News Brief
ENVIRONMENTAL LAW CENTRE

Vol.21 No. 4, 2006 Page 1
ISSN 1712-6843

Clean Air Act Weak on Greenhouse Gas Emissions

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After much anticipation, the federal government's new law will do very little to reduce greenhouse gas (GHG) emissions in the short term or to address Canada's international commitments under the Kyoto Protocol. It will be 2010 before the government begins to regulate industry with intensity-based GHG emission targets, 2025 when national targets will be set for air pollutants, and 2050 when Canada commits to an absolute reduction of GHG emissions.

Canada's Clean Air Act

Canada's Clean Air Act (*Clean Air Act)* was tabled in the House of Commons on October 19, 2006.[1] The Act does not offer anything new in terms of legislation; rather, it creates amendments to three existing pieces of legislation: the *Canadian Environmental Protection Act, 1999* (*CEPA*), the *Energy Efficiency Act* and the *Motor Vehicle Fuel Consumption Standards Act.*

In terms of emission targets, the *Clean Air Act* treats air pollutants, such as components of smog, and GHGs separately. As outlined in the accompanying Notice of Intent, in the short-term (2010-2015) the government intends to develop new regulations for vehicle fuel consumption and develop fixed caps for air pollutant emissions.[2] Over the same period, the government intends to adopt "intensity-based" targets for GHG emissions. Intensity-based targets means that targets for emissions levels are set relative to the economic output of various industries. For example, under intensity-based targets, individual emission limits per barrel of oil will be lowered, but if production increases, the overall amount of GHG emissions can grow.[3]

In the mid-term (2020-2025) the government intends to set national targets for smog and ozone levels, while continuing with "ambitious" intensity based targets for GHG emissions that will lead to absolute reductions in emissions. In the long-term (2050), the government intents to cut GHG emissions by 45 to 65 per cent from 2003 levels.[4]

Effectively, this means that there are no short-term targets or regulations for "large final emitters" or the major industrial facilities in key sectors such as the oil and gas sector, forest products sector, fossil fuel fired electricity generation plants, metal smelters, iron and steel plants, cement plants and chemical production facilities. Together, these sectors contribute about one-half of Canada's air pollutants and GHG emissions.[5] The government intends to consult with these sectors over the next three years to establish intensity-based targets by 2010. This is being done even though the previous government already held years of consultations on regulating large final emitters.

Assuming the *Clean Air Act* becomes law, the only regulations we will see in the next year are regulations to reduce emissions from some on-road and off-road vehicles such

as motorcycles, outboard engines, all-terrain vehicles and off-road diesel engines. At this time, it is unclear what proportion of Canada's emissions come from these sources or the amount they will be reduced. In the next year, the government also intends to regulate and reduce volatile organic compound (VOC) emissions from various consumer and commercial products such as paint and car finishes which impact air quality. All these intentions point to synchronizing Canadian regulations with those of the United States Environmental Protection Agency.[6]

The *Clean Air Act* makes no mention of the Kyoto Protocol and the emissions targets the federal government committed to in 2002, although Canada remains a party to the treaty. Under the Kyoto Protocol, Canada's target for GHG emissions is set at six per cent below 1990 levels by 2012.[7] Canada's GHG emissions in 2004 were almost 27 per cent above 1990 levels.[8]

Alternative proposals

On October 4, 2006, the Liberals introduced a private member's bill, Bill C-288, *An Act to ensure Canada meets its global climate change obligations under the Kyoto Protocol* (Bill C-288). Bill C-288 has passed second reading and it is currently in committee. It creates an obligation on the Minister of Environment to establish a "climate change plan" based on Kyoto targets and to make regulations to carry out the plan. It also creates an obligation on the Commissioner of the Environment and Sustainable Development to review the plan and the proposed regulations and submit a report to Parliament.

