News Brief
ENVIRONMENTAL LAW CENTRE

Vol. 23 No. 1, 2008 Page 1
ISSN 1712-6843

"The Public Interest:" What Could It Mean For The ERCB and NRCB?

By Jodie Hierlmeier
Staff Counsel
Environmental Law Centre

Introduction

The Environmental Law Centre (ELC) recently completed a brief entitled "*Roadmap for Reforming 'The Public Interest' for the ERCB and NRCB*," which is available on our website at <www.elc.ab.ca>. This article provides an overview of some of the ELC's research and recommendations on "the public interest" with respect to the regulation of Alberta's natural resources. The recommendations focus on two main points:

- specifying what the public interest means for the ERCB and NRCB by using the Land-use Framework; and
- providing meaningful public input at each key stage of the decision-making process.

Background

In Alberta "the public interest" is expressly included within the legislative mandates of two boards: the Energy Resources Conservation Board (ERCB) and the Natural Resources Conservation Board (NRCB). Both Boards review and license projects which impact natural resources in Alberta. The ERCB regulates the development of fossil fuel projects, many of which occur on public land and involve the use of publicly owned energy resources. The NRCB reviews certain non-energy projects relating to forestry, recreation and tourism, mining and water management.

If a hearing is triggered, both the ERCB and NRCB are required by law to determine whether a proposed project is in the public interest while taking into account the project's social, economic and environmental effects.[1] The problem is that the term "the public interest" is not defined in either Board's legislation and these Boards have faced ongoing challenges in stating and applying this concept in their decisions.

The task of deciding whether a project is in the public interest has become increasingly difficult in the context of Alberta's economic boom. Alberta's rapid economic growth has placed increased pressures on the land base and its users and heightened the problem of cumulative effects. This growth has also sparked increased concern and interest by Albertans, as many seek to be involved in hearings before the ERCB and NRCB to address the public interest aspect of resource development.

These pressures highlight the need to re-examine whether a public interest test is sufficient for making decisions about natural resource development in Alberta. This research is especially timely due to the creation of the ERCB as a new regulatory entity

in Alberta[2] and to ensure that this Board approaches its work with the proper underlying policy foundation.

"The public interest" in ERCB decisions

A review of ERCB decisions revealed that the Board has been inconsistent in the extent to which it discusses and applies the public interest in its decisions. For example, the latest trilogy of oil sands decisions included very little analysis of the public interest and the interplay and weighing of social and environmental impacts versus economic benefits.[3] In contrast, other ERCB decisions included in-depth discussions on the public interest, most often when the Board either turned down the application for not being in the public interest or added conditions to the project's approval to make it in the public interest.[4]

Overall, very few ERCB decisions included any in-depth discussion or application of public interest considerations.[5] If the public interest was mentioned, it was often as a one line comment which justified approval of the energy project.

Economic interests were also clear in ERCB decisions. In a number of decisions, the Board discussed how the economic benefits or the "need for the well" analysis fits into the ERCB's public interest considerations.[6] It must be remembered that operators have already acquired the mineral rights in question from the province before seeking ERCB approval to exercise their rights to develop the resource and for all Albertans to benefit from the taxes and royalties associated with the resource. When operators come to the ERCB with mineral rights in hand, this tilts the public interest calculation in favour of approving the project, all other factors being equal.[7]

The ERCB's weighing approach also emphasizes the economic side of the equation because the scale is tipped in favour of the overall provincial benefit derived from resource extraction (from royalties and taxes) as compared with environmental and social costs, which are experienced at a local or regional level. This leads to the result that the economic benefit is not compared on the same scale as the environmental and social costs.

The ERCB does not mention "the public interest" in relation to opportunities for "the public" to participate in its hearings. The ERCB is permitted to make decisions or take other actions without giving notice or triggering a hearing. A hearing will be triggered if someone is "directly and adversely affected" by the energy application; this individual or group then has standing to appear before the Board in the hearing process.[8]

However, standing is difficult to attain when energy development is proposed for public lands or involves sweet gas wells with small consultation radiuses.[9] The ERCB's narrow approach to standing also leads to situations, particularly on public land, where no one other than the industry operator is permitted to present their views on the public interest. Consequently, the only voice often heard by the ERCB is that of the industry operator which it regulates.

Interestingly, this approach to standing has created a double standard between projects proposed near densely populated areas and those in sparsely populated regions located on

public land, with the former almost certainly requiring an hearing to decide on licensing and the latter being approved by the ERCB without a hearing being triggered.

Compared to the language for standing, the test for intervener costs is quite narrow. There are clear terms limiting the availability of costs only to "local interveners" or those who have economic (private property) interests in land affected by the proposed project. From a practical point of view, standing is often irrelevant if a person does not have the financial resources to participate effectively in the hearing. In ERCB hearings, costs and public participation have become closely tied to economic interests.

"The public interest" in NRCB decisions

At the time of writing, the NRCB had completed reviews of 11 major natural resource development projects in Alberta. This is a considerably smaller case load than that of the ERCB, which reviewed over 60,000 applications and held 39 hearings in 2006 alone.[10] The NRCB's role is limited to holding hearings on certain one-time projects and, unlike the ERCB, the NRCB has no regulatory oversight of a certain industry or a project once it is approved.

The NRCB, in two of its earlier decisions, linked the public interest to the sustainability of natural resources and attention to cumulative effects.[11] It also wrote much longer decisions that made a detailed attempt to articulate its definition of the public interest and explain how this definition led it to reach its decisions on the evidence before it. This approach and these ideas only appear explicitly in two decisions and do not appear in more recent NRCB decisions. More recent NRCB decisions involve much less discussion on the public interest; in latter decisions "the public interest" appears as one phrase in a decision as a way to justify the decision that has been made.

