News Brief

ENVIRONMENTAL LAW CENTRE

Vol. 19 No. 1 2004
ISSN 1188-2565

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In This Issue

Sour Gas Well Application Denied

Polaris Resources Ltd. – Application for a Well Licence, Special Gas Well Spacing, Compulsory Pooling, and Flaring Permit (16 December 2003), Decision 2003-101 (Alberta Energy and Utilities Board) Application 1276521

Polaris Resources Ltd. (Polaris) applied to the Energy Utilities Board (EUB) for a licence, pursuant to s. 2.020 of the *Oil and Gas Conservation Regulations*, for a level 3 critical sour gas well. The EUB denied the application.

Over the past several years the EUB has denied other applications such as Amoco Petroleum for an exploratory well in the Whaleback in 1994,[1] Stampede Oil for a sour gas well near Millarville in 1999,[2] and Shell Canada for the Ferrier sour gas well near Rocky Mountain House in 2001.[3] All of these prior applications were opposed by local communities for similar reasons.

This decision reflects key considerations that the EUB will look at in denying an application. These include unfavourable relationships with the company, dissatisfaction with public consultation, lack of trust, negative impacts to wildlife and the environment, risk to public and animal health, emergency response zones, and public safety in the event of an emergency evacuation.

Public consultation

In the decision not to approve the licence application, the EUB gave serious consideration to a number of key concerns raised by the opponents with respect to adequacy of the consultation, poor relations with the company, and a belief there was little interest in meeting the community needs. In the prior Stampede Oil and Shell Canada decisions, the EUB criticized the companies for not properly informing the public, which led to negative interactions between the companies and the communities.

In this case, Polaris' view was that some community members were adamantly opposed to the project and would not negotiate or discuss the project despite their attempts. The EUB noted that members of the public have an equal obligation to participate in a meaningful way in these consultation processes to have their concerns adequately addressed. Those opposed to the project considered the consultation to be intermittent and the company either unresponsive or unwilling to take the time to understand how rural communities work. The EUB's position was that the proponent is primarily responsible to initiate, develop and maintain appropriate relations within the community.[4] It determined that Polaris had underestimated the depth of concern of local residents, and had not properly considered public input.

Environmental effects

Opponents objected to the application based on potential cumulative negative effects to wildlife, aesthetic and ecological values of the area including grassland biodiversity. An ecosystem approach as opposed to multiple-use planning was preferred, with a moratorium on development in the Whaleback area requested. Other issues raised included air quality impacts, tributary and stream contamination, and surface disturbances from the proposed access road.

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Environmental Law Centre
News Brief
Volume 19 Number 1 2004

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

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Non-profit Environmental
Organizations: $40 + GST

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(Sour Gas Well Application Denied. . .continued from Page 1)

Polaris proposed a management plan it believed would mitigate potential effects of water quality. It had included a plan for minimizing surface disturbances, and proposed 'no net loss' for wildlife habitat in its management plan. Although this was acknowledged by the EUB it was not satisfied that Polaris had adequately addressed flood concerns, groundwater seepage or mitigation measures for the site location. It also was not confident that disturbances of native grasses or rare plants had been properly considered. The EUB wanted to be convinced that Polaris was prepared to take all necessary mitigation measures for any disturbance to the lands and the adjacent Whaleback ecosystem. It determined that Polaris had not properly addressed the cumulative effect issues that were specifically raised by the public as an EUB requirement.

Quality of life

Opponents were concerned about risks to local residents from flaring and blowout scenarios. They questioned how this balanced with the benefits of the well, and believed the short-term industrial activity would have negative social and economic impacts on their well-established ranching community. They also felt that visual impacts of road development and industrial activity would devalue the natural landscape. The EUB was of the belief that the well could be drilled with minimal visual impacts and without unduly harming the quality of life of residents.

Safety issues

Polaris' position was that safety and environmental impact issues were not as much of an issue as was the community rejection of the project. Polaris proposed an emergency preparedness committee be established to address local issues and further develop the emergency response plan once the well was completed, with ongoing community assistance.

Opponents pointed out that when the relationship with a company is not good, people are less trusting and more fearful of H_2S gas releases. Other concerns included evacuation issues in the event of a blowout, notification concerns, and exit routes. The EUB was concerned that Polaris had not presented a plan to deal with restricted or reduced access to or exit from the community during adverse weather conditions in the unique terrain. It did not feel that telephone notification, or roving personnel would be able to overcome communication challenges in the event of an emergency evacuation.

The EUB determined that Polaris could have been more diligent in listening to residents' concerns and special needs identification. The EUB expects that industry will develop acceptable procedures to address needs, and respond to public concerns by adjusting its emergency planning zone.

The EUB was also concerned with Polaris' financial capability. Polaris had lost its primary partner for the project just prior to the hearing, and another of its partners indicated it would need to raise further capital to continue as a project participant. Polaris was confident it would obtain a new financial partner once a licence was granted. The EUB however expressed concern that where certainty of a company's ability to conduct a project in a manner consistent with public interest is paramount, an insecure financial position is an issue regarding the company's ability to execute the project.

Need for the well

Polaris' intention was to explore the same subsurface feature that was previously targeted by Amoco Petroleum to evaluate the potential for discovering hydrocarbons. In the Amoco decision, the EUB denied the application after concluding it was deficient and inconsistent with provincial management goals. The EUB determined it had to balance the need for the well to gather information and the potential economic benefit against the potential social and environmental costs to the area before it could determine if the proposed well was in the public interest. It was looking to be convinced that the company could take all necessary action to mitigate risk and inspire confidence in local residents.

