Appeal No. 01-062-R

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

Date of Hearing – October 16-18, 2001, February 5-6, 2002
Date of Final Submissions – April 19, 2002
Date of Decision – May 21, 2002

IN THE MATTER OF sections 91, 94, 95, 99 and 103 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by Imperial Oil Limited and Devon Estates Limited with respect to Environmental Protection Order #EPO-2001-01 issued on June 25, 2001 by the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment.

Cite as: *Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* re: *Imperial Oil Ltd.*

HEARING BEFORE: William A. Tilleman, Q.C., Chair,
Ron Peiluck, and
Dr. Curt Vos.

PARTIES:

Appellants: Imperial Oil Limited and Devon Estates Limited, represented by Mr. Ken Mills, Ms. Bernadette Alexander, Mr. Paul Jeffrey, and Mr. Dalton McGrath, Blake, Cassels and Graydon, LLP.

Director: Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Mr. Grant Sprague, Alberta Justice.

Intervenors: The City of Calgary, represented by Mr. Ron Kruhlak and Mr. Corbin Devlin, McLennan Ross.

Calhome Properties Ltd., represented by Mr. Ted Helgeson, Helgeson & Chibambo Law Office.

Lynnview Ridge Residents Action Committee, represented by Mr. Gavin Fitch, Rooney Prentice.

Calgary Health Region, represented by Mr. David Wood, Donahue Ernst Young.

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EXECUTIVE SUMMARY

Imperial Oil and Devon Estates, a subsidiary of Imperial Oil, filed a Notice of Appeal respecting a "substance release" Environmental Protection Order (EPO). The EPO was issued to Imperial Oil and Devon Estates by Alberta Environment with respect to the Lynnview Ridge residential subdivision in southeast Calgary, following the discovery of lead and hydrocarbon pollution at the subdivision. Imperial Oil had operated an oil refinery in the area between the 1920s and the 1970s, following which Devon Estates, in conjunction with others, developed the land into the residential subdivision.

Imperial Oil argued, for a number of reasons, that Alberta Environment should have addressed the Lynnview Ridge pollution problem, not through a "substance release" EPO, but through a "contaminated site" EPO largely because the pollution was "historic". Imperial Oil argues that a "contaminated site" EPO would have resulted in a "fairer" allocation of cleanup responsibility that includes other parties that have been connected with the site. Among the other parties that Imperial Oil believed should be held responsible for the pollution were the City of Calgary and Calhome Properties Ltd. Imperial Oil also argued that certain implementation directions given by Alberta Environment after the EPO was issues were unreasonable.

The Board undertook an extensive hearing and received volumes of legal, technical, and scientific information regarding the appeal from Imperial Oil, Devon Estates, Alberta Environment, the City of Calgary, Calhome Properties Ltd, the Lynnview Ridge Residents Action Committee, and the Calgary Health Region. Taking all of this information into account, the Board has recommended to the Minister that he should:

1. confirm Alberta Environment's decision to issue the "substance release" EPO;
2. confirm Alberta Environment's decision not to name parties other than Imperial Oil and Devon Estates in the EPO;
3. confirm that Alberta Environment's decision to issue the EPO was reasonably and sufficiently precise so as to provide a proper foundation for the implementation direction to require the removal of soils containing greater than 140 ppm of lead between 0.3 metres and 1.5 metres;

4. confirm that Alberta Environment's decision to issue the EPO was reasonably and sufficiently precise so as to provide a proper foundation for the implementation direction to require the removal of 0.3 metres of soil under decks, fences, gardens, shrubs, and tree;

5. vary the EPO to make it clear that the implementation direction to remove 0.3 metres of soil under driveways, patios, and sidewalks on private property where they provide an effective barrier to the lead in the soil is not within the scope of the EPO;

6. vary the EPO to require that the work under the EPO shall be performed to the satisfaction of the Director; and

7. direct Alberta Environment to continue to apply the "substance release" EPO and, if new evidence supports it, to apply a "contaminated site" EPO.

I. INTRODUCTION

[1] This is a Report and Recommendations with respect to an appeal filed by Imperial Oil Limited ("Imperial Oil") and its wholly owned real estate subsidiary Devon Estates Limited ("Devon Estates") under the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 (the "Act" or "EPEA").[1] Imperial Oil and Devon Estates (collectively the "Appellants") filed a Notice of Appeal respecting Environmental Protection Order #EPO-2001-01 (the "Order")[2] with the Environmental Appeal Board (the "Board") on July 3, 2001. The Order was issued to the Appellants on June 25, 2001, by the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment (the "Director")[3] with respect to the Lynnview Ridge residential subdivision (the "Subdivision" or "Lynnview Ridge") in Calgary, Alberta.

[2] The Director issued the Order under section 102 of the Act.[4] Section 102 provides the Director with broad authority to require that "persons responsible" for pollution take appropriate steps to assess its extent and to clean it up or otherwise properly manage its risks.

[3] Following two separate written submission processes, the Board decided on five general issues that the Board would consider at the hearing of this Appeal.[5] The first four issues

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[1] The *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 on January 1, 2002. However, for the purpose of this Report and Recommendations, and with the agreement of the Parties, the Board will refer to the sections of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3. Where appropriate, the Board will identify the appropriate sections under the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12. The Board's Recommendations and the Draft Ministerial Order proposed by the Board will refer to the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12 provisions.

[2] The Board will use "EPO" when referring generally to environmental protection orders and "Order" when referring to the environmental protection order that is the subject of this Appeal.

[3] The Director is Mr. Jay Litke, whose organizational title is "Manager" rather than "Director," but he is the "Director" for the purposes of section 84(1)(h) of EPEA, which provides for appeals of environmental protection orders issued by the Director. Pursuant to section 23 of EPEA, Mr. Litke has been designated as a Director by a Ministerial Order. (See the Order re: Director.) The Board will refer to him as the "Director" in this Report and Recommendations.

[4] Section 102 of EPEA is now section 113 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12.

[5] The issues established by the Board were:

> "1. Are the Appellants persons responsible under section 102? This question is limited to the issues of whether section 102 has retroactive effect.
>
> 2. Has there been a release within the meaning of section 1(ggg) having regard to its

arise from a common underlying complaint of the Appellants: the Director should have addressed the Lynnview Ridge pollution problem, not through the Order issued under section 102, but through an EPO issued under section 114 which applies specifically to "contaminated sites."[6] The Appellants contend that application of section 114 would result in a "fairer" allocation of cleanup responsibility that includes other parties that have been connected with the site. The fifth issue relates to subsequent directions made by the Director to the Appellants pursuant to the Order. The Appellants question the nature and extent of the clean up obligations prescribed by the Director, and the Board must determine whether the EPO was reasonable in the circumstances.

[4] In deciding another appeal involving similar issues to those raised here, the Board noted at the outset that its analysis was guided by the difficult conceptual and practical problems faced by the government in addressing contaminated sites throughout Alberta.[7] The Board is also mindful that stakes are high in this appeal, in part because of the huge potential costs that the Appellants face in complying with the Order and that the other parties may face if the Appellants are successful in compelling the Director to make them share responsibility for cleaning up the pollution.

[5] Although the cleanup costs are high, the risks associated with the pollution have, to some extent, diminished since the Order was issued. When the Director issued the Order, there appeared, at least to him and the Calgary Health Region, to be significant health risks to the

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'historical nature' and has this release caused an adverse effect?

3. Does the Director have the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114? If the Director has the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114, was that discretion exercised properly?

4. Did the Director exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the EPO [(the Order)]?"

5. Is the EPO [(the Order)] reasonable and sufficiently precise in the circumstances up to the date of the hearing?

[6] Section 114 of EPEA is now section 129 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12.

[7] *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta* Environment (December 7, 2001), E.A.B. Appeal No. 00-067-R ("McColl"), at pages 1 and 2. That case is now the subject of a judicial review in the Court of Queens Bench, Action Number 0203-04933.

Lynnview Ridge residents from the pollution and uncertainties regarding the future use and value of the Subdivision itself. The Board notes that Imperial Oil subsequently offered to purchase the residents' homes or offered the residents a sum of money to cover relocation expenses during clean up of the site. Many of the residents accepted Imperial Oil's offer to purchase their home and have now moved out of Lynnview Ridge. Others, however, have not.[8] As a result, the community health risks are reduced, but not entirely removed. Nevertheless, the pollution is unlikely to naturally disappear or dissipate. Therefore, unless someone removes it, the pollution will remain in the land at Lynnview Ridge.

[6] Finally, on a more general level, the Director's ability to rely on section 102 of EPEA as a powerful and efficient tool to remedy "historically" polluted sites throughout Alberta is at issue in this Appeal.

[7] Given these high stakes, it is no surprise that there are numerous parties involved in this Appeal and that these parties have vigorously advocated their respective positions. In addition to the Appellants, Imperial Oil and Devon Estates, who were the recipients of the Order, and the Director, who issued the Order, the other parties to this Appeal include: the Lynnview Ridge Residents Action Committee (the "Residents Committee"), which represents the interests of many of the residents of the subdivision; the Calgary Health Region ("CHR") who presented community health concerns; the City of Calgary (the "City"); and Calhome Properties Ltd. ("Calhome"), a wholly owned subsidiary of the City of Calgary.[9] Both the City of Calgary and Calhome are participating in this Appeal to refute claims by the Appellants that the Director should have also named them in the Order. The Board also received written submissions from Rio Verde Properties Ltd., who own rental properties in the Lynnview Ridge area and were an intervenor in this Appeal. Imperial Oil has also argued that the liabilities associated with this

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[8] The Board notes that some of the residents of the Subdivision have chosen to remain. The Board understands that they will temporarily move from their homes during portions of the cleanup and will return once those portions of the cleanup are completed. The Board is mindful that these residents are equally, if not more so, impacted by the work required by the Order. The remaining residents want to ensure that their health and safety is protected. As well, they wish to preserve the economic values of their homes. There is also the general public interest, particularly in this case to the other residents of the City of Calgary, to be considered in protecting the environment.

[9] The parties to this appeal are the Appellants, the Director, the City of Calgary, Calhome, the Residents Committee, and the CHR (collectively the "Parties").

Order should also be shared by a number of other companies, who either are defunct or no longer carry on business in Alberta: Nu-West Development Corporation Ltd. ("Nu-West"), Entek Engineering Limited. ("Entek"), Curtis Engineering & Testing Limited. ("Curtis") and Kidco Holdings Limited. ("Kidco").[10]

[8] The Board's task is to analyze the Parties' arguments and make recommendations to the Environment Minister as to whether the Order should stand, in what form, and whether additional parties should be held responsible to meet the obligations under the Order.[11]

II. BACKGROUND

A. History of Use and Ownership of the Site

[9] The evidentiary record in this appeal is voluminous and the facts are complex, but there are several basic facts that the Parties do not appear to dispute. These facts, and the related areas of dispute, are summarized below.

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[10] Based on the information provided to the Board by the Appellants, it appears that Entek, Curtis, and Kidco are no longer operating. Again, based on the information provided to the Board by the Appellants, it appears that Nu-West has been continued out of Alberta into Delaware, and is now known as Glenayre Technologies Inc. ("Glenayre"). As is the Board's standard practice, the Board attempted to provide notice of its proceeding to these parties, by sending a copy of the Order and the Notice of Appeal to the last known address of these parties. The Board's letters to Entek, Curtis, and Kidco were returned. In response to the Board's notice, Glenayre retained Alberta Legal Counsel who advised that Glenayre "…does not carry on business in Alberta, does not have any assets in this jurisdiction, and has no involvement with the subject matter of this appeal. Therefore, Glenayre … does not attorn or submit to the jurisdiction of the Environmental Appeal Board." (Letter from Mr. Ken Bailey, Q.C., Parlee McLaws on behalf of Glenayre dated September 11, 2001.) Glenayre has not participated in the Board's proceedings but has been provided notice.

[11] Pursuant to section 91(1) (now section 99(1)) of EPEA:

> "In the case of a notice of appeal referred to in section 84(1)(a) of (j) of this Act … the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it."

Pursuant to section 92(1) (now section 100(1)) of EPEA:

> "On receiving a report of the Board the Minister may, by order,
>
> (a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make, …
>
> (c) make any further order that the Minister considers necessary for the purposes of carrying out the decision."

[10] The Director issued the Order in respect of land in the residential subdivision at Lynnview Ridge in southeast Calgary. The land that is the subject of this Order was the last to be subdivided for residential development in Lynnview Ridge and was referred to throughout the Appeal as Lynnview Ridge Phase 4 (the "Subdivision Lands"). The Subdivision Lands are located on a ridge, running north and south, that overlooks the Bow River and recreational areas to the west and that is bordered by the Canadian National Railway tracks on the north. Townhouses were built on the northern-most part of the Subdivision Lands. The remainder of the Subdivision Lands consists of single-family houses on lots of varying size, but which are generally typical of the size of lots in Calgary. Each house has a front and back yard. Some houses have garages, some have decks, and some have both.

[11] Prior to 1959, the City of Calgary owned the majority of the lands that are now within the Subdivision Lands. Imperial Oil owned the remaining portions of these lands, as well as lands to the immediate north of the present subdivision boundary. Between approximately 1923 and 1977, Imperial Oil used those adjacent lands to the north of the Subdivisions Lands and the Canadian National Railway tracks for the operation of a petroleum refinery.

[12] During the operation of the petroleum refinery, Imperial Oil operated a storage tank farm on the Subdivision Lands. The tank farm was located partly on Imperial Oil's portion of the Subdivision Lands and partly on other lands owned by Imperial Oil just east of the Subdivision Lands. The tank farm consisted of six large above-ground tanks. Four of those six tanks were located on the Subdivision Lands where the residential townhouses currently exist.

[13] In 1959, Imperial Oil purchased the City's portion of the Subdivision Lands with the intent of using those lands to support an expansion of its refinery. Although Imperial Oil did not proceed with the expansion, it did use the newly-acquired portion of the Subdivision Lands for its existing refinery operations, including using the northeast corner as a land farm to treat hydrocarbon sludge from the refinery.

[14] In 1971, Imperial Oil transferred all of the Subdivision Lands to Devon Estates, except those portions containing part of the tank farm. That same year, Devon Estates entered into a joint venture agreement with Nu-West. Pursuant to this agreement, Nu-West would essentially manage the process for developing and marketing the lands for residential use.

[15] In the early 1970s, the City of Calgary was reviewing land use classifications in the area and prepared the "Ogden Design Brief." The Ogden Design Brief was approved by the City Council on July 5, 1971. At this time, the Subdivision Lands were still zoned "industrial." Some correspondence from the City of Calgary to Imperial Oil around this time indicates that the City encouraged, or at least, approved of, residential development on the lands south of the Subdivision Lands, in an area that has been referred to as Lynnview Ridge Phases I - III.[12]

[16] By 1977, Imperial Oil had ceased operating the refinery, and dismantled and decommissioned it and the tank farm. Imperial Oil still owned the refinery lands located adjacent to the Subdivision Lands, the portion of the tank farm lands outside of the Subdivision Lands, and the remainder of the Subdivision Lands containing part of the tank farm. The remainder of the Subdivision Lands were transferred to Devon Estates in 1979.

[17] Hydrocarbon pollution in the sub-soils of the Subdivision Lands was documented as early as 1976, in a series of reports prepared by a consultant for Nu-West for the purposes of determining the suitability of the Subdivision Lands for residential development.[13] In 1978 and 1980, Nu-West provided the City of Calgary with subdivision plans that included proposals for addressing the polluted soils. In 1980, the City approved the plans, re-zoned the Subdivision Lands for residential use, and approved the subdivision.

[18] In 1981, Devon Estates sold the Subdivision Lands to Nu-West. Also in that year, Nu-West sold two of the multi-family lots to Calhome (previously known as the City of Calgary Housing Corporation).

[19] In the following years, residences were constructed and inhabited but the pollution problem remained. In 1987, the City of Calgary convened a Task Force to investigate the presence of substances from the refinery and the tank farm area. The primary focus of the

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[12] For example, in a letter dated April 1, 1971, the then City Solicitor, Mr. Jay Salmon, suggested to the legal department of Imperial Oil that "…the zoning application ought to be made and should be proceeded with as expeditiously as possible." The date of the letter indicates to the Board that the City Solicitor was not referring to the Subdivision Lands, part of which was still used in Imperial Oil's refinery operations at that time.

[13] *Foundation Investigation Old Imperial Esso Tank Farm, Calgary, Alberta* by Curtis Engineering & Testing Ltd., 1976 (the "Curtis Reports").

Task Force was an area known as Beaver Dam Flats, the area below the ridge next to the Bow River, but some testing was also conducted on the Subdivision Lands.

[20] In 1998, the City of Calgary reconvened the Task Force and hired EBA Consulting Ltd. ("EBA") to investigate the presence of substances on the Subdivision Lands. The Task Force's priorities were to assess both the extent of lead pollution and whether hydrocarbon vapours were entering the Lynnwood Ridge homes. Investigations continued throughout 1999 and 2000 and EBA produced a draft report in early 2001.

[21] The Director was made aware of the draft report prepared by EBA in early 2001 and discussed the potential health risks with the CHR. The substances of concern identified in the report were lead and hydrocarbons (the "Substances").[14]

[22] In June 2001, following a series of reports and extensive consultation with residents, Imperial Oil, the City of Calgary, Calgary Health Region, and other parties connected with the Subdivision Lands, the Director decided to issue the Order.

B. The Appeal Proceedings

[23] On July 3, 2001, Imperial Oil filed its Notice of Appeal pursuant to section 84(1)(h) of EPEA, which allows the recipients of an environmental protection order, including an order issued under section 102, to appeal the Order to this Board.[15] Although Imperial Oil also initially requested the Board to grant a stay of the Order pending the outcome of this Appeal, Imperial Oil did not pursue that request.

[24] On August 22, 2001, after reviewing the Parties' submissions, the Board decided the following four issues in this Appeal:

> "1. Are the Appellants persons responsible under section 102? This question

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[14] According to the Order, the analytical results included in the May 2001 draft report indicated that "…numerous high hydrocarbon vapour concentrations [were] confirmed…" and that "…a number of soil samples taken for lead analysis… ranged over 1200 mg/kg, and therefore exceeded the Canadian Council of Ministers of the Environment (CCME) soil limit of 140 mg/kg."

[15] Section 84(1)(h) (now section 91(1)(h)) of EPEA provides:

> "A notice of appeal may be submitted to the Board by the following persons in the following circumstances: … (h) where the Director issues an environmental protection order … the person to whom the order is directed may submit a notice of appeal."

is limited to the issues of whether section 102 has retroactive effect.

2. Has there been a release within the meaning of section 1(ggg) having regard to its 'historical nature' and has this release caused an adverse effect?

3. Does the Director have the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114? If the Director has the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114, was that discretion exercised properly?

4. Did the Director exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the EPO [(the Order)]?"[16]

[25] Significantly, on September 11 and 12, 2001, the Director sent two key letters to Imperial Oil entitled "Decision on Conceptual Framework for Remediation at Lynnview Ridge." On September 18, 2001, Imperial Oil filed a second Notice of Appeal appealing the "decision" of Alberta Environment included in the September 11 and 12 letters.

[26] On October 26, 2001, the Board decided that it would not permit Imperial Oil to file a second Notice of Appeal, but it would permit the addition of a fifth issue to this Appeal to address concerns related to the Director's significant September 11 and 12 letters.[17] The Board described Issue 5 as: "Is the EPO reasonable and sufficiently precise in the circumstances up to the date of the hearing?"

[27] Imperial Oil was also concerned that the City of Calgary had not provided all relevant documents in its possession to the Director before he made his decision. A dispute over document production between Imperial Oil and the City of Calgary culminated in the Board's document production decision issued on December 10, 2001.[18] The Board subsequently ordered

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[16] *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (August 22, 2001), E.A.B. Appeal No. 01-062-ID. Sections 1(ggg), 102 and 114 of EPEA are reproduced in paragraphs 41, 39, and 42 respectively. Section 1(ggg) of EPEA is now section 1(hhh) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

[17] Preliminary Motions: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (October 26, 2001), E.A.B. Appeal No. 01-062-ID.

[18] Document Production Motions: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (December 10, 2001), E.A.B. Appeal No. 01-062-ID.

both the City of Calgary and Imperial Oil to produce certain documents to the Board for its review in relation to this Appeal.

[28] The first part of the hearing of this Appeal occurred on October 16, 17, and 18, 2001. As the addition of Issue 5 and the document production issue were determined after the first hearing date, the Board adjourned the hearing to February 5, 2002, to enable it to hear evidence in respect of Issue 5 and any further submissions arising out of the documents produced by Imperial Oil and the City of Calgary. The second part of the hearing of this Appeal was held on February 5 and 6, 2002. After the hearing, at the request of the Parties, the Board established a process to receive final arguments in writing.

[29] After the hearings concluded, the Appellants informed the Board, on April 1, 2002, that they had received further letters from the Director, which imposed "…additional unreasonable demands upon Imperial."[19] The two letters from the Director, to which the Appellants referred, were dated March 19 and 26, 2002. The Appellants requested the Board to reconsider its decision of October 26, 2001, which determined the five issues the Board would consider in this Appeal. The Appellants requested the addition of the following two issues:

> "1. Do the Director's Letter Orders, as part of the EPO [(the Order)], unreasonably extend the scope of the EPO [(the Order)], reveal an improperly 'open-ended' and ever escalating EPO, or are they otherwise unreasonable?
>
> 2. Is Item 10 of the March 26 Letter Order *ultra vires* the Director's authority by reason of constituting an invalid delegation of his regulatory authority or are it and Item 1 of the Letter Order received March 22 *ultra vires* because they place the Applicants at risk of being unable to comply with the enforceable EPO [(the Order)] for reasons entirely beyond their control?"

[30] After considering the Parties' submissions on the Appellants' request, the Board decided to consider the additional letters of the Director as evidence in the context of Issue 5. Although Issue 5 was framed to limit the Board's consideration of evidence arising up to the date of the hearing, we are of the view that the Director's additional letters raise similar issues to the September 11 and 12, 2001 letters, which we have already considered under Issue 5. However,

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[19] Letter dated April 1, 2002, from the Appellants.

the Board has decided not to include the two additional issues proposed by the Appellants in this Appeal at this time.

III. ANALYSIS AND DISCUSSION

A. The Bigger Picture

[31] Before beginning our detailed legal analysis into the specific issues before us, we would like to comment on the bigger picture. First, it is an undisputed fact that between 1923 and 1973 Imperial Oil ran an oil refinery adjacent to the Subdivision Lands and used the Subdivision Lands as part of their operation. Further, it is an undisputed fact that the oil refinery produced hydrocarbons containing lead. (Exactly where, in the refinery, these hydrocarbons containing lead were produced and stored may be in dispute, but they were clearly produced at the refinery.) Finally, it is an undisputed fact that hydrocarbons and lead have subsequently been found on the Subdivision Lands. (Again, the extent, nature, and impact of these contaminants may be in dispute, but their presence is not.)

[32] As a result of these facts, the Appellants have been named in the Order that requires them to undertake potentially extensive and costly remediation work. The Appellants have appealed to ensure that they are only liable for obligations that the Act properly imposes on them. The Board accepts that these Appellants are entitled to advance all *reasonable* defenses to the Order that are available to them. The Appellants may not win at the end of the day, but they are entitled to present their arguments and they have done so.

[33] However, having regard to all of the extensive evidence and comprehensive technical, scientific and legal arguments presented before the Board, and having regard to the detailed analysis that follows, it is clear to the Board that there is only one reasonable conclusion that can be drawn: the Appellants are the source of the hydrocarbons and lead on the Subdivision Lands. There is no other reasonable explanation as to the source of the hydrocarbons and lead on the Subdivision lands.

[34] It is important that these facts not be lost among the complex legal arguments presented by the Parties to this Appeal. Arguments about the retrospective application of the law, arguments regarding joint venture agreements with other developers, arguments regarding

development agreements and the municipal planning process, and legal arguments regarding how the Act should be interpreted, can in no way change these facts; an extensive refinery operation closed its doors and some pollution remained behind.

B. Statutory Background

[35] After briefly discussing the Appellants' burden of proof in this Appeal and the Board's standard of review, the Board will address each of the 5 issues in this Appeal in turn. The issues all raise common questions about the functional relationship between the Director's power to issue EPOs under two different sections of EPEA.

[36] When this Appeal was filed, the two relevant sections of EPEA were numbered section 102 and section 114. However, Alberta has now revised and consolidated its statutes, and the Revised Statutes of Alberta, including EPEA, came into on January 1, 2002. The revision did not change the intent of the law, but, for most purposes, merely renumbered the chapters and sections. As the issues in this Appeal were framed in terms of the previous section numbers and all the Parties' submissions refer to the previous section numbers, the Board's Report and Recommendations will also refer to the previous section numbers.[20]

[37] The Board notes that in *McColl* it generally compared sections 102 (now section 113) and 114 (now section 129).[21] The Board will, again, briefly describe the main sections of EPEA to which this Appeal similarly relates.

[38] Sections 102 (now section 113) and 114 (now section 129) are both found in Part 4 (now Part 5) of EPEA, entitled "Release of Substances." Both sections give the Director broad authority to issue an EPO requiring a person responsible for pollution to assess, clean up, and generally minimize the environmental risks of pollution. Section 226(1) (now section 240(1)) provides that all persons named in an EPO are jointly responsible for implementing the EPO and jointly and severally liable for the costs of doing so. Although both sections relate to the issuance of an EPO, the texts and contexts of sections 102 (now section 113) and 114 (now

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[20] However, to assist in the transition to the new numbering of EPEA, the Board will also note the new section numbers in parentheses during the first part of its Report and Recommendations.

