News Brief

ENVIRONMENTAL LAW CENTRE

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204, 10709 Jasper Avenue
Edmonton, Alberta T5J 3N3

In This Issue

AOPA Amendments Give With One Hand and Take With the Other

The *Agricultural Operation Practices Act* (AOPA) regulates intensive livestock operations (known as "confined feeding operations" under AOPA) within Alberta.[1] Recent amendments to AOPA[2] offer broader opportunities to some parties to participate in the regulatory process, but also have the effect of limiting (or in some instances, eliminating) the consideration of environmental and municipal concerns. The amendments are the result of a targeted review of AOPA carried out by Alberta Agriculture, Food and Rural Development in 2003, which sought stakeholder response to a questionnaire and also involved subsequent meetings with a range of stakeholder groups.

Participation

One of the most noteworthy changes made by the amendments expands the notice requirements in relation to applications for registrations. Registrations are required under AOPA for mid-size confined feeding operations. Previously, only the applicant for a registration and the municipality in which an operation is located were considered affected persons, from which flowed entitlement to receive notices and make submissions during the regulatory process. The amendments now extend "affected person" status to owners and occupants in close proximity to a confined feeding operation applying for a registration.

While this expansion of status is a positive step, there are some potential problems. One concern is that the procedure for determining affected persons is different for registrations as compared to approvals. For approval applications, affected persons are identified by a procedure provided for in the *Agricultural Operations, Part 2 Matters Regulation*[3] (Part 2 Regulation), which focuses on the number of animal units at a proposed feeding operation in determining the geographic location of affected persons. The AOPA amendments provide that affected persons, for the purposes of registration applications, include neighbours within either one-half mile or the minimum distance separation[4] of the confined feeding operation, whichever distance is greater. It is unclear why different processes for determining affected persons are required for approvals and registrations. This difference may cause confusion amongst operators, neighbours and even approval officers, as the procedures are different and the calculation of minimum distance separation rather complex.

The amended registration process does not provide for any time interval between a neighbour's application for determination as a directly affected party and substantive submissions by that person regarding the application for registration. The amendments also do not provide for any form of access

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EDITOR
Cindy Chiasson

ASSISTANT EDITORS
Keri Barringer
James Mallet

PRODUCTION EDITOR
Debbie Lindskoog

ADVISORY COMMITTEE
Ron Kruhlak,
McLennan Ross
Marta Sherk,
City of Edmonton
Law Department

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G.S.T. Registration: 11890 0679 RT0001

204, 10709 Jasper Avenue
Edmonton, Alberta
Canada T5J 3N3

Phone: (780) 424-5099
Fax: (780) 424-5133
E-mail: elc@elc.ab.ca
http://www.elc.ab.ca

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or opportunity to review an application for registration and any supporting documents. This differs from the approval process, which specifically mandates public access to applications, supporting information and related submissions.[5] As such, it appears that neighbours of operations seeking registrations will face the difficult task of preparing for two applications concurrently, without any guarantee of access to the application or related information.

Narrower scope of consideration

The amendments clearly narrow the consideration of both municipal and environmental matters in the review of applications for approvals, registrations and authorizations. Previously, an approval officer was obliged to determine whether an application was consistent with the municipal development plan and deny any application that was inconsistent with the plan. However, the amendments narrow the scope of this consideration to the "land use provisions" of the municipal development plan, which has the effect of taking environmental, economic and social elements of these plans, and any non-land use constraints imposed by such plans, out of the scope of the approval officer's consideration.[6]

Where approval officer decisions are reviewed by the Natural Resources Conservation Board (the Board), consideration of these elements is also weakened. The amendments downgrade the consideration of municipal development issues from a mandatory to discretionary element, and make the consideration of natural resources, environmental and land use issues mandatory only in review of approval decisions.[7]

Other changes

The amendments make changes in relation to variances of regulatory requirements. The power to vary registrations and authorizations has been extended beyond the Board to approval officers.[8] Approval officers are also now empowered to amend approvals, registrations or authorizations without any notice to affected parties, if the amendment relates to a "minor alteration" that will result in "minimal changes" to environmental risk and disturbance.[9] However, no criteria are provided to guide approval officers in determining what constitutes a minor alteration or a minimal change.

The definition of "confined feeding operation" has been revised to refer specifically to land or buildings used rather than the activities that take place on that land or in the buildings.[10] A new section has been added to AOPA to provide greater clarity with respect to transitional matters. It deems that operations meeting certain conditions have been issued an approval, registration or authorization, and specifies methods for determining the permitted capacities for such operations.[11]

The amendments also create a new enforcement tool – the emergency order. This order can be issued in relation to releases of manure, composting materials or compost into the environment, where the release "may cause, is causing or has caused an immediate and significant risk to the environment". The Board is empowered to take action to carry out the order and recover costs in instances of non-compliance. A party to whom an emergency order is issued can apply to the Board to review the amount of costs where the Board acts on the order, but cannot appeal or otherwise seek review of the order itself.[12]

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New Legislation Permits Off-Road Vehicle Use in Heritage Rangeland

Introduction

On March 11, 2004, the *Black Creek Heritage Rangeland Trails Act*[1] ("Black Creek Act") received Royal Assent in the legislature. The Act represents the government's latest attempt to balance competing interests in the Whaleback, which is Alberta's most extensive and least disturbed tract of montane ecoregion. Once the Act is proclaimed, off-highway and highway vehicle use will be allowed on specified trails in the Black Creek Heritage Rangeland for the purpose of gaining access to the adjacent Bob Creek Wildland Park.[2]

