News Brief

ENVIRONMENTAL LAW CENTRE

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In This Issue

Wanna Buy Some Hot Air? A Brief Legal Overview of Greenhouse Gas Emissions Trading

One option being considered as a tool in reducing greenhouse gas (GHG) emissions and meeting Canada's reduction target if the *Kyoto Protocol* is ratified is emissions trading. Both the federal and Alberta governments have indicated clear interest in pursuing GHG emissions trading as an important part of any effort to reduce domestic GHG emissions. However, many do not clearly understand emissions trading and its significance in relation to GHG reduction and climate change. This article will discuss this matter, together with related legal issues.

What is emissions trading?

Simply put, emissions trading is a means of using market forces to encourage emissions reductions. Commonly, emitters are allocated permits that allow them to emit a specific level of pollutants. Emitters that can reduce their emissions below their allocated levels will be able to sell any excess permits to those who may find it more cost-effective to purchase these permits rather than implement their own emission reduction measures. The philosophy underlying emissions trading is that these trades of emissions permits will ultimately achieve emissions reductions at a lower total cost than simply imposing regulated reduction levels for all emitters.

Why is emissions trading significant to climate change?

The *Kyoto Protocol* (the Protocol) specifically provides for emissions trading as a means to be used by countries to achieve their GHG reduction targets agreed to under the Protocol.[1] The Protocol contemplates transfers of "emission reduction units" between Annex I countries, subject to certain conditions set out in the Protocol.[2] It also provides that the parties to the Protocol will develop a system for emissions trading, including requirements for verification, reporting and accountability.[3] This points to the ultimate development of an international system for GHG emissions trading if the Protocol is ratified.

GHGs are particularly amenable to emissions trading, as their environmental effects are global, rather than localized. As such, GHG emission reduction in any part of the world will provide an environmental benefit in relation to climate change generally. This reinforces the potential for GHG emissions trading on an international basis.

What laws would be required for emissions trading in Canada?

A complicating factor in establishing a Canadian system for GHG emissions trading is the fact that constitutional authority for environmental matters is shared between the federal government and the provinces. Due to this split jurisdiction, the optimum situation for development of a domestic GHG emissions trading system would be a cooperative undertaking between the federal government and the provinces, as it is unclear which level of government might have authority to create and administer a trading system without cooperation of the other level of government. Ultimately the constitutional authority for creation of emissions trading systems will depend in large part on the legal characterization of such a legislative scheme.[4]

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Both Alberta and the federal government have legislative provisions that would enable them to develop emissions trading systems. The *Environmental Protection and Enhancement Act* enables Alberta's Minister of Environment to establish programs and measures for the use of economic and financial instruments and market-based approaches, including emissions trading. However, this must be done in accordance with regulations; there currently are no provincial regulations enabling the creation of emissions trading systems.[5]

In the federal arena, the *Canadian Environmental Protection Act, 1999* enables the Minister of Environment to create guidelines, programs and other measures for economic instruments, including systems of tradeable units.[6] However, the Minister is obliged to offer to consult with provincial governments on these matters. The Minister may proceed to act 60 days after making such an offer if it is not accepted; the Act is silent as to the Minister's options should a provincial government agree to consult but not agree with the federal approach.[7] Relatively detailed enabling powers are provided under the Act to the federal Cabinet to make regulations creating trading systems.[8] The Act also provides the Minister with what is effectively an emergency regulation power in relation to established trading systems.[9]

Some other considerations

It is likely that an effective Canadian GHG emissions trading system will require the participation and cooperation of both the federal and provincial levels of government. The strong indications from the *Kyoto Protocol* of the likely creation of an international emissions trading system and the role of the federal government in ensuring the implementation of international obligations point towards the necessary involvement of the federal government in development of a Canadian trading system. However, the provinces will also have a very relevant role to play in developing such a system.

An important element of any GHG emissions trading system will be credibility and transparency of the system. Given the lack of understanding by much of the general public of climate change as a whole and public mistrust of government, industry and financial markets, there is likely to be skepticism on the part of the public as to the actual value and environmental efficacy of an emissions trading system. It will be important to have a trading system that is based in law rather than policy, with strong enforcement and significant penalties for non-compliance. Such a system should also include means to control and minimize the possibilities of fraud, such as third party audits or other verification of credits. A scientifically supported basis for caps on emissions will also be relevant in creating a credible GHG emissions trading system, while a system which reduces the capped level of emissions over time will aid in achieving ultimate GHG reduction.

One important matter to keep in mind in relation to GHG emissions trading is that a trading system will not be the sole tool for achieving GHG reductions. GHG emissions trading must be considered by governments and likely participants in suite with other reduction options. This is especially relevant for those sectors that are unlikely to be covered by an emissions trading system, for example, transportation or individual fossil fuel use.

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1 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, UNFCCC COP, 3d Sess., UN doc. FCCC/CP/1977/L.7/Add.1.
2 *Ibid.* at Art. 6.
3 *Ibid.* at Art. 16 bis
4 For more detailed discussion of constitutional and legislative issues related to emissions trading systems, see E. Atkinson, *The Legislative Authority to Implement a Domestic Emissions Trading System* (Ottawa: National Round Table on the Environment and the Economy, 1999. Another helpful source is C. Rolfe, *Turning Down the Heat - Emissions Trading and Canadian Implementation of the Kyoto Protocol* (Vancouver: West Coast Environmental Law Research Foundation, 1998).
5 R.S.A. 2000, c. E-12, s.13.
6 S.C. 1999, c. 33 at s.322.
7 *Ibid.* at s.323.
8 *Ibid.* at s.326
9 *Ibid.* at s.327.