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New Privacy Law May Affect Environmental and Community Groups

Please note: This article is provided as information only. It is not an official interpretation of the law and is not binding on the Office of the Information and Privacy Commissioner. For the purpose of applying or interpreting the law, the Personal Information Protection Act and Regulations should be consulted.

On January 1, 2004, the *Personal Information Protection Act*[1] (PIPA) became law in Alberta. PIPA regulates how private sector organizations handle personal information, and strikes a balance between the right of individuals to have their personal information protected and the need of organizations to collect, use and disclose such information.

Background

Alberta has had legislation governing the use of personal information by public bodies since 1995 (the *Freedom of Information and Protection of Privacy Act*). Federal legislation governing the use of personal information by the private sector (the *Personal Information Protection and Electronic Documents Act* (PIPEDA)) came into force in 2001. PIPEDA governs the collection, use and disclosure of personal information by "federal works, undertakings or businesses" (including federally-regulated organizations) in the course of commercial activities. Effective January 1, 2004, PIPEDA also applies to the collection, use and disclosure of personal information as part of any commercial activity within a province, except where a province has adopted substantially similar privacy legislation.

The coming into force of Alberta's *Personal Information Protection Act* means that provincially-regulated organizations using personal information will be governed mainly by PIPA. PIPEDA will only apply where personal information is used or disclosed across a provincial border as part of a commercial activity.[2]

Application of PIPA to certain registered or incorporated non-profit organizations

PIPA does not apply to organizations incorporated under the *Societies Act* or the *Agricultural Societies Act*, or registered under Part 9 of the *Companies Act* (a "non-profit organization" under PIPA), except where personal information is collected, used or disclosed in connection with a commercial activity.[3]

A commercial activity includes any transaction or any regular course of conduct that is of a commercial character including the selling, bartering or leasing of membership, donor, or other fundraising lists. Personal information connected to a commercial activity is also likely to include the following:[4]

- Personal information gathered from paid subscribers to a newsletter, or from individuals who register for a conference or training session organized by the organization;
- Personal information gathered from individuals who have paid a fee for any service provided by the organization;
- Personal information collected in the course of any of the organization's activities where the intent of the activity is to make a profit.

The following are examples of personal information handled by PIPA non-profit organizations that will not be subject to PIPA:[5]

- Employment records of employees, volunteers, and board members, including resumes, criminal reference checks, payroll and benefit information;
- Client records where no fee was charged for the service;
- Personal information collection as part of a membership process or during fund-raising activities.

Application of PIPA to other organizations

If an organization is not incorporated or registered under the *Societies Act*, the *Agricultural Societies Act*, or Part 9 of the *Companies Act*, all provisions of PIPA apply. This is true regardless of whether the purposes or activities of the organization are not-for-profit.

The requirements

The following is a list of some of the key PIPA requirements that now apply as explained above:[6]

- An organization is responsible for the personal information in its custody or under its control and must designate one or more individuals who are responsible for ensuring the organization is in compliance with the Act.
- An organization may collect personal information only to the extent that is reasonable for meeting the purposes for which the information is collected.
- An organization may use or disclose personal information only for the purposes the information was originally collected, except with the consent of the individual or as permitted by the Act.
- When an organization collects personal information from an individual, it must give notice of the purpose(s) of collection and a contact for questions.
- An organization must make a reasonable effort to ensure that any personal information it collects, uses, or discloses is accurate and complete.

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In Progress

In the Legislature...

Federal Legislation

The *Antarctic Environmental Protection Act* and the *Antarctic Environmental Protection Regulations* are in force as of December 1, 2003. Also effective as of December 1, 2003, the Minister of the Environment is designated as Minister for the purposes of that Act. With the coming into force of the Act, Canada ratified the Madrid Protocol, i.e. the *Protocol on Environmental Protection to the Antarctic Treaty*.

Two federal Departments are conducting reviews of legislation. Transport Canada is performing a ten-year review of the *Transportation of Dangerous Goods Act, 1992*. Further information on the process is available on the website <http://www.tc.gc.ca/tdg/consult/actreview/menu.htm>. As well, Health Canada has initiated a review of its legislation with a goal of introducing a new *Canada Health Protection Act*, which would replace the *Food and Drugs Act*, the *Hazardous Products Act*, the *Quarantine Act*, and the *Radiation Emitting Devices Act*. More information on the review, including background documents and opportunities for participation, is available on the website <http://renewal.hc-sc.gc.ca>.

Federal Regulations

The *Off-Road Small Spark-Ignition Engine Emission Regulations* under the *Canadian Environmental Protection Act, 1999* were finalized as of November 6, 2003, with the bulk of the Regulations coming into force on January 1, 2005. The Regulations introduce emission standards for small-spark ignitions and apply to 2005 and later-model years.

Environmental Emergency Regulations under the *Canadian Environmental Protection Act, 1999* came into force on November 18, 2003. The Regulations present a list of 174 substances, which may be harmful to the environment if they enter it as a result of an environmental emergency. The Regulations require information from any person who owns or has the charge, management, or control of any of the listed substances, an environmental emergency plan, and specify reporting requirements.

