News Brief
ENVIRONMENTAL LAW CENTRE

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In This Issue

Provincial Regulation of Confined Feeding Operations

Introduction

After years of stakeholder meetings, the provincial government finally has moved to regulate intensive livestock operations, (now called "confined feeding operations", or "CFOs") through amendments to the *Agricultural Operations and Practices Act* (AOPA) (S.A., c. A-7.7) and complementing regulations. The Natural Resources Conservation Board (NRCB) will administer the new rules. They involve a permitting process under AOPA, regulatory standards and an interpretation of the AOPA nuisance action shield. The new rules come into effect in January, 2002.

AOPA's statutory authorizations and regulatory standards

The amendments introduce two levels of statutory authorizations: approvals and registrations. Approvals are required by new and expanding CFOs of the size set out in column 3 of Schedule 1 of the proposed regulation (e.g. over 350 beef cow finishers (900 + lbs.)) or 500 beef cow feeders (under 900 lbs.). Registratio limits are in column 2 (e.g. 150-349 lbs. for finishers and 200-499 lbs. for feeders). Existing permitted CFOs and manure storage facilities do not need to obtain a statutory authorization under the Act, unless they require one for an expansion. Nevertheless they must comply with the Act and regulations, though terms and conditions on their permits prevail over anything in the Act or the regulation.

The regulations set out record keeping requirements and standards for operations, such as for minimum distance, feeding and bedding sites, water management, manure, nutrients and others.

Operations not requiring a statutory authorization still may be subject to the standards. A person may apply to a variance from the standards for most matters (AOPA s. 17(1)).

If passed, proposed standards will apply to the following persons:

- Owners and operators of CFOs that require an approval or registration and manure storage facilities that require authorization under the amended AOPA
- Owners and operators of seasonal feeding or bedding sites
- Owners and operators of a manure collection area or storage facility whether or not an authorization is required under the AOPA
- A person who applies manure (Part I, Standards and Administrative Proposals)

Participating in the approval process

Like the *Environmental Protection and Enhancement Act* public notice and comment provisions apply mainly to proposed operations that require an approval and not to those that require only a registration. The provisions for CFO's that require approvals are a bit complicated and those who fail to comply with the complexity will be left out. The trick is to first be an "affected person" or a person notified by an approval officer, and then be determined to be a "directly affected person". Only directly affected persons have the right to be given reasonable opportunity to review information, to furnish evidence and to make written submissions (s. 19 of Act).

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Affected persons are:

- Those persons (including organizations or other entities) having a geographical proximity as set out in section 5 of the regulations. These include the hosting municipality, anyone having a *Water Act* water right within 10 miles downstream of a water course where the CFO is within 100 metres of the water course, and owners, residents and municipalities within specified distances dependant on the size of the proposed operations.
- A member of the public who viewed the application at the place where it was available for viewing.

Other persons that may be notified are those who are directly affected in connection with an associated *Water Act* or *Environmental Protection and Enhancement Act* statutory authorization and other persons the approving officer determines (s. 19(1)).

To become directly affected, affected persons and notified persons must apply to an approving officer with reasons. Different time limits for the applications apply depending on the reason why a person is affected. The approving officer must make a determination and notify those who applied, though the legislation neither sets time limits on the officer nor provides criteria to make the determination. In view of the latter, presumably, the officer will decide in accordance with case law and board decisions (Energy and Utilities Board, Natural Resources Conservation Board and Environmental Appeal Board) on "directly affected".

Participation in the registration process
The only directly affected persons in the registration process are the applicant and the municipalities that are affected persons. The Act does not even give adjacent landowners or directly affected persons participation rights by virtue of being directly affected.

[illegible]
Under the former rules [illegible] may be located and set conditions of operation [illegible] permits. The new rules change this. [illegible] a registration or approval if it is [illegible] development plan (AOPA, ss 20 and 22). [illegible] municipalities to forthwith amend their municipal [illegible]. The applicant, and any other directly affected person may [illegible] (ss 20(5), 22(4) and 25(5)). In conducting its [illegible] by any municipal development plan [illegible] the municipal role since there are [illegible] water supplies, [illegible]

[illegible]
[illegible]

[illegible]

[illegible]

Enforcement Briefs

By Ian Zaharko, *Environmental Law Centre*

Department of Fisheries and Oceans Prairie Expansions

Interview with Mr. Garry Linsey, Area Director for the Prairie Region of the federal Department of Fisheries and Oceans.

ELC: Good morning Mr. Linsey! Thank you for providing ELC with an opportunity to interview you on your Department of Fisheries and Ocean's (DFO's) recent expansion into the Prairie Provinces.

DFO: You are most welcome.

ELC: When do you plan on making the official announcement of the expansion?

DFO: Early in 2002.

ELC: Is there a primary goal of this move towards expansion of the Fish Habitat Management Program (FHMP)?

