

News Brief

ENVIRONMENTAL LAW CENTRE

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Environmental Law Centre

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Provincial Water Strategy Promises Better Management

At the end of November 2003, the Alberta Government released *Water For Life: Alberta's Strategy for Sustainability*.¹ The Strategy, which is the product of two years of consultations with experts, stakeholders and the public, lays out three goals:

- A safe, secure drinking water supply,
- Healthy aquatic ecosystems, and
- Reliable, quality water supplies for a sustainable economy.

To achieve these goals, the Government has undertaken to take action to increase

- knowledge and research concerning Alberta's water resources,
- partnerships (at the provincial, basin, and local watershed level), and
- water conservation.

These broad goals and courses of action are welcome. However, the success of the Strategy will depend on the specific steps taken by government to achieve them.

Strong points

Several elements of the Strategy stand out as very positive steps. A source-to-tap approach to ensuring the safety of our drinking water demonstrates sound environmental and economic planning. The Strategy also promises an assessment of wetlands and a new policy and action plan to protect them, a key element of source protection.

The Strategy's promise of a plan to manage publicly-owned infrastructure for long-term sustainability is also welcome.

Knowledge and research

Increasing our understanding of Alberta's surface and groundwater resources, and the processes that sustain them, is key to effective water management. The Strategy promises, among other measures, a new water research centre, a province-wide assessment of surface and ground water quality and quantity, and an assessment of aquatic ecosystems. The assessments proposed will lead, within 10 years, to an understanding of Alberta's surface and ground water, and aquatic ecosystems.

The success of these measures will depend on very significant new research funding from the provincial government. It is also critical that the federal government designate increased funds for water research. Current levels of government funding for this type of research are inadequate to address emerging water issues.²

The communication of research and monitoring results to water management decision-makers and the public will be essential to the success of *Water For Life*. The Strategy calls for several positive actions on this point, including the development of online resources and a provincial centre for water information from private and public sources.

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Partnerships

In a recent issue of *News Brief*, we reviewed the Alberta Government's plan to incorporate provincial, basin-level, and local watershed councils into decision-making about water management.³

The Provincial Water Advisory Council (PWAC) will be established in the spring of 2004 to identify emerging issues, set priorities for water research, and advise government to ensure objectives are achieved.⁴ The basin-level Watershed Planning and Advisory Councils (WPAC) will be established for the Milk, Oldman, Bow, Red Deer, Battle, North Saskatchewan, Cold Lake-Beaver River, and Lesser Slave Lake watersheds by 2007. WPACs for the Athabasca and Peacc watersheds will be established by 2010. The WPACs will lead in water management planning, develop and promote best management practices, report on the state of the watershed, and promote stewardship and educational activities.

The Strategy provides that some members of the WPACs will be involved with the Provincial Water Advisory Council. It is unclear, however, whether each WPAC will be represented on the PWAC. It is also unclear what role existing basin-level water management groups will have in the emerging WPACs. A fair and carefully designed selection process will be important to build confidence in the WPACs and to take advantage of the experience and expertise of existing groups.

Alberta Environment has acknowledged the importance of initial and continuing government funding in the partnerships.⁵ Adequate funding for the councils and watershed groups will be essential to ensuring a level playing field for participants, and to building confidence in the partnerships.

Water conservation

The Strategy indicates that Alberta Environment will develop water conservation and productivity plans for all sectors that use water. Actual water use will be monitored and reported to ensure that objectives set out in the plans are met. The government will also determine and report on the true value of water to the provincial economy, and evaluate and implement economic instruments (which may include pricing). Finally, an education program will be established to raise awareness regarding water conservation.

There are no measures in the Strategy that will ensure a reduction in the amount of water that is currently diverted from Alberta's water bodies. The Strategy calls for efficiency and productivity of water use to improve by 30% from 2005 levels by 2015. While a worthy target, it is designed to prevent harm to the economy. It offers no real protection to the environment, and cannot ensure that overall demands on our water resources are sustainable. Only environmental measures, which are left to the provincial and basin water councils, can ensure the needs of the environment are met.

The Strategy includes storage projects as a major component of meeting growing demands for water. It is unfortunate that conservation is not stressed as the environmentally-sound, cost effective solution to shortage issues. Major dams and reservoir construction, with their demonstrated harmful environmental effects, huge costs, and uncertain benefits, should be tools of last resort.

Water allocation transfers

Alberta Environment plans to authorize water allocation transfers within all watersheds. Under the *Water Act*, transfers are only possible where provided for in a Cabinet approved water management plan or by Cabinet order.⁶ The response to proposed transfers in the *Water For Life* consultation was mixed.⁷ While most responses were favourable, many felt that transfers should be carefully restricted. A watershed approach to management requires that watershed councils determine conditions under which transfers should be available. Transfers should only be approved pursuant to management plans.

