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Equity and the *Water Act*: First in Time, First in Right and Water Transfers Raise Questions of Public Interest

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The *Water Act*[1] and its predecessor legislation[2] are based on a water allocation system that gives priority access to water to licence holders who were first to obtain a licence. This system of prior allocation (or appropriation in the United States), more commonly referred to as First in Time First in Right (or FITFIR) in Alberta, was a method of water allocation that promoted settlement on lands with no water source associated with them. This system gives priority to those who obtained licences earlier over those who obtain a licence later. In water short periods this may result in no water being available to meet the licence allocations of later licence holders.

The *Water Act* also enables the transfer of licence allocations from one party to another for differing uses. The transfer provisions of the Act enable a limited form of buying and selling of water allocations, i.e., a regulated market in licences. Finally, the *Water Act* is clear that the Crown owns the water within the province's boundaries, that is to say that water is a public resource. The combined effect of these legal realities raises significant questions about water use, water sale and environmental and social equity.

These questions are of particular significance in the arid portion of the province where the main tributaries of the South Saskatchewan River Basin (SSRB), with the exception of the Red Deer River, are over allocated and the government has "closed" the basin to further allocations from the majority of surface waters. The closure of the basin has focused a reflection on FITFIR's inadequacies. Namely, FITFIR may not be an appropriate system in an over allocated watershed to achieve an end goal of maintaining the integrity of the aquatic environment. Variations in water supply and priority needs of the FITFIR participants ensure that instream flow needs will rarely be met. Similarly, the FITFIR model, when linked with a transfer system, raises serious issues of social and environmental equity.

On the social front, historically we gave water away for laudable reasons of inviting settlement and economic growth. The main costs associated with a licence were found in the building of infrastructure to facilitate water diversion and transport, with government often providing subsidies to assist in the building of these works. A heavy reliance existed on engineering to provide an ongoing water supply, as it does to varying degrees to this day.

Water facilitated colonization, begetting greater water diversion and use. Over time it became evident that the aquatic environment could not be sustained with the level of diversions and in 2006 the SSRB was closed.[3] The result? A fortuitous boon for licencees in the SSRB by way of a cash windfall for those able and willing to transfer a water allocation. Now water allocations are worth money, in the realm of $2000-$5000

per acre-foot by some estimation (although details about these amounts are difficult to determine as the sale amounts have not been reported). Older licences, with higher priority, can likely leverage more money for the sale of an allocation. At this stage it is important to remember that water is legislatively a public resource, owned by the Crown.

Some would argue that the transfer of the water licence and resulting payments is akin to appropriating water, a public resource, for significant private gain. Yet public debate on this issue remains limited. The social equity of paying potentially millions of dollars to someone who, by happenstance, obtained a water licence many years ago must be debated. How does the use of water, a public resource, in the past justify windfall profits?

This inequity becomes less quantifiable when one considers the environment. The same legal system that grants licences also ensures that returning water to support environmental integrity will be difficult. Users have a priority over the environmental flows, unless the government decides that there may be a significant adverse effect on the environment and suspends or cancels a licence.[4] This protection may give rise to the payment of compensation to the licence holder.[5] An incremental return is also enabled by allowing the government to hold back up to 10% of the amount of a water licence that is subject to a transfer.[6] Perversely, the public may end up paying licence holders significant amounts of money for historical use of a public resource, even though this public resource has already provided licence holders with substantial private gains over time. Indeed, the current legislative framework may make things worse, as the allowance of transfers may see a net increase in actual water use, potentially resulting in greater environmental degradation.[7]

Another anachronistic outcome of the system is that it favours basin closures and high use of riverine ecosystems. Licence holders in open basins may wish to promote water intensive uses and industries to move into the area so they too can benefit from a cash windfall when the basin closes and water transfers are the only remaining tools.

Tradable water allocations may very well produce efficiencies but when combined with the FITFIR system, social and environmental inequities are likely to result. The government should provide some justification for not addressing these inequities if the public's trust in the water management system is to be maintained.

[1] R.S.A. 2000, c. W-3.
[2] Including the *Water Resources Act*, R.S.A. 1980, c. W-5.
[3] Alberta Environment, "Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)" (August 2006), online: Alberta Environment <http://environment.alberta.ca/documents/SSRB_Plan_Phase2.pdf>.
[4] *Supra* note 1 at s. 55(2).
[5] *Ibid.*
[6] *Ibid*. at s. 83.
[7] The potential for further degradation will depend on the change in use and the resulting quantity and quality of return flows.