DFO: The primary goal is to deliver programs under the federal *Fisheries Act*, the *Navigable Waters Act* and certain provisions under the *Canadian Environmental Protection Act*. With our expansion we hope to further enhance our program in terms of improved efficiencies, clarity and consistency throughout the region.

ELC: You are expanding the role of DFO in the prairies. Why is this expansion happening in the prairies and why now?

DFO: Part of the initiative is tied to the Old Man River Dam case. The courts have clearly determined that habitat protection under the *Fisheries Act* can not be delegated to the provinces and as a result we are not only enhancing the program but also strengthening the delivery.

ELC: As a result of the expansion how many new prairie offices are now in place?

DFO: There are seven new offices! Four in Alberta, two in Saskatchewan and one added to the existing Manitoba office.
(Editors note: see the listing of the offices and contact information on page 5).

ELC: Is there an increased number of DFO staff? How do you plan on employing your staff in the region?

DFO: Yes, the expansion has created another 109 positions and there will be 120 new bodies when DFO-Prairie is fully staffed.

ELC: What kind of changes can proponents expect from the strengthening of the habitat program?

DFO: What should be recognized immediately is a higher profile of the DFO programs in the prairie region. Accompanying the raised profile will be the increased number of delivery points, more accessible information, a new website, more officials in the field, a greater emphasis on education, clarification and streamlining of requirements and enhanced attention to fish bearing waters.

ELC: Can you explain the relationship between the provinces and DFO? How is the Ontario Agreement on Compliance Protocol working out? Do you have agreements with provinces other than Ontario?

DFO: We have established excellent working agreements with Ontario and have and wish to extend such co-operative working arrangements with the remaining provinces, NGO'S, other federal agencies, stakeholders - basically all that have an impact or potential impact on fish habitat.

ELC: How does DFO work together with other federal departments like Environment Canada? How will the expanded DFO presence impact existing DFO relationships? Will it create others?

DFO: DFO and Environment Canada have a long existing Memorandum of Understanding with respect to section 36 (dealing with deleterious substances) of the *Fisheries Act*. With our increased presence in the region we will be pursuing developing more partnerships and reinforcing existing ones.

ELC: In the new DFO brochure on *Safeguarding Fish Habitat in Canada's inland provinces* you highlight "Clear and consistent action" - what does DFO mean by this?

DFO: With our increased number of program delivery points, this is being translated to meaning the promotion of: a "one stop shopping" or "one window" approach towards how we do business; a streamlined referral process, technological advances, and improved accessibility - to name a few.

ELC: Where can we find more information about the enhanced role of DFO (website, phone...)?

DFO: All are welcomed to come and visit our offices, our Website (visit http://www.dfo-mpo.gc.ca/habitat/home_c.htm) or make a toll free call to 1-800-0-Canada.

ELC: Thank you Mr. Linsey. We appreciate your contributions and look forward to providing our readers with more DFO administration and enforcement updates, as they become available.

DFO: You are most welcome!

(Continued on Page 5)

In Progress

In the Legislature...

Alberta Legislation

The *Agricultural Operation Practices Amendment Act, 2001* was given royal assent on November 29, 2001 and comes into effect on January 1, 2002. The Act amends the existing *Agricultural Operation Practices Act* to introduce changes for regulating intensive livestock operations (referred to in the Act as "confined feeding operations") in the province.

Alberta Regulations and Policy

As of September 14, 2001, the *Oil and Gas Conservation Regulations*, AR 151/71 are amended by AR 182/2001. The amendment introduces a security requirement for oilfield waste management facilities.

Alberta Environment released new *Salt Contamination and Assessment Remediation Guidelines* to replace the interim guidelines. The Guidelines describe the regulatory requirements for remediating salt contaminated land.

The Alberta Energy and Utilities Board has established revised sulphur recovery guidelines for sour gas plants, other upstream petroleum facilities and downstream petroleum operations. The new guidelines are set out in *Interim Directive ID 2001-3*, replacing *IL 88-13: Sulphur Recovery Guidelines - Gas Processing Operations* effective January 1, 2002.

Alberta Municipal Affairs is proposing amendments to the *Community Organization Property Tax Exemption Regulation*, AR 281/98. The proposed amendments "would provide for a property tax exemption to lands currently in conservation use that are held by qualified organizations" and is intended to address concerns that the current assessment of conservation lands at market value is a deterrent to land conservation.

Cases and Enforcement Action. . .

Glacier Power Ltd., proponent of the Dunvegan Hydroelectric Project, requested an adjournment of the Joint Energy and Utilities Board/Natural Resources Conservation Board Panel reviewing the proposed development. The adjournment was requested to give Glacier time to provide additional information on fish and ice issues requested by federal and provincial government agencies. The hearing is scheduled to recommence on June 17, 2002.

In a ruling released October 16, 2001, Federal Court Judge Gibson denied the application by the Canadian Parks and Wilderness Society for judicial review of the decision to allow a winter road through Wood Buffalo National Park. The road was approved in May 2001 by the Minister of Canadian Heritage. (See In Progress in Vol. 16, Vol. 3 for previous history of this case.)