Alberta Legislation

The Legislative Assembly finalized a number of pieces of legislation before adjourning in December 2003. Bill 36, the *Environmental Protection and Enhancement Amendment Act, 2003* received Royal Assent on December 4, 2003. It comes into force on various dates. The amendment incorporates the new process for issuing reclamation certificates into the Act. As well, the amendment incorporates codes of practice into the Act by specifying them in a number of places where 'approval' or 'by regulation' is specified. Also receiving Royal Assent on December 4, 2003 were:

- Bill 37, the *Climate Change and Emissions Management Act*,
- Bill 49, the *Public Lands Amendment Act, 2003*,
- Bill 50, the *Wildlife Amendment Act, 2003*,
- Bill 51, the *Natural Resources Conservation Board Amendment Act, 2003*, and
- Bill 208, the *Occupiers' Liability (Recreational Users) Amendment Act, 2003*.

The *Wildlife Amendment Act, 2003* makes a number of amendments to the enforcement and administration provisions, including increased penalties for poaching, the capacity to enter into reciprocal agreements with other jurisdictions, and a system for tracking those with outstanding fines for wildlife offences to ensure they are not able to purchase hunting or fishing licences.

Cases and Enforcement Action...

Recent enforcement news from Environment Canada includes:

- A Provincial Court Judge in Quebec ordered St-Paul Seafood Limited to pay a $500 fine and $9,500 to the federal Environmental Damages Fund after the company pled guilty to a violation of the *Canadian Environmental Protection Act, 1999* by dumping fish waste without the required permit.
- The Ontario Court of Justice ordered Cheung Hon (Oliver) Mok to pay a fine of $17,500 plus a mandatory victim surcharge of $4,375 after receiving a guilty plea to two charges under the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*. The charges were for illegally importing from Hong Kong traditional Chinese medicines containing derivatives of endangered animals and plants.
- An Ontario Court of Justice in Brampton sentenced Canadian Tire Corporation to a penalty of $25,000 after receiving a guilty plea to three counts of violating the *Ozone-depleting Substances Regulations* under the *Canadian Environmental Protection Act, 1999*. The penalty is to be directed to the Canadian Dermatological Association to be used for public education and awareness of skin cancer and other health concerns associated with the thinning of the ozone layer.

The Ontario Superior Court of Justice dismissed an application by Croplife Canada challenging a City of Toronto bylaw prohibiting the use of pesticides. The Court ruled that the bylaw is legal under the Ontario *Municipal Act* and does not conflict with provincial or federal pesticide legislation.

■ **Dolores Noga**
Information Services Coordinator
Environmental Law Centre

In Progress reports on selected environmental activity of the 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 <http://www.elc.ab.ca>.

New Model Emerging for Wildlife Management

What is the best approach to managing wildlife, where there are diverse and conflicting interests at play? In many cases, ranchers, resource developers, hunters, conservationists, government officials and others all have strong views about how wildlife should be managed. Obtaining broad support for a management strategy has been a major obstacle to addressing wildlife concerns in the past. A new model, called Collaborative and Adaptive Resource Management (CARM), is being tried by provincial departments and stakeholders to build consensus in several important cases across the province.

Collaborative and Adaptive Resource Management

The CARM model was developed by Dr. Cormack Gates, who teaches in the Faculty of Environmental Design at the University of Calgary. The model is designed to involve interested parties in a process that leads to recommendations for managing any environmental resource. Top-down, government-driven processes have, in some cases, failed to generate confidence or obtain broad support. By contrast, the CARM process is normally initiated by a government agency or department, but is consensus-based and driven by the stakeholders. It is designed to overcome institutional barriers, such as lack of cooperation or communication between government departments, and to encourage interested parties to generate ideas in collaboration with government.

How the process works

Under the CARM model, one or more government agencies with jurisdiction over the resource initiate the process by scoping the issues, identifying and engaging stakeholders, providing basic information, and inviting stakeholders to participate on the planning team. Ideally, the members of the planning team are selected to represent the full scope of interests in the resource. This may include industry, environmental, recreational, and aboriginal interests, as well as municipal, provincial and federal agencies.

Once established, the planning team attends a series of meetings to finalize terms of reference, set objectives, evaluate alternatives, and develop a management plan. The number of meetings will depend on the complexity of the issues to be resolved. The process is consensus-based, requiring unanimous agreement on each element of the plan before it is adopted. Once finalized, the management plan is submitted by the lead agency as a recommendation to the Minister responsible for the resource. At his discretion, the Minister then leads implementation of the steps set out in the plan.

Recent examples

Over the past six months, the Environmental Law Centre has been assisting the Luscar Mines Conservation Group to develop a strategy to protect wildlife and habitat on mine sites near Hinton, Alberta. As the mines are reclaimed and closed, the wildlife is increasingly vulnerable to hunting and habitat degradation from off-road vehicle use.

The group's membership includes local residents, hunters, environmentalists, conservationists, off-road vehicle users and local government officials, among others. After initial meetings, the group decided that the most effective way to ensure protection for the wildlife was to convince the Minister of Sustainable Resource Development to initiate a planning process based on Dr. Gates' model.