Alberta Passes Class Proceedings Legislation

The *Class Proceedings Act* (the Act) was enacted during the Spring 2003 Legislative sittings, but has not yet been proclaimed.¹ Prior to the enactment of this legislation, the only way to commence a 'representative' action in Alberta was under Rule 42 of the *Alberta Rules of Court*.² This Rule enables one or more persons having a common interest in an intended action to sue. However, the Rule provided little guidance, was narrowly interpreted and often challenged by defendants.³

Some of the barriers to commencing a class action in Alberta prior to this new legislation were removed by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*.⁴ In that case the Court recognized that environmental issues and disputes are of a type that may lend themselves to litigation by way of class action. In determining whether a class action should proceed, the Court also considered whether the action serves judicial economy by putting similar actions together; improves access to justice; and ensures that potential wrongdoers do not avoid obligations to the public. It further clarified the existing test to review class-certification criteria: the class must be capable of clear definition; issues of fact or law must be common to all class members; success on a common issue means success for all; and the representative plaintiff adequately represents the class.⁵

Law reform

The Alberta Law Reform Institute (ALRI) recommended in 2000 that the Alberta government introduce class action legislation. It suggested that the model put forward by the Uniform Law Conference of Canada (ULCC) for a Class Proceedings Act be adopted. The Act does follow many of the 28 recommendations suggested in the ALRI Final Report,⁶ and is similar to the B.C. *Class Proceedings Act*.⁷ It includes sections determining certification requirements for the class and any subclass members (subclass members have a claim that raises common issues not shared by all class members); determining common issues for a class; allowing for opting into an action if a person is not a resident; opting out of a proceeding; requiring court approval for fee agreements and settlement agreements; and establishing the appeals process.

Costs

One major difference between the proposed ULCC legislation, the B.C. legislation, and the Act is the awarding of costs. The ULCC recommended that class members, other than the person appointed as representative plaintiff for the class, not be held liable to pay costs except with respect to determination of their own individual claims. This approach has been used generally where there exists or is contemplation of a litigation fund to assist the representative plaintiff in paying for expenses in a class action suit, including any costs that may be awarded against him or her. The B.C. legislation adopted a 'no costs' rule which presumes that costs will not be awarded to any party unless there has been frivolous, vexatious or abusive conduct. The ALRI recommended that the B.C. approach be followed.

Alberta, however, did not follow any of the recommended approaches. The Act provides that the Court may award costs as per the *Rules of Court*, thereby providing no protection from cost liability for any of the parties to a class action proceeding. In a newspaper article, the Alberta government suggests that the legislation sets a 'higher standard' where all parties in the action would be prepared to share the costs if awarded against the representative plaintiff. This way it may be hoping to keep the number of class actions to a minimum. The article goes on to say that a review can be conducted if the Act is not found to be sufficient to give people access to the courts.⁸ It has also been suggested that representative plaintiffs may have a small chance in the Court of Appeal to argue setting aside a costs award against them on the basis of public interest.⁹

Opting in and out

The Act does follow the recommendation of the ALRI and the ULCC and, similar to the B.C. legislation, provides for an 'opting in' clause to a person who is not an Alberta resident but wishes to join the class action. The court has the authority to determine at any time whether a person is a class member or subclass member. The Act also provides for 'opting out' as a class member, but once the court has certified a proceeding, leave of the court is required to opt out.

Contingency fees

The Act speaks only to court approval of contingency fee agreements with a representative plaintiff, not to more general fee agreement arrangements as is provided in the B.C. legislation and the ULCC proposal. The ALRI recommendations discussed agreements respecting fees generally, and review of such agreements. The Act is not clear on whether court approval is needed for fee agreements other than contingencies.

Context for environmental litigation

One thing a representative plaintiff may want to consider is whether the matter would be better commenced by individual action rather than as a class proceeding. This will depend on factors including the evidence that a person may want to present, such as individual health or environmental concerns; if he or she has other issues not shared by all members of the class; and the damages sought.

Other things to consider are the outcomes wanted by members of the class. An individual may be looking for a different outcome than the rest of the group, and therefore may prefer to proceed as an individual. With the potential for costs to be awarded against representative plaintiffs and no litigation fund contemplated, there may not be much of a change in the number of class actions commenced in Alberta as a result of the new legislation, environmental or otherwise.

In the Legislature...

Federal Legislation

With the exception of subsection 1(2) and section 32, *An Act to amend the Canadian Environmental Assessment Act* came into force on October 30, 2003. The Act received Royal Assent on June 11, 2003.

Northwest Territories Legislation

Bill 22, the *Waste Recovery and Reduction Act*, passed third reading on October 9, 2003, and received Royal Assent on October 10, 2003. The legislation allows the Territorial Government to establish programs to recover, recycle, and reuse waste materials in NWT communities. The legislation also allows the Commissioner in Executive Council to prohibit the sale and distribution of certain materials that are detrimental to the environment.

British Columbia Legislation

Changes in the province's environmental legislation, all of which received Royal Assent on October 23, 2003, include:

- Bill 53, the *Integrated Pest Management Act*,
- Bill 57, the *Environmental Management Act*,
- Bill 69, the *Forest and Range Practices Amendment Act, 2003*, and
- Bill 73, the *Sustainable Resource Management Statutes Amendment Act, 2003*.