Comments on these articles may be sent to the editor at elc@elc.ab.ca.

Flurry of Aboriginal Litigation Hits Alberta

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2008 is shaping up to be a litigious year for some Alberta's First Nations communities. Concern about oil sands development, cumulative effects and water have driven some First Nations to take their concerns to the courts. This article provides a brief overview of some of the latest Alberta lawsuits and court decisions.

Oil sands

On June 4, 2008, the Chipewyan Prairie Dene First Nation (CPDFN) filed a legal action against the Alberta government and various government departments for granting mineral leases to MEG Energy Corporation for phase 3 of its Christina Lake oil sands project.

The CPDFN, which is located 70 km south of Fort McMurray, alleges that the provincial government breached its constitutional duty by granting mineral leases without consulting their community. The First Nation seeks a ruling that will require Alberta to hold meaningful consultation with them when considering granting mineral leases in their traditional territory.

Additionally, the First Nation is asking the court to rule that the Energy Resources Conservation Board and Alberta Environment cannot not approve MEG Energy's project until Alberta meaningfully consults with them so as to ensure protection of their Treaty 8 rights and aboriginal rights. The claim also raises the need, through consultation with the First Nation, for regional land-use planning, proper cumulative impacts assessment that looks at the full impact of existing, planned and reasonably foreseeable development, and the establishment of appropriate baseline data, benchmarks and related measures to guide development and to ensure that the First Nation can exercise its rights now and in the future.

Industrial development and cumulative effects

On May 14, 2008, the Beaver Lake Cree First Nation launched a civil action against the Alberta and federal governments claiming that intensive industrial development in their territory renders their Treaty 6 rights meaningless.

In their statement of claim, the First Nation lists more than 15,000 developments approved in their traditional lands near Lac La Biche, about 200 km northeast of Edmonton, including Husky Energy's Tucker oil sands project north of Cold Lake. The band claims that the approval of oil and gas, forestry and mining developments and/or the cumulative effects of these developments degrade the environment, leading to a decline in wildlife, and water quantity and quality. This compromises the band's freedom to hunt, fish and trap as guaranteed by Treaty 6. They claim that the Crown has breached its fiduciary obligations by failing to consult with them and accommodate their rights with respect to industrial developments in their territory.

Water

On October 8, 2008 the Alberta Court of Queen's Bench released a decision regarding claims by the Tsuu T'ina First Nation and the Samson Cree First Nation that the province failed to properly consult them about the South Saskatchewan River Basin (SSRB) Water Management Plan.[1] The SSRB plan recommended that the Alberta government stop accepting applications for new water allocations in parts of the over allocated SSRB. Both the Tsuu T'ina Nation (a Treaty 7 Nation located on Calgary's southwest outskirts with a reserve next to the Elbow River) and the Samson Cree Nation (a Treaty 6 Nation with interests in the Battle River watershed and Pigeon Lake, north of Red Deer) sought judicial review of the government's approval of the SSRB plan on the basis that the Crown had failed to discharge its duty to consult and accommodate these two First Nations prior to adopting the plan. The First Nations claimed that the plan's adoption might have adverse effects on their aboriginal or treaty rights including not only an aboriginal or treaty right to water, but also rights to fish and hunt, and rights to the full use and enjoyment of their reserves.

The Court dismissed the applications based on two lines of reasoning. First, the court held that assuming the adoption of the plan constituted a *prima facie* infringement of their aboriginal or treaty rights, that infringement was justified because the plan served a compelling and substantial purpose (conservation of a scarce and valued resource) and because the plan was not inconsistent with the honour of the Crown. The First Nations were either not treated any differently than any other person with respect to priority rights to water or were treated better than others given that First Nations were given priority over other new allocation seekers after conservation targets for the SSRB were met.

Second, the court held that even if there was a duty to consult, the extent or scope of this duty was at the low end of the spectrum and had been fulfilled because there was no or minimal adverse effect on the rights of the applicants and because of the relative weakness of the applicants' legal claim. The claim was considered weak primarily because neither Treaty 6 nor Treaty 7 spoke to specific water rights.

