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EUB Changes Enforcement Policy

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The Alberta Energy and Utilities Board (EUB) recently announced changes to its compliance and enforcement policy. The new policy is set out in *Directive 019: EUB Compliance Assurance – Enforcement* and will apply to all EUB requirements and processes except utility rate matters.[1] Unfortunately, Directive 019 has not simplified the enforcement process nor has it significantly improved public access to enforcement and compliance information. The new policy takes effect January 1, 2006.

Background

Since June 1999, the EUB's approach was based on "enforcement ladders", which set out escalating rules of enforcement when a licensee did not comply with EUB requirements.[2] The EUB enforcement ladders were based on three categories of non-compliance (minor, major and serious). If non-compliance occurred, the incident was categorized and the EUB placed the company on the corresponding enforcement ladder, which required the company to meet specified conditions to get off the ladder and stop the process of escalating enforcement. If there was persistent non-compliance, the licensee was moved up the ladder and became subject to more severe enforcement actions. The EUB enforcement ladders achieved high rates of licensee compliance in many categories and generally improved consistency in enforcement.

Although the enforcement ladders improved industry compliance, the EUB thought there were opportunities to improve its enforcement approach. In March 2005, the EUB released the *Draft Directive: EUB Compliance Assurance—Enforcement* for stakeholder review. Directive 019 incorporates some stakeholder recommended revisions from the Draft Directive.

Risk assessment

One of the major changes to the EUB enforcement process is that the new policy consists of two enforcement categories instead of three. The purpose of this change was to simplify the enforcement process. Directive 019 has two categories of non-compliance, "low risk" and "high risk." The EUB will use a "risk assessment matrix" to predetermine the level of risk associated with a non-compliance incident. The matrix is difficult to explain and is diagrammed separately from Directive 019.[3] The matrix consists of four criteria: health and safety, environmental impact, conservation (of the resource), and stakeholder confidence in the regulatory process. The risk level is based on the likelihood and the severity of consequences for each criterion.

Using the matrix, an example of a low risk non-compliance incident would be an incident that results in a moderate likelihood of adverse short-term health impacts, short-term adverse effects on the environment, the potential for permanent damage to the oil

reservoir, and localized stakeholder concerns or some adverse media coverage. If the effects of non-compliance were more significant for any of the criteria, then the incident would be categorized as a high risk incident.

If an incident is rated as low risk, the licensee is subject to the low risk enforcement process. A licensee gets two chances to correct the problem before enforcement action is taken. On the third chance, the EUB will apply one or more enforcement actions which include: issuing fees; partial or full suspension of operations; suspension and/or cancellation of license or approval; or enactment of "refer status." Refer status means that any of the licensee's pending and future EUB applications are subject to a more rigorous review. Licensees who are persistently low risk non-compliant will be subject to further low risk enforcement actions, but will not be subject to the high risk enforcement process.

If an incident is rated as high risk, the licensee is subject to the high risk enforcement process. The high risk process offers a slightly different range of possible enforcement actions than the low risk process and requires the licensee to develop and implement a written action plan within 60 days. If necessary, the EUB may suspend operations to remove the potential hazard. Initial high risk enforcement actions include: issuing fees; self audits or inspections; partial or full suspension of operations; or suspension and/or cancellation of the license or approval.

If a licensee is identified as persistently high risk non-compliant, the EUB will apply one or more of the high risk enforcement actions and has the option of ordering third party audits or inspections. The licensee will also have to submit a more detailed action plan. Further high risk disregard of EUB requirements will result in further enforcement actions and the option of issuing an order for suspension, cleanup or abandonment, or the enactment of refer status. In any event, senior EUB staff will always meet with licensees before enforcement actions are escalated.

Other features

Directive 019 permits licensees to voluntarily self-report non-compliance incidents to the EUB without enforcement actions. It also provides some access to a company's compliance information. The EUB will list low risk and high risk compliance categories on its website and will publish an annual compliance report and incident reports. The public will have to contact the company if they want specific compliance information or use the *Freedom of Information and Protection of Privacy Act* (FOIPP) process to request the information.

Comment

Directive 019 is an improvement over the Draft Directive that was released for stakeholder review earlier this year. One of the most important changes made in the final version of Directive 019 was to clarify that EUB staff will impose one or more enforcement actions in the event of non-compliance. In the Draft Directive all enforcements actions were discretionary and there was no escalation of enforcement actions for persistent non-compliers.

