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Bill 50 Delivers Shocks to the Electricity Planning Process

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Alberta's electricity transmission system uses a "regulated monopoly." Transmission is planned by the Alberta Electric System Operator (AESO), also called the Independent System Operator (ISO), and regulated by the Alberta Utilities Commission (AUC).

The ISO provides access to the Alberta Interconnected Electric System for generation and distribution companies and large industrial consumers of electricity. To provide these services, the ISO contracts with transmission facility owners to acquire transmission services. The ISO is responsible for assessing current and future needs for transmission and directs transmission proposals to meet identified need.

The AUC is the approval body for the need for new transmission projects. The AUC reviews the needs identification documents of the ISO and decides whether or not to approve them. The AUC also approves, varies or denies permits to build and operate transmission lines. The AUC may make decisions based on whether the proposed transmission is in the public interest. The AUC may also hold hearings in which directly and adversely affected parties may participate.

Critical transmission will follow a different approval process

This June, the Alberta government introduced Bill 50, the *Electric Statutes Amendment Act*.[1] Bill 50 creates a category of transmission under the *Electric Utilities Act* entitled "critical transmission infrastructure." Bill 50 amends three acts, the *Alberta Utilities Commission Act*, the *Electric Utilities Act* and the *Hydro and Electric Energy Act*.[2]

Under the proposed s.41.1, 41.2 and 41.3 of the *Electric Utilities Act*, provincial Cabinet can designate a proposed transmission project as "critical" if, among other factors, it is in the opinion of Cabinet "critical to ensure the safe, reliable and economic operation of the interconnected electric system." Section 41.1 permits transmission need approvals that will affect landowners to be made without notice or consideration of the various purposes of the applicable legislation.

Under Bill 50, Cabinet will make the critical infrastructure designation based on ISO forecasting and planning documents. However, Cabinet can make the designation without a needs identification document being prepared by the ISO or approved by the AUC. It is therefore not clear what information Cabinet will have available to identify infrastructure as "critical." In the planning materials of the ISO, system expansion or enhancement is identified as "is or may be" required and many significant details are not yet included.

Role of AUC in critical transmission approval is limited

Bill 50 removes the application of sections 34-36 of the *Electric Utilities Act* when a transmission project is designated "critical." As a result, the needs identification document assessment process before the AUC is replaced with a Cabinet determination under s.41.1

which includes the location, technical solutions and other details of the critical transmission infrastructure.

The AUC will still approve individual critical transmission applications. However, Bill 50 removes jurisdiction for the AUC under s.17 of the *Alberta Utilities Commission Act* to consider the public interest, including social, economic and environmental considerations in critical transmission applications. It does so by adding s.17(2) to that Act, as well as by amending s.19 of the *Hydro and Electric Energy Act* to prevent the AUC from refusing a critical infrastructure application on the basis that it is not needed or is not in the public interest.

As a result of these changes, the AUC's role is eliminated in the needs identification stage and is severely reduced or potentially nullified in the individual transmission approval stage of the process for critical infrastructure. The precise role of the AUC in the later stages of planning for critical infrastructure is very unclear, as many of the powers of the AUC under s.19 of the *Hydro and Electric Energy Act* will have already been determined by Cabinet under the proposed s.41.1 of the *Electric Utilities Act.* Therefore, although the AUC would still have the final critical infrastructure project placed before it, there may be no meaningful role for the AUC to play.

Planning criteria and objectives for critical transmission are unclear

Under Bill 50 there is no clear process for advancing or debating environmental issues, property rights or social components of critical transmission projects, or to assist the government in controlling pollution and ensuring environmental conservation in the transmission of electric energy in Alberta. These objectives of the *Hydro and Electric Energy Act* appear not to be applied to critical transmission infrastructure at any stage. Objectives from the *Electric Utilities Act* such as flexibility and competitiveness in electricity generation are also absent from the designation of critical infrastructure. Inserting Cabinet discretion that lies largely outside the application of the broader legislative purposes applied in other transmission infrastructure decisions is troubling.

There is little guidance regarding how Cabinet will decide which infrastructure is "critical." The designation process does not require that Cabinet consult the public or affected parties prior to making the designation. Specifically, section 13 of the *Hydro and Electric Energy Act* would be amended to deem not only the construction but also the connection and operation of critical transmission infrastructure to be necessary and in the public interest. Yet, the amendments in Bill 50 do not require Cabinet to consider whether an infrastructure project is in the public interest in making the designation.

