News Brief

ENVIRONMENTAL LAW CENTRE

Vol. 16 No. 2 2001
ISSN 1188-2565

204, 10709 Jasper Avenue
Edmonton, Alberta T5J 3N3

In This Issue

Let's Be a Little More Creative: Creative Sentencing in Alberta

The option of creative sentencing was adopted in Alberta's main piece of environmental legislation - the *Environmental Protection and Enhancement Act* ("EPEA") - in response to the concern that traditional criminal penalties are not sufficient to deal with environmental offences. Creative sentences provide sentencing options beyond the traditional use of fines and imprisonment.

The scope of orders that a Court may issue as creative sentences is set out in section 220 of EPEA. Creative sentences may include prohibitions against specified activities, remediation of the harm caused, publication of the facts of the offence, payment of security, provision of information to the Minister, compensation for remedial actions taken by the Minister, community service or any other conditions designed to secure the good conduct of the offender. While the creative sentence must fit into the enumerated categories in section 220 of EPEA, the specific terms of the sentence are at the discretion of the Court.

Creative sentences have great potential to not only punish an environmental offender but also to remedy the environmental damage resulting from commission of the offence. Historically, several types of projects have been supported as creative sentences pursuant to section 220 of EPEA. These types of projects can be broadly classified as follows:

- research projects;
- remediation projects;
- publication;
- education projects;
- corporate environmental audits and environmental management systems; and
- support of existing environmental projects.

When imposing a creative sentence, the Court considers the nature of the offence and the circumstances surrounding it.

Recognizing the potential of creative sentencing to remedy the environmental damage caused by the commission of offences, guidelines have been jointly developed by Alberta Environment and Alberta Justice. The *Creative Sentencing Guidelines* (the "Guidelines") provide guidance about the assessment of creative sentencing proposals, about appropriate creative sentencing projects and about appropriate groups for conducting creative sentencing projects.

Creative sentencing proposals are assessed using principles set out in the Guidelines (pages 2 to 3). These are as follows:

- Conditions and requirements must be in place to ensure that the offender achieves and maintains compliance with existing legislation.
- Creative sentencing orders are to be limited to the remediation of the adverse public health or environmental consequences of the offence.

(Continued on Page 5)

Environmental Law Centre *News Brief*
Volume 16 Number 2 2001

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

EDITOR
Arlene Kwasniak

ASSISTANT EDITORS
Cindy Chiasson
Brenda Heelan Powell
Robert R.G. Williams

PRODUCTION EDITOR
Debbie Lindskoog

ADVISORY COMMITTEE
Ron Kruhlak,
McLennan Ross
Marta Sherk,
City of Edmonton Law Department

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

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

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

The opinions in News Brief do not necessarily represent the opinions of the members of the News Brief Advisory Committee or the Environmental Law Centre Board of Directors. In addition, the opinions of non-staff authors do not necessarily represent the opinions of Environmental Law Centre staff.

Letter to the Editor

I read with interest the *Ask Staff Counsel* question titled "Down in the Dumps Over the Dumps" in the Vol. 15, No. 4, 2000 issue of *News Brief*. The question addressed the rights of local property owners concerned about the effect of a proposed new landfill on themselves and the business they are investigating. While the answer given adequately addressed questions concerning the landfill, it failed to mention to the property owners that their proposed business, that of bottling and selling the water from a spring on their property, would require a licence under Alberta's *Water Act*. According to s. 49(1) of the Act, a licence is required to divert or use surface or groundwater. Authorization under other legislation may also be necessary, a fact that should come to light during the review of their licence application. The property owners should also know that licences are granted for a specific term.

I believe this oversight should be noted, since the concern for their business is the basis to their question. Further information on water licences and approvals is available on the website www.gov.ab.ca/env/water.html.

Signed,
Water Critic

Dear Water Critic:
Thank you for your letter. You are absolutely right regarding your comments on the need for a license under the *Water Act*. Although we are not convinced that our only addressing the question asked involved an "oversight" we sincerely appreciate your pointing out the further legal requirements. As well, we will keep the concern you express in your letter in mind in our future production of the *Ask Staff Counsel News Brief* feature.

Arlene Kwasniak
Executive Director
Environmental Law Centre

Our Thanks to Jillian Flett. . .

The Environmental Law Centre Board and Staff would like to heartily thank Jillian Flett, Director, Environmental Assessment and Compliance, Alberta Environment, for her many years of contributing excellent articles to the Enforcement Briefs section of the *News Brief*.

Welcome Aboard!

The Environmental Law Centre Board and Staff would like to extend a warm welcome to the new staff members who have joined our team: Keri Barringer and Ian Zaharko as Staff Counsel, Alison Peel and James Johnson as summer law students, Michael Eaton as summer research assistant, Maureen Ferra as library assistant and Jan Taylor as bookkeeper.

By Arlene Kwasniak, Executive Director, Environmental Law Centre

Enforcement and Statutes, Regulations and Policies[1]

Introduction

A myriad of statutes, regulations and policy directives affect what governments do when carrying out their responsibilities. It can be confusing to sort out the distinctions between these different types of directives. It can be even more confusing to figure out which of these directives has consequences if the person subject to them fails to abide by them. This article is designed to assist readers in recognizing which category a directive falls under and whether it is enforceable.

Laws - statutes and regulations and enforceability

Included in the broad category of law are statutes (also referred to as "acts") and regulations. Statutes are called primary legislation because they are laws made by elected representatives in the provincial Legislature or federal parliament. Statutes create the framework for regulating a subject area, such as the environment, by setting out basic rules and legal requirements. Statutes also establish the powers of government and its officials in the subject area, including the power to make regulations. Examples of provincial statutes that are relevant to Alberta's environment are the *Environmental Protection and Enhancement Act* and the *Water Act*. Federal examples include the *Canadian Environmental Protection* Act and the *Fisheries Act*.