Despite this improvement, Directive 019 still falls short of addressing other concerns. Generally, the risk assessment matrix is confusing and does little to simplify the

enforcement process. There is also no general requirement to notify the public in the case of a self-disclosed non-compliance incident. Particularly when self-disclosing high risk non-compliance, every company should be required to notify those potentially affected by the incident.

Additionally, Directive 019 provides a limited range of publicly accessible information. It appears that the disclosure of enforcement actions, aside from enforcement orders, will be lumped into an annual compliance report. This will not make it easy for the public to obtain information on specific enforcement actions such as fines, suspensions or the cancellation of licenses. The process of obtaining this information through a formal FOIPP request can be cumbersome and time consuming. Given the general legislative trend towards public availability of information and the EUB's duty to regulate in the public interest, the disclosure of enforcement-related information should be much broader. As a model, the EUB should consider the disclosure provisions under the *Environmental Protection and Enhancement Act* (EPEA) and its regulations. For example, sections 35 and 237.1 of EPEA provide for the public disclosure of information relating to orders, administrative penalties and prosecutions issued under the Act.[4] To ensure transparency in the EUB enforcement regime and public confidence in this system, enforcement-related information should be available and easily accessible to the public.

[1] (Calgary: Alberta Energy And Utilities Board, 2005), online: Alberta Energy and Utilities Board <http://www.eub.gov.ab.ca/bbs/documents/directives/DirectiveDraft_CAI.pdf>.
[2] *Informational Letter (IL) 99-4: EUB Enforcement Process, Generic Enforcement Ladder and Field Surveillance Enforcement Ladder* (Calgary: Alberta Energy and Utilities Board, 1999), online: Alberta Energy and Utilities Board <http://www.eub.gov.ab.ca/bbs/ils/ils/pdf/il99-04.pdf >.
[3] The EUB's *Compliance Assurance Risk Assessment Matrix* is available online: Alberta Energy and Utilities Board <http://www.eub.gov.ab.ca/BBS/enforcement/RiskMatrix/matrix.htm>.
[4] See also Jodie Hierlmeier, "Regulatory Changes on the Disclosure of Information under EPEA" *Environmental Law Centre News Brief,* 20:3 (2005), online: Environmental Law Centre <http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?id=888>.

Comments on this article may be sent to the editor at elc@elc.ab.ca.

DFO Sets New Policy Course for *Fisheries Act* Enforcement

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Section 35(1) of the federal *Fisheries Act* (the Act) provides that "no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."[1] Referred to as the "HADD" section of the Act, section 35 is monitored and enforced by the Department of Fisheries and Oceans (DFO).[2]

The HADD provision has broad and almost innumerable applications to activities in fisheries waters, from building a dock or driving an off-road vehicle through a stream to damming a river. Under section 35(2) of the Act, the Minister of Fisheries and Oceans may authorize activities that constitute a HADD. Generally, authorization triggers a formal environmental assessment under the *Canadian Environmental Assessment Act* (CEAA).[3]

Policy changes regarding HADD enforcement and compliance are currently underway, arising from DFO's *2005-2010 Strategic Plan: Our Waters, Our Future.*[4] The Plan foresees, in part:

- a risk management framework wherein risk levels associated with particular habitat and particular activities are to be assigned; and

- the use of non-legal instruments to protect fisheries habitat, such as class screenings, operation statements and guidelines. These instruments would first focus on "low risk activities" but, in "future years, the focus will turn to addressing medium- and higher-risk activities".[5]

These policy changes will have direct impacts on those conducting activities in or near fisheries habitat and on the enforcement and protection of the nation's fisheries. In particular, the policy shift will mean decreased staffing in the enforcement division and the use of Operational Position Statements to guide activities with the potential to cause a HADD.

HADD no stranger to controversy

Long before the current round of policy changes, DFO enforcement of the HADD provision was a contentious issue, particularly from the perspective of the environmental community. In particular, the use of "letters of advice", issued by DFO in instances where an activity had the potential to cause a HADD, attracted criticism.

Under the legislation, those who wish to undertake an activity that may cause a HADD must apply to DFO for an authorization.[6] However, most projects with the potential to cause a HADD proceed without either section 35 authorization or environmental impact assessment (EIA). Instead, the Department has relied on "letters of advice" which it sends to project proponents, outlining steps to be taken that should enable the proponent to avoid causing HADD.