Similar to the ERCB, the public interest is not mentioned in relation to the issue of standing or costs, yet the NRCB has demonstrated a broad approach to public participation notwithstanding the use of the term "directly affected" in its legislation. Unlike the ERCB's local intervener test for costs, the NRCB's statutory provisions do not refer to economic rights or interests in land as criteria for eligibility for costs. Furthermore, in one decision, the NRCB identified and addressed the gap associated with public participation on public lands and took steps to correct this gap by advancing funds itself to interveners.[12]

"The public interest" is used to justify decisions

A comprehensive review of ERCB and NRCB decisions revealed that both Boards have been inconsistent in stating and applying the public interest tests in their decisions. When these Boards do not define the public interest in any explicit or consistent manner, it means that they have very broad discretion to make decisions. One of the consequences that flow from this broad discretion is that the public interest is simply used to justify the decision that has been made. The words "the public interest" appear as one phrase in a decision as a way to validate the decision but do not aid the decision-maker in actually *making* decisions.

The danger is that the public interest becomes shorthand that replaces the reasoning for decisions. A decision-maker can simply hide under the cover of a public interest test to legitimize a decision.

"The public interest" and economic interests

There is a tendency, or a vulnerability, to emphasize the economic dimension over social and environmental considerations when determining the public interest. This is most obvious in ERCB decisions, but it is also evident from the Alberta government's failure to implement the NRCB's recommendations based on broader social and environmental considerations.[13]

The emphasis on economic considerations is due, in part, to a failure of the Boards themselves to provide a consistent internal structuring of the values that the public interest represents in their decision-making. Neither the ERCB nor the NRCB has articulated clearly and consistently the content or use of the public interest in their decisions. As a default, the public interest becomes prone to domination by economic interests because these are the interests most consistently heard by the decision-maker due to narrow interpretations of standing and costs, or because economic factors are often easier to measure and quantify than environmental and social costs.

Of course, it is easy to fault the Boards, particularly the ERCB, for promoting economic rights over others, but placing the responsibility entirely on the Boards is misguided. The institutional structure of the ERCB predisposes it to reflect the views of the public interest that are asserted by the industries it regulates, predominantly because operators come to the ERCB with the mineral rights in hand. At the highest level, economic interests which dominate the public interest in Alberta stem from provincial policies which set ambitious targets for growth in the energy sector and in non-energy land uses such as tourism.[14]

Economic interests are also privileged in Alberta due to the absence of overarching energy and land-use policies, which could set out how social and environmental benefits could be achieved alongside economic development. The balancing act that these Boards must undertake will always remain difficult in the policy vacuum that exists in Alberta. When a project reaches the licensing stage before the ERCB and NRCB, too often important broad level policy issues have not been addressed; issues such as the appropriateness of industrial land and resource use in a given area, the ecological value and condition of the region where development is to occur, or the cumulative effects of the proposed development in relation to the environmental and social capacity of the region to sustain those impacts. All of these factors place pressure on the Boards, particularly on the ERCB, to achieve a potentially unattainable balance between economic growth and social and environmental considerations.

Public interest reforms

Our research concludes that the public interest, in its present form and use by the ERCB and NRCB, provides limited guidance for directing decisions over natural resource development in Alberta. The public interest is most often used as a means of justifying and legitimizing decisions but does not aid the decision-maker in actually *making* decisions. The public interest has become dominated by economic considerations, particularly in relation to the ERCB.

In order for the term to be useful, the public interest must have both a substantive and a procedural component. The substantive component is the content or criteria of the public interest that guides the decision-maker as to the factors that require consideration. The procedural component deals with the manner in which that content

is gathered; the procedure should provide the best chance that the decision will reflect the content or criteria of the public interest.

The substantive component of the public interest should come from the Land-use Framework. The Land-use Framework is touted as the big picture plan for land and resource use in the province.[15] As part of this plan, the ERCB and NRCB should be told that "the public interest" includes ensuring that the projects that they approve are consistent with land-use plans established under the Land-use Framework. By making these land-use plans prior to the licensing stage and binding on the ERCB and NRCB, the public interest is defined in terms of the applicable land-use plan. The effect is to constrain the Boards' discretion, much as a public interest test would, but through the authority of decisions made earlier in the decision-making chain.

The benefit of using the Land-use Framework is that overarching plans should guide the allocation of mineral rights by the Department of Energy. The issuance of mineral rights is a key decision-making stage for directing the timing, location and intensity of oil and gas development, and contributes to the domination of economic interests in ERCB processes.

Also, broad level planning processes can better deal with the cumulative effects of many projects and activities occurring on the landscape. It is unlikely that cumulative effects can be adequately addressed in a project-specific review before the ERCB and NRCB.

There are a number of avenues by which the procedural component of the public interest determinations could be improved. The first avenue is by broadening standing and costs eligibility to ensure the breadth and intensity of issues are fully represented to the Boards, particularly for projects occurring on public lands. There is a general trend in public interest litigation across Canada to consider litigants' history of involvement in issues in assessing the presence of a "genuine interest" sufficient to establish standing.[16] Accordingly, it is recommended that the terms "directly affected" and "directly and adversely affected" be removed from the legislation and that standing be granted to any person or group who has a legitimate interest which ought to be represented in the hearing, or has an established record of legitimate concern for the interest they seek to represent.

At the same time, the term "local intervener" should be removed from the ERCB's legislation so that costs are no longer directly tied to property and economic rights. Costs awards for both Boards should be tied to whether the costs are reasonable and directly necessary to the proceeding, and whether the party contributed to a better understanding of the issues before the Board.[17]

Second, in order to seriously examine and promote increased public participation in natural resource development in Alberta we must consider when in the decision-making hierarchy that participation should occur. Removing the "directly affected" criterion from the legislation is a starting point; however, this only addresses the issue of public participation at the hearing stage. A number of key decisions are made before an ERCB or NRCB hearing is held where no public input currently exists. If Alberta goes ahead with its Land-use Framework, the province must provide meaningful public input at stages where major decisions about land-use and resource development are being made, and where the public interest will be determined.