In December, the Luscar Mines Conservation Group reached agreement on terms of reference based on CARM. Under the terms, the group would become a member of a multi-stakeholder planning team that will develop recommendations for integrated management of the wildlife and habitat. The terms of reference have been submitted to the Minister of Sustainable Resource Development for approval, with a request that the Minister initiate the planning process. In the meantime, the group is investigating land use designations and interpretive opportunities that are consistent with wildlife conservation.

The work of the Luscar Mines Conservation Group comes on the heels of successful efforts in Southern Alberta to resolve wildlife management issues using the same process. In Medicine Hat, the City and interested parties, over the course of 10 meetings, reached consensus on land and wildlife management for Police Point Park, a 200 acre urban natural area. The City is expected to accept the plan soon.

Dale Eslinger, Area Biologist for Fish & Wildlife Division and a planning team member for Police Point Park, stresses the importance of collaboration: "In the past, plans were consultative, but agency-centered and developed. The CARM model is community-based, and helps engage stakeholders and develop trust in officials and the process."

Those involved in the process point out that there are limitations. Getting government departments and agencies fully on board has been difficult in some cases. The collaborative nature of the process also means that it is best suited to management issues within a confined landscape where conflicts are limited and expertise readily available. In some cases, issues may be too complex, or conflicts too intense, for the process to be effective.

Eslinger also has some concerns with keeping the public involved over the long term: "The CARM process could represent a major improvement in management. But the list of endangered species is growing. The collaborative development of strategy and action plans requires people power. The individuals on these committees are donating their time - they have busy lives and may run out of patience."

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Case Notes

Supreme Court Allows Interim Costs for Public Interest Case

British Columbia (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71

This recent decision provides an excellent discussion of interim costs in public interest law cases. The Supreme Court of Canada (the Court) reviewed the discretionary power of courts to grant interim costs and the criteria that must be met to justify such an award. A strong dissenting opinion provided critical analysis of the law of interim costs and the narrow circumstances under which they have been awarded in the past. The majority of the Court upheld the British Columbia Court of Appeal's decision to grant interim costs.

The facts

Members of four British Columbia Indian Bands were logging Crown land, in contravention of stop work orders issued by the Minister of Forests for breach of the *Forest Practices Code*. The Minister commenced legal action to enforce the orders. The Bands claimed the right to log the lands under aboriginal title and sought to challenge the *Code* constitutionally as conflicting with their aboriginal rights. As part of this challenge, the Bands requested their legal costs be paid by the Crown in advance of the trial. The chambers judge declined to order the Crown to pay the Bands' costs, however the British Columbia Court of Appeal reversed this decision and awarded interim costs to the Bands.

The majority decision

Justice LeBel outlined several criteria that must be present to justify an award for interim costs in public interest litigation. The party seeking the order would be deprived of the opportunity to proceed for financial reasons and no other option exists; there is a *prima facie* case of sufficient merit to warrant proceeding; and the issues transcend those of the individual litigant, are of public importance, and have not been resolved in previous cases. If these conditions are established, a court will have a narrow jurisdiction to order the party's costs be paid prospectively. The Court held that the trial court must determine in any particular case whether it should be classified as special enough to make it appropriate for an award of interim costs. The Court held the criteria had been met in this case and suggested that limitations imposed by the Court of Appeal in the costs order would encourage the parties to resolve the issue through negotiation.

Awards of interim costs in appropriate cases have been recognized in Canada, but are limited to exceptional cases because the court is asked essentially to pre-determine an issue. Concerns such as access to justice and mitigating severe inequality between litigants are prominent in such cases.

Traditionally, the power to order interim costs has been exercised mainly in matrimonial cases where some liability has been presumed, and in trust cases where the court granted advanced costs to be paid by the trust for whose benefit the action was brought. The Court noted that when considering an interim costs order a court should address the balance between the need to encourage reasonable litigation and access to justice.

The dissenting opinion

Speaking for the dissent, Justice Major would have allowed the appeal and denied interim costs to the Bands. Justice Major discussed the usual practice of awarding of costs to the successful party after the conclusion of litigation, and indicated that awarding interim costs when liability was undecided was a dramatic extension of the precedent. The majority decision to award interim costs was classified in the dissent as a form of judicially imposed legal aid.

Justice Major found that no special circumstances existed to make this case a public interest test case requiring the ordering of interim costs. He held there was no evidence to show that the land claims were exceptional in this case, and implied that the decision may result in an increase of interim costs applications with little guidance for trial judges.

The dissent summed up the minority's view of the narrow guidelines for awarding extraordinary interim costs: the party seeking the costs cannot afford the litigation and has no means to proceed; there is a special relationship between the parties so that an award of interim costs is appropriate; and there is a presumption that the party seeking the interim costs will win an award from the other party. The minority indicated that 'special circumstances' has not been clearly defined, therefore blurring the distinction between the traditional awarding of costs and access to justice.

It will be important to follow any future interim cost applications closely to see whether this decision has opened the door to more public interest litigation.

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

(New Privacy Law May Affect Environmental and Community Groups. . .continued from Page 3)

- An organization must make reasonable security arrangements to protect personal information against security risks.

- An organization must provide an individual with access to his or her own personal information, and allow for corrections to that information, as long as the request is reasonable and exceptions do not exist that prevent access or corrections. The organization may charge reasonable fees for providing access.