The use of letters of advice has undermined section 35 in at least two respects. First, it has allowed activities to go forward that might otherwise have required environmental assessment under CEAA. A CEAA assessment requires a certain level of public participation and transparency, and would provide a fuller assessment of the actual and potential impacts on local fish habitat. Second, the use of letters of advice has made prosecution, even where a HADD occurs, difficult or impossible, as the offender may successfully raise the defences of officially induced error and due diligence. The new shift in policy does little to deal with these criticisms and may further undermine enforcement of the Act.

Shifting policy gears

The shift in enforcement and regulation under the Department's Habitat Management Program, cited as being in line with the federal government's "Smart Regulation" agenda, focuses more on collaboration and soft law approaches and less on strict enforcement of the *Fisheries Act*.[7]T

The new policy direction will see significant reductions in fisheries enforcement officers across the country. In Alberta, for instance, it is expected that the number of enforcement officers will be reduced by over 65% from 2004 levels.[8] The other prairie provinces are also slated for significant reductions in officers. These officer positions may be replaced with inspectors; however, without significant amendments to the *Fisheries Act,* it is unclear what legislative powers these inspectors would have.

Considering the number of activities with the potential to trigger section 35, this will certainly mean decreased inspections, investigations and prosecutions of *Fisheries Act* violations. This in turn may have significant implications for other public and private enforcement mechanisms. In particular, there may be greater scope for private prosecution in instances where government enforcement is lacking.

Implications of Operational Position Statements

While the effect of the reduction in enforcement staff is predictable, the implications of using legally unenforceable compliance tools are less apparent and worthy of further discussion. The current trend in compliance tools appears to be toward guidelines or policy statements, however the final legal status and enforceability of these tools has yet to be determined. One of these tools in particular, "Operational Position Statements" (OPS), is currently being developed and will soon be relied upon by DFO for compliance.

These position statements appear to be standardized replacements for letters of advice in that they outline steps to be taken to avoid a HADD for a particular type or class of activity. Undoubtedly, the objectives of Operational Position Statements include addressing capacity limitations, minimizing costs and avoiding the adversarial prosecution approach. The question remains, however, whether adherence to the Operational Position Statements can or will be enforced.

The uncertainty surrounding enforcement of OPS is evident within the wording of the statements themselves. The interim OPS for pipeline crossings reads, "if the Designated Works meet the criteria outlined in [the OPS] and are carried out as specified in the HADD avoidance measures provided throughout [the OPS], the proposed Designated

Works *are not likely to contravene section 35(1) of the Fisheries Act*.[9] (Emphasis added).

It therefore appears that even strict adherence with an OPS may nevertheless result in a violation of section 35. This is in large part due to the fact that standardized statements cannot foresee every situation. Whether a HADD occurs is a question of fact that depends upon the circumstances in each case. As such, standardized guidelines are likely to miss relevant features of the fisheries population or habitat in particular regions or with particular sensitivities.

While the OPS give reasonable guidance to proponents of activities that may violate section 35, the use of the OPS perpetuates the difficulties inherent in letters of advice. As with the letters of advice, environmental assessment triggers are side-stepped and the likelihood of prosecutions moving forward, even in instances where HADD occurs, are minimized due to the availability of legitimate defences.

DFO's view is that these tools (letters of advice and OPS) are valid enforcement and compliance tools,[10] notwithstanding the apparent undermining of the legislative scheme. The fact remains, however, that even with letters of advice and OPS in place, HADD will likely continue to occur.

Enforcement of OPS

Currently, failure to comply with the provisions of an Operational Position Statement does not constitute an offence under the Act. If OPS are used it appears there may be a need to amend the Act, both to clarify their legal status and to effectively enforce their provisions. By making it an offence to derogate from an OPS in the absence of written approval from the department, the criticism regarding legal enforceability and prosecution would be partially addressed.

Similarly, some, if not all, of the OPS will require notification of DFO by the proponent. This notification requirement needs to be legislated to be effective. While notification itself does little to address the fundamental issue of habitat protection, it allows DFO to track and inspect activities and to intervene if specific criteria require it. Without legislative backing for the notification requirements, however, there is little to ensure monitoring of activities or compliance with the OPS and the Act itself.

