News Brief
ENVIRONMENTAL LAW CENTRE

Vol. 17 No. 4 2002
ISSN 1188-2565

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In This Issue

Bill 32 Heats Up Alberta's Climate Change Picture

Introduction

The Alberta Government has taken its climate change strategy a step closer to law with its fall 2002 introduction of Bill 32, the *Climate Change and Emissions Management Act*.[1] The Province intends to carry the Bill over beyond the fall sitting of the Legislature to allow for stakeholder consultation in early 2003, with passage of the Bill planned for the spring 2003 legislative sitting.[2] This article briefly discusses selected elements of Bill 32, including constitutional matters, its general nature and sectoral agreements.

Constitutional questions...

Bill 32 raises many interesting and novel constitutional questions. As a starting point, the Bill imposes a greenhouse gas emission intensity reduction target and provides that no other targets, such as federal targets, are in effect in Alberta.[3] The Preamble seeks to provide jurisdictional support for this provision by asserting provincial ownership of and control over carbon dioxide and methane, the two most significant greenhouse gases. The Bill proceeds on the basis that these gases are not pollutants, but natural resources belonging to and under the exclusive legislative jurisdiction of the Province.

The Province, as a legal person, has full executive power to control and manage natural resources owned by the provincial Crown.[4] This power is separate from the Province's legislative powers and allows the Province to control Crown property as a private owner would in the absence of legislative restrictions. For example, water in Alberta is owned and its use controlled by the Province. While ownership of trapped greenhouse gases, such as coal-bed or landfill methane, may be established, it is an open question whether property rights can be established over gases dispersed into the atmosphere.

The province also has constitutional jurisdiction to control harmful emissions and set reduction targets.[5] However, the federal government has constitutional authority to control interprovincial and international pollution and deal with matters of national concern.[6] If a legislated reduction target were characterized by the courts as addressing a matter over which both levels of government have jurisdiction, such as transboundary pollution or, arguably, climate change, provincial and federal targets would normally be allowed to operate concurrently unless they are in conflict. This means that emitters would be obliged to comply with the more stringent target, thereby meeting both.

However, if Bill 32's legislated reduction target were characterized as an exercise in natural resource management (as the Preamble suggests), a court would likely find a federal target invalid as an invasion of exclusive provincial jurisdiction. On the other hand, if legislation is characterized as addressing a matter of national concern, the federal government may have exclusive authority to set such targets. The courts are unlikely to invoke the national concern doctrine where federal legislation imposing an emissions target can be supported under another federal power, such as the criminal law power.[7]

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Environmental Law Centre
News Brief
Volume 17 Number 4 2002

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

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By the same token, the courts may resist Alberta's characterization of carbon dioxide and methane as natural resources. As jurisdiction to control harmful air emissions is shared, it is likely that both levels of government have authority to legislate emission reduction targets.

The devil is in the details

A striking feature of Bill 32 is the significant lack of detail regarding implementation of the climate change plan, together with corresponding grants of very broad discretion and power to the Minister and Cabinet. The Bill touches on various elements of the Alberta climate change strategy, including emission targets, emission trading and programs. However, it is difficult to determine the likely extent and potential impact of these elements because the bulk of the details are left to be determined in regulations. For example, the emission targets are tied to a percentage of Gross Domestic Product[8], but the means of determining the relevant value is left to the regulations.[9] The provisions dealing with emissions trading systems and programs to further the Act are strictly enabling sections granting broad powers to either Cabinet or the Minister.[10] Both provisions, while listing types of programs or elements of emissions trading regulations, indicate that these are "without limitation", which implies potentially extensive exercises of discretion by government.

This lack of detail is even more striking with respect to offences and enforcement under the Bill. While the Bill makes passing reference to contraventions and offences, no offences are specified in the Bill itself but are left to be established in regulations. Provisions dealing with enforcement seem to be haphazardly inserted, with sections addressing administrative penalties[11] and corporate liability[12], but no other enforcement tools or procedures specified beyond regulatory enabling powers related to compliance orders.[13] This points to a lack of planning with respect to ultimate enforcement of the legislation, especially when compared to the enforcement provisions of other environmental legislation such as the *Environmental Protection and Enhancement Act*[14] and *Water Act*.[15]

Sectoral agreements

A key element of Alberta's climate change plan would see the Province entering into sector-specific agreements (sectoral agreements) to achieve greenhouse gas emission reduction. Bill 32 begins to establish the framework for such agreements, but leaves this matter quite uncertain. While the Bill is fairly specific as to the potential content of sectoral agreements, no process is specified for the negotiation, creation, implementation or enforcement of these agreements. It is unclear whether such details would be addressed by regulations. More significantly, no role is provided for either the public or affected stakeholders in any element of sectoral agreements.

Bill 32 does not establish clear parameters or criteria for identifying sectors, which could lead to uncertainty in establishing which parties represent a sector for the purpose of negotiating and concluding a sectoral agreement. The Bill's provisions imply that a few operators could enter into an agreement with the Province that could bind an entire sector. In relation to this, regulations may be made extending sectoral agreements to non-parties and imposing more stringent requirements and obligations on those parties.[16] While such regulations could be used to bring operators with poor emissions reductions performance into line, the broad nature of the enabling power also leaves the door open to the possibility of unfair or punitive treatment of operators. To ensure fair treatment of operators in a sector and a level playing field, more specific limits or criteria should be attached to these broad regulatory powers.