There are three critical infrastructure designations in Bill 50 that include infrastructure identified by the ISO in its July 2009 long-term plan.[3] These "critical" transmission projects are described in the ISO plan as needed in the next ten years. The southern transmission reinforcement need has been approved by the AUC, but proposed measures have not yet been approved. The others have not yet been approved in either aspect by the AUC.

Even if it could be convincingly argued that the "critical" designations in Bill 50 are urgently necessary at this time, there is no clear justification for granting permanent powers to Cabinet to make critical designations that circumvent the normal planning process. This approach appears to contemplate ongoing crisis decision-making in transmission approval.

The ELC recommends that Bill 50 not be passed

Bill 50 gives too much discretion to Cabinet to plan essential components of a complex electricity system and offers no significant improvements to transmission planning. The scope of discretion provided to Cabinet in Bill 50 threatens to undermine the overall objectives of

electricity legislation in Alberta. The Bill also fails to address other historic problems with standing and needs assessment that predate the creation of the AUC.

There is no doubt that Alberta is facing challenges in electricity transmission planning. These have included transmission proceedings that had difficulty responding to public concern. However, Bill 50 is a curious solution because it gives Cabinet broad discretion to approve the need for transmission without the benefit of a complete consultation, planning and approval process.

If the transmission planning and approval process in Alberta needs improvement, then these improvements should be consistent and apply to all transmission infrastructure. Instead Bill 50 grants extraordinary powers to Cabinet to single out "critical" transmission projects for discretionary approval, without offering any improvements to the normal approval process.

The Bill should at a minimum be amended to remove Cabinet's broad discretion over the designation of transmission infrastructure as "critical" and to restore the powers of the Alberta Utilities Commission and other planning bodies to assess the need for transmission, and whether it is in the public interest.

The three specific critical infrastructure designations should also be removed from Bill 50 and made subject to the full approval process before the AUC. They are designed to accommodate growth in the next ten years. They can therefore be subject to the ordinary approval process.

In Bill 50 the Alberta government is missing an important opportunity to ensure that environmental conservation, sustainability, public participation and other important factors are included in transmission planning.

[1] Bill 50, *Electric Statutes Amendment Act,* 2nd Sess., 27th Leg., Alberta, 2009.
[2] *Alberta Utilities Commission Act,* S.A. 2007, c. A-37.2; *Electric Utilities Act,* S.A. 2003, c. E.5-1; *Hydro and Electric Energy Act,* R.S.A. 2000, c. H-16.
[3] Alberta Electric System Operator, *Long Term Transmission System Plan,* (Calgary: AESO, July 2009) at 18; online: Alberta Electric System Operator <http://www.aeso.ca/downloads/AESO_LTTSP_Final_July_2009.pdf>.

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Court of Appeal Opens ERCB's Standing Door a Crack

Kelly v. Alberta (Energy Resources Conservation Board), 2009 ABCA 349

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The issue of standing, or who gets to participate in regulatory proceedings, has been one of long debate in Alberta. It has been most apparent in relation to Energy Resources Conservation Board (ERCB) hearings, given the volume of applications dealt with by the ERCB. A common criticism is that the ERCB has applied its standing test much too narrowly, particularly in light of its public interest mandate. The Court of Appeal recently addressed this issue in *Kelly v. Alberta (Energy Resources Conservation Board)*[1] and provided explicit direction to the ERCB on standing matters.

Background

Standing in ERCB hearings is established under s. 26 of the *Energy Resources Conservation Act*, which requires the ERCB to provide a range of participation rights to a person who may be "directly and adversely affected" by a decision on an application.[2] Where there are no objections to an application by any potentially directly and adversely affected persons, the ERCB will process the application without a hearing.

The ERCB acts as the doorkeeper for public participation in its hearings. The term "directly and adversely affected" is not defined in legislation, and its meaning is determined by the ERCB on a case-by-case basis. Much reliance is placed on public consultation requirements for industry set out in ERCB *Directive 56*, which vary based on proximity to proposed energy facilities.[3] The ERCB has also identified the following factors that it takes into account when determining whether a person is directly and adversely affected:[4]

- Will the proposed project potentially affect safety or economic or property rights?
- Is the person affected in a different or greater way than the general public?
- Is there a clear and direct connection between the proposed project and the rights the person claims will be affected?