Remaining legal questions

The question of whether a HADD is or is not likely to occur is one guided by the factual situation in each case. The existence of a HADD is not a question of government policy. While enforcement of s. 35 violations is affected by the new DFO policy, the question remains whether OPS (and for that matter letters of advice) constitute valid exercises of government discretion under the Act. It would appear at first instance that, by creating these alternative mechanisms to deal with habitat protection, the intent and purpose of the Act is actively being undermined.

Conclusion

The combined effect of reduced enforcement capacity and a move towards soft, more collaborative approaches to section 35 compliance is difficult to ascertain. The steps being taken towards reduced enforcement of the HADD provision are, however, likely to

have significant negative impacts on fisheries habitat. Indeed, the OPS approach can be characterized as an experiment with enforcement tools, leaving doubt as to whether the OPS methods will be effective at HADD avoidance.

The reduced number of prosecutions and investigations under the new policy will likely allow for financial savings by DFO, but at a potentially significant cost to fish habitat. The intent of the Act would be better served through a case-by-case authorization process and the EIA mechanism currently available under federal legislation. Given the planned reductions in enforcement capacity, the future of *Fisheries Act* enforcement will likely bring new opportunities for private prosecutors and their lawyers.

[1] R.S.C. 1985, c. F-14.
[2] While some provincial conservation officers have been sworn in as fisheries officers under the *Fisheries Act,* primary responsibility for the Act's enforcement lies with DFO. The pollution prevention provision of the Act, section 36(3), is enforced by Environment Canada by agreement with DFO.
[3] S.C. 1992, c. C-37 and the *Inclusion List Regulations*, SOR/94-637.
[4] (Ottawa: Fisheries and Oceans Canada, 2005). This document is available online at <http://www.dfo-mpo.gc.ca/dfo-mpo/plan/plan_e.pdf>.
[5] *Ibid*. at 20-21.
[6] *Supra* note 1, s. 35.
[7] *Supra* note 4. Concerning the Smart Regulation agenda, see: Canada, External Advisory Committee on Smart Regulation, *Smart Regulation: A Regulatory Strategy for Canada* (Ottawa: External Advisory Committee on Smart Regulation, September 2004) available online at <http://www.pco-bcp.gc.ca/smartreg-regint/en/08/rpt_fnl.pdf>. A "soft law approach" is one that relies on mechanisms that are generally not legally enforceable, such as policy and guidelines.
[8] Ritchie Rath, Field Supervisor, Central and Arctic Region, Department of Fisheries and Oceans, *Changes to DFO HADD Enforcement and Operational Positions Statements*, presentation to the Environmental Law (Alberta North) Subsection of the Canadian Bar Association (9 June 2005) [unpublished].
[9] Fisheries and Oceans Canada, *Interim Operational Position Statement: Pipeline Crossings in the Prairies Area* (Ottawa: Fisheries and Oceans Canada, 2005) at 1.
[10] See e.g. Canada's submission regarding "letters of advice" before the Commission of Environmental Cooperation: CEC, *Factual Record, Oldman River II Submission* (SEM-97-006). This document is available online at <http://www.cec.org/files/pdf/sem/97-6-FFR_en.pdf>.

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EAB Decision Raises Concerns Over Alberta Environment's Mandate

Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd. (24 February 2005) Appeal Nos. 03-150, 151 and 152-R (A.E.A.B.)

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The Environmental Appeals Board (EAB) recently released its report and recommendations on key amendments to the Cheviot Mine Project.[1] The decision sheds light on the scope of Alberta Environment's discretion to refuse an approval for a project that has been authorized by another regulator. The decision also examines adaptive management principles applied to approvals in the form of workplans. Both issues bring into question the Department's ability and willingness to address environmental concerns and ensure that impacts are minimized.

Background

The original Cheviot Project was proposed in 1996, consisting of a stand-alone project with an open-pit mine and a coal-processing plant at one location. After two hearings of a Joint Panel of the Canadian Environmental Assessment Agency (CEAA) and the Alberta Energy and Utilities Board (EUB), and a trip to the Federal Court, the project was finally granted the required approvals.

The project was not undertaken at first due to unfavourable economic conditions, but in 2002, the developer, Cardinal River Coals (CRC), came back with a revised proposal. Instead of shipping processed coal out by rail, coal would be transported by trucks over a new haul road to a new processing plant. Interestingly, in its original project application, CRC had examined and dismissed the haul road option as not viable due to environmental and other factors.