[21] *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R. (See paragraphs 44 and onward.)

section 129) differ in several fundamental respects. As outlined below, sections 102 (now section 113) and 114 (now section 129) set out different processes for the Director to issue an EPO, different criteria which must be met before the Director can issue an EPO, and different "persons responsible" who may be subject to an EPO.

[39] Section 102 (now section 113) provides:

> "(1) Subject to subsection (2), where the Director is of the opinion that
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> (a) a release of a substance into the environment may occur, is occurring or has occurred, and
>
> (b) the release may cause, is causing or has caused an adverse effect,
>
> the Director may issue an environmental protection order to the person responsible for the substance.
>
> (2) Where the release of the substance into the environment is or was expressly authorized by and is or was in compliance with an approval or registration or the regulations, the Director may not issue an environmental protection order under subsection (1) unless in the Director's opinion the adverse effect was not reasonably foreseeable at the time the approval or registration was issued or the regulations were made, as the case may be.
>
> (3) An environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary, including, but not limited to, any or all of the following:
>
> (a) investigate the situation;
>
> (b) take any action specified by the Director to prevent the release;
>
> (c) measure the rate of release or the ambient concentration, or both, of the substance;
>
> (d) minimize or remedy the effects of the substance on the environment;
>
> (e) restore the area affected by the release to a condition satisfactory to the Director;
>
> (f) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance, or lessen or prevent further releases of or control the rate of release of the substance into the environment;
>
> (g) install, replace or alter any equipment or thing in order to control or eliminate on an immediate and temporary basis the release of the substance into the environment;
>
> (h) construct, improve, extend or enlarge the plant, structure or thing if that is necessary to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

> (i) report on any matter ordered to be done in accordance with directions set out in the order."

[40] The definitions of "adverse effect," "person responsible," and "release" are found in section 1 of EPEA. Adverse effect means "…impairment of or damage to the environment, human health or safety or property."[22] The definition of "person responsible" states:

> "…'person responsible', when used with reference to a substance or a thing containing a substance, means
>
> (i) the owner and a previous owner of the substance or thing,
>
> (ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,
>
> (iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and
>
> (iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii),
>
> but does not include
>
> (v) a municipality in respect of a parcel of land shown on its tax arrears list, unless after the date on which the municipality is entitled to possession of the parcel under section 420 of the Municipal Government Act or becomes the owner of the parcel under section 424 of that Act the municipality releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel, or
>
> (vi) a person who investigates or tests a parcel of land for the purpose of determining the environmental condition of that parcel, unless the investigation or test releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel."[23]

[41] Release "…includes to spill, discharge, dispose of, spray, inject, inoculate, abandon, deposit, leak, seep, pour, emit, empty, throw, dump, place and exhaust."[24]

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22 EPEA section 1(b).

23 EPEA section 1(ss) (now section 1(tt)).

24 EPEA section 1(ggg) (now section 1(hhh)).

[42] Section 114 (now section 129) is found in Division 2 of Part 4 (now Division 2 of Part 5), entitled "Contaminated Sites." Section 114 (now section 129) states:

> "(1) Where the Director designates a contaminated site, the Director may issue an environmental protection order to a person responsible for the contaminated site.
>
> (2) In deciding whether to issue an environmental protection order under subsection (1) to a particular person responsible for the contaminated site, the Director shall give consideration to the following, where the information is available:
>
> (a) when the substance became present in, on or under the site;
>
> (b) in the case of an owner or previous owner of the site,
>
> (i) whether the substance was present in, on or under the site at the time that person became an owner;
>
> (ii) whether the person knew or ought reasonably to have known that the substance was present in, on or under the site at the time that person became an owner;
>
> (iii) whether the presence of the substance in, on or under the site ought to have been discovered by the owner had the owner exercised due diligence in ascertaining the presence of the substance before he became an owner, and whether the owner exercised such due diligence;
>
> (iv) whether the presence of the substance in, on or under the site was caused solely by the act or omission of another person, other than an employee, agent or person with whom the owner or previous owner has or had a contractual relationship;
>
> (v) the price the owner paid for the site and the relationship between that price and the fair market value of the site had the substance not been present in, on or under it;
>
> (c) in the case of a previous owner, whether that owner disposed of his interest in the site without disclosing the presence of the substance in, on or under the site to the person who acquired the interest;
>
> (d) whether the person took all reasonable care to prevent the presence of the substance in, on or under the site;
>
> (e) whether a person dealing with the substance followed accepted industry standards and practice in effect at the time or complied with the requirements of applicable enactments in effect at the time;
>
> (f) whether the person contributed to further accumulation or the continued release of the substance on becoming aware of the presence of the substance in, on or under the site;
>
> (g) what steps the person took to deal with the site on becoming aware of the

presence of the substance in, on or under the site;

(h) any other criteria the Director considers to be relevant.

(3) In issuing an environmental protection order under subsection (1) the Director shall give consideration to whether the Government has assumed responsibility for part of the costs of restoring and securing the contaminated site and the environment affected by the contaminated site pursuant to a program or other measure under section 109.

(4) An environmental protection order made under subsection (1) may

(a) require the person to whom the order is directed to take any measures that the Director considers are necessary to restore or secure the contaminated site and the environment affected by the contaminated site, including, but not limited to, any or all of the measures specified in section 102,

(b) contain provisions providing for the apportionment of the cost of doing any of the work or carrying out any of the measures referred to in clause (a), and

(c) in accordance with the regulations, regulate or prohibit the use of the contaminated site or the use of any product that comes from the contaminated site."

[43] Section 110 (now section 125) provides the process for designating a contaminated site:

"(1) Where the Director is of the opinion that a substance that may cause, is causing or has caused a significant adverse effect is present in an area of the environment, the Director may designate an area of the environment as a contaminated site.

(2) Subsection (1) applies notwithstanding that any or all of the following may apply:

(a) a reclamation certificate or remediation certificate has been issued in respect of the contaminated site;

(b) an administrative or enforcement remedy has been pursued under this Act or under any other law in respect of the contaminated site;

(c) the substance was released in accordance with this Act or any other law;

(d) the release of the substance was not prohibited under this Act;

(e) the substance originated from a source other than the contaminated site.

(3) The Director may cancel a designation of a contaminated site."

[44] Sections 110 (now section 125) and 114 (now section 129) are predicated on more rigorous facts and procedures than section 102 (now section 113) EPOs. Section 102 (now section 113) EPOs may be predicated, not only on ongoing and past substance releases, but also

on releases that "may occur." By contrast, a contaminated site designation under section 110 (now section 125) requires that a substance is already present in the environment. Further, a contaminated site designation requires a release that poses an actual or threatened "significant adverse effect," whereas section 102 (now section 113) merely requires an "adverse effect."

[45] The process for issuing a section 114 (now section 129) EPO also requires more procedural steps and, thus, is potentially longer than the process for issuing a section 102 (section 113) EPO. A section 114 (now section 129) EPO requires that the land first be designated a contaminated site. When a contaminated site is designated, the Director must provide notice to the owner of the site, any of the persons responsible for the contaminated site, and the local authority, in accordance with the regulations. The Director must also consider Statements of Concern submitted by persons who are directly affected by a proposed designation. The designation of a contaminated site can also be appealed.[25] Finally, if the person responsible for the contaminated site enters into an agreement with the Director (or with other persons responsible where approved by the Director) providing for remedial action and apportionment of costs, the Director may not issue an EPO under section 114 (now section 129).

[46] Another important difference between the two sections is the potential recipient of the EPO. As previously mentioned, an EPO under section 102 (now section 113) may be issued to a "person responsible" as defined in section 1(ss) (now section 1(tt)). However, an EPO under section 114 (now section 129) may be issued to a "person responsible for the contaminated site," which is defined at the beginning of Part 4 (now Part 5). Section 96(1)(c) (now section 107(1)(c)) provides that a "person responsible for the contaminated site" means:

> "(i) a person responsible for the substance that is in, on or under the contaminated site,
>
> (ii) any other person who the Director considers caused or contributed to the release of the substance into the environment,
>
> (iii) the owner of the contaminated site,
>
> (iv) any previous owner of the contaminated site who was the owner at any time when the substance was in, on or under the contaminated site,

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[25] In such circumstances, there could be an entire appeal process on the designation of the contaminated site and then a subsequent appeal process on the EPO if it is issued.

> (v) a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in any of subclauses (ii) to (iv), and
>
> (vi) a person who acts as the principle or agent of a person referred to in any of subclauses (ii) to (v)....”

[47] The relevant definition of a “person responsible” for the purposes of section 102 (now section 113) focuses on the person who caused or contributed to the pollution and, in our view, implements the “polluter pays” principle advocated in section 2 of EPEA.[26] However, the relevant definition for section 114 (now section 129) reaches beyond the person who caused or contributed to the pollution and attaches responsibility to any person who owns or owned the contaminated land, regardless of whether they contributed to the presence of the contaminants in the land. The Board will later discuss how these differences may be relevant to the Director’s decision to proceed under either section 102 (now section 113) or section 114 (now section 129).

[48] Further, while section 114 (now section 129) EPOs are predicated on more rigorous procedural steps and substantive facts that section 102 (now section 113) EPOs, the Director has certain powers under the section 114 (now section 129) process that are lacking in section 102 (now section 113).[27] Although it is clear to the Board that significant differences exist between the two processes for issuing EPOs, EPEA provides no express guidance on when the Director should use one process over the other, or even what factors the Director should consider in choosing between the two processes. Therefore, in this Appeal, the Board is not prepared to recommend that the Minister order that the Director should have proceeded under the section 114 (now section 129) process rather than the section 102 (now section 113) process he chose, provided that the substantive underpinnings of section 102 (now section 113) were met. In fact, the Director has the legal discretion to issue an EPO under section 102 (now section 113)

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[26] Section 2(i) of EPEA provides:

> “The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following … (i) the responsibility of polluters to pay for the costs of their actions….”

[27] See *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraphs 40 to 55. (A discussion of these differences.)

as he did here and, if circumstances warrant, later roll it into an EPO pursuant to section 114 (now section 129).[28] For example, section 114(4) (now section 129(4)) provides that:

> "An environmental protection order made under subsection (1) [(a section 114 EPO)] may (a) require the person to whom the order is directed to take any measures that the Director considers are necessary to restore or secure the contaminated site and the environment affected by the contaminated site, including, but not limited to, *any or all of the measures specified in section 102*…." (Emphasis added.)

C. Burden of Proof and Standard of Review

[49] This is an Appeal brought by Imperial Oil against the Director's decision to issue the Order. In all previous appeals before the Board the appellant has borne the burden of proving its case. Imperial Oil, thus, bears the burden of proving to the Board that, on balance, the Director did not make the correct decision and that the Order should be cancelled or varied.

[50] However, in this Appeal, the Appellants contended that the Director must establish on the balance of probabilities that his decisions were correct and his decision-making process was reasonable. The Appellants submitted "…the burden is <u>not</u> upon Imperial [Oil] to establish that the decisions were incorrect, or the process unreasonable."[29] The Appellants relied on a decision of the Supreme Court of British Columbia, which the Appellants argued is similar to the present Appeal, that the burden of proof, in an appeal of the administrative decision, must be placed upon the administrative decision-making body.[30] The Appellants claimed that the Court in *Re: Andres Wines*[31] reached this decision because:

(a) the appellate tribunal conducted a hearing, while the administrative body had not;

(b) the relevant legislation indicated that the appellate tribunal must consider

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[28] Section 110 (now section 125), pursuant to which the Director designates a contaminated site before issuing a section 114 (now section 129) EPO, provides that the Director may designate a contaminated site notwithstanding that an administrative or enforcement remedy has been pursued under this Act or under any other law in respect of the contaminated site.

[29] Submissions of the Appellants, February 21, 2002, at page 6, paragraph 21. (Emphasis in the original.)

[30] *Re: Andres Wines (B.C.) Ltd. and British Columbia Marketing Board* (1987), 41 D.L.R. (4th) 368, at page 371 (B.C.S.C.) ("*Re: Andres Wines*").

[31] *Re: Andres Wines (B.C.) Ltd. and British Columbia Marketing Board* (1987), 41 D.L.R. (4th) 368 (B.C.S.C.).

the matter *de novo*; and

(c) the burden of proof rests on the administrative decision-making body in the first instance.[32]

[51] The Board does not agree that the decision in *Re: Andres Wines* is relevant or frankly helpful to appeals before this Board.[33] There are fundamental differences between the British Columbia Grape Marketing Board, which was the initial decision-maker in the *Re: Andres Wines* decision, and the Director.

[52] Contrary to the Appellants' interpretation of the decision, in our view, the Court clearly stated that its reasons for holding that the Grape Board should bear the initial burden were:

(a) The price fixed by the Grape Board (the decision) is a determination made by one of the two *interested* parties.

(b) The Grape Board and the Wine Council, with opposite interests, were usually the only two parties to an appeal. The appellate body had to also consider the interests of the wine consumer.

(c) The Grape Board is possessed of all the facts and figures that go into the cost of producing grapes since it is composed of the grape growers themselves.

[53] By contrast, the Director does not have an interest in the decisions he makes; he is designated by the Minister to act for the purposes of EPEA. Secondly, as this Appeal evidences, this Board does not usually hear appeals between the same two parties, which will always have opposite interests. Rather, the Board hears submissions during an appeal from a number of parties with a broad range of interests, including always the public interests and usually citizens. Finally, the Director does not possess all the facts and figures that he requires to make a decision. For this reason, the Director is given investigative powers and requests information from various parties before he makes a decision. Generally, the appellant initially has, or has the ability to obtain, as much information about a specific environmental situation equal to the Director. The Director also generally meets with parties before he issues an EPO, giving the parties the

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[32] It is not clear to the Board why the third factor raised by the Appellants is a reason for the Court's decision.

[33] Further, the decision is not highly persuasive as the comments on the burden of proof were *obiter*.

opportunity to voice their concerns. This is a fundamentally different process than what was considered by the Court in *Re Andres Wines.*

[54] The Board is not satisfied that any of the other reasons proposed by the Appellants support reversing the burden of proof.[34] Indeed, the Board is of the view that the integrity of EPEA appeal process would be obstructed if every person, who was the subject of a decision under EPEA could, without establishing a *prima facie* case, require the Director to justify his decision.

[55] Further, the Board is of the view that it would be extremely unfair to the other Parties, especially the Director, to now reverse the burden of proof when the procedure followed in this Appeal gave the benefit to the Appellants in meeting that burden. The Appellants first queried their burden of proof, not initially, but during the second part of this hearing in February 2002. The Board determined the procedure for this Appeal in August 2001[35] and followed the procedure in the first part of the hearing in October 2001. The Chair made it clear that the Board expected the Appellants to prove the facts necessary to their case when he said, at the beginning of the hearing in October:

> "Well, the one thing that Imperial holds or is faced with that the rest of you aren't is the burden of proving the case; that is, the primary burden rests with them. If they don't meet it on a balance of evidence, they lose." [36]

[56] The procedure allowed the Appellants to present their case first, introduce rebuttal evidence, and have the last word in closing submissions. Even if the Board thought there was any merit in the Appellants' submission relating to the Grape Marketing Board decision, which it does not, prejudice to the other Parties would likely preclude the Board from changing this Appeal now, requiring the Director to have the burden of proof.

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[34] The Appellants suggested that the Board can only inject balance into the decision if the burden of proof falls on the Director; harsh penalties under EPEA enforcing non-compliance with an EPO require that the burden of proof falls on the Director; and as only the Director can know his opinion, the burden of proof should rest with him: Appellants' Submission, dated February 21, 2002, at pages 7 and 8, paragraphs 24 to 26.

[35] Letter from the Board, dated September 5, 2001, outlining the procedure to be followed that the hearing.

[36] Transcript, dated October 16 to 18, 2001, at page 34, lines 3 to 7.

[57] The Appellants submitted that the Board's standard of review in this Appeal is one of correctness. The Appellants claimed that the open-ended nature of the Board's consideration of evidence indicates that the Board should determine the facts for itself, without deferring to the Director's choice of evidence or his factual and policy conclusions based on that evidence.[37] The Appellants further submitted that if it appears to the Board that the administrative record provided by the Director is incomplete, the Board ought to give the Director's decision less deference than if the record is complete.

[58] By contrast, the City of Calgary submitted that the Board should take a deferential approach at least towards the Director's choice of persons responsible in an EPO.[38] The City of Calgary submitted that the appropriate standard of review by the Board is whether the Director's decision was reasonable and consistent with the public interest and the purposes of EPEA.

[59] As the Board recently explained in *McColl*,[39] the Board reviews the Director's decisions under the correctness standard as warranted by the *de novo* nature of the Board's review, the Board's own expertise, the Board's role in recommending the correct decision to the Minister, and the courts' deferential review of the Board's decisions. The Board also explained that the Board may afford the Director some deference as a practical matter, in part, but only because the Board's appeal record is usually based on the Director's record. The Board also typically defers to the Director in policy matters, but we never have and never will view that as binding in any of our decisions. Each case, like that one, will be determined on its own merits.

[60] The Board notes that, in this Appeal, it ordered the production of further documents from Imperial Oil and the City of Calgary after the first hearing. These documents were not before the Director when he made his decision to issue the Order but were certainly considered by him before he decided to re-think and confirm that decision.[40] The Board has

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[37] The Appellants relied on the Board's decision in *Ash* v. *Director of Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection* re: *City of Calgary* (June 8, 1998), E.A.B. Appeal No. 97-032, at paragraphs 17 to 22.

[38] The City of Calgary relied on the Board's decision in *Legal Oil and Gas Ltd* v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999) E.A.B. Appeal No. 98-009-R ("*Legal Oil*").

[39] *McColl-Frontenac Inc*. v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service*, *Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R.

[40] The Board asked the Director to review the documents produced by the City of Calgary and Imperial Oil to

considered the extent to which this new information and evidence adduced at the hearing affects the Director's Order. The Board noted in *McColl*[41] that in an ideal world, the Director would issue a remedial order only if the Director had a comprehensive and definitive description of all the facts. However, the ideal scenario is not feasible because of the costs and time to investigate sites, and some facts are difficult, if not impossible, to determine. In short, and particularly with underground pollution in residential areas, the Director must often decide with an incomplete picture of the facts. The Board is mindful of this constraint in assessing the Director's decision and notes the Director's statement in this Appeal that he is willing to vary his decision if new information comes to light.[42]

D. Issue 1: Are the Appellants Persons Responsible under Section 102? (Limited to Retrospective Effect.)

[61] Although this first issue was limited to an examination of retrospectivity, the Board notes that one of the fundamental issues that it must consider is Imperial Oil's responsibility for the Substances found on the Subdivision Lands. Of course, the question of the retrospective application of EPEA and the other issues in this Appeal would be irrelevant if Imperial Oil had satisfied the Board that Imperial Oil's operations were not the source of the Substances. The question of whether the substances are in fact attributable to Imperial Oil's operations was raised, albeit implicitly, at the hearing and it is to this evidence that the Board will first turn.

1. Was Imperial Oil the Source of the Substances?

[62] Section 102 of EPEA states that the Director may issue an EPO to the "person responsible" for the substance. As noted earlier, section 1(ss) (now section 1(tt)) states that a:

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determine whether they persuaded him to change his original decision not to name the City of Calgary as a "person responsible" in the Order. The Director responded on January 16, 2002, that he was not persuaded that the City of Calgary was a person responsible.

41 *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 40.

42 Specifically, the Board reiterates its statement in *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 64, that "…the Director should, in the future, consider (based on more information as it becomes available) whether to use the contaminated sites process as the overall means for remediating the site."

> "'person responsible,' when used with reference to a substance or thing containing a substance, means
>
> (i) the owner and a *previous owner* of the *substance* or thing,
>
> (ii) every person who has or *has had charge, management or control* of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing, ... and
>
> (iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii) …." (Emphasis added.)

[63] There is no doubt in the Board's mind that the hydrocarbons present on the Subdivision Lands occurred as a result of Imperial Oil's land farming and storage tank operations on the Subdivision Lands before 1977. Imperial Oil did not adduce any evidence to seriously dispute such a finding. Imperial Oil owned the hydrocarbons, and both stored and disposed of the hydrocarbons on the Subdivision Lands. In fact, during the document discovery process after the first part of the hearing, Imperial Oil produced a document that tends to show more precisely the possible source of hydrocarbons in the Subdivision Lands. The 31 year old letter, dated April 16, 1971, from Nu-West to Imperial Oil states:

> "There is, however, one difficulty that must be checked out and that is the appearance of some oil on the surface of this land and we would suspect that your tanks are still leaking."

[64] Also, in respect of the hydrocarbons, we find that Imperial Oil meets the definition of "person responsible" under EPEA.

[65] However, during the first part of the hearing, Mr. Andrew Teal, the environmental and regulatory compliance manager for Imperial Oil, raised the question of whether Imperial Oil's operations were actually the source of lead contamination on the Subdivision Lands. Mr. Teal explained that, to his knowledge, the products stored on the Subdivision Lands during the history of the refinery operations did not contain lead.[43] After the first part of the hearing, during the document discovery process, the Board heard that most of Imperial Oil's documents relating to the refinery operations had been destroyed, and therefore, there was no way of proving the

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[43] Transcript, dated October 16 to 18, 2001, at page 100, lines 3 to 6, and page 72, lines 12 to 14.

contents of the storage tanks during the life of the refinery. Accordingly, the Board affords little weight to Mr. Teal's opinion that the storage tanks never held leaded products.

[66] Mr. Teal also noted that, of the soils tested on the Subdivision Lands to date, the highest lead concentrations occurred in the top 30 cm of soil.[44] Mr. Teal appeared to suggest that the topsoil brought onto the Subdivision Lands during the development may already have been contaminated with lead. The Board notes that Imperial Oil did not adduce any evidence as to the source of the topsoil. However, it appears that at least some of the topsoil was handled on Imperial Oil's refinery lands before it was distributed across the Subdivision Lands.[45] In the Board's view, if the lead contamination did not occur directly from Imperial Oil's operations on the Subdivision Lands, it was sourced from Imperial Oil's refinery lands one way or another, for example, as a result of the Nu-West and Devon Estates joint venture handling topsoil on those lands. In either scenario, Imperial Oil had charge, management or control of the lead and satisfied the definition of a "person responsible."

[67] Significantly, the Board notes that Mr. Teal does not seriously dispute such a finding by the Board. During the hearing, the Chair of the Board asked whether it was likely or probable that the lead was generated by Imperial Oil:[46]

> "Chairman: Okay, but it's probable that it was IOL [(Imperial Oil)]?
>
> Mr. Teal: It is, again, likely.
>
> Chairman: Okay, well, I have heard more than likely, and now is your opportunity to correct me if I'm hearing wrong. If you take a scale of 1 to 100, and that's a percentage, what is your -- you're the environment manager, you were there at all times, you have as much information on this file as anyone from Imperial Oil, you've given evidence about those soils and the history of this site and so on and so forth. What is your conclusion about the source of these hydrocarbons and lead in terms of who was the owner or producer? On a percentage basis, what is the percentage that this was Imperial Oil hydrocarbons?
>
> Mr. Teal: As far as where the lead actually originated as far as the activity?

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44 Transcript, dated October 16 to 18, 2001, at page 108, lines 8 to 16.

45 Mr. Teal indicated that the soil handling area was located in one of the tank lots below the hill, outside the Lynnview Ridge area. He suggested that lead in the soil in that area could have been scooped up and mixed with the topsoil and redistributed over the Subdivision Lands. Transcript, dated October 16 to 18, 2001, at pages 256 and 257.

46 Transcript, dated October 16 to 18, 2001, at pages 257 and 258.

> Chairman: Yes.
>
> Mr. Teal: I would suggest that it's likely, again. What does that mean? Perhaps an 80 percent likelihood that in fact the lead somehow originated from that refining operation. ..."

[68] The Board is also satisfied that Imperial Oil's subsidiary, Devon Estates, meets the definition of a "person responsible" under EPEA. Devon Estates was aware of the presence of hydrocarbons at the Subdivision Lands when it received a copy of the Curtis Reports and it was, at this time, the owner of the Subdivision Lands and jointly engaged in the development of the Subdivision Lands. The Board finds that the fact that Devon Estates was not the operational partner of the land development joint venture between it and Nu-West, does not absolve it of responsibility for the development of the land and the associated charge, management and control of the Substances. The Board is satisfied that through meetings with Nu-West and the receipt of information from Nu-West, Devon Estates was sufficiently aware of the ongoing development activities and was in a position to prevent activities on the Subdivision Lands of which it did not approve. Devon Estates was at least the principal of others who were directed to manage the Substances during development. These development activities were supposed to include the removal of hydrocarbons from the Subdivision Lands and included the stripping and grading of the Subdivision Lands.

[69] The nature of the joint venture between Devon Estates and Nu-West is further evidenced by the Joint Venture Agreement ("JVA") between the two companies.[47] Nu-West was designated the operator under the JVA. However, each had an equal interest in the joint account for the development and Nu-West was required to keep in continuous communication with Devon Estates so that Devon Estates could participate in the joint planning and other decisions of the parties.[48] Further the JVA provided that:

> "All operations on the Land by either party shall be at their joint risk and expense provided that each party shall save harmless and indemnify the other from and against all claims and loss suffered by a party by reason of the negligent act or

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[47] Ogden Area Development Agreement, dated December 8, 1971, between Devon Estates and Nu-West, Exhibit 16 to the Affidavit of Andrew R. Teal, dated August 30, 2001.