Alberta's Water Strategy

Early in 2002, the Alberta government announced a consultation initiative called "Water for Life: Alberta's Strategy for Sustainability".

The province invited Albertans to participate in what they hope will be a comprehensive consultation process leading to the creation of a water management strategy that identifies short, medium and long term actions.

Alberta Environment made available information packages for all of those interested plus distributed hard copy workbooks on water management. An electronic interactive workbook on the "Water for Life" website was also available.

There were 15 Alberta public consultation meetings over the course of March, 2002. These consultations were organized so the government could learn, through participant feedback, more about existing water knowledge, evaluate current water use and strategize for the future. The examination and evaluation of water in Alberta emphasized the quantity of water in Alberta along with incorporating a review of the water quality.

The need for Alberta to devise a water strategy is based upon the current knowledge that existing water supplies are rapidly being strained by growth in municipalities, industry and agriculture. Cycles of drought have also taken their toll and the threat of climate change always lingers. Water quality has become an issue since the recent events in Walkerton and North Battleford. Objectives for Alberta's "Water for Life" initiative are the development of healthy sustainable ecosystems; safe, reliable, secure drinking water; and effective water management.

The first phase of the "Water for Life" program was the idea stage. This was a gathering of ideas from a small diverse group of Albertans. The next phase was the comprehensive outreach and consultation process. The consultation process involved requesting Albertans to complete the "Water for Life" workbook - both hard copy and electronic. The government also consulted 1,000 Albertans by telephone.

The information gathered by the government was compiled. In May 2002, a summary of the "Water for Life" consultation was released. The initial response from the survey comes as no surprise. Albertans want clean drinking water, pollution and contamination-free waters, no industrial or agricultural growth where there is not enough water, and planning for the future.

Albertans also said "no" to diverting water from one river basin to another. As a result of the survey being so definite with respect to river basin water diversion, the government of Alberta officially rejected water diversion from one river basin to another. Albertans also did not support encouraging companies to build or manage private water storage facilities.

The survey also made it clear that Albertans will not support further allocation of water if it harms the environment. The basic message that came through the survey response is that Alberta cannot sacrifice the environment to serve economic interests. Albertans were unanimous in their belief that water is a precious resource and survey results bolstered calls for more detailed information and support for the mapping of Alberta's ground water supply. Another urgent issue that was raised is that of the petroleum industry's practice of injecting fresh water into oil and gas wells to boost production. In 2000 some 206 billion litres of fresh water were injected into wells. In the year 2001 the amount of fresh water injection increased by 273 billion litres. The trend of such dramatic increases of fresh water injection is alarming.

Phase 3 of the program was a two-day forum hosted by the Minister of Environment in early June. There were approximately 100 delegates with a variety of interests ranging from conservation to industry. They met to review the ideas raised in the Phase 2 summary. Their mission was to condense the survey responses into concise and clear action items. The Alberta government plans to act upon the action items and translate them into a strategy for maintaining a sustainable and safe water supply.

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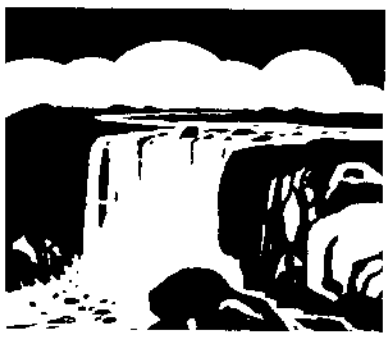

In Progress

In the Legislature...

Federal Legislation

The *Canada Foundation for Sustainable Development Technology Act* came into force on March 22, 2001. The Act received Royal Assent on June 14, 2001. The Minister of Natural Resources was designated as Minister for the purposes of the Act and the Foundation for Sustainable Development Technology in Canada as the foundation for the purposes of the Act.

Alberta Legislation

Bill 3, the *Irrigation Districts Amendment Act, 2002*, was introduced into the Legislature on February 27th and passed second reading on March 5th. The Bill introduces a number of amendments to the Act and is intended to "accommodate small-volume water users who wish to use water without the necessity of obtaining" a water licence.

Bill 202, the *Environmental Protection and Enhancement (Clean-up Instructions) Amendment Act, 2002* which was introduced on February 28th, passed second reading on March 4th, and passed Committee with amendments on March 18th. The amendment states that the Director "shall" issue instructions concerning the restoration of an area when a release has been reported under s.110. The amendment also introduces the requirement for a comprehensive review of the Act every ten years.

Federal Regulations

As a result of the new *Transportation of Dangerous Goods Regulations*, scheduled to come into force on August 15, 2002, the Department of Environment is proposing new regulations. The new regulations will govern the interprovincial transport of hazardous waste and introduce an amendment to the export and import of hazardous waste. The *Interprovincial Movement of Hazardous Waste Regulations* are scheduled to come into force on August 15, 2002. Proposed *Regulations Amending the Export and Import of Hazardous Wastes Regulations* are also scheduled to come into force on August 15th.

Cases and Enforcement Action...

An Alberta Provincial Court Judge sentenced the Quarry Ridge Golf Centre Ltd. of Fort McMurray to a $10,000 fine after the Centre pled guilty to violations of their License under s.142(1)(c) of the *Water Act*. Half of the fine is a creative sentence for constructing holding ponds to provide storage capacity for the golf course during dry months.

An Alberta Provincial Court Judge sentenced the University of Calgary to a $150,000 fine after the University plead guilty to the release of ammonia gas from the ice-making plant at the Olympic Oval in June 1999. The release was in violation of s.98(2) of the *Environmental Protection and Enhancement Act*. Of the $150,000 penalty, $75,000 is a creative sentence order under which a trust account is to be established to fund the creation of a multi-media teaching tool for ice-based facility safety by November 1, 2003.