The *Kelly* decision

In *Kelly*, three landowners living near two proposed sour gas wells had been held by the ERCB not to be potentially directly and adversely affected and thus ineligible for standing. All three lived outside the emergency planning zone (EPZ), a zone designated around a facility that requires emergency response planning by the operator. An EPZ is significant for standing purposes because it is often used as reference in determining proximity for consultation requirements for sour oil and gas wells and by the ERCB in determining standing.[5]

However, these people based their claim for standing on their location in the protective action zone (PAZ) as modelled by the operator in its licence applications. The PAZ is defined as "an area downwind of a hazardous release where outdoor pollutant concentrations may result in life threatening or serious and possibly irreversible health effects on the public".[6] Its use was introduced by the ERCB in mid-2008; the specific size and location of a PAZ depends largely on the speed and direction of wind when a release occurs from a well or other facility.[7]

The landowners asserted that the possibility of exposure to life threatening or serious health effects from well releases, due to their location in the PAZ, meant that they could be directly and adversely affected by the ERCB's decision to issue the well licences. In response, the ERCB held that this information was not sufficient to establish standing, indicating that the landowners had not shown that they would be affected to a greater degree than the general public nor had they provided any further evidence, beyond residence in the PAZ, regarding potential effects on their rights.[8]

Upon review, the Court of Appeal found that the ERCB had erred in its consideration of the landowners' claim for standing, with respect to the test for standing itself and the evidence necessary to establish possible adverse effect on their rights. It overturned the ERCB's decision that the landowners did not have standing and returned the matter to the ERCB for consideration and redetermination, attaching various directions to the ERCB. Of note in the decision are the following matters:

- The Court held that the test for standing before the ERCB does not include a requirement for a person to show a potential effect to a different or greater degree than the general public;[9]

- The landowners' location in the PAZ was adequate evidence to establish standing and the right to be consulted or notified under ERCB directives may also suffice to give persons standing;[10]

- The Court found that the drilling and completion of the wells did not render the landowners' appeal moot, citing the continuing adversarial relationship between the parties and a concession made by the operator of ongoing health and safety risk during well operation;[11] and

- Unlike many other administrative appeals where the matter has simply been remitted to the board or tribunal for reconsideration, the Court here placed a number of specific directions on its referral of the matter back to the ERCB, related to standing, treatment of evidence and the potential scope of the ERCB's decision on the wells in question.[12]

What does the decision mean?

The immediate significance of *Kelly* is in relation to sour oil and gas wells and facilities. It appeared that much more extensive consultation and broader participation might become the norm to address the rights of people falling within each project's PAZ. The ERCB temporarily suspended issuing licences to sour oil and gas applications to allow it time to develop a response to the Court's ruling in *Kelly*, although it continued accepting and processing these applications.[13]

Ten days later, this suspension was lifted by the ERCB, which indicated its response and future direction. The ERCB indicated that it had made an error in the computer model used to calculate EPZs and PAZs, and had corrected it by adjusting the concentration of hydrogen sulphide used to calculate the PAZ.[14] Interestingly, this change results in PAZs that will not reach beyond the boundaries of an EPZ. Revisions have been made to *Directives 56* and *71* with a view to providing greater clarity on the ERCB's original intent for the PAZ concept and better defining how persons may be directly and adversely affected. Changes have been made to consultation and notification requirements for sour oil and gas applications, particularly in relation to residents within EPZs and PAZs.[15]

It was open to the ERCB to seek to appeal the Court of Appeal's decision to the Supreme Court of Canada. This would have required leave to appeal from the Supreme Court, which is

generally limited to matters that are of public importance or raise an important point of law and would be of national applicability. It is questionable whether the issues raised in *Kelly* would be of national significance, particularly given that other Canadian jurisdictions have more open standing tests and also are more willing to apply public interest standing tests.

Is there an impact beyond sour oil and gas?

While the rights identified in *Kelly* arise from the ERCB's regulatory system for sour oil and gas, the decision may prove persuasive in other energy development situations where parties seek to expand the factors the ERCB should consider in determining standing. The Court of Appeal was very direct in rejecting the ERCB's approach of requiring persons to prove a different or greater effect on themselves than on members of the general public.[16] This puts the future focus directly on the rights claimed by a person who has filed an objection, the validity of those rights, and whether the ERCB's decision on an application may directly and adversely affect those rights.