Bill 88, the *Private Managed Forest Land Act* was introduced on October 29, 2003, passed third reading on November 6, 2003, and received Royal Assent on November 17, 2003. The Bill establishes a Private Managed Forest Land Council, and addresses forest management and compliance and enforcement on private managed forest land.

Federal Regulations

Two Regulations pursuant to the *Canadian Environmental Protection Act, 1999* are in force as of September 25, 2003. These are the *Regulations Amending the Benzene in Gasoline Regulations* and with the exception of sections 7 and 8, *Regulations Amending the Sulphur in Gasoline Regulations*.

Cases and Enforcement Action...

A British Columbia Provincial Court Judge sentenced Pacific Fibre Ltd. to a total fine of \$15,000 after the Company pled guilty to depositing a deleterious substance into a place where it entered into waters frequented by fish in contravention of s.36(3) of the federal *Fisheries Act*. The sentence consists of a fine of \$500 on each of two counts and the deposit of \$14,000 to be used for salmon enhancement on the Sunshine Coast.

In another decision from British Columbia Provincial Court, Omega Farms of Abbotsford and a custom manure hauler and spreader were fined a total of \$13,000 after pleading guilty to illegal discharge of manure. The fine was assessed under the *Waste Management Act* following an incident where the manure impacted nearby watercourses. The fine allocated \$10,000 to the Habitat Conservation Trust Fund.

An Alberta Provincial Court Judge in Cochrane assessed penalties against Canadian 88 Energy Corp. after the Company pled guilty to charges under both provincial and federal legislation. A penalty of \$78,000 was assessed for the release of a substance in an amount that causes or may cause a significant adverse effect, contrary to s.98(2) of the *Environmental Protection and Enhancement Act*. Of the penalty, \$67,500 is to be paid into the Environment Canada Environmental Damages Fund to be used in a Creative Sentencing Order. The Company also pled guilty to a charge that it unlawfully deposited or permitted the deposit of a deleterious substance in water frequented by fish, an offence under s.36(3) of the federal *Fisheries Act*. A penalty of \$76,650 was assessed, with \$67,500 of this to be paid into the Environment Canada Environmental Damages Fund to carry out further conditions of the order under s.79.2 of the *Fisheries Act*.

A Provincial Court Judge in Winnipeg fined Ever Spring Orchid Nursery (Manitoba) Ltd. a total of \$15,000 for illegally importing endangered orchids into Canada, in violation of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (WAPPRIITA)* and the *Customs Act*. A portion of the fine is designated for the Friends of the Conservatory to build an educational display at the Assiniboine Park Plant Conservatory to house the seized orchids.

Alberta Environment issued an administrative penalty under the *Environmental Protection and Enhancement Act* to Western Aerial Applications Ltd. of the Municipal District of Northern Lights No. 22. The \$6,000 penalty was assessed further to s.11 of the *Pesticide (Ministerial) Regulation* for failing to record the required information by the end of the day on which the pesticide was used or applied, and for failing to apply a herbicide as required by the label for that herbicide and which did not create observable impact within five metres of an open body of water.

■ **Dolores Noga**
Information Services Coordinator
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Multi-stakeholder Initiative Proposes Emission Framework for Alberta's Electricity Sector

The Clean Air Strategic Alliance (CASA), a multi-stakeholder organization dealing with air quality strategy in Alberta, recently completed a two year initiative to propose an air quality management regime that could be applied to Alberta's electricity generation sector post – 2005. The process was carried out by the Electricity Project Team (EPT), a group of about 30 people consisting of industry; municipalities; provincial and federal government; and non-government representatives. The EPT bloomed into nine working subgroups that held over 100 meetings, and produced a final report that proposed 71 recommendations to the CASA Board of Directors in November 2003. The CASA Board accepted the recommendations for presentation to the Minister of Environment.

EPT Scope and focus

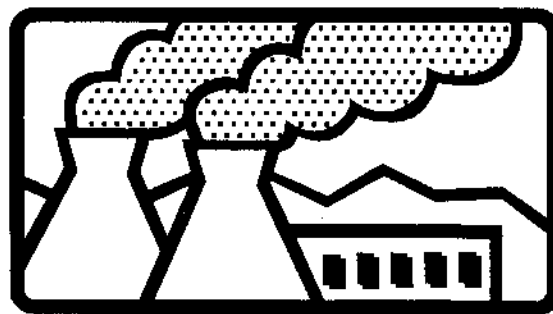
When the team initially formed, determining the Terms of Reference was the first priority. CASA uses a consensus process for decision-making that encourages parties to find agreement on matters. If any decisions are 'blocked', the team has to find a way to rework the issue until all are in agreement. The EPT's objectives were to recommend strategies to improve the air emissions performance of Alberta's electricity generation sector, reflecting CASA's goals for air quality, which are to: 1) protect the environment, 2) optimize economic performance and efficiency, and 3) seek continuous improvement.

The EPT determined that it would focus on five priority substances: mercury, nitrogen oxides (Nox), sulphur dioxide (SO₂), particulate matter and greenhouse gases. In addition, work was undertaken to screen a number of additional substances that may provide what was called a 'co-benefit,' in terms of reducing emissions of other substances associated with fossil fuel combustion, as well as additional substances of concern that may need to be addressed sometime in the future.