Conclusions

The regulation of Alberta's natural resources is at a crossroads. Alberta's rapid economic growth has placed tremendous pressure on the land base and heightened the problem of cumulative effects. With the current pressures facing Alberta, the provincial government must reconsider whether the public interest and the broad requirements to take into account social, environmental and economic considerations are sufficiently concrete to fulfill the province's responsibility to set the direction for natural resource use.

In our brief, we provide decision-makers with a road map for reforming the public interest so it can provide better guidance for the ERCB and NRCB and so resource development will occur on a more proactive basis. These reforms are critical in creating a much needed plan for land and resource development in Alberta. They would also be a strong step towards restoring Albertans' faith in regulatory bodies and processes.

[1] *Energy Resources Conservation Act,* R.S.A. 2000, c. E-10, s. 3 [*ERCA*]; *Natural Resources Conservation Board Act,* R.S.A. 2000, c. N-3, s. 2.

[2] As of January 1, 2008, the province of Alberta split its one energy regulator, the Energy and Utilities Board (EUB), into two separate agencies: the ERCB, which regulates fossil fuel production, and the Alberta Utilities Commission, which regulates the electricity system. See *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2.

[3] See *Application for Expansion of an Oil Sands Mine (North Steepbank Mine Extension) and a Bitumen Upgrading Facility (Voyageur Upgrader) in the Fort McMurray Area* (14 November 2006), Decision 2006-112, EUB Application 1391211 and 1391212 [*Suncor*]; *Application to Expand the Oil Sands Mining and Processing Plant Facilities at the Muskeg River Mine* (17 December 2006), Decision 2006-128, Joint Panel Application 1398411 [*Albian*]; *Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the Fort McMurray Area* (27 February 2007), Decision 2007-013, Joint Panel Application 1414891 [*Kearl*].

[4] See *Shell Canada Limited Application for a Well Licence, Shell PCP Ferrier 7-7-38-6W5, Ferrier Field* (20 March 2001), Decision 2001-9, ERCB Application 1042932 at 34; *Memorandum of Decision Pre-hearing Meeting Manhattan Resources Ltd. Applications for Wells, Pipelines, and Facilities Licences and An Amendment To A Facility Fort Saskatchewan Field* (6 December 2002), Decision 2002-107, ERCB Applications (see Appendix A of the decision for application numbers) at 4; *Applications for a Well Licence, Special Gas Well Spacing, Compulsory Pooling, and Flaring Permit, Livingstone Field* (16 December 2003), Decision 2003-101, ERCB Applications 1276521 and 1276489 [*Polaris*] at 3 and 22*; Applications for Licences to Drill Six Critical Sour Natural Gas Wells, Reduced Emergency Planning Zone, Special Well Spacing, and Production Facilities, Okotoks Field (Southeast Calgary Area)* (22 June 2005), Decision 2005-060, ERCB Applications 1276857, 1276858, 1276859, 1276860, 1307759, 1307760, 1278265 and 1310351 [*Compton*] at 13.

[5] The author read ERCB energy decisions from 1996 to 2006 as posted on its website; online: Energy Resources Conservation Board <www.ercb.ca>.

[6] See *Polaris, supra* note 4 at 5; see also *Compton, supra* note 4 at 16.

[7] Steven Kennett & Michael Wenig, "Alberta's Oil and Gas Boom Fuels Land-use Conflicts" (2005) 91 *Resources* 1 at 5 [Kennett & Wenig].

[8] *ERCA, supra* note 1, s. 26.

[9] See *Decision on Requests for Consideration of Standing Respecting a Well Licence Application by Compton Petroleum Corporation Eastern Slopes Area* (8 June 2006), Decision 2006-052, ERCB Application 1423649 [*Eastern Slopes*]. The ERCB has also denied standing to recreational users of public land; see *Prehearing Meeting Applications for a Well and Associated Pipeline Licences Waterton Field* (29 June 2007), Decision 2007-053, ERCB Applications No. 1498479 and 1483571, leave to appeal denied; see *Sawyer v. Alberta Energy and Utilities Board*, 2007 ABCA 297.

[10] Alberta Energy and Utilities Board, *2006 Year in Review* (Calgary: Alberta Energy and Utilities Board, 2007) at 30.

[11] See *Application to Construct a Recreational and Tourism Project in the Town of Canmore, Alberta* (8 December 1992), Application 9103 at 5-1, 5-2 and 13-6; *Application to Construct Recreational and Tourism Facilities in the West Castle Valley, Near Pincher Creek, Alberta* (20 December 1993) Application 9201 at 5-20, 5-21, 12-5-12-13 [*West Castle*].

[12] *Construction of 18-Hole Golf Course Facility, Evan Thomas Creek* (29 April 1992), Pre-hearing report, Application 9104 at 6.

[13] The Government of Alberta failed to approve the NRCB's second condition in *West Castle, supra* note 11, which required the establishment of a protected area. As a result, the approved resort has been permitted to grow into a permanent residential and commercial community, without the designation of a large protected area as conditioned by the NRCB. For a commentary on this issue, see Neil Brennan, "Private Rights and Public Concerns: The 'Public Interest' in Alberta's Environmental Management Regime" (1996) 7 J.E.L.P. 243 at 265-266.
[14] See Kennett & Wenig, *supra* note 7 at 3-4.
[15] Online: Alberta Sustainable Resource and Environmental Management <http://www.landuse.gov.ab.ca/>.
[16] See Chris Tollefson, "Advancing an Agenda? A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation" (2002) 51 U.N.B.L.J. 175.
[17] These requirements are already detailed in both Boards' rules of practice; see *Energy Resources Conservation Board Rules of Practice,* Alta. Reg. 252/2007, s. 57; *Rules of Practice of the Natural Resources Conservation Board Regulation,* Alta. Reg. 77/2005, s. 28.

Comments on the articles in this issue may be sent to the editor at elc@elc.ab.ca.