Taking this in conjunction with the explicit legislative duty imposed on the ERCB to determine whether projects are in the public interest, having regard to economic, social and environmental factors,[17] the Court of Appeal may have opened the standing door wide enough to expand standing considerations beyond those predominantly focused on property ownership in proximity to proposed development. Commentators have discussed the scope of the public interest and the lack of any one "expert" that may assist a regulator by bringing forward the full range of views and values that are relevant to assessing the public interest. Broad participation rights will enable the regulator to hear and consider the wide range of factors relevant to determine the public interest and help avoid avoid capture of the process by any particular interest.[18]

Given the public interest aspect of the ERCB's mandate, it may be time for the Alberta Legislature to revisit the standing test for energy development. An appropriate step would be to remove the reference in section 3 of the *Energy Resources Conservation Act* to direct and adverse effect on rights and provide instead 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. The standing door needs to open far enough to allow full and proper consideration of environmental and social factors alongside economic matters.

[1] 2009 ABCA 349.
[2] R.S.A. 2000, c. E-10, s. 26(2).
[3] Energy Resources Conservation Board, *Directive 56: Energy Development Applications and Schedules* (Calgary: Energy Resources Conservation Board, 2008), Tables 5.1, 6.1 and 7.1.; online: ERCB <http://www,ercb,ca/docs/documents/directives/directive056.pdf>.
[4] Energy Resources Conservation Board, *ERCB Brochure: Understanding Oil and Gas Development in Alberta* (Calgary: Energy Resources Conservation Board, 2008); online: ERCB <http://www.ercb.ab.ca/docs/documents/directives/directive056_brochure.pdf>.
[5] *Supra* note 3, Table 7.1.
[6] Energy Resources Conservation Board, *Directive 71: Emergency Preparedness and Response Requirements for the Petroleum Industry* (Calgary: Energy Resources Conservation Board, 2008) at 69; online: ERCB <http://www.ercb.ca/docs/documents/directives/directive071.pdf>.
[7] *Ibid.*, 12.
[8] *Supra* note 1, para. 13.
[9] *Ibid.*, paras. 31-32.
[10] *Ibid.*, paras. 29, 40.
[11] *Ibid.*, para. 49-52.
[12] *Ibid.*, para. 54.
[13] Energy Resources Conservation Board, News Release, NR 2009-28, "ERCB temporarily suspends issuing sour licences pending response to Court of Appeal decision" (3 November 2009), online: ERCB <http://www.ercb.ca/portal/server.pt/gateway/PTARGS_0_0_303_263_0_43/http%3B/ercbContent/publishedcontent/publish/ercb_home/news/news_releases/2009/nr2009_28.aspx>.

[14] Energy Resources Conservation Board, News Release, NR 2009-29, "ERCB announces changes in response to Court of Appeal ruling" (13 November 2009), online: ERCB <http://www.ercb.ca/portal/server.pt/gateway/PTARGS_0_0_303_263_0_43/http%3B/ercbContent/publishedcontent/publish/ercb_home/news/news_releases/2009/nr2009_29.aspx>.
[15] Energy Resources Conservation Board, Bulletin 2009-41, "Processing of Applications for Sour Oil and Gas Development in Light of the Court of Appeal Decision in the Matter of Kelly v. Alberta (Energy Resources Conservation Board) and Grizzly Resources Ltd." (13 November 2009), online: ERCB <http://www.ercb.ca/portal/server.pt/gateway/PTARGS_0_0_303_263_0_43/http%3B/ercbContent/publishedcontent/publish/ercb_home/industry_zone/rules__regulations__requirements/bulletins/bulletin_2009_41.aspx>.
[16] *Supra* note 1, para. 32.
[17] *Supra* note 2, s. 3.
[18] Jodie L. HierImeier, " 'The Public Interest': Can it Provide Guidance for the ERCB and NRCB?" (2008) 18 J.E.L.P. 279; Raj Anand & Ian G. Scott, Q.C., "Financing Public Participation in Environmental Decision-Making" (1982) 60 Can. Bar. Rev. 81.

