

**AN UPDATE ON**  
**ALBERTA'S REGULATORY FRAMEWORK**

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## TABLE OF CONTENTS

<b>I.</b>	<b>Amendments to the Environmental Protection and Enhancement Act</b> . . . . .	1
(a)	Ammonite Shell . . . . .	1
(b)	Wells . . . . .	1
(c)	Interdepartmental Committees . . . . .	2
(d)	Delegation of Regulation-Making Authority . . . . .	2
(e)	Debt as Grounds to Refuse Approval . . . . .	2
(f)	Notices of Appeal . . . . .	2
(g)	Release Reporting . . . . .	2
(h)	Conservation and Reclamation . . . . .	3
(i)	Hazardous Recyclables . . . . .	3
(j)	Waste . . . . .	4
(k)	Enforcement Orders . . . . .	4
(l)	Administrative Penalties . . . . .	5
(m)	Limitation of Liability for Executors, Administrators, Receivers and Trustees . . . . .	7
(n)	Amendment of Environmental Protection Orders . . . . .	8
(o)	The <i>Water Act</i> . . . . .	8
<b>II.</b>	<b>Environmental Assessments Under EPEA - Largely Unchanged</b> . . . . .	8
(a)	Recent Development - <i>Alberta Cement</i> . . . . .	10
<b>III.</b>	<b>Approvals Under EPEA - Largely Unchanged</b> . . . . .	10
<b>IV.</b>	<b>Enforcement Options Under EPEA - Largely Unchanged</b> . . . . .	11
<b>V.</b>	<b>The Environmental Appeal Board - Recent Developments</b> . . . . .	12
(a)	Chem-Security - Power of Board to Accept New Evidence . . . . .	13
(b)	Nurani - Power of Board to Reconsider Past Decisions . . . . .	13
(c)	Laidlaw - When Board will Exercises its Discretion to Reconsider Decisions . . . . .	14
(d)	Iwaskow - Application of Procedural Rules to Citizen-Appellants . . . . .	15
(e)	Ash - Objectives in Granting Costs . . . . .	16
(f)	Chalifoux - Board Bound by Rules of Natural Justice . . . . .	16

<b>VI.</b>	<b>The <i>Water Act</i></b> .....	17
(a)	Purpose of the Act .....	17
(b)	Water in Alberta is Property of the Crown .....	18
(c)	The <i>Water Act</i> and EPEA .....	18
(d)	Water Management Framework .....	19
(e)	Priority of Rights to Divert Water .....	19
(f)	Designation of Activities Requiring Approval .....	21
(g)	Transfer of Water Rights .....	21
(h)	Resolution of Disputes and Water Management Orders .....	22
(i)	Enforcement .....	22

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**Amendments to the Environmental Protection and Enhancement Act**

A number of amendments were made to the *Environmental Protection and Enhancement Act* ("EPEA") in Bill 33, the *Environmental Protection and Enhancement Amendment Act, 1998*. The four major purposes of the amendments, as expressed by the Minister of Environmental Protection at second reading, are:

1. To enhance the ability of the government to recover its costs;
2. To streamline and clarify the regulatory process;
3. To provide for more regulation powers; and
4. To make some minor miscellaneous administrative improvements.

The following are brief summaries of the amendments.

**Ammonite Shell**

Section 1 of EPEA is amended to include the attempted recovery of ammonite shell in the definition of "quarry". This is intended to address the increasing interest in ammonite shell in Alberta and to clarify how EPEA applies to those who undertake to recover it.

**Wells**

The definition of "well" has also been amended to clarify the inclusion of both production and injection wells. While this does not change the application of EPEA, it does clarify that injection wells are regulated as wells under EPEA. Further, approvals of water wells will in the future be regulated under the *Water Act* and they have therefore been excluded from EPEA. Consequential amendments to the *Water Act* were included in the Amendment Act to effect this change.