An Alberta Provincial Court Judge assessed the City of Edmonton with a penalty of $200,000 after the City pled guilty to one count of violating their approval under s.213(e) of the *Environmental Protection and Enhancement Act*. The charge relates to failing to immediately report the release of untreated sewage from the Rossdale Pump Station into the North Saskatchewan River. The assessed penalty consisted of a $5,000 fine, $5,000 to repay Alberta Environment for the costs of the investigation, and a creative sentencing order valued at $190,000 to go to the University of Alberta Civil and Environmental Engineering Department to fund a university study on possible alternate uses for city waste water.

A class action suit on behalf of all certified organic grain farmers in Saskatchewan was filed in the Court of Queen's Bench in Saskatoon on January 10, 2002. The action against Monsanto and Aventis seeks compensation for damages caused by their genetically engineered canola and seeks to prevent Monsanto from introducing genetically engineered wheat into Saskatchewan. An application brought by Monsanto and Aventis on April 16, 2002 asking to be relieved of their obligation to file defences was denied. The statement of claim and further information is available on the website at <www.saskorganic.com/oapf.htm>.

On May 7, 2002, the Sierra Legal Defence Fund submitted a formal complaint to the Commission for Environmental Cooperation asserting that Canada, i.e. the federal government, is failing to effectively enforce the pollution prevention provisions of the *Fisheries Act* and of the *Pulp and Paper Effluent Regulations* against pulp and paper mills in Quebec, Ontario, and the Atlantic Provinces. The Commission Council will review the complaint and may direct the preparation of a factual record.

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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.

Enforcement of Environmental Appeal Board Recommendations and Natural Resources Board Decisions

This article addresses the question that is often asked regarding the enforcement powers related to Environmental Appeal Board recommendations and Natural Resources Conservation Board decisions. Often we are most interested in hearing the outcome of a Board decision or recommendation, but we do not know how any of these final decisions or conditions are monitored or enforced. The material below captures the law on this subject and provides some insight into regulatory enforcement powers.

Powers of the Environmental Appeal Board (EAB)

The powers of the EAB are limited in most cases to making recommendations to the Minister of Environment. Within 30 days of completion of a hearing of a matter referred to the EAB under s. 91(1)(a)-(m) of the *Environmental Protection and Enhancement Act*[1] (EPEA) or s.115(1)(a)-(i), (k), (m)-(p) and (r) of the *Water Act*[2] (WA), the EAB must submit its report and recommendations to the Minister.[3] The Minister then makes the final decision and may agree with, vary or reject the EAB's recommendations. The Minister may make any direction or order necessary for the purpose of carrying out the decision.[4]

With respect to appeals submitted under s. 91(1)(n)-(o) EPEA, which address Director's decisions regarding administrative penalties or requests for confidentiality, or s. 115(l)(j), (l) or (q) WA, the EAB has final decision-making authority and is required to submit a written decision on the matter within 30 days.[5]

Alberta Environment's "Compliance Assurance Principles" outline a choice of enforcement responses that are available depending on the circumstances of a particular case.[6] The purposes of the responses are to remedy, deter, and punish an offender. Possible responses include remedial orders, written warnings, administrative penalties, cancellation, suspension or removal of authorizations, and prosecutions. Alberta Environment decides which response is appropriate in each individual situation, and operates under the enforcement provisions of Part 10 EPEA.

Powers of the Natural Resources Conservation Board (NRCB)

The Natural Resources Conservation Board (NRCB) has jurisdiction to determine whether a proposed development that is the subject of an application is in the public interest. Under s.2 of the *Natural Resources Conservation Board Act*[7] (the Act), the Board reviews projects that will or may affect natural resources in Alberta to determine if they are in the public interest, having regard to the social and economic effects of the projects and the effect of the projects on the environment. Under the Act the types of projects subject to an NRCB review include resource-based projects such as forestry and recreational related applications, for which an environmental impact assessment has been ordered by the Environment Minister.

Section 9 of the Act gives authority to the NRCB, with prior authorization of the Lieutenant Governor in Council, to grant an approval on any terms and conditions it considers appropriate, but does not dispense with the requirement that any other required licence, permit or other authorization be obtained for a reviewable project. If an application is approved, any terms and conditions imposed by the NRCB are stated in its decision report. The NRCB may apply to the Court of Queen's Bench for a restraining order to enforce an order or direction made or issued by the NRCB.[8] Also, the NRCB is authorized with the approval of the Lieutenant Governor in Council to "take any action and make any orders and directions that the Board considers necessary to effect the purpose of this Act".[9] This suggests the NRCB has far reaching jurisdiction, however there are no provisions in the Act or related regulations which give the NRCB the authority to act as an ongoing regulator, or to ensure implementation of any of the conditions it attaches to an approval.

Interaction between the NRCB and EPEA

Within the context of the Act, the NRCB may impose conditions that require approval holders to establish the satisfaction of conditions to ongoing regulatory agencies. Regulators under other legislation such as EPEA, for example, are in a position to impose ongoing regulatory requirements upon project operations and to monitor and inspect the activities of the NRCB approval holders. Alberta Environment has ongoing regulatory jurisdiction and considerable enforcement powers. Imposing terms and conditions which must be completed to the satisfaction of a regulatory body is a means by which the NRCB compensates for its jurisdictional limitations.

If the NRCB becomes aware of a situation where a condition of an approval is or may be contravened, it would normally discuss this with the appropriate regulatory authority. Also, under the authority of EPEA, the Director must consider any applicable written decision of the NRCB including all of the NRCB's suggestions and recommendations, prior to making a decision whether to issue an approval. Evidence that was heard before the NRCB may also be considered. A Director's decision may be subject to appeal to the EAB, and if the NRCB conducted a hearing or review, there may be limitations placed on the appeals that may be heard by the EAB.