Review by the Information and Privacy Commissioner

PIPA authorizes the Information and Privacy Commissioner to review the decisions of private sector organizations to deny an individual access to his or her own personal information, or to refuse a request for correction to the individual's personal information.[7] Individuals may also make a complaint to the Commissioner if they believe their personal information has been collected, used or disclosed without proper authority or without their consent.[8]

Compliance and penalties

PIPA gives the Commissioner the authority to require mediation, hold an inquiry, and issue orders to enforce compliance with the Act, among other measures.[9] PIPA makes it an offence to willfully collect, use or disclose personal information in contravention of the Act.[10] It is also an offence to willfully try to gain access to such information; to destroy, change or hide information to avoid dealing with an access request; or to obstruct or mislead the Commissioner or his staff. While PIPA provides maximum penalties of $10,000 for individuals and $100,000 for organizations, neither can be convicted if the court is satisfied that the action in question was reasonable in the circumstances.[11]

Practical steps for compliance

For organizations and activities to which PIPA applies, reasonableness and common sense are paramount in complying with the Act. The Office of the Information and Privacy Commissioner has come up with a set of practical steps to assist organizations to achieve compliance:[12]

- Obtain consent for collecting, using and disclosing personal information, except when inappropriate (for example, in an emergency or when consent would compromise the availability or accuracy of the information). Obtain the consent in a form appropriate to the kind of information concerned. If an individual modifies or withdraws his or her consent, respect the changes.

- Collect personal information only for reasonable purposes and only collect as much personal information as is reasonable for those purposes. Except when inappropriate, collect personal information directly from the individual concerned and inform the individual of how you will use and disclose the information.

- Use and disclose personal information only for the purposes for which it was collected, unless the individual consents or the Act permits use or disclosure without consent.

- On request, provide an individual with information about the existence, use and disclosure of the individual's personal information and provide access to that information, if reasonable. On request, correct information that is inaccurate.

- Ensure that any personal information is as accurate as necessary for the identified purposes; ensure that personal information is secure; and keep the information only as long as reasonable for business and legal reasons.

- Designate an individual to make sure you comply with the Act, and make information about your organization's management of personal information available on request.

Further information

For additional information and resources, please contact:

The Office of the Information and Privacy Commissioner of Alberta
Toll free: 1-888-878-4044
E-mail: generalinfo@oipc.ab.ca
Web site: <http://www.oipc.ab.ca>

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Action Update

Federal Environmental Petition a Useful Tool

Imagine a simple, straightforward means of raising your environmental concerns with government ministers. Even better, imagine an overseer to ensure that your concerns make their way to the right place and are addressed in a timely fashion. Wishful thinking? Perhaps not. The federal environmental petitions process under the *Auditor General Act* offers a relatively simple means for Canadians to bring their environmental concerns and questions to a range of federal departments and agencies.[1]

What is the environmental petition process?

Any resident of Canada, including organizations and corporations, can submit a petition dealing with an environmental matter to the Commissioner of the Environment and Sustainable Development in Ottawa. The Commissioner administers the environmental petitions process by receiving and directing petitions to relevant federal ministers and monitoring responses by those ministers. Under the *Auditor General Act*, the Commissioner must forward a petition to the appropriate minister(s) within 15 days, and any minister receiving a petition must respond directly to the petitioner within 120 days. The Commissioner monitors ministers' responses for timeliness and adequacy of content. Replies that do not adequately address the requests made in a petition may be returned by the Commissioner to the minister for further work.

Petition requirements and process

A petition under the environmental petition process can be a simple letter or a more detailed document with supporting materials – the content depends largely upon the petitioner. There are two basic requirements that an environmental petition must meet: it must address an environmental matter, and the issue raised must come within the responsibility of at least one of the twenty-five federal departments and agencies that are subject to the petitions process.[2]

A range of questions and requests can be set out in an environmental petition. For example, any of the following requests could be made:

- An investigation into possible non-compliance with or non-enforcement of a federal law;
- Clarification of federal policy related to environmental matters;
- A review of existing environmental laws, regulations or policies. It is also open to petitioners to suggest improvements or changes to existing laws, regulations and policies;
- Information about how a particular department is involved in an environmental matter or issue;
- Steps that have been taken to meet a commitment made by a minister or department on an environmental matter or issue;
- Information about the environmental integrity of a department's own operations.

To increase the profile of the environmental petitions process and assist Canadians in making use of the process, the Commissioner has created a petitions catalogue on the Internet that provides access to actual petitions and the responses provided by government. The petitions catalogue can be found at <http://www.oag-bvg.gc.ca/domino/petitions.nsf/english>. On the "environmental petitions" section of the Commissioner's website, the Commissioner's annual reports since 2001 and *A Guide to Environmental Petitions* can be accessed.[3] These documents also give a great deal of useful information on the petitions process.

An assessment of the process

The environmental petition process was created by amendments to the *Auditor General Act* in 1995. Since that time, over 100 petitions have been submitted; in some instances, petitioners have submitted follow-up petitions on an issue. Since 2001, the Commissioner has taken an active role in encouraging Canadians to make use of the process and in administering that process. As mentioned above, the Commissioner monitors whether departments and agencies are responding to petitions within the legislated time requirements. Although there are no sanctions set out in the *Act* for failure to respond within the required time, the Commissioner has been very open and direct in assessing the performance of government and in identifying instances of non-compliance (and the offending departments or agencies) in the annual reports on the petitions process.