On November 16, 2001, the Council of the Commission for Environmental Cooperation requested that a factual record be prepared in relation to the submission by the Friends of the Oldman River alleging that the federal government is failing to enforce the federal *Fisheries Act* or the *Canadian Environmental Assessment Act*. The submission was filed under articles 14 and 15 of the North American Agreement on Environmental Cooperation on October 4, 1997. The factual record is restricted to the forest access road built by Sunpine Forest Products.

A decision released by Alberta Court of Appeal Justice Berger on August 29, 2001 in *ConCerv v. Alberta Energy and Utilities Board* pertaining to the approved expansion of the EPCOR Rossdale Power Plant in Edmonton, granted ConCerv the right to appeal on selected grounds, but not on whether or not the Board can consider the need for the project.

The Saskatchewan Organic Directorate announced development of the Saskatchewan Organic Protection Fund to fund a class action lawsuit on behalf of organic farmers in Saskatchewan. The lawsuit will seek compensation from those responsible for damage to organic farmers caused by the introduction of genetically engineered canola into the province and will seek to prevent the proposed introduction of genetically engineered wheat.

■ **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.

(Department of Fisheries and Oceans Prairie Expansions. . . Continued from Page 3)

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Environmental Law Centre New Publication

Community Action on Industrial Facilities: Guidebook and Background Materials
By Cindy Chiasson and Brenda Heelan Powell
$19.95 + GST

The Community Action on Industrial Facilities package is a tool to guide community groups to active involvement in air and water quality monitoring and enforcement related to industrial facilities. In a shrink wrapped format, this package includes a guidebook, which provides the "how-to's" of setting up training programs and community groups, and background materials, which cover a range of topics related to air and water quality monitoring and enforcement and can be used as training or reference materials. Resource lists and checklists throughout the package give users extensive practical information and contacts on air and water quality matters in Alberta.

******Special Community Action Offer******
Community Action on Industrial Facilities: Guidebook and Background Materials, November/2001 (regular price $19.95) and Community Action on Air Quality: Guidebook and Background Materials, June/1999 (regular price $24.95) together for the special price of $29.95

To order contact the Environmental Law Centre by telephone at (780) 424-5099, toll free at 1-800-661-4238, by fax at (780) 424-5133, by email at elc@elc.ab.ca, or by mail or in person at 204, 10709 Jasper Avenue, Edmonton, AB T5J 3N3. Both of the above Community Action packages are also available as free downloads from the Environmental Law Centre website at www.elc.ab.ca.

Case Notes

Falsifying Documents at Wastewater Treatment Plant Gives One Day Jail and 500 Hours Community Service

R. v. *Derek West* (March 1, 2001) No. 990533001P1 (Alta. Prov. Ct.)

In environmental sentencing the court strives to deliver a sentence that gives a specific deterrence to the accused and a general deterrence to the public from causing future environmental harm. Other considerations include rehabilitating the offender and protection of the public[1]. In addition, under the Alberta *Environmental Protection and Enhancement Act*[2] (EPEA) the court may order the accused to remedy the harm caused to the environment, provide compensation for remediation and order community service. In this recent decision the court considered factors such as loss of professional status, disgrace in the community, job and seniority loss, and the offender's moral culpability in delivering its sentence.

Mr. West, a senior operator at the Banff Wastewater Treatment Plant plead guilty to violating subsection 213(a)&(d) of the EPEA for knowingly submitting falsified monthly reports to Alberta Environment. In three of four falsified reports, a violation of an EPEA approval occurred. An obligation to immediately report these violations was ignored. Although a joint submission recommended a custodial sentence with the Crown asking for six to nine months in jail, the court imposed one day imprisonment and 500 hours of community service. On appeal, the Crown argued that the trial judge did not fully give due consideration to the recommended jail sentence, nor to the importance of denunciation and deterrence for a *mens rea* environmental offence[3]. Nevertheless, the trial decision was upheld.

In comparison to *R.* v. *Derek West*, other decisions have shown less lenience. In *R.* v. *McGlone*[4] a jail sentence of 45 days was imposed for 'knowingly' contravening an enforcement order contrary to subsection 213(f) of EPEA. Mr. McGlone was also fined $5000 for contravening an enforcement order contrary to subsection 213 (g) of EPEA for unlawful aerial spraying of a pesticide, and $2500 for applying a pesticide not in accordance with the Regulations. The court determined there had been blatant and intentional disregard for the Act. Mr. McGlone's appeal was dismissed.[5]

In *R.* v. *Lefebvre*[6] an appeal by the Crown for a jail sentence was dismissed. At the trial the accused plead guilty and was sentenced to a $7000 fine for knowingly contravening subsection 97(1) of EPEA, which prohibits a release other than that authorized by an approval, and for treating and disposing hazardous waste without proper approval. As well, the accused failed to report that canisters containing hazardous material were being buried without proper treatment.