The *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* ("WAERNAHR Act")[3] was amended in June 2003 to allow for the creation of heritage rangelands, a designation intended to protect the grassland ecology of these areas while permitting continued grazing.[4] The Black Creek Heritage Rangeland was designated by order in council June 24, 2003 as the first heritage rangeland under the amendments to the WAERNAHR Act. The adjacent Bob Creek Wildland Park is designated under the *Provincial Parks Act*.[5]

An as yet unproclaimed section of the WAERNAHR Act prohibits off-highway vehicle (OHV) use in heritage rangelands, and restricts highway vehicle use to established roads.[6] The Black Creek Act carves out an exception to this prohibition with respect to the Bob Creek and Camp Creek Trails within the Black Creek Heritage Rangeland.[7] Pursuant to regulations under the *Provincial Parks Act*, OHV use would be permitted on designated trails within the Bob Creek Wildland Park.[8]

Protecting rangelands in the Whaleback

Controversy over appropriate uses for the Whaleback, which contains vast tracts of rangeland, dates back to the late 1970's. The area has been used for grazing for decades, but has seen relatively little industrial development or road building. In 1994, public interest in the Whaleback jumped when the Energy Resources Conservation Board held hearings regarding a controversial application by Amoco Canada to drill an exploratory well in the area. In its unprecedented decision to reject the application outright, the Board cited concerns for the region's high recreational, aesthetic and wildlife values.[9] More recently, in December 2003 the EUB turned down applications by Polaris to drill for sour gas on lands adjacent to the Bob Creek and Black Creek protected areas, citing uncertain impacts on the protected areas, among other factors.[10]

The Whaleback was nominated for consideration under Alberta's Special Places program in 1995. Over the next several years, a Whaleback local committee representing industry, ranchers, recreational users, off-highway vehicle users, environmental groups and others developed recommendations for managing the area. In their 1998 report, a majority of the local committee supported an established system of off-highway vehicle trails, in addition to limited commercial logging, oil and gas development and some mining operations.[11]

On May 11, 1999, the Province created the Bob Creek Wildland Park and the Black Creek Heritage Rangeland Natural Area by order in council under the Special Places Initiative. A local planning team was then established to address remaining land-use issues in the areas to be protected. This planning team produced a draft report that was made available for public comment between November 2003 and January 2004.[12] The report has not been finalized.

Problems in planning and lawmaking

The Special Places program, and the composition and decision-making process of the Whaleback local committee, have been criticized as weighted against serious environmental protection and in favour of the status quo.[13] The Black Creek Act adds substance to this argument, and supports the view that the Province's approach to the protection of Alberta's key natural areas remains unpredictable and incoherent.[14]

The draft report of the local planning team recommends that OHV use be permitted on specified trails in the heritage rangeland to access Bob Creek Wildland.[15] The report then acknowledges that the WAERNAHR Act prohibits OHV use in heritage rangelands, and indicates that "the provincial government will adopt new legislation in the future to allow recreational off-highway vehicles to cross the Black Creek Heritage Rangeland [to access Bob Creek]."[16] The fact that the Provincial government appears to have committed to allowing OHV access through the rangeland brings into question the usefulness of the public consultation on the draft report carried out this past winter. The passing of the Black Creek Act before the committee's report is finalized further suggests that the Province was not open to public opposition to any OHV use in the Black Creek protected area.

The problems highlighted by the Black Creek Act go beyond management issues in the Black Creek Heritage Rangeland, however. Natural areas are designated for protection by the Province under the WAERNAHR Act, the *Provincial Parks Act* and the *Willmore Wilderness Park Act*.[17] The level of protection varies greatly among the many designations available under these Acts. The wide discretion the Acts provide for officials to create management guidelines respecting permitted activities adds to the uncertainty surrounding our protected areas. Environmentalists and legal analysts have long argued for less discretion and greater certainty in our protected areas laws.[18]

In Progress

In the Legislature...

Federal Legislation

Bill C-22, *An Act to amend the Criminal Code (cruelty to animals)* passed third reading on March 8, 2004. In the previous session, this was Bill C-10B, which was passed by the House of Commons on October 9, 2002 and further amended on June 6, 2003 after being reviewed in the Senate. The Bill amends the *Criminal Code* by consolidating animal cruelty offences and increasing the maximum penalties.

Alberta Legislation

A number of Bills were introduced and passed third reading in the Spring sitting of the Alberta Legislative Assembly. Of particular interest are the following:

- Bill 13, the *Forest Reserves Amendment Act, 2004* was introduced on February 24, 2004 and passed third reading on March 10, 2004. It received Royal Assent on March 11, 2004 and with some exceptions, is in force as of then. Among other changes, the amendment adds a section on administrative penalties and increases the maximum penalty for offences. The section pertaining to administrative penalties will come into force on proclamation.

- Bill 17, the *Agricultural Operation Practices Amendment Act, 2004* was introduced on March 8, 2004 and passed third reading on March 18, 2004. It received Royal Assent on March 30, 2004 and comes into force on proclamation. The amendments apply to the regulation of confined feeding operations in Alberta and the regulation of manure management standards.

Alberta Regulations

The *Release Reporting Regulation*, Alta. Reg. 117/93, under the *Environmental Protection and Enhancement Act* is amended as of December 19, 2003. The amendment regulation, Alta. Reg. 386/2003, replaces s. 3 dealing with substances regulated by the federal transportation of dangerous goods legislation, provides for reporting by electronic means, and establishes a review date for the regulation of November 30, 2013.

