educate yourself about alternatives. On the law reform issues, read the Standing Committee report, and then write to your MP and the Ministers of Health, Environment, and Agriculture and Agri-food.

References:

(1) Http://www.parl.gc.ca/InfoComDoc/36/2/ENVI/Studies/Reports/envi01-e.html [the Committee Report]

(2) J.F. Castrilli and Toby Vigod, *Pesticides in Canada: An Examination of Federal Law and Policy* (Ottawa: Law Ref. Commission of Canada, 1987)

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(4) A.R. Lucas, "The New Environmental Law" in Watts and Brown, eds., *Canada: The State of Federation 1989* (Kingston: Queen's University Institute for Intergovernmental Affairs, 1990) at 168-171.

(5) Pesticide Registration Review Team, *Final Report, Recommendations for a Revised Federal Pest Management Regulatory System* (Ottawa: Supply & Services, 1990) [the Blue Book]

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(7) Report of the Commissioner of the Environment and Sustainable Development, 1999, http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c9menu_e.html, Ch.3 [the Audit]

(8) National Round Table on the Environment and the Economy, *Lindane Case Study*, http://www.nrtee-trnee.ca/eng/programs/health/LINDANE_c.htm

(9) Http://www.hc-sc.gc.ca/pmra-arla/

Practical Stuff

By Andrew R. Hudson, *Environmental Law Centre*

Talking to Your Neighbours

This is your sad tale.

You wanted to build a plant that your lawyer thought might be controversial. She said, "Maybe you should talk to the neighbours?" You said, "Those busybodies! No Way!"

Instead, you applied for the "approval" from Alberta Environment that was needed under the *Environmental Protection and Enhancement Act*[1]. There were some things left out of the application which you didn't think were very important. Nevertheless, the bureaucrats refused to handle the application until it was complete. In addition, the Department made you notify the "busybodies" about your plans and required you to place ads about your plans in the local paper.

It didn't surprise you when several neighbours and an environmental group raised concerns about your plans with the Department. The Department required you to indicate how you planned to address these concerns. The bureaucrats even suggested that you change your plans to satisfy these busybodies. You held your ground.

It took some doing but eventually you received the approval that you had applied for. You were a bit behind in your schedule but you were glad to finally be able to get to work on building your plant.

However, you then learned that some of the people who had expressed concern about your plant had appealed the Department's granting the approval to the Environmental Appeal Board. You were afraid that more time would be lost when you learned from your lawyer that the appeal did not automatically act as a stay of the approval, that is, the approval remained valid and you could still proceed acting on it. Your lawyer told you that you would be running the risk that the Environmental Appeal Board could overturn or amend the approval but you were prepared to run that risk because you were confident that the appeals would be rejected.

However shortly after getting started on the work, you found out that the appellants had applied to the Environmental Appeal Board for a stay and to your chagrin, the Board granted it. That put your plans on hold again.

The appeal process took a few months to complete. Your lawyer tried to convince the Appeal Board that none of the appellants were directly affected by your plant since that would take away their right to appeal. This was not successful.

The Board suggested a mediation meeting to try to resolve the conflict. You refused. There was no substance to their arguments and everyone knew it.

A hearing was scheduled before three members of the Appeal Board. It took a full day. The Board did not give its decision immediately but said that it would give it within the next 30 to 60 days. When the decision did come it was in your favour. However it turned out that the decision was not actually a decision at all, but was rather just a recommendation to the Minister of the Environment. The Minister, it turned out, was free to accept, reject or vary the recommendation. Luckily, the Minister decided to follow the recommendation.

You asked your lawyer if this was the end of the line. She referred you to section 92.2 of the *Environmental Protection and Enhancement Act* that states:

> Where this Part empowers or compels the Minister or the Board to do anything, the Minister or the Board has exclusive and final jurisdiction to do that thing and no decision, order, direction, ruling, proceeding, report or recommendation of the Minister or the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to question, review, prohibit or restrain the Minister or the Board or any of its proceedings.

You especially liked the part about "final" jurisdiction.

A few days later, you were understandably surprised to learn that some of the neighbours had sued in the Court of Queen's Bench to overturn the decision of the Environmental Appeal Board.

It turned out that the word "final" does not always mean "final". The neighbours had brought an application for judicial review claiming that the Appeal Board had made a significant error that deprived it of jurisdiction in the matter.