Conclusion

It is unlikely that the Province has exclusive constitutional authority to set emissions reduction targets, as the Alberta government has asserted in Bill 32. Looking beyond the constitutional issues, the Bill in its current form generates more questions than it answers and creates a minimal framework for dealing with climate change in the Alberta context.

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Climate Change Consultation History

By John Bennett, Executive Director, *Climate Action Network - Canada*

Provincial and territorial engagement in climate change talks

1989	The Canadian Climate Program Board was created to provide a national (meaning provinces, territories and relevant stakeholders) forum to discuss issues related to the climate.
1991-1992	The federal government met regularly with provinces and territories to discuss Canada's position as it prepared for the Earth Summit in Rio.
1992	Provinces were part of the Canadian delegation in Rio.
1993-1997	The federal government met regularly with provinces and territories to discuss Canada's position and actions as the international negotiations unfolded.
Dec. 1997	Provinces and territories were an integral part of the Canadian delegation at the Conference of the Parties (CoP) 3 in Kyoto. In fact, provinces and territories have been part of the Canadian delegation at all CoPs before, during and after Kyoto.
Dec. 1997	Meeting right after the conclusion of the Kyoto Protocol, First Ministers agreed to establish the National Climate Change Process (NCCP) and directed their Ministers of the Environment and Energy to work together to consider jointly the appropriate courses of action. First Ministers stated that climate change is an important issue and that Canada must do its part and do so in such a way that no region is asked to bear an unreasonable burden. Alberta co-chaired the NCCP, with the federal government, from 1997 until it withdrew in May 2002.
1998-1999	Under the umbrella of the NCCP co-chaired by Ottawa and Alberta, extensive groundwork by the Issue Tables/Working Groups took place in interaction with federal, provincial, and territorial officials.
May 2000	The Joint Meeting of Ministers (JMM) agreed on a number of key elements to be included in a National Implementation Strategy, including a phased approach to planning to take advantage of early opportunities while making informed decisions as domestic circumstances unfold and international rules become clearer.
Feb. 2002	At their 7th meeting since Kyoto, the JMM agreed that the federal government take a lead in preparing a first draft of the national climate change plan for review at their next meeting.
May 2002	The federal government published a *Discussion Paper on Canada's Contribution to Addressing Climate Change* presenting four options for reaching the Kyoto target and seeking input on a number of key issues. After reviewing the Discussion Paper, the JMM agreed that a draft implementation plan for achieving Canada's Kyoto target be developed for presentation at a future JMM. Realizing that the federal government was working on four Kyoto-compatible options, Alberta withdrew as co-chair of the National Climate Change Process and proposed to start from scratch.
Oct. 2002	In Halifax, at the 9th JMM since Kyoto, acknowledging that the federal government "intends to ratify the Kyoto Protocol before the end of this year", provinces and territories presented a statement setting out 12 principles for a National Climate Change Plan.

In Progress

In the Legislature...

Federal Legislation

Bill C-27, the *Nuclear Fuel Waste Act*, (now c.23 of the Statutes of Canada), came into force on November 15, 2002. The Bill provides for the long-term management of radioactive wastes.

Bill C-17, the *Public Safety Act, 2002* was introduced on October 31, 2002, passed second reading on November 20, 2002, and has been referred to a Legislative Committee for review. The Bill amends a number of existing Acts and enacts the *Biological and Toxin Weapons Convention Implementation Act* with a goal to enhance public safety. Among the Acts that will be amended if the Bill is passed are the *Canadian Environmental Protection Act, 1999*, Department *of Health Act*, *Food and Drugs Act*, *Hazardous Products Act*, National *Energy Board Act*, Navigable *Waters Protection Act*, and *Pest Control Products Act*.

Federal Regulations

As of December 1, 2002, *Export of Substances Under the Rotterdam Convention Regulations* are in force. The Regulations, under the *Canadian Environmental Protection Act, 1999*, permit Canada to implement the *Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*.

Saskatchewan Legislation

The Environmental Management and Protection Act, 2002, S.S. 2002, c.E-10.21, was proclaimed in force as of October 1, 2002. With this, previous legislation, the *Environmental Management and Protection Act* and the *Ozone-depleting Substances Control Act, 1993* are repealed.

Cases and Enforcement Action...

The Supreme Court of British Columbia released a decision in *Canadian Natural* v. *Mediation and Arbitration Board*. The case "raises the issue of the extent to which, if at all, a tribunal is required to provide written reasons of its decision." In her decision, Justice Loo noted that the Board is required to provide a written explanation or reasons for its decision.

The Federal Court of Canada, Trial Division, released a decision in the application for judicial review in *Inter-Church Uranium Committee Educational Co-Operative* v. *Atomic Energy Control Board*. This decision looks at the application of the *Canadian Environmental Assessment Act* (CEAA) to the McClean Lake Uranium Mining Project, a project originally authorized under the *Environmental Assessment and Review Process Guidelines Order*. The judicial review was of a licence issued on June 17, 1999 by the Board to operate the open pit mine and the related tailings management facility. The Judge quashed the licence noting that CEAA must be complied with.

An Alberta Provincial Court Judge in Pincher Creek sentenced Future Ford Sales Ltd. of Blairmore to a $15,000 penalty after the Company pled guilty to a charge of illegal disposal of hazardous waste in violation of s.182.1 of the *Environmental Protection and Enhancement Act*. The waste was used oil that the Company was using to heat their shop and storing in tanks with no secondary containment in place as is required. The penalty consists of a $5,000 fine, including repayment of some of the investigation costs, and a $10,000 Creative Sentence Order designated to go to the Alberta Conservation Association to fund projects on the Crowsnest River and/or its tributaries.