In *R.* v *Timothy Underwood*[7], based on a joint submission, the court imposed a three month jail sentence for knowingly releasing a substance into the environment in excess of amounts allowed by regulations contrary to subsection 97(1) of EPEA, submitting false lab reports and improperly shipping hazardous waste to a landfill. This was the first jail term sentenced under EPEA. The sentence reflects the seriousness of the offences and potential harm to public health and the environment.

In each of the above cases the accused was guilty of 'knowingly' contravening the EPEA. Under EPEA the penalties are higher for these types of offences and include provisions for imprisonment of up to two years. When sentencing the court considers both aggravating and mitigating factors. In *West* the court acknowledged that denunciation and deterrents were of paramount importance, yet determined that a job loss and disgrace in the community and in the accused's profession were enough of a deterrent to the accused and to others. The court also found that Mr. West was not at the high end of moral culpability for his offence because he did not realize a dishonest profit. In its sentencing submissions, the Crown argued there is no general principle that a custodial disposition is always appropriate for willful environmental offences, but that West's offences demonstrate the deliberation, recklessness and stealth that call for time in custody[8].

Aggravating factors considered in *McGlone* included a prior conviction for contravening regulations, knowledge of a fully enforceable enforcement order in place, and a commercial profit aspect to the offence. The court imposed a jail sentence because the accused blatantly disregarded the conditions of the order. In *Lefebvre* an aggravating factor was the accused had not only failed to report the release of a substance as required under EPEA, but also was found to have breached the public trust to ensure proper disposal of materials. In *Underwood* and in *West*, aggravating factors were knowingly covering up mistakes and providing false information to Alberta Environment.

Mitigating factors include a guilty plea, efforts by the offender to comply with the law prior to the offence, and the offender's conduct after the offence. Remorse may be considered if it is believable. The sentences tend to be more severe when there is the potential for commercial profit combined with a breach of public confidence.

(Continued on Page 9)

Case Notes

As noted in Vol.16 No.3, in continuing to take steps to better deliver its public programs to aboriginal communities, among others, the Environmental Law Centre will strive to see that each issue of News Brief contains material that should be of interest to aboriginal communities and their representatives.

Moral Duty to Consult

Council of Haida Nation v. British Columbia (Minister of Forests) (2000) 36 C.E.L.R. (N.S.) 155 and [2001] 2 C.N.L.R. 83.

On November 21, 2000, the BC Supreme Court issued its decision in the above judicial review case where it considered the evolving issue of whether the Crown has a legal duty to consult with aboriginal people on natural resource matters. The case revolved around the Haida Gwaii, the traditional territory of the Haida Nation, also known as the Queen Charlotte Islands. The Haida have claimed aboriginal title to this territory of old-growth forest for more than 100 years.

In 1961, a Tree Farm Licence (TFL) was issued to MacMillan Bloedel Limited (MacBlo) which covered several areas of Haida Gwaii. In 1981 and 1995, the BC Minister of Forests (the Minister) replaced the TFL and MacBlo continued logging operations pursuant to it. In 2000, the Minister issued a replacement TFL to Weyerhaeuser Company Limited who had recently acquired the assets of MacBlo. The Court noted that all three of the Minister's TFL decisions were made without the consent of the Haida and the 1995 and 2000 decisions were made against the objections of the Haida. The Council of the Haida Nation challenged the three decisions.

The Haida argued that the TFL replacements should be declared invalid on the following grounds:

1. The lands covered by the TFL were subject to the Haida's asserted claim of aboriginal title. This constituted a legal encumbrance on the Crown's title to the timber under the provincial *Forest Act* and prohibited the Minister from issuing replacement TFLs. Thus, the Minister acted without statutory authorization and exceeded his jurisdiction under the *Forest Act*.
2. Alternatively, the claim to aboriginal title constituted an equitable encumbrance on the timber due to the fiduciary relationship between the Crown and all aboriginal peoples. This claim imposed a fiduciary duty on the provincial Crown to treat the timber as being legally encumbered by Haida title unless and until the Crown established that it was not so encumbered. By replacing the TFL without disproving the Haida claim, and without incorporating terms and conditions into the TFL that would adequately accommodate and protect the asserted aboriginal title, the Minister acted in breach of the Crown's fiduciary duty and without jurisdiction.
3. Alternatively, the Minister acted in breach of a fiduciary duty owed to the Haida by replacing the TFL without first consulting with the Haida in good faith and with the intention of substantially addressing their concerns with respect to their asserted aboriginal title.

The Court noted that in all three grounds, the Haida relied on the assertion, as opposed to the proof, of their aboriginal title in the TFL lands. The question of whether their asserted rights did in fact exist though was outside the scope of the judicial review process. The mere assertion of aboriginal rights had no legal effect unless and until the claimed rights and a *prima facie* infringement were proven and these were matters to be determined at trial.

The Court also stated that the scope of the provincial Crown's fiduciary duty to the Haida, including a duty to consult, could not be determined without a trial. This issue, like the issue of infringement, was also dependent on the nature and extent of the aboriginal right or title that first needed to be established at trial.