The Court of Queen's Bench proceedings took some time. In the end the Court concluded that the Board had made a significant mistake and therefore sent the matter back to the Board.

Around you went again. You are now awaiting the Board's second decision. Months have passed and the plant is no nearer completion.

Maybe you should have talked to the neighbours.

[1] S.A. 1992, c. E13.3.

Ask Staff Counsel

Can't See the Forest (Law) For the Trees

Dear Staff Counsel:
During a hike by a forest under a Forest Management Agreement, I was somewhat upset by some harvesting practices. Uncertain of the laws that govern the forest industry in Alberta I made inquiries and found myself confronted with a deluge of documents. How can I tell which are laws and which are not?

Sincerely, Tim Berlack

Dear Tim Berlack:

Policies, laws and agreements

Given the range of statutes, regulations, orders, agreements, guidelines, codes, and rules that relate to Alberta forests, it can be difficult to know whether a document is policy, law, or a personal agreement. We hope this discussion helps.

There are many kinds of government policies. Some policies state how government administers, interprets or enforces particular laws. Some result from government exercizing discretion given by laws, for example, by setting guidelines for a certain industrial activity. Others describe government's direction and objectives regarding some matter. Although most policy directives are meant to be followed by the persons to whom they apply, they normally are not legally binding.

By contrast, laws are the legally binding directives, usually in the form of statutes or regulations, which often dictate how one must act in specific instances. While properly enacted statutes and regulations are legally enforceable in our courts, policy generally is not. That said, certain guidelines, rules or similar directives may become legally binding through incorporation into a statute or regulation.

Contracts are agreements among the parties to them and generally are enforceable only by the parties.

Forestry Laws and Management

The Provincial statutes and regulations that are central to the forestry industry include the *Forests Act* and the *Timber Management Regulation*. These apply to the industry with regard to forest management practices. They are fairly general in their scope and do not specifically define many aspects of forestry management. More specific directives are provided elsewhere such as in Forest Management Agreements (FMAs), Annual and Detailed Operating Plans, which describe cutblocks, setbacks etc., and Operating Ground Rules, which present standards and guidelines for timber harvest, road development, reclamation, reforestation and integration of timber harvesting with other forest uses. The question is, are these more specific directives law?

Forest Management Agreements - Contract and Law

An FMA delineates a company's timber rights in relation to the Crown and other land users and outlines its general obligations relating to harvesting, reforesting and management practices. An FMA is a contract between the Crown and the agreement holder. However, FMAs are more than just contracts. They also impose general, enforceable legal obligations since a violation of a FMA constitutes an offense under section 100(b) of the *Timber Management Regulation*. Under Schedule 2, a violation of a FMA is subject to a penalty of the between and $300 and $5000. In addition, under the *Forests Act* (s.25 (2)), the Minister may carry out a number of enforcement measures for non-compliance, including, suspension of the agreement or even cancellation, with Cabinet approval.

Operating Plans and Ground Rules

Under section 100 (a) of the *Timber Management Regulation*, a FMA holder has a general enforceable legal obligation to comply with approved Annual Operating Plans. With respect to other plans, whether compliance is a matter of general law, depends on whether they have been made law, by virtue, for example, of a FMA requiring compliance. Regarding Operating Ground Rules, the common set states that compliance is a "standard condition of...timber licenses and permits" and with any deviation from the rules be accompanied by "prescribing special operating conditions in timber dispositions or in the approved Annu Operating Plan" (page 3).

Forestry Policies

Forestry policies may be separated into vision policy, which refers to general future directions, and operational policy, which refers to the current administrating forestry operations. An example of a vision policy is the *Alberta Forest Legacy*. The policy includes ecosystem management, monitoring and public participation as essential elements to a new sustainable forest management strategy. To date, these elements have not been incorporated into any statutes. An example of operational policy is the *Interim Forest Management Planning Manual*. This manual serves as benchmark in developing the forestry proponents detailed plans, although it allows forest companies to deviate from the planning manual process with prior approval from the department. The manual provides terms of reference to assist operators and to evaluate their progr and management strategies. Although many FMAs require that plans be made in accordance with the manual, given its nature, incontrovertibly, enforceable requirements may be hard to pin down.

Prepared with assistance of Jason Unger
Research Associate
Environmental Law Centre, Summer 2000

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