As of December 31, 2003, Alta. Reg. 391/2003 amends the *Alberta Energy and Utilities Board Rules of Practice*, established as Alta. Reg. 101/2001. The amendment adds a subclause to the 'cost awards' section, noting that the Board may consider, in a utilities proceeding, whether the participant took part solely to protect their business interests. Information related to this is available in the Energy and Utilities Board *Bulletin 2004-03: Amendment to the EUB's Rules of Practice and Update to Guide 31B* available on their website at <www.eub.gov.ab.ca/BBS/requirements/ils/gbs/bulletin-2004-03.htm>.

Manitoba Legislation

The Resource Tourism Operators Act, S.M. 2002, c. 46 and the *Resource Tourism Operators Regulation*, Manitoba Regulation 28/2004 are in force as of March 1, 2004.

Cases and Enforcement Action...

In *R. v. Terroco Industries Ltd.* the Crown appealed the Provincial Court sentence regarding offences that occurred May 16, 2000 in Consort, Alberta. The Alberta Court of Queen's Bench increased the assessed penalty from $50,000 to $150,000 on one count of releasing or permitting the release of a substance that may cause a significant adverse effect in violation of s. 98(2) of the *Environmental Protection and Enhancement Act*. On a second count of loading, unloading or storing dangerous goods in a manner that could cause discharge, emission or escape of the dangerous goods contrary to s. 19(a) of the [Alberta] *Dangerous Goods Transportation and Handling Act*, the Court increased the penalty from $5,000 to $15,000. Terroco filed and was granted leave to appeal the decision.

An Alberta Court of Queen's Bench decision released on March 1, 2004 found Calvin Verbeek and 742333 Alberta Ltd. operating as Verbeek Sand and Gravel in contempt for failing to comply with the Enforcement Order issued to them by not fulfilling the obligations set out in the reclamation plan and by continuing to operate without an approval. Mr. Verbeek was fined $1,000 and the company $10,000.

An Alberta Court of Queen's Bench decision released on March 16, 2004 dismissed the appeal in *R. v. Centennial Zinc Plating Ltd.* The company was sentenced in April 2003 to a fine of $125,000 after it pled guilty to one count of unlawfully releasing a substance into the environment in an amount that causes or may cause a significant adverse effect in violation of s. 98(2) of the *Environmental Protection and Enhancement Act*.

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

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Alberta Environment Takes Restrictive View of "Directly Affected"

For a number of years, members of the public have found themselves fighting significant battles regarding the determination of "directly affected" status when they have sought to participate in the regulatory decision-making processes under the *Environmental Protection and Enhancement Act* (EPEA) and the *Water Act*. In spite of purpose statements in both Acts recognizing the need and importance of public participation[1], Alberta Environment has taken a restrictive position that tends to limit citizen involvement in the early stages of the statutory authorization process.

Regulatory background

Within Alberta Environment, it is the Director who claims jurisdiction to determine whether a party is directly affected under either EPEA or the *Water Act*. This arises from sections in both Acts providing for the submission of statements of concern by directly affected persons in relation to applications for statutory authorizations or amendments to those authorizations.[2] The acceptance of a statement of concern entitles a party to notice of the Director's decision[3] and to file an appeal of that decision with the Environmental Appeals Board (EAB).[4]

The EAB derives its jurisdiction to determine whether a party is directly affected from the appeal provisions of the two Acts mentioned above. Those sections provide for the filing of an appeal "by any person who previously submitted a statement of concern...and is directly affected by the Director's decision".[5] This question of a party's status is often one of the initial issues dealt with by the EAB in any appeal before it.

Nature of the problem

Alberta Environment has had a policy in place since 1997 regarding the acceptance of statements of concern.[6] The policy sets out general criteria that can be applied by the Director in determining whether or not to accept a statement of concern, and is quite inclusive in nature. The cover memorandum states:

> Consistent with the general intent of the EPEA legislation, we wish to encourage public participation in all our regulatory activities. Therefore, the application of this policy should err on the side of inclusivity rather than exclusivity in terms of deeming public input as a formal Statement of Concern.[7]

However, this policy was replaced in 2000 with an updated policy (the 2000 policy) that is more restrictive.[8] The policy changes were likely sparked by the EAB's *Bildson* decision[9], which held that the Director had accepted Brian Bildson's late-filed statement of concern by sending him a letter acknowledging his submission and indicating that his concerns would be considered in the review of the application for approval. Alberta Environment also gave Bildson notice of the Director's decision to issue an approval and indicated that he might have a right to appeal that decision.

At the EAB preliminary meeting on this matter, Alberta Environment argued that Bildson's submission was not a valid statement of concern under EPEA, but the EAB ruled against this position, based on Alberta Environment's actions in relation to Bildson's submission.

The 2000 policy categorically rejects the acceptance of any late-filed submission as a statement of concern unless the filer has requested an extension prior to the expiry of the submission period and such extension has been granted. It appears from the policy that Alberta Environment will not grant extensions unless the project proponent gives its consent, which raises the question of whether the Department is abdicating its role as regulator and deferring its discretion to the proponent.