Recent changes to NRCB powers

There is one final note with respect to the recent changes to the *Agricultural Operation Practices Act*[10] (AOPA), effective January 2002. Under AOPA, the NRCB has the responsibility for approving all applications and extensions regarding intensive livestock operations and for inspecting and enforcing the standards and conditions set out in its approvals. The NRCB may issue enforcement orders regardless of whether or not a person has been charged or convicted in respect of a contravention, if it believes that person is creating a risk to the environment or an inappropriate disturbance, or contravening an approval, registration or authorization of the NRCB.

The Conflict Between the Oil and Gas Industry and Agricultural Landowners - the Major Issues and Some Legal Recommendations to Resolve it

Introduction

Northern Alberta has experienced tremendous growth in resource development in recent years, including large-scale forestry operations, extensive oil and gas exploration and development, and the clearing of large tracts of land for agricultural purposes. Along with this boom have come serious and pervasive resource and land use conflicts such as those involving the petroleum and forestry sectors[1], conflicts between upstream and downstream water users, conflicts between aboriginal peoples and resource development, and the conflict involving agricultural development and the resultant loss of biodiversity. These conflicts arise because the same land is in demand for different purposes, and one land use is not compatible with other uses of the same land or somehow impinges on the uses of adjacent or nearby land.

The conflict involving the oil and gas industry and the agricultural sector is the most well documented and most familiar to Albertans. It has received a considerable amount of public attention in recent years partly as a result of a series of acts of vandalism directed at oil and gas facilities in northern Alberta. One need only look to the recent publicity given to the conviction and incarceration of agricultural landowner Wiebo Ludwig for vandalism to petroleum facilities in northern Alberta and the murder of oil-executive Patrick Kent by disgruntled landowner Wayne Roberts.[2] Many observers are of the view that the problems between the oil and gas sector and landowners will only increase unless steps are taken to remedy the situation.

Issues

The range of issues lying at the heart of the conflict are extensive. However, the main ones concern surface and subsurface land disturbance caused by oil and gas development; loss of agricultural land; degradation of groundwater and surface water supplies; human and animal health issues (particularly as a result of sour gas installations and flaring); inadequate research; legislative and regulatory problems; the lack of regional planning; inadequate communication and poor public relations; cumulative effects issues; monitoring and operational problems; and enforcement issues. A detailed account of these issues is far beyond the scope of this article. Instead, it will concentrate on a few legislative and regulatory reforms that might be instituted to decrease the problems between the two sectors.

Mineral rights disposition

It can be argued that the oil and gas rights disposition process lies at the heart of the many problems that exist between the oil and gas industry and the agricultural sector. This disposition of rights involves both the issuance of rights to the subsurface minerals and the issuance of access rights to the land surface, or surface rights. A major issue that is consistently raised by critics of the oil and gas regulatory regime is that the procedure for granting mineral rights is flawed.

The provincial Crown Mineral Disposition Review Committee (CMDRC) is responsible for initially reviewing all proposed mineral rights dispositions and then providing recommendations to the Minister of Energy. It is the only formal institution for reviewing the issuance of mineral rights before they are submitted to the Minister. It has been argued by some that the end point of the disposition issuance process - an operating well - is virtually certain once mineral rights are granted without restrictions on surface access.

The CMDRC is made up of governmental representatives from Alberta Energy, Environment, Agriculture, Community Development, Municipal Affairs and Sustainable Resource Development. Although the concept of having a committee made up of representatives from all relevant government departments is desirable there are inherent problems with limiting its composition to government representatives since it does not allow public input at the initial critical moment of the rights disposition process for a resource that is publicly owned. From a public relations perspective alone public participation and input at this stage is highly desirable. The present closed process should be opened and expanded. Currently, the Chair of the CMDRC requests comments from its members and various agencies concerning parcels of land and then develops recommendations on whether the parcel should be offered for disposition. If the CMDRC decides to offer the parcel it must also decide whether it should be offered with or without restrictions.

It is recommended that the membership of the CMDRC be broadened to include members of the general public as well as representatives from non-governmental organizations. This would give the CMDRC more credibility and allow diverse opinions to be considered from all stakeholders at this very critical preliminary stage of the approval process. It is also recommended that the Energy and Utilities Board's membership on the CMDRC be reexamined and reconsidered in light of its legislated role as an objective regulator. Although there is no reason to believe that its participation on the CMDRC is not objective, its participation may give some an impression of bias and lack objectivity, which is not desirable. In addition, it is also suggested that the CMDRC allow presentations (oral or written) by landowners who may be adversely affected by the approval. A more open hearing process involving an expanded CMDRC would allow concerns to be reviewed before the mineral rights are granted.

(Continued on Page 9)

Case Notes

EAB Penalty Reductions Don't Add Up

Burnswest v. Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment (March 2002), 01-090-D (E.A.B.)

The Environmental Appeal Board has recently given a new criterion for evaluating administrative penalties: confusion. Indeed, "considerable confusion among Alberta Environment employees…resulting in miscommunication and an unacceptably long delay"[1] caused the Board to reduce the administrative penalty issued to Burnswest Corporation and Tiamat Environmental Consultants. The Board reduced the $3,500 penalty for treating more than 10 tonnes of hazardous waste without an approval to $1,000.[2] In fact, Tiamat land treated over 460 tonnes of hydrocarbon contaminated soil without being authorized by Alberta Environment.