### **Interdepartmental Committees**

Section 10 has been amended to delete references to "interdepartmental committees" and to include reference to employees of the federal government and federal agencies as potential participants in committees. This change will allow federal and provincial officials to work together as is contemplated in the federal provincial harmonization initiative discussed earlier in this conference by the Minister of Environmental Protection.

### **Delegation of Regulation-Making Authority**

Amendments to s. 35 of EPEA authorize the making of regulations delegating the performance of a number of functions.

### **Debt as Grounds to Refuse Approval**

A new s. 62.1 is added to EPEA which permits the Director to refuse to issue an approval of a registration where the applicant is indebted to the government of Alberta under EPEA or any other enactment.

### **Notices of Appeal**

"Notices of objection" have been changed to "notices of appeal" throughout EPEA. This presumably is intended to clarify that the purpose of forwarding such a notice to AEP is to launch the appeal process.

### **Release Reporting**

The release reporting provisions of the Act have also been expanded, requiring a person who releases or causes a release to report the release to any employer and including the person having control of the substance in the group of persons who must report releases. This change clarifies the duties of the person having control of the released substances to report the release.

### **Conservation and Reclamation**

A number of changes have been made to Part 5 of EPEA, which deals with conservation and reclamation. First, the definition of "operator" has been amended to include a working interest participant in a well, and "working interest participant" has been defined to include both legal and beneficial ownership and control of an interest in a well. Secondly, land owned by the Crown in right of Canada has been added to the definition of "specified land," thus including within the purview of EPEA the duty to conserve and reclaim federal Crown land. Thirdly, inspectors have been given the discretion to refuse to issue a reclamation certificate where the applicant is indebted to the Government. Finally, in order to clarify that the duty of an operator to conserve is distinct from its duty to reclaim, the wording of s. 122(1)(a) has been changed to set out conservation and reclamation as separate duties.

It is also notable that s. 84 has been amended to include a right of appeal in situations where the Director cancels a reclamation certificate, whether or not a reclamation inquiry has been conducted, and where the Director refuses to accept an application for a reclamation certificate or an inspector refuses to issue one.

### **Hazardous Recyclables**

The provisions of EPEA dealing with recyclables, and with hazardous recyclables in particular, have also been amended. The definition of "dispose of" has been broadened by the replacement of the phrase "means to" with the word "includes", and to include deposit as a type of disposal. Section 162(b) has been clarified by replacing the phrase "in respect of which an approval or registration has been issued authorizing it" with the phrase "that is authorized under this Act." Further, the regulation making authority under this section has been expanded to include the exemption of any person from the application of all or part of section 162.

### **Waste**

Section 168.1 has been replaced and a new section 168.2 added. These sections provide:

- 168.1 No person shall dispose of waste except
- (a) at a waste management facility, or in a container the contents of which will be taken to a waste management facility, that is the subject of the appropriate approval, registration or notice required under this Act, or
  - (b) in accordance with the written authorization of the Director.

168.2 For the purposes of sections 169 to 173, waste is deemed to be disposed of on public land, on a highway, on land owned or administered by a local authority, on land owned by another person or on, into or under water or ice, as the case may be, if the waste is in another location and by natural forces moves or is moved to the public land, highway, land owned or administered by the local authority, land owned by another person or on, into or under the water or ice.

The amendments to sections 168.1 and 168.2 come into force upon proclamation.

The regulation making powers under section 178 are expanded to permit the Director to exempt anything from the definition of waste, as well as to exempt any person from the application of all or part of the waste division of EPEA.