Equally significant is the policy's hard line in relation to advising members of the public about decisions relating to granting of approvals or other statutory authorizations. The policy states:

> Anyone who has submitted a statement of concern which has not been accepted, as falling within the requirements of Section 70 [now 72], are not to receive the formal notice of decision required under Section 71(3) [now 74(3)]. In particular, they must not receive a decision that advises that they may file an appeal of the Director's decision with the Environmental Appeal Board.[10]

The EAB has considered notices of appeal filed by parties whose statements of concern had previously been rejected by the Director.[11] Part of the difficulty for such parties and the EAB is that often these notices of appeal have been filed outside of the statutory time limit, because the parties have not received direct notice of the Director's decision. In *Rew*, the EAB suggested that Alberta Environment be more flexible in its policy, stating:

> The Board is of the view that even where the Director does not accept a Statement of Concern, the Director should still advise the person who attempted to file the Statement of Concern that he has made a decision regarding the application. Providing such advice would create greater certainty in the appeal process.[12]

Possible resolution

A first step in resolving this difficulty would be to review whether there is any need for such a policy, engaging all interested parties in the discussion. Consistent with past Environmental Law Centre submissions in relation to development of EPEA and evaluations of the EAB,[13] the Centre believes that environmental regulatory processes should enable participation and input by any party with a genuine interest. Ultimately the environmental decision-making process should aim to achieve the best possible result from an environmental protection standpoint. Public participation is an important element of that process.

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Case Notes

Reasonable Expectation of Consultation Taken Seriously by Courts

Bar C Ranch and Cattle Company Ltd. v Red Rock Sawmills Ltd., 2004 ABQB 170

Introduction

This case is an example of the importance of the public consultation process in providing a means for landowners to have input when they are affected by the decisions made in relation to leased Crown land. The analysis discusses how the courts currently view the reasonable or legitimate expectation of consultation, and looks in particular at this expectation in light of when the government promises such an opportunity.

Background

Bar C Ranch ranches and operates a guest ranch on their own land and leased Crown land in the South Ghost area of Alberta. The operating lease contained an agreement to allow timber removal from the leased land. Bar C was consulted by the Respondent loggers in 2003 regarding its preliminary harvest plan, annual operating plan and detailed block plans. Although Bar C did not want the logging it provided input on how it thought such logging should occur. Bar C however, was not satisfied with the results of their input and sent letters to the Premier, Minister and the Assistant Deputy Minister (ADM) of Sustainable Resource Development. They each responded, outlining the government's position on managing public land to support a full range of uses with as little conflict as possible. In particular, a letter from the ADM in November 2003 recognized input regarding the harvest that had already occurred, but went on to say that Bar C would have a further opportunity for input once the detailed block plans had been designed.

In January 9, 2004 Bar C applied to the court for an order to restrain the Respondents from commencing logging operations on their leased grazing land. The Respondents had been granted permits to harvest from January 6 to March 30, 2004. After numerous appeals and adjournments Bar C obtained an interim order restraining further felling of trees by the loggers until the hearing of Bar C's application to stop the logging. The following commentary is based on that application.

Analysis

The Court considered a tripartite test in relation to injuctive relief, to determine the level of satisfaction that would be required for each test, before making its determination that the logging operations would be stopped. It first considered whether there was a serious issue to be tried, and determined the basis for the request for injunctive relief was a reasonable expectation of consultation. Bar C had been given an opportunity for input into the harvest plan prior to the letter of the ADM, although none had been provided afterwards. The court determined that in situations where there is a legitimate difference of view, the decision maker, charged with a public duty of fairness, should have a greater role. It found that the November 2003 letter established an independent right to be heard beyond the normal public input process that was in place, and held that the threshold for a serious issue had been met.

The Court also found the test for irreparable harm had been met. The evidence presented showed that a substantial amount of the logging had already occurred in the cut blocks. The court accepted Bar C's position that removal of the forest affected the wilderness experience associated with its operations and would lead to a financial decline in its operations.

The third part of the test considered the balance of inconvenience. The Court determined that the loggers would profit from the logging they had already completed (72% of the 2004 harvest). The Court said when the profit they made along with the potential loss they would incur was balanced against the circumstances of Bar C's potential losses from its trail riding operations, the balance was in favour of Bar C.

Case Law

Other cases have shown that when the government creates a reasonable or legitimate expectation it has been held accountable. In *Schwarz Hospitality Group Ltd.* v. *Canada Minister of Canadian Heritage)* the Applicant applied for approval to renovate and expand the lodge he leased in Banff National Park.[1] Applications were submitted to Parks Canada in 1997 and 1999. The Applicant was advised by way of letter in August 1997 that the Parks Canada Advisory Development Board recommended acceptance of the application subject to conditions. In June 1998 however, the Applicant was advised that new measures to protect national parks were in place and there was a moratorium on development. During this time discussions continued between Parks Canada and the Applicant who submitted a revised final environmental assessment report in November 1999. The Applicant anticipated a positive decision followed by issuance of the redevelopment permit, but did not get it.

The Court found that the Parks Superintendent had created a reasonable or legitimate expectation on the part of the Applicant that the proposal would be reviewed and a favourable decision made. It found that Parks Canada officials had encouraged the Applicant to continue to invest time, energy and money into refining the redevelopment proposal. Mandamus was ordered in the first judicial review application directing the respondents

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(Reasonable Expectation of Consultation Taken Seriously. . .continued from Page 6)

to review the proposal and issue the redevelopment permit, or provide reasons to the applicant if it was rejected. Mandamus was ordered in a second application directing the responsible authority to fulfill obligations in relation to the environmental assessment submitted, and to provide reasons justifying if the assessment was rejected.