Regulations flesh out the regulatory framework provided by a statute. They are referred to as "subordinate legislation" because a person or body makes them other than the federal parliament or provincial legislature; for example, cabinet or a cabinet minister. Statutes may also give powers to make regulations to specific regulatory bodies or agencies, such as the Alberta Energy and Utilities Board.

When properly created, statutes and regulations are legally binding and enforceable. The statutory delegates that administer them must do so strictly in accordance with their provisions or else be open to an action for judicial review. The persons to whom they apply must comply with their provisions or else be subject to enforcement action.

Policies

Who is subject to government policies?

Some government policies set out government's direction or objectives in an area. Sometimes policies are aimed at the government employees who administer laws and government programs. These set out how these people are expected to act when carrying out some government responsibility, such as considering an application for an approval under legislation. The public expects government representatives and employers to comply with such government policies. Other policies are aimed at the persons and companies who are not government employees. For example, a government policy might expect companies to operate an industrial activity in accordance with government directives.

Forms of policies

Policies take many different forms. For example, the *Wetland Management in the Settled Area of Alberta - an Interim Policy* (Water Resources Commission, 1993) sets out the provincial government's vision regarding wetland management and its overall objectives and direction to sustain the benefits that functioning wetlands provide. However, it does not dictate hard and specific rules on how water legislation administrators are to act when confronted with an application to drain a wetland. Nevertheless, the administrators of water laws are meant to honour their government's policy when carrying out legislated duties.

Other policies are more specific. These may take the form of guidelines, standards or codes that apply to persons who carry out certain activities. These policies often resemble legislation in that they set out particular rules that the subject group is meant to comply with. These directives are often developed by government employees, but can also be developed by other organizations such as technical or scientific groups, such as the Canadian Standards Association, or policy development groups, such as the Canadian Council of Ministers of the Environment.

Enforceability of policies

Although policy directives are meant to be followed by the persons to whom they apply, they normally are not legally binding in the sense that legal consequences likely would follow if they are not complied with. This is a main way in which policies differ from laws. Non-compliance with policies, of course, might have consequences other than legal enforcement action. For example, a government employee who does not follow government policy in dealing with matters might be admonished. A member of the private sector who does not follow government policy with respect to an industrial activity might find more stringent approval conditions the next time he or she goes to renew it. Nevertheless, for a policy to be made legally binding, it must be incorporated into a statute or a regulation. For example, a regulation might state that an approval holder must comply with certain guidelines or else the holder is guilty of an offence. In this case the guidelines are law and legally bind the holder.

Determining the nature of a directive

To determine whether a directive is law or policy, one should look to how it was created and by whom. As well, one can review the directive to find whether it creates offences and penalties, which is generally more consistent with laws. If there is still is a question, a lawyer (including a lawyer at the Environmental Law Centre) should be able to advise whether a particular directive is law or policy.

[1] A version of this article is published in the *Enlaw* column in the summer edition of *Encompass Magazine*.

In Progress

In the Legislature...

Federal Legislation

On March 20, 2001, the Minister of the Environment tabled Bill C-19, *An Act to amend the Canadian Environmental Assessment Act*, in the House of Commons.

Alberta Legislation

Bill 4, the *Surface Rights Amendment Act, 2001* was introduced April 12, 2001 and passed third reading on May 1, 2001. The amendment increases the maximum amount payable concerning damages from the current $5,000 to $25,000 for applications filed on or after July 1, 2001.

Saskatchewan Legislation

Bill 10, the *Oil and Gas Conservation Amendment Act, 2001* was introduced April 5, 2001. The Bill will expand the environmental protection provision of the *Oil and Gas Conservation Act*, to ensure proper abandonment and land reclamation of oil and gas wells and facilities, with a focus on prevention of orphan wells and facilities.

Federal Regulations

As of April 26, 2001 Schedule 1 to the *Canadian Environmental Protection Act, 1999* is amended. The amendment adds to the Schedule: acetaldehyde (molecular formula C_2H_4O); 1,3-Butadiene (molecular formula C_4H_6); acrylonitrile (molecular formula C_3H_3N); respirable particulate matter less than or equal to 10 microns; and acrolein (molecular formula C_3H_4O).

Alberta Regulations

AR 45/2001, the *Orphan Fund Delegated Administration Regulation*, is in force as of March 19, 2001. The Regulation establishes the Alberta Oil and Gas Orphan Abandonment and Reclamation Association as a delegated authority for the purposes of Part 11.1 of the *Oil and Gas Conservation Act*. Part 11.1 pertains to orphan funds. The Regulation expires April 1, 2006 to ensure a review.

Cases and Enforcement Action. . .

RHK Hydraulic Cylinder Services Ltd. of Edmonton was sentenced on March 7, 2001 in Alberta Provincial Court to a $50,000 fine and a Creative Sentencing Order valued at a minimum of $50,000. The company, which operated a hydraulic manufacturing and repair shop from which chromic acid waste was released, was guilty of violations of s.98(2) of the *Environmental Protection and Enhancement Act*. The Creative Sentencing Order requires the company to be bound by the terms of a Code of Practice established specifically for it for two years, commencing March 7, 2001. In addition to the assessed penalties, the company must remediate the site, at a cost estimated to be at least $100,000.

Alberta Environment issued Enforcement Order No. 2001-WA-03 and Amendment No. 1 to it under the *Water Act*. The Order was issued to George Joe Platzer of Valleyview regarding clearing of vegetation along the length of Goose Creek within Platzer's land, deposition of dirt and vegetation onto the frozen creek, and the construction of a watercourse crossing, all without the approval required by s.36(1) of the *Water Act*. The Order requires the activities to cease immediately, the disturbed portions of the bed and shores to be restored, and a plan be developed and implemented to prevent siltation.