### **Enforcement Orders**

The enforcement provisions of EPEA have also undergone some significant changes, especially with regard to the powers of the Minister to collect costs. Section 204(2)(b) now clarifies that the Minister may, by order, require any person who purchases land to which an enforcement order relates, including on a sale to realize on a security interest, to pay to the Minister that portion of the sale price up to the amount owing in respect of costs. In addition, the following section dealing with costs has been added:

- 205.1 Costs incurred by the Director under section 204 or 231 and costs incurred by an inspector or investigator or the Director in taking emergency measures under section 104 or 145 constitute a charge in favour of the Government,

- (a) in the case of costs incurred under section 204 or 231, on the land to which the order relates and on any other land that,
  - (i) is contiguous to the land to which the order relates,
  - (ii) is used for the same or a related purpose, and
  - (iii) is owned by the person who owns the land to which the order relates or by the person to whom the order is directed,

and

- (b) in the case of costs incurred under section 104 or 145, on the land on which the emergency measures were taken and on any other land that
  - (i) is contiguous to the land on which the emergency measures were taken,
  - (ii) is used for the same or a related purpose, and
  - (iii) is owned by the person who owns the land on which the emergency measures were taken,

and the charge is enforceable in the same way as a mortgage or other security on land and ranks above any other claim, right or charge against the land, notwithstanding any other law of Alberta.

Section 202 has been amended to give the Director the explicit power to amend an enforcement order by adding to the list of persons to whom the order is directed.

### **Administrative Penalties**

The addition of s. 206.1 expands limitation period for civil proceedings stemming from an alleged release of a substance, providing that:

206.1(1) A judge of the Court of Queen's Bench may, on application, extend a limitation period provided by a law in force in Alberta for the commencement of a civil proceeding where the basis for the proceeding is an alleged adverse effect resulting from the alleged release of a substance into the environment.

(2) An application under subsection (1) may be made before or after the expiry of the limitation period.

(3) In considering an application under subsection (1), the judge shall consider the following factors, where information is available:

- (a) when the alleged adverse effect occurred;

- (b) whether the alleged adverse effect ought to have been discovered by the claimant had the claimant exercised due diligence in ascertaining the presence of the alleged adverse effect, and whether the claimant exercised such due diligence;
- (c) whether extending the limitation period would prejudice the proposed defendant's ability to maintain a defence to the claim on the merits;
- (d) any other criteria the court considers to be relevant.

This extension of the limitation period comes into effect upon proclamation.

To simplify the enforcement of orders, the following section has been added to EPEA:

210.1(1) In this section, "order" means

- (a) a designation of an area of the environment as a contaminated site under section 110,
- (b) an enforcement order, and
- (c) an environmental protection order.

(2) The Director may submit a certified copy of an order to

- (a) the Registrar of Land Titles under the *Land Titles Act*, or
- (b) the Registrar of the Metis Settlements Land Registry under the *Metis Settlements Act*.

(3) On receiving a certified copy of an order under subsection (2), the Registrar shall

- (a) endorse a memorandum of the order on the certificate of title to the land to which the order relates, or
- (b) record the order against the Metis title register for the land to which the order relates,

as the case may be.

(4) Notwithstanding any other Act, an endorsement or record under this section does not lapse and shall not be cancelled except on the receipt by the Registrar of a notice in writing from the Director requesting the cancellation.

(5) On making an endorsement or record under this section, the Registrar shall notify the Director to that effect, and the Director shall notify in writing

- (a) the registered owner of the land to which the order relates and all other persons who have a registered interest against the land, or

(b) the person against whose Metis title the order is recorded and all other persons who have a recorded interest against the Metis title, as the case may be.

In addition, section 223 has been amended to provide that, subject to the right of appeal to the EAB, the notice of administrative penalty and the regulations, the Minister may file a copy of the notice of administrative penalty at the Court of Queen's Bench, at which time it is enforceable as if it were a judgement of the Court.

The penalty provision in s. 225(f) has been clarified to provide that the maximum administrative penalty which may be imposed for certain contraventions is \$5,000 for each contravention or, in the case of an ongoing contravention, for each day or part of a day on which the contravention continues.

#### **Limitation of Liability for Executors, Administrators, Receivers and Trustees**

The limitation on the liability for executors, administrators, receivers, receiver-managers, and trustees found in s. 226 of EPEA has been modified. The liability of such persons is typically limited to the value of the assets being administered. However, s. 226(4) had provided that such persons could be held personally liable where they contributed to further accumulation or the continued release of the substance after becoming aware of the presence of the substance in, on or under the contaminated site. The new provision limits their personal liability to cases where the situation identified in the environmental protection order ("EPO") has resulted from or been aggravated by their gross negligence or wilful misconduct. This amendment will come into force on proclamation, and will make the EPEA consistent with the new s. 14.06(2) of the *Bankruptcy and Insolvency Act* (SC 1997, c. 12), which came into force on September 30, 1997.