In a decision released on August 22, 2002, the Alberta Court of Appeal upheld the previous decision in *Prairie Crocus Ranching Coalition Society* v. *Cardston (County of), 20* pertaining to the approval of sub-division of ranch land next to Waterton Lakes National Park.

The Alberta Energy and Utilities Board released their decision regarding the *Truenorth Energy Corporation Application to Construct and Operate an Oil Sands Mine and Cogeneration Plant in the Fort McMurray Area*. The Board determined the oil sands project to be "in the public interest" and approved it with conditions. The Board also approved the cogeneration portion but deferred its decision on the substation.

Alberta Environment issued an Enforcement Order under the *Water Act* to Robin Stewart of Water Valley. The Order pertains to the improper construction of a corduroy road across a wetland, an activity which required an approval. Mr. Stewart had a permit, but the work was not done as represented and the Remediation Plan presented was deficient. The Order requires that all activity pertaining to the project be ceased, that a Remediation Plan be submitted and implemented, and that a final written report be provided.

■ **Dolores Noga**
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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.

Pest Control Proposals Need Strengthening

Bill C-8,[1] the new *Pest Control Products Act*, was passed through the House of Commons in October 2002, and is now before the Senate Standing Committee on Social Affairs, Science and Technology. The Bill in its current form is a marked improvement over the existing *Pest Control Products Act*[2], providing in particular for a refined evaluation and registration process for new products, mandatory re-evaluation of certain registered products, and public consultation in specific circumstances. However, serious deficiencies in the Bill remain to be addressed by the Senate.

The increase in municipal bylaws banning cosmetic pesticide use demonstrates an urgent need for reform at the federal level.[3] Such bylaws are an important tool for municipalities responding to local concerns over pesticides and the adequacy of current law to protect health and the environment. However, comprehensive assessment of pesticide risks and a national strategy to reduce them depends on effective federal regulation. Bill C-8 represents an opportunity for the federal government to revise the federal process to better reflect changing attitudes toward pesticides, and to address the perceived need for pesticide bylaws.[4]

Current requirements

The Pest Control Management Agency is the federal agency responsible for determining whether use of individual pesticides involves an unacceptable risk to the environment or human health. Under the current Act, a pesticide that is determined not to pose such a risk and is found to have value with respect to its intended uses may be registered for use in Canada, with strict labeling and usage restrictions imposed. The existing *Pest Control Product Regulations* require the Minister to refuse to register a product where there is an "unacceptable risk" of harm to health or the environment.[5] The existing standard provides an uncertain basis for refusal and very broad discretion to the regulator.

Changes to the decision-making process

Bill C-8 clarifies the standard by requiring reasonable certainty of no harm to the environment, health, or future generations before a risk is determined to be acceptable and a product registered for use.[6] The Bill also expressly provides that the burden is on the applicant to establish that the risks meet this standard.[7] Unlike the existing standard, the Bill's provision appears to require the regulator to consider the extent of uncertain risk in its assessment. These are welcome revisions that reflect a more conservative attitude toward new pesticides.

For "major" decisions, the Bill requires that the regulator consider aggregate exposure and cumulative effects, apply margins of safety, and conduct public consultations.[8] Major decisions are those involving new active ingredients, re-evaluation or review of a registration, or a registration with the potential for significantly increased risks. Re-evaluation is required for all registrations that involved new active ingredients at the time of registration.[9] Although limited in application, these requirements significantly broaden the risk assessment process for most decisions involving serious risk.

The Bill also provides that the Minister's primary objective in administering the Act "is to prevent unacceptable risks to people and the environment from the use of pest control products."[10] However, the Bill does not incorporate the Precautionary Principle across the board.[11] Express application of the Principle appears to be limited to the re-evaluation of registered products, where the regulator may cancel or amend a registration even in the absence of proof of harm.[12] Much of the decision-making process provided by the bill is, however, implicitly precautionary. The Senate should clarify and strengthen this by expressly incorporating the Principle into the Preamble and all of the bill's decision-making provisions. This emphasis on precaution is needed to demonstrate a renewed federal commitment to health and the environment in pesticide regulation.

Limited access to information

The Bill also provides for a register of pest control products.[13] The register would make available to the public

- government evaluation reports on product value and risks associated with a product,
- information on applications and registered products,
- notices of objection to registration and the Minister's decisions with reasons, and
- other information as specified in the Act (s.42(2)) or the regulations.

Information in the register would also be available electronically. However, confidential test data or business information would not be available to the public unless authorized by the regulations or by the Minister.[14] Furthermore, unless otherwise provided in the regulations, information on contaminants and non-active ingredients would not be available where the Minister does not consider them to be of health or environmental concern.

No ban on cosmetic pesticides

The Bill does not include a ban or phase-out of cosmetic pesticides. In light of increasing urban use and misuse of such pesticides and growing public concern, this omission is a major shortcoming. The Bill's provisions for product re-evaluation and generally preventive approach, while welcome, cannot properly address the risks associated with misuse or large-scale cumulative effects. To give meaning to the Bill's primary objective of preventing unacceptable risk, the Bill should be revised to include a phase-out of cosmetic use.

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Case Notes

Costs Awarded to Citizens in Lafarge Appeal

Kievit et al v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.* (27 May 2002) 01-097,098 and 101-CD (A.E.A.B.)