[48] Ogden Area Development Agreement, dated December 8, 1971, between Devon Estates and Nu-West, Exhibit 16 to the Affidavit of Andrew R. Teal, dated August 30, 2001, section 6(c).

omission of the other in pursuance of the Development."[49]

[70] The Board is satisfied that Imperial Oil and Devon Estates meet the definition of a "person responsible" under the broad language of EPEA in respect of the Subdivision Lands. The Board will now turn to the question of whether the fact that the Appellants owned, and had charge, management and control of the Substances before EPEA came into force, prevents the Director from issuing an EPO to them under section 102 of EPEA.

2. Retrospective Application of Section 102

[71] The Appellants submitted that there is a *prima facie* presumption against the retrospective operation of a statute: a statute is generally not construed so as to change the character of past transactions carried on upon the faith of the then existing law.[50] Generally, this means that when the Legislature changes the law or imposes new laws by statute, those bound only become subject to the new law from the date it became law.

[72] The Appellants challenged the Director's power to issue the EPO pursuant to section 102 of EPEA. They submitted that the releases occurred before September 1, 1993 (the date when EPEA came into force) and section 102 is not a provision with retrospective operation.

[73] The retrospective application of section 102 of EPEA is a recurring issue in appeals of EPOs before this Board.[51] The Board's disposal of this issue in each appeal is fact dependent. However, each appeal, including this Appeal, involved a common element: pollution that originated before EPEA came into force but which remains in the environment and is causing or threatening to cause an adverse effect. As long as we weigh the facts of each individual appeal, as we have done carefully in this case, the Board sees no reason to deviate from its previous decisions, especially given the direction of the Alberta Court of Queen's Bench

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[49] Ogden Area Development Agreement, dated December 8, 1971, between Devon Estates and Nu-West, Exhibit 16 to the Affidavit of Andrew R. Teal, dated August 30, 2001, section 9(a).

[50] *Phillips* v. *Eyre* (1870), L.R. 6 Q.B.1, at page 23.

[51] See: *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R and *Legal Oil and Gas Ltd*. v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999), E.A.B. Appeal No. 98-009-R.

recently affirming one of the Board's decisions.[52] However, the Board will explain its conclusions in respect of this Appeal below.

[74] The retrospectivity issue requires the Board to determine whether the Director was empowered to issue an EPO under section 102 with respect to the facts in this Appeal. The question arises because EPEA, and with it section 102, came into force on September 1, 1993 but the Appellants' relationship with the Subdivision Lands and the Substances appears to have occurred many years before that date. The retrospectivity issue comprises two questions:

1. Did the Director apply section 102 retrospectively by issuing the Order?
2. Did the Legislature intend that section 102 could be applied retrospectively?[53]

[75] If the Director did not apply section 102 retrospectively, or the Director did apply it retrospectively and it appears that the Legislature intended that section 102 could be applied retrospectively, then the Director can issue an EPO in respect of pollution that was released before 1993.

3. Was Section 102 Applied Retrospectively?

[76] This question has two components.[54] First, the Board must ask whether the EPO applies to an event or conduct that occurred before September 1, 1993, the date when EPEA came into force. If the facts with which the relevant provision is concerned are ongoing or some facts occurred after the provision was enacted, the application of the provision is not retrospective. Secondly, the Board must determine whether section 102 of EPEA applies new legal obligations to conduct that occurred before September 1, 1993. The Board will address each of these components in turn.

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52 *Legal Oil and Gas Ltd.* v. *Alberta (Minister of Environment)* (2000), 34 C.E.L.R. (N.S.) 303, 84 Alta L.R. (3d) 159 (Alta Q.B.) Clackson J. ("*Legal* (Q.B.)").

53 *McColl-Frontenac Inc*. v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 67 and *Legal Oil and Gas Ltd*. v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999), E.A.B. Appeal No. 98-009-R, at paragraph 26.

54 *McColl-Frontenac Inc. v. Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 68 and *Legal Oil and Gas Ltd.* v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999), E.A.B. Appeal No. 98-009-R, at paragraph 27.

a. When Did the Release Occur?

[77] The Appellants submitted that if the relevant facts with which a provision is concerned "…are not all in the past, the application of the provision is immediate rather than retrospective."[55] The Appellants submitted that the application of section 102 in the Order is not immediate because the refinery ceased operations in the mid-1970s and was decommissioned in 1977, there is no evidence of migration off-site with respect to the Subdivision Lands, and there is no evidence of migration causing increased off-site concentrations of lead or hydrocarbons.[56]

[78] The Board accepts that Imperial Oil and Devon Estates did not own the Subdivision Lands on September 1, 1993. Further, it is likely that most if not all of the lead and hydrocarbons found their way into the Subdivision Lands during the period of Imperial Oil's refinery operations, before EPEA came into force. However, on that point, some of Mr. Teal's evidence raises the probability of ongoing releases of hydrocarbons into or adjacent to the Subdivision Lands from other land still owned by Imperial Oil.

[79] During the hearing, the Chair asked Mr. Teal whether the likely sources of the Substances were now eliminated:[57]

> "Chairman: Do you know when were the sources likely eliminated so that no new substances would have been added to the soil? For example, you stated in '77 or '78 the tank farms and the refinery was decommissioned in this area. Is that the last day that any sources would have been added to the environment? Are you aware of any other potential sources for lead or hydrocarbons following the decommissioning?
>
> Mr. Teal: It would be 1975 when the decommissioning took place. Certainly between 1975 and 1977 would be the last time any potential source could arise.
>
> Chairman: And you said that you sold the lands, but are there other lands that Imperial [Oil] or Devon [Estates] still owns in that area that might be used for, I think you were talking about -- someone gave evidence about an offsite area that still exists.
> Mr. Teal: Yes, in fact, to the east of Lynnview Ridge and south of the CNR tracks, we still own that parcel of land. I believe it's about 17 acres or something like that.
>
> Chairman: Is there anything happening there today or since '75 or '77 and the

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55 Appellants' Submission, September 6, 2001, at page 29, paragraph 99.

56 Appellants' Submission, dated September 6, 2001, at page 29, paragraph 100.

57 Transcript, dated October 16 to 18, 2001, at pages 259 to 260.

> EPO being issued that would be a continued source or an ongoing source of release of lead or hydrocarbons?
>
> Mr. Teal: Not as far as lead, no. We do have an active recovery trench on that site that is intercepting hydrocarbons that actually come off the main refinery site. So hydrocarbons are being actively managed in that area and we still maintain that operation."

[80] The Appellants submitted that there is "…ample and significant evidence that there has been no migration or additional release of the Substances."[58] However, the Board does not recall any substantive evidence at this hearing tending to prove or disprove the migration of the Substances from off-site areas previously owned, controlled or managed by Imperial Oil onto the Subdivision Lands. The Appellants merely referred to Dr. Agar's statement that he has no evidence that hydrocarbons are moving beyond the Subdivision Lands[59] and Dr. Davies' evidence that elemental lead and lead salts generally tend to remain immobile in the soil.[60]

[81] In short, the Board is not satisfied that migration from off-site is or is not occurring.

[82] Next, the Board must consider whether the presence of the Substances within the Subdivision Lands may constitute an ongoing release. One of the primary concerns of the Director, the CHR, and the Residents Committee is that the substances may not remain in the same location. The Board is satisfied on the evidence that there is a risk, albeit small, that lead in dust particles and hydrocarbon vapours have migrated or may migrate into residents' houses. To the extent that the substances are existent and mobile may represent ongoing releases.

[83] Such an interpretation is consistent with the language of section 102. Section 102 states that in order to issue an EPO, the Director must be of the opinion that a release may occur, is occurring, or *has* occurred and it may cause, is causing, or *has* caused an adverse effect. There is no specific requirement that the release must be directly attributable to human activity. Therefore, if a substance was deposited some time ago but continues in fact to emit vapours or may emit vapours, it may still fall within section 102. This interpretation is further supported by

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58 Appellants' Submission, dated February 21, 2002, at page 10, paragraph 34.

59 Transcript, dated October 16 to 18, 2001, at page 122, lines 25 and 26.

60 Transcript, dated February 5 to 6, 2002, at pages 864 and 865.

the final phrase of section 102(1), which provides that the Director may issue an EPO to the "person responsible" for the substance rather than merely the person responsible for the release. It is also supported by section 2(a) of EPEA.[61]

[84] The Director's choice of persons upon whom to issue an EPO is not limited to persons responsible for the release or who actively released the substance. Thus, in the Board's view, the Order applies in respect of releases which occurred before EPEA came into force in connection with Imperial Oil's operations, after EPEA came into force, when the Substances migrated through the Subdivision Lands, and which occur presently or in the future.

[85] In *McColl* and *Legal Oil*, the Board also found it relevant that the presence of contamination, rather than merely the escape of substances, was ongoing. In those appeals the Board analyzed the temporal focus of the order subject to appeal through a spectrum, rather than in black and white, retrospective and non-retrospective terms. Using this approach, the Board concluded that the more the order in question is based on present circumstances rather than pre-EPEA conduct, the weaker the presumption against construing section 102 as applying to the relevant pre-EPEA conduct.[62] As in *McColl* and *Legal Oil*, the Imperial Oil Order stems from the pre-EPEA introduction of the Substances on to the Subdivision Lands, but is concerned principally with the ongoing presence of the Substances and their adverse effects. Regardless, the Board is of the view that the Order relates to present circumstances and is, therefore, not applied entirely retrospectively.[63]

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[61] Section 2(a) of EPEA provides:

> "The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: (a) the protection of the environment is essential *to the integrity of ecosystems and human health and to the well-being of society*...." (Emphasis added.)

[62] *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraphs 81 to 83 and *Legal Oil and Gas Ltd*. v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999), E.A.B. Appeal No. 98-009-R, at paragraph 31.

[63] The Appellants argued that *Legal Oil* is distinguishable, in part, because there was an ongoing release in *Legal Oil*, namely, the ongoing migration of the pollution. The Appellants' Submission, dated September 6, 2001, at page 45, paragraph 162. ("The existence of long known substances which are not migrating does not constitute an ongoing release.") Even if there is no pollution migration from or to the Subdivision Lands, this distinction is not relevant, in part, because the pollution migration was within the lands that were the focus of the cleanup order and the Board's focus was on that ongoing pollution. *Legal Oil and Gas Ltd.* v. *Director, Land Reclamation Division,*

[86] The Appellants submitted that if the relevant facts are not all prior to the enactment of the legislative provision in question, the provision should be viewed as having an immediate as opposed to retrospective effect.[64] The Appellants claimed that the relevant facts are all in the past and, therefore, section 102 was applied to a completed past event. However, the Board does not agree with the Appellants' characterization of the relevant facts.[65] As the Order is primarily concerned with the investigation and remediation of ongoing pollution, and the amelioration and prevention of adverse effects, in the Board's view these are the most relevant facts.

[87] A distinction may be drawn, for the purposes of the retrospectivity issue, between a single event which occurred at a specific time and the release of substances over an indeterminate period which continue to migrate through the environment and present a continued threat of adverse effects. Because of this important distinction, the Board is not prepared to conclude that the release of the Substances in the Subdivision Lands is a completed past event.

Alberta Environmental Protection (July 23, 1999), E.A.B. Appeal No. 98-009-R, at paragraph 9 (noting migration within the farm land covered by the cleanup order) and, at paragraph 27 (noting that, although the pollution was caused by conduct that occurred well before EPEA came into force, "…the contamination itself is an *ongoing* occurrence..."). The expanding geographic scope of the pollution in *Legal Oil* simply underscored the need for the cleanup order. *Legal Oil and Gas Ltd*. v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999), E.A.B. Appeal No. 98-009-R, at paragraph 39 and footnote 36 (noting the "…public interest in remedying the environmental effects of a long-festering and *still growing* pollution problem.") However, the Board made no finding in *Legal Oil* that the ongoing pollution migration was causing an ongoing release.

[64] The Appellants' Submission, September 6, 2001, at page 29, paragraph 98 (citing *Quebec (Expropriation Tribunal)* v. *Quebec (Attorney General)*, [1986] 1 S.C.R. 732 ("*Quebec (Expropriation Tribunal*)"). In the Board's view, this rule actually poses a higher burden for the Appellants than the Board's spectrum approach, because if even some of the "relevant" facts are in the present, the retrospectivity presumption disappears entirely rather than simply being applied with less than full force.

[65] Whether the spectrum approach or the "immediate as opposed to retrospective" rule is used, the Board notes that its rejection of the retrospectivity claims in this Appeal (as in *McColl* and *Legal Oil*), is consistent with the outcome of the *Quebec (Expropriation Tribunal)* case cited by the Appellants. In that case, the Supreme Court of Canada upheld, as non-retrospective, the application of new federal legislative expropriation procedures to an expropriation that had commenced before the new legislative procedures took effect. See also *Quebec (Expropriation Tribunal)*, at page 746 (citing *Acme Village School District (Board of Trustees of)* v. *Steele-Smith*, [1933] S.C.R. 47 (viewing, as prospective, legislation imposing limitations on School Board's power to terminate a teacher hired under a contract that took effect before the legislation was adopted) and *Bellechasse Hospital* v. *Pilotte*, [1975] 2 S.C.R. 454 (viewing, as prospective, new regulations restricting hospital's ability to refuse to renew a contract entered into before the regulations took effect)). In these cases, the legislation is considered prospective, because it is being applied to present facts, even though those facts *stemmed* from conduct that occurred before the legislation took effect.

b. New Legal Obligations

[88] The second component of this question is whether section 102 creates legal obligations that did not exist prior to the enactment of EPEA. The presumption against retrospectivity seeks to prevent the operation of a law that would prejudicially affect the existing status or accrued rights unless the Legislature intended that result. If the statute in question does not substantively change the law, the presumption against retrospectivity does not arise.

[89] As the Board noted in *McColl* and *Legal Oil*, one of the Legislature's principal purposes in enacting EPEA was to consolidate several existing statutes.[66] These predecessor statutes included the *Clean Air Act*, *Clean Water Act,* and *Hazardous Chemicals Act*, each of which authorized the government to issue remedial orders that are roughly comparable in scope to an order under section 102 of EPEA.[67]

[90] In particular, section 6(1) of the *Hazardous Chemicals Act* authorized the Environment Minister to issue a chemical control order when, in the Director's opinion, the "...use, handling, storage ... [or] disposal … [of a] hazardous chemical ... adversely affects or is likely to adversely affect the health or safety of any person...." Under section 6(2) of the

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[66] *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 75 and *Legal Oil and Gas Ltd.* v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999), E.A.B. Appeal No. 98-009-R, at paragraph 29 (citing EPEA's transitional provisions). See also: *Syncrude Environmental Assessment Coalition* v. *Alberta (Energy Resources Conservation Board)* (1994), 17 Alta. L.R. (3d) 368, at page 370 (Alta. C.A.) (referring to EPEA as an "omnibus environmental statute which repealed some prior environmental legislation"); N. Vlavianos, *Liability for Well Abandonment, Reclamation, Release of Substances and Contaminated Sites in Alberta: Does the Polluter or Beneficiary Pay?* (LL.M. Thesis, University of Calgary, Faculty of Law (2000), at pages 61 and 62; R. Cotton and A.R. Lucas, *Canadian Environmental Law*, 2d ed. (Ontario: Buttersworths Canada Ltd., 1991), Vol. 1 at Commentary 8:1. In a different context, Imperial Oil itself noted that the "Legislature amended and repealed many previous statutes in order to replace them within a comprehensive EPEA to protect the environment...." Appellants' Submission, September 6, 2001, at page 32, paragraph 110.

[67] See: *Clean Air Act*, R.S.A. 1980, c. C-12, s. 13 ("emission control orders" requiring "procedures to be followed in the control or elimination of the contaminant"); *Clean Water Act*, R.S.A. 1980, c. C-13, s. 14 (same, in context of water pollution); *Hazardous Chemicals Act*, R.S.A. c. H-3, s. 6 ("chemical control orders"); N. Vlavianos, *Liability for Well Abandonment, Reclamation, Release of Substances and Contaminated Sites in Alberta: Does the Polluter or Beneficiary Pay?* (LL.M. Thesis, University of Calgary, Faculty of Law (2000), at pages 61 and 62 ("Prior to the enactment of EPEA in 1993, a number of environmental statutes addressed the issue of releases of substances into the environment.... With significant modifications, many of the features of these former statutes were brought forward in EPEA and, in particular, in Part 4, Division 1, entitled 'Release of Substances Generally'."); R. Cotton and A.R. Lucas, *Canadian Environmental Law*, 2d ed. (Ontario: Buttersworths Canada Ltd., 1991), Vol. 1 at Commentary 8:1, footnote 5 (referring to the *Hazardous Chemicals Act* "control order" and *Clean Water Act* stop work order as "predecessor provisions" to EPEA s. 102).

Hazardous Chemicals Act, an order could require the person responsible for the released substance to limit or stop the release and to comply with any directions in the order regarding the "...manner in which a hazardous chemical or a substance or thing containing a hazardous chemical or any container of either of them may be handled, stored, used, [or] disposed of...." In the Board's view, this section authorized the government to require a person to investigate and clean up a hazardous chemical that the person had released.[68]

[91] The *Hazardous Chemicals Act* came into force on September 15, 1978, and thus, like EPEA, it may have postdated the original releases of the Substances as a result of Imperial Oil's operations on the Subdivision Lands.[69] However, the *Hazardous Chemicals Act* was in effect during Devon Estate's ownership of the Subdivision Lands. In the Board's opinion, Devon Estate's ownership of the Subdivision Lands at a time when contamination was potentially exacerbated through development activities, would have been sufficient for the Minister to name it as a "person responsible" under the *Hazardous Chemicals Act*.[70]

[92] Even before the enactment of the *Hazardous Chemicals Act*, the common law torts of nuisance and negligence may have given rise to an action by any person who suffered damage as a result of the presence of the Substances in the Subdivision Lands – though we certainly do not decide that point or make our decision based upon that point.[71]

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[68] See: *Bavarian Lion Co.* v. *Alberta (Director of Pollution Control)* (1990), 76 Alta. L.R. (2d) 394 (Alta. C.A.), leave to appeal to the S.C.C. denied, [1991] 1 S.C.R. vi (affirming s. 6 order requiring off-site disposal of PCB-contaminated material stored by the recipient of the order). But see: *Alchem Inc. and Sokil Express Lines Ltd.* v. *Director of Pollution Control* (December 22, 1989) (H.C.A.C.) (Hazardous Chemicals Advisory Committee decision that s. 6 orders can not require a "person responsible" to clean up a hazardous chemicals spill); *Appealing Chemical Control Orders in Alberta* (1991), 6 Environmental Law Centre Newsletter No. 1 at 1 and footnote 3 (Speculating that the Advisory Committee's decision in *Alchem* was overruled by the Alberta Court of Appeal's decision in *Bavarian Lion Co.*).

[69] *Hazardous Chemicals Act,* S.A. 1978, c. 18. Proclaimed into force on September 15, 1978 (74 Alberta Gazette No. 18, at page 3210).

[70] Like the analogous EPEA definition, section 1(j) of the *Hazardous Chemicals Act* defines "person responsible" as the person who owned, or had charge, management, or control of, the released substance.

[71] See: *Legal Oil and Gas Ltd*. v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999), E.A.B. Appeal No. 98-009-R, at paragraph 28 (citing *Colonial Developments (IV)* v. *Petro-Canada*, [1996] A.J. No. 1140 (Alta. Q.B.) (imposing tort liability for off-site hydrocarbon contamination from defendant-oil company's land, even assuming the company had not itself caused the release but had simply 'adopted the nuisance' created by prior owners)); *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 79 footnote 74.

[93] The Appellants' legal risks under the common law and even the *Hazardous Chemicals Act* were arguably less significant than under EPEA, but that is *not* the point. The Board's point is that section 102 of EPEA has considerable historical antecedents. As the Board previously concluded, and concludes again here, " ... the obligations created by that section did not spring up from a legal vacuum when the Legislature proclaimed ... [EPEA] into force."[72] Regardless of whether the Appellants met the decommissioning and cleanup standards of the time, in the Board's view, the Appellants never had a vested right to pollute or to continue to pollute the environment. Therefore, by requiring the Appellants to clean up their pollution, the Director is not changing the rights of the Appellants. He is acting within his statutory authority.

c. Conclusion

[94] The Board concludes that the Director's application of section 102 has retrospective aspects, but it cannot be described solely or even largely as retrospective. The legal obligations under section 102 of EPEA have significant legislative roots that pre-date the sale of the Subdivision Lands to Nu-West, and common law roots that pre-date the original release of the pollution itself. In addition, the Order applies section 102 in a prospective fashion with respect to the Order's focus on ongoing pollution and potential adverse effects, which is our finding in this Appeal.

[95] As explained below the Board also believes that the Director's application of section 102 was consistent with legislative intent, even if the presumption against retrospectivity is applicable in this instance.

4. The Legislature's Intent

[96] Even if the Board were to assume, which it does not, that the Director applied section 102 retrospectively by issuing the Order to the Appellants, the Courts have identified exceptions to the presumption against retrospective operation of a statute. First, the Courts have indicated that the presumption against retrospective operation of a statute may be rebutted by the express language or necessary implication of the statute. The Supreme Court said, "…statutes

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[72] *Legal Oil and Gas Ltd.* v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999), E.A.B. Appeal No. 98-009-R, at paragraph 30.

are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act."[73] Second, the Board applies the Supreme Court's rule, in *Brosseau* v. *Alberta Securities Commission*, that the presumption against retrospectivity is inapplicable to statutes that impose a penalty for a past event, "…so long as the goal of the penalty is not to punish the person in question, but to protect the public."[74]

[97] Both of these "exceptions" are examples of the Courts examining the Legislature's intent in enacting the relevant provision. The Board has previously surmised that the presumption against retrospectivity is simply one of several tools for interpreting legislation in order to give effect to the Legislature's intent.[75] The question the Board must ask is whether the Legislature intended that section 102 would apply to the circumstances in this Appeal.

a. Did the Legislature Intend to Allow the Director to Apply Section 102 to the Circumstances in this Appeal?

[98] The Appellants submitted that section 102 may only apply to releases that occurred prior to the enactment of EPEA if section 102 has retrospective effect as a result of the express language or necessary implications of EPEA.[76] The Appellants argued that section 102 does not contain the express language or necessary implication to allow its retrospective application. The Appellants contrasted the language of section 102 with other statutes which they claimed expressly permit retrospective application.[77] The Appellants contrasted the language of section 108 of EPEA, which the Appellants claim

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[73] Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue), [1977] 1 S.C.R. 271, at page 279.

[74] *Brosseau* v. *Alberta Securities Commission,* [1989] 1 S.C.R. 301 ("*Brosseau*"), at page 319.

[75] See: *McColl-Frontenac Inc*. v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 84; *Legal Oil and Gas Ltd*. v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999), E.A.B. Appeal No. 98-009-R, at paragraph 32, footnote 26 (both E.A.B. decisions citing Pierre-Andre Cote, *The Interpretation of Legislation in Canada*, 2nd ed. (Quebec: Yvon Blais, Inc., 1991), at page 112 (In resolving a retrospectivity issue, "…[t]he role of both judge and reader is to detect this [legislative] intent, using all available indications. The text of the enactment itself, the presumptions and the appreciation of its consequences are merely guides to the discovery of legislative intent.") and at page 132 (the presumption against retrospective legislation is not a constitutional rule or rule of law, just a "rule of construction" (citation omitted)). See also *Re: Royal Canadian Mounted Police Act*, [1990] 123 N.R. 120, at page 138 (F.C.A.) (cautioning against applying the presumption in a rigid or inflexible manner that would override legislative intent).

[76] Appellants' Submission, dated September 6, 2001, at page 30, paragraphs 101 and 102.

[77] Appellants' Submission, dated September 6, 2001, at page 30, paragraphs 104 and 106.

was intended to have retrospective effect.[78] The Appellants also argued that the other sections in Division 1 are designed to deal with "…contemporary and specific substance release issues, as reflected in its terms and prospective language…" and therefore, section 102 was not intended to have retrospective effect.[79] Finally, the Appellants examined the plausibility, efficacy, and acceptability of applying section 102 retrospectively.[80] The Appellants conclude that section 102 was intended to cover releases which are about to occur, are occurring, or have recently occurred, whereas the combination of section 108 and mandatory factors listed in 114(2) indicate that the Legislature intended section 114 to have retrospective operation.[81] The Appellants argued that any other interpretation would lead to uncertainty and unfairness.

[99] The Board does not agree. Section 102(1) refers to ongoing and future releases as well as to those that "ha[ve] occurred." On its face, this term refers to all past releases, regardless of when they occurred. The Appellants argued that the word "recently" should be read into this phrase so that section 102 EPOs are applied only to those releases that have recently occurred.[82] The Appellants claimed that the Legislature's reference to past releases was intended simply to remove from the Director the obligation to catch a polluter in the act of releasing pollution. However, section 102 makes other references to the past. Section 102(1) also refers to releases that "ha[ve] caused" an adverse effect. Further, the definition of a "person responsible" in section 1(ss) includes the *previous* owner of the released substance, every person who *has had* charge, management and control of the substance, and any successor of a person responsible.