Environmental Law Centre *News Brief*
Volume 23 Number 1 2008

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

Oil Sands Appeal Provides Little Clarity

Pembina Institute for Appropriate Development v. Attorney General of Canada, 2008 F.C. 302

By Dean Watt
Staff Counsel
Environmental Law Centre

Introduction

The Federal Court has found that the decision of the Canada-Alberta Joint Review Panel (Panel), charged with reviewing Imperial Oil's application in respect of the Kearl Lake oil sands mining project, did not meet the requirements set out under the *Canadian Environmental Assessment Act* (*CEAA*).[1] The Court found that the Panel failed to provide the rationale for its determination that mitigation strategies identified by the project proponent would be effective in reducing the amount of greenhouse gas emissions from the project to an insignificant amount.[2] The case was remitted back to the Panel with a direction to provide a rationale for its conclusions respecting mitigation of greenhouse gas emissions.

This article focuses on the findings of the Federal Court with respect to the lack of rationale for the Panel's reliance on emissions intensity reductions as a mitigation strategy to address the problem of greenhouse gas emissions and also on the Court's general approach with respect to mitigation measures, the precautionary principle and adaptive management.

Background

Imperial Oil's proposed oil sands mining project (the Kearl Project) is a truck and shovel operation with associated bitumen extraction facilities, tailings management facilities and other supporting infrastructure. Located approximately 70 kilometres north of Fort McMurray, this project is projected to produce 48,000 cubic metres of bitumen per day at full production, until the year 2060.[3]

The Kearl Project required approvals from the Alberta Energy and Utilities Board and Alberta Environment and an environmental assessment under the provincial *Environmental Protection and Enhancement Act (EPEA)*.[4] It also required approval from the federal Minister of Fisheries and Oceans under section 35(2) of the *Fisheries Act* due to expected harmful alteration, disturbance or destruction of fish habitat, which is otherwise illegal.[5] The Minister is unable to give such an approval unless an environmental assessment is conducted under the *CEAA*. Through operation of an agreement between Alberta and the government of Canada, a Panel was constituted to conduct an assessment of the Kearl Project.

A hearing was held in November 2006. Various stakeholder groups raised concerns related to a wide range of issues, including social and economic effects, mine plan and resource conservation, tailings management, reclamation, air emissions, surface water, aquatic resources, the effectiveness of the Cumulative Effects Management Association, traditional land use and knowledge, the need for follow up and human health.[6]

In February 2007, the Panel's report was released.[7] It contained the approval of the Energy and Utilities Board and the Panel's recommendation to the Department of Fisheries and Oceans (DFO) to approve the project. This recommendation was based on the Panel's view that the implementation of proposed mitigation measures and recommendations would make the Kearl Project unlikely to cause significant adverse environmental effects.

The applicants sought judicial review of the Panel's decision on the grounds that the Panel's reliance on mitigation measures that were not technically or economically feasible and the Panel's failure to comply with *CEAA* requirements to provide a rationale for its recommendations to the DFO constituted reviewable errors.[8]

Panel's failure to provide rationale for conclusions

The applicants were successful in their assertions that the Panel committed a reviewable error by failing to provide a cogent rationale for its conclusion that the greenhouse gas emissions from the Kearl Project, which were stated in Imperial Oil's environmental impact assessment (EIA) to average 3.7 million tonnes annually, would not constitute a significant adverse effect on the environment.

Imperial Oil stated, in its application for approval, that its approach to greenhouse gas management required the most energy efficient, commercially proven and economic technology be selected to minimize emissions.[9] Nevertheless, Imperial Oil's EIA indicated that the Kearl Project's average annual greenhouse gas emissions would be equivalent to the greenhouse gas emissions of 800,000 passenger vehicles.[10]

The applicants argued that the Panel failed to comment on the effectiveness of intensity-based "mitigation".[11] The Court identified the Panel's specific expectations with respect to Imperial Oil's commitments to implement a number of emissions reduction strategies and noted the Panel's support of the Alberta government in the development of *EPEA* approval requirements to address greenhouse gas intensity targets.[12] However, the Court noted that while the evidence before the Panel showed that intensity based targets place limits on the per barrel emissions associated with a project, absolute emissions associated with a project would continue to rise as production increases. The planned increase in total production of bitumen would result in an absolute increase in greenhouse gas emissions associated with the Kearl Project. The Court stated:[13]

> [t]he Panel dismissed as insignificant the greenhouse gas emissions without any rationale as to why the intensity-based mitigation would be effective to reduce the greenhouse gas emissions, equivalent to 800,000 passenger vehicles, to a level of insignificance. Without this vital link, the clear and cogent articulation of reasons behind the Panel's conclusion, the deference accorded to its expertise is not triggered.

Finding that the evidence presented indicated that intensity-based targets will not address the problem of greenhouse gas emissions, the Court said it was incumbent on the Panel to provide justification for its recommendation to the DFO that the greenhouse gas emissions of the project would be insignificant and remitted the matter back to the Panel to do so.[14]

The judgment is significant for its finding that intensity-based greenhouse gas targets will not address the problem of greenhouse gas emissions where total production increases. Even assuming successful implementation of proposed emissions intensity reduction strategies, the Kearl Project is still expected to emit greenhouse gas volumes equivalent to 800,000 cars annually, not an insignificant amount. Environmentalist have long argued that intensity-based targets will not address the problem of climate change because such targets allow for increases in absolute emissions; more greenhouse gas, not less.[15]

Alberta's strategy for addressing the greenhouse gas problem relies heavily on intensity-based targets.[16] The federal government's *Turning the Corner* strategy for addressing climate change also relies, in part, on intensity based targets to achieve its goals.[17] This case highlights a frequently cited criticism of intensity-based targets and will, going forward, put increased pressure on regulatory decision-makers to justify how such strategies actually mitigate greenhouse gas effects.

Panel's reliance on mitigation measures

While the applicants were successful in their challenge with respect to greenhouse gas emissions, they were unsuccessful in challenging the Panel's decision on the grounds that it otherwise relied on mitigation measures that were not technically or economically feasible. The applicants' challenge in this regard was made in respect of a number of issues, including the Cumulative Effects Management Association (CEMA), watershed management, landscape reclamation, and species at risk.