Feds Face Firm Greenhouse Gas Bill

Bill C-311 – *The Climate Change Accountability Act*

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Bill C-311, the proposed *Climate Change Accountability Act,* would commit the federal government to firm targets for real reduction of greenhouse gas emissions (GHG).[1] It would assist in a continental approach to GHG reduction, but a constitutional challenge is foreseeable should the bill pass. More urgently, the bill will need amendments to ensure true accountability. It provides modest opportunities for public participation, but is not certain to be enforceable against government.

Status of Bill C-311

Bill C-311 passed its second reading in the House of Commons and currently rests with the Standing Committee on Environment and Sustainable Development. On October 22, 2009, the House voted to return the bill to the Committee for 30 more days. With the bill in Committee, there is little chance that Canada will bring a new GHG law to the United Nations Framework Convention on Climate Change (UNFCCC) in Copenhagen this December.[2] Perceived delay on the eve of the international summit has sparked public demonstrations and disruption of Parliament. When the Committee reports back to the House, motions for amendments will be made and the bill will be read a third time for final approval. An identical bill was approved by the House in 2008, but died before Senate approval when Parliament was adjourned for the 2008 election.

Proponents of Bill C-311 assert that it would commit the government to real GHG reductions. At the second reading debates[3] opponents of the bill argued against its passing based on unknown economic costs, unconstitutional infringement of provincial jurisdiction, and substantial overlap with the existing *Kyoto Protocol Implementation Act* (*KPIA*).[4]

Content of Bill C-311

The basic scheme of Bill C-311 replicates the *KPIA*:

- It affirms that climate change is affecting Canada, and purportedly binds the government to action within a specified time. It requires the Minister of the Environment to publish a plan, followed by a statement of expected GHG reductions.

The statement must include measures to be taken to ensure that both the domestic plan and international duties are met.

- The government has two reporting obligations. The first is directly to the public. The Minister must publish advice received from the National Round Table on Environment and Economy (NRTEE) on chosen reduction measures. This report must be published in a location accessible to the public. The second obligation is to publish a progress report on the plan. This report is to be produced every two years and tabled in Parliament, but must only be published in a manner deemed appropriate by the Minister.

- Cabinet would have discretion to make regulations to limit GHG emissions through targets, standards, permit trading, and enforcement. Specific offences would be created by the regulations. Proposed regulations would be published for comment.

- Provinces are recognized as having power to act on GHG, while federal regulations are to remain within constitutional boundaries. Provinces, municipalities, and First Nations may take stronger measures if they choose.

Bill C-311 is new law in several ways:

- The purpose is broad: To contribute to the prevention of dangerous climate change. The bill states that this threshold is two degrees Celsius above the pre-industrial age. The bill also requires that Canada's position in international affairs align with the objectives of the UNFCCC, whereas the purpose of the *KPIA* is merely to meet obligations set out in the Kyoto Protocol.

- The commitment is ambitious: National GHG is to be 80% below 1990 levels by 2050, and 25% below 1990 levels by 2020. This exceeds Kyoto targets, which require Canada to reduce GHG by 6% from 1990 levels by 2012.

- The plan is narrow: A GHG "emissions target plan" based on scientific evidence. The NRTEE would be required to assess the quality of the technical evidence used to set targets. The *KPIA*, by comparison, allowed Cabinet to consider numerous socio-economic policy factors in the creation of a "climate change plan".

- Regulations are far-reaching: Despite its stated commitment to constitutional boundaries, the bill adds new areas in which Cabinet may regulate, including:

    - Limiting GHG releases in the provinces by applying federal standards to the provinces; and

    - The use or production of equipment, fuels, and technological processes.

- Regulations must be made 10 years before the corresponding target date. Current text of the bill would have regulations in place by December 2009.

Discussion

There is no federal GHG legislation independent of Kyoto Protocol targets. Kyoto ends in 2012, or may be altered in Copenhagen. The *KPIA* will not likely be applicable once there is no Kyoto Protocol to implement, leaving Canada with no meaningful GHG law.