The Court went on to state, in *obiter*, that there was a "moral duty" on the provincial Crown to consult with the Haida in relation to the TFL replacements for the following reasons:

1. There was a reasonable probability that the Haida could establish aboriginal title to some of the TFL lands, a substantial probability that they could establish an aboriginal right to harvest trees in this area and a reasonable probability that they could show a *prima facie* case of infringement of the right to harvest. The Haida claim went far beyond the mere "assertion" of aboriginal title and the provincial Crown should have been able to make a similar assessment of the strength of this claim long before the Minister made the 2000 TFL replacement decision.
2. The Crown and the Haida were involved in treaty negotiations since 1992 however the Crown refused to discuss TFL replacement as a negotiation interim measure. This occurred despite the parties' acceptance of the BC Claims Task Force Report which recommended that interim measures be negotiated when an interest is affected which could undermine the claims process.
3. The provincial Crown arguably failed to comply with its own consultation guidelines in refusing to consult with the Haida on the TFL replacements.
4. The TFL contains one-quarter of the area of Haida Gwaii, large areas have already been logged and it takes 500 years for old-growth forests to develop.
5. Consultation at the operational level, when individual cutting permits are issued, would not enable the Haida to influence the quantity of logging allowed in the TFL area. However consultation at the TFL replacement stage would enable them to seek the inclusion of TFL terms and conditions to address their major concerns on a long-term basis.

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Action Update

AENV Business Plan

Every Alberta government department has been required for a number of years to develop business plans related to their mandates and activities. These plans can give some insight into upcoming policy direction by government departments. Alberta Environment has recently made its 2002-05 business plan public. The plan provides some interesting indicators of intended directions for a department that has been through many changes and four different ministers over the course of the past three years.

Key areas

The plan identifies five key policy areas in which Alberta Environment intends to concentrate its new activities over the 2002-05 time period. It was emphasized during consultation sessions on the draft plan that these new areas were to be pursued in addition to the department's ongoing activities. The key policy areas are:

- water;
- air;
- climate change;
- integrated resource management; and
- regulatory systems.

Planned initiatives in these key policy areas include development of a long-term provincial water strategy which will apparently address both quality and quantity; work on standard setting for air emissions; broad policy work on climate change, with research into the possible development of emissions trading; development of strategies geared to integrated resource management; and review and restructuring of the regulatory system, with greater movement to mechanisms such as codes of practice.

Sustainable development

In its preamble, the plan makes many references to sustainable development and Alberta Environment's leadership role in sustainable development. At the broad policy level, these references point to some indication that the province may be looking to address sustainable development in a more serious and substantive fashion than it has done in the past. While the province and Alberta Environment have undertaken a variety of sustainable development exercises, most notably the Alberta Round Table on Environment and Economy, these have largely been geared towards a view of sustainable development as a simple balancing of economic and environmental interests rather than as a form of integrated decision-making and action.

The business plan discusses partnerships between government departments in promotion of sustainable development and more importantly, "the increased integration of social, economic and environmental goals". However, while the plan provides greater recognition of the integration element of sustainable development, much of its language is still couched in terms of development rather than protection or sustainability.

Concerns

Partnerships are mentioned numerous times in the business plan. At first glance, this seems quite positive, especially in light of broad comments on information sharing and the role of Albertans, communities and industry in making informed decisions. However, when examining the more detailed information included in the plan, these comments fall short and seem to maintain a closed loop of government-industry cooperation that excludes public and community interests. In particular, implementation of planned integrated resource management activities seems to rely heavily on partnership with the Alberta Chamber of Resources, an organization made up of resource development industries.

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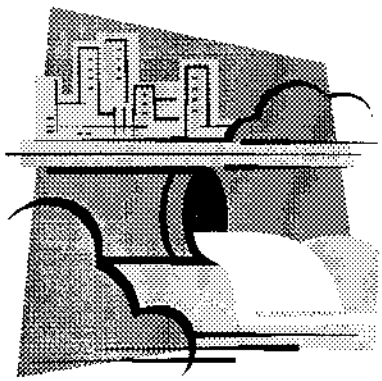

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It is difficult to see how a case like *West* which has many aggravating factors similar to these other cases resulted in a less severe sentence, particularly when the illegal actions took place over a lengthy period of time and had the potential for serious health and environmental consequences.

■ **Keri Barringer**
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1 E. Swanson & E. Hughes, *The Price of Pollution: Environmental Litigation in Canada* (Edmonton: Environmental Law Centre, 1990) at 180-182.
2 *Environmental Protection and Enhancement* Act, S.A. 1992 c.E-13.3, s.220.
3 Memorandum of the Crown Appellant, *R.* v *Derek George West* (November 20, 2001) Appeal #9905A3034S10101-07 (Alta. Q.B.)
4 (November 28, 1998) No. 70640-719 St. Albert (Alta. Prov. Ct.)
5 *The Regulatory Review*, (Edmonton: Environmental Law Centre), June 1999, issue #61.
6 (30 June 1999) #9803-01331S50101 (Alta. Q.B.)
7 (21 March 1996) #9503 1532 C6 (Alta Q.B.)
8 Sentencing Submission of the Crown, *R.* v *Derek George West*, *supra* note 3.

