News Brief

ENVIRONMENTAL LAW CENTRE

Vol. 17 No. 1 2002
ISSN 1188-2565

204, 10709 Jasper Avenue
Edmonton, Alberta T5J 3N3

In This Issue

Electricity Generation Expansion Sparks Many Issues 1

Regulatory Change for Alberta Workplaces 3

In Progress 4

Commercial Leases and Landlord Liability for Tenants' Contamination 5

Case Notes
Court Affirms Federal Role in Environmental Assessment 6

Action Update
Where's Alberta Environment Going With Our Waste? 8

Practical Stuff
Researching Environmental Law on the Internet 11

Ask Staff Counsel
Environmental Impairment Liability Insurance and Landfills 12

Environmental Law Centre

Celebrating 20 years of excellence in environmental law

1982 – 2002

Electricity Generation Expansion Sparks Many Issues

The electricity sector has been a subject of intense interest in Alberta since the provincial government's move to deregulate the market in the late 1990's. From the environmental law perspective, many of the issues related to electricity generation have come into focus with the recent release of decisions by the Alberta Energy and Utilities Board (AEUB) approving Epcor's proposed Genesee 3 expansion[1] and TransAlta's Keephills 3 and 4 expansion[2]. Issues to be discussed in this article include the determination of public interest by the AEUB, evolving standards for the electricity sector, and monitoring.

Determining "Public Interest"

In reviewing proposed energy resources projects, such as the Genesee and Keephills expansions, the AEUB is required to consider whether "the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment".[3] In both the Genesee and Keephills hearings, interveners argued that determination of the public interest should include consideration of the need within Alberta for the extra electricity to be generated by the proposed expansions. These arguments were based on the premise that the new electricity will exceed Alberta's forecast energy needs for the foreseeable future, with the excess likely to be exported. Interveners submitted that incurring adverse environmental effects for the benefit of energy consumers in export markets would not be in the public interest of Albertans.

In both decisions, the AEUB declined to address this submission as a factor in determining the public interest. It indicated that legislative changes resulting from the deregulation of the provincial electricity market had removed its jurisdiction to address future demand for electricity in Alberta and that the matter would be governed by the competitive market.[4] The AEUB's decisions on both the Genesee and Keephills expansions are being appealed by the Sierra Legal Defence Fund on behalf of the Clean Energy Coalition. The appeals focus on the issue of need for electricity as a consideration in determination of the public interest.

The legislative changes referred to in these two cases do require the AEUB to consider the purposes of the *Electric Utilities Act*[5] when considering whether applications for generating units under the *Hydro and Electric Energy Act*[6] are in the public interest. However, it is not conclusive that these changes have had the effect of removing consideration of need for electricity as a factor in determining public interest. While the purpose section of the *Electric Utilities Act* is broad in nature and specifically makes reference to competitive market forces, it also refers to establishment of a framework that provides for "the sharing among *all consumers of electricity in Alberta* of the benefits and responsibilities for costs associated with electricity produced..."[7] and also allows the provincial electric industry to be regulated where necessary.[8] (emphasis added)

(Continued on Page 10)

Environmental Law Centre *News Brief*
Volume 17 Number 1 2002

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

EDITOR
Cindy Chiasson

ASSISTANT EDITORS
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

Letter to the Editor

I read with interest the article "Drawing a Fine Line: The Adjudication of 'Directly Affected'" (*News Brief*, Vol. 16, No. 3, 2001, p.6). I have an interest for a number of reasons. I was the Director of record in the case discussed in that article and thus have a personal interest. I also believe that the article misstated Alberta Environment's policy and the potential impact of the suggested change in this policy.

I want to point out that I no longer work for Alberta Environment and that my comments do not necessarily reflect official government policy. My comments are opinion combined with personal knowledge of how policy was developed during my employment with Alberta Environment.

During my tenure with Alberta Environment, the department never had a policy of accepting any and all submissions received as Statements of Concern (SOC). Policy regarding the test to be used to determine "directly affected" developed gradually and in a consistent direction. The intent of the policy guidance to be inclusive relates to those situations where it was a close call. Directors have no interest in having their decisions overturned because they've been excessively limiting.

I think it's also a decision that the legislation obligates the department to make. I agree that there is no statutory requirement for the Director to make this decision. However, if the test of directly affected were solely at the discretion of the person submitting a SOC, that phrase would not need to be in the Act. The simple act of submitting a SOC would declare the person to be directly affected, in their opinion.

During the public consultation process during the formulation of the *Environmental Protection and Enhancement Act*, this issue was discussed and it was decided that the Director would be the decision maker in this respect. This was determined to be an appropriate balance between the public interest in allowing public consultation and the economic need of the province to allow reasonable development of resources.

I disagree with your interpretation in relation to the consequences of allowing anyone to submit a SOC. The implications do not relate only to notification. The key aspect of a SOC is the ability to launch an appeal. It's clear that the potential for unduly delaying development simply because it's unpopular is great. If the development legitimately impacts citizens, they have a legitimate opportunity to comment and appeal. The gatekeeper function that the Director has disallows people from making appeals for purposes other than environmental. The Environmental Appeal Board stands as the reviewer for the Director's decisions and I know its decisions are used to modify the department's SOC policy.

I agree that the lack of notice to the persons providing a submission is valuable direction from the Environmental Appeal Board. It is one that can be addressed easily by the department through their normal practice.

Yours truly,
Rob Kemp

Editor's note: We appreciate Mr. Kemp's comments, especially in relation to the light they shed on Alberta Environment's policy approach to the issue of "directly affected" under the Environmental Protection and Enhancement Act. An upcoming Environmental Law Centre project will be assessing accessibility to the Environmental Appeal Board process by individuals and non-governmental organizations. This project, funded by the Alberta Law Foundation, is scheduled to commence in the fall of 2002, with completion in the spring of 2004.