Background and Decision

Exactly who knew what and when is not entirely clear. The weeks immediately preceding and following Tiamat's treatment of contaminated soil were full of miscommunications. According to Alberta Environment, Tiamat was told twice before it began that it would require an approval, while Tiamat said it did not know and was following standard practice. Tiamat stopped its operations after officials from Alberta Environment visited the site, but when Tiamat tried to cooperate, it seems that the department was not exactly sure what was required of them either. Letters to Tiamat from Alberta Environment made reference to a "registration" being needed. Tiamat then filled out an application for a registration, only to be told seven months later that it was the wrong form.

In its decision the Board did not make it clear whose story it believed. For the Board what did matter was that both parties knew some sort of statutory authorization was needed. The Board was clear that whenever there is uncertainty the onus is on the interested party to conduct "deliberate and clear discussions with Alberta Environment on a course of action"[3]. For Tiamat to have proceeded without an approval in the face of this uncertainty was an offence for which an administrative penalty was justified, regardless of whether Alberta Environment was confused as well.

Analysis

When conflicts arise over administrative penalties, the Board has the final say, and can vary a penalty in any way that a Director could.[4] Besides errors in calculating the base penalty, reasons for variation can include factors such as cooperation, mitigation attempts, a history of non-compliance, or "any other relevant factors".[5]

In previous cases the Board has only reduced the Director's assessment due to problems with the base penalty calculation or for failure to account for the offender's good behaviour.[6] Indeed, *Burnswest* is the first time that the Board has gone beyond the standard criteria like mitigation and cooperation. Although the Board did follow its traditional analysis by examining and modifying some of the factors mentioned above, it also reduced the penalty because of Alberta Environment's behaviour: namely (i) its confusion about legislative requirements, (ii) the "grossly unreasonable" delay in the approval process caused by this confusion, and (iii) the seven months it took the Director to assess the penalty and issue a preliminary notice.

In this author's opinion, the Board's decision makes practical sense. The approval and enforcement divisions at Alberta Environment might be separated administratively, but this does not give the Department an excuse to be equivocal and confused about the statutory requirements.[7] Indeed, "[i]n providing direction regarding the regulatory scheme, Alberta Environment should speak with one voice."[8] This is sound advice for the department, as it will ensure a better-run regulatory regime. Also, the Board in effect has killed two birds with one stone: by upholding the penalty an offender has been punished for not following the regulatory process, and by reducing the penalty in this way Alberta Environment is sent a message of reform.

Despite the positive practical effects of the Board's decision, its reasoning for reducing the penalty does not add up. First, Tiamat knew that they required some sort of statutory authorization and they proceeded without one. Surely their actions cannot have been any less willful because they were not sure of the precise regulatory details. The mixed signals that the Board denounces only came after Tiamat had knowingly broken the rules. To reduce the penalty for this subsequent confusion fails to recognize Tiamat's blatant and willful disregard for the regulatory regime. Second (and in much the same way), the fact that Tiamat's subsequent approval process took a long time is not in any way logically connected to the prior offence and should also not affect the assessment of the penalty. Perhaps admonishing Alberta Environment for its cumbersome administration is justifiable, but stretching the penalty system in order to do so is not. Third, it is unclear why the Board decided that seven months is too long for Alberta Environment to make a preliminary penalty assessment, given that the regulations allow up to two years.[9] By reducing the penalty for this reason the Board has effectively rewritten the regulation. What's more, this new time constraint might cause Alberta Environment to rush its investigations or even reconsider issuing a penalty altogether.

The problem seems to be that the Board's reasoning is founded more on a desire to right an administrative wrong than to ensure administrative penalties are logically calculated and assessed. Their attention, perhaps, was too focused on Alberta Environment's poor behaviour and not enough on the other issues at hand.

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1 *Burnswest* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (March 2002), 01-090-D (E.A.B.) at para. 67 [hereinafter *Burnswest*].
2 This is a violation of s. 61 of the *Environmental Protection and Enhancement Act* (R.S.A. 2000, c. E-12), namely conducting an activity without an approval when it is required by regulation to have one. Under s. 5(1) and Schedule 1, Division 1(a) of the *Activities Designation Regulation* (Alta. Reg. 211/96) treating more than ten tonnes of hazardous waste per month at a fixed facility requires an approval. During the hearing there was some dispute as to whether Tiamat's operation even fell under this definition, but the Board did not analyse the issue thoroughly.
3 *Supra* note 1 at para. 47
4 *Environmental Protection and Enhancement Act*, s. 98(2)(a).
5 *Administrative Penalty Regulation*, Alta. Reg. 143/95, s. 3(2).
6 *Bodo Oilfield Maintenance Ltd.* v. *Director, Enforcement and Monitoring Division, Alberta Environmental Protection* (April 1999), 98-247-D (E.A.B.); *Hayspur Aviation Ltd.* v. *Director of Pollution Control, Alberta Environmental Protection* (June 1997), 97-001 (E.A.B.)
7 This is, in essence, what the Director offered as an excuse at the hearing.
8 *Supra* note 1, at para. 55.
9 *Supra* note 5, s. 2(3).

Action Update

CASA Working on Management System for Electricity Air Emissions

Earlier this year, the Clean Air Strategic Alliance (CASA), a multi-stakeholder organization that develops air quality management plans for Alberta, began work on the development of a management approach for air emissions from Alberta's electricity sector. The CASA electricity project team, a group made up of representatives from government, industry and non-governmental organizations, is carrying out a broad review of air emissions related to the electricity sector, with a goal of recommending a management system for those emissions to the CASA Board of Directors in June 2003. The Environmental Law Centre has representatives participating on both the project team and the Board of Directors. The Alberta government has indicated that it will make use of the CASA recommendations in developing new post-2005 air emission standards for the electricity generation sector.