(Moral Duty to Consult. . . Continued from Page 7)

The Court concluded that although it opined that the provincial Crown had a moral duty to consult with the Haida on the TFL replacements, it was not satisfied that the honour of the Crown had been diminished by the past failure to fulfill such duty. However, the honour of the Crown would be called into question if that failure continued.

■ **Holly D. Prus**
Counsel
Justice Canada

Administrative Penalties

The following administrative penalties of $5,000 or over were issued under the *Environmental Protection and Enhancement Act* since the last issue of *News Brief:*

- $5,000 to Syncrude Canada Ltd. for emitting an air contaminant from a source not specified as a permitted source in their Approval. The penalty was assessed under s 213(e) of the *Environmental Protection and Enhancement Act.*
- $13,000 to Syncrude Canada Ltd. for failing to immediately report the release of various vapours on several occasions and failing to report that the pilot light on a hydrocarbon flare stack went out. The penalty was assessed under s. 213(e) and s. 99(1) of the *Environmental Protection and Enhancement Act.*
- $5,000 to Praxair Canada Inc. of Strathcona County for failing to submit required reports in violation of their Approval. The penalty was assessed under s. 213(e) of the *Environmental Protection and Enhancement Act.*

The following administrative penalties over $2,000 were issued under the *Public Lands Act* and *Forests Act* since the last issue of *News Brief:*

- $4,250. to Hunt Oil Company of Canada Inc. of Calgary for unauthorized use of public land and contravening their licence of occupation contrary to s.47(1) and 47.1 of the *Public Lands Act.*
- $2,100. to the Badland Hills Cattle Grazing Association of Taber for unauthorized use of public land contrary to s.47(1) of the *Public Lands Act.* This corrects the penalty of $4,200. assessed to the Association on September 6, 2000.
- $14,638.97 to Northrock Resources Ltd. of Calgary for contravening terms and conditions of their licence contrary to s.47(1) of the *Public Lands Act.*
- $2,211.53 to Tony Sawchuk of Newbrook for unauthorized timber harvest operations contrary to s.10 of the *Forests Act.*

Now its Time to Say Goodbye...

It is with both sadness and anticipation that I write this farewell message to Environmental Law Centre staff and *News Brief* readers. The Environmental Law Centre is a vital institution and one of the best to work in. It was truly difficult to bring myself to leave. My nearly 11 years at the Centre have been the most valuable and enjoyable in my law career. However, after much consideration and consternation I decided to change career gears to hopefully more effectively use my legal talents and experience to further environmental objectives, in particular, land conservation and habitat protection. I believe I can do this best in private practice. My new vocation begins January 1st.

I joined the Centre in February, 1991, fairly fresh out of graduate school and still working on my Master's degree in environmental law. The first Executive Director, Linda Duncan, had just recently left and Donna Tingley was the new one. Worried about being able to complete my Master's while working full time, Donna suggested that I secure foundation funding and make it a Centre project. Thus came *Alberta Public Rangeland Law and Policy,* my first Centre publication. I did not know what I was sticking my foot in! We all survived this somewhat infamous treatise, public interest in public lands in tact.

Donna is now Executive Director of the Clean Air Strategy Alliance, and my other early colleagues also have moved on. Howard (Sam) Samoil is with Alberta Justice and Elizabeth Swanson, TransCanada Pipeline. We still miss Andy Hudson's (seconded in 1991, later to become permanent staff) sweet tenor at birthday parties since he became counsel at the Natural Resources Conservation Board. But the ELC family welcomed new legal staff. Cindy Chiasson joined four years ago. Cindy's invaluable services and excellent legal skills were recognized by her being appointed the new Executive Director, effective January 1st, 2002.

Brenda-Heelan Powell's (now on maternity leave) stature and matching towering analytical legal talents infused Centre workplace and work. Robert Williams, our newest permanent lawyer, astutely applies his academic bent to environmental legal matters. Our contract lawyers, Keri Barringer and Ian Zaharko, have fit right into the ELC family and exude ELC spirit.

I will miss all of the legal staff. But equally I will miss the rest of the Centre crew. Dolores Noga, who runs the Centre's impressive library, is one of the most adept persons I know. Debbie Lindskoog, office manager, is as organized and proficient as she is elegant. Iris Djurfors runs our search services with aplomb and is a superior (though modest) source of information on almost any topic. Jan Taylor's accounting skills, enthusiasm and generosity enhance the Centre's bottom line and lift its spirit. Fran Schultz, secretary and receptionist, is almost too good to be true both professionally and as a person. But I'm saving the pulse of the Centre for last. Laura Ferguson, our incomparable accountant, finance officer, and fine person has been at the ELC nearly since its inception. She understands and guides its sometimes mysterious workings better than anyone.