Regulatory Change For Alberta Workplaces

Since 1999, the Workplace Health and Safety Division of Alberta Human Resources and Employment has been reviewing rules for safe and healthy workplaces. As part of a government-wide initiative, this review addressed regulations pursuant to the *Occupational Health and Safety Act*.[1] Many of the regulations had not been reviewed in over 20 years -- the *Explosives Safety Regulation*[2] was enacted in 1976, for example – while new technology and workplace concerns created issues unanticipated by current regulations.

Consultation

Recognizing that stakeholder viewpoints were critical, the Department established tripartite task forces to steer each review, prepare a draft proposal, solicit comments from stakeholders, modify the drafts based on the comments received, and prepare a final report for the Department. To generally oversee the project and deal with any non-consensus items, the Council on Workplace Safety was established. This Council consisted of an employer representative, a worker representative and a member of the provincial Occupational Health and Safety Council. Only eight issues of non-consensus reached the Council for resolution, with all other proposals resolved by the task forces.

Highlights of proposed changes

The *General Safety Regulation* is the most comprehensive regulation, as it affects every industry and worksite.[3] As well as updating technical standards, the draft proposal emphasizes several key areas. With respect to planning, hazard identification and hazard elimination and control strategies, the proposal includes a requirement for employers to prepare a health and safety plan if ordered to do so based on their history and safety record, and a requirement for employers to conduct worksite hazard assessments.

Proposed communication requirements include directions that hazard assessments be written, workers be involved in assessments, and written procedures be prepared for matters such as confined space entry and emergency response. Other proposed requirements are directed at worker competency and training. These include requirements that training include specifics such as equipment limitations, loading and unloading, use and care of personal protective equipment, work site hazards and emergency response, as well as specific skill requirements for supervisors of oil and gas well operations.

The *Chemical Hazards Regulation* focuses on dealing with excessive emission of hazardous materials and on implementation of the Workplace Hazardous Materials Information System (WHMIS).[4] The draft proposal updates Occupational Exposure Limits (OELs), clarifies assessment and air monitoring requirements, establishes the requirement for a control plan where workers are exposed to lead, expands requirements for appropriate protective clothing, and consolidates and streamlines requirements related to fibrogenic dusts (asbestos, silica, coal dust).

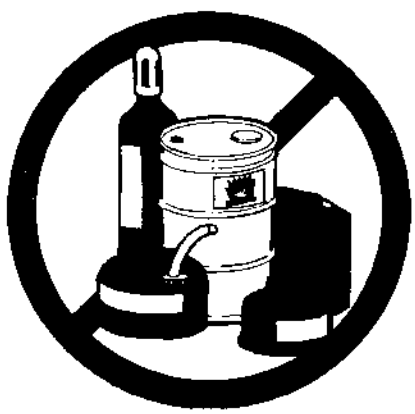
The *Explosives Safety Regulation* addresses the handling of explosives as a complement to federal law. The draft proposal eliminates obsolete requirements or those that duplicate federal regulations. The proposal also establishes industry-specific requirements in oil well perforation, avalanche control and pyrotechnics and new requirements when abandoning misfires and the use of open-flame equipment in seismic blasting.

Future action

The final reports of the task forces have been submitted to the Department and the Council on Workplace Safety has submitted recommendations on the non-consensus items. Legal drafting is underway and is expected to take 4-6 months for a first draft. An Order in Council is expected to follow, featuring repeal of current regulations and proclamation of a new *Occupational Health and Safety Regulation*.

■ **Kenn Hample, P. Eng.**
Workplace Health and Safety Division
Alberta Human Resources and Employment

1 R.S.A. 2000, c. O-2.
2 Alta. Reg. 272/76.
3 Alta. Reg. 448/83.
4 Alta. Reg. 393/88.



In Progress

In the Legislature...

Federal Legislation

Debate began on February 18, 2002 on Bill C-5, the *Species at Risk Act*, which was reported back from the Standing Committee on Environment and Sustainable Development on December 3, 2001.

Bill C-19, *An Act to amend the Canadian Environmental Assessment Act*, continues to be studied by the Standing Committee on Environment and Sustainable Development. The Committee met several times in February, 2002 to hear representations on the Bill.

Alberta Legislation

Bill 219, the *Fisheries (Alberta) Amendment Act, 2001 (No. 2)* was introduced on November 21, 2001. The Bill is intended to provide principles for the sustainability of Alberta's fisheries by addressing fishing licences, the management of habitat and the control of pests.

Alberta Regulations

Several regulations under the *Agricultural Operation Practices Act* came into effect on January 1, 2002, all pertaining to the new process for regulating confined feeding operations. These are the:

- *Agricultural Operations, Part 2 Matters Regulation*, AR 257/2001,
- *Board Administrative Procedures Regulation*, AR 268/2001, and
- *Standards and Administration Regulation*, AR 267/2001.

As of October 17, 2001, the *Wildlife Regulation*, AR 143/97 is amended by AR 194/2001. The amendment makes some changes to s.107 'Traps for certain fur-bearing animals, etc.' as well as to Schedule 15, specifically changes to quotas for cougar and open seasons for fur-bearing animals.

Cases and Enforcement Action...

Tibor Molnar was ordered to pay $2,000 to the Habitat Conservation Trust Fund for violating the British Columbia *Water Act* by digging out a tributary to a creek that provided habitat for a species of trout listed as being at risk. Molnar must restore the creek and replant the areas stripped of vegetation. Charges under the federal *Fisheries Act* were stayed.

A Saskatchewan Provincial Court Judge sentenced Safety-Kleen Ltd. to a fine of $50,000 for failing to give notice of the proposed export of hazardous waste as required by the *Canadian Environmental Protection Act, 199*. The company was also fined $25,000 on each of two counts of handling and transporting flammable materials without the proper documentation. The latter charges were under the federal *Transportation of Dangerous Goods Regulations*.