The Alberta Environmental Appeal Board released its decision in *Grant and Yule* v. *Director, Bow Region, Natural Resources Service, Alberta Environment*, re: *Village of Standard*. These were appeals of an Approval issued unde the *Water Act*. In its decision, the Board addressed the issue of whether adequate notice had been given and then dismissed the appeals as being filed outside the allowed time period. The Board did note that the Appellants could file requests to intervene in another appeal of the same Approval.

The Alberta Information and Privacy Commissioner released Order 2000-034 concerning a request for seismic information. The Commissioner ruled the release of such information was prohibited by s.49(1) of the *Mines and Minerals Act* which prevailed over the *Freedom of Information and Protection of Privacy Act*. The decision is based on section 16(1) of the *Freedom of Information and Protection of Privacy Regulation*.

The terms of the Creative Sentencing Order issued under the *Environmental Protection and Enhancement Act* to Chem-Security (Alberta) Ltd. following judgement on October 1998 have now been finalized. Of the total sentence of $625,000, the Court ordered that the creative sentence component be $325,000. Of those funds, $175,000 will go to the University of Alberta, Faculty of Medicine for a risk assessment/risk communication project. The remaining $150,000 will go into a trust fund for Public Works and Government Services Canada for a game meat analysis program.

■ **Cindy Chiasson**, *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.

(Let's Be a Little More Creative:...continued from Page 1)

- Creative sentencing orders must be over and above a substantial monetary penalty.
- There must be a connection between the contravention and the creative sentencing project such that the benefits truly address the wrong that was done.
- The project must either improve the environment or reduce the level of risk to the public.
- The main beneficiary of the project must be the public. A project that would be undertaken by an individual or company as "sound business practice" is not eligible.
- There must be some accountability regarding control over the funds, either through great specificity in the creative sentencing order and a high degree of control exercised by the court, or through use of a trust account.
- The project must have as its first objective a benefit to the citizens of Alberta.
- The project must result in a concrete, tangible and measurable result.

Further, every project that is recommended as a creative sentence must meet the following criteria, the project must:

- fit within the *EPEA* section 220 parameters;
- improve the environment or reduce the level of risk to the public;
- benefit the citizens of Alberta;
- be related to the offence;
- be as local as possible to the area where the offence occurred;
- be technically feasible;
- result in a concrete, tangible and measurable result;
- be cost-effective; and
- be other than the "sound business practice" of the offender.

In addition to the above, the Guidelines provide criteria for groups that wish to undertake creative sentencing projects. The Guidelines also set out the information required for a creative sentencing proposal.

Unfortunately, the Guidelines do not provide guidance about the submission of creative sentencing proposals by third party organizations. Generally, it appears that creative sentencing proposals are selected primarily as a result of consultation between the Crown and defence counsel. Then creative sentencing proposals are brought to the attention of the Court by joint submissions of the Crown and defence counsel. This process has resulted in some excellent projects, which aim to remediate the environmental damage caused by the offence.

For example, in the *Western Feedlots Ltd.* case, the defendant pumped excess water collecting on its feedlot onto adjacent land. Rather than being absorbed into the land, the water made its way into a stream causing environmental damage. In addition to a fine, a creative sentence consisting of a $60,000 deposit into a trust account for Ducks Unlimited Canada was imposed. This money was to be used for an environmental improvement project that aimed to improve circulation of water to prevent avian botulism outbreaks.

However, a more open and formal process could take advantage of the flexibility of creative sentencing. By opening up the process for selecting proposals to be used as creative sentences, a greater variety of proposals could be brought to the attention of the Court. As a result, more projects that directly remediate the environmental damage associated with commission of environmental offences could be conducted.

A more open and formal process for selecting creative sentencing projects could be developed by amending the existing process. While negotiating an appropriate creative sentencing proposal, the Crown and defence counsel could publicly request proposal submissions for consideration (if a concern, it should be possible to do so on a confidential basis without releasing the offender's name). These submissions would be reviewed by the Crown and defence counsel. A submission acceptable to both would become a joint submission to the Court.

Steps could be taken to ensure the process does not become "bogged down" with too many proposals. For instance, this process could be limited to those situations in which a substantial amount - for example, over $10,000 - is contemplated. In addition, the public request for proposals could provide general guidance regarding the type of project that is desired - for example, a wetlands remediation project.

Brenda Heelan Powell
Staff Counsel
Environmental Law Centre.

Case Notes

EUB Rejects Sour Gas Well for Public Safety

Re: Shell Canada Limited Application for a Well Licence, Shell PCP Ferrier 7-7-38-6W5, Ferrier Field (20 March 2001), Decision 2001-9 (Alberta Energy and Utilities Board) Application 1042932

Earlier this spring, the Alberta Energy and Utilities Board ("EUB" or "the Board") denied an application by Shell for a licence to drill a level 4 critical sour gas well in the Clearwater area near Rocky Mountain House.[1] The Board held, in light of the evidence, that Shell's proposal would not assure public safety. The decision provides helpful guidance and Board commentary on a number of matters, including Board expectations of applicants and administrative matters.

Public Safety

In rejecting Shell's application, the Board discussed the criteria to be applied in determining whether public safety will be protected. The Board must address itself to the results if a reasonable worst-case scenario were to occur, in spite of all reasonable precautions, and determine whether public safety could be adequately protected in those circumstances. In making such a determination, the Board must be satisfied that the related risk is acceptable; the applicant is not required to demonstrate that there would be no risk whatsoever.[2] In the circumstances of this case, the EUB found that Shell's proposal would not assure public safety in the event of the reasonable worst-case scenario.