On October 26, 2006, New Democrat leader Jack Layton introduced a private member's bill to require interim targets for each five year period beginning in 2015 to meet an overall target of a 80 per cent reduction in GHG emissions by 2050 from 1990 levels.[9]

Private members' bills are put at the bottom of the order of precedence in House of Commons debates and rarely pass into law. Regardless of whether these bills become law, it is interesting to note that a majority of MPs in the House of Commons appear to support alternative proposals rather than the *Clean Air Act*.[10]

Alberta's approach

Alberta has legislation in place to regulate GHGs under the *Climate Change and Emissions Management Act.*[11] This Act includes an intensity-based target to reduce Alberta's GHG emissions by 50 per cent below 1990 levels by 2020.[12] Since it is an intensity-based target, if Alberta's economy continues to grow, the 50 per cent intensity target could be met even while total GHG emissions rise above 1990 levels.

If the *Clean Air Act* becomes law, it includes a mechanism to coordinate federal-provincial legislation. The *Clean Air Act* includes amendments to the equivalency provisions under *CEPA,* which allow the federal government to transfer some powers to enforce regulations for air pollutants and GHGs over to the provinces.[13] An equivalency agreement with a province means that certain air pollutants or GHGs could be regulated under provincial law rather than under *CEPA*.[14] However, in order for an equivalency agreement to be valid, Alberta would have to enact or amend its *Climate Change and Emissions Management Act* to make it equivalent to federal standards.

If equivalency agreements for GHGs cannot be negotiated with Alberta or other provinces, the options would be for the federal government to enact uniform federal

legislation on climate change or for each province to enact or proceed with its own legislation on climate change. Since "the environment" is a matter of jurisdiction shared between the federal and provincial levels of government, any approach not based on federal-provincial cooperation may be vulnerable to constitutional challenge.[15]

Conclusions

The federal government has set a 44-year target to implement any major absolute reduction in GHG emissions. This target is too far off and amounts to serious delays in taking action on climate change. One of the largest flaws of the Act is that the federal government has set no short-term or mid-term GHG reduction targets; this provides little guidance or incentive for industries to cut absolute emissions before 2050.

While the federal government calls for a long-term target to cut GHG emissions in half, the Pembina Institute has indicated that the oil sands, which are the single largest contributor to GHG growth in Canada, could be carbon neutral by 2020.[16] There are also warnings from the international community that there will be long-term economic costs for failing to take immediate action to cut GHG emissions. A recent report released by Sir Nicholas Stern, a former World Bank economist, indicates that the social and economic impact of global warming could be as severe as the Great Depression or both World Wars.[17] The report details the rising costs of dealing with longer and stronger heat waves, droughts, rainfall and floods, and estimates that unabated climate change would eventually cost the world the equivalent of between five and 20 per cent of global gross domestic product each year. The report unequivocally states that the benefits of strong early action on climate change far outweigh the economic costs of not acting.[18]

Reports such as these strongly suggest that more can and should be done immediately to address climate change. This is in direct contrast to the action taken by the federal government. Perhaps Canadians should look to the opposition parties for federal action on climate change; at least the private members' bills aim to set short-term goals to reduce GHG emissions and better reflect the scale of reduction needed in order to prevent or mitigate the dangerous effects of climate change.

[1] Bill C-30, *An Act to amend the Canadian Environmental Protection Act, 1999, the Energy Efficiency Act and the Motor Vehicle Fuel Consumption Standards Act (Canada's Clean Air Act),* 1st Sess., 39th Parl., 2006 [*Clean Air Act*].
[2] *Notice of Intent to Develop and Implement Regulations and Other Measures to Reduce Air Emissions,* C. Gaz. 2006.I.3351 at 3359, online: Environment Canada, CEPA Environmental Registry <http://www.ec.gc.ca/CEPARegistry/notices/NoticeDetail.cfm?intNotice=376>.
[3] *Ibid.*
[4] *Ibid.*
[5] These sectors contribute to 52 per cent of Canada's air pollutants and 47 per cent of GHG emissions, *ibid.* at 3354.
[6] *Ibid.* at 3355.
[7] *Kyoto Protocol to the United Nations Framework Convention on Climate Change,* 11 December 1997, UNFCCC COP, 3d Sess., UN doc. FCCC/CP/1977/L.7/Add.1.
[8] Johanne Gélinas, *Report of the Commissioner for the Environment and Sustainable Development to the House of Commons* (Ottawa: Office of the Auditor General of Canada, 2006) at 8.
[9] Bill C-377, *An act to ensure Canada assumes its responsibilities in preventing dangerous climate change,* 1st Sess., 39th Parl., 2006 [First reading].
[10] Bill C-288 was approved at second reading by a vote of 152 to 115 in the House of Commons.
[11] S.A. 2003, c. C-16.7.
[12] *Ibid.,* s. 3.
[13] *Supra* note 1, s. 5.