Public involvement

Alberta Environment requested that the public be provided an opportunity to participate in development of the final recommendations. As a result, the EPT established a public consultation working group to develop and implement a public consultation program. The result was a three phase program, with 11 public meetings attended by about 350 people overall. The audience was mainly targeted to citizens who lived in the vicinity of coal-fired power plants. The objective of the consultation process was to provide information, gather input from citizens, and incorporate their concerns into the management framework recommendations. Discussions at the meetings involved numerous areas for consideration including renewable and alternative energy; energy efficiency and conservation; emissions trading; emissions reduction; best available technology economically achievable (BATEA); greenhouse gases; hotspots; grandfathering of existing and transitional plants; and monitoring and enforcement.

An important aspect of the EPT process was the identification and recommendation of the public right to notice and opportunities to review, comment or participate in numerous activities. These included development of the air emissions trading regime; development of guidelines and standards for the electricity generating sector; review of sectoral or other agreements regarding greenhouse gases and other substances; access to information regarding inter-governmental agreements; a public review component of any monitoring and enforcement reform; and ensuring that a transparent process is in place that includes ready and timely access to information from the electricity sector that is not subject to proprietary or confidentiality claims. The non-government stakeholders supported a recommendation for consideration of environmental justice principles, including a review of the precautionary principle in the environmental decision-making and implementation processes for the new emissions management regime.



Recommendations

Final recommendations of the EPT propose an emissions reduction period for existing facilities from 2010 to 2025 when the facilities are at the end of their production life. After 2020, reductions will occur through a combination of shutdowns and technology control upgrades. The existence of power purchase agreements between generators and buyers precludes earlier emission reductions for existing plants. All new coal and gas-fired generation units will be subject to new BATEA-based emission standards for SO₂, NO_x, particulate matter, and mercury as of January 2006. Emission reductions expected by 2025 are 46% below 2003 levels for SO₂, 32% below 2003 levels for NO_x, and 51% below 2003 levels for particulate matter. Mercury emissions are expected to be reduced 50% below 2003 levels by the end of 2010.

Case Notes

Clearer Picture Developing for Successful Costs Claims Before EAB

Costs Decision: Imperial Oil and Devon Estates (8 September 2003) Appeal No. 01-062-CD (Alberta E.A.B.)

A recent decision of the Environmental Appeal Board (EAB) dealing with costs is the latest in a line of more liberal Board costs determinations. Early costs decisions by the Board consistently declined to grant costs to applicants, but the past few years have seen the EAB make a number of costs awards.

Background

This costs decision arises out of the lengthy proceedings before the EAB in relation to an environmental protection order issued to Imperial Oil (Imperial) and Devon Estates (Devon). The order directed assessment and remediation of a residential subdivision in Calgary contaminated with hydrocarbons and lead from long-term operations by Imperial predating the residential development. Proceedings before the EAB included determination of a number of preliminary issues, five days of hearings and participation by a range of parties, such as the City of Calgary, a committee of subdivision residents (the Committee), the Calgary Health Region and a property development company. Following completion of the hearings, the EAB issued a report and recommendations that the Minister of Environment uphold the order. The Minister did so, differing with the EAB's recommendation on two points.

Each of these parties referred to above (other than Imperial and Devon) submitted costs requests to the EAB. The Board awarded partial costs to the City and the Committee. It declined to grant costs to the Calgary Health Region. The property development company withdrew its costs request prior to the EAB's determination of the requests.

General principles

This decision sets out some general principles commonly used by the EAB in making costs determinations. Primary among these are underlying elements consistently applied by the EAB – emphasis on the purposes of the *Environmental Protection and Enhancement Act*,¹ particularly the shared responsibility of all Albertans for environmental protection,² and requirements that costs be directly related to matters in notices of appeal and preparation and presentation of a party's submission.³

The proceedings leading up to this costs decision were particularly contentious and the submissions on the costs requests included claims for solicitor-client costs and arguments that costs should be used as punitive or compensatory tools. The EAB reiterated its standard position that it is not bound by the “loser-pays” costs principles that apply in litigation matters before the courts, and went on to indicate that success or failure on a particular issue of an appeal would not be determinative of an award of costs.⁴ It also rejected the use of costs to compensate or punish parties, preferring an approach of rewarding parties for assisting, contributing substantially to appeals and furthering the purposes of the legislation.⁵ The EAB also reiterated its long-standing position that costs should not be awarded against the Director unless there are exceptional circumstances, giving the Director protection where acting in good faith in carrying out statutory duties.⁶

Costs – Calgary Health Region

The Calgary Health Region (CHR) was one of the parties that requested an award of costs in relation to its participation in the proceedings. The EAB took a somewhat novel approach in declining to award costs to the CHR. It indicated that the CHR's participation occurred within the scope of its statutory mandate under the *Public Health Act* to protect the health of citizens and classed the CHR as being in a similar position as the Director. Given that position, the EAB stated that the CHR would be protected from awards of costs against it as long as it participated in good faith and in pursuit of its statutory duties and that it would also not be awarded costs where it participates in an appeal as part of its statutory duties.⁷ This position is mildly surprising given that none of the parties to the appeal argued that costs should be assessed against the CHR.