In *Cook* v. *Alberta (Minister of Environmental Protection)* the Applicants argued they were led to believe the Minister of Environmental Protection would accept the recommendations of the department, and grant their recreational lease application to establish a wilderness camping facility on public lands.[2] The Minister rejected the recommendation without reasons, even though he had been supportive and positive about their plan. When the Applicants appealed, the Minister sent a letter stating he would support the decision of the Appeal Committee. The Appeal Committee requested the Minister withdraw land from the Forest Management Agreement and reinstate the lease application. When the Minister rejected this request for reinstatement the Applicants applied for judicial review. Although the application was not successful, the matter was remitted back to the Minister to provide reasons. The court recognized that when the doctrine of legitimate expectation applies, the duty of fairness requires that a claimant can expect a certain procedure will be followed.

Conclusion

The above cases are examples of how the rules of procedural fairness apply when a reasonable or legitimate expectation is found. Bar C is an important decision because it upholds the importance of public input above the normal process when the government advises that further opportunity to provide input will be made available. The letter written by the ADM created a responsibility to ensure that further input was provided and is a positive step for the affected public. The government should be encouraged to continue to make these opportunities available for those who are affected by the decisions made. Similarly, in the *Schwarz* and *Cook* cases the finding that the government had created a reasonable or legitimate expectation encouraged the Court to find favourably for the Applicants. The Courts do seem willing to find that there is a responsibility that is created by government officials when applicants are led to believe they will be consulted or that their applications will be granted, and particularly when they have expended a considerable amount of time, energy and resources in their efforts.

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

1 [2001] F.C.J. No. 263 FCT 112.
2 [2001] A.J. No. 1469 ABCA 276.

Action Update

Contaminated Sites Committee Submits Interim Report

As discussed in a previous issue of *News Brief*,[1] the Contaminated Sites Stakeholder Advisory Committee (CSSAC) was created in the fall of 2003 to review Alberta's contaminated sites legislation and make recommendations on any possible changes. CSSAC submitted an interim report to the Minister of Environment in early April 2004 and is awaiting a response and any further direction from the Minister. As of late May 2004, the Minister had provided no response, nor has the report yet been made publicly available.

CSSAC met six times, for 1 – 2 days each meeting. Initial meetings focused on gaining a common understanding of the existing regulatory and policy contexts and on issue identification. Subsequently, given the tight time line imposed by the Minister, CSSAC focused on developing high-level recommendations to incorporate within an interim report. For a number of topics, smaller subgroups of CSSAC members worked to develop suggestions for adoption by CSSAC as a whole.

Issues

A number of issues were identified and discussed by CSSAC. These included liability; brownfield redevelopment; regulatory process; access to information; limited public resources; and the role of local authorities. Discussions on liability covered matters such as termination; allocation; insurance or a security fund; and potentially liable parties. Concerns in relation to brownfield redevelopment centered primarily on greater liability certainty and provision of economic incentives.

Alberta's regulatory process for dealing with contaminated sites has been problematic.[2] Process related matters dealt with by CSSAC included cleanup levels and standards; risk management; and process clarification and streamlining. Access to information was a concern for a number of CSSAC members, and in particular, information on environmental condition of land, third party access to relevant information, and disclosure obligations.

Broad regulatory context

Part of the contextual information considered by CSSAC was *A Review of Regulatory Approaches to Contaminated Site Management*, a report prepared by the Environmental Law Centre for Alberta Environment.[3] The report provided a comparative review of contaminated site legislation from selected jurisdictions in Canada, the United States and Europe, with emphasis on issues identified by Alberta Environment.

The review identified some legislative trends in relation to contaminated site management. The legislation examined consistently incorporated the "polluter pays" principle and provided for retrospective liability in relation to contamination and remediation costs. Other common elements were greater access to information about contaminated sites; provisions explicitly enabling use of risk management; links between contaminated site management and land use planning; and clearly stated exemptions from liability.

Other legislative provisions were of interest, although they were not common to all or most jurisdictions. Sparked largely by the need to deal with limited government resources, some legislation provided for third party review and certification of remediation of contaminated sites. In some instances, the third party involvement was related to low and medium risk contaminated sites, with review and certification of high risk contaminated sites remaining within government's purview. Some foreign jurisdictions also sought to deal with contaminated sites and brownfield redevelopment through either positive incentives, such as reduced liability or tax cuts, or disincentives, such as double or triple fines or damages.

What next?

CSSAC members are currently awaiting a response from Minister Taylor to the interim report, as well as the public release of the report. Given the limited time available to CSSAC, its focus was on producing an interim report containing broad consensus recommendations, with a view to pursuing further, more detailed work in the future. In this vein, one of the primary recommendations to the Minister was to continue CSSAC's mandate to review Alberta's contaminated sites legislation and make any necessary recommendations for change. As well, the time restrictions limited the amount of consultation that CSSAC members could do with their constituencies prior to submission of the interim report. Prompt public release of the interim report by the Minister would facilitate such discussion.

The Environmental Law Centre strongly supports the proposed continuation of CSSAC's mandate. The Committee members represent a broad cross-section of the stakeholders in relation to contaminated land matters in Alberta and bring significant expertise and commitment to the table. A great deal of progress was achieved in a short period of time and CSSAC members are committed to continuing their work and reviewing many of the issues in a much more detailed fashion.

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

1 Cindy Chiasson, "Alberta Environment Reviews Contaminated Sites Legislation" *Environmental Law Centre News Brief* 18:4 (2003) 8.

2 For discussion of this issue, 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.

3 Environmental Law Centre. *A Review of Regulatory Approaches to Contaminated Site Management* (Edmonton: Environmental Law Centre, 2004).

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(New Legislation Permits Off-Road Vehicle Use in Heritage Rangeland. . . .continued from Page 3)

The Black Creek Heritage Rangeland designation was created after years of consultations and false starts.[19] The prohibition on OHV use in heritage rangelands contained in the WAERNAHR Act provided the certainty necessary for the effective protection of these sensitive areas from OHV's.[20] Unfortunately, the Black Creek Act demonstrates that the level of protection for designated rangelands is not certain, existing protected areas legislation notwithstanding.