Emergency planning and preparedness

Much of the hearing and decision was focused on emergency planning matters. Shell had proposed the use of a reduced emergency planning zone ("EPZ"). In accordance with EUB requirements, the EPZ for the proposed well was calculated to be 19.2 kilometres from the well site, but Shell sought at the hearing to reduce the zone to 4 kilometres for more effective management. The Board detailed its expectations in relation to an application for a reduced EPZ. It indicated that such an application should be submitted for review and approval at the outset of a project, prior to any public consultation taking place, to allow for full review and public discussion. The application should contained detailed information supporting the applicant's contention that the calculated zone would be unmanageable, together with details for all public protection and safety measures being proposed to ensure public safety in emergencies.[3]

The Board also listed some of the criteria that it considers in determining whether a reduced EPZ is appropriate. These include:

- local terrain;
- population density;
- proposed evacuation and sheltering criteria for hydrogen sulphide and sulphur dioxide within and beyond the reduced EPZ;
- ignition criteria; and
- proposed air quality monitoring strategy.

The Board indicated that ignition criteria would be the most important factor considered.[4] There is an expectation that an applicant will address special needs and concerns of residents within the EPZ within its emergency response plan prior to submitting it to the EUB and adjust the size and shape of the EPZ in response to public concerns.

Public consultation

In this case, Shell's initial public consultation efforts were criticized and found to have a negative effect on the ongoing interaction between Shell and members of the public. The Board discussed its expectations for applicants' public consultation efforts, indicating that the applicant's information must be "extensive, consistent, factual and disclosed in a timely way".[5] It also indicated that where a proposal is unique in some way or is part of a larger project, the applicant should be prepared to discuss the entire project and how the project complements other plans for energy development in the area. These comments by the Board appear to be intended to address ongoing public complaints related to proliferation of oil and gas facilities and the provision of limited information on proposed projects.

Administrative matters

One administrative matter that the Board commented on was the use of expert witnesses. This was sparked by the revelation that the expert witnesses appearing on behalf of some interveners had not met directly with the interveners. The Board indicated that it expected expert witnesses to meet with their clients before the hearing to facilitate the clients' understanding of issues by sharing their experience and advice.[6]

The Board also expressed concern because both Shell and interveners had declined to reveal some information to it at the hearing, citing confidentiality restrictions in relation to pre-hearing mediation undertaken by the parties. It made reference to EUB materials on the Appropriate Dispute Resolution process, which indicate that confidentiality agreements must conform to regulatory and statutory requirements, as some matters discussed in ADR may need to be disclosed to the EUB or other regulators.[7]

Conclusion

While this decision is noteworthy simply because the EUB rarely rejects well licence applications, it is also significant due to the guidance provided by the Board in relation to procedural matters on licence applications. The clarification and criteria set out by the Board with respect to matters such as public safety, reduced emergency planning zones and public consultation will be helpful to industry and the public alike.

(Continued on Page 9)

Citizen Submissions under the North American Agreement on Environmental Cooperation: Finding the Facts on Fisheries

Final Factual Record for Submission SEM-97-001 (BC Aboriginal Fisheries Commission et al) 11 June 2000, prepared in accordance with Article 15 of the North American Agreement on Environmental Cooperation

This factual record represents the first instance where the *North American Agreement on Environmental Cooperation* ("NAAEC") has been used to record Canada's practices on environmental enforcement, focusing on an allegation by a group of Canadian and American non-government organizations that Canada is failing to enforce the federal *Fisheries Act* against B.C. Hydro.

NAFTA Side Agreement

The NAAEC is one of two "side agreements" to the *North American Free Trade Agreement* signed by Canada, Mexico and the United States. While much of the agreement and the institutions that support it deal with cooperative arrangements, the NAAEC also contains specific obligations designed to ensure that a minimum standard of laws and legal processes is met, including the effective enforcement of environmental laws.

The NAAEC also creates the Commission for Environmental Cooperation comprised of three institutions: the Council, which is the governing body of the Commission and whose members are the environment ministers from the three countries; a permanent Secretariat situated in Montreal; and the Joint Public Advisory Committee ("JPAC").

Remedies on Enforcement

The NAAEC provides two remedies on environmental enforcement. The first, under Part V, creates a procedure available to the parties where there has been a persistent failure by a party to enforce its environmental laws that can lead to an arbitral panel and a monetary enforcement assessment. This procedure has never been used since the NAAEC came into effect on January 1, 1994.

The second, the "citizen submission process" established under articles 14 and 15 of the agreement, has been initiated on 30 occasions to date. The submission process can be used by any non-government organization or person asserting "that a Party is failing to effectively enforce its environmental law". The process is managed by a special legal unit in the Secretariat to the CEC and includes three stages. At the first stage, the Secretariat screens the submission looking at specified issues of form and substance (Art. 14(1)). At the next stage, the Secretariat determines whether the submission merits a response from the party, having regard to criteria such as whether private remedies have been pursed (Art. 14(2)).

Where the Secretariat requests a response, the party may indicate that the matter is subject to a pending judicial or administrative proceeding (pursued by the party), at which point the process is terminated, or if this is not the case, the party may include any information that it wishes to submit (Art. 14(3)). Based on the information provided, the Secretariat may recommend to the Council that a factual record, which is the ultimate sanction under this process, be prepared (Art. 15(1)). A two-thirds vote by the Council is required to proceed to prepare a factual record (Art. 15(2)).