[100] In the Board's view, these broad historical references collectively indicate that the Legislature intended section 102 to apply to pollution that originated at any time in the past, including before EPEA came into force, because it had to apply on the *first* day EPEA came into force. As the Board explained in *Legal Oil*, this plain reading is warranted when the terms are

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78 Appellants' Submission, dated September 6, 2001, at page 31, paragraph 106.

79 Appellants' Submission, dated February 21, 2002, at page 15, paragraph 58.

80 Appellants' Submission, dated September 6, 2001, at pages 33 to 39, paragraph 114 and onward.

81 Appellants' Submission, dated September 6, 2001, at page 34, paragraphs 119 and 120.

82 Appellants' Submission, dated September 6, 2001, at page 33, paragraph 116 (noting that the Legislature's reference to past releases was intended simply to remove the Director's obligation to catch a polluter in the act of

read in light of the far-reaching environmental protection objectives of the public welfare-based EPEA and the Alberta *Interpretation Act*.[83] Section 10 of the *Interpretation Act* provides that Alberta statutes "shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of ... [their] objects."

[101] The Courts support an examination of legislative intent as a means to determine whether a statute should be interpreted to apply retrospectively. In *Nova* v. *Amoco*,[84] Justice Estey dealt with the issue of retrospectivity by examining the intent behind a statute. He stated, "…each statute must, for the purpose of its interpretation, stand on its own and be examined according to its terminology and the general legislative pattern it establishes."[85] Further, the Alberta Court of Appeal stated that the "...Alberta Legislature can legislate retrospectively, but its product must expressly say so or at least indicate that such an intention is clear by implication."[86] The Court of Appeal also stated, "…there are circumstances when a legislative intent to make an enactment retroactive can be deduced from the purpose of the legislation, the circumstances in which it was adopted, and the procedure employed by the legislator."[87]

[102] The Appellant's asserted that if the Legislature had intended section 102 to apply to pollution that originated before EPEA came into force, it would have said so in more precise terms.[88] The Appellants referred to analogous pollution cleanup statutes enacted in British Columbia and Quebec. The Appellants referred to section 31.42 of the Quebec *Environment Quality Act*[89] which provides:

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releasing pollution).

83 *Legal Oil and Gas Ltd*. v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999), E.A.B. Appeal No. 98-009-R, at paragraphs 32 and 37 (citing s. 2 of EPEA and s. 10 of the *Interpretation Act,* R.S.A. 1980, c. I-7 (now *Interpretation Act*, R.S.A. 2000, c. I-8)). Section 10 of the *Interpretation Act* provides: "An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objectives."

84 *Nova Corporation* v. *Amoco Canada Petroleum Co.,* [1981] 2 S.C.R. 437.

85 *Nova Corporation* v. *Amoco Canada Petroleum Co*., [1981] 2 S.C.R. 437, at page 448.

86 *Syncrude Environmental Assessment Coalition* v. *Alberta (Energy Resources Conservation Board)* (1994), 17 Alta. L. R. (3d) 368, at page 372 (Alta.C.A.).

87 *Rivard* v. *Alberta Dental Hygienists' Association* (2001), 83 Alta. L. R. (3d) 201, at page 214.

88 Appellants' Submission, dated September 6, 2001, at page 31, paragraph 106.

89 *Environment Quality Act,* R.S.Q. 1990, c. Q-2.

> "Where the Minister believes on reasonable grounds that a contaminant is present in the environment ... he may order whoever has emitted, deposited, released or discharged, even before 22 June 1990, all or some of the contaminants…."

[103] Clearly, EPEA does not contain express language to address the retrospectivity issue in a manner similar to the Quebec statute. However, the Board does not agree that the British Columbia *Waste Management Act* provides a clearer expression of retrospective intent than section 102 of EPEA.[90] The reference to "retroactive" liability in section 27(1) of the *Waste Management Act* applies only with respect to third party cleanup costs if the person already qualifies as a person responsible for the contamination. The threshold categories of "person responsible" do not refer to retroactive responsibility although the British Columbia Legislature might have intended that result.[91] Further, section 27.1(1) which authorizes the government to issue cleanup orders to persons responsible, does not refer to retroactive responsibility although the Legislature likely intended that result as well.

[104] Although the Appellants submitted that section 108 in Part 4, Division 2 of EPEA expressly permits retrospective application of Division 2, the Board does not reach the same conclusion; whatever differences exist between section 108 and section 102 of EPEA, it is clear that the Legislature used past tense in both Divisions. In any event, this is Alberta, not British Columbia.

[105] Section 108 provides that Division 2 applies "…regardless of when a substance became present in, on or under the contaminated site." Although section 102 applies to releases that "have occurred," the Appellants argued that the section only applies to releases that have occurred since September 1, 1993. The Board agrees that section 108 supports a necessary implication that Division 2 may operate retrospectively, but it is not express language in the same manner as the language of the Quebec statute. Since section 108 lacks express reference to

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[90] Section 27(1) of the British Columbia *Waste Management Act*, R.S.B.C. 1996, c. 482 (cited in the Appellant's Submission, dated September 6, 2001, at page 30 paragraph 104), provides that persons who are "responsible for remediation" at a "contaminated site" are liable for third party cleanup costs "retroactively."

[91] Section 26.6(1) of the British Columbia *Waste Management Act*, R.S.B.C. 1996, c. 482, refers more expressly to the retrospectivity issue, by exempting from the "person responsible" definition any person "who would become a responsible person only because of an act of God that occurred before the coming into force of this section and who exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site..."

pollution that occurred before EPEA came into force (or in comparably explicit terms), the Board does not follow the Appellants' argument that section 102 must contain such express terms before it can have retrospective application. In *Legal Oil*, and again in this Appeal, the Board concludes that the temporal reference in section 108 is comparable to the historical references in section 102 and that both sections may apply to pollution that occurred in the past, including before EPEA came into force.[92]

[106] The Appellants also based their retrospectivity argument on a contextual analysis of Divisions 1 and 2 of Part 4 of EPEA. The Appellants inferred that the Legislature intended Division 1, entitled "Release of Substances Generally," and Division 2, entitled "Contaminated Sites," to be "handled differently."[93] The Appellants argued that this legislative objective can be achieved only by applying Division 1 prospectively (including "recent" past releases) and applying Division 2 to "historic" pollution, including pollution that was released before EPEA came into force.[94]

[107] The Appellants argued that Division 1 prescribes a "logical time sequence" so that the application of sections in Division 1 follows chronologically from the narrow categories of substance releases referred to and prohibited by sections 97 and 98.[95] The Board rejects the Appellants' argument that given the first sections (sections 97 and 98) of Division 1 apply from 1993 onwards, so should the rest of Division 1 (including section 102).[96] The reason that the first

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92 *Legal Oil and Gas Ltd*. v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999), E.A.B. Appeal No. 98-009-R, at paragraph 36.

93 Appellants' Submission, dated September 6, 2001, at page 32, paragraph 110.

94 The Appellants' Submission refers alternately to "historic" (or "historical") pollution, and pollution that originated before EPEA came into force, but without clarifying whether the two categories are perfectly equivalent. For purposes of this decision, the Board considers "historic" pollution as all pollution whose release is no longer ongoing. This broad category includes the sub-category of pollution that was released entirely or partly before EPEA came into force. See *McColl-Frontenac Inc*. v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 124, footnote 109.

95 Appellants' Submission, dated September 6, 2001, at page 32, paragraphs 111 and 112.

96 The Board disagrees with part of the Appellants' rationale for this position. According to the Appellants, the prospective focus of these provisions, as well as section 102, is evident by their general application to substance releases that are not authorized by an "approval" or by "regulations." (However, section 102 orders can apply even to these releases under certain circumstances). The Appellants reason that, since an "approval" refers to an authorization made *under* EPEA, it would be "nonsensical" to apply the pollution prohibitions to substance releases that occurred before EPEA came into force "when the defence of an approval and regulatory compliance was not

sections apply from the commencement of EPEA is that they refer to approvals issued under EPEA and they refer to releases in the present or future tenses. By contrast, section 102 specifically refers to *past* releases.[97] In the Board's view, Division 1 provides a comprehensive regulatory framework for preventing and remediating substance releases, and given the purposes of EPEA, Division 1 should be interpreted as broadly as the language of its respective sections allows. The Board cannot find any reason to strictly limit the operation of Division 1 based on a temporal sequence of events.

[108] The Board also rejects the Appellants' argument that interpreting section 102 to apply to "historic" pollution would render section 114 (the EPO provision in Division 2 of Part 4) meaningless.[98] In considering the Appellants' argument, the Board wonders why interpreting section 114 to apply to historic pollution would not similarly render the references to past pollution in section 102 meaningless, or applying either section to recent releases would not render the other section meaningless. The Board is of the view that the primary differences

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available" (Appellants' Submission, dated September 6, 2001, at page 32). There are two problems with this logic. First, the Board sees no reason why the defence would have to be relevant in *all* circumstances in which those sections might apply, as long as the defence is relevant to some of them and, thus, is not meaningless. Second, the Board does not agree that the references to "approvals" are limited to authorizations made only after EPEA came into force. Section 243(4), one of the transitional provisions in Part 12 of EPEA, expressly authorizes the adoption of regulations that allow approvals issued under any of the statutes preceding, and repealed by, EPEA to be treated as approvals for EPEA purposes. Then-Environment Minister Ralph Klein emphasized the importance of this legislative continuity in comments to the Legislative Committee of the Whole on proposed amendments to the Bill that became EPEA:

> "Basically ... this legislation involves rolling nine separate Acts into one Act, and we need the legislative authority to make sure that there is a smooth transition as these Acts are brought into the new ... [EPEA]. Basically, clear provisions are required to support the orderly transition when the proposed legislation is implemented." *Alberta Hansard*, Vol. 2, 22nd Legis., 4th Session (June 16, 1992), at page 1425.

[97] Section 102, the section that is the focus of this appeal, authorizes the Director to issue "environmental protection orders" to require "persons responsible" for pollution to take remedial measures. Section 103 largely mirrors the terms of section 102, but specifically authorizes the issuance of orders that require "persons responsible" to take "necessary" "emergency measures" to remedy pollution that has caused or may cause an "immediate and significant adverse effect." Section 104 authorizes the Director to take remedial action on his own for pollution that has caused or may cause an "immediate and significant adverse effect." Section 105 provides comparable authority to section 102, but specifically for a substance or "thing" that is causing or has caused an "offensive odour" and without specifically referring to the offending agent's "release." These sections use the same tense in referring to the types of releases covered, so any conclusions regarding the retrospective application of one section would appear to apply to the other sections in the group.

[98] Appellants' Submission, dated September 6, 2001, at page 35, paragraph 121.

between sections 102 and 114 are not temporal.[99] The potential recipient of an EPO under each of these sections is one main difference. While responsibility under a section 102 EPO is determined according to a person's ownership or control over the polluting substance, under section 114, an EPO may be issued to anyone who owned the polluted land. A possible reason for this difference is to ensure that the Director can issue EPOs in circumstances where it is not entirely clear who was responsible for the pollution or where there were many polluting parties. For example, the Director could designate a gas station as a contaminated site (commencing the section 114 process) in circumstances where the site had been operated for a number of years as a gas station with numerous different owners. In such a situation (which is *not* our case) the Director may apply section 114 to cover both historical and more recent pollution.

[109] Although the Appellants also raised questions of fairness to contrast Divisions 1 and 2 of Part 4 in making their retrospectivity argument, the Board will address this question within our discussion of Issue 3.

[110] The Appellants also sought to distinguish between sections 102 and 114 on the basis of expedition. According to the Appellants, the fact that the Director can issue a section 102 EPO more quickly than a section 114 EPO, indicates that section 102 was intended to cover the situation where "…a release is occurring or has recently occurred and the Director needs to be able to move quickly to remedy it."[100] The Board recognizes that it is quicker to issue an EPO under section 102, but does not consider that this factor is evidence of legislative intent on the retrospectivity issue. The need for expedition may arise as a result of the toxicity of a substance and the likelihood that people, some of whom will be particularly vulnerable like children or elderly people, will be exposed to it, rather than because it was recently released. The Board is

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[99] The Appellants stated that "…[t]he argument that both sections 102 and 114 have retrospective effect begs the question as to why the sections have different language." (Appellants' Submission, dated September 6, 2001, at page 32, paragraph 113.) The Board's response is that the language relating to their temporal application is not materially different. Specifically, both texts apply to releases "which occurred after the coming into force of EPEA," and under both texts, the relevant release "need not be continuing," both characteristics the Appellants ascribe solely to section 102. Further, in the Board's view, both texts are "expressly designed for historical contamination" which characteristic the Appellants attribute only to Division 2.

[100] Appellants' Submission, dated September 6, 2001, at page 35, paragraph 126.

wary of construing section 102 in a way that would prevent its use in such risk-based decision-making situations.

[111] In the Board's view, the far-reaching environmental protection purposes (including cleanup of pollution) of EPEA and the plain text of section 102 necessarily imply that the Legislature intended that the Director should not be constrained in issuing an EPO under section 102 merely because the pollution originated before September 1, 1993. In the Board's view, the Legislature intended to provide the Director with fully adequate tools to address circumstances where pollution exists in the environment, including pre-EPEA pollution, and especially to protect human health, rather than limit the application of one tool on the basis of when the pollution was released.

b. The Public Purpose of an EPO

[112] In *Legal Oil,* the Board also indicated that a public protection purpose underlying the legislation may support its retrospective operation. The Supreme Court recognized the public protection purpose exception in *Brosseau*.[101] The Supreme Court referred to one category of retrospective statute that, it stated, Driedger[102] claims does not attract the presumption. The category is comprised of statutes that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event. The Supreme Court elaborated:

> "A subcategory of the third type of statute described by Driedger is enactments which may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public."[103]

[113] The Appellants noted that the Federal Court in *Re: Royal Canadian Mounted Police* questioned whether the Supreme Court had correctly interpreted Driedger through its analysis in *Brosseau* and then queried the correct interpretation of *Brosseau*.[104] The Federal Court endorsed a narrow interpretation of the exception to the general presumption and

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101 *Brosseau* v. *Alberta Securities Commission,* [1989] 1 S.C.R. 301.

102 *E. Driedger, Construction of Statutes*, 2nd ed. (Toronto: Buttersworth, 1983).

103 *Brosseau* v. *Alberta Securities Commission,* [1989] 1 S.C.R. 301, at page 319.

104 *Re: Royal Canadian Mounted Police Act* (Can.), [1990] 123 N.R. 120 (F.C.A.).

ultimately determined that "…if there is a public interest exception at all, ... it must ... be reducible to a matter of legislative intent, that is whether Parliament intended prospectivity or retrospectivity."[105]

[114] However, the Board notes that the Alberta Court of Queen's Bench recently upheld the Board's conclusion in *Legal Oil* that to the extent that an EPO has a retrospective element, section 102 of EPEA (clearly a public welfare statute) is intended to operate in that fashion. The Court upheld the Board's conclusion at least on the basis of "…an exception to the presumption against retrospective application when the purpose of the provision is to protect the public rather than to punish."[106]

[115] The Board acknowledges that the presumption against retrospectivity is based on the potential unfairness of imposing legislative burdens on parties based on actions they took before the legislation existed. However, fairness to those parties is not the only interest at stake. In the Board's mind, the rule in *Brosseau* simply reflects circumstances where a considerable countervailing public interest negates the threshold presumption for interpreting legislative intent.

[116] Thus, in *Legal Oil*, the Board interpreted the Legislature's intent in enacting section 102, not simply from the text of that provision, but also in light of the far-reaching environmental objectives in section 2 of EPEA. We found then, and still do, that such EPOs fall within what we find is the public protection exception to the presumption.

[117] The Appellants submitted that the limits of the exception were explained in the following statement by Driedger:

> "In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies because a new consequence is attached to a prior event. But if the new punishment or penalty is intended to protect the public, the presumption does not apply."[107]

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105 *Re: Royal Canadian Mounted Police Act* (Can.), [1990] 123 N.R. 120 (F.C.A.), at page 138.

106 *Legal Oil and Gas Ltd* v. *Alberta (Minister of Environment)* (2000), 34 C.E.L.R. (N.S.) 303, at page 312, 84 Alta. L.R. (3d) 159, at page 168 (Alta.Q.B.).

107 E. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978) 56 Can. Bar Rev. 264, at page 275.

The Board notes that these orders are environmental *protection* orders.

[118] The Appellants then went on to say that the new consequence to Imperial Oil of its prior ownership of Lynnview Ridge lands is penal.[108] The Appellants stated that Imperial Oil alone faces immense costs for matters it was not solely responsible for, all because the Director has given retrospective effect to section 102 and that failure to comply with an EPO can result in huge fines and, in the case of individuals including corporate officers, jail sentences.[109]

[119] The Appellants' argument is plainly wrong. The Order is not penal, it is remedial. For whatever reason, pollutants are present at the Subdivision Lands, and in the interests of protecting the environment and human health, someone must clean it up and for all of the legal arguments, we cannot lose sight of that point.

[120] Section 102 gives the Director the power to require the person who was responsible for the release of the substance to clean it up. The EPO does not fine the Appellants or threaten the Appellants' corporate officers with jail sentences. The EPO is not an enforcement order. Certainly, failure to comply with an EPO may have penal consequences, but any such consequences result from the *failure to comply with the order* of the Director rather than as a result of the release of polluting substances.

[121] Further, the EPO was not issued to Imperial Oil because of its prior ownership of the Subdivision Lands. The EPO was issued to the Appellants because they were responsible for the release across all time periods of the Substances onto the Subdivision Lands.

[122] The Appellants made other arguments to the effect that the Order is a form of punishment. The Appellants submitted that the purpose of EPEA as set out in section 2 includes "…the protection of the public from the results of pollution as well as the imposition of retribution on all persons responsible for the pollution."[110] The Appellants also stated, "…[i]t is the responsibility of the Board to determine which purpose is the primary purpose in this case and that requires a weighing of the risk of harm to the public against the prejudice to IOL

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108 Appellants' Submission, dated February 21, 2002, at page 21, paragraph 85.

109 Appellants' Submission, dated February 21, 2002, at page 21, paragraph 85.

110 Appellants' Submission, dated September 6, 2001, at page 43, paragraph 157.

[(Imperial Oil)]."[111] Finally, the Appellants stated that the Order "…issued against them is akin to an onerous mandatory injunction requiring them to invest significant amounts of time and money to carry out the directions in the EPO."[112]

[123] However, in the Board's view, the text of the Order and the overall context in which it was issued indicate that the Director was concerned with delineating and alleviating what he perceived as an immediate public health risk, rather than punishing Imperial Oil. The costs that Imperial Oil may face in accomplishing this key public interest objective do not turn it into a punitive measure. The objective is remedial.

[124] EPEA contains many offences to which are attached significant fines and other punitive measures. An EPO, however, is not a punitive measure to which significant a fine or jail are attached. An EPO is a proper response to the occurrence or threat of "…impairment of or damage to the environment, human health or safety or property."[113] One of the objectives of an EPO is to require further investigation of the sources and extent of pollution and, indeed, the Order issued to the Appellants required them to submit a report that delineated the quantity, extent, levels, and location of the Substances. The investigation and cleanup of pollution benefits the whole community by reducing the health risk to persons who are or who may come in contact with the pollutants and preventing the spread of the pollutants into other areas. An EPO has a strong public welfare and protection purpose, which in the Board's view may warrant greater deference than other legislative purposes for which the Courts have previously applied the exemption against the retrospectivity presumption.

[125] To the extent that the public purpose of a law may reduce or remove the presumption against retrospectivity, the Board finds that the essence of section 102 of this important public welfare statute (EPEA) is to protect the environment and, of course, public health and the human environment. Viewed in this light, and given the potential health risks involved, the EPO should apply regardless of when the pollution originated in the environment.

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111 Appellants' Submission, dated September 6, 2001, at page 43, paragraph 157.

112 Appellants' Submission, dated September 6, 2001, at page 44, paragraph 160.

113 The definition of "adverse effect" at s. 1(b) of EPEA.

c. Conclusion

[126] The Board finds the overarching presumption against retrospective application of section 102 is not warranted, given the intent of the Order to protect the public rather than to punish Imperial Oil, or at most, the presumption is weak given the Order's prospective focus on ongoing pollution, together with the historical antecedents of section 102. Even if the presumption is applied at full strength, there is ample evidence in the text of EPEA to indicate that the Legislature intended to allow the Director to apply section 102 to circumstances where, as we find here, there is ongoing pollution that originated before EPEA came into force.

E. Issue 2: Has there been a release within the meaning of section 1(ggg) having regard to its historical nature and has this release caused an adverse effect?

[127] Before issuing an EPO pursuant to section 102 of EPEA, the Director must first be of the opinion that a release of a substance into the environment may occur, is occurring or has occurred. Second, the Director must be of the opinion that the release may cause, is causing or has caused an adverse effect. The Board determined that both components of Issue 2 were in large part legal questions.[114] However, on the component relating to "adverse effect," the Board heard a considerable amount of factual evidence, primarily led by Imperial Oil. Therefore, the Board will address both legal and factual elements to determine whether it was appropriate for the Director to find that the release of the Substances may cause, is causing, or has caused an adverse effect.

[128] The Board also notes that aspects of the question of adverse effect, particularly the Director's opinion that time was of the essence in issuing the Order, may also be relevant to

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[114] On August 23, 2001, the Board received a letter from the Director asking for clarification with respect to Issue 2. The Director stated:

> "…I am uncertain as to the inclusion of the words 'Has this release caused an adverse effect' in the statement of issues.
>
> If there is uncertainty as to whether the substances to which the Environmental Protection Order addresses, being hydrocarbon vapours and lead, does the Board require evidence, through the filing of affidavits, that clearly establish the effects of these 2 substances, and whether the effects on human health and enjoyment of property would be found to constitute and adverse effect."

On August 24, 2001, the Board responded:

> "The Board confirms that it views Issue 2 as principally being legal in nature. However, if the parties wish to bring evidence to support their legal arguments, they are free to do so."

its discussion of Issue 3 in this Appeal. The Board will consider the issue of urgency in issuing the Order during its discussion of Issue 3.

1. Has there been a "release"?

[129] EPEA section 1(ggg) defines the term "release" as "…includ[ing] to spill, discharge, dispose of, spray, inject, inoculate, abandon, deposit, leak, seep, pour, emit, empty, throw, dump, place and exhaust." The definition is broad and inclusive.

[130] The Appellants did not argue that a release has not occurred. Rather, their contention was that the definition of release does not encompass past releases or stationary substances. The Appellants submitted that "release" is defined in section 1(ggg) in the present and future tense and expressly omits historic contamination (which, the Appellants argued, is specifically covered by Division 2 of Part 4).[115] Further, the Appellants submitted that the definition of "release" connotes action and, read in the context of section 102, it is the active release of substances that section 102 seeks to stop through an EPO.[116]

[131] By contrast, the Residents Committee submitted that the definition of "release" contains a list of verbs in the infinitive form with no reference to any tense.[117] The Residents Committee further submitted that the relevant tenses, past, present and future, are contained in section 102.[118] The Board prefers the argument of the Residents Committee. The Board is of the view that the verbs listed in the definition of release were intended to indicate the types of activities that would constitute a "release" rather than *when* such activities should occur. Again, how else would this section be viewed, especially on the first day of proclamation, September 1, 1993?

[132] The record is not completely clear as to the precise source and manner in which hydrocarbon and lead pollution found its way into the Subdivision Lands, but the Board has absolutely no doubt that those substances were "released" onto the Subdivision Lands, given the

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115 Appellants' Submission, dated September 6, 2001, at page 47, paragraph 170.

116 Appellants' Submission, dated September 6, 2001, at page 47, paragraph 171.

117 Residents Committee's Submission, dated September 6, 2001, at page 11, paragraph 30.

118 Residents Committee's Submission, dated September 6, 2001, at page 11, paragraph 31.

breadth of the definition of in section 1(ggg) of EPEA and we so find as a fact. At minimum, the waste applied on the part of the Subdivision Lands used for the land farm was *deposited*[119] by Imperial Oil and the letter from Nu-West[120] indicates that some of Imperial Oil's stored petroleum products *leaked*[121] into the Subdivision Lands.

[133] The Board also notes that section 102(1)(a) expressly refers to a release that "has occurred" and, therefore, rejects the Appellants' submission that section 102 was only intended to stop the active release of a substance. Further, the Board finds that, particularly in the case of hydrocarbon vapour migration, the Substances are not necessarily stationary and may be defined as ongoing or even future releases.

[134] Thus, the Board finds that, on the facts of this Appeal, a release "may occur, is occurring, or has occurred" on the Subdivision Lands.

2. Is there an Adverse Effect?

[135] Having established that Section 102(1)(b) requires the Director to be of the opinion that the release may cause, is causing, or has caused an "adverse effect," Section 1(b) defines adverse effect to mean "…impairment of or damage to the environment, human health or safety or property." The Board must consider legal and factual aspects of the meaning of "adverse effect" to determine whether the Director could be of the opinion that the release may cause, is causing, or has caused an *adverse* effect.

[136] The Parties to this Appeal proposed different measures to determine an adverse effect. The Residents Committee indicated that no properties had sold in the area since the extent of the presence of hydrocarbons and lead in the soils became known. They cogently argued that the drop in property values was an example of impairment of or damage to property. Some Parties, including the CHR and the Residents Committee, submitted that the general health risk caused by the presence of the substances in the Soils established an adverse effect. They

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119 See definition of "release" in section 1(ggg) of EPEA.