Comment

Although the province's SSRB water management plan withstood the challenges by the Tsuu T'ina and Samson Cree Nations, the issue of whether a treaty right could include the right to water remains a live issue. The court left this door open by stating that "to be successful the claimed right will have to be found as an ancillary to the treaty rights to hunt, fish and reserve land."[2] In the future, we may see claims to water rights framed as collateral to treaty rights such as the right to fish.

Looking forward, the CPDFN and Beaver Cree Nation lawsuits could set precedents on the way mineral leases and surface developments are approved in the future. A victory would open the door for First Nation communities to demand much higher levels of consultation and accommodation from government and industry on industrial operations on their territory. It could create a precedent that will allow other bands to enforce similar demands across the mega oil sands projects in Alberta's north.

It is clear that these lawsuits could drastically alter how Alberta consults with First Nation communities. Alberta's current consultation policy[3] permits the government to delegate its responsibility for consultation with First Nations to industry. The policy also states that the leasing of Crown mineral rights does not trigger the duty to consult. The Alberta government does not consult with First Nations prior to the disposition of Crown mineral rights, and First Nations consultation is not a condition of acquiring or renewing mineral agreements. So currently in Alberta not only does consultation take place after mineral leases have already been awarded, but companies who are tasked with the duty to consult also have no control over the cumulative effects with other projects that infringe upon treaty and aboriginal rights. Although legally only the Crown has a fiduciary obligation to conduct meaningful consultation in good faith with First Nations, it appears that it will take a legal challenge to enforce this point in Alberta.

[1] *Tsuu T'ina Nation v. Alberta (Environment)*, 2008 ABQB 547.
[2] *Ibid.* at para. 129.
[3] Government of Alberta, "First Nations Consultation Guidelines on Land Management and Resource Development" (14 November 2007), online: Alberta Aboriginal Relations <http://www.aboriginal.alberta.ca/571.cfm>.

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Initiating Investigations Under the *Environmental Protection and Enhancement Act*

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The *Environmental Protection and Enhancement Act* and its regulations prohibit individuals and companies from doing certain things and require them to do other things. The prohibition against the release of substances that have or may have an adverse effect on the environment and the corresponding duty to report releases are examples. Additional obligations or prohibitions may be found in various Codes of Practice regulating different activities, in the terms and conditions of approvals issued under *EPEA* and in enforcement orders, environmental protection orders or other documents issued by Alberta Environment. An approval holder may be required to provide regular reports to Alberta Environment or may be prohibited from undertaking certain activities during specified times of the year. The *EPEA* makes it an offence to contravene these orders, the terms and conditions of approvals or codes of practice, as well as many sections of the *EPEA*.[1]

Not all offences are brought to the attention of Alberta Environment, however. Enforcement is expensive and Alberta Environment cannot be everywhere and see everything. Frequently the Environmental Law Centre receives information requests respecting alleged offences under the *EPEA* or its regulations. People often want to know why Alberta Environment is not doing anything to stop the alleged offence. In some cases, Alberta Environment may be unaware of the offence, but anyone can call Alberta Environment's anonymous complaint line at 1-800-222-6514 to report an alleged offence. Be aware, however, that Alberta Environment is not required to follow up on a complaint or even to respond to the complainant. This can feel unsatisfying.

For those who want to ensure Alberta Environment follows up on their complaint, the *EPEA* provides an opportunity for citizens to compel Alberta Environment to undertake an investigation. Section 196 of the *EPEA* enables a person who is of the opinion that an offence has been committed under the *EPEA* to make an application for investigation. This is an application that is sent to the Director asking to have an investigation conducted. Two people must submit an application for investigation. The two people must ordinarily reside in Alberta and be 18 or older.

The application must be accompanied by a solemn declaration (a document that is sworn or attested to before a Commissioner for Oaths) stating the names and addresses of the two applicants. The declaration must also state the nature of the alleged offence, the name of each individual alleged to be involved in committing the offence and a concise statement of the evidence supporting the allegations. This application is not anonymous.

The Director, an Alberta Environment official, must acknowledge receipt of the application for investigation and is compelled by the *EPEA* to "investigate all matters that the director considers necessary for a determination of the facts relating to the alleged events." The Director is also required to provide a progress report to the applicants

within 90 days of receiving the application. In this report the Director will describe what action, if any, may be taken to address the alleged offence.