Project team work

The goal of the CASA electricity project team is to develop an air emissions management approach, including standards and performance expectations, for Alberta's electricity sector. Tasks that the team will be dealing with over the course of the next year include recommending approaches for management of priority air emissions and reduction of greenhouse gas emissions; application of these approaches to new and existing electricity generation facilities; and requirements for monitoring, reporting and "compliance mechanisms".[1]

Significance of this initiative

The electricity sector has been a focus of attention in Alberta in recent years, beginning with the deregulation of the sector in the late 1990s. Alberta Environment issued new air emission standards for electricity generating facilities during 2001; the province intends that these standards apply to the sector until 2005. It is also expected that the federal government and the Canadian Council of Ministers of the Environment will be bringing new standards related to electricity generation into effect within the next few years.

The significance of potential environmental effects of electricity generation in Alberta were highlighted in the recent decisions of the Energy and Utilities Board (EUB) on expansions of two coal-fired generation facilities southwest of Edmonton.[2] Environmental issues considered by the EUB included the need for a wide range of monitoring for various parameters, the potential effects of emissions on human and animal health, and the timing by which new emission standards should apply to the expanded facilities.[3] Many of these issues will be dealt with by the CASA electricity project team in the course of its work.

Opportunities for public input

Prior to approval of the electricity project team, concerns were raised at the CASA Board of Directors regarding the involvement of affected stakeholders and the general public. As a result, one of the project team's tasks is to develop a strategy and action plan for communications and consultation with stakeholders and the public. Interested individuals and groups can obtain an information package from CASA by calling (780) 427-9793 (in the Edmonton area) or 310-0000 (elsewhere in Alberta). As well, a wide range of information is available through the Internet at www.casa-electricity.org. Through that site, it is also possible to sign up for regular progress updates and provide input on the management of air emissions from the electricity sector.

A point to consider

An important question in the matter of management of air emissions from Alberta's electricity sector is how the province will deal with timing the application of new emission standards to existing generating facilities. The EUB clearly indicated in its decisions on the electricity generation expansions that it felt that "grandfathering" of the facilities was inappropriate and that any new electricity-related environmental standards should apply to all generation facilities as those standards are enacted. However, it will take some effort and the cooperation of Alberta Environment to ensure that electricity generation facilities are not grandfathered.

Alberta Environment is responsible for issuing operating approvals to electricity generation facilities in Alberta. The approvals contain terms and conditions on emission levels that must not be exceeded by these facilities. However, Alberta Environment's power to amend approvals on its own initiative, to strengthen emission standards for example, is subject to certain limitations under the *Environmental Protection and Enhancement Act*.[4] The standard length of approvals under the Act is ten years[5], thus without either the ability to amend those approvals or the incorporation of new electricity emission standards in regulations, many electricity generation facilities in Alberta would effectively be grandfathered with respect to new emission standards. This matter is one that bears serious consideration by the CASA electricity working group and Board of Directors and merits pointed questions from stakeholders and the general public.

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

1 "Electricity project", online: Clean Air Strategic Alliance <http://www.casahome.org/electricity/index.asp> (date accessed: 27 May 2002).

2 *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; *TransAlta Energy Corporation, 900-MW Keephills Power Plant Expansion* (12 February 2002), Decision 2002-014 (Alberta Energy and Utilities Board) Application 2001206.

3 See "Electricity Generation Expansion Sparks Many Issues" (2002) 17:1 *News Brief* 1 at p.1 for a more detailed discussion of the two EUB decisions on electricity generation expansion.

4 R.S.A. 2000, c. E-12, s. 70(3).

5 *Environmental Protection and Enhancement (Miscellaneous) Regulation*, Alta. Reg. 118/93, s.7.

(The Conflict Between the Oil and Gas Industry . . continued from Page 6)

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Environmental impact assessment

Legislative changes are required if the above recommendations are to be implemented. It is recommended that the provincial government institute legislative changes that would codify the CMDRC's new role and expanded involvement in the granting of mineral rights. These changes could be incorporated into the *Mines and Minerals Act* [3] and its regulations.

It is also recommended that the environmental review function of the CMDRC be reevaluated, revised, expanded, and strengthened. This review process has been criticized for being "at most a very general assessment of the potential environmental impacts of mineral developments".[4]

It is also recommended that changes be made to regulations under the *Environmental Protection and Enhancement Act* (EPEA).[5] The drilling, construction, operation or reclamation of oil and gas wells are expressly exempted from the requirement to undergo an environmental impact assessment under Schedule 2 of the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*.[6] Only certain oil and gas developments are subject to a formal environmental impact assessment process under EPEA.[7] It is recommended that "the drilling, construction, operation or reclamation of an oil or gas well" be removed from Schedule 2 of the Regulation. This would at least allow for the possibility of an environmental impact assessment, which is not currently the case.

Note: This article is part of a longer paper, which deals with the conflict between the petroleum industry and the agricultural sector in northern Alberta. That paper in turn represents one aspect of a larger project on resource conflicts in northern Alberta undertaken as part of a collaborative effort between the Environmental Law Centre and the Canadian Institute of Resources Law at the University of Calgary. To obtain further information or purchase the paper, call (780) 424-5099 or visit the Centre's website at www.elc.ab.ca.

■ **Robert R.G. Williams**
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1 For an in-depth analysis of this conflict see M. Ross, *Legal and Institutional Responses to Conflicts Involving the Oil and Gas and Forestry Sectors*, Occasional Paper #10 (Calgary: Canadian Institute of Resources Law, University of Calgary, 2002).
2 For an excellent account of this conflict the reader is referred to A. Nikiforuk, *Saboteurs: Weibo Ludwig's War Against Big Oil* (Toronto: Macfarlane Walter & Ross, 2001).
3 R.S.A. 2000, c. M-17.
4 *Supra note* 1 at 22.
5 R.S.A. 2000, c. E-12.
6 *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, A.R. 111/93, Schedule 2, paragraph (e), which states that "the drilling, construction, operation or reclamation of an oil or gas well" is an activity that is exempt from an environmental impact assessment.
7 *Ibid.*, Schedule 1, paragraphs (n) and (q).