120 Letter from Nu-West to Imperial Oil, dated April 16, 1971.

121 See definition of "release" in section 1(ggg) of EPEA.

also submitted that the mere presence of the Substances in the soils at the concentrations measured represented an impairment of or damage to the environment.

[137] The Director submitted that an adverse effect has occurred in respect of hydrocarbons because the hydrocarbon levels found at the Subdivision Lands either exceed the Council of Canadian Ministers of the Environment ("CCME") objective for residential areas or are potential health concerns for those breathing hydrocarbon vapours.[122] The Director submitted that an adverse effect has occurred in respect of lead because the lead levels in some areas also exceed the criteria for residential areas established by the CCME (the "1997 CCME Lead Guidelines" or the "CCME Guidelines").[123]

[138] Imperial Oil initially stated in its submission that it would address the issue of whether there is an adverse effect through cross-examination of witnesses, by reference to differing guidelines in jurisdictions outside Alberta and by the response to the Komex Report.[124] The Appellants particularly took issue with the Director's adoption of the 1997 CCME Lead Guidelines for the purposes of the Subdivision Lands.

[139] The Appellants adduced evidence at both the October and February hearings that, in the Board's view, was relevant to their argument on whether the release may cause, is causing or has caused an adverse effect. Although the Board limited the February hearing to Issue 5 and argument that arose through the document production process related to Issue 4, the Board noted that there is a relationship between the question of adverse effect and Issue 5. In its preliminary motions decision on Issue 5, the Board stated:

> "The [first four] issues identified by the Board relate primarily to the Director's discretion to issue the EPO in the manner he chose, rather than the actual terms of the EPO. That said, the terms of the EPO do bear a relationship to the issues. The question of whether the release has caused an adverse effect is directly relevant to the terms of the obligations imposed by the Director under the EPO. The Appellants also submitted that the issue of whether there may be an adverse

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122 Director's Submission, dated September 6, 2001, at page 9, paragraph 41.

123 Director's Submission, dated September 6, 2001, at page 9, paragraph 41.

124 Appellants' Submission, dated September 6, 2001, at page 48, paragraph 173. *Assessment of Environmental Studies and Proposed Remediation Options* by Komex International Ltd., August 9, 2001 (the "Komex Report").

effect will ultimately determine the scope of the remediation to be carried out."[125] Therefore, while the Board accepts that the Appellants led evidence at the February hearing to address Issue 5, the Board has also considered some of that evidence in determining whether the release may cause, is causing, or has caused an adverse effect.

[140] On the question of whether adverse effects have occurred or are threatened to occur at the Subdivision Lands, the Appellants adduced expert evidence from Dr. John Agar from O'Connor Associates, Dr. Don Davies from Cantox, and Dr. Lesbia Smith M.D., a consultant to public health authorities. The Board also heard evidence from Dr. Tim Lambert and Dr. Brent Frieson M.D. from the CHR and Dr. Wilfried Staudt from Komex International. The Board considered that all of these witnesses were credible and notes that differing scientific or medical opinions are not unusual.

[141] In these circumstances, the Board adopts a precautionary approach. Section 102 of EPEA requires the Director to reach an opinion that the release may cause, is causing, or has caused impairment of or damage to the environment, human health or safety or property. The Director may reasonably reach that conclusion if there is a risk of impairment or damage either occurring in the future or having already occurred. *He does not have to prove the risk.* The Appellants have not convinced the Board that there is *no* risk or negligible risk of impairment or damage.

[142] The Supreme Court of Canada recently endorsed the precautionary principle in *Spraytech* v. *Town of Hudson*.[126] The precautionary principle is a concept in international law that is defined in the Bergen Ministerial Declaration on Sustainable Development (1990) as follows:

> "In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a

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[125] Preliminary Motions*: Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (October 26, 2001), E.A.B. Appeal No. 01-062-ID, at paragraph 47.

[126] *114957 Canada Ltee. (Spraytech, Societe d'arrosage)* v. *Hudson (Town)* [2001], 2 S.C.R. 241.

reason for postponing measures to prevent environmental degradation."[127]

[143] The Supreme Court upheld the Town of Hudson's decision to regulate pesticide use as consistent with principles of international law and policy stating, "…in the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action."[128] In a similar manner, the Board finds that the "…lack of full scientific certainty should not be used as a reason for postponing measures to prevent…" or minimize impairment of or damage to the environment, human health or safety or property.[129] Therefore, the Board assesses the Director's opinion that the release at the Subdivision Lands may cause, is causing, or has caused an adverse effect in the context of the precautionary principle.

a. CCME Guidelines for Lead

[144] The Board heard a considerable amount of evidence related to the Director's application to the Subdivision Lands of the CCME Guidelines relating to lead concentrations. In 1997, the CCME first issued guidelines recommending lead levels in soils be reduced to 140 ppm for residential lands (the 1997 CCME Lead Guidelines). When the CCME reviewed the lead guidelines in 1999, it maintained the following soil quality guidelines:

(a) 70 ppm for agricultural land;

(b) 140 ppm for residential and park land;

(c) 260 ppm for commercial land uses;

(d) 600 ppm for industrial land uses.[130]

[145] Although the CCME Guidelines are nationally endorsed, it is entirely up to Alberta to decide how it will use these guidelines. In fact, the Board heard that among the

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127 Bergen Ministerial Declaration on Sustainable Development (1990), at paragraph 7. The Supreme Court applied this definition of the precautionary principle in the *Spraytech* decision, at paragraph 31. The Supreme Court also stated, at paragraph 32, "…there may be currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law."

128 *114957 Canada Ltee. (Spraytech, Societe d'arrosage)* v. *Hudson (Town)* [2001], 2 S.C.R. 241, at paragraph 32.

129 The Board also notes that the definition of environment under EPEA includes all living organisms and, therefore, humans (and human health) are a component of the environment.

130 Canadian Council of the Ministers of the Environment, *Canadian Soil Quality Guidelines for the Protection of Environmental and Human Health Summary Tables*, available at http://www.ccme.ca (last modified April 12, 2002).

provinces, different lead threshold or guideline concentrations exist for residential lands. The Director told us that in Alberta the CCME Guidelines for lead have been adopted as a standard:

> "Mr. McDonald: I just wonder if you could comment briefly on the submission [of the Appellants] when it talks in terms of you not considering proper science in setting the criteria for the cleanup standard for lead.
>
> Mr. Litke: Well, I mean, the province, through our department, has complete jurisdiction to establish cleanup requirements for any substance release, including lead, and the only thing I can say, Mr. McDonald, is that we have selected a standard of 140 ppm for lead.
>
> Mr. McDonald: And that's the provincial standard, not something that you selected.
>
> Mr. Litke: It's a provincial standard."[131]

[146] Although the Board is not willing to give a general all-encompassing report on Alberta Environment's adoption of environmental policies, the Board will examine whether it was reasonable for the Director to apply the CCME Guidelines to the Subdivision Lands in the appeals before us.

[147] The Board heard considerable evidence about the appropriateness of the Director adopting the CCME Guidelines as a basis for cleanup requirements and, hence, as a threshold to determine "adverse effect." The essence of the Appellants' argument, in this regard, focused on the fact that by adopting the 1997 CCME Lead Guidelines, the Director had applied the lowest threshold of lead concentrations applicable anywhere in Canada or in the United States.

[148] Dr. Agar stated, with respect to the 1997 CCME Lead Guidelines, that "…based on the fact that 140 parts per million is the lowest guideline in effect currently in North America and the amount of -- the experience and also the level of effort that's gone into establishing the U.S. guidelines, [he] would be awfully surprised if the cleanup guidelines in Alberta would be decreased in the future."[132]

[149] Dr. Davies also discussed the United States guidelines and how they were determined. However, Dr. Davies was primarily concerned about blood lead levels, stating

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131 Transcript, dated February 5 and 6, 2002, at pages 992 and 993. With respect to the adoption of this guideline, the Board assumes that the Director speaks on behalf of the Government of Alberta as he has indicated.

132 Transcript, dated October 16 to 18, 2002, at page 128, lines 21 to 26.

"…irrespective of the soil level concentrations, its the blood lead levels that really drive a decision as to whether the health of these children are being impacted or not." There was some dispute among expect witnesses as to whether a threshold blood lead level existed for predicting adverse effects in children. However, this issue was primarily raised in respect of the question of urgency in issuing the Order.

[150] In response to the Parties' discussion about standards adopted by the United States Environmental Protection Agency ("US EPA"), the Board has reviewed those lead standards and finds as follows. The lead levels recently adopted by the US EPA were 400 ppm for bare soil in children's play areas and 1200 ppm in non-play residential areas. The Board notes that the US EPA standards were not intended as site specific soil lead cleanup levels. The US EPA's 400/1200 ppm levels are incorporated in the rule entitled: *Lead: Identification of Dangerous Levels of Lead*.[133] That rule was adopted pursuant to section 403 of the *Toxic Substances Control Act*,[134] which required the US EPA to "identify" "lead contaminated soil."[135] The general purpose of the rule is to help "…identify properties that present risks to children before children are harmed."[136] The rule also serves several other functions: determining when lead remediation activities must be performed by certified experts; providing property sellers with a benchmark for when to disclose knowledge of lead contamination to prospective purchasers; determining eligibility for certain federal cleanup funds; and triggering remediation requirements for certain federally-owned or federally-financed properties.[137]

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133 *Lead: Identification of Dangerous Levels of Lead,* 66 Fed. Reg. 1206 (January 5, 2001). The rule has been challenged in a pending case, but the issues raised do not relate to the adequacy of the 400/1200 ppm levels or their use as cleanup standards. See: *National Multi-Housing Council* v. *EPA*, No. 01-1159 (D.C. Circuit) (oral argument scheduled for March 2002).

134 *Toxic Substances Control Act,* 15 U.S.C. at 2683, as amended by the *Residential Lead-Based Paint Hazard Reduction Act*, 1992 ("Title X" of the *Housing and Community Development Act*, 1992) [Pub.L. Cite B. See the Fed. Reg. Notice].

135 *Toxic Substance Control Act*, 15 U.S.C. at 2683(12), section 401 defines "lead contaminated soil" as "bare soil on residential real property that contains lead at or in excess of levels determined to be hazardous to human health. …."

136 66 Fed. Reg. 1210

137 See 66 Fed. Reg. 1210 (cols. 1-2); 63 Fed. Reg. 30,302 at 30, 303-30,304 (June 3, 1998) (Federal Register notice accompanying proposed rule).

[151] The US EPA's soil lead levels were not intended as benchmarks for soil cleanup.[138] The US EPA did not rule out the potential use of these soil lead levels as abatement standards.[139] However, the US EPA strongly cautioned environmental practitioners to exercise care in using the federal levels for this purpose.[140] This caution was based on the nationwide, rather than site specific, focus of the methods used to establish the US EPA's lead levels.[141] In addition, this common denominator approach failed to account for variation in the bioavailability of lead from different sources[142] and for the cumulative or synergistic effects of exposure to lead and other harmful substances.[143]

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[138] See 66 Fed. Reg. 1234 (col. 3) ("The establishment of the standards ... do not, in and of themselves, mandate any action... EPA does not believe that this action, in and of itself, imposes any requirements..."); See also 66 Fed. Reg. 1234 at 1224 (col. 2) (expressing EPA's view that 400 ppm is inappropriate as an "across-the-board abatement level."), 1234 (col. 1) ("The TSCA soil hazard levels ... should not be understood as a minimum cleanup level for lead in soils at hazardous waste sites...").

[139] 66 Fed. Reg. 1210 (col. 1) ("The standards are intended to be used prospectively. That is, they should be used to identify properties that present risks to children before children are harmed. This, of course, would not prevent them from being used retrospectively in the case of ... clearance of resulting lead hazard control activities.").

[140] See: 66 Fed. Reg. 1211 (col. 3) ("If one chooses to apply the hazard level to situations beyond the scope of Title X, care must be taken to ensure that the action taken in such settings is appropriate to the circumstances presented in that situation, and that the action is adequate to provide any necessary protection for children exposed."); 66 Fed. Reg. 1211 (col. 2) ("The need for more permanent controls should be determined with consideration of local conditions and usage patterns, the relative risks from different lead sources, and the potential for exposures to change over time.").

[141] See: 63 Fed. Reg. 30,307 to 30,208 (preamble to proposed rule explaining rationale for nationwide lead hazard levels). See also: 66 Fed. Reg. 1207 (col. 3) (preamble to final rule noting that the rule is aimed at the "lowest levels at which the analysis shows that across the board abatement on a national level could be justified. EPA recognizes however that for any levels of lead in dust or soil, judgment must be exercised as to how to treat the medium, and interim controls as well as abatement [that] could be effective."); 66 Fed. Reg. 1207 at 1209 (noting that the relationship between environmental lead levels and health is complex, and is dependent upon numerous site-specific and child-specific factors but that national standards provide a fixed base of comparison for all homes, so regulators can compare properties and establish remediation priorities); 66 Fed. Reg. 1207 at 1226 (col. 3) (distinguishing national standards from a "site-specific evaluation [that] may identify unacceptable risks to children ..."); 66 Fed. Reg. 1207 at 1231 (col. 3) (noting that the lead levels were derived from cost/benefit considerations made "at a national level"); 66 Fed. Reg. 1207 at 1232 (col. 3) (noting that EPA is "mindful of the need to advise the public that lower levels [than the EPA levels] are not risk-free and may in individual cases present significant risks."); 66 Fed. Reg. 1207 at 1232 ("Risks could exist below the hazard standard and [EPA] recognizes that organizations and individuals may want to consider taking some action, informed by knowledge of local circumstances, at levels below the hazard levels."); 66 Fed. Reg. 1207 at 1234 ("Soil lead levels less than these [*Toxic Substance Control Act* levels] still may pose serious health risks and may warrant timely response actions including abatement.").

[142] *Toxic Substance Control Act*, 403 Final Rule, Response to Comments (December 22, 2000), at pages 34 to 35 (accessible from: http://www.epa.gov/lead/leadhaz.htm (last modified: June 6, 2001)).

[143] 66 Fed. Reg. 1209 (col 3).

[152] Of course, similar issues may arise when the CCME Guidelines are applied without conducting a site specific risk assessment. However, at this point it is necessary to recall what was required of the Director under section 102 of EPEA in issuing an EPO and what, in fact, the Director did.

[153] Section 102 requires the Director to form the opinion that the release of the Substances may cause, is causing, or has caused an adverse effect. EPEA does not refer to standards or guidelines to assist the Director in determining whether such impairment or damage exists or may exist. The Director must make his decision, as delegated to him by the legislation, based on the information he has before him and using his reasonable judgment. The Director reviewed the various studies and reports before him, consulted the CHR, and ultimately determined that as some of the levels of Substances reported were higher than the CCME Guidelines, the adverse effect requirement of section 102 was satisfied. The Board can see no reason why the Director should have, instead, adopted or even considered less-stringent guidelines from other jurisdictions. The Director was entitled to adopt the CCME Guidelines and, as a matter of Alberta policy, chose to do so in this case.

[154] And in this regard, it is relevant that the Director submitted that discussions he had with the CHR led him to conclude that there is a significant, immediate and real risk to human health posed by the presence of the substances.[144] That conclusion, at least in the early summer of 2001, was reasonable to reach. The Board also finds that it was reasonable, when initially assessing the situation at the Subdivision Lands, for the Director to seek the opinion of the CHR on public health issues. The Board would expect the Director to seek information from other sources in respect of issues over which he has limited expertise.

[155] The Board also notes the following exchange between Dr. Lambert, for the CHR, and Dr. Agar during cross-examination at the hearing:

> "Dr. Lambert: So, Dr. Agar, with this historic data and the recent data that we understand from the EBA report, which I know you're aware, the surficial soils are now from 1 to 3,000 parts per million roughly. Do you consider the residential subdivision of Lynnview Ridge to be adversely impacted by the lead

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144 66 Fed. Reg. 1209 (col 3).

contamination that exists in the soils?

Dr. Agar: Once again, are you referring to the definition of adversely impacted or adversely affected?

Dr. Lambert: That's correct, sir.

Dr. Agar: The soils by definition are adversely affected if they're above guidelines.

Dr. Lambert: And in this case we could use either 140, Alberta Environment Tier I of 50 or EPA of 400 and the soils would be adversely impacted; is that correct sir?

Dr. Agar: For residential -

Dr. Lambert: Yes.

Dr. Agar: - human health ingestion, yes."[145]

[156] In light of the precautionary principle and in the absence of compelling evidence to the contrary, the Board agrees with Dr. Agar's statements. The Board finds that, at minimum, it was open to the Director to form the opinion that the release may cause, is causing, or has caused an adverse effect in respect of impairment of or damage to the environment.

b. Differing Scientific Opinion

[157] Scientific opinion among the witnesses differed with respect to the testing procedures for the hydrocarbons and the potential health effects associated with the presence of lead in the Subdivision Lands.

[158] Dr. Agar had previous involvement with investigating the Substances in the Subdivision Lands during the 1987 Task Force. Dr. Agar stated that the sampling done at that time revealed lead concentrations on the Subdivision Lands less than the residential guidelines of the day, which were 500 ppm.[146] He also stated that the investigations concluded that hydrocarbon vapours were present in some areas and that these should be monitored periodically.[147]

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145 Transcript, dated October 16 to 18, 2001, at page 195, lines 3 to 19. (Corrected to the Board's tape.)

146 Transcript, dated October 16 to 18, 2001, at page 114, lines 16 to 21.

147 Transcript, dated October 16 to 18, 2001, at page 115, lines 1 to 14.

[159] Dr. Agar indicated that a recent report on indoor air sampling concluded that there was no statistical difference between the concentrations of benzene and other hydrocarbon vapour in the community and in the control homes outside of the Lynnview Ridge Area.[148] He also stated that his firm conducted further indoor sampling and concluded that hydrocarbon vapours were within the range reported in the literature for Canadian and American homes and that there was no evidence of subsurface vapours affecting the air quality on the sampling dates.[149] He was concerned that some reports prepared in respect of the Subdivision Lands may have applied a permeability factor in calculations that was at least an order of magnitude high, leading to conclusions of potential vapour inhalation issues which he does not believe exist.[150] He also disagreed with the focus on aliphatic hydrocarbons in the Komex Report that had assessed the potential for adverse health effects due to inhalation of hydrocarbon vapours.[151]

[160] Dr. Staudt, one of the authors of the Komex Report, addressed the conclusions of that report against the criticisms of Dr. Agar. It appears to the Board that both Dr. Agar and Dr. Staudt agreed that further testing was required in the Subdivision Lands to fully delineate the presence and migration of hydrocarbons. The Board is satisfied that the authors of the Komex Report reported potential migration of hydrocarbon vapours into three of the townhouses at Lynnview Ridge. While this does not prove that migration has occurred or will occur, the Board is of the view that the conclusions of the Komex Report were sufficient to support the Director's initial opinion that the presence of the hydrocarbons may cause or is causing an adverse effect, for the purposes of issuing the Order.

[161] The Board echoes Dr. Staudt's views when he said:

> "My biggest point was, and that's also my disappointment, I believe we identified evidence, the potential, we're not just making a scientific argument. And there are people living there, so we were hoping that our evidence would have been picked up and either confirmed or clearly refuted, so the people who live there can just say with confidence, it's not going to be a problem."[152]

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148 Transcript, dated October 16 to 18, 2001, at page 117, lines 15 to 27.

149 Transcript, dated October 16 to 18, 2001, at page 118, lines 14 to 20..

150 Transcript, dated October 16 to 18, 2001, at pages 121 and 122.

151 Transcript, dated October 16 to 18, 2001, at page 129, lines 7 to 13.

152 Transcript, dated October 16 to 18, 2001, at pages 561 to 562.

[162] The Board also heard considerable evidence on the question of what concentrations of lead would be likely to result in human health effects. The Board will discuss this evidence in more detail under Issue 5. However, the Board finds, in respect of potential adverse health effects resulting from soil lead concentrations higher than 140 ppm, that the evidence was sufficient for the Director to determine that a risk of impairment or damage of human health existed.

c. Conclusion

[163] The Board views the following exchange between Mr. Teal from Imperial Oil and Mr. Fitch, counsel for the Residents Committee, as significant:

> "Mr. Fitch: I guess I'm still curious about your statement that you don't think there had been any damage to the environment. Let's take the example of 3 Lynnview Rise. There was a reading there of 990 milligrams per kilogram of lead in the surface soil?
>
> Mr. Teal: At what depth?
>
> Mr. Fitch: I don't know. It's in the 0 -- the ground to 0.3 metre horizon.
>
> Mr. Teal: Okay.
>
> Mr. Fitch: You don't consider that a problem?
>
> Mr. Teal: It certainly is a potential problem. If those soils were exposed, if in fact those soils became available and were, in fact, inhaled or ingested, then certainly that could be an issue from an environmental perspective, from a human health perspective."[153]

[164] The Board is uncertain whether Imperial Oil purports to distinguish between "a potential problem" and a release that "may cause ... an adverse effect," but in the Board's view, for the purposes of this Appeal, they mean the same thing. Indeed, the Board is satisfied that the *potential* for an adverse effect to occur *continues to exist* while high levels of released hazardous substances remain in the soil.

[165] The Board is satisfied that sufficient preliminary evidence existed to support the Director's decision to issue the Order, especially given that one of the purposes of the Order was to require further delineation of the Substances.

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[153] Transcript, dated October 16 to 18, 2001, at pages 169 to 170.

F. Issue 3: Does the Director have the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114? If so, was that discretion exercised properly?

[166] The Appellants' arguments in respect of Issue 3 in this Appeal were closely related to the Appellants' arguments in respect of Issue 1. The Appellants were of the view that the Legislature intended the Director to apply section 114, rather than section 102, to address circumstances such as those in this Appeal. Consequently, some of the Appellants' arguments that were made in respect of Issue 1 equally apply, and will be discussed by the Board, in respect of Issue 3.

[167] The Board notes that, like the other issues, Issue 3 raises two distinct questions. First, whether the Director has the discretion to choose between two sections when issuing an EPO. Second, whether the Director properly exercised his discretion in choosing section 102 over 114. These questions will be addressed separately by the Board.

1. Does the Director have discretion to choose between issuing orders under sections 102 and 114?

[168] The Appellants submitted that the Director did not have the discretion to choose between section 102 and 114 when he issued the Order. However, in the Board's view, the Appellants have not provided sufficient legislative analysis to support this claim. The Appellants claimed that the Director assumed that he had the ability to choose between sections 102 and 114 based on his misinterpretation of the decision in *McCain Foods*.[154] The Appellants claimed that, contrary to the Director's view, the Court in *McCain Foods* did not consider whether the Director had an ability to choose between sections. The Appellants also noted that the Court stated, "…a reading of both offence creating sections offers support for an interpretation that each section was intended to govern a separate track."[155]

[169] The Board notes that the decision in *McCain Foods* dealt with the Director's authority under entirely different provisions of EPEA than those at issue in this Appeal. The

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[154] *McCain Foods (Canada)* v. *Alberta (Environmental Appeal Board),* [2001] A.B.Q.B. 701 (Alta.Q.B.)

[155] *McCain Foods (Canada)* v. *Alberta (Environmental Appeal Board),* [2001] A.B.Q.B. 701 (Alta.Q.B.), at paragraph 43.

Board does not consider that decision dispositive in determining whether it was appropriate for the Director to proceed under section 102 in this Appeal.

[170] Further, the Appellants stated that the fundamental issue before the Board was not whether the Director had the discretion to choose between sections, but whether he was acting within the scope of his jurisdiction when he proceeded under section 102.[156] The Appellants submitted that "…the Director did not have the jurisdiction to choose to issue the Order under section 102 and the lack of jurisdiction renders the Order a nullity."[157] Once again, the Board is not satisfied with the Appellants' explanation that the Director lacks jurisdiction. To the extent that the Appellants' argument stemmed from its view that section 102 cannot be applied in this case, the Board has addressed this claim within its discussion of Issue 1.

[171] The Board previously explained in *McColl*, that there is a necessary overlap between the coverage of section 102 and 114. After comparing section 102 and the "contaminated sites" provisions in Part 4 Division 2 in detail, the Board concluded in *McColl* that it had "…difficulty determining the Legislative intent regarding the [overall] functional differences between section 102 and 114 orders."[158] The Board also noted that "…EPEA provides no express guidance on when the Director should use one section or the other, or even what factors the Director should consider in choosing between the two sections."[159]

[172] The Appellants' analysis appeared to stem from its premise that the Legislature intended sections 102 and 114 to be handled differently and based this on the fact that the Legislature amended and repealed many previous statutes in order to replace them with a comprehensive EPEA to protect the environment. The Board agrees that a neat compartmentalization of legislative functions may be a worthy objective of new legislation aimed at consolidating and updating several prior statutes. However, given the complexity of the *environmental* issues addressed, legislatures seldom, if ever, achieve this objective in practice.

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156 Appellants' Submission, dated September 6, 2001, at page 50, paragraph 180.

157 Appellants' Submission, dated September 6, 2001, at page 50, paragraph 180.

158 *McColl-Frontenac Inc*. v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at page 63.

159 *McColl-Frontenac Inc*. v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at page 63.

Rather, the more typical environmental legislative model is one where new provisions are simply added onto the existing consolidated framework. Based on our current analysis, and in *McColl*, the Board believes that the "contaminated sites" provisions in Part 4, Division 2 fit this legislation by accretion model. In the Board's view, they were added to the existing (consolidated) set of legislative tools, including section 102 EPOs, to enhance Alberta Environment's ability to address pollution and the risks it poses to human health, but were not intended to replace other legislative tools entirely with respect to "contaminated" sites.