The Alberta Environmental Appeal Board released a decision in *Ouimet et al* v. *Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment, re: Ouellette Packers (2000) Ltd.* This was an appeal of a Preliminary Certificate and proposed Licence to divert water issued under the *Water Act* to support a hog processing plant. The Board ruled the appellants were not "directly affected" and determined that the concern presented would more appropriately be addressed by an appeal of the Approval issued under the *Environmental Protection and Enhancement Act*.

The Alberta Environmental Appeal Board released a Costs Decision in *Paron et al*. This Decision relates to the meetings and hearing held following appeals of the Approval issued to TransAlta for the operation and reclamation of the Lake Wabamun Thermal Electric Power Plant. Parties to the hearing were informed in September 2001 of the Board's decision to award costs only to the Lake Wabamun Enhancement and Protection Association and only for the Preliminary Meeting, with Ennax to pay the costs. The Costs Decision released now presents the reasons for the Board's decision.

The Alberta Energy and Utilities Board released *Decision 2002-014: TransAlta Energy Corporation 900-MW Keephills Power Plant Expansion No. 2001200*. The Board approved the application subject to a number of conditions, directions, and recommendations. (See "Electricity Generation Expansion Sparks Many Issues," page 1 of this issue).

A decision released February 12, 2002 by Alberta Court of Queen's Bench Justice LoVecchio, turned down the application by the Prairie Crocus Ranching Coalition Society to quash the decision of Cardston County's Municipal Planning Commission granting a subdivision permit for the development of country residential lots on the border of Waterton Lakes National Park.

■ **Keri Barringer**, *Staff Counsel*
Dolores Noga, *Librarian*
Environmental Law Centre

In Progress reports on selected environmental activity 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.

Commercial Leases and Landlord Liability for Tenants' Contamination

For many commercial landlords, the possibility that a tenant may contaminate the leased property is a serious concern. Unless steps are taken to protect the landlord, he may be liable for the full cost of remediation, or clean-up, required under Alberta's *Environmental Protection and Enhancement Act*.[1] The landlord may also face losses on sale, and may be liable to adjacent property owners and individuals who suffer injury from exposure to contaminants on the site.

To limit exposure to such liability, a landlord should consider the inclusion in the lease of a carefully worded clause dealing with responsibility for potential contamination by the tenant. Alberta case law indicates that, faced with a lease that does not directly address responsibility for contamination, the courts may imply a term requiring that the tenant return the property uncontaminated upon termination. However, recent decisions from other provinces suggest that landlords should not rely upon the willingness of the courts to imply such a term.

Case Law

The leading Alberta case in this area is *Darmac Credit Corp. v. Great Western Containers Inc.*[2] In *Darmac*, the tenant company leased premises for the purpose of a chemical and oil drum reconditioning business. The lease provided that the tenant would, on termination of the lease, "restore the Demised Premises…at its own expense to the physical condition thereof existing at the commencement date…."

On termination, the landlord discovered that the tenant had contaminated the premises with hydrocarbons and chemicals. The issue was what was required to return the premises to their original condition. The Court found the tenant liable to the landlord for the cost of soil remediation studies and for the cost of remediation to standards set by environmental legislation. The Court stated as follows:

> [The Tenant] had an obligation to restore the Nisku property to its original state pursuant to the lease. It originally was not contaminated.
>
> ….
>
> In my view, in today's commercial world, unless a lease provides otherwise, it is implied within a lease that lands are to be returned uncontaminated.[3]

Unfortunately, it is not clear from the reasons in *Darmac* whether the Court found for the landlord on the basis of the express term in the lease, or an implied term that the lands be returned uncontaminated.

Courts in other provinces have rejected *Darmac* as precedent for the implication of such a term. In the recent Manitoba case of *Westfair Foods Ltd. v. Domo Gasoline Corp.*, the leased land was found to be contaminated as a result of leakage from the tenant's underground storage tanks.[4] The tenant remediated the property according to provincial soil remediation guidelines. On termination, the landlord argued it was entitled to have the lands returned in their original condition. The lease provided that the lessee would "remove the said gasoline dispensing equipment…and restore the surface of the ground to the same condition as it was prior to the installation of the said gasoline dispensing equipment." The Trial Judge refused to imply a term requiring the tenant to return the premises uncontaminated, and stated that *Darmac* had been decided not upon an implied term, but upon the express terms of the *Darmac* lease. This decision was confirmed on appeal.

Westfair indicates that, at least in Manitoba, absent an express term requiring that the leased land be returned in its original condition, a tenant who performs a reasonable clean-up will in most cases have met its obligations under the lease. Reasonable clean-up is determined with reference to regulatory requirements and the property's intended, and highest and best, uses.

In the British Columbia case of *O'Connor v. Fleck*, the lease provided that the tenant would return the building in its original condition on termination.[5] The tenant left large quantities of contaminated waste in the leased building, which the landlord paid to remediate. The Court held that there was an implied term that the premises would be returned uncontaminated, but limited the tenant's obligation to taking reasonable steps with reference to the building's contemplated use.

Conclusion

In summary, where a lease requires a tenant to restore the leased premises to its original condition on termination, the tenant will likely be liable only for the cost of remediation to standards set under Alberta environmental legislation. It spite of the *Darmac* decision, it remains uncertain whether, in the absence of an express term requiring a tenant to return leased property in an uncontaminated state, an Alberta court would imply a such term. In order to limit liability, a landlord should consider insisting upon a term in the lease requiring the tenant to remediate any contamination the tenant causes to specified remediation levels.

■ **James Mallet**
Student at Law
Witten LLP

1 R.S.A. 2000, c.E-12
2 (1994), 163 A.R. 10 (Alta Q.B.).
3 *Ibid.*, paragraph 59-60
4 (1999), 28 R.P.R.(3d) 232 (Man. C.A.), aff'g 23 R.P.R. (3d) 128 (Man. Q.B.).
5 (2000), 35 R.P.R. (3d) 169 (B.C.S.C.).