The applicants asserted that the Panel's reliance on CEMA as a mitigation measure was an error given the Panel's own concerns about CEMA's inability to meet timelines and to complete its work "to establish and maintain priority for critical items such as the Water Management Framework for the Athabasca River, the Muskeg River Watershed Integrated Management Plan, and the Regional Terrestrial and Wildlife Management Framework."[18] The Court noted that CEMA is "expected to address the objectives of watershed management planning" and noted further that CEMA has an "important role in regional effects management". The Court also recognized the Panel's concerns about CEMA and the Panel's recommendations for CEMA's improvement and for regulatory backstopping in the event that CEMA is unable to meet timelines. Nevertheless, it found that the Panel had not considered CEMA as a mitigation measure, "but rather as the proper vehicle for the development of environmental management frameworks".[19]

From a practical perspective, this makes the position of CEMA and its work hard to place in the assessment of mitigation measures. CEMA is intimately related to the development and implementation of mitigation measures. CEMA's publicly stated objectives include the following:[20]

> Develop the basis for the ongoing management of impacts of industrial development on the regional environment, including recommending the priorities and objectives for, and content of, monitoring and research, and both employing and recommending mitigation options.

CEMA has responsibility for developing a wide range of environmental management frameworks, including mitigation measures, to address cumulative impacts. The finding that CEMA itself is not a mitigation measure is significant because it distinguishes

between CEMA and the mitigation strategies that CEMA is charged with developing. Reliance upon an ineffective mitigation measure constitutes an error. Reliance on an ineffective "vehicle for the development of environmental management frameworks" is not.

The Court considered the applicants' assertion that there had been "no evidence or the scantest of evidence upon which to evaluate the existence, nature and effectiveness of the mitigation measures" respecting potential impacts on watershed management.[21] The judge found to the contrary and stated that there was evidence upon which the Panel could reasonably assess technically and economically feasible measures that would mitigate any significant adverse environmental effects on the local watershed, fish and fish habitat.[22]

Unfortunately, this portion of the decision presents a laundry list of proposed mitigation measures but does not establish a standard or test to apply to determine whether sufficient evidence exists to support the Panel's reliance on the proposed mitigation measures. There is no discussion as to the type or amount of evidence that must be presented to support the effectiveness of a proposed mitigation measure.

Uncertainty and adaptive management

The Court addressed the issue of uncertainty in the environmental assessment process. It found that the ongoing and dynamic nature of environmental assessment and the principle of adaptive management allowed the Panel to approve the project nothwithstanding uncertainties respecting consolidated tailings technology, end pit lakes, reclamation of peatlands and mitigation of impacts on species at risk. The Court cited the principle of adaptive management as a counter to the "potentially paralyzing effects of the precautionary principle" and stated that:[23]

> adaptive management permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exist.

The Court found that the dynamic and fluid nature of the environmental assessment process meant that perfect certainty regarding environmental effects is not required.[24] It also concluded that it is not necessary that all aspects of a mitigation measure be proven commercially and noted that innovation would be stifled if mitigation strategies could only be approved if they used previously demonstrated technologies.[25] The Court found that the Panel did not err by recommending further study into mitigation where uncertainty existed respecting the effectiveness of known technology, such as is the case with end pit lakes, or where known technologies are demonstrated to be ineffective in reclamation of habitat and where no mitigation measures exist, such as the case with the impacts on the Yellow Rail, a bird listed under the *Species at Risk Act*.[26] The Court also found that the Panel properly concluded Imperial Oil's inability to effectively reclaim peatlands would be resolved by the dynamic nature of follow-up measures and adaptive management, including reliance on generally known replacement measures for marshes and wetlands.[27]

The Court's comments regarding uncertainty in the environmental review process are significant because on their face they indicate that uncertainty respecting the effectiveness of mitigation measures in an application is not fatal and, in fact, may be addressed in a number of ways. The Court's interpretation of adaptive management requires that sufficient information regarding impacts and potential mitigation measures already exist. Unfortunately, the decision does not identify or establish a legal test to determine whether sufficient evidence exists respecting impacts or mitigation measures to allow an adaptive management approach to be used. Without providing guidance of this sort, this case has the potential to allow for increased reliance by proponents on yet-to-be-developed mitigation measures to address known or uncertain impacts.

[1] S.C. 1992, c. 37.
[2] *Pembina Institute for Appropriate Development v. Attorney General of Canada,* 2008 F.C. 302.
[3] *Ibid.* at para. 3.
[4] R.S.A. 2000, c. E-12.
[5] *Fisheries Act,* R.S.C. 1985, c. F-14.
[6] *Supra* note 2 at para. 11.
[7] *Imperial Oil Resources Ventures Limited, Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the Fort McMurray Area* (27 February 2007), EUB Decision 2007-13 (Joint Review Panel-A.E.U.B. and Canada).
[8] *Supra* note 2 at para. 35.
[9] *Ibid.* at para. 71.
[10] *Ibid.* at para. 70.
[11] *Ibid.* at para. 70.
[12] *Ibid.* at para 77.
[13] *Ibid.* at para. 78.
[14] *Ibid.* at para 79.
[15] Dale Marshall, *Intensity-Based Targets: Not the Solution to Climate Change*, (David Suzuki Foundation, 26 February 2007), online: Climate Action Network Canada <http://www.climateactionnetwork.ca/e/resources/publications/member/dsf-intensity-targets.pdf>.
[16] Government of Alberta, *Greenhouse Gas Emissions Intensity*, online: Alberta Environment <http://www3.gov.ab.ca/env/soe/climate_indicators/15_ghg.html>.
[17] Government of Canada, *Turning the Corner: Regulatory Framework for Industrial Greenhouse Gas Emissions*, online: Environment Canada <http://www.ec.gc.ca/doc/virage-corner/2008-03/541_eng.htm#final>.
[18] *Supra* note 2 at para. 42.
[19] *Ibid.* at para. 44.
[20] Cumulative Environmental Management Association, *Objectives and Mandate,* online: Cumulative Environmental Management Association, <http://www.cemaonline.ca/content/view/14/47/>.
[21] *Supra* note 2 at para. 47.
[22] *Ibid.* at paras. 48-50.
[23] *Ibid*. at para. 32.
[24] *Ibid*. at para. 34.
[25] *Ibid*. at para. 54.
[26] *Ibid*. at paras. 55-58, 68-69.
[27] *Ibid*. at para. 60.