Conclusion

When management principles are set out in legislation, interested persons and the public are able to gauge what level of protection a particular designation will offer, and respond or comment accordingly. Public involvement and confidence in the law making process is enhanced. The Black Creek Act undermines public confidence and introduces a new level of uncertainty, indicating that even activity prohibitions set out in legislation may be circumvented where expedient.

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

1 S.A. 2004, c. B-2.5.
2 "Highway vehicle" is defined in section 1 of the Act, and "means a motorized vehicle designed primarily for travel on highways." The Act incorporates the definition of "off-highway vehicle" provided by the *Traffic Safety Act*, R.S.A. 2000, c. T-6, s. 117.
3 R.S.A. 2000, c. W-9.
4 R.S.A. 2000, c. 34 (Supp).
5 R.S.A. 2000, c. P-35.
6 *Supra* note 3, s. 8.1(3).
7 *Supra* note 1, Schedule. The trails may be further specified in forthcoming regulations.
8 *General Regulation (Provincial Parks Act)*, Alta. Reg. 102/85, s. 27.
9 Alberta Energy Resources Conservation Board, *Application for an Exploratory Well, Amoco Canada Petroleum Company Limited, Whaleback Ridge Area*, Decision D 94-8, 6 September 1994, p. 35.
10 Alberta Energy and Utilities Board, *Polaris Resources Ltd - Application for a Well Licence, Special Gas Well Spacing, Compulsory Pooling, and Flaring Permit*, Decision 2003-101, 16 December 2003, pp. 21-22.
11 Alberta Special Places Whaleback Local Committee, *Recommendations to the Minister of Environmental Protection*, Draft Report (28 April 1998).
12 Bob Creek Wildland/Black Creek Heritage Rangeland Management Planning Team, *Draft Management Plan: Bob Creek Wildland/Black Creek Heritage Rangeland* (November 5, 2003).
13 Steven A. Kennett, "Special Places 2000: Lessons from the Whaleback and the Castle" *Resources* 63 (Summer 1998) 1; Andrew Nikiforuk, "Oh, Wilderness: The Promise of Special Places 2000 Betrayed" *Alberta Views* 1:4 (Fall 1998) 20.
14 David W. Poulton, "The Law of Parks and Protected Areas in Alberta" online: Canadian Parks and Wilderness Society <http://www.cpawscalgary.org/legislation/law-parks-protected-areas.html>.
15 *Supra* note 11 at 26-34.
16 *Ibid.* at 27.
17 *Supra* note 3; R.S.A. 2000, c. P-35; R.S.A. 2000, c. W-11.
18 David W. Poulton, "New Protected Areas Legislation" *Environmental Law Centre News Brief* 13:1 (1998) 1.
19 The Provincial government first sought to create this designation under Bill 15, *Natural Heritage Act*, 3d Sess., 24th Leg., Alberta, 1999, which was never passed.
20 Archie Landals, *Heritage Rangelands: A Bold Step to Preserve a Legacy* (Edmonton: Alberta Community Development, 2003).

(AOPA Amendments Give With One Hand. . . .continued from Page 2)

Conclusion

Although the AOPA amendments make some positive changes to the regulatory system for confined feeding operations, such as expanding the scope of affected persons in relation to registrations, creating a new enforcement tool, and clarifying transitional provisions, other changes appear to run counter to environmental protection, municipal interests and meaningful participation by affected persons. The lack of guidance for approval officers in making amendments to approvals and registrations may result in overly broad exercises of discretion. The process created for participation of neighbours in registration applications is convoluted and does not enable access to application documents that would be necessary to prepare for effective participation and input. The narrowing of considerations dealt with by approval officers and the Board in relation to environmental and municipal matters appears to shift AOPA's focus from protection of environmental and local interests to economic development.

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

1 R.S.A. 2000, c. A-7.
2 *Agricultural Operation Practices Amendment Act, 2004*, S.A. 2004, c. 14. This Act was proclaimed on June 1, 2004.
3 Alta. Reg. 257/2001, s. 5.
4 Minimum distance separation is determined in accordance with the *Standards and Administration Regulation*, Alta. Reg. 267/2001.
5 Sections 8, 9 and 12 of the *Board Administrative Procedures Regulation*, Alta. Reg. 26/2001, provide for access to applications for approvals, supporting information, and submissions made in relation to such applications.
6 See ss. 11 and 22, *supra* note 2. The elements of municipal development plans are set out in s. 632, *Municipal Government Act*, R.S.A. 2000, c. M-26.
7 See s. 14, *supra* note 2. Prior to the amendments, the Board was required to consider natural resources, environmental and land use issues in review of approval, registration and authorization decisions.
8 *Ibid.*, s. 8.
9 *Ibid.*, ss. 10 and 12.
10 *Ibid.*, s. 2(d).
11 *Ibid.*, s. 9.
12 *Ibid.*, s. 20.

(Alberta Environment Takes Restricted View. . . .continued from Page 5)

As well, consideration should be given to amending EPEA and the *Water Act* to remove any reference to "directly affected" in relation to the submission of statements of concern. The Director is not statutorily obliged to make any particular consideration of statements of concern as part of the statutory authorization processes under these two Acts, and is only bound to provide notice of his or her decision regarding such authorizations to those who submitted statements of concern, which should not be a particularly onerous task in the age of computers and mail merges. Currently, the Director is presumably reviewing the content of all submissions made to determine directly affected status, so it seems unlikely that a change to remove the directly affected criterion would drastically increase the Director's workload. While the filing of a statement of concern is a prerequisite for seeking appellant status before the EAB, the EAB has been making determinations of directly affected status as part of its deliberations since its inception. Therefore, it is unlikely that this will greatly increase the number of appeals, as undertaking an appeal is no minor task.