There is federal policy in place, with industry-specific regulations to begin in January 2010.[5] Bill C-311 was drafted to pre-empt the start of regulations under the current approach. The

current approach is intensity-based, requiring specified facilities to reduce their ratio of GHG to economic production, but allowing for increased production. A shift to firm targets would follow in 2020. The policy uses a baseline of 2006, the year in which notice of intent to create regulations was issued.[6] A 2006 baseline avoids the fact that Canadian GHG has risen 20% since the Kyoto baseline of 1990. The current federal approach is rejected by many environmental organizations for its lack of real GHG reductions. The NRTEE has added, after public consultation, that federal leadership on GHG reduction is currently lacking.[7] Policy arguments against hard targets may further be eroded by recent NGO reports suggesting that Canada can meet such targets and still experience economic growth.[8]

A requirement for effective federal GHG law that did not receive attention in the Parliamentary debates is the ability of that law to forward a harmonized continental approach to GHG.[9] Bill C-311 would better serve a continental approach than does current federal policy, as the majority of new GHG legislation at the provincial and state levels creates firm targets on which to base cap and trade regimes and firm targets are near certain in the US. A U.S. Congressional bill with the same '80% by 2050' target as Bill C-311 passed the House of Representatives and entered the Senate.[1] The U.S. Senate responded with its own bill, which also proposes firm targets.[11] Firm targets have been enacted in British Columbia, Manitoba, and Nova Scotia,[12] whereas Alberta and Saskatchewan are following the federal intensity-based approach.[13] Alberta's *Climate Change and Emissions Management Act* makes no reference to "greenhouse gas".[14]

A constitutional challenge is likely if Bill C-311 passes. Some federal jurisdiction over emissions regulation is certain,[15] but the issue will likely be the extent to which regulations limit the ability of provinces to act within their own spheres. Strong federal leadership on GHG will force the question.

The immediate challenge for Bill C-311 is to ensure its own enforceability. This is not currently a feature of the *KPIA*. On October 15th, 2009, the Federal Court of Appeal (FCA) dismissed an attempt by environmental group Friends of the Earth to enforce the *KPIA*.[16] The only reason provided by the FCA for dismissing the application was agreement with the Court below. The Federal Court (FC) had held that compliance with Kyoto targets was "non-justiciable", a matter for Parliament rather than the Courts.[17] The FC held that though the *KPIA* used mandatory language, it was without meaningful content or remedies. The wording of Bill C-311 is almost identical, suggesting that it could be unenforceable as well.

Bill C-311 is stronger than the *KPIA* in at least two ways. First, targets are created directly by the Canadian law, not by any international agreement. Compliance with international treaties is within the discretion of Parliament, but adherence to domestic law is not. Courts may be less apt to allow public officials to ignore domestic law as to do so would undermine the rule of law. Second, it should be easier to measure implementation of the new form of plan. The "emissions target plan" proposed by Bill C-311 must be based on scientific evidence that has passed the scrutiny of an arm's length advisory body. The "climate change plan" required of the *KPIA* allowed government to weight numerous socio-economic policy considerations, making non-compliance difficult to prove.

Enforceability in the courts is crucial because the bill itself provides only modest opportunities for public participation in the implementation of a proper plan. The public may comment on proposed regulations or participate in NRTEE forums, but the Minister is not required to follow advice. Likewise the Minister must provide the public with a report on advice received, but not a report on actual progress made.

Bill C-311 will need amendments to create true accountability in a *Climate Change Accountability Act*. Possibilities include: having the plan prepared by an external body and requiring the Minister to adopt it, subjecting the Minister's statements to oversight by the Auditor General, and providing for citizen's suits and remedies.[18] It should at least provide for judicial review and not re-enact the language of a currently non-justiciable law.

Bill C-311 must do more than simply fill a legislative vacuum when the Kyoto Protocol becomes obsolete. It will not be ready for Copenhagen, but it could provide greater domestic accountability if passed. A bill that already commits to real GHG reductions and a strong federal role could be amended to both empower the public and ensure its own enforceability.