Also notable with regard to such persons is the amendment to s. 127, which now provides that environmental protection orders may be issued to successors, assignees, executors,

administrators, receivers, receiver-managers, trustees and persons who act as their principal or agent, as well as to the person to whom the original reclamation certificate was issued, if the Director is of the opinion that further work may be necessary after the issuance of a reclamation certificate.

### **Amendment of Environmental Protection Orders**

Section 229 has also been amended, providing that the Director may amend an EPO by adding to the list of persons to whom it is directed, and section 231 is amended in manner similar to s. 204, providing that the Minister may by order direct any person who purchases land to which an EPO applies to pay the purchase price to the Minister rather than to the vendor.

### ***The Water Act***

The Amendment Act also makes consequential changes to the *Water Act* to facilitate the transfer of the regulations of water well drilling from EPEA to the *Water Act*.

### **Environmental Assessments Under EPEA - Largely Unchanged**

Assessments and approvals are dealt with in Part 2 of EPEA. The purpose of the environmental assessment process is set out in section 38, which provides that:

38 The purpose of the environmental assessment process is

- (a) to support the goals of environmental protection and sustainable development,
- (b) to integrate environmental protection and economic decisions at the earliest stages of planning an activity,
- (c) to predict the environmental, social, economic and cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the proposed activity, and
- (d) to provide for the involvement of the public, proponents, the Government and Government agencies in the review of proposed activities.

The Director of Environmental Assessment determines whether a proposed activity will trigger the assessment process where the Director is of the opinion that the potential environmental impacts of a proposed activity warrant further consideration. Where the proposed activity is identified as a "mandatory activity" in the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, the Director must order an Environmental Impact Assessment ("EIA"). If not, the Director is to conduct an initial review, considering the location, size and nature of the proposed activity, the complexity and technology to be employed in the proposed activity, concerns which have been expressed by the public, the presence of similar activities in the same area, any other criteria set out in the regulations, and any other relevant factors. If the Director determines that further assessment is required, the project proponent must publish a notice in an area newspaper, indicating that an EIA has been ordered and that any person directly affected by the proposed activity may submit a written statement of concern to the Director.

The next step in the process is for the Director to prepare an environmental screening report deciding whether an EIA is required. In making this determination, the Director must give due consideration to all statements of concern which have been submitted. If the Director determines that an EIA is required, the proponent is required to prepare an EIA in accordance with the provisions of EPEA and the *Environmental Impact Assessment Regulation*. Notwithstanding any decision by the Director or any exemption contained in the regulations, the Minister has the discretion to order that an EIA report be prepared by a proponent.

### **Recent Development - *Alberta Cement***

#### **Broad Authority Given to Department in Environmental Impact Assessments**

In *Alberta Cement Corporation v. Alberta (Environmental Protection)*, [1997] A.J. No. 893 (Q.B.), the Plaintiff had applied for judicial review of a decision of the Director in charge of Environmental Impact Assessments ("EIAs") that an EIA undertaken by the Plaintiff was not complete. The Court dismissed the application, noting that the Director's expertise lies

clearly within the environmental assessment process and that the Director is likely to have far more knowledge of relevant matters than the typical judge. The Court concluded that the purpose of EPEA is best served by affording deference to decisions of the Director and reviewing such decisions based on a standard of patent unreasonableness.