The Environmental Appeal Board (the Board) recently awarded costs to the Appellants for legal representation[1], in their appeal of Lafarge Canada Inc.'s (Lafarge) amending approval for its cement manufacturing plant near Exshaw, Alberta. The appeal, initiated by three individual Appellants and the Bow Valley Citizens for Clean Air (BVCCA) challenged the terms of the approval. The amendment was originally granted in October 2001 by Alberta Environment, permitting Lafarge to change the fuel supply for part of their Exshaw plant from natural gas to coal.

The Board has discretion under section 96 of the *Environmental Protection and Enhancement Act* (EPEA)[2] to "award costs of and incidental to any proceedings before it....". Under section 20 of the *Environmental Appeal Board Regulation*[3] the Board has the discretion to consider numerous criteria in determining an award of final costs, in whole or in part, including whether the party made a substantial contribution to the appeal. In considering the criteria, the Board also considers the purposes of the EPEA in promoting the protection, enhancement and wise use of the environment.

In terms of the broader costs picture, the Board has awarded costs infrequently. The Board is not required to make its decisions on a loser pays principle as the courts do, but will look at the public interest, the reasonableness of the request, and the purpose of the legislation as mentioned above. The Board's starting point is that costs incurred in an appeal are the responsibility of the individual parties who share a responsibility for protecting the environment.[4] The costs for two individual consultants, acting as witnesses for the Appellants and the BVCCA, were denied. The Board was not satisfied that their contribution was substantial, nor that their assistance was in the category of expert witnesses.

The Board awarded partial costs, with respect to legal costs claimed by the Appellants and the BVCCA. The Board was satisfied that there had been significant assistance by counsel with respect to the appeal process, procedurally and otherwise. The Board has previously stated that it is not appropriate to base its awards on a solicitor and client costs approach. Rather, it bases its costs awards on what it considers a reasonable allowance for hearing and preparation time, modified to reflect the administrative and regulatory environment and other criteria that apply before the Board.[5] The legal costs claimed in this appeal were found by the Board to be reasonable, while an award of costs was found to help address the imbalance of resources and contribute to the efficient functioning of the appeal process.

Although the quantum of costs awarded was small in comparison to the total amount requested there are a number of significant factors in this decision. Overall, the success of the costs decision reflects the work of the Appellants, the BVCCA and their counsel at the hearing. The Board recognized that the Appellants' and BVCCA submissions in large part resulted in the Board's recommendations to the Minister and the amendments that were ultimately approved by the Minister. The Appellants and the BVCCA worked hard to raise concerns and identify ways to resolve the issues, and proposed constructive options for the Board to consider in making its recommendations.

Appellants who present well thought out arguments and know what they ultimately want help to streamline the hearing process and assist the Board with its job. In this decision, the Board pointed out that counsel's assistance to them and guidance to the Appellants and the BVCCA was extremely helpful in reaching agreements on standing and issues, pooling the available resources and working together to streamline the process. [6] The Board looks for a focused presentation on key issues and efficient use of the Board's time. This, combined with a reasonable request for fees, led to the award of a percentage of legal costs in this decision. When the Board made its decision that Lafarge would bear the costs awarded it acknowledged that Lafarge's actions in offering its cooperation and presenting practical solutions to policy issues helped to mitigate the award of costs against them.

To summarize, this decision reflects the outcome of the principal decision in the appeal. The Appellants and the BVCCA were strategic. They did not request the Director's decision be overturned, which is a much more difficult argument to make. They brought well-prepared and researched arguments and knowledgeable witnesses to the Board, and by pooling their resources, worked together to focus and make efficient use of time. These effective contributions resulted in this successful costs application and should be an incentive for others who become involved in the appeal process in the future.

■ **Keri Barringer**
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1 Costs Decision re: *Kievit et al.* (12 November 2002), Appeal Nos. 01-097, 098 and 101-CD (A.E.A.B.).
2 R.S.A. 2000, c. E-12.
3 Alta. Reg. 114/93.
4 *Supra* note 1 at para. 28.
5 Costs Decision re: *Mizeras, Glombick, Fenske, et al.* (29 November 1999) Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.).
6 *Supra* note 1 at paras. 42-43.

Inter-Basin Transfer Approved by Alberta

One of the most contentious water-related issues in Alberta is that of transferring water between different river basins, commonly referred to as inter-basin transfers. Indeed, provincial law currently prohibits licences permitting inter-basin transfers unless authorized by a special Act of the Legislature and preceded by public consultation.[1] The provincial government recently passed such an Act. The *North Red Deer Water Authorization Act* (the Act) authorizes a licence under the *Water Act* for the transfer of water between the South and North Saskatchewan River Basins.[2] The Act itself is very brief, consisting of a preamble and two sections, one of which authorizes the issuance of a licence under the *Water Act* for the inter-basin transfer and the other of which forecloses the possibility of appeal to the Environmental Appeal Board with respect to the licence in question.