Legal costs

The requests of each of the other parties claiming costs were composed chiefly of legal fees. Ultimately, the EAB awarded costs to both the City and the Committee to cover a portion of each party's legal expenses. In making these determinations, the EAB carried out a detailed review of the legal fees and disbursements claimed.

As part of this review, the EAB considered the number of hours spent by counsel on both the hearing and preparation and compared the amount of time claimed as between counsel for the various parties. Where the number of hours spent were not explicitly set out in the costs claim, the EAB carried out its own calculations based on figures available in the claim or reasonable estimates. In setting an amount for legal fees, the EAB does not automatically apply the counsel's billing rate, but instead makes use of the provincial government's tariff of fees for hiring outside counsel. Contribution by counsel to the conduct and substance of the proceedings is also a significant determinant in the ultimate award of legal costs.

In this matter, the EAB also made certain determinations regarding disbursements that will be of interest to parties participating in appeals and their counsel. The City of Calgary hired Edmonton counsel to represent it in this matter and claimed various costs related to having counsel from another city, including travel, hotel, and meals. The EAB indicated that it would not allow those costs as part of the award.⁸ The disbursements submitted by two parties also included expenses for on-line legal searches, which are common tools used by many lawyers. The EAB declined to include those expenses as part of the costs, likening them to charging a client for the use of a law firm's library.⁹

Summing up

While the EAB appears to be more inclined to make costs awards than it was in the past, it still applies a number of limits on what will be granted. Claimants who have presented as one group or large cohesive organizations appear to have the best opportunities to succeed in recovering a portion of their costs, while activity proponents and regulatory or quasi-governmental bodies have little chance of doing so. Parties seeking awards for legal costs are well served to be as specific as possible regarding their claims by setting out hours and charge rates of their counsel and highlighting those points where they feel they made a significant contribution to the proceedings.

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¹ R.S.A. 2000, c. E-12.

² *Ibid.*, s. 2(f).

³ *Environmental Appeal Board Regulation*, Alta. Reg. 114/93, s. 18(2).

⁴ *Costs Decision: Imperial Oil and Devon Estates* (8 September 2003) Appeal No. 01-062-CD (Alberta E.A.B.) at para. 69.

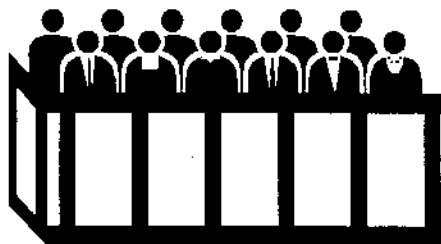
⁵ *Ibid.*, para. 60.

⁶ *Ibid.*, para. 126.

⁷ *Ibid.*, para. 82.

⁸ *Ibid.*, para. 122.

⁹ *Ibid.*, paras. 95 and 122.



Action Update

Alberta Environment Reviews Contaminated Sites Legislation

Alberta Environment recently established a multi-stakeholder advisory committee, the Contaminated Sites Stakeholder Advisory Committee (CSSAC), to review the province's contaminated sites legislation and make recommendations on any possible changes to that legislation. Contaminated sites in Alberta are currently regulated under the *Environmental Protection and Enhancement Act* (EPEA).¹ Two main regulatory options are available under EPEA: provisions dealing with substance releases (which is Alberta Environment's preferred option)² and designation of contaminated sites, which has rarely been used.³ As discussed in previous issues of *News Brief*, lack of clarity regarding regulatory tools for remediation of contamination has resulted in ongoing disputes and litigation about contaminated sites over EPEA's ten-year history.⁴

The CSSAC has 17 members, representing the following organizations:

- Alberta Association of Municipal Districts and Counties;
- Alberta Energy and Utilities Board;
- Alberta Environment;
- Alberta Environmental Network;
- Alberta Farmer's Advocate;
- Alberta Finance;
- Alberta Municipal Affairs;
- Alberta Real Estate Association;
- Alberta Urban Municipalities Association;
- Canadian Association of Petroleum Producers;
- Canadian Chemical Producers Association;
- Canadian Petroleum Products Institute; and
- Environmental Law Centre.

Meetings began in October 2003, with a target to submit a report and recommendations to the Minister of Environment by the end of March 2004. The Minister has indicated that legislative change will be considered if recommended by the CSSAC. Issues raised thus far in committee meetings include:

- Historical contamination and retrospective liability;
- Liability and remediation related to changes in remediation criteria;
- Circumstances in which particular regulatory tools are used to deal with contamination;
- Broad liability matters, including persons responsible and allocation of liability; and
- Means for documenting and providing notice of site conditions.

Issues of particular interest to the Environmental Law Centre are clarity regarding choices of regulatory tools, and public accessibility of information related to contaminated sites.

As part of its deliberations, the CSSAC will review a report being prepared by the Environmental Law Centre, a comparative analysis of regulatory approaches to contaminated land management in selected jurisdictions in Canada, the United States and Europe.