At the very least, Alberta Environment should take the immediate step of changing its policy to remove the interdiction against providing notice of the Director's decision to any party whose submission has been rejected by the Director. As indicated by the EAB in *Rew*, such a step would add greater certainty to the appeal process and would also be an acknowledgement by the province of the importance of public participation, consistent with the purpose statements in both EPEA and the *Water Act*.

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

1 *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 2(f) – (g) and *Water Act*, R.S.A. 2000, c. W-3, s. 2(d).
2 Under the *Environmental Protection and Enhancement Act*, *ibid.* at s. 73, statements of concern can be submitted in relation to applications for approvals or amendments to approvals. Under the *Water Act*, *ibid.* at s. 109, statements of concern can be submitted in relation to applications for approvals, licences or transfers of water allocations under licences, and amendments to approvals, licences or preliminary certificates. In all of these instances, prior notice of the applications must have been given; statements of concern cannot be filed in instances where the Director has waived prior notice of an application.
3 *Environmental Protection and Enhancement Act*, *ibid.*, at s. 74, and *Water Act*, *ibid.* at s. 111.
4 *Environmental Protection and Enhancement Act*, *ibid.* at s. 91(1), and *Water Act*, *ibid.* at s. 115.
5 *Environmental Protection and Enhancement Act*, *ibid.* at s. 91(1)(a)(i) and *Water Act*, *ibid.* at ss. 115(1)(a)(i), (b)(i) and (c)(i).
6 Alberta Environmental Protection, *Service Policy on Acceptance of Statements of Concern* (Edmonton: Alberta Environmental Protection, Environmental Regulatory Service, 1 December 1997).
7 *Ibid.*
8 Alberta Environment, *Acceptance and Acknowledgement of Statements of Concern*, Policy No. ES-99-PP3 (Edmonton: Alberta Environment, Environmental Sciences Division, February 2000).
9 *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection, re: Smoky River Coal* (19 October 1998) 98-230-D (Alberta E.A.B.).
10 *Supra* note 8, Policy, clause (iv). The EPEA section numbers changed with the updating of the RSA 2000, and the Policy was written prior to the final update.
11 *Metis Nation of Alberta Zone II Regional Council v. Director, Bow Region, Environmental Service, Alberta Environment re: AEC Pipelines Ltd.* (20 March 2001) 00-073 (Alberta E.A.B.); *Rew v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (30 October 2003) 03-138-D (Alberta E.A.B.). For commentary on the *Metis Nation* decision, see Cindy Chiasson, "Drawing a Fine Line: The Adjudication of Directly Affected" *Environmental Law Centre News Brief* 16:3 (2001) 6.
12 *Rew, ibid.* at 5.
13 See *In Response to the Discussion Draft of the Proposed Alberta Environmental Protection and Enhancement Act* (Edmonton: Environmental Law Centre, 1990), and *Evaluation of the Environmental Appeal Board: Comments and Suggestions* (Edmonton: Environmental Law Centre, 1999), available online at <http://www.elc.ab.ca/ims/client/upload/eabeval.pdf>.

Practical Stuff

By Keri Barringer, *Environmental Law Centre,* Researched by *Lisa Semenchuk*

Landowners and Oil and Gas Interests: Issues to consider

Introduction

Many landowners in Alberta are faced with the prospect of oil and gas related development on their property. There are many environmental issues, both short term and long term, which may need to be considered when negotiating a surface lease agreement.

General points to consider

Ensure that you understand the specifics of the development: location of the operation (on actual legal land survey), location of access points, when the operations will be conducted, the type of equipment that will be used, etc. It is essential to express any concerns at the outset, investigate them, and ask the company to provide you with a response.

Environmental issues to consider

While there cannot be an exhaustive list of all the possible environmental issues to consider, as much depends on the land itself, the following provides some basic points for consideration:[1]

a) Water supply and quality - Specify in your agreement that the company must test any water supply of concern before and after operations and provide a copy of the results to you. Also ensure that the company has made arrangements to contain (and dispose of) water used on site and prevent the flow of off site water onto the site.

b) Air quality during testing - Ask the company for the shortest time period possible for testing. Discuss the possibility of inline testing which does not include releases to the air. You may want to impose conditions on the testing stage such as notification.

c) Air quality, long term - You may want to include in the agreement that there is to be no routine flaring or that notification be provided.

d) Spills/leaks - You will want to know what monitoring program the company has in place and the emergency response procedures. Make certain that the company will notify you as soon as possible in the event that a spill or leak is detected, and that adequate reporting will follow.

e) Weed control - Find out what measures are in place to control weeds on site and to prevent spreading If possible, negotiate to avoid the used of herbicides or soil sterilants to protect surrounding vegetation, and ensure equipment will be steam cleaned to prevent the spread of non-local plants to other sites.

f) Noise – This can be a problem particularly during initial construction. Consider specifying certain times for construction and when noise must be avoided, (i.e. nighttime or bird nesting times)

g) Waste - Have the company agree to clean up all waste left by their operations, including off-site disposal of excess drill cuttings from seismic operations, to prevent damage to vegetation.

h) Future developments - Specify in the agreement that you are agreeing only to the current project and any future developments must be negotiated anew.

i) Reclamation - Determine the company's plan for protection of topsoil during operations, and its time line and proposal for reclamation once the operation is abandoned.

j) Pipelines - If heat from pipelines is a concern, try to have the location of the pipeline changed, or ensure a corrosion monitoring and mitigation program is in place.