Background

The licence authorized under the Act would allow for the transfer of treated water from Red Deer, in the South Saskatchewan River Basin, to Blackfalds, Lacombe, Ponoka and First Nations reserves in the Hobbema area. Those communities, other than Blackfalds, are situated within the North Saskatchewan River Basin. All of the receiving communities currently rely on groundwater for their water supplies and are facing increased demand and decreasing supply. Relevant factors include population growth, reduced aquifer levels and biofouling of wells. The communities concerned have commissioned various studies, including an environmental impact study, and have carried out a public consultation initiative within the affected regions.[3]

Public consultation

While it is clear from a review of the background materials that the Act offers a practical solution to a difficult situation, it also raises a number of issues that will not be resolved by its passage alone. One of the main issues is whether there should have been a broader public consultation on this Act, dealing with the matter of inter-basin transfers generally. The *Water Act* requires the Minister of Environment to consult with the public on any bill to authorize inter-basin transfers, prior to introduction of such a bill in the Legislature.[4] During 2002, Alberta Environment carried out its "Water for Life" consultation on water management in Alberta. This consultation included responses to workbooks, telephone surveys and a stakeholder forum. Over the course of this consultation, the government has seen strong opposition to inter-basin transfers, with some possibility of public acceptance of such transfers in unspecified limited circumstances.[5]

Given the significant concerns of Albertans with respect to inter-basin transfers, it would have been advisable for Alberta Environment to have carried out a consultation specifically focusing on inter-basin transfers before introducing the Act. While there are concerns with respect to water supplies in the affected areas, the project that is the subject of the Act is still in its preliminary stages and is not scheduled for completion until 2005. An issue-specific consultation could be carried out without unduly delaying this project and would give Albertans an opportunity to thoroughly discuss the broad issue and provide detailed input to the Province. In any event, there is still a need for such a discussion in spite of the Act's passage.

Water management planning

The circumstances underlying the Act point to the real need for progress in water management planning in Alberta. As mentioned above, factors such as population growth, decreases in aquifer levels and contamination of groundwater supplies are relevant. The issue of water conservation is also significant, although not addressed directly in the proposal covered by the Act. However, movement on water management planning has been slow and there are currently no approved water management plans in place in Alberta. Given the significant concerns to be addressed by the Act, the Province should play a more proactive role in moving the planning process ahead.

Where's the appeal?

Another issue of concern raised by the Act is its revocation of any possibility of appeal of the licence that it authorizes.[6] Appeals of licences are provided for under the *Water Act;*[7] generally, the licence holder and directly affected persons will be able to appeal the issuance of a licence to the Environmental Appeal Board. However, the effect of the Act is to remove the ability to appeal a licence authorized under the Act, if granted. While the circumstances of the affected communities in this instance are important, they are not yet an emergency, which begs the question as to why the Province would deem it necessary to remove the right of appeal.

The Act provides the necessary authorization for the issuance of a licence authorizing the inter-basin transfer in question, but does not have the effect of issuing the necessary licence. It is still necessary for the Director to consider the licence application in accordance with the *Water Act* and decide whether to issue the licence. Under the *Water Act*, any terms or conditions that the Director considers appropriate may be imposed in a licence. As such, there may be conditions or requirements not directly dealt with by either the preliminary consultation or the Act that may be of concern to either the applicant or directly affected persons and be the basis for a valid appeal to the Environmental Appeal Board.

The effect of the Act will be to deprive both the applicant and directly affected persons of their statutory right to appeal the licence, with no apparent basis for doing so. The Legislature should amend the Act to remove section 2 and restore the right of appeal with respect to this licence.

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Security Management Statutes Amendment Act, 2002 – Impacts on Environmental Legislation in Alberta

This Act was originally introduced in the Alberta Legislature as Bill 32 in May 2002 and was passed in the fall 2002 sitting.[1] The Act arises from the Ministerial Task Force on Security formed after the September 11, 2001 events. The Task Force re-evaluated and updated security measures to deal with and help prevent the threat of terrorist activity in Alberta. The review looked at the emergency and security measures in place within Alberta's legislation. Eighteen statutes are amended by the Act, and several amendments may have a significant impact on environmental legislation.

The Act amends provincial law to enhance the protection of Alberta's infrastructure, industry, natural resources and the environment, and is intended to assist the province with its ability to respond to emergency situations by having legal and strategic mechanisms in place. A news release issued upon the Bill's introduction, indicated that the Bill would be debated in the fall 2002 sitting to allow time for Albertans to provide their comments. However, there was no formal consultation and as a result, there was little public feedback.

Prior to being passed, the Act prompted lengthy discussion regarding the wide powers that the amendments gave to the Ministers, the balance needed between protecting rights and freedoms and securing public safety, the denial of access to information by the head of a public body, and information sharing by any Minister with a foreign government's police department or other authority. Further discussion concerned the tests that should be applied to ensure the government was not exceeding its powers in these instances and limitations on the public's right to know about government's activities.

The legislation that is affected by the proposed amendments and could have significant impacts in the environmental area are:

- *Alberta Energy and Utilities Board Act* [2],
- *Dangerous Goods Transportation and Handling Act* [3],
- *Government Organization Act* [4],
- *Provincial Parks Act* [5],
- *Wilderness Areas, Ecological Reserves and Natural Areas Act* [6],
- *Freedom of Information and Protection of Privacy Act* [7], and
- *Charitable Fund-raising Act* [8].

Alberta Energy and Utilities Board

Under the *Alberta Energy and Utilities Board Act*, the amendments confer new regulatory powers on the Alberta Energy and Utilities Board (EUB). For purposes of addressing security regarding a 'terrorist activity' or suspected activity, the EUB is given authority to make regulations dealing with shut down of energy facilities using security measures it believes are necessary. A 'terrorist activity' is defined at length in section 83.01 of the *Criminal Code* [9].

This amendment gives broad powers to the EUB as it does not define security measures. This discretion could result in restrictions to address a security issue regarding terrorist activity that would in all likelihood pre-empt any environmental considerations.

Transportation of dangerous goods

The *Dangerous Goods Transportation and Handling Act* is amended to authorize the Minister to require persons engaged in handling or transporting dangerous goods to take measures to secure operations against terrorist activity. Securing operations is not defined leaving the Minister wide discretion.