Practical Stuff

Water Diversions, Licences, Property Transactions and Water Sales

By Jason Unger
Staff Counsel
Environmental Law Centre

When land is subdivided and sold, who retains the right to the water? This question, in various forms, has been posed numerous times to staff at the Environmental Law Centre. It is an issue that pits perceived "rights" to divert water against the reality that is created by the *Water Act*.[1] Water licences and the historical diversion of water for agricultural or household use do not convey a property right in water in Alberta. This must be clearly understood by those who wish to subdivide and sell land from which water was traditionally diverted. It must also be clearly understood by those who may be approached by people or companies seeking to purchase water from their land.

The *Water Act* provides several key concepts that are relevant to land owners. First, the Crown (i.e., the provincial government) owns the water.[2] This does not change when you obtain a water licence or when you divert water for household or traditional agricultural uses (which do not require a licence in every instance). Second, when you sell your land the ability to divert that water runs with the land.[3] This means that once land is sold the rights to divert water transfer to the new owner. In cases where a licence or registration is involved the *Water Act* requires that notice of the disposition be given to the Director.[4]

The person selling the land has no ability to retain water diversion rights by way of contract or the common law. When property is sold the only way to retain a diversion right is to have the licence transferred pursuant to the *Water Act*. Indeed, talking about "water rights" is a bit of a misnomer, albeit one the legislation perpetuates. You never gain a direct right to divert water; rather, you are permitted to divert water by operation of the *Water Act* and this permission is tied to the land where the diversion takes place.

A more detailed look at the legislation illustrates this point. Section 21 of the *Water Act* allows diversion of water for specific household purposes. This diversion right applies to "a person who *owns or occupies land* that adjoins a river, stream, lake, natural watercourse or other natural water body" (a "riparian owner or occupant") or "a person *who owns or occupies land* under which groundwater exists" [emphasis added]. Section 22 continues to describe the diversion "right" by noting:

> A riparian owner, riparian occupant or person who owns or occupies land under which groundwater exists has the right to divert water only in accordance with section 21 and may not divert water for any other purpose unless authorized by this Act or under an approval, licence or registration.

Only an owner or occupant of land can divert land for household purposes. This means that a landowner cannot divert water to adjacent landowners, whether it is for

household or other purposes. If such an activity is to lawfully take place there is a requirement to have a *Water Act* licence.

This is the same for a "traditional agriculture user" under the *Water Act* although water can be diverted to adjacent parcels of land so long as it is part of the "same farm unit".[5]

The mixing of contracts and statutory laws under the *Water Act*: oil and water
Conflicts may arise where water diversions have historically occurred from a particular well or waterbody, the land is subdivided and sold and there is an attempt by the seller to retain rights to divert water. In instances where this occurs the person buying the land will, without first acquiring the required water licence, be breaking the law by conveying the water to adjoining water users. Lawful diversions of water require either a licence to divert the water or a property right in relation to the water being diverted.

This requirement applies regardless of any contractual arrangements the seller and purchaser of the property may come to in relation to water. Remember that neither party owns the water, as that ownership right is retained by the Crown. Therefore neither party can make a contract in relation to the diversion. This includes any request to provide water to an adjoining landowner or company that indicates a wish to purchase water.

Are there options for retaining the ability to divert water when selling land? The *Water Act* provides a mechanism that allows for the transfer of water licences. Diversions for household purposes cannot be transferred or assigned to adjoining landowners. If an adjoining landowner wishes to divert water in this way, a water licence would be required. Similarly a right to divert water pursuant to a registration (for agricultural purposes) cannot be transferred.

The only real ability to transfer a preexisting right exists for licences.[6] The government has the discretion to allow or deny a transfer. If one is allowed, the government may also decide to hold back 10% of the water allocation.

When disputes about water diversions arise
Alberta Environment administers the *Water Act* and is responsible for its enforcement. Illegal water diversions can be resolved by way of compliance and enforcement initiatives being initiated by the government. In addition, an individual can also pursue a "private prosecution" of individuals who are acting unlawfully. For more information about private prosecutions, contact the Environmental Law Centre.

Conclusions
The public perception of "water rights" in Alberta can lead individuals to pursue unlawful activities. The legislative framework around water is created to provide some certainty around water allocations and to prohibit the plundering of this essential resource. "Water rights" were historically used to encourage colonization and development in the west. Accompanying this colonization was a strong laissez faire attitude toward resource development. However, the government, in recognizing that water was a public good, did not fully incorporate this laissez faire approach into water management.

[1] R.S.A. 2000, c. W-3.
[2] *Ibid*. at s. 3.

[3] *Ibid*. at ss. 21, 24, 45, 58, 72 and 75.
[4] *Ibid*. at s. 80(1).
[5] *Ibid*. at s. 24(2).
[6] *Ibid*. at s. 82.

Federal Court Finds CEAA Amendments Alter Government's Scoping Powers

Miningwatch Canada v. Minister of Fisheries and Oceans, 2007 FC 955

By Jason Unger
Staff Counsel
Environmental Law Centre

Following the Federal Court of Appeal *TrueNorth* decision,[1] it appeared that the federal government had secured its ability to scope projects for environmental assessment in whatever manner it deemed fit. In turn, this scoping decision would dictate the type of environmental assessment and level of public participation that was required under the *Canadian Environmental Assessment Act* (*CEAA*).[2] This discretion included the ability to scope projects out of the purview of the *Comprehensive Study List Regulation* (*CSL*).[3] The *TrueNorth* case was decided under a previous incarnation of *CEAA* and subsequent amendments to the Act are the cornerstone of a new approach espoused by the Federal Court in *Miningwatch Canada v. Minister of Fisheries and Oceans* (*Miningwatch*).[4]

The *Miningwatch* case involved a proposed mine that was likely to result in a destruction or disruption of fish habitat, thereby triggering the jurisdiction of the Department of Fisheries and Oceans (DFO) and application of *CEAA* to the project. There was an environmental assessment pursued by British Columbia and the Department of Fisheries and Oceans decided at first that the mine should undergo a comprehensive study due to its inclusion in the *CSL*. Subsequently DFO re-scoped the project and decided that a screening was all that was required.