Case Notes

Court Affirms Federal Role in Environmental Assessment

Environmental Resource Centre et al v. *Minister of Environment (Canada) et al* (20 December 2001), Decision Numbers T-274-99, T-1799-99, T-100-00 (Federal Court, Trial Division).

In late December of 2001 the Federal Court rendered an important decision that strengthened the federal government's role in the environmental assessment process as it relates to large oil sands projects.[1] Justice Heneghan of the Trial Division ruled that the federal Ministers of Environment and Fisheries failed to comply with their duties under the *Canadian Environmental Assessment Act* (CEAA)[2] when they approved Suncor's "Project Millennium" in northeastern Alberta. The project involved a $2 billion expansion and upgrade of an existing oil sands mine.

Background

Three environmental groups, the Environmental Resource Centre, Prairie Acid Rain Coalition and Toxics Watch Society, brought applications for judicial review related to the approval of Suncor Energy's "Project Millennium".

Suncor prepared an application for review and approval by Alberta Environment and the Alberta Energy and Utilities Board. An environmental impact assessment (EIA) was completed and public hearings were held. The federal environmental assessment process was triggered because the Project required authorization from the federal Department of Fisheries and Oceans (DFO) for harmful alteration, destruction or disruption of fish habitat under section 35(2) of the federal *Fisheries Act*. DFO was the federal responsible authority (RA) for the project.

An environmental assessment in the form of a Comprehensive Study Review (CSR) was conducted in accordance with the requirements of sections 16(1) - (2) of CEAA. The CSR, which relied on the EIA prepared by Suncor, was then submitted to the Canadian Environmental Assessment Agency (Agency). The Minister of Fisheries (MFO) advised the Minister of the Environment (MOE) of this and requested her advice on the appropriate course of action. The Agency then requested, and received, a copy of the terms of reference for the provincial Regional Sustainable Development Strategy (RSDS) and provided it to the MOE prior to her decision on the CSR.

The stated purpose of the RSDS[3] is to "provide a framework for managing cumulative environmental effects and to ensure sustainable development in the Athabasca oil sands area."[4] Alberta Environment states that its approach "is expected to help resolve environmental issues in a collaborative fashion and to minimize confrontational approaches such as legal hearings and court challenges."[5] The RSDS states that "[i]t is guided by government policy, and is consistent with provincial and national commitments to sustainable development and biological diversity."[6]

The Applicants described the RSDS as "a multi-stakeholder process involving all of the companies operating in the region, federal and provincial agencies, affected municipalities and towns, First Nations and non-governmental groups" and noted that "[p]articipation in RSDS is voluntary, and decisions made are by consensus."[7]

The MOE considered the RSDS and made her decision on January 21, 1999. She approved the project, and stated that "the project as described, is not likely to cause significant adverse environmental effects."[8] She then referred the matter back to the MFO, who then issued the authorizations under the *Fisheries Act*.

The applications for judicial review challenged the legality of the decision made by the federal MOE pursuant to CEAA and challenged the decisions of the MFO to issue authorizations. Although numerous issues were addressed in the case, only the adoption of the RSDS as a "mitigation measure" and ministerial discretion will be discussed in what follows.

Analysis

The Applicants argued that the federal CSR did not comply with section 16 of CEAA because the authors of the CSR relied on the Alberta regulatory processes, especially the RSDS, to mitigate environmental effects.[9] Justice Heneghan concluded that the MOE had considered the CSR as well as public comments in making her decision.[10] She noted that since the federal CSR refers to the Alberta process and the RSDS as constituting mitigation measures, then the question is whether the Minister's reliance upon the RSDS was a correct interpretation of the requirements of section 16 of CEAA or a reasonable discretionary decision.[11]

Public comments received after the CSR was released had expressed concerns about the significance of environmental effects, as did Environment Canada, which opined that "the Minister may lack the flexibility within the current legislation to consider the Alberta Strategy [RSDS] as a mechanism to respond to the uncertainties associated with cumulative effects.... should Alberta fail to deliver on the strategy, the Minister [MOE] does not have any legislative authority to deal with that eventuality."[12]

Justice Heneghan was clearly influenced by Environment Canada's opinion. She noted that it highlighted the problem with the MOE's decision; namely that the Minister relied upon provincial regulatory processes (including the RSDS and industry based initiatives) that were beyond enforcement or control by federal authorities.[13]

(Continued on Page 9)

New Executive Director Named

Cindy Chiasson

Jennifer Klimek, President of the Environmental Law Centre, is pleased to announce the appointment of Cindy Chiasson as Executive Director. Ms. Chiasson had been Staff Counsel with the Centre from 1997 until her appointment effective January 1, 2002. She replaces Arlene Kwasniak, who has returned to private legal practice.

Ms. Chiasson has practiced law since 1987 and has concentrated her practice on environmental and natural resources law and policy since 1990. She has extensive environmental regulatory experience, having worked for a number of years with the provincial government on the development of the *Environmental Protection and Enhancement Act* and related regulations and codes of practice.

Ms. Chiasson also has in-depth experience in contaminated sites and air quality matters. She has represented Alberta in national contaminated sites initiatives and is the author of *Get the Real Dirt: Contaminated Real Estate and the Law in Alberta* (2000). She has also written *Community Action on Air Quality* (1999) and *Community Action on Industrial Facilities* (2002), materials aimed at community-based environmental monitoring and enforcement.