[173] In the Board's view, the Director is only constrained from applying any of the provisions of EPEA to the extent that the text of the specific provision requires such constraint. Thus, if the circumstances of a particular matter meet the criteria prescribed within a section, the Director may proceed under that section.

2. Did the Director properly exercise his discretion in choosing section 102 over section 114?

[174] Generally, the Appellants claimed that it is fairer to apply Division 2 to historic pollution.[160] The Appellants argued that this fairness is reflected in the factors that the Director must consider under section 114(2) and in provisions allowing the Director to allocate responsibility among persons responsible and to assign orphan shares to the government instead of a joint and several liability approach.

[175] The Board has previously acknowledged these equitable advantages and repeats that equitable remedies may also be the most environmentally beneficial.[161] Conversely, these advantages are not limited to contamination caused by pollution that occurred before EPEA came into force. Equitable allocations of liability may also provide a more equitable remedy for pollution that was recently released. The Board also notes that the extent of the equitable advantages of Division 2 depends upon whose interest is at issue. The equities of assigning responsibility for cleaning up pollution is a complex matter. Although the Board is sympathetic

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[160] Appellants' Submission, dated September 6, 2001, at pages 37 to 38 and 40 to 41.

[161] *McColl-Frontenac Inc*. v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 130.

to Imperial Oil's portrayal of itself as a "conscientious deep pocket," the Board notes that there are also other public interests that reduce or adjust the force of the Appellants' fairness claims.

[176] Specifically in relation to this Appeal, the Appellants claimed that the Director issued the Order "…based upon irrelevant considerations such as the ease of access to the party or the party's presumed wealth."[162]

[177] By contrast, the Director submitted that the health concerns required immediate remedial action and that section 102 was a tool that facilitated immediate remedial action. Therefore, he elected to use section 102 to address the concerns. The Director also indicated that both the section 102 and contaminated sites processes require the Director to be "of the opinion" that certain things have occurred and that he was satisfied that the criteria for section 102 were met in the circumstances leading up to this Appeal. The Director said:

> "The issue being addressed here required timely and appropriate action. I clearly saw it as an emerging issue. Anyone familiar with the contaminated sites process is aware that this process is designed to sort out many persons responsible, potential persons responsible. It's lengthy. It's detailed. It should only be considered when the adverse effect does not require immediate or emergent protection. In my mind, it's a tool of last resort. And there was no uncertainty in my mind as to who was involved in this issue."[163]

[178] The Board highlights one of the differences between section 102 and the Part 4, Division 2 process, and that is the adverse effect criterion. Under section 102, the Director must be of the opinion that the release "may cause, is causing or has caused an adverse effect;" whereas under section 110, the Director must be of the opinion that a substance "may cause, is causing or has caused a *significant* adverse effect" before the Director can designate a contaminated site. Given the adversarial and heated disputes before this Board on the question of adverse effect in the now almost vacant Subdivision Lands, the Board wonders whether Imperial Oil would ever accept that a *significant* adverse effect exists in respect of the Subdivision Lands. (And then who would clean it up?) Further, the "significant adverse effect" criterion is included in the contaminated land designation provision, which is itself appealable.

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162 Appellants' Submission, dated September 6, 2001, at page 54, paragraph 197.

163 Transcript, dated October 16 to 18, 2001, at page 275, lines 12 to 21.

Thus, the Director could face appeals against both the contaminated site designation and the issuance of the EPO under section 114. Of course, the Board is not required in this Appeal to determine the circumstances that would meet the "significant adverse effect" standard under section 110, and we do not determine it. The Board merely notes that, in comparing the processes in Divisions 1 and 2 of Part 4, a lower threshold of impact is required under section 102 than under section 110 and this may be important in dealing with the possibility of acting quickly when the public's health may be at risk.

[179] Therefore, possibly the greatest impetus behind the Director's decision to proceed under section 102 was his sense of urgency to have the pollution issue at the Subdivision Lands addressed. The Director indicates that he, personally, became aware of the presence of the Substances in the Subdivision Lands in April, 2001, when he was told about the draft EBA report that was prepared for the City of Calgary and that the CHR had concerns as a result of the report.[164]

[180] The Director indicated that the City of Calgary and Imperial Oil initially worked together to inform residents about potential health concerns and to delineate the contaminants at the Subdivision Lands. However, the Director was then told that the City of Calgary did not believe that they were responsible for the pollution and would not participate further after a delineation plan was prepared and submitted to Alberta Environment by the end of June 2001. The Director also explained that the City of Calgary had indicated that the working relationship between the City of Calgary and Imperial Oil was not effective and that they were not communicating, which was different advice from that which the Director had obtained from Imperial Oil. The Director said:

> "It was extremely important, in my view, that this relationship had to be good in order to address the need for timeliness. If it was not, we knew we possibly had an issue here."[165]

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164 Transcript, dated October 16 to 18, 2001, at page 262, lines 10 to 16.

165 Transcript, dated October 16 to 18, 2001, at page 265, lines 18 to 21.

[181] The Director suggested that one of the other reasons for the need for timeliness in issuing the Order was to alleviate the stress on the residents of the Subdivision Lands. Surely this was the case.

[182] The Board heard evidence from Dr. Timothy Lambert and Dr. Brent Friesen from the CHR on the immediacy of the health issue at Lynnview Ridge. Dr. Friesen, the Chief Medical Officer of Health, indicated that when the CHR determined that Alberta Environment should proceed under EPEA in respect of the issue at the Subdivision Lands, he had said that if action under EPEA was not possible or could not proceed in a timely fashion, he would take action under the *Public Health Act*.[166] He stated that:

> "The decision for taking urgent action was based on the findings in the EBA report of lead concentrations up to and over 2,000 parts per million that were assessed to be an immediate concern to children living in the community with the potential for irreversible health effects to occur."[167]

The Appellants later responded with evidence from experts to the effect that the results of blood lead level tests conducted on children living at Lynnview Ridge were not of concern. There was also some dispute between the expert witnesses on the question of whether there was a threshold blood lead concentration that would increase the likelihood of harm to a child.

[183] Ultimately, the Board is of the view that section 102 and Division 2 of Part 4 create separate processes which may culminate, individually or possibly together, in the Director issuing an EPO. The Board accepts the Director's evidence that he was concerned that the Order in this case should be issued quickly to ensure that the issues at the Subdivision Lands were addressed. The Board accepts that the Director made his decision based on the advice of the CHR, the results of tests which indicated that levels were higher than those prescribed in CCME Guidelines, his perception that investigation and remediation would not proceed without an EPO because of the relationship between the City of Calgary and Imperial Oil, and the anxiety of the residents of Lynnview Ridge. While the sense of urgency may have diminished since Imperial Oil purchased many of the residences in the area, some residents remain, and the pollution

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166 *Public Health Act*, R.S.A. 1980, c. P-27 (now *Public Health Act*, R.S.A. 2000, c. P-37).

167 Transcript, dated October 16 to 18, 2001, at pages 372 to 373.

remains. The Board does not consider the purchase of some of the residences by Imperial Oil as sufficient reason to revoke the Order. The Board also does not consider the results of blood tests on some children in the area as sufficient to require the Director to cancel the Order.

[184] The Board is satisfied that, in the circumstances of early summer 2001, the Director was justified in his opinion that the criteria of section 102 were met and he was, therefore, empowered to issue the Order under that section. The Board does not agree that the Director should have given Division 2 of Part 4 mutual exclusivity over section 102 as a public health investigation and remediation tool.[168]

[185] The Appellants also submitted that the Director breached one of the rules of procedural fairness or natural justice (legitimate expectations) by not following the procedure outlined in Alberta Environment's Guidelines for the Designation of Contaminated Sites (the "Guideline").[169] The Board previously addressed a similar argument in *McColl*. The Board concluded in *McColl,* and repeats here, that the Guideline addresses the process for designating a contaminated site under Part 4, Division 2; it does not purport to apply to the Director's procedure for issuing an EPO under section 102 of Part 4, Division 1.[170] Therefore, the Appellants could not have a legitimate expectation that the Director would apply the Guideline for the purposes of issuing an EPO under section 102. Further, the Guideline does not indicate when the Director will apply Part 4, Division 2 as opposed to any other tool under EPEA. The Board notes there is no suggestion in this Appeal that anyone has requested designation of a contaminated site under section 110.

[186] The Board also previously noted in *McColl*, and repeats and stresses emphatically here, that there is nothing to prevent the Director from designating a contaminated site in respect of lands which are already the subject of an EPO issued under section 102 if the Director is of

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168 The Board does not necessarily agree with the Director that Division 2 of Part 4 should only be used as "a last resort." Certainly, there may be circumstances that fit more squarely within the Division 2 process than under section 102, or they may be used together. However, the Board is of the view that its opinion in this regard does not affect its findings in this Appeal.

169 Environmental Service Environmental Sciences Division, Guideline for the Designation of Contaminated Sites Under the Environmental Protection and Enhancement Act (April 2000).

170 *McColl-Frontenac Inc*. v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 111.

the opinion that a change in circumstances warrants such a designation.[171] Indeed, section 110 states that land may be designated a contaminated site even though an administrative or enforcement remedy has been pursued under EPEA.

G. Issue 4: Did the Director exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the EPO?

[187] The Board has determined that the environmental criteria, of which the Director must be satisfied before issuing an EPO under section 102, existed at the Subdivision Lands. Issue 4 deals with the question of to whom the EPO should be issued. The Board has already determined that the Appellants were persons responsible. However, the Appellants argue that other parties also fit the definition of a person responsible.

[188] Before examining the responsibility of the different parties for the presence of lead and hydrocarbons at the Subdivision Lands, the Board will briefly discuss the underlying purposes of EPEA and, specifically, the EPO process under section 102.

[189] Section 2 of EPEA lists the purpose of the Act and the principles that the Act recognizes in meeting its purpose. Different principles are relevant to different aspects of the environmental protection goals addressed under EPEA. However, clearly relevant to the remediation component of an EPO, section 2(i) recognizes "…the responsibility of polluters to pay for the costs of their actions." This principle guides the Board in determining questions of fairness when it considers who should be named as a person responsible in respect of the Subdivision Lands.

[190] The Appellants submitted that the Director had ignored another key principle under EPEA, which is found in section 2(f): "…the shared responsibility of all Alberta citizens for ensuring the protection, enhancement, and wise use of the environment through individual actions."[172] The Board agrees that the principle quoted by the Appellants is also recognized in section 2 of EPEA. However, the Board is not sure of its significance as a guiding principle for the purposes of issuing an EPO, especially an EPO under section 102. The Board interprets this

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[171] *McColl-Frontenac Inc*. v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 109.

principle prospectively, in other words, that all Albertans are responsible for *preventing* environmental degradation, rather than shared responsibility for cleanup if degradation has occurred. Further, section 102 attaches responsibility under an EPO to the polluter rather than the owner of the polluted land: section 102 focuses on the ownership or control of the substances rather than ownership or control of the land.

[191] The Appellants submitted that there are other parties which satisfy the definition of persons responsible in section 1(ss) of EPEA by virtue of the fact that they are either owners or previous owners of the substances or that they have or have had charge, management, or control of the substances. The Appellants relied on definitions in the Oxford English Dictionary to determine the meaning of "charge," "management," and "control." Specifically, the Appellants submitted that control lies not only in the ability to carry out an activity, but also in the ability to restrain or prevent that activity. The Appellants further applied definitions in the Oxford English Dictionary for some of the terms used in section 1(ss)(ii) with reference to "charge, management or control," namely, "treatment," "handling," "use," "disposal," "transportation," and "application." Essentially the Appellants argued for a broad interpretation of "charge, management or control" that extends beyond direct control of a substance.

[192] In this context, the Appellants submitted that there are at least six parties who should be named as responsible parties, including the City of Calgary, Calhome, Nu-West, Entek, Curtis, and Kidco. The City of Calgary's involvement with the Subdivision Lands was as a statutory planning authority. Calhome, the City of Calgary's wholly owned subsidiary, purchased some of the townhouses on the Subdivision Lands. Nu-West's involvement was as Devon Estate's joint venture partner in the development of the Subdivision Lands. Entek, Curtis, and Kidco were each contracted by Nu-West to undertake various tasks during the development of the Subdivision Lands. The Board will address the issues corresponding to each party separately as the circumstances dictate.

[193] The Board notes at the outset, that there is nothing in section 102 that requires the Director to name all potential persons responsible in an EPO, and efficiency arguments might

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[172] Appellants' Submission, dated March 21, 2002, at page 20, paragraph 78.

militate against the Director attempting to adopt such an approach. Previously in *Legal Oil*, the Board noted that the task of attempting to apportion the costs of cleanup would introduce chaos into the timely and responsive cleanup of oil well sites. This argument may be extended to apply to other polluted sites including the Subdivision Lands in this Appeal.

[194] Further, from a remediation perspective, the number of parties named in an EPO issued under Section 102 is irrelevant, because all parties named in the EPO are jointly responsible for carrying out the terms of the EPO and are jointly and severally liable for the costs of doing so. It is feasible that the parties named in a section 102 EPO could negotiate an allocation of responsibility for cleanup amongst themselves, but that is a private matter. If cleanup does not occur in accordance with the EPO, the Director may pursue any or all of the parties named under the EPO for the full costs of cleanup.

[195] Even if an EPO was issued pursuant to section 114, the Director is not required but, rather, has the discretion to apportion the costs of cleanup among persons responsible. If the Director decides not to apportion costs under a section 114 EPO, the persons responsible are jointly and severally liable in the same manner as they are under a section 102 EPO.

[196] Finally, the Appellants generally submitted that the Director abused his discretion by deciding not to name other parties as persons responsible without requiring further information from parties that, in the Appellants' view, meet the criteria for a person responsible. The issue of the Director's requests for information from the City of Calgary will be discussed below. However, Nu-West, Entek, Curtis, and Kidco no longer exist in Alberta and the Board is not willing to overturn the Director's decision on the basis that he did not seek information from parties that are currently not operating in Alberta. On a more general note, the Board hears appeals on a *de novo* basis. Therefore, the Board will address allegations of insufficient information by seeking any additional information that, in the Board's view, will help it reach a decision. The Board is not willing to simply overturn the Director's decision on the basis of allegations that he did not request or consider sufficient information in making his decision. We now know his intentions and do not find them to be unreasonable, for reasons explained below.

[197] The Director's decision to issue the Order to two companies, Imperial Oil and Devon Estates, which the Director was satisfied met the definition of "persons responsible," may

be categorized as an efficient use of resources. However, administrative fairness obliges the Director to also name other clearly responsible parties in an EPO so that the cleanup burden might be shared. If two parties caused or contributed to the presence of substances at a site, it would be unfair if responsibility for cleanup was attached to one party while the other party remained free of obligation. The Director must balance efficiency and fairness in reaching his decision to issue an EPO.

[198] In determining whether the Director exercised his discretion unreasonably by deciding not to name the other parties referred to above as persons responsible, the Board will consider whether the parties meet the definition of a person responsible and whether in the interests of fairness the party should have been named in the Order.

1. Nu-West Development Corporation Ltd.

[199] Nu-West undertook the operating role of the joint venture with Devon Estates to develop the Subdivision Lands. Devon Estates was the landowner. The Director agrees that Nu-West, in carrying out the development of the Subdivision Lands, probably meets the criteria of a "person responsible" under EPEA. However, Nu-West is no longer registered as a company in Alberta and, therefore, the Director stated that he "saw really no purpose to add Nu-West to the order,"[173] even though he would if he could.

[200] The Appellants submitted that the test for naming Nu-West as a person responsible is not whether Nu-West would be a meaningful addition to the EPO. The Appellants submitted that Nu-West should be named as a person responsible because the Director has conceded that it had the requisite charge, management, and control. Given that the Director has the discretion to name a person responsible, the Board must determine whether the Director was acting unfairly or unreasonably in making that decision.

[201] The Appellants submitted that the fact that Nu-West has been struck from the Corporate Register is an insufficient reason to refuse to name them in the EPO. The Appellants argued that as Nu-West and the other parties have been struck from the Corporate Register, there

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[173] Transcript, dated October 16 to 18, 2001, at pages 277 and 278.

exists the potential for an orphaned share of responsibility.[174] The Appellants submitted that section 109 of EPEA contemplates situations where there may be orphan liability:

> "The Minister may establish programs and other measures the Minister considers necessary to pay for the costs of restoring and securing contaminated sites and the environment affected by contaminated sites in circumstances where a person responsible for the contaminated site cannot be identified or is unable to pay for the costs."[175]

[202] The Board dealt with a similar issue in *McColl.* In *McColl*, the Board noted that the orphan liability provision relates to designated contaminated sites and is inapplicable to the Director's issuance of an EPO under section 102.[176] As discussed above, the Board also noted in *McColl* that while section 102 allows the Director to name more than one person responsible, the Board does not read that section as *requiring* the Director to name all persons who fall within that category. Rather, EPEA affords the Director discretion in deciding which persons responsible to name in a section 102 EPO. That call is for the legislators to make, not us.

[203] Even if the Director named Nu-West under the Order, the fact that Nu-West does not exist in Alberta would mean that Imperial Oil probably remains solely liable for the cleanup of the Subdivision Lands. Further, it is unlikely that the Director's decision not to order Nu-West to cleanup the Subdivision Lands would affect Imperial Oil's success in claiming any contribution towards cleanup costs from an out-of-province successor of Nu-West. In any case, the Board is of the view that the Director was not acting unreasonably or unfairly in deciding not to name Nu-West in the Order.

[204] The Board can only assume that the Appellants might argue that the Director should have issued the Order under section 114 rather than 102, named Nu-West as a person responsible and allocated liability among the parties, and lobbied to establish a measure to require Alberta taxpayers to meet Nu-West's portion of the cleanup costs. Although the Board indicated in *McColl* that the involvement in a polluted site of a party that has ceased to exist may be a relevant factor for the purposes of deciding whether to issue an EPO under section 102 or

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174 Appellants' Submission, dated September 6, 2001, at page 54, paragraph 194.

175 Appellants' Submission, dated September 6, 2001, at page 91, paragraph 317.

176 *McColl-Frontenac Inc*. v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service,*

114,[177] the Board is of the view that such circumstances should not affect the Director's final decision to proceed under section 102. The Board reaches this conclusion because there is no evidence that Nu-West acted outside or independently of the joint venture agreement with respect to the development of the Subdivision Land, or manufactured or deposited the Substances. The Board is not satisfied, on the little evidence before it that Nu-West caused or contributed to the presence of the Substances in the Subdivision Lands. Certainly, the Board is not satisfied that any responsibility of Nu-West for the present situation at the Subdivision Lands is sufficiently great to support overturning the Director's decision to proceed under section 102 in order to pursue part of the cleanup costs from the Alberta taxpayers.

2. Entek, Curtis and Kidco

[205] Entek, Curtis, and Kidco were each contracted by Nu-West, pursuant to the joint venture development, to undertake certain activities on the Subdivision Lands. None of these parties exist in Alberta any longer. Although for this reason alone, the Board is satisfied that the Director was not acting unreasonably in deciding not to name these parties in the Order, the Board will consider the Appellants' further submissions on this matter.

[206] The Appellants submitted that Entek was responsible for the engineering services relating to the Subdivision Lands, including the management, removal and disposal of the contaminated soil. The Appellants submitted that Entek's responsibilities derived from the agreement it entered into with Nu-West. The Appellants further submitted that other responsibilities which indicate that Entek had charge, management, or control of the substances include: preparing final construction drawings; involvement in negotiations with the City on the Development Agreement; ordering drilling of test holes and backfill compaction testing; and managing the stripping and rough grading of the lands.

[207] The Appellants submitted that Curtis was retained by Nu-West for the purpose of determining whether the lands were suitable for redevelopment and ultimately produced the reports which recommended the removal of the petroleum saturated soils. The Appellants

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Alberta Environment (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 99.

[177] *McColl-Frontenac Inc*. v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service,*

submitted that Curtis was then responsible for overseeing and managing the treatment, handling, transportation, and disposal of the contaminated soils.

[208] The Appellants submitted that Kidco Holdings had charge, management, and control of the substances because it was contracted to perform rough grading of the lands and was responsible for the excavation, transportation, and disposal of the contaminated soil and applying clean fill over contaminated fill.

[209] The Board has seen little compelling evidence of the roles of these contractors on the Subdivision Lands with respect to the Substances and no evidence that any of these contractors acted independently of the joint venture's instructions. The Appellants have not established to the Board's satisfaction that Entek, Curtis, or Kidco had the requisite ownership, charge, management, or control of the Substances such that they should have been named. Without further evidence, the Board is unable to determine whether any of these contractors meet the criteria of a person responsible for this Appeal, which it must find before it can consider whether the Director acted unreasonably in not naming them in the Order. Even if the criteria were met, in the Board's view, the contractors were acting under the instructions of the joint venture, and the joint venture must have accepted responsibility for their actions. Therefore, the Board does not consider that the Director acted unfairly or unreasonably by naming Devon Estates and not naming these other parties in the Order.

3. The City of Calgary

[210] The Appellants submitted that "…the City is a person responsible for the substances by virtue of its previous ownership of a major portion of the Subdivision Lands, and because it has had charge, management, or control over the substance, including the ability to prevent the development of the Subdivision."[178] However, the Appellants did not pursue the argument that the City's responsibility arose through its previous ownership of the Subdivision Lands. There was no evidence that the City conducted any activities on the Subdivision Lands, which could have caused or contributed to the presence of the substances in the Subdivision

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Alberta Environment (December 7, 2001), E.A.B. Appeal No 00-067-R, at paragraph 99, footnote 95.

[178] Appellants' Submission, dated September 6, 2001, at page 76, paragraph 273.

Lands before they became part of Imperial Oil's refinery. In essence, the Appellants submitted that because the City had extensive knowledge of the contamination on the Subdivision Lands, and because the City encouraged the Appellants' to release their land for residential development, the City's subsequent approval of the re-zoning, and its imposition of conditions and restrictions on the development of Lynnwood Phase 4, went beyond mere regulatory approval and instead constituted "charge, management and control" over the substances as contemplated by EPEA.[179]

[211] By contrast, the City of Calgary submitted that the relevant test is not whether a person had *knowledge* of the substance, or a role in planning, development, and approval of a subdivision, but, rather, whether the person had charge, management, or control of the substance.[180] The City of Calgary submitted that its involvement with the planning approval processes for the Subdivision Lands did not equate to charge, management, or control of the Substances. The Board agrees that the focus of the test is the charge, management, or control of the *substances,* rather than planning approval processes. However, the Board must determine whether control over land use approval processes indirectly imputes charge, management, or control over the Substances.

[212] The issue of the City's level of responsibility for the current situation at the Subdivision Lands is a difficult one. The City approved a land use that allowed a large number of people to come into contact with soils polluted by lead and hydrocarbons. However, the City did not cause the pollution of those soils.

[213] Regardless of whether the City contributed to the current situation at the Subdivision Lands, the issue before the Board is whether the City had charge, management, or control of the lead and hydrocarbons in accordance with EPEA and, therefore, could be named as a person responsible in the Order. Further, even if the City could be named a "person responsible," it does not automatically follow that the Director acted unreasonably by not naming the City in the Order.

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179 Appellants' Submission, dated February 21, 2001, at pages 26 to 45, paragraph 150 to 178.

180 City of Calgary's Submission, dated December 21, 2001, at page 3, paragraph 11.

[214] The issue of the Director's reasonableness *vis a vis* the City is a question for this Board to decide. Other questions relating to the City's duties or civil liability between Imperial Oil and the City or other parties are not for this Board to consider. The Board notes that its recommendations to the Minister are made without prejudice to the ability of any party to take civil action. Section 206 of EPEA provides that nothing in EPEA shall be construed so as to repeal, remove or reduce any remedy available to any person at common law or under any Act of Parliament or of a provincial legislature.

a. Evidence of the City's Involvement

[215] After the document production process ordered by the Board, the Appellants and the City of Calgary made submissions to the Director on the City's responsibility. The Director reviewed the new documents and the Parties' submissions but determined that they did not change his original decision that the City was not a "person responsible." The submissions made to the Director on this issue are also relevant to the Board's decision regarding the Director's reasonableness. In their submission, the Appellants divided the City of Calgary's involvement with the development of the Subdivision Lands into three periods and label these: The City's Early Initiatives, The City's Extensive Knowledge, and The City's Active Role. The Board will address the evidence relating to the City of Calgary's involvement with the Subdivision Lands under these three headings.

- The City's Early Initiatives

[216] The Appellants submitted that "…the City was keenly interested in re-zoning [Imperial Oil's] surplus refinery lands from heavy industrial to residential given the pressing need for residential housing in the Ogden area."[181] The Appellants referred to correspondence including:

(a) an Imperial Oil memo dated February 26, 1971, which indicates that the City had approached Imperial Oil between 1963 and 1971 asking Imperial Oil to consider releasing its lands so that surplus refinery lands could be converted to residential lands;

(b) a letter from Mayor Harry Hays to the President of Imperial Oil dated April 23, 1963, inquiring as to whether Imperial Oil would be interested in selling its

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[181] Appellants' Submission, dated December 14, 2001, at page 8, paragraph 36.

surplus refinery lands; and

(c) an internal Imperial Oil letter dated July 14, 1969, attaching a memo that indicates that the City would be most receptive to the development of the area.