The Court in *Miningwatch* went to significant length to distinguish the *TrueNorth* case and cited the amendments to *CEAA* to justify holding that the approach of scoping projects out of a comprehensive study was contrary to the legislative intent.[5] The Court held that a project is placed into a specific "track" of environmental assessment by the description of the project by the proponent and only after that track is determined does the scoping discretion of the government come into operation.[6]

The Court recognized that by scoping the project narrowly, the statutorily mandated public participation in the environmental assessment was undermined. It was recognized that public participation in the environmental assessment process should not be frustrated by a scoping decision that arbitrarily determined that a mine was not a mine.

The breadth of application of the Federal Court Trial Division decision in *Miningwatch* remains to be seen. The Court had to distinguish the *Miningwatch* case from that of *TrueNorth* and did so by relying heavily on the amendments to *CEAA* and on the fact that, in *TrueNorth*, there was no evidence that the project was to undergo a comprehensive study.[7] *Miningwatch* may therefore have limited application to instances where the responsible authority attempts to redefine a project and thereby remove it from the purview of the *CSL*. The Court's obiter comments however seem to indicate a broader application of reasoning that limits a responsible authority's ability to avoid comprehensive studies.[8]

The discretion of the federal government to scope projects under *CEAA*, as upheld in *TrueNorth*, had effectively rendered the *CSL* meaningless. In this regard the *Miningwatch* case represents an important step to re-instilling logic and reason in the triggering of comprehensive studies. In particular, the *Miningwatch* case counteracts what appeared to be a government policy of commandeering the legislative process, through a claim of absolute discretion, in an effort to minimize its environmental assessment responsibilities under *CEAA*.

[1] *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans),* 2006 FCA 31; leave to appeal to S.C.C. refused [2006], Docket: 31370.
[2] S.C. 1992, c. 37.
[3] SOR/94-438 (*CSL*).
[4] 2007 FC 955.
[5] The Court found that the amended section 21 indicated that the public had a right to participate in defining the scope of the assessment to be conducted under a comprehensive study and this could not be avoided by simply redefining the project to remove it from the purview of the *CSL*. The change in wording effectively meant that scoping occurred only once the track of project was determined.
[6] *Supra* note 4 at paras. 274-284.
[7] *Ibid.* at paras. 283-289.
[8] *Supra* note 6.

Action Update: *Alberta Utilities Commission Act*

By Dean Watt
Staff Counsel
Environmental Law Centre

The *Alberta Utilities Commission Act* (*AUCA*) was passed by the Alberta Legislature prior to the end of the fall 2007 sitting and was proclaimed in force January 1, 2008.[1] Introduced as Bill 46, the *AUCA* raised a great deal of controversy amongst landowner groups and environmental non-governmental organizations concerned about its impacts on citizen participation in regulatory decision-making processes related to the construction of electricity infrastructure projects such as transmission lines.[2] The Environmental Law Centre's submissions on Bill 46 and its amendments are available online.[3]

The creation of the AUC and its jurisdiction

The *AUCA* split the Energy and Utilities Board (EUB) into two separate boards, the Energy Resources Conservation Board (ERCB) and the Alberta Utilities Commission (AUC). Commencing January 1, 2008, the AUC became the provincial regulator with oversight of electric and gas utilities. This regulatory oversight includes approving the need for and the construction of new facilities such as transmission lines under the *Electric Utilities Act* (*EUA*)[4] and the *Hydro and Electric Energy Act* (*HEEA*).[5] Applications for electricity facilities projects that were filed with the EUB are to be continued by the AUC.

The ERCB already exists and already makes decisions in respect of applications under the *Oil and Gas Conservation Act* (*ERCA*)[6] and many other provincial acts. The ERCB will continue to make decisions under those pieces of legislation.[7]

Participation rights before the AUC

Section 9(1) of the *AUCA* gives the AUC the ability to make decisions or orders within its jurisdiction without giving notice or holding a hearing. However, if it appears to the AUC that the decision or order may directly and adversely affect the rights of a person, that person has certain procedural rights, including notice of the application, a reasonable opportunity of learning the facts bearing on the application and the right to a hearing.[8]

Section 9(3) allows the AUC to avoid holding a hearing on an application if no person requests a hearing and, where an application is for the construction or operation of certain facilities, including a transmission line under the *HEEA*, if the AUC is satisfied that the project proponent complied with all relevant AUC rules respecting each owner of land that may be directly and adversely affected.[9]

These AUC rules are set out as Appendix A to *AUC Rule 007*.[10] Appendix A identifies participant involvement program requirements and discusses, among other things, who to include in such programs and what information to disclose. Appendix A specifies the notification and consultation requirements that are applicable to applications by the Independent System Operator (ISO) for AUC approval of an need identification document (NID) required under section 34 of the *EUA.* The NID identifies a present or future transmission system constraint and corresponding need for upgrade or

enhancement of the transmission system and proposes the ISO's own preferred solution to meet the identified need as well as a range of alternative solutions. The NID application does not identify a specific route for a transmission line; rather the NID application considers, on a more general level, whether a new or improved transmission line is needed, based on current and forecast demands on the whole system.

In the event that the AUC approves this NID, the ISO will direct a transmission facility owner to prepare and submit to the AUC an application under section 14 of the *HEEA* for approval of a specific project. Such a project will have more precise location information such as routing for a transmission line. Appendix A specifies the notification requirements applicable to an application by a facility owner for an approval under the *HEEA* to construct and operate a new facility, including a transmission line.