[1] Bill C-311, An Act to ensure Canada assumes its responsibilities in preventing dangerous climate change, 2nd Session, 40th Parl., 2009.
[2] The UNFCCC is the umbrella body to the Kyoto Protocol. Not all UNFCCC parties are Kyoto Protocol signatories.
[3] House of Commons Debates, No. 023 (March 4, 2009) at 18:20 (Hon. Mark Wawara).
[4] *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30.
[5] Canada, Minister of Environment, *Turning the Corner: an action plan to reduce greenhouse gases and air pollution*, (Ottawa: Government of Canada, 2007); Canada, Minister of Environment, *Turning the Corner: regulatory framework for industrial greenhouse gas emissions*, (Ottawa: Government of Canada, 2008).
[6] *Ibid.*
[7] National Round Table on Energy and Environment, *Climate Forward: A Next Step Policy Agenda for Canada, Report on the NRTEE's 20th Anniversary Forum* (Canada: NRTEE, 2008).
[8] Matthew Bramley, Pierre Sadik and Dale Marshall, *Climate Leadership, Economic Prosperity: a final report on an economic study of greenhouse gas targets and policies in Canada* (N.P.: Pembina Institute and David Suzuki Foundation, 2009); Jaccard and Associates, *Exploration of Two Canadian Greenhouse Gas Emissions Targets* (Vancouver: Pembina Institute, 2009).
[9] National Round Table on Environment and Economy, *Achieving 2050: a carbon pricing policy for Canada* (Canada: NRTEE 2009); Yves Faguy, "Turning Up The Heat", *National* (September, 2009) 14, online: <www.cba.org>.
[10] *Clean Energy and Security Act*, ACES, H.R. 2454.
[11] U.S., Bill S.1733, *A bill to create clean energy jobs, promote energy independence, reduce global warming pollution, and transition to a clean energy economy*, 111th Congress, 2009.
[12] *Greenhouse Gas Reduction Targets Act*, S.B.C. 2007, c. 42; *Climate Change and Emissions Reductions Act*, C.C.S.M. c. C135; *Environmental Goals and Sustainable Prosperity Act*, S.N.S. 2007, c. 7.
[13] Bill 95: *Act respecting the Management and Reduction of Greenhouse Gases and Adaptation to Climate Change*, 2nd Sess., 26th Leg., Saskatchewan, 2009 (ordered to a second reading during 3rd Sess., 26th Leg.); Saskatchewan, Ministry of Environment; *Management and Reduction of Greenhouse Gases and Adaptation to Climate Change Technical Briefing Package* (Saskatchewan: 2009); *Climate Change and Emissions Management Act*, S.A. 2003, c. C-16.7. [*CCEMA*].
[14] *CCEMA*, *ibid.*
[15] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.
[16] *Friends of the Earth v. Canada* (Minister of the Environment) 2009 FCA 297.
[17] *Friends of the Earth v. Canada* (Minister of Environment) 2008 FC 1183.
[18] Conservation Voters of British Columbia, *Creating a Law to Fight Global Warming (The Global Warming Solutions Act)*, (2006) [unpublished, archived at University of Victoria Environmental Law Centre].

All About the "Riffles": Critical Habitat Identification Under *SARA*

Environmental Defence Canada v. Minister of Fisheries and Oceans 2009 FC 878

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For the second time in recent months the Federal Court has reviewed and assessed the government's approach to identification of critical habitat under the *Species at Risk Act* (*SARA*).[1] The Court in *Environmental Defence Canada v. Minister of Fisheries and Oceans* (the

"Dace Case") considered the federal government approach to identification of critical habitat of an endangered minnow, the Nooksack Dace.[2]

Identification of critical habitat is central to species protection under *SARA* as it is a legislative prerequisite to the application of prohibitions against habitat destruction under the Act. The Court in the Dace Case reaffirmed the mandatory nature of critical habitat identification during the recovery strategy process and provided guidance as to what is meant by "critical habitat".

In what Justice Campbell described as "a story about the creation and application of policy by the Minister in clear contravention of the law, and a reluctance to be held accountable for failure to follow the law", the case focused, in part, on the fact that there was a blanket approach to removal of critical habitat identification in recovery strategies directed by the government.[3]

As with all endangered and threatened species under *SARA*, preparation of a "recovery strategy" was required for the dace, which "must include [in part]…an identification of the species' critical habitat, to the extent possible, based on the best available information".[4] A draft recovery strategy had been posted on the *SARA* Public Registry, wherein critical habitat was identified. Subsequently, a final recovery strategy was posted, with the identification of critical habitat removed.[5]

The case confirmed the approach to critical habitat identification set out in *Alberta Wilderness Association v. Minister of Environment*, namely that the Minister must identify critical habitat "to the extent possible, based on the best available information".[6] In the Dace Case, the federal government had argued that there had been no decision regarding critical habitat made by the Minister, and that deferral of critical habitat identification was to allow for a peer review process. The Court noted that the decision not to make a decision about critical habitat "applied the belief that the determinations [of critical habitat] could be postponed on policy grounds as a defensible action", and rejected this assertion in light of the knowledge available to the recovery team and the Minister at the time.[7] Specifically, the work conducted around dace habitat identified the importance of "riffles", or "areas of shallow turbulent flow over rocky substrate", to the species' spawning, resting, foraging and overwintering.[8] Further, a minimal viable population size for the dace was estimated and integrated with information regarding available riffle area, leading to critical habitat identification. The evidence before the Court clearly articulated both critical features of dace habitat and identified specific locations where the dace occurred.