Government discretionary powers

The *Government Organization Act* now allows a Minister to share information that is relevant to combat terrorism with other government agencies, boards, commissions, or a foreign jurisdiction, other provincial bodies, or a police service in or outside Canada. The context of information sharing is very broad and the only explicit restriction is that the Minister must consent to the release of the information once provided. This broad discretion could result in conflict where other enforcement agencies are at work. No specific means are provided to coordinate various actions that may be taken by the Ministers themselves.

Access to protected areas

Under the *Provincial Parks Act* the Minister is given authority to prohibit or restrict access to or travel in a park or recreation area by way of an order. The order must specify the restrictions. There are no criteria limiting the application of these restrictions. Section 11 of the *Wilderness Areas, Ecological Reserves and Natural Areas Act* is also amended in a similar fashion, giving the Minister unrestricted authority to, by order, close, prohibit or restrict access to or travel in a wilderness area, natural area or ecological reserve. The amendments have not changed the powers in the legislation dramatically, but they do make the Acts more consistent. The concern is that environmental interests or activities may be curtailed by a Minister's decision.

Access to information

Under the *Freedom of Information and Protection of Privacy Act*, a person's ability to obtain information may be further restricted. The amendment gives the head of a public body authority to refuse disclosure if it is reasonably expected that the disclosed activities were suspected of constituting threats to Canada's security, within the meaning of the *Canadian Security Intelligence Service Act*.[10] This is entirely a discretionary power that could restrict information gathering by environmental organizations.

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(Pest Control Proposals. . . Continued from Page 5)

Conclusion

The reforms contained in Bill C-8 are an important step forward in preventive pesticide regulation. Further changes are needed to address public concern over cosmetic pesticides and to ensure public access to information on all ingredients that may raise concerns. A precautionary and transparent federal process is essential to the effective management of pesticide risks.

■ **James Mallet**
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1 Bill C-8, *Pest Control Products Act*, 2d Sess., 37th Parl., 2002.
2 R.S.C. 1985, c.P-9.
3 See Valiante, *infra* note 4 at 343. The ability of municipalities to pass such bylaws under general statutory powers to protect local health and welfare was confirmed by the Supreme Court of Canada in *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 40. For a discussion of this case see A. Kwasniak and A. Peel, "Municipal Regulation of Pesticide Use" *News Brief* 16:3 (2001) 10.
4 See M. Valiante, "Turf War: Municipal Powers, the Regulation of Pesticides and the *Hudson* Decision" (2002) 11 J.E.L.P. 325.
5 *Pest Control Products Regulation*, C.R.C., c.1253, s. 18.
6 Bill C-8, *supra* note 1, cl. 2(2).
7 *Ibid.*, cl. 7(6)(a).
8 *Ibid.*, cl. 7(7) and 28.
9 *Ibid.*, cl. 16.
10 *Ibid.*, cl. 4. The Minister responsible for the Act is the Minister of Health.
11 The Supreme Court of Canada defined the Principle in the *Hudson* case, *supra* note 3 at para. 31, quoting from the Bergen Declaration: "Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."
12 Bill C-8, *supra* note 1, cl. 20. Clause 20 sets out a modified, narrower version of the Principle defined in note 11, *supra*.
13 *Ibid.*, cl. 42.
14 *Ibid.*, cl. 43 and 44.

(Inter-Basin Transfer Approved . . . Continued from Page 7)

Conclusion

While the situation the Act seeks to address is of significant concern, it can also be considered the embodiment of broader concerns within Alberta with respect to water resources and environmental capacity. Passage of the Act, without discussion of and action on the broader underlying issues of water management and capacity to support growth, will do little to prevent the occurrence of similar situations in the future. It is incumbent on the Province to deal with the broader issues, with the input and participation of all Albertans.

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

1 *Water Act*, R.S.A. 2000, c. W-3, ss. 47-48.
2 S.A. 2002, c.N-3.5.
3 A brief overview of the concerns and current situation is provided in the *North Red Deer River Users Group Information Package*, which can be accessed on the Internet at <http://www.town.lacombe.ab.ca/41/921/consultation/publicinfopackage.pdf>. More detailed information on the Regional Water Supply Project is available on the Town of Lacombe's website at <http://www.town.lacombe.ab.ca/41/921/regwatindex.htm>.
4 *Supra* note 1, s. 48.
5 Equus Consulting Group, *Water for Life: Summary of Consultation Results* (Edmonton: 10 May 2002) at 10-11, 13-14. Also Equus Consulting Group, *Water for Life: Minister's Forum on Water, Summary Report of Advice Received* (Edmonton: August 2002) at 18-19.
6 *Supra* note 2, s. 2.
7 *Supra* note 1, s. 115.

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The Staff of the Environmental Law Centre extend sincere wishes for a joyous holiday season and a safe and prosperous New Year.

(Bill 32 Heats Up. . . Continued from Page 2)

It appears that the regulations to be made under this legislation will be key in providing necessary detail. Given the plans to carry the Bill over to the spring session to allow for consultation, the provincial government should develop draft regulations to be included as part of its consultation. Such an approach would provide more substance for review and comment by the public and result in a more meaningful consultation process. This type of approach has been taken by Alberta Environment previously, in its development and enactment of the *Environmental Protection and Enhancement Act* in the early 1990's. Clearly Bill 32 could benefit from a broad and transparent consultation process involving review of proposed regulations as well.

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

■ **James Mallet**
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Environmental Law Centre

Note: The next issue of News Brief (Vol. 18, Issue 1, 2003) will include a more detailed article on the constitutional aspects of climate change. The Environmental Law Centre will also be preparing and publishing a detailed legal review of Bill 32, the Climate Change and Emissions Management Act, in January 2003.