Notification requirements are different and somewhat broader for the ISO's NID application than those that apply to the transmission facility owner's project application. In the case of the NID approval application, the ISO must notify all occupants, residents and landowners in areas where facilities could be built to implement the ISO's preferred alternative. In addition, the ISO must advertise the NID application in local newspapers in the area where facilities could be installed to implement the preferred alternative or any other alternative solution in the need application.[11] These alternative solutions may be in different areas of the province than the ISO's preferred solution.

Appendix A contains requirements respecting personal consultation in relation to a facilities application under the *HEEA*. However, there is no personal consultation required by the ISO in the case of an application for approval of a NID under the *EUA*, the stage at which a determination of general need for a system upgrade is made.[12] This is the case even in the area in which the ISO's preferred solution would be located. Landowners have previously expressed loud dissatisfaction with being shut out of the NID approval process.

That no personal consultation is required with respect to the NID application is curious and troubling. The *AUCA*'s consequential amendments to the *EUA* imported a public interest test into the AUC's determination of the need for system expansion or enhancement under section 34. The AUCA also amended the *HEAA* by removing from section 14 of that Act the need for the AUC to consider whether a facility is required to meet present and future public convenience and need. These consequential amendments would seem to work together to locate the discussion of the need for a system expansion or enhancement and the determination of whether such an expansion or enhancement is in the public interest wholly within the NID application under section 34 of the *EUA*. Given that personal consultation is not required with respect to an NID application under this section, it appears landowners' concerns about being shut out of the NID determination and the discussion of whether transmission expansion or enhancement is needed are unlikely to be remedied by the introduction of the AUC.

Intervener funding

Section 22 of the *AUCA* provides the AUC the authority to makes rules respecting the costs to a "local intervener" for participation in any AUC hearing or proceeding. A "local intervener" is defined in the *AUCA* to be a person or group who has an interest in and is in actual possession of or is entitled to occupy land that may be directly and adversely

affected by the AUC's hearing or proceeding on an application to construct or operate facilities such as a transmission line. This restrictive definition precludes the AUC from being able to grant intervener funding to other groups, such as environmental groups, that are not tied to the land. This was a source of concern amongst landowner groups and environmental non-governmental organizations.

Amendments to Bill 46 provided the AUC with the ability to make rules respecting the payment of costs to an intervener other than a local intervener.[13] Section 21(2) of the *AUCA* now provides the AUC with the authority to make rules allowing it the discretion to award intervener funding to those other than "local interveners" within the meaning of the legislation. This was a positive amendment; however, the AUC is not required to create the rule and, in fact, appears not to have created such a rule yet.

There are two separate rules issued by the AUC with respect to intervener costs. *Rule 009: Rules on Local Intervener Costs* authorizes the AUC to award advance intervener funding, interim awards and costs awards following a proceeding and also sets out requirements for cost claims that incorporate the established intervener cost regime used by the ERCB. However, *Rule 009* refers only to local interveners as specifically defined in section 22 of the *AUCA*. It is not applicable to other interveners.

The other AUC rule dealing with costs is *Rule 022: Rules on Intervener Costs*, which governs costs orders under section 21 of the *AUCA*. While this section allows for the creation of rules respecting expanded authority to provide costs beyond local interveners, *Rule 022* specifically states that it is applicable to hearings or proceedings for rate applications or utilities under the jurisdiction of the AUC or related to rate applications. It is not applicable to intervention in NID or facilities proceedings. *Rule 022* is similar to *Rule 009* in that it authorizes advance funding, interim funding and final costs awards; however, this is only in respect of rate hearings or proceedings.

Whether additional rules will be issued expanding intervener funding to include those other than local interveners for their participation in facilities or NID proceedings remains to be seen. The Commission is undertaking a review of Rule 022 and is holding public consultations as a part of that review.[14] The AUC has invited submissions on a wide range of issues regarding the implementation of Rule 022. Written submissions are due by April 15, 2008.

[1] S.A. 2007, c. A-37.2.
[2] There were also concerns expressed by consumers' groups about potential impacts on stakeholder participation in rate setting hearings. Regulations and rules relating to, or stakeholder concerns about, public utility rate setting are beyond the scope of the ELC's focus, formed no part of its submissions to the Minister, and are not dealt with in this article.
[3] Online: Environmental Law Centre, *Comments on Bill 46-Alberta Utilities Commission Act* <http://www.elc.ab.ca/ims/client/upload/Bill%2046%20-%20Alberta%20Utilities%20AUC%20Act.pdf>; *Comments on Bill 46-Alberta Utilities Commission Act-Government Amendments* <http://www.elc.ab.ca/ims/client/upload/Bill%2046%20-%20Knight%20letter%20re%20amendments-Bill%2046.pdf>.
[4] S.A. 2003, c. E-5.1.
[5] R.S.A. 2000, c. H-16.
[6] R.S.A. 2000, c. E-10.
[7] The *AUCA* does not amend section 26 of the *ERCA*, which grants participation rights at hearings before the ERCB on matters within its jurisdiction.
[8] Section 9(2) provides for the directly and adversely affected test for standing. For reasons set out in the ELC's submissions to the Minister, *supra* note 3, the ELC considers this test to be too narrow.

[9] Section 9(4) provides that while a directly and adversely affected person is entitled to a hearing, it is not required to be an oral hearing. Neither is a person necessarily entitled to be represented by a lawyer.
[10] *AUC Rule 007: Rules Respecting Applications for Power Plants, Substations, Transmission Lines, and Industrial System Designations* (Calgary: Alberta Utilities Commission, 2008).
[11] *Ibid* at 47.
[12] *Ibid* at 48.
[13] *AUCA*, supra note 1, s. 21(2).
[14] Alberta Utilities Commission, Bulletin 2008-01, *Consultation Rule 022, Rules on Intervenor Costs* (20 March 2008), online: <http://www.auc.ab.ca/aucdocs/documents/bulletins/Bulletin-2008-01.pdf>.