### **Approvals Under EPEA - Largely Unchanged**

EPEA and the *Approvals and Registrations Procedure Regulation* (AR 113/93), the *Activities Designation Regulation* (AR 211/96), and the *Environmental Protection and Enhancement (Miscellaneous) Regulation* (AR 118/93) set out the activities which require approval and the process to be followed is issuing such approvals. The proponent of an activity requiring approval must submit an application for approval, providing the information required under the *Approvals and Registrations Procedure Regulation* along with any other information which may be required by the Director. Once the application is complete, public notice of the application is to be given. The requirement for public notice may be waived by the Director in an emergency, where the activity falls within the definition of "routine" found in the *Environmental Protection and Enhancement (Miscellaneous) Regulation*, and where adequate notice has already been given. Notice of the application is to include an invitation for persons directly affected by the application to submit a written statement of concern to the Director within a specified time period.

Upon receipt of the completed application and the expiry of the time period set out in the notice, the Director reviews the application:

to determine whether the impact on the environment of the activity, the change to the activity or the amendment, addition or deletion of a term or condition of an approval is in accordance with the Act and the regulations made under the Act. (s. 6(1) of the ARP Regulations)

As part of the review process, the Director may refer the application to a Referral Committee established under s. 7 of the ARP Regulations, or may require the applicant to conduct public meetings to provide the public with additional information about the proposed activity.

If an approval is issued, it is typically valid for a term of ten years and may contain terms and conditions thought necessary to protect the environment.

### **Enforcement Options Under EPEA - Largely Unchanged**

Enforcement is dealt with primarily in Part 10 of EPEA, which set out a broad framework of enforcement powers, including:

- right of entry and inspection;
- search and seizure powers;
- enforcement orders;
- court orders; and
- prosecutions.

EPEA also protects civil remedies which may arise under EPEA, at common law or under any other statute. This part provides that the Minister may establish programs to promote the reporting of acts of omissions that are detrimental to the environment and offences under EPEA.

The Pollution Control Division of AEP has developed an Enforcement Program and Enforcement Principles, the purpose of which is to ensure compliance with EPEA and the regulations by providing a clear understanding of how they will be enforced. The Enforcement Principles set out the government's approach to compliance with environmental legislation, while the Enforcement Program sets out the implementation of the investigative and enforcement functions associated with the administration of the legislation.

The objective of the Enforcement Program is stated to be protection and enhancement of the environment through responses which fit into the categories of deterrence, remediation and education. The Pollution Control Division, which has primary responsibility for enforcement of EPEA, states that its mission statement is "to achieve the protection, enhancement and wise use of the environment, now and in the future, by providing firm but fair enforcement of environmental legislation in a timely and consistent manner."

### **The Environmental Appeal Board - Recent Developments**

The Environmental Appeal Board (the "EAB") is established under Part 3 of EPEA. Section 84 sets out the circumstances in which appeals may be submitted to the EAB. Upon receipt of a notice of appeal pursuant to s. 84, the EAB is required to conduct a hearing of the appeal unless the parties consent to the issuance of a decision without a hearing of the appeal. A number of recent court cases have discussed the powers of the EAB in holding hearings.

#### ***Chem-Security***

##### **Power of Board to Accept New Evidence**

In *Chem-Security (Alberta) Ltd. v. Alberta (Environmental Appeal Board)*, [1997] A.J. No. 738, the Court of Appeal dealt with the issue of the power of the EAB to deal with new evidence on appeal. The Court clarified that pursuant to s. 87(2), a hearing before the EAB is a *de novo* hearing. As such, the Board may hear evidence which was not before the initial decision-maker.

#### ***Nurani***

##### **Power of Board to Reconsider Past Decisions**

At issue in *Nurani v. Alberta (Environmental Appeal Board)*, [1997] A.J. No. 1163, was the jurisdiction of the EAB to reconsider its decisions pursuant to s. 92.1 of EPEA. The Applicant, Nurani, had applied to the Director of Chemical Assessment and Management

Division of AEP for an approval to operate a bottle depot. When the application was denied by the Director, Nurani appealed his decision to the EAB. The EAB heard the Nurani appeal without notice to other interested parties, and overturned the Director's decision. Several intervenors then applied to the EAB for reconsideration of its report and recommendations pursuant to s. 92.1 of EPEA on the ground that they had not received adequate notice of the hearing. When the EAB announced its intent to hold a hearing to determine whether it should reconsider its decision, Nurani applied to the Court of Queen's Bench for an order in the nature of prohibition.