1 Bill 32, *Climate Change and Emissions Management Act*, 2d Sess., 25th Leg., Alberta, 2002.
2 Comments by Hon. L. Taylor, Minister of Environment, to Clean Air Strategic Alliance Board of Directors, Edmonton, November 28, 2002.
3 *Supra* note 1, s. 3.
4 *Constitution Act, 1930*, R.S.C. 1985, Appendix II, No. 26. The Natural Resources Transfer Agreement transferring these rights from the federal government to Alberta is scheduled to the Act. Regarding executive powers over public property, see P.W. Hogg, *Constitutional Law of Canada*, loose-leaf (Scarborough, Ont.: Carswell, 1997) at 28.3.
5 The provincial power over property and civil rights in the Province: *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 92.
6 Matters of national concern are included in the "peace, order and good government power" (opening words of s.91 of the *Constitution Act, ibid.*) Other relevant federal powers include the criminal law power (s.91(27)) and the treaty power (*supra* note 5, R.S.C. 1985, App. II, No. 31). See C. Rolfe, *Turning Down the Heat* (Vancouver: West Coast Environmental Law Research Foundation, 1998) at 347.
7 See *R. v. Hydro-Quebec* [1997] 3 S.C.R. 213 and Rolfe, *supra* note 6 at 364. Furthermore, it is uncertain whether greenhouse gas emissions or climate change are distinctive enough as subject matters to qualify as matters of national concern: Hogg, *supra* note 4 at 17.3(c).
8 *Supra* note 1, s. 3(1).
9 *Ibid.*, s. 1(b)
10 Regarding emissions trading, see *ibid.*, s. 5. Regarding programs, see *ibid.*, s. 7.
11 *Ibid.*, ss. 10-14.
12 *Ibid.*, ss. 15-16.
13 *Ibid.*, s. 17(1)(s).
14 R.S.A. 2000, c. E-12, Part 10.
15 R.S.A. 2000, c. W-3, Parts 10 and 11.
16 *Supra* note 1, ss. 17(1)(m) and 17(3).

(*Security Management Statutes Amendment Act*. . . Continued from Page 8)

Charitable registrations

Under the *Charitable Fund-raising Act* the Minister can refuse to register, issue, or renew a registration or licence of a charitable organization if the organization or any of its directors or principals is named in a certificate signed under the federal *Charities Registration (Security Information) Act*.[11] The federal legislation authorizes the Minister to issue the certificate if on reasonable grounds it is believed that resources have been made available by the organization to an entity that is listed within the definition of 'terrorist activity' in the *Criminal Code*. This amendment could affect a charitable organization relating to the environment should such a certificate be signed.

With all of the above amendments, Ministerial discretion is strengthened and there is the potential for conflict between precautionary measures being put into place by discretionary powers and individual or organizational freedoms. It is not possible to predict how the decisions will or may interfere with regular activities, but this may lead to demands for a higher level of accountability on decision makers.

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

1 *Security Management Statutes Amendment Act*, 2002, S.A. 2002, c.32.
2 R.S.A. 2000, c. A-17.
3 R.S.A. 2000, c. D-4
4 R.S.A. 2000, c. G-10.
5 R.S.A. 2000, c. P-35
6 R.S.A. 2000, c. W-9..
7 R.S.A. 2000, c. F-25.
8 R.S.A. 2000, c. C-9.
9 R.S.C. 1985, c. C-46, as am. by *Anti-Terrorism Act*, S.C. 2001, c. 41, s.4.
10 R.S.C. 1985, c. C-23.
11 See s.113 of the *Anti-terrorism Act*, S.C. 2001, c. 41.

By Dolores Noga, Information Services Coordinator, *Environmental Law Centre*

Accessing Climate Change Information Via Websites

With all the information available on the Kyoto Protocol and the multitude of predictions on the possible ramifications of its ratification, the Environmental Law Centre thought it timely to provide the following list of websites that our readers can refer to in their quest for information.

Government information

The Government of Canada's Climate Change Website is found at <http://www.climatechange.gc.ca/english/index.shtml>. On this site, one can access the *Climate Change Plan for Canada*, a report *Climate Change Impacts and Adaptation: a Canadian Perspective*, student resource materials, and information on the Climate Change Action Fund. A Climate Change Information Kit can be ordered from the site.

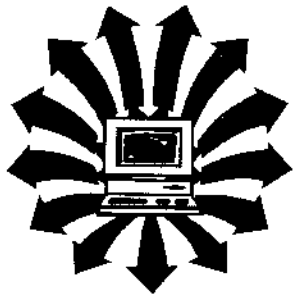
The Natural Resources Canada Climate Change Website is at <http://climatechange.nrcan.gc.ca/english/index.asp>. This site presents information on the issue of climate change as well as climate change information related to energy, forestry, earth sciences, and minerals and metals.

The Alberta Government site for information on the Kyoto Protocol is found at <http://www.gov.ab.ca/home/kyoto/display.cfm?ID=1>. The site provides information on Alberta's plan for reducing greenhouse gas emissions, access to Bill 32, the *Climate Change and Emissions Management Act* presently before the Alberta Legislature, access to news articles, and information on personal actions that can be taken.

The site of *Making it Work: A Saskatchewan Perspective on Climate Change Policy* is <http://www.ir.gov.sk.ca/Default.aspx?DN=3359,3087,2936,Documents>.