While Alberta Environment has indicated that it felt that a review of contaminated sites legislation was merited given EPEA's tenth anniversary, other factors have likely contributed to the review decision. Alberta municipalities have been lobbying the province to revisit contaminated land legislation and policy, particularly in relation to brownfield development.⁵ At the national level, the National Round Table on the Environment and the Economy has investigated brownfield redevelopment issues and policy for a number of years, and is currently making presentations across Canada on brownfield redevelopment and other municipal issues.⁶

Other Canadian jurisdictions have made recent changes to their contaminated sites legislation and policy. In 2001, Ontario passed the *Brownfields Statute Law Amendment Act, 2001*,⁷ which modified various statutes and added new provisions to the *Environmental Protection Act* to facilitate brownfield development.⁸ Quebec amended its *Environment Quality Act* in 2002 to incorporate new provisions dealing with contaminated land and brownfield redevelopment.⁹ In October 2003, British Columbia passed the new *Environmental Management Act*,¹⁰ which includes contaminated lands provisions and replaces the previous legislation set out in the *Waste Management Act*.¹¹

The CSSAC faces a formidable task, given the timeline set for it. It is possible that the committee's work may continue past the March 2004 deadline, but it is unlikely that significant additional time will be given, with a provincial election expected to be called within the next year to year and a half.

■ **Cindy Chiasson**
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¹ R.S.A. 2000, c. E-12.

² *Ibid.*, Part 5, Division 1.

³ *Ibid.*, Part 5, Division 2.

⁴ See Cindy Chiasson, "Regulatory Reform Needed for Contaminated Sites" *Environmental Law Centre News Brief* 18:3 (2003) 1 and "Direction Needed for Regulatory Remediation of Contamination" *Environmental Law Centre News Brief* 17:3 (2002) 1.

⁵ Alberta Urban Municipalities Association, Resolution No. A-S, *Brownfields Redevelopment Legislative Review* (2001).

⁶ See the National Round Table on the Environment and the Economy's website at <<http://www.nrtee-trnee.ca>> for further information on its current series of presentations. The most recent report issued by the National Round Table on brownfield redevelopment is *Cleaning up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada* (Ottawa: National Round Table on the Environment and the Economy, 2003), which is available on the National Round Table's website.

⁷ S.O. 2001, c. 17.

⁸ *Environmental Protection Act*, R.S.O. 1990, c. E.19, Parts XV.1 and XV.2.

⁹ *An Act to amend the Environment Quality Act and other legislative provisions with regard to land protection and rehabilitation*, S.Q. 2002, c. 11.

¹⁰ S.B.C. 2003, c. 53.

¹¹ *Waste Management Act*, R.S.B.C. 1996, c. 482.

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Shores Belzil Jardine
Valentine Volvo

UP TO \$125

Lionel Allingham
Brownlee Fryett
Thomas Dickson
Dr. Mary Griffiths
Martin Ignasiak
Thomasine Irwin
Jennifer Savill

(Provincial Water Strategy Promises Better Management. Continued from Page 2)

The availability of transfers is likely to result in more efficient use of water. However, making unused amounts of licensed water available for use by another party will not reduce overall water use. To the contrary, transfers are likely to increase the overall amount of water diverted.

Conclusions

Water For Life addresses an issue that is already a reality in southern Alberta: increased demand from agriculture, industry and population growth, combined with a warming climate, has and will continue to result in water shortages. The Strategy sets out many useful and concrete steps to involve the public in water management, promote conservation, ensure sufficient flow for aquatic habitat, and ensure our water is safe to drink.

However, the problems facing our water resources are much broader. Land uses, including forestry and urban expansion, are compromising natural filtration processes and degrading both aquatic environments and drinking water sources. Non-point source pollution from municipalities and agriculture also threaten water quality. The Strategy provides no direction on these pressing issues.

Our province is in real need of minimum, enforceable standards for protecting surface and ground water quality and the aquatic environment from increased pressures and demands. The government must also be directly accountable for ensuring these standards are enforced. Once these standards are in place, the water councils, watershed groups and the government can usefully roll up their sleeves to the task of ensuring our water is effectively managed.

■ James Mallet
Staff Counsel
Environmental Law Centre

¹ (Edmonton, Alberta Environment, 2003). This document is available on Alberta Environment's Water For Life website at <<http://www.waterforlife.gov.ab.ca>>.

² One noted Alberta water researcher states that provincial spending on environmental research decreased more than 50% between 1990 and 1999; see David Schindler, "Mountain Water: Lifeblood of the Prairies", in Bernadette McDonald and Douglas Jehl, eds., *Whose Water Is It?* (Washington, D.C.: National Geographic Society, 2003) at 174.

³ James Mallet, "Draft Provincial Water Strategy Stresses Partnerships" *Environmental Law Centre News Brief* 18:2 (2003)1.

⁴ Telephone conversation with Beverly Yee, Director, Environmental Partnerships and Education Branch, Alberta Environment (20 November 2003).

⁵ Comments of Lorne Taylor, Minister of Environment, to Canadian Bar Association, Northern Alberta Environmental Law Section (23 October 2003).