On completion, a factual record may be made public on a two-thirds vote by the Council (Art. 15(7)). Only two submissions have reached the completed factual record stage: the *Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo* and the B.C. Hydro Factual Record. The rest were either rejected at an early stage or have not yet been through the full assessment process.[1]

The question of what should be included in a factual record is debatable and controversial. The only assistance offered by the agreement is a list of the types of information that can be considered by the Secretariat in preparing a factual record: information provided by a party; and relevant technical, scientific or other information that is publicly available, submitted by interested non-government organizations or persons, submitted by the JPAC or developed by the Secretariat or independent experts (Art. 15(4)). The difficulty for the Secretariat in preparing a factual record on the question of the effectiveness of enforcement is determining what constitutes a fact, relating to the effectiveness of enforcement without making an assessment or drawing a conclusion.

B.C. Hydro Submission

The submission in this case alleged that the federal government is failing to effectively enforce s. 35(1) of the *Fisheries Act* against B.C. Hydro based on the fact that Canada has laid only 2 charges against B.C. Hydro since 1990 "despite clear and well documented evidence that Hydro's operations have damaged fish habitat on numerous occasions".[2] The submission includes a list of six instances where it asserts that the operations of B.C. Hydro harmed fish habitat and a comprehensive review of the impact of B.C. Hydro's operations at 33 locations. In reply, Canada argued that the NAAEC recognizes that enforcement includes more than prosecution. It identified a list of five enforcement and compliance strategies that are used to achieve long term protection of the environment as it concerns fish and fish habitat: new projects; regional technical committees; the water use planning initiative and water quality guidelines.

This submission also alleged that Canada failed to consider the environmental impacts of the production of energy for export under the *National Energy Board Act*, but this allegation was not addressed in the final factual record at the recommendation of the Secretariat.

Factual Record

The B.C. Hydro Factual Record is a lengthy document which contains a summary of the submission, a summary of Canada's response and a summary of the relevant information and facts presented by the Secretariat. A Scope of Inquiry document issued by the Secretariat focused the information gathering process on the nature of the alleged violations, the nature of Canada's responses and information relating to the effectiveness of the responses[3]. The balance of the factual record consists of a detailed review of each of Canada's five

(Continued on Page 10)

Action Update

Proposed Amendments to the *Canadian Environmental Assessment Act* and Aboriginal Interests and Perspectives

Aboriginal Interests and Perspectives and *Canadian Environmental Assessment Act* Five Year Review

As noted in the last issue of News Brief, the Environmental Law Centre is taking steps to better deliver its public programs to aboriginal communities, among others. As part of this effort, the Centre will strive to see that each issue of News Brief contains material that should be of interest to aboriginal communities and their representatives. This article provides an update of proposed amendments to the *Canadian Environmental Assessment Act* ("CEAA") in Bill C-19, focusing on those particularly relevant to aboriginal communities.

The CEAA has recently undergone a statutory required five-year review. The review process included national consultations including public sessions, specialized workshops and an interactive website. More than 1,200 Canadians participated in the consultations. The federal government conducted two parallel discussion processes: one for provinces and territories and one for Aboriginal organizations. In addition, the Regulatory Advisory Committee ("RAC"), a multi-stakeholder group formed under the CEAA to advise the Minister of Environment in respect of regulatory and other matters relating to environmental assessment, held numerous meetings and produced a report for five-year review. One of the RAC meetings was devoted to exploring aboriginal perspectives and recommendations relevant to a renewed CEAA. Bill C-19, as well as many documents and reports resulting from the five-year review process may be accessed online at the CEAA Agency website at <www.ceaa-acee.gc.ca>. The reports include submissions and recommendations of the RAC and of the Metis National Council, the Inuit Tapirisat of Canada and the Assembly of First Nations. The three aboriginal reports as well as the RAC report contain numerous recommendations for the new CEAA of interest to aboriginal communities. Although these recommendations largely were not included in Bill C-19, the new CEAA does take some steps towards recognizing and incorporating aboriginal interests and perspectives.

Key amendments to CEAA of general interest

Bill C-19 would make many changes to the current CEAA, including amendments to:

- the class screenings provisions to facilitate greater use of this assessment method
- give greater potential to require assessments for projects of Crown corporations
- clarify the transboundary provisions to better enable the federal government to assess projects with transboundary effects
- enable regulations for assessment of certain projects outside of Canada
- improve coordination among environmental assessment participants, including through giving the CEAA Agency additional powers
- eliminate the possibility that following a comprehensive study process a project would go to panel review, while introducing the potential for better public participation in and participant funding for comprehensive studies
- strengthen the incorporation of aboriginal perspectives in the environmental assessment process and to better ensure the applicability of the Act on reserves.

A summary of these and other changes to the CEAA are set out in the Minister's Report to Parliament titled "Strengthening Environmental Assessment for Canadians" which may be accessed at the mentioned website.

Changes of particular relevance to Aboriginal communities

Provisions of Bill C-19 that are of particular relevance to Aboriginal communities include amendments to:

- add to the purposes of the Act "to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment" (section 4)
- add to the factors that may be considered in conducting an environmental assessment, community knowledge and aboriginal traditional knowledge (section 16.1)
- give bands and other aboriginal representatives new rights to notice when projects are to be assessed on reserve lands, lands set aside under self-government legislation or lands in which Indians had interest (as defined by the CEAA) (amendments to section 48)
- require environmental assessments of all federally funded projects on reserve lands when essential details of the projects are known at the time of funding (through deletion of current CEAA section 10(2))
- allow for regulations governing the conducting of environmental assessment and follow-up programs by band councils on reserve lands set aside under the *Indian Act* (sections 10 and 59 (1)).