Administrative Penalties

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

- $3,500 to EPCOR Water Services Inc. of Strathmore for commencing construction of a Wastewater Treatment Plant without an approval in violation of s.59 of the *Environmental Protection and Enhancement Act*.
- $3,500 to Anderson Exploration Ltd. operators of a sour gas processing plant in Saddle Hills County. The penalty was assessed for contravening their Approval by failing to analyze the parameters prior to releasing industrial runoff from the Holding Pond and for releasing an excess amount from the pond into the surrounding watershed.
- $5,000 to Slave Lake Pulp Corporation for contravening their Approval by discharging liquid effluent from the wastewater treatment facility that did not meet the contaminant limits.
- $5,500 to Wintergreen Family Resorts Ltd. of the Municipal District of Rocky View No. 44. While the property has been transferred to a new owner, the penalty was assessed to Wintergreen for contravening their Approval by failing to ensure that the day-to-day operation of the Plant and collection system was supervised by a certified operator, late submission of the Wastewater Irrigation Report, and failing to immediately report a contravention of their Approval. The penalty was assessed under s.213(e) of the *Environmental Protection and Enhancement Act*. The penalty has been appealed to the Environmental Appeal Board.
- $14,500 to Orica Canada Inc., operators of a fertilizer manufacturing plant in Wheatland County, for failing to record and perform a variety of tests as required by their Approval.

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

- $3,000 to SEEHTA Forest Products Ltd. of Red Earth for contravening terms and conditions of their licence in violation of s.100(b) of the *Timber Management Regulation*.
- $3,000 to Defiant Energy Corporation of Calgary for contravening terms and conditions of their lease in violation of s.47.1 of the *Public Lands Act*.
- $9,074.25 to Central Alberta Midstream for unauthorized use of public land on a lease contrary to ss.48(1) and 49(1) of the *Public Lands Act*.
- $12,195.04 to Husky Energy of Calgary for unauthorized use of public land contrary to s.48(1) of the *Public Lands Act*.
- $8,483.44 to Husky Energy of Calgary for unauthorized use of public land contrary to s.48(1) of the *Public Lands Act*.
- $21,275.95 to Corridor Pipeline Limited of Sherwood Park for unauthorized harvest of timber in violation of s.10 of the *Forests Act*.

Action Update

Where's Alberta Environment Going With Our Waste?

The *Alberta User Guide for Waste Managers* (Guide) is being updated. The Guide was first published by Alberta Environment in 1995 to assist waste generators, carriers and receivers in understanding Alberta's hazardous waste legislation (primarily the *Environmental Protection and Enhancement Act*[1] and the *Waste Control Regulation* [2]). Since 1995, hazardous waste management in Alberta has changed as a result of legislative amendments, memoranda of understanding, new codes of practice and experience gained by regulatory authorities and waste managers with new standards, technologies, and practices. An update to the Guide was required to accurately reflect existing legislation and meet current and future needs of users.

The process to update the Guide began in the summer of 2000, culminating in the release of a draft for public discussion in August 2001. In conjunction with the update of the Guide, Alberta Environment is also proposing amendments to the *Waste Control Regulation*. The new draft Guide reflects the proposed amendments to the regulation.

The major changes to the Guide include:

- the adoption of the U.S. Environmental Protection Agency lists of hazardous wastes and chemicals (F, K, P and U lists) to identify and classify hazardous waste;
- changes to the numerical criteria of a consolidated table for 9.2 and 9.3 substances for both classification and landfill restriction purposes; and
- a new table that sets out the substances and numerical criteria for landfill disposal of hazardous waste (moved from s. 13 of the *Waste Control Regulation*).

The draft Guide is divided into 10 parts, a schedule and five appendices. Part 1 sets out the purpose of the Guide, major changes to the Guide and important contact information. Parts 2 through 10 cover the following topics: overview of regulatory responsibilities; responsibilities of waste managers; waste classification; landfill restrictions; test methods; transportation of hazardous waste and hazardous recyclables; importation of hazardous waste and hazardous recyclables; approvals and registrations for waste management facilities; and frequently asked questions and answers.

The Schedule to the Guide has been changed. Tables 1 and 2 of the current Guide have been consolidated into a new Table 1. Table 2 sets out hazardous industrial waste from specific and non-specific sources and replaces Table 3 of the current Guide. Table 3 lists hazardous waste chemicals and replaces the current Table 4. Finally, a new Table 4 has been added which lists the hazardous substances and numerical criteria for the landfill disposal of hazardous waste.

There are five appendices to the Guide:

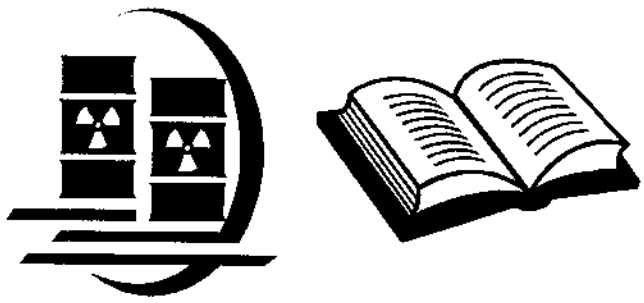
- Appendix A: Definitions;
- Appendix B: Guide to the Waste Control Regulation;
- Appendix C: Wastes Not Regulated As Hazardous;
- Appendix D: Precedence of Classes Table; and
- Appendix E: Waste Classification Examples.

The new draft Guide is posted on Alberta Environment's website at <http://www3.gov.ab.ca/env/waste/indhaz/draftdocuments.html>.

Two public workshops were held in September and October of 2001 and stakeholders and the public was invited to submit written comments on the draft Guide. The new Guide has not yet been finalized. Alberta Environment is planning additional consultation before the new Guide becomes final.

■ **Joanne Smart**
Regulatory Analyst
Stantec Consulting Ltd.