⁶ *Water Act*, R.S.A. 2000, c. W-3, s. 81(7)(a).

⁷ *Water For Life: Summary of Consultation Results* (Edmonton: Alberta Environment, 2002) at 17-18.



Further material on this subject can be found in the conference proceedings on class actions hosted by the Legal Education Society of Alberta.¹⁰

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

¹ S.A. 2003, c.C-16.5.
² *Alberta Rules of Court*, Alta. Reg. 390/68 as amended.
³ Gavin S. Fitch, "Environmental Class Actions in Alberta" (Paper presented at the Canadian Institute Conference What's New in Environmental Law and Regulation in Alberta, 7-8 October 2002) [unpublished].
⁴ [2001] S.C.R. 534.
⁵ *Ibid.*
⁶ Alberta Law Reform Institute, *Class Actions, Final Report No. 85* (Edmonton: Alberta Law Reform Institute, 2000).
⁷ R.S.B.C. 1996, c. 50.
⁸ Tom Barrett, "New Bill Will Stifle Access to Justice: Lawyers" *Edmonton Journal* (7 March 2003).
⁹ Clint G. Docken, "Costs in Representative and Class Actions "The Big Chill" (Paper presented at the Legal Education Society of Alberta Conference on Class Proceedings: Bill 25, 17 June 2003).
¹⁰ *Class Proceedings: Bill 25. Proceedings of a Seminar Held June 17, 2003* (Edmonton: Legal Education Society of Alberta, 2003).

The non-government stakeholders from the EPT support the introduction of a multi-stakeholder review every five years that will assess the performance of the framework, review BATEA emissions limits, and consider if continuous improvement is evident with co-benefits occurring from the priority substance management. Other elements of the framework supported by the non-government stakeholders include: establishment of multi-stakeholder committees for ongoing support of energy efficiency and energy conservation initiatives; support for the provincial government's 3.5% renewable energy target; support for 'hot-spot' reviews to provide a forum for addressing localized community health and environmental impacts from power plants; analysis of environmental, economic and health issues as part of any plans for addressing impacts; taking the recommended mercury reductions to the Canada Wide Standards table for action; and support for the public review of proposed new rules and regulations, procedures and accountability structures for monitoring and enforcement of the new management framework for the electricity sector.

The full *Emission Management Framework for the Alberta Electricity Sector*, including recommendations, is available on the CASA website at <<http://www.casahome.org>>, or by telephoning (780) 427-9793. A legal review of the public's rights and obligations regarding transparency, public participation, right to comment, and accountability is also available through the CASA website or by telephoning the CASA office.

■ **Keri Barringer**
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Corbin D. Devlin, McLennan Ross LLP

Gavin Fitch, Rooney Prentice

Lynda Jenkins, Environmental Prosecutor, Special Prosecutions, Alberta Justice

Arlene Kwasniak, Assistant Professor of Law, Faculty of Law, University of Calgary

Susan McRory, Environmental Coordinator, Special Prosecutions, Alberta Justice



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

By Cindy Chiasson, *Environmental Law Centre*

Water Systems Shift to EPEA Codes of Practice

Effective October 1, 2003, regulatory changes under the *Environmental Protection and Enhancement Act* (EPEA) have shifted the following types of operations from site-specific approvals to registrations under generic codes of practice:

- Wastewater systems that use a wastewater lagoon as the means of treatment (*Code of Practice for Wastewater Systems Using a Wastewater Lagoon*);
- Wastewater collection systems that discharge into a wastewater system authorized under EPEA (*Code of Practice for Wastewater Systems Consisting Solely of a Wastewater Collection System*);
- Waterworks systems that use as a source groundwater that does not require treatment (*Code of Practice for Waterworks Systems Using High Quality Groundwater*); and
- Waterworks systems that only distribute potable water from a waterworks system authorized under EPEA (*Code of Practice for a Waterworks System Consisting Solely for a Water Distribution System*).

The first two Codes of Practice mentioned above are made and given effect under the *Wastewater and Storm Drainage Regulation* (Alta. Reg. 119/93); the other two Codes of Practice are made and given effect under the *Environmental Protection and Enhancement (Miscellaneous) Regulation* (Alta. Reg. 118/93).

Major Differences

There are various differences between operating under an approval and a registration pursuant to a Code of Practice. While registration under a Code of Practice requires an application to Alberta Environment, the information to be supplied is not as extensive and there are no provisions for public notice of the application or for statements of concern. As well, applicants cannot appeal the Director's refusal to issue a registration.

Operators of systems regulated under a registration are required to comply with a generic Code of Practice intended to apply to all relevant facilities, with no variation for site-specific considerations, as would be found under an approval. Codes of Practice are fairly prescriptive with respect to matters such as design, construction, operations, monitoring, reclamation, reporting and record keeping.

It is in relation to reporting and record keeping that operators will notice some of the most significant differences as compared to approvals. While reporting frequency may be similar (usually contraventions, annual and monthly reports), operations under the wastewater-related Codes of Practice are not required to provide monthly reports, and none of the reports provided to Alberta Environment under any of these new Codes of Practice are required to be publicly disclosed under EPEA. As well, operators subject to the Codes of Practice need not submit operational, monitoring or other records to Alberta Environment, but are instead required to maintain these records and make them available to Alberta Environment upon request.