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

Environmental Law Centre Donors - 2000

The Environmental Law Centre extends its gratitude to those individuals, companies and foundations that made a financial contribution to support the Centre's operations in 2000. They are:

BENEFACTORS - $5,000 +

Alberta Law Foundation
Alberta Real Estate Foundation
Dow Chemical Canada Inc.
Ducks Unlimited Canada
Edmonton Community Lottery Board
Western Economic Diversification Canada

PATRONS $2,500 - $4,999

Austin S. Nelson Foundation
BP Canada Energy Company
Fraser Milner Casgrain
Gowling Lafleur Henderson LLP
Lusear Ltd.
TELUS

PARTNERS $1,000 - $2,499

Alberta Pacific Forest Industries Inc
Burnet,Duckworth & Palmer
Canadian Hydro Developers, Inc
Canadian Pacific Charitable Foundation
Judith Hanebury, Q.C.
McLennan Ross
Mabel Resources Limited
Nexen Inc.
Suncor Energy Foundation
Syncrude Canada Ltd.

ASSOCIATES $500 - $999

Garry Appel
Association of General Counsel of Alberta
Cheryl Bradley
City of Edmonton -- Asset Management & Public Works
Crestar Energy
Field Atkinson Perraton
Lorne Fitch
Fleming Kamberlz
Dr. David Ho
Lucas Bowker & White
Letha MacLachlan
Mactaggart Third Fund
Dennis Thomas, Q.C.
Donna Tingley

FRIENDS $250 - $499

ATCO Ltd.
Ackroyd, Piasta, Roth & Day
Chevron Canada Resources
Cindy Chiasson
Keith Ferguson
Steve Ferner
Arlene Kwasniak
Alastair R. Lucas
Michael L.J. Morin, Q.C.
OxyVinyls Canada, Inc
Cliff Wallis

CONTRIBUTORS $125 - $249

Allen Carlson
City of St. Albert -- Planning & Engineering
Patricia Clayton
Gerald DeSorcy
Albert Oberstein
Paul Edwards
Patricia Langer
Debra Lindskoog
JGM Consulting Inc
Nature Conservancy of Canada
Clifton D. O'Brien
Roe and Company
Dr. Mary Richardson
Shores Belzil
Valentine Volvo

UP TO $125

Beresh Depoe Cunningham
Brownlee Fryett
Barbara Burgeraf
Michael CalEhoo
Thomas Dickson
Linda Duncan
Jimery Jamieson
William Fuller
Mary Griffiths
Thomasine Irwin
J. Derek Johnson
Komex International Ltd.
Frank Laszczak
John Paul Mimeault
Kim Sanderson
United Way of Calgary -- Donor Choice Program

(EUB Rejects Sour Gas Well for Public Safety . . Continued from Page 6)

Hopefully, the EUB will see fit to revise the particular guides and related documents to make this information easier for all parties involved in well licence applications to find.

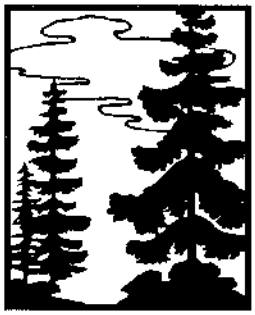
■ **Cindy Chiasson**
Staff Counsel
Environmental Law Centre

1 See Alberta Energy and Utilities Board Interim Directive ID 97-6 for further explanation of the classification of sour gas wells in Alberta.
2 Alberta Energy and Utilities Board Decision 2001-9, p.38.
3 *Ibid.*, pp.22-23.
4 *Ibid.*, pp.23-24.
5 *Ibid.*, p.32.
6 *Ibid.*, p.33.
7 *Ibid.*, p.34. See also Alberta Energy and Utilities Board Informational Letter IL 2001-1.

An Environmental Law Centre Seminar

Topic:	Traditional Knowledge and Environmental Protection
By:	Allan J.Wolfleg, Siksika (Blackfoot) Nation
Date:	Thursday, September 20, 2001
Time:	Lunch: 12:00 to 12:30
	Seminar: 12:30 to 2:00 p.m.
Where:	The Environmental Law Centre
	204, 10709 Jasper Avenue
	Edmonton, Alberta
Cost:	No cost, but bring your own lunch.

This seminar will explore the links between indigenous traditional knowledge and the need to protect the environment.



"Treat the earth well!
Your parents did not give it to you,
Your children loaned it to you
We do not inherit the Earth from our ancestors,
We borrow it from our children."

To register call (780) 424-5099 or 1-800-661-4238,
fax (780) 424-5133
or e-mail fschultz@elc.ab.ca

(Citizen Submissions under the North American Agreement . . Continued from Page 7)

enforcement responses, listed above, including the principle of "no net loss" which is Canada's guiding principle in its approach to protecting fish habitat.

Of interest is the position of the respective parties on the test for determining the relevant facts relating to the effectiveness of Canada's enforcement activities. Canada asserted that its enforcement would be effective if it achieved "no net loss of the productive habitats supporting the fisheries resources"[4]. The submitters suggested that compliance with the underlying environmental law is an indicator of effective enforcement; further, compliance must result in achievement of the substantive purpose of the law[5]. While not adopting one position or the other, the Secretariat notes the CEC's project underway since 1997 to determine the indicators of effective enforcement and concludes that "an important purpose of a factual record is to provide information that may assist the public in assessing" whether a party's environmental enforcement is effective[6].

Expert Group

Because of the complex nature of the submission, the Secretariat formed an expert group to assist it in obtaining information under the process.[7] In fact, the expert group sat as a kind of panel, and received information, both orally and in writing, from the "stakeholders" to the process, Canada, the submitters, British Columbia and B.C. Hydro. Although the expert group noted repeatedly that it did not have access to all the information that would have been relevant to better understand the effectiveness of Canada's enforcement of the *Fisheries* Act, it produced a substantial report that is appended to the factual record.