In 2003, the Commissioner began a program auditing government's follow-up on commitments made in petition responses.[4] The first year selected responses to four petitions and assessed how well the relevant government departments did in carrying out commitments made in their responses. The Commissioner's report on the audits is notable for its candour and transparency in assessing the departments in question. The Commissioner's commitment to the petitions process and to holding government accountable on a long-term basis for its responses, as well as the relative ease of filing a petition, make the environmental petition process an attractive tool for Canadians seeking action on environmental issues at the federal level.

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

1 *Auditor General Act*, R.S.C. 1985, c. A-17, s. 22.
2 The list of federal departments and agencies subject to the environmental petitions process can be accessed on the Internet at <http://www.oag-bvg.gc.ca/domino/cesd-cesd.nsf/html/federal_e.html>
3 The website for the Commissioner for the Environment and Sustainable Development is located at <http://www.oag-bvg.gc.ca/domino/oag-bvg.nsf/html/environment.html>.
4 See Chapter 4 of the 2003 *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons* (Ottawa: Office of the Auditor General of Canada, 2003) for a detailed discussion of the audits carried out thus far by the Commissioner.

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Conclusion

The EUB was not satisfied that the risks to the community and the environment were adequately addressed and therefore these outweighed the benefit that would be received by granting the licence. Ultimately the EUB denied the application as not being in the public interest, although it indicated it would consider future applications on their own merits. It appears that, similar to previous decisions, the EUB must be satisfied of several criteria – an effective consultation plan with communication, trust building in the community, adequate environmental impact assessment with proper mitigation for wildlife and vegetation, a sound development plan, a stable financial situation, experience with H_2S gas, and a sound emergency response plan that elicits confidence from the community. Each time the EUB denies an application, it is a message to the companies to be better prepared. It is an incredible amount of work, time, commitment, and cost to the opponents who can take some satisfaction that the EUB, particularly with respect to critical sour gas well applications, will listen.

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

1 *Amoco Canada Petroleum Company Limited -- Application for an Exploratory Well, Wholchack Ridge Area* (31 December 1993), Decision D94-8 (Alberta Energy Resources Conservation Board).

2 *Stampede Oils Inc. – Application for a Well Licence, Turner Valley Field* (14 December 1999), Decision 99-30 (Alberta Energy and Utilities Board) Application 1031511.

3 *Shell Canada Limited – Application for a Well Licence, Shell PCP Ferrier 7-7-38-6W5, Ferrier Field* (20 March 2001), Decision 2001-9 (Alberta Energy and Utilities Board) Application 1042932.

4 *Polaris Resources Ltd. Application for a Well Licence, Special Gas Well Spacing, Compulsory Pooling, and Flaring* Permit (16 December 2003), Decision 2003-103 (Alberta Energy and Utilities Board) Application 1276521.

2003 Mactaggart Essay Prize Winners

The Environmental Law Centre is pleased to announce the winning essays for the 2003 Sir John A. Mactaggart Essay Prize in Environmental Law. The first prize was awarded to Michelle Toering from McGill University for her essay: *An Argument for a Human Right to a Healthy Environment: What is it and How Can it Be Implemented.* Second prize was awarded to Paul Guy from the University of Toronto for his essay: *Throwing Caution to the Wind: The Precautionary Principle, NAFTA and Environmental Protection in Canada.*

Members of the 2003 volunteer selection committee were: Alastair Mactaggart (Honourary); Elaine Hughes, University of Alberta; Ron Kruhlak, McLennan Ross LLP; and Gilbert Van Nes, Alberta Environmental Appeal Board.

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

For further information, contact Dolores Noga, Information Services Coordinator, at the Environmental Law Centre at 204, 10709 Jasper Avenue, Edmonton, AB T5J 3N3, by phone at (780) 424-5099 or 1-800-661-4238, by fax at (780) 424-5133, by email at dnoga@elc.ab.ca, or check the Environmental Law Centre website at <http://www.elc.ab.ca>.

(New Model Emerging for Wildlife Management. . . .continued from Page 5)

How citizens can get involved

Although the CARM process itself is initiated by a government department or agency, individuals and groups can request that such action be taken. Concerned citizens in a community could start as the Luscar group has done, by meeting to identify issues and objectives, then submitting a formal proposal to the Minister requesting initiation of the CARM process.

Once the CARM process is formally underway, stakeholders can identify themselves to the lead agency and ask to participate on the planning team.

Conclusion

Collaborative and Adaptive Resource Management requires that government departments and agencies coordinate efforts, and may represent a challenge to traditionally insular decision-making within departments. However, the Province appears to be willing to support the collaborative process, at least on a trial basis. The Police Point Park project demonstrates that the process can generate effective management solutions with broad support.

Advantages of an agency-initiated process such as CARM include government financial and administrative support. Agency involvement from the early stages also provides some assurance that the plan that emerges will be acceptable to the Agency and the Minister responsible.

CARM is a promising approach to public resource management with potential for broad application. As a community-based and driven process, the model will also serve as a useful example for water management planning under the Province's *Water For Life* strategy.