In rendering its decision, the Court noted that the right of the EAB to reconsider its decisions is explicitly set out in s. 92.1, which provides that:

Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it.

As EPEA is legislation in public interest, it is to be given a liberal and flexible interpretation. Further, the Court indicated that the privative effect of s. 92.2, which gives the EAB "exclusive and final jurisdiction" to do anything it is empowered to do under Part 3 of EPEA, cannot be ignored by the Court. As such, so long as the decision of the EAB to reconsider does not amount to a breach of natural justice, the EAB has discretion to do so.

The EAB thereafter proceeded with a new hearing and came to the same conclusion as the original panel. As such, the EAB stated that there was no basis on which to set aside the previous Report and Recommendation, which were allowed to stand along with the approval of the Minister. (*Nurani v. Alberta (Department of Environmental Protection)*, May 22, 1998, Appeal No. 97-026)

***Laidlaw***

**When Board will Exercises its Discretion to Reconsider Decisions**

In *Laidlaw Environmental Services (Ryley) Ltd. v. Alberta (Department of Environmental Protection)*, April 7, 1998, Appeal No. 96-059, Laidlaw requested that the EAB review its previous decision recommending that the Director approve Laidlaw's hazardous waste storage facility with three changes.

its decision against reconsideration of its earlier decision, the Board provided instruction on factors that it will consider in determining whether to exercise its discretion to reconsider decisions. Firstly, the EAB noted that the common underlying question is all requests for reconsideration is whether granting reconsideration will promote the public interest. Secondly, there must be exceptional, compelling circumstances to warrant reconsideration. Thirdly, the costs of delay and the interest of all in finality will be considered. Fourthly, the Board will consider whether other parties will be prejudice other parties to the original proceeding by taking advantage of their lack of financial resources. Finally, the Board noted that it will not routinely grant reconsideration requests on the grounds that "new" evidence is available, as to do so would open the process up to appeal upon appeal based upon new research or new scientific evidence.

***Iwaskow***

**Application of Procedural Rules to Citizen-Appellants**

In *Iwaskow v. Alberta (Department of Environmental Protection)*, April 30, 1998, Appeal No. 98-001, the Board considered to what extent its procedural rules will be strictly applied to public citizen appellants. Mr. Iwaskow had forwarded an undated letter to the EAB regarding an approval issued to Talisman Energy Inc. for operation of the Teepee Creek sour gas processing plant. The letter did not identify itself as a notice of objection or appeal, but set out a number of concerns which Mr. Iwaskow had apparently raised with the Director prior to the issuance of the approval. The Board followed up on this letter by giving Mr. Iwaskow

several opportunities to clarify his concerns and to provide information establishing that he was directly affected by the plant and therefore entitled to institute an appeal. Mr. Iwaskow failed to respond to the Board's inquiries in anything but general terms.

In determining that Mr. Iwaskow was not directly affected and dismissing his appeal, the Board noted that:

. . . it is often necessary to apply its rules of procedure leniently in appeals brought by private citizens, again, particularly when they are not represented by counsel, lack the assistance of scientific efforts, and have done everything they can otherwise do on their own behalf. . . . The Board also believes that there are limits as to how far it can and should go in accommodating private citizen-appellants. . . . Appellants who are not themselves scientists must be willing to comb through the Department's records, conduct their own survey of the scientific literature, and obtain other relevant information, in order to demonstrate the validity of their concerns. Appellants must overcome the required burden of proof to assist the Board in discharging its task.