To the extent that the factual record draws conclusions, they are in the name of the expert group:

- "the level of effort Canada has invested in addressing habitat concerns seems to vary widely by facility."[8]
- "where actions have been taken to reduce harm to fish habitat caused by B.C. Hydro operations, in many instances these actions have paid dividends and have led to marked improvements in fish habitat."[9]
- "the WUP (water use planning) process is an improvement in many ways over previous strategies to resolve harm to fish habitat… the overall direction of the WUP process is promising…the 'proof" will lie in the results over the next several years."[10]

While the Secretariat is authorized by the NAAEC to consider information developed by independent experts, in this case, it may have used this arms length panel to draw the conclusions that most readers would expect from such a lengthy and onerous review.

■ **Donna Tingley**
Barrister & Solicitor

1 The full text of all citizen submissions, factual records and other documents related to submissions made under Art. 14 of the *North American Agreement on Environmental Cooperation* can be found on a registry on the CEC website <www.cec.org>.
2 Factual Record, at 1.
3 Factual Record, at 21.
4 Factual Record, at 36.
5 *Ibid.*
6 Factual Record, at 38
7 The expert panel was convened by Stephen Owen, Lam Professor of Law & Public Policy at the University of Victoria, and consisted of William Rest, an expert in hydroelectric operations, Dean David Cohen, an expert in regulatory and compliance matters, and Professor Michael Healey, an expert in fish habitat-related issues
8 Factual Record, at 106.
9 *Ibid.*
10 Factual Record, at 109.

Administrative Penalties

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

- $29,500. to DVP Purchase Corp. of Westlock County, owners and operators of a thermal electric power plant, for failing to have a bio mass fuel dryer, failing to totally enclose the ash collection and removal system, eight counts of exceeding CO emissions, failing to continuously monitor the CO flow rate at the powerhouse stack emissions, and failing to submit three reports by the specified time. A Notice of Appeal has been filed with the Environmental Appeal Board.
- $15,000 to Gulf Canada Resources Limited operating the Surmont Enhanced Recovery In-Situ Heavy Oil Plant in the Municipality of Wood Buffalo. The penalty was assessed to Gulf for failing to calculate certain emissions, failing to monitor other emissions, submitting some monthly reports late, failing to submit others, and late submission of four 1999 annual reports as well as the Proposal for the Groundwater Monitoring Program. The penalty was assessed under s.213 (c) of the *Environmental Protection and Enhancement Act.*
- $3,000 to Carmichael Permafrost Limited of Calgary for improper disposal of waste on land owned by the City of Calgary. The penalty was assessed under s.171 of the *Environmental Protection and Enhancement Act.*
- $3,500. to Inland Cement Limited of Edmonton for a discharge of particulate matter from an unauthorized source. The penalty was assessed under s.213(e) of the *Environmental Protection and Enhancement Act.*

The following administrative penalties over $500 were issued under the *Public Lands Act* and *Forests Act* since the last issue of *News Brief:*

- $682.36 to Kelly Horse Logging of Edmonton for unauthorized timber havest in violation of s.10 of the *Forest Act.*
- $1,055.50 and $948. to GEX Resources Ltd. of Calgary for unauthorized use of public land and contravening terms and conditions on two of their leases; infractions contrary to s.47(1) and 47.1 of the *Public Lands Act.*
- $1,000. to Johnny Caudron of Joussard for failing to return completed forms in violation of s.117.2 of the *Timber Management Regulation.*
- $1,000. to Premier Horticulture Ltd. of Riviere du Loup, Quebec for contravening terms and conditions of an easement contrary to s.47.1 of the *Public Lands Act.*
- $1,250. to Canadian Natural Resources Limited of Calgary for unauthorized use of public land in violation of s.47(1) of the *Public Lands Act.*

By Cindy Chiasson, *Environmental Law Centre*

Contaminated Land – Minimizing the Buyer's Risk[1]

One of the most basic legal principles related to the sale of land is caveat emptor or "buyer beware", which puts the onus on buyers to satisfy themselves about the condition of any property before agreeing to buy it. While there are some limited exceptions, this principle will apply to the large majority of real estate transactions. Any prospective buyer concerned about environmental liability should take two steps before making an offer on a property. First, the buyer should consider the level of risk he or she is willing to bear in relation to environmental concerns. Second, the buyer should learn as much as possible about a property, its past uses and its current condition. If buyers consider their own level of acceptable risk and obtain information about property, they can present offers to purchase that contain safeguards to protect them from environmental liability.

Information is the key element for buyers in any possible purchase of land. The more information buyers are able to gather about property, the less the likelihood of unpleasant (and often costly) surprises after transactions close. It is important to gather as much information as possible, as early as is possible in the transaction. There is a wide range of information available about property and its environmental state.[2] Some examples are government documents such as approvals, licences and enforcement records; land titles searches; or environmental site assessments. Buyers should focus on locating any record or source that might give information about previous and current property uses and environmental conditions.

In gathering such information, one of the most obvious steps is to ask parties involved in the sale, such as the seller, real estate agents and lenders. Sellers and real estate agents are all under certain legal duties to disclose information about property. With the help of a lawyer, buyers can also include conditions in offers to purchase that will help them to access environmental information about property. Government sources are also helpful, but some government information may not be publicly accessible. Once buyers have information in hand, they should review it with someone who can assist them in understanding it and assessing its implications in relation to their own concerns. The proper "assistant" will vary depending on the information collected, and could be a real estate agent, lawyer or environmental consultant.

Prospective buyers may be starting to think, "This sounds like too much work. All I want to do is buy some land. Can't the real estate agent deal with this for me?" The answer is "Maybe, but you shouldn't rely on it." In part, this is due to the legal consequences flowing from the relationship between the real estate agent and others in property transactions. The law treats the real estate agent as a fiduciary of the seller and thus certain duties are owed to the seller. While the law does impose duties on real estate agents to be truthful and honest in dealing with prospective buyers, they do not have the same type of fiduciary obligations to those buyers. Due to this, buyers should always ask a real estate agent who they are representing in a transaction and to whom their legal duties lie.