■ **James Mallet**
Staff Counsel
Environmental Law Centre

Announcing the 2004 Sir John A. Mactaggart Essay Prize in Environmental Law

The Environmental Law Centre is pleased to give notice of the 2004 competition for the Sir John A. Mactaggart Essay Prize in Environmental Law. The competition is open to undergraduate and graduate students attending a recognized law program in Canada. Qualifying students are encouraged to submit original essays addressing an environmental law issue that is significant and relevant to Canada. First prize is $500 and a bound volume from Carswell. Second prize is a bound volume from Carswell. Prize-winning essays will be submitted to the *Journal of Environmental Law and Practice* for publication consideration. Entry deadline is June 15, 2004. For further information, contact the Environmental Law Centre at (780) 424-5099 or fschultz@elc.ab.ca, or check the Centre's website at <http://www.elc.ab.ca>.

(New Privacy Act May Affect Environmental and Community Groups. . . .continued from Page 7)

Alberta Government Services
Information Management, Access and Privacy
Phone: 780-644-PIPA (7472) (Toll Free dial 310-0000 first within Alberta)
E-mail: pspinfo@gov.ab.ca
Web site: <http://www.psp.gov.ab.ca>

■ **Tim Chander**
Research and Issues Manager
Office of the Information and Privacy Commissioner of Alberta

■ **James Mallet**
Staff Counsel
Environmental Law Centre

1 S.A. 2003, c. P-6.5.
2 For further information on PIPEDA, see the *Guide for Businesses and Organizations to Canada's Personal Information Protection and Electronic Documents Act* on the Privacy Commissioner of Canada website at <http://www.privcom.gc.ca/information/guide_e.asp#002>.
3 *Supra* note 1, s. 56(2) and (3).
4 Adapted from *Non Profit Organizations' Personal Information Protection Act Information Sheet 1*, available at the Alberta Government Private Sector Privacy Publications webpage at <http://www.psp.gov.ab.ca/publications.html>.
5 *Ibid.*
6 Excerpted from the Alberta Government Private Sector Privacy Frequently Asked Questions webpage, available at <http://www.psp.gov.ab.ca/faq.html>.
7 *Supra* note 1, s. 50.
8 *Ibid.*, s. 46.
9 *Ibid.*, ss. 49, 50 and 53.
10 *Ibid.*, s. 59(1).
11 *Ibid.*, s. 59(2) and (3).
12 Excerpted from the Office of the Information and Privacy Commissioner of Alberta PIPA on a Page webpage, available at <http://www.oipc.ab.ca/pipa/publications.cfm>.

The ELC is looking for lawyers interested in environmental law

The Environmental Law Centre (ELC) is looking for lawyers who would be interested in referrals on environmental law matters.

The ELC is an Edmonton based charity that is committed to providing high quality legal services in environmental and natural resources law. Our clients can range from the general public, to non-governmental organizations and the business community. We regularly receive questions (over 470 in 2003) that run the gamut of environmental law topics from air quality to water rights.

Due to restrictions imposed by our funders, our in-house lawyers cannot provide legal representation for our clients. When the need does arise we try to refer our clients to lawyers who have experience or interest in the field. Unfortunately our referral network is not exhaustive. In an effort to expand our current referral system we are trying to locate lawyers across the province who may be interested in taking on clients with environmental law concerns.

An extensive background in environmental law is not required, but a keen interest in the field certainly is. We think that the more diverse and complete our referral list is, the better our clients will be served.

If you are interested in the possibility of receiving referrals on environmental law matters, please contact James Mallet at (780) 424-5099 or 1-800-661-4238 or by e-mail at jmallet@elc.ab.ca. You can also visit our website at <http://www.elc.ab.ca>.

By James Mallet, *Environmental Law Centre*

Tips for Preparing Board Submissions Without a Lawyer

Individuals and environmental groups preparing submissions for the Environmental Appeal Board, Energy and Utilities Board, or Natural Resources Conservation Board often wonder how to get their points across most effectively. When a lawyer's help is not available, persons preparing submissions can make a better impression and a bigger impact on the Board by attending to the following points.

Preparation

If possible, obtain a copy of a submission prepared by an experienced lawyer. This will provide guidance on appropriate structure, format and language.

Stick to the issues. Before you begin to write, make sure you understand the issues that the Board has agreed to determine. An appeal may involve several stages, with different issues identified for each. For example, a preliminary hearing may be held to deal with matters such as standing, or to determine the issues the board will address at the main hearing.

Identify exactly what you want from the Board. You may know that your position is that the Board should, for example, overturn the Director's decision and cancel the approval or license issued. If this is the only outcome acceptable to you or you want to set a precedent on a point, you may decide not to volunteer any alternative solutions.

On the other hand, you may decide that your concerns could be addressed through a condition to the approval or license at issue, or by having the Director reconsider the matter according to law. In such a case, consider setting out these "fall-back" positions in your submission. The Board is generally receptive to efforts at compromise. However, you should also be aware that the Board, in an effort to find a solution acceptable to all parties, may favour your fall-back positions over your request that the approval or license be cancelled. Consider these factors carefully before suggesting alternatives.

Identify your key arguments or concerns. Pare down each point you want to make to a few lines. Avoid statements of fact at this stage of preparation. Your points should clearly identify the specific deficiencies of the decision under challenge.

Identify facts that support your argument. At this stage, make a list of the facts that are directly relevant to your key arguments. Where a fact statement does not directly support your argument or provide essential context, leave it out. Remember that your argument may be undermined if the Board concludes that you have overstated your facts, or that your facts do not support your position.

Identify supporting statute law and precedent. Set aside some time to review the applicable legislation. You will also need time to look for decisions that support your position, and excerpts that can be incorporated into your submission.[1] Counsel for most boards will generally direct you to relevant decisions and the governing legislation. For additional help, you may also contact the Environmental Law Centre.