It may be that nothing is done. If the Director is of the opinion that no further investigation is required, he or she can discontinue the investigation. However, if that happens, the Director is required to inform the applicants and provide written reasons for discontinuing.

The fact that one can initiate an investigation does not necessarily mean that the applicants' desired outcome will be realized. An investigation may determine that a substance release is within authorized limits. In such a case, no offence exists. That said, this process puts pressure on Alberta Environment and ensures that the applicants are kept in the loop.

[1] R.S.A. 2000, c. E-12, s. 227.

Tree Trespass: Not Just Nosy Neighbours Anymore

By Megan Johnson
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The politics of tree care are common issues between neighbours. One party wants to live in her own version of an urban forest, while on the other side of the property line the other party prefers a well-manicured aesthetic. When neighbours take tree maintenance into their own hands, situations can deteriorate very quickly, and courtrooms become the site where grudges are aired.

While the idea of judges ruling on conflicts between neighbours seems comical, tree trespass is an increasingly relevant legal issue in Alberta. The rapid pace of development in the province means that more and more landowners are facing the consequences of having industry as their neighbour. This has created confusion for landowners as to the nature and extent of their legal rights over their land and the things that are on it.

One of the most common incidents is the cutting of trees as a consequence of development of oil and gas infrastructure or transmission lines. Here, the conflict is generally between landowners and operators. Operators are defined in the *Surface Rights Act* as "the person…having the right to a mineral or the right to work it…or [their] agent" or the person "empowered to acquire an interest in land for the purpose of the pipeline, power transmission line or telephone line."[1]

If the landowner holds a right of entry agreement or a surface lease with the operator, unauthorized tree removal falls under the jurisdiction of the Surface Rights Board. If there is no such agreement, however, the conflict will be addressed by a lawsuit in the court system.

When can operators cut down your trees?
Operators can cut down trees on a landowner's property if they have applied to the Surface Rights Board (SRB) for a right of entry order to remove the trees. The SRB can grant right of entry orders for any activity "for or incidental to" the construction, operation, and/or removal of transmission lines, pipelines, and mining and drilling operations.[2] An operator can obtain a right of entry order to remove a landowner's trees if the operator can show the SRB that the tree removal was necessary for the activity in question.

To obtain a right of entry order operators first have to seek the landowner's permission.[3] If the landowner does not consent, the operator can then go to the SRB to obtain a right of entry order. The operator must bring proof of the original attempts to get landowner consent.[4]

If the SRB does grant the right of entry order, the landowner is entitled to compensation.[5] The *Surface Rights Act* specifies that landowners should receive an entry fee that is equal to the lesser of $5,000 or $500 per acre. The Board can also award compensation for damages to the land. In cases of tree damage or removal, the Board usually will usually award damages based on a combination of the commercial value of the trees lost and a quantitative assessment of the functional value of the trees, if any.[6] Functional values that the Board has considered include windbreaks, shelter, and soil conservation, as well as aesthetics.[7]

Trespass
If the operator is removing trees on property without the authorization of a right of entry order, a surface lease, or other form of private agreement with the landowner, the landowner may have a claim for trespass in the courts. Trespass is a legal action that occurs where there is direct interference with another party's property. It is the most common type of action to deal with the unauthorized removal of trees.

Operators commit trespass to the extent that their workers cross the boundaries of the landowner's property to cut and prune trees. Neighbours can cut branches or roots that extend across the property line; however, they cannot enter the other party's property or cut "any part of the tree that is on the other person's side of the property."[8] The precise location of the property line is thus vital in proving that the tree removal was trespass, and should be supported by expert evidence in court.

The courts have found different levels of culpability in tree trespass. In law, it is the operator's responsibility to ascertain the location of the property line before they begin cutting trees.[9] Deliberately removing trees or vegetation with knowledge of being across the property line, for example, is 'wilful' trespass, and may entitle the landowner to punitive damages. If the property line was simply crossed by mistake, however, the operator will be responsible for a lesser amount of damages.[10]

Damages
Courts generally assess damages for tree trespass based on the value of the vegetation lost. Courts have also allowed restoration costs, damages for loss of use and enjoyment, as well as punitive damages. If the landowner can bring evidence that the trees are necessary to provide a windbreak and prevent erosion, the court may be more likely to

award a higher amount of damages.[11] These awards rarely compensate for other factors, such as environmental and aesthetic loss.