In 2003, the haul road and related amendments were approved by a Director at Alberta Environment pursuant to the *Environmental Protection and Enhancement Act* (EPEA) and the *Water Act*.[2] Area naturalist and guide Ben Gadd then appealed the approvals to the EAB. Gadd had previously raised his concerns with the EUB, but that board found that he lacked standing, and the EUB permits were issued without a hearing. The EAB, however, found that Gadd was "directly affected" as required by EPEA,[3] and heard the appeal in 2005.

In preliminary matters, CRC challenged the jurisdiction of the EAB on the basis that the CEAA/EUB Joint Panel had already decided the matter. On this issue, EAB found that the revised project proposal involved environmental impacts that were different from the original proposal, and that the EAB had jurisdiction to hear the appeal.[4]

Matters already dealt with by other tribunals

In reviewing the Director's decision, the EAB found that where the EUB has issued an authorization for a project, the Director is expected to issue an environmental approval "absent some significant issue": [5]

> The AEUB determined the Haul Road is in the best interest of the public, specifically considering the economic benefits to the region. That judgment call was for the AEUB to make. As such, the Director would have faced a challenge from the Approval Holder if he had simply refused the application for the Haul Road. Ultimately, such a challenge would have come before this Board, and if the Director's decision had been sustained by the Board, it likely would have gone to Judicial Review. There are no cases specifically involving the Board that have addressed this question, but the Board is prepared for the purposes of this case, to accept that the way in which the regulatory scheme is set up between the AEUB and the Director, that absent some significant issue, there is an expectation that the Director should issue some sort of approval.

This approach raises important questions about the scope of the Director's discretion in issuing approvals under EPEA.

The Director's discretion to refuse an approval

EPEA requires the Director to consider any decisions made by the EUB or the Natural Resources Conservation Board (NRCB) in deciding an application for approval.[6] The Director must take into account, but is not bound by, a decision of either Board. Furthermore, because the Director's decisions are based on environmental considerations, he or she is not only exercising a jurisdiction that is distinct from either Board, but making decisions according to different criteria. EPEA therefore contemplates circumstances in which the Director would refuse an approval due to environmental concerns, regardless of prior authorization by the EUB or NRCB.

This discretion is critical to ensure that projects proceed only where environmental impacts are well understood and can be properly mitigated. The jurisdictions of the EUB and NRCB, while including environmental matters, relate primarily to resource development, not environmental conservation. Only the Director has a primary jurisdictional mandate to ensure environmental standards are maintained. It is therefore essential that EUB and NRCB decisions not prevent the Director from refusing an approval.

In an appeal to the EAB, that Board can determine which issues are properly before it, and in doing this it may consider whether a hearing addressing the issue was previously held by the EUB, NRCB or a CEAA panel.[7] Where such a hearing was held, the EAB may also consider whether or not the appellant had the opportunity to participate. The EAB appears to have confused this jurisdiction (to determine the issues properly before it) with the Director's jurisdiction. This latter official must consider the decision of the EUB or NRCB and any evidence presented before them. However, the issues properly before the Director are those raised by the approval application itself and any properly filed statements of concern. A decision of the EUB or NRCB, or evidence presented before them, should not, and legally does not, restrict the jurisdiction of the Director to refuse an approval on environmental grounds.

What is a "significant issue"?

The Board's restrictive approach to the Director's discretion begs the question: what constitutes a "significant issue" that might allow the Director to refuse an approval where an EUB or NRCB authorization has been issued? It appears that a "significant issue" must, at a minimum, be more significant that those raised by the approval amendments at issue in *Gadd*. These included, by the admission of the EAB: increased risk to critical wildlife; reduced scenic value; reduced tourism and public access to wilderness; and increased poacher and other illegal access if the road were abandoned.[8]

These are serious considerations, and there is no indication of how, or if, these issues were addressed by the EUB, as that board issued its permits without holding a hearing or issuing reasons. The previous decisions of the CEAA/EUB Joint Panel, which were before the EAB, were only directly relevant to unchanged elements of the proposal.

Also troubling is the fact that if the Director's discretion is limited by an EUB or NRCB authorization, then it is difficult to argue that the EAB should not also be so limited. Indeed, the EAB's comments appear to accept this restriction as a policy, if not a legal, requirement.