Drafting

There is more than one way to write an effective submission. The following is a basic approach that can be modified as needed.

It generally makes sense to begin with a description of who you are and any geographical or other ties you have to the matter at hand. If you are represented by an environmental or community group, outline the group's membership, mandate and main activities.

Next, provide context for the issue at hand by outlining relevant actions taken by the proponent, government officials, and your group. You should also include the relevant facts about the project that pertain to the issue. For example, if the appeal concerns the effect of the project on air emissions, summarize the data on air emissions. The purpose here is not to raise your concerns, but to bring the Board up to speed on the regulatory process to date and the facts on which your appeal is based.

Next, set out your key arguments, numbered, in point form, and in bold face. This will help focus your writing, and will also focus the readers' attention. From this point, explain how your facts support your first argument, lay out your reasoning, and set out any supporting statute law or precedent. Then turn to your second argument, and so on, being careful not to confuse them. Each sentence in each section of your argument should either support or provide essential context for the argument you are building.

Lastly, state what you want from the Board. It may also be appropriate to state this at the beginning of your submission, by way of introduction.

Further suggestions

It is generally best to avoid insulting or sarcastic language. Try to communicate the level of your concern while maintaining a professional tone.

Try to avoid legalistic language, unless you have a legal background and understand how legal terms are used. As much as possible, keep your language simple.

Begin your work far enough in advance that you have time to write several drafts. Where possible, ask an experienced lawyer to review your submission and provide comments on clarity, language and structure.

The author wishes to thank Jennifer Klimek for her assistance with this article.

[1] Past Environmental Appeal Board decisions are available on-line at <http://www3.gov.ab.ca/eab>. Energy and Utilities Board decisions are available at <http://www.eub.gov.ab.ca>. Decisions of the Natural Resources Conservation Board may be viewed at <http://www.nrcb.gov.ab.ca>.

Ask Staff Counsel

Help – My Neighbour's Tanks are Leaking!

Dear Staff Counsel:
My property has been contaminated by leakage from the underground storage tanks of the gas station next door. Will I be required to clean up my property or is my neighbour responsible? I have heard about a program for cleaning up underground tank contamination. Will that help me?

Yours truly,
Dirk T. Dert

Dear Mr. Dert,
The question of responsibility for remediation of contaminated land is covered by legislation and by the common law. Alberta's *Environmental Protection and Enhancement Act* (EPEA) can be used by Alberta Environment to require responsible parties to remediate contamination. Most commonly, Alberta Environment relies on substance release provisions in Part 5, Division 1 EPEA to require remediation. Under those provisions, parties that have caused contamination and their successors are held responsible for remediating that contamination.

There are contaminated sites provisions in Part 5, Division 2 EPEA that direct responsibility for contamination to a wider range of parties, including owners of contaminated land. However, Alberta Environment's policy is to use those provisions to deal with extraordinary circumstances where contaminated land poses a significant adverse effect to human health or the environment. Practically speaking, the contaminated sites provisions are rarely used, and the substance release requirements are the tool generally used by Alberta Environment if contamination is not remediated on a voluntary basis. You may wish to contact Alberta Environment about your concerns. Depending on where you are located in the province, you can contact the relevant zone staff who deal with contaminated land:

- Northern region, regional director, phone (780) 427-7617;
- Central region, regional director, phone (403) 340-4881;
- Southern region, regional director, phone (403) 297-5959.

All Alberta government telephone numbers can be reached toll-free within Alberta by first dialing 310-0000.

Another option you might consider is pursuing common law remedies through court action. Depending on the circumstances of your particular situation, you may be able to pursue actions in nuisance, trespass or negligence. If you are successful, a court can award you money damages to compensate for loss or damages you have suffered. In addition, a court can grant an injunction, prohibiting a continuation of the activity causing the problem, in successful actions for nuisance or trespass. To determine whether any common law remedies apply to your situation, you should consult a lawyer. There are time limitations for the commencement of common law actions, so you may not be able to rely on these rights if you have been aware of the contamination on your property for a long period of time.

Practically speaking, pursuing remediation of contamination under EPEA rather than through court action is often a better choice. By choosing the regulatory route, you are generally not subject to the same time limitations that are part of court actions. As well, Alberta Environment is the body responsible for ensuring that remediation occurs under EPEA, thus you may incur fewer costs than you would in pursuing court action. Court action can also be very lengthy and an award of costs will give you the money to remediate, rather than requiring the responsible party to undertake the necessary work.

Alberta Municipal Affairs, the provincial department that administers the *Alberta Fire Code*, began a time-limited remediation funding program in 2000 for certain underground petroleum storage tank sites. The program applied to orphaned former gas stations taken over by municipalities and to gas stations owned by small operators. Under this program, funding of up to $10,000 for environmental site assessments and up to $100,000 for remediation was available to qualifying parties. It should be noted that this funding was not necessarily intended to cover the total costs of assessment or remediation, and that any remaining costs would be the owners' responsibility. No new applications have been accepted for this program since March 28, 2002, but the deadline for completion of remediation undertaken as part of the program has been extended to October 31, 2004. For more information about the program, call 1-866-833-3300 within Alberta (415-8666 in Edmonton).

Prepared by:
Cindy Chiasson
Executive Director

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.