[217] The Appellants also referred to the Ogden Sector Design Brief, prepared by the City in 1970. The Appellants stated that while the Ogden Sector Design Brief focused on the surplus refinery lands south of what became Lynnwood Phase IV, the lands that later became Lynnwood Phase IV are mentioned in the draft Ogden Sector Design Brief. The Appellants also submitted that "…indications from the maps and text of the Ogden Design Brief suggest that the City contemplated the possibility of developing these lands if and when they became available for development."[182]

[218] The City, however, pointed out that each of the letters relates to lands that were not part of the Lynnwood Phase 4 development, because at the time these letters were written, the Subdivision Lands were still in use as part of the refinery.

[219] The Board is not convinced that responsibility for pollution cleanup attaches to the City based on the limited evidence suggesting that the City encouraged the re-zoning of the land. First, the Board has not seen evidence to indicate that the City specifically approached Imperial Oil to actively encourage residential development on the polluted Subdivision Lands. The evidence appears to relate to other parts of Lynnview Ridge. Second, the Board would not find it unusual if a municipality approached a landowner to discuss the landowner's future intentions for land use over a large tract of land. Such, it seems, is the nature of municipal planning. The landowner is the only person who can decide to apply for a residential subdivision from optional lands and, of course, the landowner is likely to benefit from the increased re-sale value of land converted from an industrial site to a residential subdivision.

[220] The Appellants also submitted that "…in order to secure the surplus refinery lands for residential development, the City assured Imperial Oil that in the event of residential development of the area the City would be prepared to waive…" restrictive land use and buffer requirements that the City had previously imposed in an Agreement with Imperial Oil in 1959.[183]

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182 Appellants' Submission, dated December 14, 2001, at page 9, paragraph 30.

183 Appellants' Submission, dated December 14, 2001, at page 9, paragraph 31.

However, the internal Imperial Oil letter that the Appellants referenced in this regard merely provides that the 1959 Agreement requirements were made on the basis that Imperial Oil used the land for industrial purposes. In the Board's view, it is not unusual that these requirements would be waived if the land was to be used for residential purposes. Further, this letter was written in 1970 and we find that it concerned the earlier phases of development in the area.

[221] Finally, under the heading of the City's early initiatives, the Appellants suggested that the City's anxiousness to residentially develop the surplus refinery lands resulted in it taking an active role in ensuring the process was carried out expeditiously as possible. By contrast, the City claims that it followed its usual planning processes. The Board was impressed by the testimony on the City's planning processes provided by Mr. Owen Tobert, Executive Officer for Utilities and Environmental Protection at the City of Calgary. The Board accepts Mr. Tobert's evidence on the planning process. Further, in the Board's view, the speed with which the City conducted the planning process, which commenced almost ten years before the residential development of the Subdivision Lands, has little bearing on the question of the City's charge, management, or control of the Substances.

- The City's "Extensive" Knowledge

[222] The Appellants submitted that "…at all material times during the rezoning and development process of Lynnwood Phase IV, the City acted with knowledge of the presence of hydrocarbon contamination on these lands and adjacent lands."[184]

[223] The Board is satisfied from the evidence that the City was aware of hydrocarbons on lands in the vicinity of the Subdivision Lands during the planning processes related to the Lynnwood area. The Board is also satisfied that the City knew, before it re-zoned and issued a subdivision approval in respect of the Subdivision Lands, that parts of the Subdivision Lands were used as a tank farm and that *hydrocarbons* remained in the Subdivision Lands. The Board finds that the City had actual knowledge of the presence of hydrocarbons in the Subdivision Lands as a result of receiving copies of the Curtis Reports. The City had to know by then.

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[184] Appellants' Submission, dated December 14, 2001, at page 11, paragraph 38.

[224] However, the Board has not seen evidence to suggest that the City of Calgary knew about the presence of *lead* in the Subdivision Lands at any time during the development approval process. The Board finds that at the time the City became aware of the presence of lead in the Subdivision Lands, it was not in a position to exercise any control over the substances or the land use within the meaning of EPEA.

- The City's "Active" Role

[225] The Appellants submitted that if the City had merely exercised its statutory obligation to respond to the subdivision application so as to ensure that relevant documents had been prepared and submitted by qualified licensed engineers, there would have been no need for the extensive circulation that took place between the various City departments to comment on, recommend, and impose conditions on the reclassification of the land use and development of Lynnwood Phase IV.[185] However, the Board finds nothing unusual or untoward in the circulation through the various City departments of applications for a large residential development for comment, or the various comments received from those departments. The Board accepts Mr. Tobert's responses to the Appellants' questioning on specific conditions. The Board accepts that weeping tile requirements, sulphate resistant concrete, and stripping and rough grading of the site were standard planning issues normally arising in the development of similar subdivisions at the time.

[226] The Board finds that the City's response to knowledge of the presence of hydrocarbons, was to require the developers to undertake the remediation measures proposed by the developers' soil consultants as a condition of the development approval. Special Clause 170(J) of the 1980 Development Agreement between the City and Nu-West Development reads:

> "J Site Grading
>
> (i) The Developer, at no expense to the City, to the satisfaction of the Engineer and in conjunction with the stripping and rough grading of the Development Area, shall ensure that the removal and disposal of the contaminated soil, and the filling and compaction of the affected areas, is completed in accordance with the recommendations contained in the Soils Consultants Report which supported the Development Application."

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185 Appellants' Submission, dated December 14, 2001, at page 13, paragraph 40.

[227] The Board accepts the City's evidence that, especially at the time of the development, it did not have the environmental expertise to inspect soil conditions to verify compliance with the Development Agreement. However, the Board will consider whether by imposing this condition, the City exercised, or purported to exercise, charge, management, or control over the Substances.

b. Conclusion on Evidence

[228] The Board finds that the City of Calgary did not at any time have ownership of the substances or direct control over the Substances as required by the language of EPEA. In the Board's view, the City did not cause or contribute to the presence of the lead or hydrocarbons in the soil: the City surely was not the polluter. The Board will, however, consider the implications of the City's knowledge of the presence of hydrocarbons and its control over the land use planning process for its potential charge, management, or control of the Substances. The Board must consider these implications to determine whether the City had charge, management, or control of the two substances that are the subject of Order: lead and hydrocarbons. The Board will deal with the two substances separately, because the evidence indicates that the City knew of the presence of hydrocarbons during the development approval process but had no knowledge of the presence of lead in the Subdivision Lands until 1987. Lead, of course, is now the main issue before us in the Order.

c. Charge, Management or Control of Lead

[229] Based on the hearing and the record before us, the Board finds that the City did not at any time have charge, management, or control of the lead in the Subdivision Lands as required by EPEA. Again, there is no evidence that the City had knowledge of the presence of lead on the Subdivision Lands and, in the Board's view, there is nothing indicating that the City should have had knowledge of the presence of lead at the time the land was re-zoned or the subdivision approval granted.

[230] The Appellants appeared to agree that knowledge is a prerequisite for charge, management, or control. During cross-examination of the Director, the Appellants said:

> "Mr. Mills: So to the extent that we have the issue of knowledge of dealing with a contaminated site, you are satisfied that the City had certainly some degree of knowledge that they were dealing with a site contaminated by hydrocarbons. Is that fair?

> Mr. Litke: I think what's fair is that the City had knowledge that there was a concern with respect to oil on the property.
>
> Mr. Mills: And you will agree with me, sir, that knowledge is a precursor to control, or to charge, management, and control. But basically if you don't know about something, you can't have charge -- really, it would be hard to have charge, management or control of the substance, but once you have knowledge, you are at least a step down that road. I am not saying it equates to charge, management, and control, but you are a step closer to charge, management, and control with knowledge of a substance.
>
> Mr. Litke: I would agree; if you don't have knowledge of the substance, you don't have an issue."[186]

[231] The Board must decide whether knowledge of lead can be imputed from knowledge of hydrocarbons. Certainly, the City knew that site was previously operated as part of an oil refinery, but the City had no involvement in the manufacture of the substances at the refinery and, even during this Appeal, we heard Mr. Teal postulate that lead may not have come from the oil refinery operations. By contrast, Imperial Oil had operated the refinery since 1923 and was in the best position to know exactly what activities had occurred on the Subdivision Lands during the life of the refinery. Consequently, we expect Imperial Oil to know what substances it likely would have released and where those releases were likely to have occurred. The Appellants engaged Curtis to conduct a soil assessment and we would expect that Imperial Oil would have informed Curtis of the history of the site. In the Board's view, it was reasonable, at the time, for the City to rely on the Curtis Reports to describe the soil conditions at the Subdivision Lands.

[232] We agree with the Appellants that it is difficult to exercise charge, management, or control over a substance if you do not know about it. However, setting the question of knowledge of lead aside, what potential charge, management, or control could the City exercise over lead? This issue will be further discussed in respect of hydrocarbons, but the Board notes that even if the recommendations of the Curtis Reports were met, as required by the City, the lead would likely have remained in the soil as high incidences of lead and hydrocarbons appear not to occur in the same areas of the Subdivision Lands. The Board finds it difficult to see how the City could have had charge, management, or control of lead without knowing of its presence

and when the planning conditions it did impose on the Appellants would unlikely have addressed the presence of lead in the soil.

[233] Further, the Board affords very little weight to the Appellants' claim that the City directed the developers on the location of the topsoil loam stockpile, which somehow became contaminated with lead before the soil was spread over the Subdivision Lands. First, the Board finds that the City merely approved the location of the loam stockpile that was proposed by the developers and located on land owned by Devon Estates. Second, the Board is of the view that any involvement of the City in determining the location of a loam stockpile is far too remote to the presence of lead in the Subdivision Lands to support a finding that the City had charge, management or control of the lead.

d. Charge, Management, or Control of Hydrocarbons

[234] The Board must now determine whether the City's knowledge of the presence of hydrocarbons in the Subdivision Lands extended its control over the development planning processes to charge, management or control of the hydrocarbons. Although, in hindsight, the residential subdivision should probably not have gone ahead in the manner in which it occurred, it is not the role of the Board to historically unravel the City of Calgary's planning processes. True, the Board must determine whether the City had charge, management, or control of the hydrocarbons, and if so, whether the Director acted unfairly by not naming the City as a person responsible in the Order.

[235] The Appellants relied on *James Sabiston*[187] as authority for the claim that municipalities may be persons responsible for contamination. The Appellants quoted from the Ontario Environmental Appeal Board ["OEAB"] decision:

> "Where the Municipality has intervened through the passage of a by-law specifying the conditions under which a site is to be utilized, it is the opinion of the Board that the Municipality has assumed a portion of the responsibility of the disposal site within the definition of 'person responsible' as defined in section 1(h) of EPEA, ie. 'a person ... having the charge, management or control of a

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186 Transcript, dated February 5 and 6, 2002, at page 1031, lines 10 to 27.

187 *James Sabiston Ltd.* v. *Ontario (Ministry of Environment)* [1980] O.E.A.B. No. 22.

> source of contaminant' and consideration might be given in the future to the joining of such Municipalities as parties in similar proceedings."[188]

[236] But the Board does not find the *James Sabiston* decision particularly helpful to decide the issues before it in this Appeal. First, the comments of the OEAB are *obiter dicta* because the OEAB did not find that the municipality was a person responsible. The municipality did not even appear before the OEAB. Second, the context in which these comments were made was that the municipality operated a joint venture with James Sabiston at the landfill site. Third, it appeared significant to the OEAB that the municipality "…intervened through the passage of a by-law." As such, it appears that the municipality acted pro-actively, if not unilaterally. In this Appeal, the Board is satisfied that the City of Calgary's actions were in response to applications submitted on behalf of the developers. The facts are not the same.

[237] We are not saying that a municipality enjoys any special protection from the requirements of EPEA by virtue of its status as a statutory planning authority. The Director may certainly name a municipality as a person responsible under an EPO, if in the appropriate circumstances all of the *James Sabiston* elements are present. However, the actions of a municipality so named must equate to a similar ability to actively manage or control the substances as any other party named under an EPO. The Board may have reached a different conclusion if the City was responsible for regulating the *activities* that led to the *release* of the Substances rather than regulating the *land use* after the pollution had occurred.

[238] Although discussed in a slightly different context, the issue of control was raised in a recent United States Court of Appeals decision regarding the liability of the United States for the cleanup of a contaminated site under the *Comprehensive Environmental Response, Compensation, and Liability Act* ("CERCLA").[189] The defendant oil companies argued that the United States should be liable for part of the cleanup costs as an "arranger" under the CERCLA. The text of CERCLA section 9607(a)(3) provides that:

> "…any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of

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188 *James Sabiston Ltd.* v. *Ontario (Ministry of Environment)* [1980] O.E.A.B. No. 22, at page 2.

189 *United States* v. *Shell Oil Company* (February 11, 2002) Federal Court of Appeal, 9th Circuit, No. 00-55027.

> hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances ... shall be liable."

[239] The oil companies contended that although the United States did not exercise any actual control over the oil companies' disposal of the waste substances, it had the ultimate authority to exercise such control and should be considered an "arranger." However, the United States Federal Court of Appeals stated that the oil companies' conception of "authority to control" was based on an incorrect reading of a previous 8th Circuit Case.[190] The Court of Appeals, holding that the United States was not an arranger, stated that the United States neither exercised actual control, nor had the direct ability to control, in the sense intended in the NEPACCO case, and the waste never belonged to the United States.[191]

[240] As in the United States decision, the Board does not find that the City of Calgary had the direct ability to control the hydrocarbons (or the lead for that matter). If the developers had refused to comply with the Curtis Report recommendations, the City of Calgary did not have the power to enter Imperial Oil's land and remove the hydrocarbons itself.

4. Calhome Properties Ltd.

[241] The Appellants submitted that Calhome's ownership of a portion of the Subdivision Lands is distinct from other landowners in the area because it had knowledge of the

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[190] *United States* v. *Northeastern Pharmaceutical & Chemical Co*. (1986), 810 Federal Reporter 2d 726 (Federal Court of Appeal, 8th Circuit) ("NEPACCO"). The Court of Appeals stated that in NEPACCO, there was actual control exercised by the vice-president, who gave permission to the plant supervisor to dispose of the waste. There had also been an actual exercise of control by the plant supervisor. The Court stated, "…in other words, NEPACCO holds that responsible officials in the chain of command of a corporation may be held responsible as arrangers when one of those officers has exercised actual control over the disposition of waste on behalf of the corporation, and the other officer has the authority to control the first officer…" at paragraph 61.

[191] The Court of Appeals quoted from Judge Levi's opinion in *United States* v. *Iron Mountain Mines, Inc*. (1995), 881 Federal Supplement 1432 (California District Court):

> "It is true that some cases impose arranger liability on parties who did not literally own or physically possess hazardous waste at the time it was disposed of or released. But in each of these cases the party either was the source of the pollution or managed its disposal by the arranger."

The Court also noted that no court has imposed arranger liability on a party who never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue, citing, *General Elec. Co.* v. *AAMCO Transmissions Inc.* (1992), 962 Federal Reporter 2d 281 at page 286 (Federal Court of Appeal, 2nd Circuit) ("…it is the obligation to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision…).

Substances when it purchased the lands.[192] The Appellants submitted that City Alderman and members of the City's Planning Commission were present at the meeting in which Calhome's Board of Directors approved the purchase of the lands from Nu-West.[193] The Appellants also submitted "…it would be unfair for a party with knowledge of contamination to purchase property at a reduced price, only to re-zone and develop that land."[194]

[242] From what we heard, the Board is satisfied that Calhome did not purchase the townhouses at a reduced price but, rather, paid fair market value. This fact, in itself, indicates that even if the City of Calgary's knowledge of hydrocarbons in the Subdivision Lands before they were developed could be attributed to Calhome, Calhome logically assumed that the problem had been resolved before it purchased the lands.

[243] Further, the Appellants' argument that Calhome is a person responsible appears to rely on the definition of "person responsible for the contaminated site" which is only relevant for the purposes of an EPO issued under section 114 of EPEA. The definition of a "person responsible" for the purposes of an EPO issued under section 102 of EPEA, focuses on ownership of the substance rather than the owner of land and does not consider the purchase price of land. The relevant definition of "person responsible" for this Order (and there is a difference) includes:

> "(i) the owner and a previous owner of the substance;
>
> (ii) every person who has or has had charge, management or control of the substance ...; and
>
> (iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in (i) or (ii)."[195]

[244] Although Calhome may have assumed ownership of the Substances when it bought the townhouses, in the Board's view it would have been unfair if the Director had named

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192 Appellants' Submission, dated September 6, 2001, at pages 84 to 85, paragraph 296.

193 Appellants' Submission, dated September 6, 2001, at pages 85 to 86, paragraph 299.

194 Appellants' Submission, dated September 6, 2001, at page 86, paragraph 301.

195 The definition of "person responsible" in section 1(ss) states "…when used with reference to a substance or a thing containing a substance…." Section 102 only makes reference to a substance (section 105 which refers to the person responsible for the substance or thing) and, therefore, the reference to a "thing" in the definition of "person responsible" is not relevant for the purposes of section 102.

Calhome as a person responsible in the Order. Further, section 96(1) defines the "owner of a substance" as the owner of the substance immediately before or during the release of the substance. Although this definition is for the purposes of Part 4 and the definition of "person responsible" is not found in Part 4, the definition of "owner of a substance" may be relevant to the extent that "person responsible" is used in Part 4.

[245] To us the convincing argument is that, in a similar manner to all other land owners in the Subdivision Lands, Calhome did not manufacture the Substances, manage, or deposit the Substances on the Subdivision Lands: Calhome was not the polluter. Although Calhome assumed the ability to exercise charge, management, or control over the substances in the land that it purchased, the Board would consider it unreasonable on these facts if the Director had named Calhome a person responsible under the Order.

H. Issue 5: Is the EPO reasonably and sufficiently precise in the circumstances? (The September 11 and 12, 2001 Letters)

[246] Issue 5 was included in this Appeal as a result of the Board Decision dated October 26, 2001.[196] The issue arose as a result of further directions that were provided by the Director as part of the "iterative" (adaptable) process established by the Order.[197] The adaptable process established by the Order required the Appellants to provide a Remedial Options Report for review by the Director. Once the Director reviewed the Remedial Options Report, he responded to the Appellants with two letters dated September 11 and 12, 2002 that require the Appellants to undertake certain work.

[247] The Board agrees with the Director that the process contemplated with respect to the issuance of an EPO is an adaptable process. By adaptable process we mean that the Director can properly order the person to whom an EPO is directed to investigate a situation, develop a plan, and implement that plan, all under the Director's general supervision. During this process there would be discussions and the exchange of information between the Director and the person

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196 Preliminary Motions: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional services, Alberta Environment* (October 26, 2001), E.A.B. Appeal No. 01-062-ID.

197 The Board does not prefer the Director's use the word "iterate," which means *repeat*. Instead, the Board prefers the word "adaptable" to explain the Director's process.

to whom the EPO is directed, and the details of the remediation work would be worked out and fine-tuned. This is supported by the Act. It is also supported by the principle of good science and environmental management.

[248] The Appellants, however, objected to the contents of these letters that form part of this adaptable process, and attempted, by various means, to appeal the letters. As discussed in some detail in the Board's Decision of October 26, 2001, the letters of the Director that form part of the adaptable process are not in and of themselves subject to appeal. As a result, the *only* role that these letters play are as *evidence* in relation to reasonableness and precision of the Order within the scope of the Appeal that was properly filed. The reasonableness and precision of the Order itself is properly within the jurisdiction of the Board, and it is on this basis that we will consider these letters.

[249] As stated by the Board in its October 26, 2001 Decision:

> "The Board does not propose to generally review the Director's implementation of his decision [- the Director's letters of direction]. *What the Board is prepared to consider, in situations such as this, is whether the original terms of the EPO were too broad or vague, such that the Director's subsequent implementation decisions are without a proper foundation.* This is what makes the information that has subsequently become available [(the September 11 and 12, 2001 letters)] relevant to the EPO's [(the Order's)] original terms."[198] [Emphasis added.]

[250] To give any other interpretation to the powers of the Board would be inappropriate. While the Board is not suggesting that this is what happened here, to give any other interpretation would permit the Director to issue an EPO in the terms "investigate what I tell you to investigate, develop a plan to remediate what I tell you to remediate, and remediate what I tell you to remediate". An EPO such as this would effectively delegate all of the decision making power to the adaptive process, and that would be wrong. In the Board's view, an EPO must be sufficiently precise to provide a relatively clear indication, to the person to whom it is directed, generally what work would be required. This is necessary to give any meaning to the appeal process. In the Board's view, any direction within the adaptive process that is not properly within the scope of the EPO as written is void, and any substantive changes to the EPO

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[198] Preliminary Motions: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region,*

to include work that was not contemplated within its original terms should require a new, more precise EPO. Again, this is necessary to give any effective meaning to the appeal process.

1. Issue 5

[251] This is the position that caused the Board to add Issue 5 to the hearing. Issue 5 provides:

> "Is the EPO reasonable and sufficiently precise in the circumstance up to the date of the hearing?"

[252] Issue 5 comprises two parts. Both parts need to be considered in the context of the entire Order. Issue 5 moves beyond the Director's decision to issue an EPO and reviews how the Director issued the Order. First, Issue 5 asks whether the Order, in the circumstances up to the date of the hearing, was reasonable. Second, Issue 5 asks whether the Order was sufficiently precise. Although both parts of Issue 5 are integrally related, the Board will discuss them separately. The Board will then consider the three outstanding areas of contention in relation to Issue 5 in light of its discussion on whether the Order was "reasonable" and "sufficiently precise."

[253] The Chairman sought clarification of the three outstanding issues areas of contention at the end of the hearing:[199]

> "Chairman: Before the panel goes, I need to find out exactly where your disagreement is with Alberta Environment. ... You have an EPO that was added to, if you will, by several letters, one of which dated September 11th, had several specific terms and conditions set out that Imperial [Oil] had to do. It seems, from my summary of the files and the evidence over the last couple of days at least, that probably Imperial Oil is only taking exception with the lead in soils below 30 centimetres and take an exception with the lead in soils below concrete and asphalt and is taking exception with the requirement that the residents have the final say on any remediation to their satisfaction, as opposed to the satisfaction of the Director as authorized by the EPO, the regs and the Act. That seems to be roughly the disagreement so far with the Director.
>
> Is that right to the panel? Is that the summary of where you stand? Everything else seems to have been resolved or is almost resolved? I see nods?

Regional Services, Alberta Environment (October 26, 2001), E.A.B. Appeal No. 01-062-ID, at page 21.

[199] Transcript, dated February 5 and 6, 2002, at page 1206, lines 1 to 24.

Dr. Agar: I can't think of any other issues."

Thus, the only remaining areas of disagreement relating to fulfillment of the Order between the Appellants and the Director are:

(a) the removal of soils containing greater than 140 ppm of lead that are located between 0.3 metres and 1.5 metres from the surface;

(b) the removal of soils containing greater than 140 ppm of lead that are located beneath semi-permanent structures such as "…decks, fences, driveways, patios, sidewalks on private property, gardens, shrubs and trees;" and

(c) the requirement that restoration of properties after remediation should be completed to the satisfaction of the property owner.

[254] The task before the Board, with respect to these letters, is to determine whether the Order as written, is reasonable and sufficiently precise, such that it forms a proper foundation for these directions that the Director gave as part of the adaptive process.

2. Reasonableness

[255] The Appellants submitted that "…the Director was required to act reasonably and fairly when deciding whether to issue the EPO, in setting the terms of any EPO issued and subsequently deciding what else Imperial Oil had to do to fulfill the EPO."[200] Issue 5 is limited to the last two aspects of the Director's decision. The Board has already determined that in the current circumstances the Director was entitled to form the opinion that a release had occurred and that the release may cause, is causing or has caused an adverse effect.

[256] The Appellants referred to certain factors previously considered by this Board in determining whether the Director exercised his discretion reasonably.[201] The Appellants submitted that the relevant factors were whether:

(a) the requirements specified could be achieved;

(b) the decision reflected a consideration of the available evidence; and

(c) the discretion exercised served the purposes of the Act.[202]

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200 Appellants' Submissions, dated February 21, 2002, at page 64.

201 *Ainsworth Lumber Co. and Footner Forest Products Ltd.* v. *Director, Northwest Boreal Region, Alberta Environment* (June 26, 2000), E.A.B. Appeal No. 00-004 and 00-005-R.

In response to the first factor, the Appellants submitted that the Order imposed unachievable deadlines.

[257] By contrast, the Director emphasized "…the process, by necessity, is iterative [(adaptable)] for it is only as more information becomes available that the appropriateness of a response can be measured and implemented."[203] During the February 2002 hearing, the Director said:

> "Orders are iterative [(adaptable)]. In other words, the order is not seen as the final direction to the company. The order contemplates a framework, if you will, or a process that as information is brought forward, or data is brought forward, subsequent decisions or directions would be required.
>
> For example, this order required a complete delineation of the substances on the site, lead and hydrocarbons, their nature and extent. And once that is available, remedial options can then be developed and reviewed by the Director. The delineation can also provide information to myself on whether any protective measures need to be implemented in the interim while the remedial operations are being developed."[204]

[258] The Board notes that the first factor raised by the Appellants, from the *Ainsworth* decision, referred to the Director's discretion in issuing an approval. Unlike an EPO, an approval is not an adaptive process but a statement of rights and enforceable obligations. However, the Appellants did not argue that all of the requirements imposed under the Order are unachievable. The Appellants' first argument was that the deadlines imposed under the process for implementing the Order were unachievable. After reviewing the evidence, Board is of the view that although the initial deadlines were in our opinion unreasonable, the Director and the Appellants have worked together to develop a timeframe that the Appellants can, and have, met. Due to the adaptive nature of the EPO process, the Board is not prepared to scrutinize directions of the Director in implementing an EPO, as long as the subsequent directions operate to implement the EPO and not to significantly change terms or to rewrite it in a way that, had the Director exercised precise regulatory diligence in the first place, he would have drafted it differently.