(Enforcement of Environmental Appeal Board Recommendations. . . continued from Page 5)

The NRCB may also apply to the Court of Queen's Bench for an order directing compliance with an enforcement order. Section 35 AOPA authorizes enforcement action when a person operates without the proper approval or registration.

■ **Keri Barringer**
Staff Counsel
Environmental Law Centre

1 R.S.A.2000, c.E-12.
2 R.S.A.2000, c.E-W-3.
3 *Supra* note 1 at s.99(r).
4 *Ibid.* at s.100(1).
5 *Ibid.* at s.98(1).
6 (Alberta Environment, Edmonton, 2000).
7 R.S.A.2000, c.N-3.
8 *Ibid.* at s.24.
9 *Ibid.* at s.22.
10 R.S.A.2000, c.A-7, as amended.

ELC – New Website

The Environmental Law Centre is pleased to announce the launch of its new website at www.elc.ab.ca. The staff and Board of Directors of the Environmental Law Centre encourage you to visit our site to see our new look and take advantage of the new features that allow you to purchase publications and subscriptions, make donations and order Environmental Enforcement and Wellsite Reclamation searches on-line. The Contact Us link on the site also allows users to submit comments or questions regarding the site or any of the Environmental Law Centre programs.

Administrative Penalties

The following administrative penalties of $4,000 or over were issued under the *Environmental Protection and Enhancement Act* since the last issue of *News Brief:*

- $4,000 to Husky Oil Operations Ltd. operating in Killam, for late submissions of Monthly Air Emissions reports.
- $6,500 to the Buffalo Lake Metis Settlement Association of Boyle for contravening their Approval to operate a Class II water treatment plant and a Class I water distribution system. The contraventions included failing to have a certified operator supervising the facility, failing to take corrective action in consultation with the Regional Engineer, failing to immediately report the decrease of free residual chlorine below specified levels, and failing to compile Monthly Production Reports on a daily basis.
- $10,500 to the County of Newell No. 4 for contravening their Approvals to operate three water treatment plants and water distribution systems within the County. The penalty was assessed under s.213(e) of the Act and has been appealed to the Environmental Appeal Board.
- $10,500 to Samson Canada Ltd. operating in the Municipal District of MacKenzie No. 23 for contravening their Approval to operate the West Bassett Lake sour gas plant. The contravention included late submission of reports, release of SO_2 during normal plant operations, and failing to immediately report their failure to submit a report. The penalty was assessed under s.213(e) of the Act.

The following administrative penalties over $1,400 were issued under the *Public Lands Act* and *Forests Act* since the last issue of *News Brief:*

- $1,450 to Redwood Energy Ltd. of Calgary for unauthorized use and contravening terms and conditions of their lease in violation of s.48(1) and 49(1) of the *Public Lands Act.*
- $2,117.30 to Ken Cowles of Mullhurst Bay for unauthorized timber harvest operations in violation of s.10 of the *Forests Act.*
- $7,500 to Buchanan Lumber of High Prairie for contravening terms and conditions of their timber disposition contrary to s.100(b) of the *Timber Management Regulation.*
- $9,000 to Talisman Energy Inc. of Calgary for contravening terms and conditions of their licence of occupation in violation of s.49(1) of the *Public Lands Act.*
- $26,550.40 to RI-Dale Trucking Sand & Gravel of Alder Flats for unauthorized use of public lands in violation of s.48(1) of the *Public Lands Act.*

By Bill Kennedy, *General Counsel, Natural Resources Conservation Board*

Update from the NRCB - Agricultural Operations

The changing face of agriculture and the associated intensification of the livestock industry have prompted considerable public attention. With the amendments to the *Agricultural Operation Practices Act* [1] (AOPA) coming into effect on January 1, 2002, the Natural Resources Conservation Board (Board) is now responsible for the regulation of confined feeding operations (CFOs) in Alberta. The new process provides that the Board assumes responsibility for the approval of the siting and the design of both new and expanding CFOs, as well as enforcement of the requirements for both new and existing facilities over their operational lives.[2]

About the Board

The Board is an independent, quasi-judicial regulatory tribunal, created in 1991 to provide a venue for the independent public review of natural resource developments. Prior to the recent legislative changes, the Board mandate was focused on larger tourism, forestry, water diversion and mining projects.[3] The Board is charged with ensuring that the development of Alberta's natural resources only takes place in a way that ensures that the public interest is protected.

Like all tribunals the Board is a creature of its defining legislation; it operates independently of government. As one example of that independence, a Board decision to deny an application for a proposed development cannot be overturned by government. As an expert quasi-judicial tribunal, Board Members must be able to bring to their positions significant expertise in the areas under their jurisdiction as well as no bias, real or perceived, towards any one position.

Applications and decisions

There are two levels of decisions under AOPA. At the first level, approval officers and inspectors make decisions on applications and compliance issues. As decision makers these individuals exercise the discretion required by AOPA and issue written decisions and reasons for each application and enforcement order. At the second level, a Board panel may hear a review of the approval officer's or inspector's decision at the request of an eligible party.[4] The evidentiary part of any hearing is opened by the approval officer or inspector presenting their decision and answering the questions of all eligible parties and the Board panel. The Board and the approval officer have no communications relative to individual applications outside of the actual hearing in order to preserve the fairness and transparency of the process.