If a landowner was to decide to pursue litigation, s/he would need to provide the court with expert evidence on the trees or bush removed from the land. This evidence should include:

- the number of trees;
- the type of trees;
- the economic value of the trees prior to removal, as determined by a professional appraiser;
- documentation of the function the trees served prior to removal, as well as an assessment of the economic value of this function;
- an evaluation of the replacement costs; and
- photos of the site, both before and after the damage if possible.

Defences to trespass

There are two key defences to the act of trespass. First, the operator can use the defence of necessity and argue that they removed the trees to prevent harm to the public. Generally, the operator would have to show a situation of "danger and emergency."[12]

Secondly, the operator could also argue that the trespass had statutory authorization. For example, the *Water, Gas and Electric Company Act* specifies that a company can cut down any trees or brush that endanger its conductors, wires, or equipment as long as it provides compensation.[13] The affected landowner must simply submit a notice for claim for damages within sixty days after the damage occurs.[14] The *Alberta Electrical and Communication Utility Code* further specifies that the operator is responsible for ensuring that trees are trimmed a safe distance from existing power lines.[15]

Other legal actions: nuisance and negligence

While the majority of legal actions surrounding unauthorized removal of trees are in trespass, there are also other legal avenues available in nuisance and negligence.

A legal action in nuisance occurs where there has been unreasonable interference with the enjoyment of one's property. The most important element of a nuisance claim is proving that the activity was unreasonable. To do this, a judge will typically balance the rights of both parties and determine "reasonability" based on the facts of the particular case. A key defence to a nuisance claim is the defence of statutory authorization – that is, that there is a particular law that allows the offending activity. These include the examples of defences to trespass discussed above.

Another final possible action is a claim in negligence. Here, the landowner would need to show that the operator owed her a duty of care, that the operator did not meet the required standard of care (that of the "reasonable person"), and that the landowner

suffered loss or injury because of the operator's failure to fulfill the duty of care.[16] Landowners can prove loss or injury with the kind of expert evidence used in the trespass cases discussed above. As the landowner and operator are usually physical neighbours, it may be relatively easy to establish a duty of care.

Given that there have not been many negligence cases addressing unauthorized tree removal, however, it is more difficult to identify the kind of behaviour that courts would deem "reasonable." Landowners need to ensure that they are prepared with as much evidence as possible, particularly from people recognized by the court as experts.

Conclusion

As more and more landowners find themselves in close proximity to the energy industry, land-use conflicts such as those over the unauthorized removal of trees are becoming more and more common. Whether conflicts will be heard before the SRB, the courts, or resolved in simple conversations with the operator, landowners should ensure that they keep meticulous records and document their land constantly. By being prepared, landowners can increase their chances of ensuring their rights are respected.

[1] R.S.A. 2000, c. S-24 at s. 1(h).
[2] *Ibid.* at s. 12(1).
[3] *Ibid.*
[4] *Ibid.* at s. 15(1).
[5] *Ibid.* at s. 19(1).
[6] *Daylight Energy Ltd.v. Bellview Ranch Ltd. et al* (2 August 2006), Alberta Surface Rights Board 2006/0120, 2006/0121 and 2006/0122, online: Alberta Surface Rights Board <http://www.surfacerights.gov.ab.ca/downloads/documentloader.ashx?id=9636>.
[7] See e.g., *Burlington Resources Canada Ltd. v. Stephenson* (4 June 2003), Alberta Surface Rights Board 2003/0034 and 2003/0035, online: Alberta Surface Rights Board <http://www.surfacerights.gov.ab.ca/downloads/documentloader.ashx?id=9242>; *Advantage Oil & Gas Ltd. v. Babu (*16 December 2002), Alberta Surface Rights Board 2002/0247, online: Alberta Surface Rights Board <http://www.surfacerights.gov. ab.ca/downloads/documentloader.ashx?id=9211>; *Corridor Pipeline Limited v. Zilinski (*4 November 2002), Alberta Surface Rights Board 2002/0144-2002/0241, online: Alberta Surface Rights Board < http://www.surfacerights.gov.ab.ca/downloads/documentloader.ashx?id=9108>.
[8] *Glashutter v. Bell,* 2001 BCSC 1581 at para. 27.
[9] *Voss v. Crooks,* 2002 BCPC 3 at para. 28.
[10] *Ibid.* at para. 27.
[11] *Bower v. Rosicky*, 2000 BCSC 85.
[12] *Perdue v. Vanderham,* 4 M.P.L.R. (4th) 86, 26 R.P.R. (4th) 141, [2004] O.J. No. 5236, [2004] O.T.C. 1121 at para. 107.
[13] R.S.A. 2000, c. W-4 at ss. 13 and 14(1).
[14] *Ibid.* at s. 15.
[15] 2nd Ed. (Edmonton: Safety Codes Council, 2002) at p. 49, section 10-002 3.1.7.
[16] The term "duty of care" simply means that the defendant – here, the operator – could reasonably foresee that her actions would affect the plaintiff – here, the landowner. If you owe someone a duty of care, you must take all reasonable precautions not to cause harm to that person.