I will greatly miss all of my friends at the ELC. I will, however, keep close contact with the Centre, and support it, and I encourage you to do the same.

I leave you with advice from Goethe, often quoted by environmentalist, the late David Brower.

" Anything you can do, or dream you can, begin it. Boldness has genius, power and magic in it."

Arlene Kwasniak

2001 Mactaggart Essay Prize Winners

Michael Welters

The Environmental Law Centre is pleased to announce the winning essays for the 2001 Sir John A. Mactaggart Essay Prize in Environmental Law. The first prize was awarded to Michael Welters from the University of Victoria for his essay: *Civil Disobedience and the Courts: The British Columbia Approach.* Second prize was awarded to Stella Varvis from the University of Alberta for her essay: *"In Trust for Future Generations: How Intergenerational Equity and the Public Trust Doctrine Can Be Used to Protect the Environment in Canada"*

Members of the 2001 volunteer selection committee were: Alastair Mactaggart (Honourary), Jennifer Klimek, Barrister and Solicitor, Donna Tingley, Clean Air Strategic Alliance and Ray Bodnarek, Alberta Justice.

The capital for this prize was donated by the Mactaggart Third Fund. Additional contributions were made by Carswell and the charitable donors to the Environmental Law Centre.

For further information, contact Cindy Chiasson, Staff Counsel at the Environmental Law Centre at 204, 10709 Jasper Avenue, Edmonton, AB T5J 3N3, by phone at (780) 424-5099 or 1-800-661-4238, by fax at (780) 424-5133, by email at cchiasson@elc.ab.ca, or check the Environmental Law Centre website at www.elc.ab.ca.

By *Alberta Energy and Utilities Board, Law Branch*

Recent Changes to the EUB's Cost Recovery Policies and Procedures

Introduction

People who participate in energy-development hearings (hearings to consider the construction and operation of oil or gas wells, pipelines, batteries, processing plants etc.) before the Alberta Energy and Utilities Board (EUB) may be entitled to recover some or all of their costs associated with that participation. The EUB recently made some important changes to its cost recovery policies and procedures. This article will discuss some of the more significant changes to the EUB's cost polices and procedures for energy-development hearings.

The Rules of Practice and New Guide 31A

One of the biggest changes has been the implementation of the EUB's Rules of Practice (the Rules), and the updating of Guide 31, Guidelines for Energy Cost Claims. Part 5 of the Rules of Practice provides a legislative framework for the filing and processing of intervener (a person who participates in an EUB hearing) cost claims. The Rules direct interveners on how and when to file their claim and indicate what factors the Board will consider when assessing their claim. Part 5 of the Rules replaces the Local Interveners' Cost Regulation and can be found in the new Guide 31A.

In conjunction with the Rules, the Board has updated its Guidelines for Energy Cost Claims (Guide 31A). The Guide provides a practical and comprehensive overview of the whole process of filing a cost claim. The purpose of Guide 31A is to provide local interveners with one easy-to-understand source for all the information and forms needed to file a complete cost claim. For example, the Guide explains in detail what factors the EUB will use to determine if an individual is entitled to recover his or her costs, it describes how to apply for advance funding status, and it describes the factors the EUB will use to determine if a cost claim is reasonable. Guide 31A is available from the EUB's Information Services Group, which can be contacted at (403) 297-8190 (toll-free in Alberta by first dialing 310-0000). The Guide is also available on the EUB's Web site at www.eub.gov.ab.ca.

The Scale of Costs

The EUB has introduced a *Scale of Costs*, which details what fees and expenses an intervener can claim with respect to his or her participation in a proceeding before the EUB. The *Scale of Costs* represents what is, in the opinion of the EUB, a fair and reasonable tariff to provide an intervener with adequate, competent, and professional assistance in making an effective submission before the EUB. The Scale of costs provides a maximum hourly rate for lawyers, consultants, and expert witnesses, and details what expenses the EUB will consider in an intervener's claim. If an intervener can advance persuasive argument that the maximum hourly rate is inadequate given the complexity of the case, the EUB may adjust the *Scale of Costs*. It should be emphasized that the EUB will only consider an adjustment to the *Scale of Costs* under exceptional and unique circumstances. The *Scale of Costs* can be found in Guide 31A.

Other Changes

Another significant change is that the EUB has substantially increased the honoraria available to interveners for the time and effort involved in preparing for a proceeding. Previously, the maximum honorarium for preparation was $500; the EUB has increased this amount to $2,500 and may consider awards in excess of this amount in very exceptional circumstances.

The way a local intervener cost claim is filed has also changed. Guide 31A contains new forms for the filing of a claim, which were designed to make the process simpler and eliminate much of the documentation that was previously required. These forms are now available on the EUB's web page and may be downloaded, or filled in manually.

Other significant topics such as how the EUB will enforce unpaid cost orders and whether or not an intervener can claim costs for the period before the EUB decides to have a hearing are also discussed in Guide 31A.