1 R.S.A. 2000, c. E-12.
2 Alta. Reg. 192/96.



(Court Affirms Federal Role. . continued from Page 6)

Environmental Law Centre Donors - 2001

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 2001. They are:

BENEFACTORS - $5,000 +
Alberta Law Foundation
Alberta Real Estate Foundation
Dow Chemical Canada Inc.
Ducks Unlimited Canada
Edmonton Community Lottery Board
TransCanada Pipelines Limited
Western Economic Diversification Canada

PATRONS $2,500 - $4,999
Austin S. Nelson Foundation
BP Canada Energy Company
Fraser Milner Casgrain
Lusear Ltd.
Petro-Canada
TELUS

PARTNERS $1,000 - $2,499
Alberta Pacific Forest Industries Inc.
Canadian Hydro Developers, Inc
Judith Hanebury, Q.C.
Nexen Inc.
Suncor Energy Foundation
Syncrude Canada Ltd

ASSOCIATES $500 - $999
Garry Appelt
City of Edmonton - Asset Management & Public Works
Conoco Canada Resources Limited
Field Atkinson Perraton
Lorne Fitch
Dr. David Ho
Ronald Kruhlak
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
Ferner Environment Inc.
Arlene Kwasniak
Alastair R. Lucas
Michael L.J. Morin, Q.C.
Cliff Wallis

CONTRIBUTORS $125 - $249
Anonymous
Paul Edwards
Debra Lindskoog
Frank Laszczak
JGM Consulting Inc
Nature Conservancy of Canada
Clifton D. O'Brien
Dr. Mary Richardson
Shores Belzil
Valentine Volvo

UP TO $125
Beresh Depoe Cunningham
Michael Callihoo
Gerald DeSorcy
Thomas Dickson
Albert Doberstein
Dr. William Fuller
Dr. Mary Griffiths
Group 4 Securitas (Canada) Limited
Thomasine Irwin
J. Derek Johnson
Andriana Lapchuk
Red Deer River Naturalists Society
Kim Sanderson
janice Taylor
United Way of Calgary -- Donor Choice Program

She concluded that "I am not satisfied that reliance upon processes over which [the Minister] has no control constitutes a reasonable exercise of authority or discretion."[14] She agreed with the Applicants' position and stated that the federal Minister would be participating only as a voluntary stakeholder in a process over which she [the Minister] had no control, and as such would be abrogating her responsibilities under section 12 of CEAA.[15] She recognized that section 12 allows federal authorities to rely on provincial actions for some purposes, but noted that nothing in the section or elsewhere permits the MOE (or any federal RA) to discharge their obligations by voluntarily participating in provincial regulatory processes and initiatives.[16] She concluded that the MFO compounded the error of law committed by the MOE by issuing the authorizations.[17]

Disposition

The Court therefore allowed the applications for judicial review. Since the work authorized had been carried out by the time the applications were heard Justice Heneghan did not make an order of prohibition. However, she did issue a declaration that the MOE's decision was wrong in law as were the MFO's authorizations.

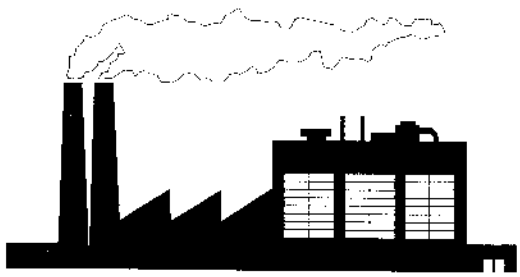
Conclusion

This case is significant because the Federal Court affirmed that the federal government has a non-delegable duty to ensure the mitigation of impacts of projects with potentially major environmental effects. It reaffirmed the role of the federal government as a "watch-dog" of environmental matters and demonstrated that it cannot defer to provincially controlled processes that have no regulated goals or outcomes. It clearly strengthened the federal government's role in the environmental assessment process as it relates to provincial energy projects. The federal government must be an active participant in the environmental assessment process, not just another participant on par with all other stakeholders. Federal Environment Ministers can no longer dodge their responsibilities. He or she must ensure that proper environmental assessments are completed on projects with potentially large scale environmental impacts - it will not be sufficient to rely strictly on provincial environmental assessments and provincial regulatory processes.

On the negative side, the Court did not issue an order of prohibition; however, as Justice Heneghan correctly pointed out, it would have served no purpose since the work had already been completed. The Applicants might have originally sought injunctive relief, but this was not done.

■ **Robert R.G. Williams**
Staff Counsel
Environmental Law Centre

Decision numbers T-274-99, T-1799-99, T-100-00, 20-12-2001, Federal Court (Trial Division).
S.C. 1992, c.37
Alberta Environment, *Regional Sustainable Development Strategy for the Athabasca Oil Sands Area* (July 1999), see the Alberta Environment web site at <http://www3.gov.ab.ca/env/regions/neb/rsds/rsds_final.pdf>.
Alberta Environment, Alberta Sustainable Resource Development, *Regional Sustainable Development Strategy for the Athabasca Oil Sands Area - Progress Report* (July 2001) at 1, see the Alberta Environment website at <http://www3.gov.ab.ca/env/regions/neb/rsds/RSDS_Progress_report_2001_10.pdf>.
Ibid.
Supra, note 3 at paragraph 3.
Supra, note 1 at paragraph 61.
Supra, note 1 at paragraph 45.
Supra, note 1 at paragraph 147.
Supra, note 1 at paragraph 149.
Supra, note 1 at paragraph 150.
Supra, note 1 at paragraph 153.
Supra, note 1 at paragraph 154.
Supra, note 1 at paragraph 156.
Supra, note 1 at paragraph 157
Ibid.
Supra, note 1 at paragraph 159



(Electricity Generation Expansion ..continued from Page 1)

It is arguable that these references leave it open for the AEUB to consider the very points raised by the interveners on need for the extra generation, particularly in light of the provision dealing with sharing of benefits and responsibilities by Alberta electricity consumers.