When is a Lake not a Lake: Getting to the Bottom of the *Metal Mining Effluent Regulations*

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Introduction

Earlier this summer, many people expressed disappointment and astonishment upon learning that mining companies are seeking, and receiving, federal authorization to dispose of mining wastes, called tailings, into lakes and other freshwater bodies inhabited by fish.[1] A regulation created under the federal *Fisheries Act*[2] allows for the reclassification of natural water bodies as "tailings impoundment areas".[3] Such a classification means that protection of fish and fish habitat ordinarily provided by the *Fisheries Act* does not apply and the water body may be used as a disposal site for mine tailings. This article briefly describes the history of this regulatory provision, the purpose for its inclusion under the *Fisheries Act* and the process through which such reclassifications are made.

Background

The federal *Fisheries Act* protects fish and fish habitat by controlling the substances a person may deposit into the water and by controlling the activities of a person where those activities may be harmful to fish or fish habitat. The *Fisheries Act* prohibits the deposit of a "deleterious substance" in any type of water frequented by fish.[4] The *Fisheries Act* defines "deleterious substance" very broadly to refer to substances that alter or degrade water quality to the point where the water is harmful to fish, fish habitat or human use of fish that frequent the water. Mining wastes, or tailings, from metal mines contain substances that can be categorized as "deleterious substances" under the *Fisheries Act*.

However, some metallic mine tailings generate acids when exposed to air. The release of these acids into the surrounding environment is referred to as acid mine drainage and can pose an environmental threat to surface or ground water. Some see underwater disposal of tailings as an environmentally sound tailings management option, as it can reduce the formation of these acids.[5] In order to enable companies to use underwater disposal as a means of minimizing acid mine drainage while avoiding liability under the *Fisheries Act*, a regulatory loophole was fashioned out of Schedule 2 to the *Metal Mining Effluent Regulations.*

Metal Mining Effluent Regulations (MMER)

The *MMER* creates a more specific definition of "deleterious substances" than is provided for in the *Fisheries Act*. The Act defines deleterious substances broadly in relation to the effect the substance would have on water quality. For the purposes of the *MMER*, a substance is a deleterious substance if it is included in Schedule 4 to the *MMER* or is acutely lethal to fish.[6] Acute lethality is determined by performing tests prescribed in the *MMER*. Section 4 of the *MMER* provides that mine owners or operators may deposit mining effluent containing deleterious substances in any water frequented by fish or in any place under conditions where the substance may enter water frequented by fish, if

the concentration of the deleterious substances or the pH level of the effluent does not exceed prescribed amounts and if the deleterious substances are not acutely lethal.[7]

The *MMER* allows an owner or operator of a mine to deposit waste rock or effluent containing any concentration of deleterious substances or of any pH level into a "tailings impoundment area".[8] A tailings impoundment area (TIA) is described as one of two things. It may be "a disposal area that is confined by anthropogenic or natural structures or by both, but does not include a disposal area that is, or is part of, a natural water body that is frequented by fish", or it may be a water body or place set out in Schedule 2 to the *MMER*.[9] Natural water bodies frequented by fish can be designated as tailings impoundment areas by their addition to Schedule 2.

Prior to depositing effluent or waste rock into a TIA, project operators or owners are required to provide, for Ministerial approval, a compensation plan to offset for the loss of fish habitat and an irrevocable letter of credit to cover the costs of the plan's implementation.[10] The operator is required to implement the approved plan and to evaluate its effectiveness. The *MMER* also requires that an owner or operator depositing effluent or waste rock into a TIA comply with a number of conditions related to monitoring of substances released and the effect on fish and the environment.