### *Ash*

#### **Objectives in Granting Costs**

In *Ash v. Alberta (Department of Environmental Protection)*, July 2, 1998, No. 97-032-C-2, the Board clarified the approach it will take in determining whether a party to an appeal should receive an award of costs. The Board noted that it believes that decisions on requests for cost should be determined with the primary objective of "making the appeal process a meaningful 'opportunity' under the Act for public participation, to help enable citizens to fulfill their 'responsibility' for protecting the environment, and to empower citizens in order to promote sustainable development." Further, although a successful appeal is typically a pre-requisite to an award of costs, costs awards are not made by the EAB on a "loser pays" basis. Provided that a citizen-appellant has raised valid public interest concerns, the Board will typically not require the appellant to pay the approval holder's costs even if the appellant is unsuccessful.

### ***Chalifoux***

#### **Board Bound by Rules of Natural Justice**

In *Chalifoux v. Alberta (Environmental Appeal Board)*, [1998] A.J. No. 532, the Alberta Court of Appeal upheld a decision of the Court of Queen's Bench finding that the EAB had failed to provide procedural fairness or natural justice to Chalifoux and therefore had lost its jurisdiction. Chalifoux, an elected Headman of the Swan River First Nation, was found by the EAB to be a representative of aboriginal persons who hunt, fish and trap in the Swan Hills and, as such, to be directly affected by the operations of the hazardous waste plant operated by Chem-Security (Alberta) Ltd. ("Chem-Security"). Chalifoux had applied for reconsideration by the EAB of its decision to limit the scope of a hearing into the operating approval of the plant. Chem-Security subsequently wrote to the EAB questioning how it intended to deal with the application. In response, the EAB invited Chem-Security and AEP to respond to the application. Upon receipt of these responses, and without allowing Chalifoux an opportunity to reply to the responses, the EAB denied Chalifoux's application.

Chalifoux applied to the Court of Queen's Bench for judicial review of the EAB decision. The Court held that in denying Chalifoux an opportunity to put forth his case supporting his initial request, or an opportunity to respond to the submissions made by Chem-Security and AEP before making its decision, Chalifoux was denied natural justice.

### **The Water Act**

The *Water Act* (the "Act") was assented to on September 3, 1996, but has not yet been proclaimed. Proclamation is expected in the fall of 1998. Once proclaimed, it will replace the *Water Resources Act* (RSA 1980, c. W-5).

#### **Purpose of the Act**

The purpose of the Act is expressed in s. 2:

2 The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta's economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to trans-boundary water management;
- (f) the important role of comprehensive and responsive action in administering this Act.

### **Water in Alberta is Property of the Crown**

The Act vests the property in and the right to the diversion and use of all water in the Province of Alberta in the Crown, except as may be provided in the regulations, and further provides that the Crown is bound by the Act.

### **The *Water Act* and EPEA**

The interplay between EPEA and the Act is set out in section 5 of the Act, which provides:

5(1) If the Director is of the opinion that an activity, diversion of water or operation of a works requires an approval under the Environmental Protection and Enhancement Act, the Director

- (a) must refer the activity, diversion of water or operation of a works for review, and
- (b) may make any recommendations that the Director considers appropriate,

to a Director under the Environmental Protection and Enhancement Act.

- (2) A referral may be made under subsection (1) whether or not
- (a) an approval has been or may be issued,
  - (b) a preliminary certificate or licence has been or may be issued, or a registration has been effected, with respect to the diversion of water or the operation of a works, or
  - (c) a term or condition of a preliminary certificate or licence applies to the diversion of water or the operation of a works.

The Director is prohibited from issuing or amending an approval, preliminary certificate or licence, or approve a transfer if the Director is of the opinion that the environmental assessment provisions of EPEA have not been complied with.

### **Water Management Framework**

Part 2 of the Act requires that the Minister establish a framework for water management planning in the Province within three years after the Act is proclaimed in force. The framework must include a strategy for the protection of the aquatic environment, which strategy may include identification of criteria to determine the order in which water bodies or classes of water bodies are to be dealt with, guidelines for establishing water conservation objectives, matters relating to the protection of biological diversity, and guidelines and mechanisms for implementing the strategy. The Minister is required to consult with the public in the development of this framework and the strategy. The Minister is also authorized to establish water guidelines, and the Director is authorized to establish water conservation objectives.