Evolving Environmental Standards for Electricity

A factor of significant interest to the environmental community in particular, in relation to these expansions, is the ongoing development of new environmental standards at both the federal and provincial levels that will be relevant to the electricity sector. This includes development of federal standards for thermal electric generation and a Canada-wide Standard for mercury, as well as Alberta implementation of the *Canada-wide Standards for Particulate Matter (PM) and Ozone*[9] and policy work geared towards the development of post-2005 standards for Alberta's electricity sector. A major concern is that these developing standards be applied to existing and newly approved electricity generation, as it is likely that approvals under the *Environmental Protection and Enhancement Act*[10] (EPEA) will be issued for the Genesee and Keephills expansions before these standards come into effect.

This concern was shared by the AEUB and in both decisions it indicated that it felt that "grandfathering" of the Genesee and Keephills expansions through exemption from future environmental standards would not be appropriate.[11] It also made specific recommendations in both decisions to Alberta Environment that the department ensure that the approval process under EPEA for the expansions deal with how future changes to environmental standards should be implemented by both Epcor and TransAlta.

It will be important for Alberta Environment to make these allowances in the approvals expected to be issued for the expansions, as EPEA imposes limitations on amendments to approvals that would make it difficult to incorporate new standards into existing approvals as those standards come into effect. Pursuant to section 70 EPEA, amendments to approvals may be made by the Director upon application by the approval holder or upon the Director's own initiative, in certain circumstances. None of the circumstances set out in section 70 would appear to apply to allow the Director, of his own accord, to amend the anticipated Genesee and Keephills approvals to incorporate new environmental standards as they come into effect. Given this, it will be important either for the anticipated approvals to be worded in such a way as to allow the incorporation of new standards or for the new standards to be incorporated into regulations that will apply to all electricity generators in addition to their approvals.

Environmental Monitoring

Environmental monitoring emerged as a major area of concern in both the Genesee and Keephills decisions. The AEUB emphasized the need for regional monitoring of cumulative effects of both generation facilities and indicated its expectation that Epcor and TransAlta will both show leadership in relation to regional environmental monitoring.

A wide range of needs and concerns were reflected in the AEUB's directions and recommendations, including health exposure and assessment, air quality, surface water and groundwater quality, sediment and soil quality, mercury monitoring and management, vegetation and wildlife.

Much mention was made in both decisions of the planned involvement by Epcor and TransAlta in the West Central Airshed Society (WCAS), a multi-stakeholder organization that carries out regional air quality monitoring under the umbrella of the Clean Air Strategic Alliance (CASA). While WCAS deals with air quality monitoring on a regional basis, it should not be considered as a cure-all for the broad range of monitoring concerns raised in the Genesee and Keephills decisions. The WCAS focus is on air quality, including air emission effects on vegetation. It would require broad reworking of its mandate and the consensus of all its stakeholders to expand its mandate to cover all the monitoring concerns identified in the AEUB decisions.

As well, in some instances Alberta Environment has removed ambient monitoring conditions from the approvals of operators that participate in regional air quality monitoring through CASA airshed zones. While some discussion has taken place on criteria that should be met for removal of such conditions, these criteria are not legislated and do not guarantee participation in the removal process by those parties who may be affected by removal of monitoring conditions.[12] As well, it is unclear which parties bear responsibility for defaults or non-compliance in instances where ambient monitoring requirements have been removed. In light of the emphasis that the AEUB has placed on monitoring and related accountability by Epcor and TransAlta in the Genesee and Keephills decisions, Alberta Environment should be very cautious with respect to the possibility of leaving monitoring responsibilities out of the approvals it is likely to grant to the generation expansions.

■ **Cindy Chiasson**
Executive Director
Environmental Law Centre

1 *Epcor Generation Inc. and Epcor Power Development Corporation, 490-MW Genesee Power Plant Expansion* (21 December 2001), Decision 2001-111 (Alberta Energy and Utilities Board) Application 2001173.
2 *TransAlta Energy Corporation, 900-MW Keephills Power Plant Expansion* (12 February 2002), Decision 2002-014 (Alberta Energy and Utilities Board) Application 2001200.
3 *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 3.
4 *Supra* note 1, pp. 3-4 and note 2, pp. 4-5.
5 R.S.A. 2000, c. E-5.
6 R.S.A. 2000, c. 11-16.
7 *Supra* note 5, s. 6(a)(i).
8 *Ibid.*, s.6(c).
9 (Canadian Council of Ministers of the Environment, June 2000)
10 R.S.A. 2000, c. E-12.
11 *Supra* note 1, p. 64 and note 2, p.68.
12 *Criteria for Reducing Compliance-Based Air Quality Monitoring Requirements for Zonal Air Quality Management in Alberta* (Alberta Environment, January 2000).

By Keri Barringer and Dolores Noga, *Environmental Law Centre*

Researching Environmental Law on the Internet

Introduction

To some, researching sources of environmental law in Canada may be overwhelming. There are however, many websites that can be useful in researching environmental law, and they are proliferating. This article refers to general sites and identifies the body or person responsible for the site in case of a location change.

Where to Begin

A starting point for any search on environmental law is a website that provides access to the laws themselves. Legislation for many Canadian jurisdictions is accessible via the Access to Justice (ACJNet) site at <http://www.acjnet.org>. This site serves as a portal to locating a variety of legislative materials for the federal level and an increasing number of the provinces and territories. Selecting the 'Access to Legislative Materials by Jurisdiction' link under the Quick Start menu will take you to a list of jurisdictions and the available information for each. For example, you can link to the Federal Department of Justice for federal statutes and regulations by selecting the appropriate option under 'Canada'. For many of the jurisdictions, links are also available to sites that provide the text of proposed Bills and perhaps a table showing progress of Bills through the respective Legislature. The ACJNet site is also very useful for accessing case law, a topic mentioned in greater detail below.