In the face of this evidence, the government argued that critical habitat was to be identified by an area alone, and not through the identification of features that provided functions critical to the species' survival.[9] This argument would have minimized the relevance of the presence of riffles and related analysis for maintaining a minimal viable population put forth by the dace expert. The Court rejected the government's argument, noting that habitat "is not just a location, but a location that includes its special identifiable features".[10]

The Court, in coming to its decision, reasserted the principle set out in *Alberta Wilderness Association v. Minister of Environment*, that "there is no discretion vested in the Minister in identifying critical habitat under the SARA".[11] The Minister must identify critical habitat based on the best available information to the extent possible.[12] Further, Justice Campbell noted that the "totality of [the federal government] conduct is fundamentally inconsistent with the precautionary principle as codified in SARA".[13]

Discussion

This decision is of significance as it rejects deferrals of critical habitat identification based on government policy decisions that are not focused on species recovery. The Department of Fisheries and Oceans attempted to defer critical habitat identification from the recovery planning stage, where there are specific statutory timelines in place, to the action planning stage, where no statutory timelines exist. If such a deferral were allowed, the amount of delay in identifying critical habitat would undoubtedly be significant.

The decision ensures that identification of critical habitat occurs in a timely fashion where a level of scientific information is readily available to the Minister (and the information was demonstrably before the Minister at the time of the decision). The decision may also have consequences for several recovery strategies currently in place. Ecojustice, counsel for the applicants in the case, indicated that they believe "the Court's decision means that DFO must fix at least 17 recovery strategies".[14]

Of particular note is the Court's apparent discontent with the reasoning for deferring critical habitat identification. Specifically, the memorandum of the Regional Director (with which the Minister's representative agreed), after stating that identification of critical habitat was not to occur in the recovery strategies, stated the following:[15]

> We would like to proceed cautiously with the identification of critical habitat, while still recognizing that we have a legal obligation to so, given that we may be setting a precedent where we are uncertain as to the potential impacts of doing so.

This reason attracted the following comment from the court.[16]

> A proper question to ask about this statement is: potential impact on what or whom? It is obvious that the impact on the Nooksack Dace is not the focus. The applicants have advanced the suggestion that political and socioeconomic considerations came into play in…[the Regional Director's] direction and …[the Deputy Minister's] decision. While I consider that this suggestion is not directly relevant to the determination of the present Application, it is clear that no political or socioeconomic considerations can be applied by a competent Minister in meeting Parliament's intention as expressed by the mandatory provisions of s. 41(1) of SARA.

This comment is of note as it goes directly to an ongoing criticism of the recovery planning process under *SARA*: that it appears that decisions regarding inclusion of critical habitat in recovery strategies are being made on the basis of any number of factors but the "best available information". In this regard, the decision reaffirms the obligation of the Minister and federal government departments to meet not only the prescriptive language of *SARA* but also its intent and purpose. One might say the decision is likely to have a "riffle" effect, not only on other existing recovery strategies, but also on how policy around critical habitat is formulated and applied.

[1] S.C. 2002, c. 29.
[2] 2009 FC 878
[3] *Ibid*. at para. 2.
[4] Supra note 1 at s. 41.
[5] Supra note 2 at paras. 8-18.
[6] 2009 FC 710.
[7] *Supra* note 2 at para. 28.
[8] *Ibid.* at para. 14.
[9] Ibid. at para. 50.

[10] *Ibid.* at para. 58.
[11] *Ibid.* at para. 40.
[12] *Ibid.*
[13] *Ibid*.
[14] Ecojustice, Media Release, Legal Victory for endangered species across Canada: Court ruling means Department of Fisheries and Oceans must overhaul recovery plans (10 September 2009), online: Ecojustice <http://www.ecojustice.ca/media-centre/press-releases/legal-victory-for-endangered-species-across-canada>.
[15] *Supra* note 2 at para. 41. [Court's emphasis]
[16] *Ibid*