[14] Currently, Alberta is the only province to have an equivalency agreement with the federal government under *CEPA* to regulate certain toxic substances under its provincial legislation; see *An Agreement on the Equivalency of Federal and Alberta Regulations for the Control of Toxic Substances in Alberta,* online: Environment Canada <http://www.mb.ec.gc.ca/pollution/e00s61.en.html>.
[15] See, e.g., James Mallet, "Constitutional support lacking for Alberta's Bill 32" (2003) 18:1 *Environmental Law Centre News Brief* 1, online: Environmental Law Centre <http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?ID=772>.
[16] Matthew McCulloch *et al., Carbon Neutral by 2020: A Leadership Opportunity in Canada's Oil Sands* (Drayton Valley: Pembina Institute, 2006).
[17] Nicholas Stern, *The Economics of Climate Change: The Stern Review Executive Summary* (London: Cabinet Office – HM Treasury, 2006) at ii.
[18] *Ibid.* at i.

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

Environmental Law Centre *News Brief*
Volume 21 Number 4 2006

News Brief (ISSN 1712-6843)
is published a minimum of four times a year by the Environmental Law Centre (Alberta) Society

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Plants May Force Alberta to Address Gaps in Species at Risk Legislation

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Environmental groups recently sought to have the federal government invoke the *Species at Risk Act*[1] (*SARA*) and apply its protective provisions to two plants in Alberta, the Tiny Cryptanthe and the Small-flowered Sand Verbena.[2] Section 34(3) of *SARA* obliges the federal Minister to recommend to Cabinet that the provisions of SARA apply on provincial lands where "the minister is of the opinion that *the laws* of the province do not effectively protect the species or residences of its individuals" [emphasis added].

Cabinet then retains the discretion as to whether to order the application of *SARA* provisions provincially. In this regard the Ministerial recommendation has little legal force in and of itself; rather, the outcome of the recommendation places the inadequacy of provincial species at risk legislation in the limelight and can ultimately prove politically problematic for both levels of government.

It must be acknowledged that forcing the Minister to make the recommendation under *SARA* through a legal challenge requires the right set of facts to substantiate that the laws are not effective. The current legislative framework for protecting species at risk provides just such facts with the federally-listed Tiny Cryptanthe and Small-flowered Sand Verbena, revealing the shortcomings of protecting and managing species at risk under the provincial *Wildlife Act*.[3] The *Wildlife Act* includes prohibitions against hunting, possessing or trafficking in wildlife that is listed as endangered or threatened.[4] Similarly, the Act prohibits the molesting, disturbing or destroying of a house, nest or den of prescribed wildlife.[5] These prohibitions are, however, completely limited by the definition of "wildlife" provided by the Act:[6]

> "wildlife" means big game, birds of prey, fur-bearing animals, migratory game birds, non-game animals, non-licence animals and upland game birds, and includes any hybrid offspring resulting from the crossing of 2 wildlife animals.

As wildlife does not include plants it is patently obvious that the legislation is not effective in their protection.[7] Similarly, the provincial legislation fall short in dealing with an innumerable diversity of species, from invertebrates to fish. When one considers that there is no alternate piece of provincial legislation in place to protect these plants and animal species any conclusion by the federal Minister that Alberta's laws are effective would certainly be patently unreasonable.