To limit the Director's discretion to deal with such concerns improperly fetters his or her authority, and compromises the Director's responsibility to ensure the environmental impacts of a project are justified. In order to ensure sound environmental management and fulfill his or her statutory duties, the Director's authority must be interpreted more broadly. Where the EUB or NRCB has not expressly and specifically addressed an environmental concern, the Director must have the discretion refuse an approval on that basis.

Workplans avoid EPEA requirements

The approvals issued to CRC for the haul road included special conditions called workplans. The workplans require CRC to carry out further studies on many of the risks involved in the project changes. CRC is also required to more closely examine potential mitigation measures.

Workplans allow an approval to be issued where risks have not been fully defined or the effectiveness of mitigation measures remains uncertain. Gadd challenged the workplans in the CRC approval on the basis that they were unenforceable and allowed CRC and the Director to circumvent the requirements of EPEA.

Terms and conditions of an approval typically prescribe specific action based on an accurate understanding of risks and necessary mitigation. The obligations on the proponent are clear, and a breach of conditions well defined. No such clarity exists with a workplan. Instead, a workplan essentially requires the proponent to continue with environmental impact assessment after the approval is granted, report to the Director, and develop mitigation plans.

Post-approval conditions

The Director has the authority to impose further monitoring and reporting conditions after an approval is issued.[9] However, the Director can only require further *mitigation* action where an adverse effect is discovered that was not reasonably foreseeable at the

time the approval was issued.[10] This leaves post-approval mitigation requirements subject to challenge by the approval holder.

For example, one of the CRC workplans involves increased monitoring of grizzly bears in the mine area. If the results of this monitoring demonstrate to the Director that stricter mitigation measures are required, he or she may be limited to imposing further monitoring and reporting measures. If the Director were to impose a new condition requiring wildlife overpasses or some other measure, CRC could challenge the condition as relating to a matter reasonably foreseeable at the time of approval (impacts on bears).

The EAB expressed concern over this issue. Although CRC reassured the EAB that the Director would retain the discretion to require further mitigation,[11] this is far from clear. In addition, the enforceability of the workplans themselves is unclear. Given this uncertainty, it is inappropriate for the Director and the EAB to rely on such plans to identify and mitigate risks without a legal mechanism to require implementation.

Public consultation on workplans left up to proponent

The EAB also recognized that workplans are not subject to EPEA's public consultation requirements relating to environmental assessment, approvals, and amendments. The Board addressed this by encouraging CRC to involve the local residents in the workplan process, but did not make this a term of the approval. Access to the studies and mitigation plans that emerge from the workplans, and the level of public input, will be largely up to CRC.

Conclusion

In *Gadd*, the EAB confirmed the Director's authority to rely on workplans, while narrowing the scope of his discretion to refuse approvals. The Board's decision weakens the approval process and allows projects to proceed that have not been fully assessed. While this will expedite approvals, it undermines EPEA and the objective of sustainable development.

[1] *Gadd v. Director, Central Region, Regional Services, Alberta Environment re*: *Cardinal River Coals Ltd.* (24 February 2005), Appeal Nos. 03-150, 151 and 152-R (A.E.A.B.).
[2] R.S.A. 2000, c. E-12 [EPEA]; R.S.A. 2000, c. W-3.
[3] *Preliminary Motions*: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004) Appeal Nos. 03-150, 03-151 and 03-152-ID1 (Alberta E.A.B.) at paras. 66-69 [Preliminary Motions]. CRC's judicial review application on the EAB's ruling that Gadd was directly affected was denied by the Court of Queen's Bench as premature: *Cardinal River Coals v. Alberta (Environmental Appeals Board)*(4 November 2004), Edmonton 0403-18462; [2004] A.J. 1606 (Alta. Q.B.).
[4] Preliminary Motions, *ibid*. For commentary on this decision, see Cindy Chiasson, "EAB to Consider Changes to Cheviot Project" *Environmental Law Centre News Brief,* 19:4 (2004) at 6, online: Environmental Law Centre ,<http;//www.elc.ab.ca/publications/NewsBriefDetails.cfm?id=834>.
[5] *Supra* note 1 at para. 143.
[6] EPEA, *supra* note 2, s. 68(4).
[7] EPEA, *supra* note 2, s. 95(2).
[8] *Supra* note 1 at paras. 183, 222, 224, and 307.
[9] EPEA, *supra* note 2, s. 70(3)(a)(ii).
[10] *Ibid*., s. 70(3)(a)(i).
[11] *Supra* note 1 at paras. 299-300.