### **Priority of Rights to Divert Water**

Part 3 of the Act deals with the right to divert water and the priority of rights. The Act provides that a person who diverts water for household purposes has priority over persons who

are entitled to divert water pursuant to an approval, licence or registration. Household purposes are defined as:

the use of a maximum of 1250 cubic metres of water per year per household for the purposes of human consumption, sanitation, fire prevention and watering animals, gardens, lawns and trees.

The Act addresses the issue of riparian rights as follows:

22(1) Notwithstanding the common law, 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.

(2) A person described in subsection (1) may commence an action with respect to a diversion of water only in respect of a diversion of water that is not authorized by this Act or under an approval, licence or registration.

(3) Nothing in this Act is to be construed so as to repeal, remove or reduce any rights held at common law by a riparian owner or occupant of land or by a person who owns or occupies land under which groundwater exists, other than the right to the continued flow or diversion of water.

The priority of persons who divert water for other than household purposes is determined by the number assigned to their approval, licence or registration. Existing authorities to divert water are deemed licences under the Act and are assigned a priority number which corresponds with the priority of the original licence or approval.

For uses of water other than household uses, the Act sets out four basic ways in which a party may either obtain the right, or protect the priority of the right, to divert or use water. These are registrations, approvals, licences, and preliminary certificates.

Persons who are traditional agricultural users of water and are not required to obtain a licence or approval to divert water may apply for registration. The priority number assigned upon registration will correspond to the first known date of diversion of water for the purposes of

raising animals or applying pesticides to crops from the source of water on the land specified in the application for registration. The quantity of water to which a person is entitled under a registration is the amount being used on the date of registration, up to a maximum of the greater of 6,250 cubic metres of water per year or the amount specified in the applicable water management plan.

### **Designation of Activities Requiring Approval**

The Act contemplates that the regulations will designate those activities that require approvals and those which require licences. The Act prohibits the commencement or continuation of a diversion of water for any purpose and the operating of a works without an approval or a licence, unless exempted by the Act or the regulations from the requirement to hold a licence or approval. The Director may issue a licence or an approval subject to any terms and conditions considered appropriate. In determining whether to issue an approval or a licence, the Director must consider the applicable approved water management plan, and may consider any existing, potential or cumulative effects on the aquatic environment, hydraulic, hydrological and hydrogeological effects, and effects on household users, other licensees and traditional agriculture users, that may result from the diversion of water, operation of a works or provision or maintenance of a rate of flow of water or water level requirements. The Director may also consider effects on public safety, with respect to irrigation, the suitability of the land for irrigated agriculture, and any other relevant matters, including any applicable water guideline, water conservation objective and water management plan. A licence or approval issued by the Director must include an expiry date determined in accordance with the regulations. Licences and approvals, as well as registrations and preliminary certificates issued pursuant to the Act run with the land.

### **Transfer of Water Rights**

Part 5 of the Act contains provisions which permit the transfer of allocations of water under a licence pursuant to an application to transfer. Where the transfer of an allocation of water

under a licence is proposed, the written consent of the fee simple owner of the land must be provided along with the application for transfer and a public review of the proposed transfer must be conducted by the Director.

### **Resolution of Disputes and Water Management Orders**

Part 7 of the Act provides for the resolution of disputes with respect to any matter under the Act, as well as for the removal of works constructed without an approval or licence or under an approval or licence that has expired or been cancelled. Part 7 also provides for the issuances of water management orders under a number of circumstances, including where the Director is of the opinion that a diversion of water has caused or may cause a significant adverse effect on the aquatic environment, human health, property or public safety.

### **Enforcement**

Parts 10, 11 and 12 of the Act deal with inquiry and enforcement orders, offences and penalties and civil matters. These parts contain provisions which are very similar to those found in Part 10 of EPEA. The Act provides broad powers of investigation, search and seizure and enforcement and sets out stringent penalties for offences. It also protects civil remedies founded in the Act, the common laws and other statutes.