Significant amendments to the *Wildlife Act* will be required if Alberta wishes to claim that they have effective laws for the protection of species at risk. Indeed, so many are the required amendments that many would argue that stand-alone legislation would be more appropriate.

What will be deemed "effective law" is an open question and yet species at risk protection requires, in very least, comprehensive assessment and coverage of the

complete diversity of species, a process for identifying and protecting key habitat before species are endangered,[8] protection for individual species and its supporting habitat and a legislated recovery process for threatened or endangered species. Until such legislation is in place it is likely that the federal Minister will continue to be petitioned and at some point in the future most certainly judicially reviewed in relation to provincial action to protect species at risk.

[1] S.C. 2002, c. S-29, as amended.
[2] See Alberta Wilderness Association, Federation of Alberta Naturalists, Canadian Parks and Wilderness Society, Sierra Club of Canada and Nature Canada, News Release, "Tiny Species Could Cause Big Headache For Feds" (8 August 2006), available online: Alberta Environment Network <http://www.aenweb.ca/node/962>.
[3] R.S.A. 2000, c. W-10.
[4] *Ibid*. at ss. 25, 55, and 62.
[5] *Ibid*. at s. 36.
[6] *Ibid*. at s. 1(ll).
[7] This exclusion of plants from the wildlife definition may also explain why no non-animal species have been listed under the *Wildlife Act* to date.
[8] See David Gauthier and Ed Wiken, "Avoiding the Endangerment of Species: The Importance of Habitats and Ecosystems" in *Politics of the Wild: Canada and Endangered Species*, Beazley, K. and Boardman, R. eds, (Don Mills, Ontario: Oxford University Press, 2001) p.49.

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

EUB Warns Against Use of Form Letters in Intervener Submissions

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The Energy and Utilities Board (the EUB) recently issued, as part of a decision on an energy application, a warning against the potential perils of submitting form letter interventions to the Board in a proceeding. The Board issued *Decision 2006-087* on September 5, 2006 in respect of an application by Dominion Exploration Canada Ltd. (Dominion) for licences to drill and operate critical sour wells.[1] The decision is helpful, in the first instance, for its discussion of the use of form letters.

Objections were received from a number of individual landowners and the Pembina Agricultural Protection Association (PAPA). In a series of prehearing rulings, the Board granted standing to three landowner families and limited participation rights to another individual who, while not a landowner, maintained cattle on grazing leases within the Emergency Protection Zone and had specific concerns about Dominion's Emergency Response Plan. PAPA was not granted standing.

Two of the interveners initially expressed their opposition to the project by signing a form letter that had been prepared by PAPA and contained general objections to the project. While these interveners believed that the act of signing the form letter alone was sufficient to indicate to the Board that they intended to be represented by PAPA,

this intent was not made clear in the letter itself; these two did not inform Dominion, the Board, or PAPA that they were intending to be represented by PAPA. The site-specific concerns and issues of these two interveners were never communicated to PAPA and were only made known to the Board and Dominion during the oral hearing. This is contrary to the Board's Rules of Practice, which require early disclosure of issues prior to the hearing so that the applicant knows the case to be met.

Landowners often rely upon form letters when communicating their initial concerns about energy projects to the Board. The Board noted that these form letters frequently contain a list of general concerns but do not contain site-specific information that clearly identifies how a proposed project affects a specific individual. The Board advised that if an individual chooses to use a form letter prepared by a landowner or other group as a means to voice their initial opposition to or issue with a proposed energy development, that individual is expected to follow up with further information regarding his or her site-specific concerns. In addition, if the party that prepared the form letter intends to represent any person signing the form letter, this too must be communicated to the Board and the project applicant.

[1] Dominion Exploration Canada Ltd., Applications for Well Licences Pembina Field (5 September 2006) Decision 2006-087 (Alberta Energy and Utilities Board).

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