Another reason why buyers should not rely wholly on real estate agents is that standard forms used by those agents often may not provide sufficient protection from environmental liability or otherwise adequately address environmental matters. At the very least, buyers should carefully read any forms presented to them by a real estate agent and assess whether those forms will adequately protect them from possible environmental liability. Even better, buyers seriously considering buying a property should consult with a lawyer experienced in environmental law before presenting an offer to purchase.

In developing an offer to purchase, buyers should consider the following:

- their current level of knowledge about the property and its environmental condition;
- ways in which they can get as much environmental information about the property as possible;
- assurances that they want to receive about the property's environmental condition; and
- ways that they want to deal with any risk of environmental liability.

With a lawyer's help, buyers can develop offers to purchase that address these matters. This can include a variety of conditions, such as:

- the ability to inspect the property and conduct tests;
- the right to receive environmental information about the property from the seller and others; and
- the ability to back out of the transaction if the buyer is not satisfied with inspection or test results.

In the offer to purchase, buyers can also seek promises from sellers about environmental matters, including the property's condition, its suitability for any intended uses by the buyer, compliance by the seller with applicable environmental laws, and the absence of government orders that affect the property.

It is ultimately the buyer's choice whether or not to purchase a particular property. With some forethought and care, buyers can minimize the risk of purchasing contaminated property. *Get the Real Dirt: Contaminated Real Estate and the Law in Alberta*, published by the Environmental Law Centre, is a valuable guide for prospective buyers and their advisors.

1 A version of this article was originally published in *Encompass* Vol. 5, No. 3, February/March 2001.

2 C. Chiasson, *Get the Real Dirt: Contaminated Real Estate and the Law in Alberta* (Edmonton: Environmental Law Centre, 2000), 37-45 and Appendix 14. See also *News Brief*, Vol 14, No.2 at 12, and *News Brief*, Vol.10, No.2 at 12

Ask Staff Counsel

Strip Malls Give Me Gas

Dear Staff Counsel:
I own a number of strip malls in Alberta. Recently I have been looking at a fantastic deal on a mall in the sunny hamlet of Upper Rubber Boot, Alberta. This is just my kind of strip mall and it has all the usual things I like in a mall and more! However, it's the *more* that gives me some pause. You see this mall has a gasoline service station on site and I have never purchased a strip mall that included a station. The Trustus station has been there since 1981 and the strip mall is owned by some dear "mom and pop" seniors. They have been there for ages and tell me they never had any problems with the property. The realtor said that the Trustus site might have had a Phase 1 assessment (what is that?) and will try to find the papers-if I want them. My annoyingly picky young lawyer advised me that before I close the deal on this gem I should perform some sort of an environmental land search. Should I arrange for an environmental assessment of the property (I really don't need any more delays!) or is the young legal beagle just looking for more billable hours?

Sincerely, Ida Byeurmall

Dear Ida Byeurmall:
You and your picky young lawyer are wise to be concerned about environmental matters prior to closing this land deal. There is a basic legal principal that applies to most purchases, including land, and it is "buyer beware!" It is important to caution that as to what should have been discovered by the buyer or disclosed by a seller is a matter that is often very complex and always in need of legal review. Each transaction will present a different set of facts requiring a thorough examination by someone with an expertise in such matters.

The service station is your first obvious clue. Since 1986 there has been a provincial fire code that deals with underground storage tanks. Standards for the tanks have been since enhanced by the 1992 *Safety Codes Act*. Also impacting this type of land sale and use will be the *Environmental Protection and Enhancement Act,* the *Alberta Fire Code*, the *Water Act*, municipal by-laws and other regulatory devices-to name a few.

Knowing this, you and your lawyer or just your lawyer should speak to the realtor to see the alleged Phase I assessment, then evaluate the need to arrange for further environmental assessment of the property. Due diligence and assuming nothing are key to all land transactions.

A full environmental site assessment ("ESA") will find out whether your property is potentially or actually contaminated, determine the extent of any contamination and if need be provide a strategy for the remediation of the contaminated property.

However, there are three different stages of environmental site assessment and they are commonly known as *phases*. Phase I ESA is a preliminary investigation and is used in determining whether your property may be contaminated. Phase I does not involve sampling, measuring or analysis of environmental components of the property, such as soil or water. This phase is the only level subject to any form of standard.

Phase II is concerned with confirming and establishing the existence of contamination on your property or showing the absence of the contamination. The type or extent of analysis or sampling that will take place is determined on a case-by-case basis.

Phase III is the process by which the extent of contamination is arrived at. It will advise you on options to de-contaminate your site as well as estimating the cost of doing so. This phase is generally used where there are unacceptable levels of contamination.

Finding an assessor is the first step to be made once you have decided to perform an ESA. The most common professionals for carrying out an ESA are engineering or environmental consultant firms. It is important to note that currently there does not exist a mandatory standard or criteria associated with those who perform ESAs. The selection of an ESA assessor is therefore a case of buyer *beware*!

Ida, space does not allow for a more thorough review of the assessment process. I covered some essentials but there is more. Heed your lawyer's advice and perform an environmental review of the property. I suggest that you get a copy (your lawyer probably already has one) of *Get the Real Dirt* from our Environmental Law Centre (ELC). Also note that for a fee of $25 plus GST, the ELC can perform an enforcement historical search or prepare specialized research papers (such as: all prosecutions since 1993) for $35 plus GST. For further information, please phone the ELC at (780) 424-5099 or fax (780) 424-5133.

Good luck with your purchase Ida! Remember; *always be wary of what lies beneath!*

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

Ask Staff Counsel Editor:
Arlene Kwasniak

Alberta Law Foundation