What Has Not Changed

While several key changes have occurred with respect to the EUB's cost practices, certain fundamental principles remain unchanged. As was previously the case, only those participants who meet the definition of a "local intervener" will be eligible to recover the reasonable costs of their participation in a hearing before the EUB. As before, the definition of local intervener requires demonstration of an interest in land that may be directly and adversely affected by the EUB's decision on the energy-development project in question. It is also important to remember that the time limit for filing a local intervener cost claim has not changed, and all claims must be filed with the Board within 30 days of the close of the hearing. For more information on these issues, please contact the EUB's Law Branch at the phone number listed below.

Further Information

The Board has made every effort to make the filing of a local intervener cost claim as easy as possible for claimants. Should interveners have any questions about the cost process, however, the EUB is happy to provide the assistance needed to fully address such questions. All questions should be directed to the EUB's Law Branch at (403) 297-7029 (toll-free in Alberta by first dialing 310-0000).

Ask Staff Counsel

When the Cat(erpillar) Gets the Birds

Dear Staff Counsel:
Come to my rescue. Please. Although winter is here in its fury, springtime is just around the corner. I know that my local municipality, in its zeal to rid the county of dangerous natural areas and annoying wildlife habitat, will approve a number of subdivision developments that will mow down those pesky forests and drain and fill those awful, smelly wetlands. Although I fear I can't halt their mission, I am trying to act to make it as easy as possible on nesting birds in the targeted areas. I intend to participate in the subdivision and development processes. I know that the province owns the bed and shores of all permanent, naturally occurring water bodies under the *Public Lands Act* and the developers will need approval under the *Water Act* to mess with the wetlands. You can bet your last loonie that I'll be waving the *Wetland Management in the Settled Area of Alberta - An Interim Policy* at these processes. It directs conserving slough/marsh wetlands in a natural state, in particular permanent ones. I am asking you whether there are any federal rules that could be relevant to my bird concerns?

Sincerely, Featheredś Fine Friend

Dear Fine:
There certainly are environmentally friendlier ways to carry out subdivision developments. We are glad you will be participating in all of the relevant processes. Regarding your bird question, the *Migratory Birds Convention Act* and regulations are relevant.

Section 5 of the *Migratory Birds Regulations* prohibits hunting of a migratory bird without a permit. The Regulations defines "hunt" broadly to mean chase, pursue, worry, follow after or on the trail of, lie in wait for, or attempt in any manner to capture, kill, injure or harass a migratory bird (s.2). This applies to both direct and indirect takings. A direct taking is the direct result of an action. For example, killing a bird as a result of shooting it. An indirect taking is incidental to some other activity. For example, killing birds through logging operations. Here the direct result is felling trees, and the indirect, incidental result is killing of nesting birds. Normally, indirect takings are unintentional, whereas, direct takings are intentional. Other activities that could involve indirect takings are resource and agricultural activities, or subdivision development.

Section 6 of the Regulation states that no person shall disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird, without a permit. It applies to both direct and indirect takings. So it applies if a person snatches migratory birds' eggs out of nests for a tasty breakfast without a permit as well as to a person who, for example, drains a wetland, and unintentionally destroys migratory birds' eggs without a permit (an indirect taking).

Section 35 of the Regulation states that "no person shall deposit or permit to be deposited oil, oil wastes or any other substance harmful to migratory birds in any waters or any area frequented by migratory birds" unless allowed by regulations, or allowed by permit. Currently there are no further regulations. If the developments involve depositing rock, debris or other substances into such waters, the section should apply. The Federal Court in *Alberta Wilderness Association* v. *Cardinal River Coals Ltd.* ((1999) T-1790-98 (F.T.D.)the Cheviot Mine Case) broadly interpreted section 35 to mean any harmful substance, and not just oil-based substances. Applying for a permit under this section will trigger the *Canadian Environmental Assessment Act*.

Four final points of interest.

First, it was not always clear whether these federal rules apply to indirect takings. However, following the Cheviot Mines case, Environment Canada's Canadian Wildlife Service (CWS) clarified the federal government's position. It has presented a power point show where one slide states "Incidental Take • Is unintentional take, incidental to some other activity, prohibited by the Migratory Bird Convention? – Yes". A later slide provides "there is not solid basis to provide an exemption to the Convention's prohibitions in the case of incidental take".

Second, there are similar prohibitions to sections 5 and 6 of the *Migratory Bird Regulations* under Alberta's *Wildlife Act* though they prohibit willful takings. These are harder to prove, and would apply to indirect takings only in the clearest cases.

Third, sections 5 and 6 apparently only apply when there are nests, eggs or birds present. However section 35 of the regulation applies where the waters are "frequented" by migratory birds.

Finally, for your information, the RCMP, federal CWS officers and Alberta Natural Resources Service Conservation Officers enforce the federal Act in Alberta.

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

Ask Staff Counsel Editor:
Arlene Kwasniak

Alberta Law Foundation