Process

The ability to designate water bodies as TIAs pre-dates the introduction of Schedule 2 to the *MMER*. Under the *Metal Mining Liquid Effluent Regulation*, the predecessor to the *MMER*, these decisions could be made at the discretion of the Minister without the formal requirements of the *MMER*. When Schedule 2 to the *MMER* was first introduced in 2002, five locations were designated as TIAs.[11] Since then, four more waters have been added to Schedule 2.[12]

The process for the addition of a lake or other water body to Schedule 2 of the *MMER* begins during the environmental impact assessment for the mining project. A project proponent will indicate whether the project will use TIAs as a tailings management strategy. Because of the potential impact of such a project on fish and fish habitat, a *Canadian Environmental Assessment Act* (*CEAA*) review is required. The responsible authority under *CEAA* has discretion to scope the project for the purposes of the environmental impact assessment (EIA). The opportunities for public input into the review will depend on the type of review undertaken; the Minister has discretion to require consultation under a screening, whereas consultation is required under a comprehensive study. In some cases, screening level assessments have been completed in respect of some projects requiring the addition of new water bodies to Schedule 2 of the *MMER*.[13] In other cases, panel reviews have been done. It is important for interested persons to be aware of which process is being used and what procedural rights exist.

Once the EIA review has been completed, the Department of Fisheries and Oceans (DFO) may recommend that Environment Canada proceed with the addition of water bodies to Schedule 2 to the *MMER*. This requires an amendment to the *MMER*. Amendment of federal regulations requires the proposed amendment be pre-published in the *Canada Gazette*, *Part I* to allow for a public comment period. A Regulatory Impact Analysis Statement (RIAS) is prepared that considers the impact of the proposed amendment. The consideration of alternatives to the amendment is limited at this

stage. DFO and Environment Canada have taken the position that detailed examination of alternatives to the use of TIAs occurs at the EIA review stage, prior to the DFO's recommendation, rather than at the RIAS stage.[14]

Environmental groups have expressed frustration with the regulatory process used to amend Schedule 2 to the *MMER*. These groups have recommended that all project applications that contemplate the use of fishbearing waterbodies as TIAs undergo a panel review or joint panel review under the *CEAA*. They have also recommended a longer comment period upon the pre-publishing of the amendments to the *MMER* in the *Canada Gazette, Part I*, noting in one case that a 30 day comment period was provided, but that the compensation plan was not released for review until 10 days after the *MMER* amendment was published in the Gazette. This was seen by groups as providing inadequate time to prepare comments. [15]

[1] Terry Milewski, "Lakes across Canada face being turned into mine dump sites" CBC News (16 June 2008), online: CBC News <http://www.cbc.ca/canada/story/2008/06/16/condemned-lakes.html>.
[2] *Fisheries Act*, R.S.C. 1985, c. F-14.
[3] *Metal Mining Effluent Regulations*, S.O.R./2002-222. ("*MMER*")
[4] *Fisheries Act*, *supra* note *2*, s. 36(3).
[5] Regulatory Impact Analysis Statement, C. Gaz. 2006 II at 1485.
[6] *MMER*, *supra* note 3, Schedule 4.
[7] Environmental groups have expressed concerns that the threshold concentrations prescribed in Schedule 4 to the *MMER* are much higher than are acceptable in other jurisdictions and are not appropriate to ensure protection of fish and fish habitat. Office of the Auditor General of Canada, *Environmental Impact of Federal Metal Mining Effluent Regulations*, Petition No. 219 (7 October 2007) at 35 of 98 ("*Mining Watch Petition*").
[8] *MMER*, *supra* note 3, s. 4.
[9] *Ibid.,* s. 5.
[10] *Ibid.*, s. 27.1.
[11] *Supra* note 5 at 1484.
[12] *MMER*, *supra* note 3, Schedule 2. A number of lakes in British Columbia, Nunavut, Manitoba and Newfoundland, as well as a portion of the Kerness Creek in British Columbia, have been designated under the *MMER*.
[13] *Mining Watch Petition*, *supra* note 7 at 12 of 98. For projects in Nunavut, additional assessments are carried out pursuant to the Nunavut Land Claims Agreement.
[14] *Supra* note 5 at 1486. The only alternative considered at this stage was maintaining the status quo and not amending the *MMER*.
[15] *Mining Watch Petition*, *supra* note 7 at 25 of 98.