Again, these records are not publicly accessible unless required by regulation made under EPEA; currently no such requirements apply.

Transitions

Operators of facilities subject to these new Codes of Practice are not immediately required to comply with those requirements. Transitional provisions in both the *Wastewater and Storm Drainage Regulation* (s. 3.2) and the *Environmental Protection and Enhancement (Miscellaneous) Regulation* (s. 8.1) provide for operators of affected facilities to comply with their existing approvals until such time as they are given written notice by the Director that the relevant Code of Practice applies to their operations.

Approvals for waterworks systems subject to either the *Code of Practice for Waterworks Systems Using High Quality Groundwater* or the *Code of Practice for Waterworks Systems Consisting Solely of a Water Distribution System* have been deemed to be registrations without expiry dates (pursuant to s. 8.2, *Environmental Protection and Enhancement (Miscellaneous) Regulation*). There are no similar deeming provisions for approvals for wastewater systems subject to either the *Code of Practice for Wastewater Systems Using a Wastewater Lagoon* or the *Code of Practice for Wastewater Systems Consisting Solely of a Wastewater Collection System*. As a consequence, operators of those facilities must apply for registrations upon expiry of their current approvals.

Ask Staff Counsel

Dear Staff Counsel:

What disposal and recycling options exist for household batteries?

The most commonly used household batteries are alkalines. Other types of disposable batteries include carbon zinc, and zinc chloride. Small amounts of mercury were used at one time as an additive in alkaline and zinc carbon batteries to suppress formation of internal gases and to prevent leakage. New technologies have eliminated the need for mercury with the exception of button cells since 1996. Unfortunately, environmentally beneficial and cost effective recycling technologies are not readily available in Canada for household batteries.

Household batteries are not listed as common household hazardous waste under Alberta Environment's Action on Waste Program. They are not regulated, nor are they classed as hazardous waste. They can be disposed of in the regular trash to go to the landfill. A voluntary program exists for disposal of recyclable batteries, but currently there is no requirement for municipalities to separate disposable from recyclable batteries.

Some possible reasons why recycling of household batteries may not be considered practical by decision makers are: low toxicity of battery materials (e.g. steel, zinc, and manganese), transportation costs and contribution to greenhouse gases, minimal value of any metals recovered from recycling, and costs to dispose of the waste. If you would like to explore the need to recycle household batteries further you could write or call Alberta Environment, talk to your MLA, or consider becoming an active member of the Recycling Council of Alberta (RCA).

Several options exist if you wish to find potential places to dispose of household batteries:

- Contact the Alberta Recycling Information Line at 1-800-463-6326 for listings of companies that will accept disposable batteries.
- Contact Pollution Prevention, Alberta Environment at (780) 422-2009 or contact Alberta Environment Action on Waste at (780) 422-2110.
- ToxCo Waste Management Ltd. in Trail, B.C. provides battery recycling services at a cost of \$2.20/kg, based on gross weight.
- Contact the National Electrical Manufacturers Association (NEMA) for a list of companies in the U.S. and Canada that collect, recycle, or treat used batteries at <www.nema.org> or phone (703) 841-3200.
- Contact the RCA at <www.recycle.ab.ca> or phone (403) 843-6563.

Prepared by:
Keri Barringer
Staff Counsel

Dear Staff Counsel:

I run a small food processing plant in central Alberta. I understand there have been changes to the rules affecting my operation. What are the changes, who do they affect, and who is responsible for the new rules?

As of October 1, 2003, Alberta Environment is no longer directly regulating small fish processing plants, small vegetable processing plants, small meat and poultry processing plants, or fish farms.

Formerly, these facilities required a registration from Alberta Environment, and were required to comply with Codes of Practice under the *Environmental Protection and Enhancement Act* (EPEA). The Codes of Practice set out enforceable restrictions on the handling of wastes and wastewater from these plants.

Alberta Agriculture, Food and Rural Development (AFRD) now assumes responsibility for monitoring these plants for environmental performance. Alberta Environment will not be involved unless an incident or ongoing problem causes or has the potential to cause an adverse effect on the environment. In such a case, Alberta Environment may take enforcement action under EPEA or the *Waste Control Regulation*.

Facilities that meet the definition of "meat plant" under the *Activities Designation Regulation* will continue to require an approval from Alberta Environment.

Limited resources made it impractical for Alberta Environment to administer registrations and monitor compliance with the Codes of Practice. Alberta Environment's position is that the changes described above will create efficiencies by incorporating additional environmental performance checks into AFRD's current monitoring system for smaller facilities.

Alberta Environment indicates that the elimination of the Codes of Practice will not result in significant changes for operators of these facilities. The Department's focus will be on educating operators and providing information regarding proper handling of wastes and wastewater.

Prepared by:
James Mallet
Staff Counsel

Ask Staff Counsel is based on actual inquiries made to Centre staff. 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 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.