Your rights

It is important to be aware that, as a landowner, you have rights concerning the land which can be enforced. The company has a responsibility to be cooperative, provide you with information, and be willing to address your concerns. If these are not being adequately addressed you can inform the Energy and Utilities Board. To benefit from your rights in a private agreement, you might include a penalty clause for any breach in the terms of the agreement, and provide for inspection of the site to ensure compliance. Also, try to negotiate an environmental protection provision in the agreement to ensure the land is protected from spills or releases, and the company remains liable for the costs of any clean up if contamination is found during or after operations.

For more information on this subject, see the Farmers' Advocate articles "Pipelines in Alberta" and "Negotiating Surface Rights" available online at <http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/>. Thanks to Sylvia Ainslie of the Farmers' Advocate for providing material.

[1] List adapted from Mary Griffiths and Tom Marr-Laing, *When the Oilpatch Comes to Your Backyard: A Citizens' Guide to Protecting Your Rights*, (Drayton Valley: Pembina Institute, 2001) at 22. .

Ask Staff Counsel

Dealing With Problems From Motor Boat Use

Dear Staff Counsel:
I own lakeshore property, and am concerned about the use of motorboats on the lake. Who regulates motorboat use, and is it possible to restrict motorboat activity?

Yours truly,
Concerned Cottager

Dear CC,
Motorboat use on lakes and rivers is a sore point for many lakefront property owners and other recreational users. Concerns may include safety, noise, shoreline erosion, and pollution. Causes generally relate to the number of motorboats and the manner and location of their operation.

Generally speaking, the federal government has the exclusive jurisdiction to regulate navigable vessels on the surface of all Canadian waters, including inland lakes and rivers.[1] Provinces can legislate or regulate activities above the shoreline, and water activities such as swimming.

The federal government regulates recreational motorboat use in Alberta under the *Canada Shipping Act, 2001*,[2] the *Boating Restrictions Regulations*,[3] the *Small Vessel Regulations*,[4] and the *Competency of Operators of Pleasure Craft Regulations*.[5] The Office of Boating Safety of the Canadian Coast Guard administers restrictions on motorboat use in cooperation with Alberta Sustainable Resource Development, Fish and Wildlife Division.

The *Boating Restrictions Regulations* impose age requirements on all persons operating motorboats, and restrict boat travel in Alberta to 10 kilometres per hour within 30 metres of the shore, with some exceptions. The exceptions include water skiing directly away from the shore, rivers which are less than 100 metres wide, and buoyed channels.

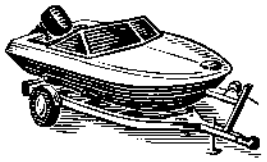
The *Boating Restrictions Regulations* also restrict boating activities on specified waterbodies. These case-by-case restrictions prohibit different types of motorboats, extend speed limited areas, and restrict activities such as water skiing and boat racing. The restrictions and the waterbodies to which they apply, including geographic coordinates, are set out in Schedules to the *Boating Restrictions Regulations*.

Local authorities, such as municipalities, may apply to amend the Regulations to restrict boat use on local waterbodies.[6] The application process is extensive and there are a host of requirements that must be met. For example, the applicant must clearly demonstrate the need for a boating restriction on the basis of specific safety concerns. Environmental concerns, such as shoreline erosion, noise, or drinking water quality, can be contributing factors to justify the need for a restriction. The applicant must also demonstrate that the problems identified could not be effectively addressed through communications, training and voluntary measures.

The Fish and Wildlife Division of Alberta Sustainable Resource Development administers the initial stages of the application process. This department is the first point of contact for a local authority wanting to apply for a boating restriction. Once the application is complete, the Fish and Wildlife Division will forward the application to the federal Office of Boating Safety, where it will be reviewed. Final acceptance of the restriction depends on the approval of a federal Cabinet committee.

Other related regulations impose requirements that apply to motorboats generally. The *Small Vessel Regulations* impose licensing and safety equipment requirements for recreational boats. All recreational vessels under 15 gross tons and powered by an engine 10 horsepower (7.5 kilowatts) or more must be licensed or registered. The *Competency of Operators of Pleasure Craft Regulations* requires that certain motorboat operators pass a safety test and carry proof of this when operating a motorboat.

Boating restrictions are enforced primarily by the RCMP and provincial Fish and Wildlife Officers. Contravention of the Act or the regulations carries a maximum penalty of $10,000.[7]



For further information on boating restrictions, see the *Local Authorities' Guide to the Boating Restriction Regulations* webpage on the Department of Fisheries and Oceans website at <http://www.ccg-gcc.gc.ca/obs-bsn/pubs/brr-guide/main_c.htm>, or call the Boating Safety Infoline at 1-800-267-6687.

1 *Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.), s. 91(10).
2 S.C. 2001, c. 26.
3 C.R.C., c. 1407.
4 C.R.C., c. 1487.
5 SOR/99-53.
6 For information on the application process, see the *Local Authorities' Guide to the Boating Restriction Regulations* webpage on the Department of Fisheries and Oceans website at <http://www.ccg-gcc.gc.ca/obs-bsn/pubs/brr-guide/main_e.htm>.
7 *Canada Shipping Act, 2001*, *supra* note 2, s. 209(2).

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.