The site of the Climate Change Branch of the Manitoba Department of Energy, Science and Technology is at <http://www.gov.mb.ca/conservation/climatechange/index.html>. From this site, one can access the Manitoba Government's plan *Kyoto and Beyond* as well as information for educators.

The site of the Government of the Northwest Territories information on climate change is found at <http://www.gov.nt.ca/RWED/eps/climate.htm>. Their *Greenhouse Gas Strategy* is accessible on the site as well as other documents.



Climate change documents and history

A 'Guide to the Climate Change Negotiation Process' can be found at <http://unfccc.int/resource/process/components/response/respkp.html>. This is part of the site of the secretariat of the United Nations Framework Convention on Climate Change. Further information on 'The Convention and Kyoto Protocol' is available at <http://unfccc.int/resource/convkp.html>. On this latter site, one can access the text and a current list of signatories and ratification information for both the Convention and the Kyoto Protocol.

The site of the Intergovernmental Panel on Climate Change (IPCC) is located at <http://www.ipcc.ch>. The IPCC, established in 1988, is an intergovernmental body that provides scientific, technical and socio-economic advice to the world community, and in particular to the 170-plus Parties to the United Nations Framework Convention on Climate Change.

Information from other organizations

The Climate Change component of the David Suzuki Foundation's website is located at <http://www.davidsuzuki.org/Climate_Change/>. The site provides information on the science of climate change, impacts of climate change, and presents solutions for reducing greenhouse gas emissions. Of significance is material presented on 'Green Leaders', success stories of companies and communities that have committed to and successfully reduced their greenhouse gas emissions.

The Pembina Institute's Climate Change website is at <http://www.climatechangesolutions.com/English/default.htm>. The site contains interactive tools and resources for various sectors to refer to for ideas to reduce their greenhouse gas emissions. Again, success stories add an interesting component.

The site of the Federation of Canadian Municipalities 'Partners for Climate Protection' program is <http://www.fcm.ca/scep/support/PCP/pcp_index.htm>. The program is intended to help municipalities prepare and implement local climate action plans. As of November 1, 2002, there are 100 participants in the program.

The site <http://www.indelta.com/cgi-bin2/carcpub.cgi?http://carc.org/ClimateChange.htm> is on the website of the Canadian Arctic Resources Committee. This site presents information from the perspective of climate change in the Arctic. It includes a number of video clips.

The Climate Action Network website is located at <http://www.climatenetwork.org/>. The Climate Action Network is a global network of over 280 non-governmental organizations working to promote government and individual action to limit human-induced climate change to ecologically sustainable levels.

Ask Staff Counsel

What's A Volunteer To Do?

Dear Staff Counsel:
Numerous volunteers are registered under the Alberta Community Development, Parks and Protected Areas Division, Volunteer Steward Program. We participate in the management and protection of natural areas and features. As volunteer stewards of these natural and protected areas, what is our legal status when we are conducting our duties under the program? We would also like to know how we can influence the designation of more protected natural areas.

Sincerely, A Friendly Volunteer

Dear Friendly Volunteer:

Role of volunteer

The role of the volunteer steward is to conform to the standards that are set out in the volunteer program. A volunteer's job is to inspect, observe, record and report to the local field officer or program coordinator. Natural areas are protected public lands, set aside with the objective of maintaining both natural features and appropriate public use. The volunteer steward is required to visit a natural area at least twice a year and provide inspection reports.

Legal status

Volunteer stewards do not legally represent the department or its initiatives, and a voluntary legal responsibility cannot be assumed. The volunteer steward can assist those with legal authority to enforce legislation by promoting responsible use and reporting disturbances of the natural areas from unauthorized or inappropriate use. Volunteers may be provided opportunities to participate in the development and implementations of site management and other processes or new regulatory initiatives or to work with advisory and local committees to determine allowed activities.

Public land administration

Natural areas are protected public lands. There is, however, no statutory requirement obligating the development of comprehensive, integrated plans for use of public lands and resources. Under the Alberta multi-use philosophy for land and resource management, it is difficult for volunteer stewards to be working to protect and manage a natural area, when another user may be conducting conflicting recreational activities in the same area. Without specific enforcement authority, the multi-use approach can and has led to difficulties when people come together with differing ideas about appropriate recreational uses. Without legal authority or specified public land uses volunteer stewards can do little to protect a multi-use designation.

Recreational leases exist but the law is not clear on a leaseholder's rights to protect land and designate use. Courts have considered whether there is an exclusive right of the leaseholder to occupy and control an area, whether permission is required for public access, liability regarding control of public access, and common law that suggests volunteers may be held to a lesser or at least an appropriate standard of care.

Protected areas legislation

Under the protected areas statutes, ecological reserves and natural areas are established by Order in Council. There is nothing in the statutes that provides a norm for public land management as a whole. This can make it difficult for a volunteer steward who ultimately wants natural sites to be preserved and protected with limited public use in certain areas. Volunteer stewards can play a role to reduce the potential for conflicts and to better manage recreational uses by lobbying and meeting with government decision makers, urging them to draft regulations to enforce protecting natural areas.

Other means to obtain protected land designations is to work with private landowners to encourage them to designate conservation easements on their properties. Promoting cooperation between land managers and all users of a recreational area can lead to identification of needs and possible designation of certain areas for particular uses that are respected by others.

Volunteer stewards should recognize that their continued persistence in finding creative solutions for use and management of crowded recreational spaces is valuable. Their work contributes to raising awareness with decision makers of the need for more protected areas with regulatory and site-specific controls.

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:
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Staff Counsel

Alberta Law Foundation