More In-Depth Research

In addition to knowing the text of the laws, it is also important to have some background information as a springboard to more in-depth research. The North American Commission for Environmental Cooperation site at <http://cec.org/pubs_info_resources/law_treat_agree/index.cfm?varlan=english> provides a valuable *Summary of Environmental Law in North America*.

From this site one can access overview information pertaining to environmental law for each of the three jurisdictions participating in the Commission: Canada, Mexico, and the United States.

Examples of topics presented include 'Public Participation', 'Environmental Impact Assessment', 'Waste Management', 'Mining', and 'Conservation of Biological Diversity and Wildlife'. To locate the information, click on the appropriate flag provided for each subject area. It is worth book-marking this exact site, as accessing it off the main page of the Commission is not immediately evident. If you prefer, the Summary can be found by going to <http://cec.org>, selecting 'English', then selecting 'Publications and Information Resources', then 'Laws, Treaties and Agreements', and last 'Summary of Environmental Laws in North America'.

Also at this site you may research a third aspect of environmental law by obtaining the text of treaties and further information on the signing and ratifying of them. The 'Transboundary Agreements Infobase' option provides a database of more than 200 agreements and treaties on transboundary environmental cooperation in North America. The database can be searched by subject, agreement name, or by parties to the agreement. Links to the full-text of the agreement are provided where possible, as is an overview and contact source. The database is located at< http://cec.org/pubs_info_Resources/law_treat_agree/transbound_agree/index.cfm?varlan=english>.

Accessing Judgments

Users may also wish to pursue the application of environmental law by accessing judgments of various courts. Fortunately, the ability to access judicial decisions via the Internet is also increasing.

The Access to Justice Network site mentioned previously provides a ready link to the decisions of courts in a number of jurisdictions.

If a court link is provided, it is worth following, as the name is not always an accurate reflection of what is provided at the end.

Subject Specific Sites

In addition to the above, it is helpful to check subject-specific sites. Two sites that serve as useful portals are:

- <http://www.findlaw.com/index.html> -While this is U.S.-based, it does guide users to Internet-based resources in environmental law.
- <http://www.llrx.com/features/ca.html> -Titled *Doing Legal Research in Canada*, this is on the site of the Law Library Resource Exchange (LLRX). It provides a valuable introduction to legal research in Canada as well as links to the catalogues of Canadian law libraries.

Finally, visit the website of the Environmental Law Centre at <http://www.elc.ab.ca>. It includes briefs and submissions authored by Centre lawyers, answers to frequently asked environmental law questions, and access to the catalogue of the Centre's public library.

For additional information on this subject, including Environmental Law Centre publications and a more extensive list of websites to browse, please refer to our "Frequently Asked Questions" which are available on our website and in the Centre's library.

Environmental Impairment Liability Insurance And Landfills

Dear Staff Counsel:
I have heard that landfill authorities can obtain environmental impairment liability insurance. Is this type of insurance mandatory in Alberta? Are there any regulations that govern the renewal of operating permits for landfills, and can these permits be extended indefinitely? I would appreciate any information or references you may have for legislative authority on these issues.

Sincerely M. Moore

Dear M. Moore:
The environmental impairment liability insurance you are asking about pertains to the import and export of hazardous waste in Canada, and comes under federal jurisdiction. Under the *Export and Import of Hazardous Wastes Regulation*, there is a specific requirement for environmental liability and third party insurance. Section 9 of the Regulation requires Canadian importers and exporters of hazardous waste to be insured for environmental impairment liability of at least $5,000,000.

In Alberta, section 18 of the *Public Vehicle Certificate and Insurance Regulation* requires that carriers of certain dangerous goods be insured. In particular, those goods which fall under Schedule XII of the federal *Transportation of Dangerous Goods Regulations*, in the quantities indicated in Column IV of that Schedule, in respect of which an emergency response plan is required to be filed with the Director General, must carry insurance. The amount must be at least $2,000,000 and protect against liability resulting from bodily injury or death and loss of or damage to property other than cargo. Transportation of dangerous goods in Alberta is regulated by the *Dangerous Goods Transportation and Handling Regulation*, which adopts the federal *Transportation of Dangerous Goods Regulations* with full force.

The responsibility for municipal waste facilities transferred from the *Public Health Act* to Alberta Environment under the *Environmental Protection and Enhancement Act* (EPEA) in 1996. Alberta Environment has the responsibility for regulating the transportation, treatment and disposal of hazardous wastes, and the responsibility for waste management facilities that handle and dispose of non-hazardous waste produced by industry. There are a number of regulations under EPEA that are relevant to the operation of landfill facilities.

The *Activities Designation Regulation* specifies those activities that require an approval, registration or notification. Section 9 deems operating permits previously issued under the *Public Health Act* with respect to landfills, as listed in Schedule 1 Division 1 or Schedule 2 Division 1, to be an approval or a registration for purposes of EPEA. Expiry of operating permits varies from 5 to 10 years depending on the board of authority that issued them.

The *Approvals and Registration Procedure Regulation* outlines the approval procedure and minimum application requirements for various projects including landfills. Section 9 of the Regulation provides that an approval or registration may not be issued where security or insurance is required, until the Director is satisfied it has been provided. Decisions on applications for new approvals, amendments and renewals of existing approvals are at the discretion of the Director.

Section 7 of the *Environmental Protection and Enhancement (Miscellaneous) Regulation*, provides that subject to section 123(4) of the Act the term of an approval is 10 years, or less if the Director considers it appropriate. The Director also has authority under section 66 EPEA to extend the expiry date.

The *Waste Control Regulation* governs the handling, storage, recycling and disposal of hazardous waste and sets operating standards for landfills. Part 4 of the Regulation governs the security requirements for an approval or registration in respect of a waste management or hazardous recyclable facility. Section 30 in Part 4 of the Regulation outlines the forms of security including cash, cheque, bond or other form acceptable to the Director.

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.

Prepared by:
Keri L. Barringer
Staff Counsel

Alberta Law Foundation