The Board has well defined information requirements for all types of applications. In addition, the Board has worked in conjunction with Alberta Environment and Alberta Transportation to establish a single window to the regulatory process. In considering any application, the Board process will notify all potentially affected municipalities and interested regional health authorities in order to facilitate their early involvement. Information requirements are drawn from the legislation and are designed to protect public health, the environment and the interests of the community, while maintaining the opportunities for sustainable growth in the agricultural sector. Through AOPA, decisions related to CFOs will be applied consistently throughout the province; however, having a more effective application review and approval process will not be particularly useful if there is not also an effective means of ensuring that both new and existing CFOs are actually built and operated according to the new requirements.

Compliance and monitoring

The Board has been given the mandate of ensuring that facilities meet the requirements set out in the Board's decision and AOPA, as well as meeting the requirements of any pre-existing municipal approvals. Commencing on January 1, 2002, the Board has been phasing in its compliance and monitoring capability and is continuing to design and document many aspects of that process.

In the first 5 months of operation, the Board has received over 200 calls regarding approximately 150 separate agricultural operations. The majority (80%) of the complaints has been from the public, with 16% referrals from other agencies and 3% notifications by the producers themselves about potential non-compliance.

Site inspections were prioritized based on the potential severity and risk associated with the activity. During the first quarter, site inspections were completed for 120 of the 150 operations and in all but 15 cases the files were resolved. This either involved gaining agreement and timely action from the producer to bring the operation into compliance or determining that the facility was in fact in compliance and advising the complainant of the same. Board inspectors issued 15 enforcement orders to agricultural operators during this time period.

The Board is confident that through results such as these, it will demonstrate to the public that operators are now being held accountable for consistently respecting and meeting the province's standards. The hope of the Board is that this will go a significant distance towards reducing some of the conflict that has recently surrounded Alberta's livestock industry. The Board is committed to making this process work.

1 R.S.A. 2000, c. A-7.

2 Municipalities considered development applications from confined feeding operations submitted up to December 31, 2001.

3 *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3.

4 In all cases the agricultural operator is an eligible party. AOPA provides for approvals, registrations, authorizations and enforcement orders. Eligibility to participate varies dependent on the type of application.

Ask Staff Counsel

Oil and Gas Exploration on First Nations Reserves

Dear Staff Counsel:
An employee of an oil and gas exploration firm has come to visit our nation and she is asking if her company could do some oil and gas exploration on our reserve. Could you tell me what laws apply to oil and gas exploration on First Nation reserves in Alberta? What approvals, if any, are required?

Sincerely, Myna Kase

Dear Myna:
Federal and provincial laws apply to oil and gas exploration on reserve land in Alberta.

Federal jurisdiction

The federal government has constitutional authority to make laws regarding "Indians and lands reserved for Indians". The federal *Indian Oil and Gas Act* and *Indian Oil and Gas Regulations, 1995* are the primary federal laws governing oil and gas exploration on reserves. Indian Oil and Gas Canada (IOGC), a division of the federal department of Indian and Northern Affairs Canada, works with band councils to administer oil and gas rights on reserve lands.

To carry out oil and gas exploration activities on a reserve, a company requires an exploratory licence. The application for the exploratory licence is made to the Executive Director of IOGC, with a copy of the application provided to the band council. Details of the application requirements are set out in sections 6-9 of the *Indian Oil and Gas Regulations, 1995*. An important application requirement is certification that the applicant has provincial authorization to carry out oil and gas exploration in the relevant province, if such a requirement exists in the province with respect to non-reserve land. The Executive Director of IOGC may approve an application for an exploratory licence, with approval of the band council, for such time period and under such terms and conditions as are agreed to between the Executive Director, the band council and the applicant.

Upon completion of exploration, the exploratory licence holder must provide detailed reports to the Executive Director, who must make the information available to the band council. These reports must meet the provincial reporting requirements for exploratory work; additional information requirements are set out in the *Indian Oil and Gas Regulations, 1995*.

If a person is dissatisfied with a decision of the Executive Director, such as a decision to issue an exploratory licence, they may apply in writing to the Minister of Indian and Northern Affairs for a review of the decision. This application for review must be made within 60 days of the Executive Director's decision.

Alberta's jurisdiction

In Alberta, exploration for oil and gas is regulated by the *Exploration Regulation* under the *Mines and Minerals Act*. The *Mines and Minerals Act* requires those carrying out oil and gas exploration in Alberta to hold an exploration licence. This exploration licence is the "written certification" required under the federal *Indian Oil and Gas Regulations, 1995* and is granted by Alberta Sustainable Resource Development. For any specific exploration program, an exploration approval is also required. The *Exploration Regulation* sets out the detailed application requirements for exploration licences and approvals.

Where exploration takes place on privately owned land, the *Exploration Regulation* requires that the licence holder first obtain the consent of the person having lawful possession of the land or that person's agent. For reserve land the federal government often provides that consent unless other arrangements have been made with the particular First Nation.

Conclusion

In summary, Indian Oil and Gas Canada is first consulted when oil and gas companies arrive seeking permission to access a reserve for oil and gas exploration. Next, on the advice of IOGC, the appropriate provincial authorities should be consulted. IOGC can assist with all federal and provincial requirements necessary for the specific needs of each nation.

If your Nation decides to proceed and allow oil and gas exploration, it is very important to consult a lawyer with experience in this area. Doing so will ensure the protection of all of those impacted by a decision and hopefully reduce any negative environmental consequences. If you are not aware of any lawyers who practice in this particular field, you can consult with other Nations or contact the Law Society of Alberta lawyer referral service at 1-800-661-1095.

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:
Cindy Chiasson, *Executive Director*, with research assistance by Ian Zaharko, *Staff Counsel*

Alberta Law Foundation