Comments on this article may be sent to the editor at elc@elc.ab.ca.

Practical Stuff

Putting the Brakes on Subdivision

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Subdivision of land is a major concern for many living in rural areas and at the urban fringe. The high value of acreage lots, combined with recent difficulties faced by agricultural producers, has put pressure on owners of working farms and ranches to subdivide and sell for country residential development. The result is a loss of productive farm and rangeland, conflicts with new neighbours unhappy with noise, dust and odours, and an erosion of farm communities.

Subdivision is a legal process that allows a parcel of land to be divided into two or more parcels with separate titles. Every municipality (including counties, municipal districts, cities, towns and villages) is required by the *Municipal Government Act* to establish a subdivision authority to decide subdivision applications.[1] With a few exceptions, no subdivision may be registered against title unless it has been approved by the subdivision authority.[2]

The role of the subdivision authority is to determine whether an application complies with the Act, existing municipal planning policies, the *Subdivision and Development Regulation,*[3] and the local land use bylaw.

Generally speaking, it is not the role of the authority to consider issues such as the need to preserve working farms and ranches. These are policy issues that should be addressed through statutory planning. The *Municipal Government Act* provides for a number of plans that a municipality may (or in some cases must) adopt to control development.[4] One such required plan, the municipal development plan, covers the whole municipality and identifies general land use categories and priorities for different areas. A municipal development plan must also include policies relating to the protection of agricultural lands.

At the urban fringe, the development of large tracts of land is normally carried out according to an area structure plan (ASP). An ASP is more specific than a municipal development plan, and sets out specific land uses (residential, park, school, transportation, etc.) and population densities. Unlike the municipal development plan, which is prepared by the municipality, an ASP is typically prepared by the developer.

Getting involved

Opportunities to influence subdivision decisions are very limited. In most cases, adjacent landowners are entitled to notice of an application to subdivide land. Notice may be provided by mail, by posting on the land to be subdivided, or by advertisement in a local newspaper. The subdivision authority must consider, but is not bound by, any written comments received from adjacent landowners.[5] There is no requirement for a hearing.

Generally speaking, neither neighbours nor adjacent landowners have a right to appeal the decision to the municipality's subdivision and development appeal board. However, adjacent landowners do have the right to be heard where the subdivision decision is appealed by the provincial government, the municipal council, or a school authority.[6]

In light of these narrow rights, individuals and groups seeking to prevent the rapid subdivision of rural lands should take a step back. The most important opportunities in this regard are at the statutory planning stage. For both municipal development plans and area structure plans, local residents have rights to review and comment during plan preparation, and to address council at a formal public hearing before the plan (or an amendment) is adopted.[7] Procedures for speaking to council are set out in municipal procedure bylaws, which are available through the municipal clerk's office.

Outside of these formal opportunities, concerned residents are also free to write, phone or meet with councilors to discuss the need to address the loss of working farms and ranches to subdivision. In general, a face-to-face meeting will have the greatest impact, and you may receive more serious consideration if you represent a well-organized group of people who share your concerns.

For further information, see *Municipal Powers, Land Use Planning, and the Environment: Understanding the Public's Role* (Environmental Law Centre, 2005), available from the Environmental Law Centre at 1-800-661-4238. This publication is also available as a free download from the Centre's website at <www.elc.ab.ca>.

[1] R.S.A. 2000, c. M-26, s. 623.
[2] *Ibid*., ss. 618, 652.
[3] Alta. Reg. 43/2002.
[4] *Supra* note 1, Part 17, Div. 4.
[5] *Supra* note 1, ss. 653-656. "Adjacent land" is defined in s. 653(4.4).
[6] *Ibid*., ss. 678-680.
[7] *Ibid*., ss. 636, 692(1).

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Municipal Powers, Land Use Planning, and the Environment: Understanding the Public's Role (June, 2005), by James S. Mallet, is now available from the Environmental Law Centre. This report includes a guide to the land use planning process and opportunities for public participation, as well as recommendations for law and policy reform. It is available for purchase from our Publications Catalogue, or as a free download from the Centre's website at <www.elc.ab.ca>.