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202 Appellants' Submission, dated February 21, 2002, at page 65, paragraph 258.

203 Director's Submission, dated March 7, 2002, at page 31, paragraph 128.

[259] Further, the Appellants submitted that the Director's decision did not reflect a consideration of the available evidence. The Appellants appeared to argue this point in relation to the Director's decision to issue the Order.[205] However, as noted previously, the Board has already decided under Issues 1, 2, and 3 of this Appeal that the Director's decision to issue the Order was reasonable. The question of reasonableness, here, relates to the substantive terms and subsequent requirements of the Order.

[260] The Appellants claimed that the Director acted unreasonably by failing to consider the clear evidence that there was no imminent health risk and by failing to consider the nature of the CCME Guidelines; the fact that it is overly conservative and the questionable scientific basis of the guideline. The evidence adduced to prove and respond to these claims will be discussed in respect of the three terms of the Order (arising from the Director's subsequent letters) that remain in contention between the Appellants and the Director.

[261] Generally, the Board accepts that once the Director is satisfied a release may cause, is causing, or has caused an adverse effect and decides to issue an EPO, the Director should consider the specific circumstances of the site in framing the terms of the EPO. However, in doing so, the Director is not required to look away from environmentally conservative policies, standards, or guidelines adopted by Alberta Environment. Based on the wording of section 2 of EPEA, he should err on the side of environmental protection. Section 2 of EPEA indicates that the protection of the environment is essential to the integrity of ecosystems and *human health*, and to the well being of society. EPEA also defines the "environment" in terms of all living organisms. Thus, protecting human health is integral to the purposes of EPEA.

[262] The Board is thus of the view that the terms of the Order issued by the Director on June 25, 2001 developed the framework or adaptable process to which the Director referred; the Order required further delineation and a Remedial Options Report. The Board finds that, in the context of its purpose to create a process for obtaining information, the terms of the Order issued on June 25, 2001, were reasonable.

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204 Transcript, dated February 5 and 6, 2002, at pages 979 and 980.

205 Appellants' Submission, dated February 21, 2002, at page 68.

[263] Further, the Appellants submitted that the Director's exercise of discretion did not serve the Act's purposes of supporting and promoting the protection, enhancement, and wise use of the environment or having the polluter pay. Once again, it appears that the Appellants are focusing on the Director's decision to issue the Order rather than the substantive terms of the Order. Further, the Board does not accept the Appellants' argument that:

> "Just because the Director ... was no longer satisfied with his original approach of asking for a delineation plan by the end of June, does not mean a fully co-operative Imperial [Oil] should receive an EPO. The Director had no basis to believe an EPO was necessary to obtain a response from Imperial [Oil]; the purposes of the Act were already being fully served."[206]

[264] The Board finds that in the circumstances of this Appeal, the Director's initial co-operative approach does not preclude him from relying on the provisions of EPEA to issue an EPO: consent is not a pre-requisite for remediation. Further, the Board seriously questions whether the initial co-operative approach fully served the "polluter pays" purpose of EPEA.

3. Sufficiently Precise

[265] The second part of Issue 5 relates to whether the terms of the Order were sufficiently precise. While the Board acknowledges that the Director cannot be expected to concisely state his remediation requirements in an EPO before reviewing the results of further testing, and in this case, before reviewing the Remedial Options Report, the terms of the EPO create expectations in the parties of the future scope of remediation requirements. In the Board's view, it is unreasonable for the Director, during his implementation of an EPO, to require the persons named in the EPO to undertake activities that were not contemplated or related to the terms of the EPO. Therefore, the Board will review the reasonableness of the Director's subsequent directions, specifically the three terms that remain in contention between the Director and the Appellants, in the light of the terms of the Order.

[266] The relevant provisions of the Order provided:

> "The Remedial Options Report shall include:
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> (a) A detailed summary of each remedial option (the 'Remedial Options') that

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206 Appellants' Submission, dated February 21, 2002, at pages 75 and 76, paragraph 297.

may be considered to remediate, risk-manage and/or remove and dispose of the Substances and the resulting adverse effects to the Subdivision Lands, and to any off-site area;

(b) Each Remedial Option shall contain:

(i) the proposed methodology for statistical and laboratory analysis, sampling, monitoring, testing and the proposed remedial procedures;

(ii) the remedial criteria for soils, surface and groundwater for each of the Substances;

(iii) a description of all measures that will be taken to ensure that there is no damage to undisturbed areas;

(iv) the results of the public consultation required by Clause 2(c) regarding that particular Remedial Option; and

(v) a schedule of implementation describing the work planned to implement the Remedial Option.

The Parties shall implement the work set out in the Remedial Option that is accepted by the Manager, in accordance with the applicable remedial criteria and schedule of implementation that are approved by the Manager."

4. Removal of Soils Between 0.3 metres and 1.5 metres

[267] The Director's September 11, 2001 letter stated:

> "On all private residential property, IOL [(Imperial Oil)] shall remove all lead-contaminated soil above the CCME 140 ppm criterion that is identified in the 0.3 to 1.5 metre depth, and replace with clean fill, except under houses, multi-family buildings and garages. ... On all municipal property, IOL [(Imperial Oil)] shall remove all lead-contaminated soil above 140ppm that is identified in the 0.3 to 1.5 metre depth and replace with clean fill, except for under sidewalks, streets and alleys."

[268] By contrast, the Appellants' Remedial Options Report recommended that site-specific Tier 3 criteria would be established for soil deeper than 0.3 metres at accessible locations.[207] The Appellants' Remedial Options Report indicated that the "…Tier 3 criteria would be developed based on the potential health risk to human and ecological receptors so that the criteria would be protective of human health and the environment, and that soils in excess of the Tier 3 criteria would be removed."[208]

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207 Appellants' Submission, dated January 25, 2002, at page 15, paragraph 52.

208 Appellants' Submission, dated January 25, 2002, at page 15, paragraph 52.

[269] To explain the relevance of different "tiers" in this analysis, the Board refers to the following statement of the CCME:

> "The general context for application of Canadian soil quality guidelines is provided by the framework for assessment and remediation. Three methods or tiers are supplied. The first tier consists in the direct adoption of Canadian soil quality guidelines. However, the fact that some sites will present conditions that differ from those assumed in the exposure scenario used in the development of the guidelines (high natural background concentrations, different use or no use of groundwater, complex mixtures of contaminants, unusual scenarios, etc.) must also be considered. For these sites, the second tier allows limited modification of Canadian soil quality guidelines by setting site-specific objectives. Finally, the third tier relies on the use of risk assessment procedures to establish remediation objectives at contaminated sites on a site-specific basis."[209]

[270] The Appellants submitted, "…the Director has ignored the importance of accounting for site-specific conditions when imposing the requirements to remove the lead contaminated soil at the various depth levels at Lynnview Ridge community."[210] During the hearing, the Appellants adduced evidence relating to the application of the CCME Guidelines, and the risk and effects of exposure to lead. The Appellants questioned whether the requirements under the Order would serve to protect community health on the Subdivision Lands. The Appellants also examined the approaches taken in other jurisdictions in, what they claim, were comparable circumstances to those existing in the Subdivision Lands. The Board will review this evidence under separate headings.

a. Application of the CCME Guidelines

[271] The Appellants once again claimed that the CCME Guidelines are overly conservative and its scientific basis for the protection of human health is questionable.[211] However, as the Board previously indicated in respect of Issue 2, the Board will not cast aspersions on the work of the CCME. Nor do we expect that Alberta should apologize for taking

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209 Canadian Council of Ministers of the Environment, *Development and Application of Soil Quality Guidelines within the CCME Framework for Contaminated Site Assessment and Remediation*, prepared February 9, 1998, at page 11, available at http://www.ccme.ca (last modified: April 12, 2002).

210 Appellants' Submission, dated February 21, 2002, at page 84, paragraph 330.

211 Appellants' Submission, dated February 21, 2002, at page 84, paragraph 334.

the position that it will be strict in enforcing protective environmental standards, including those of the CCME. The Board is prepared to accept at face value the statement of the CCME:

> "Canadian [Environmental Quality Guidelines] are nationally endorsed, science-based goals for the quality of atmospheric, aquatic, and terrestrial ecosystems. Environmental quality guidelines are defined as numerical concentrations or narrative statements that are recommended as levels that should result in negligible risk to biota, their function, or any interactions that are integral to sustaining the health of ecosystems and the designated resource uses they support."[212]

[272] The Appellants also submitted that the CCME Guidelines "…expressly contemplates the application of site-specific criteria in its use."[213] The Appellants cite part of the 1996 CCME Guidance Manual ("Manual"):

> "...guidelines tend to be conservative values that are protective of a wide range of receptors under a diverse array of potential environmental conditions. When adopted as remediation objectives on a site-specific level, these generic guidelines provide an effective basis for protecting and restoring designated sites."

[273] In the Board's view, the Manual simply makes the point that limited modification of the guidelines may be warranted in light of prescribed site-specific factors affecting contaminant mobility and receptor characterization.[214] Further, the Board found that there were few site-specific factors considered in the Manual that appear to be relevant to the Subdivision Lands to the extent that they would support a less onerous cleanup standard than that which Alberta proudly promotes.[215]

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212 Canadian Council of Ministers for the Environment, *Canadian Environmental Quality Guidelines, 1999*, updated 2001, available at http://www.ccme.ca (last modified: April 12, 2002). The table of Canadian soil quality guidelines published by the CCME states, in respect of the lead guideline for residential and parkland use of 140mg/kg:

> "Data are sufficient and adequate to calculate a soil quality guideline for environmental health and a soil quality guideline for human health. Therefore the soil quality guideline is the lower of the two and represents a fully integrated *de novo* guideline for this land use, derived in accordance with the soil protocol."

213 Appellants' Submission, dated February 21, 2002, at page 86, paragraph 341.

214 Canadian Council of Ministers of the Environment, *Guidance Manual for Developing Site-specific Soil Quality Remediation Objectives for Contaminated Sites in Canada, March 1996,* at page 12. The Board notes that this document was published before the Recommended Canadian Soil Quality Guidelines for lead were first published in 1997.

215 Some of the factors mentioned in the Manual include high natural background levels of a contaminant; complex mixtures of contaminants; unusual exposure scenarios such as the presence of special populations or

[274] Nevertheless, the Board accepts as a general proposition that if specific conditions exist which clearly militate against the strict application of Alberta Environment's policy by the Director, the Director must consider those specific conditions. Therefore, the Board will consider the evidence relating to the risks of human exposure to lead and health effects at the Subdivision Lands.

b. Community Health

[275] The Appellants asked Dr. Smith to address two questions for the hearing:

1. the reasonableness of the statement made under the EPO that the community faced an imminent health risk; and
2. whether the guidelines and standards used for lead in soil at the Subdivision Lands were reasonable to protect the health of the community.[216]

[276] Once again, in reviewing the evidence of Dr. Smith on these questions, the Board is not considering whether it was reasonable for the Director to issue the Order. The Board considered that question in Issues 1, 2, and 3 of this recommendation to the Minister and agreed. Rather, the Board will consider whether evidence related to community health risks at the Subdivision Lands supports *different* directions than those made by the Director under the Order.

[277] First, the Board notes that the Order did not state that the community faced an imminent health risk. The reference to "imminent health risks" in the Order was made in the following context:

> "The Interim Report shall include:...
>
> (b) The immediate short-term measures that will be taken to address any imminent risks of exposure by the residents and their households to the Substances that may become evident as a result of any sampling and monitoring in the Subdivision."

[278] The Board remains of the view that the Appellants have not put in question the initial terms of the Order. Therefore, the evidence relating to potential community health risks is

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receptors; the use of backyard gardens for food; possible movement of contaminants; relevance of toxicological data used to derive the guidelines; and human exposure to soil.

[216] Transcript, dated February 5 and 6, 2002, at page 840, lines 6 to 11.

viewed in the context of the *subsequent* directions of the Director. Those directions trouble the Board, in part.

[279] Dr. Smith indicated that she reviewed the blood lead surveys carried out in the Lynnview Ridge community in 1987 and 2001 and concluded that the blood lead levels were normal and compatible with background levels elsewhere in Canada. Dr. Smith also noted that there were no children at all reported with blood lead levels above 10 micrograms per decilitre which would have triggered at least the possibility of some unusual distribution of blood lead levels in the community. Dr. Smith concluded, "…there was no immediate health risk in this community at the time that these surveys were carried out."[217]

[280] The Board is of the view that Dr. Smith's comments on immediate health risks must be limited to the immediate period before the health surveys were conducted, because Dr. Smith later indicated that blood lead level reflects "…fairly recent exposures, say within the last two or three months."[218] The Board also notes that the 2001 survey was conducted at the end of the winter months and, therefore, children were unlikely to have come in contact with lead contaminated soils in the months immediately preceding the survey.

[281] The Board also heard a considerable amount of conflicting evidence from Dr. Smith and Dr. Lambert on the concentration and period of lead exposure that may cause health effects in children and the blood lead level in a child which may correspond to a detrimental health effect.

[282] To assist the Board to determine the significance of the soil lead concentration at Lynnview Ridge, the Board asked the Parties to calculate the amount of soil a 10kg child would need to consume to achieve a blood lead level of 15 ug/dL[219] at soil lead concentrations of 140 ppm, 200 ppm, and 1000 ppm. The Parties completed this task overnight.[220]

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217 Transcript, dated February 5 and 6, 2002, at page 841, lines 24 to 25.

218 Transcript, dated February 5 and 6, 2002, at page 845, lines 2 to 3.

219 Dr. Smith was prepared to accept that she would want to diminish the exposure of a child to lead contaminated soil where that child had a blood lead level of 15 ug/dL. Transcript, dated February 5 and 6, 2002, at page 968, line 20.

220 The Board accepts the difficulty in calculating an accurate response in so little time with so many variables and is grateful to the parties for their efforts in completing this assignment. But since they were all qualified as

[283] The CHR and the Director concluded:

> "Screening analyses of two types suggest that children exposed to soil contaminated to 1000 ug Pb/g could breach a 15 ug/dL blood lead level either by continuously ingesting a small fraction of a teaspoon of soil per day or by ingesting roughly a teaspoon in a single event. Soil remediated to 140ug Pb/g would require a continuous soil ingestion rate of 0.1 teaspoon per day or a single ingestion event of roughly 7 teaspoons."[221]

[284] Dr. Smith and Dr. Davies concluded that the amount of soil needed to be ingested per day to reach a steady state blood lead level of 15 ug/dL was:[222]

(a) 1000 ug Pb/g 212 mg (approx 0.04 teaspoons);

(b) 200 ug Pb/g 1060 mg (approx 0.2 teaspoons); and

(c) 140 ug Pb/g 1514 mg (approx 0.3 teaspoons).[223]

[285] Although the Board accepts Dr. Smith's opinion that, on the basis of the two blood lead level surveys to date, a health effect due to lead may not yet have occurred at the Subdivision Lands, we are not prepared to accept that potential health risks associated with exposure to soils with a lead concentration over 140 ppm are negligible or so low as not to warrant any action to remove the potential problem. The Board's view is supported by the Parties' calculations, which show that the consumption of a relatively small volume of soil may lead to a blood lead level in a child that even Dr. Smith accepts may raise health concerns. The Board's view is also held in the context of the precautionary principle, discussed earlier in this report.

c. Exposure to Lead

[286] The Appellants submitted, "…since health risks are a function of toxicity and exposure, it is unreasonable to require remediation for … soils located at intermediate depths and

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experts with significant experience, we also do not apologize for asking the question in the middle of a hearing.

[221] Exhibit 28. *Submission on Soil Ingestion Requested by E.A.B.*, Alberta Environment and Calgary Health Region.

[222] Exhibit 27. *Estimation of Soil Intake Required to Achieve a "Steady State" Blood Level of 15 ug/dl in Child for Various Lead Affected Soils.*

[223] The Board calculated the approximate proportion of a teaspoon required in each case based on a 5g teaspoon.

below as there is no reasonable opportunity for exposure to lead in these instances."[224] At the February 5 and 6, 2002 hearing, a considerable amount of evidence was adduced on the relationship between health risks, toxicity and exposure, and the risk of exposure to lead-contaminated soils.

[287] The Appellants made two arguments relating to the likelihood of exposure to lead. First, the Appellants argued that the replacement of the surficial 30 cm of soil (not located beneath permanent or semi-permanent structures) in the Subdivision Lands provides a barrier from any soil containing lead below 30 cm. This is certainly true, at least to some extent.

[288] The Appellants quoted from Dr. Davies' affidavit where he said:[225]

> "In my professional opinion, the requirement of Alberta Environment to remove all lead contaminated soil above the CCME 140 ppm criterion that is identified in the 0.3 to 1.5 m depth is without basis from a risk reduction perspective. As described earlier, not only is the CCME 140 ppm criterion highly conservative and perhaps suspect, the subsurface soil will not act as a source of exposure to lead when it is covered with a 0.3 to 0.4 m layer of topsoil and sod."

[289] It appears that the Director's issue with the 0.3 metre soil barrier is the degree of permanence. The Director argued that a soil barrier does not remove the risk of lead exposure because we cannot predict the future activities of landowners in their yards. Some examples of potential future digging activities which may disrupt lead contaminated soil below 30 cm include: planting trees and shrubs, laying a garage pad, foundations for children's play equipment, and constructing fences or decks.

[290] Second, during the hearing, Mr. Teal indicated that seasonal conditions were relevant to exposure pathways and should be considered in applying the CCME Guidelines for lead:

> "Mr. Fitch: If you wouldn't apply this conservative guideline in this case where you are dealing with the residential neighbourhood with hundreds of people living there, when on earth would you ever apply it?
>
> Mr. Teal: Again, you would look at applying it, but you would look at how

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[224] Appellants' Submission, dated January 25, 2002, at page 18, paragraph 59. The Appellants also raised the same argument to explain why it was unreasonable to require remediation below driveways and sidewalks.

[225] Appellants' Submission, dated February 21, 2002, at page 84, paragraph 334.

> much exposure, what are the exposure pathways in this set of circumstances, and is there availability on 365 days a year at this location? As we all know, there is frozen ground. Soil is covered by snow for a number of days of the year. Et cetera. So those are the kinds of things that would have to be brought into play as far as is it applicable as 140 specifically or should it be adjusted according to the conditions on the site? … It may, in fact, be if you were in a situation where you were in warm climate where the soils were exposed for 365 days a year, and you had children playing in those soils every day, then that might very well be applicable. ... There's very few locations in Alberta that you would believe that this should be applied, that's correct.
>
> Mr. Fitch: Name one.
>
> Mr. Teal: I can't think of one."[226]

[291] On the issue of the seasonal aspect of soil exposure, we do not accept that a standard adopted by Alberta Environment should be rejected because the ground is frozen in Alberta for at least part of the year. The Appellants have not presented any evidence of climatic conditions that are specific to the Subdivision Lands and, therefore, warrant remediation of the Subdivision Lands to a different standard than that adopted for Alberta. The Lynnview Ridge lands are not frozen in the summer.

[292] The significance of the 0.3 metre soil barrier is a more difficult issue. Obviously, there is far less risk of exposure to contaminated soil if there is 0.3 metres of clean soil above it. However, the risk has not entirely been eliminated. Further, in the Board's view, the risk that someone will breach the 0.3 metre barrier at some time in the future (during activities such as gardening, post hole digging, tree planting, laying concrete pads, etc.) is quite high. For this reason, the Board examined at the hearing through questions posed to the Director whether there was some interim cleanup depth that would satisfy the Director's objectives but concluded that there was not.

[293] The Appellants did not indicate to the Board how they intended to implement site specific assessments to determine which soil, if any, would be replaced in the 0.3 metre to 1.5 metre horizon. Rather, the Appellants' evidence tended to focus on arguments that a lead standard of 140 ppm was overly protective of human health, and that a 0.3 metre clean soil barrier would prevent exposure to contaminated soil. The Board was left wondering whether the

Appellants intended to remove any soil below 0.3 metres. The Board's concerns were bolstered by the fact that the Director indicated he would consider any approach that accomplished his objectives of protecting health and ensuring the future burden of managing the risk does not fall on the homeowners but that the Appellants had not offered any alternative solutions.[227]

[294] Finally, the Board notes that the Director's direction requires removal of soil between 0.3 metres and 1.5 metres only at approximately 4 percent of the sites sampled. The Board also notes that removal of this soil will not require the removal of any obstacles, as these would have already been removed when the top 0.3 metres is removed. Essentially, the Director's direction requires deeper digging in a very small number of areas. Costs associated with additional trucking are likely to be the primary burden on the Appellants.

[295] After balancing the likely burden on the Appellants against the future burden on Alberta citizens in this area, the Board is of the view that the Director's direction to require the Appellants to replace currently identified soil containing more than 140 ppm of lead located in the 0.3 metre to 1.5 metre horizon is reasonable in these circumstances.

d. Approaches in Other Jurisdictions

[296] The Appellants referred to the remediation process in, what they considered to be, comparable circumstances at Port Colborne. Dr. Smith was a senior advisor in the design, implementation, interpretation, and final report for the Port Colborne blood lead survey.[228] Dr. Smith indicated that the information from Port Colborne is relevant to the situation at the subdivision Lands because the lead levels are similar, the kind of distribution is similar, and the results of the lead survey were also similar. The Board briefly reviewed the Port Colborne Report and notes that residents at properties exceeding 1,000 ppm lead in soil were advised to avoid contact with soil and to not consume vegetables from backyard gardens.

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226 Transcript, dated February 5 and 6, 2002, at pages 1199 to 1201.

227 Transcript, dated February 5 and 5, 2002, at pages 1214 to 1216

228 Transcript, dated February 5 and 6, 2002, at page 839, line 1 to 6.

[297] During cross examination of Dr. Smith (who was not familiar with background lead levels in Alberta), the following exchange with Mr. Fitch occurred on the relationship between the Lynnview Ridge and Port Colborne sites:

> "Mr. Fitch: There are also differences aren't there?
>
> Dr. Smith: I imagine there are some. I have not enumerated all the characteristics of both sites.
>
> Mr. Fitch: Well, I just took a quick look at the executive summary to the 2-inch thick report that we were provided by our friend and I see that in the Port Colborne case, the lead levels were similar to other urban residential sites in Ontario; is that right?
>
> Dr. Smith: That's correct. ...
>
> Mr. Fitch: You would agree with me that the levels found in Lynnview Ridge are not similar to levels found in other urban residential communities in Alberta, or do you even know?
>
> Dr. Smith: I am not familiar with the Alberta database. ...
>
> Mr. Fitch: I also read in the executive summary that the lead levels found in the soil, in fact, are not attributable to the emissions from the INCO Refinery. Isn't that right? ...
>
> Dr. Smith: I understand that's still under debate because of the rubble issue and because of the activities that INCO had over the period that is attributed to the lead emissions. They may, in fact, come from another industry that is no longer there.
>
> Mr. Fitch: Well, I read this, on page 1 of the executive summary: The lead levels are not attributed to INCO emissions. So do you understand where I got that impression?
>
> Dr. Smith: ... Yes, I understand.
>
> Mr. Fitch: Would you agree with me that it would be a bit odd for the ministry of environment in Ontario to issue, say, the Ontario equivalent of an environmental protection order against a company when the lead levels found were not, in fact, attributable to that company's emissions? That would be pretty unusual, in fact, very unreasonable, wouldn't it?
>
> Dr. Smith: Yes."[229]

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[229] Transcript, dated February 5 and 6, 2002, at pages 931 to 933, lines 24 to 27, 1 to 27, and 1 to 10 respectively.

[298] On the relevance of similar circumstances in other jurisdictions, the Board is of the view that while they may have some relevance to the question of reasonableness, ultimately, the Director must reach his own decision on what is appropriate for Alberta. Specifically in relation to the Port Colborne Report, the Board notes the importance of background or regional lead levels to the reasonableness of cleanup requirements. Background levels were recognized as a site specific factor by the CCME and appear to be one reason for not requiring remediation of lead contamination of soils at Port Colborne. By contrast to the Port Colborne situation, the Board heard that background lead levels in the Lynnview Ridge community were between 8 and 17 ppm.[230] Further, the Board notes that the Canadian Soil Quality Guidelines for Contaminated Sites Report[231] listed the following ranges of concentrations of lead in urban and suburban Alberta:

(a) old urban parklands: 4-54 ppm;
(b) new urban parklands: 0-58 ppm;
(c) transportation sites: 0-86 ppm; and
(d) commercial sites: 2-272 ppm.

[299] The other significant difference between Port Colborne and Lynnview Ridge is that the Port Colborne Report did not determine the likely source of the lead in the soils. In Lynnview Ridge, we have determined that question.

[300] The Board also heard about the remediation requirements in respect of the Sydney Tarponds in Nova Scotia but, ultimately, Dr. Lambert of the Calgary Health Region testified that the Director's requirements at Lynnview Ridge are less onerous than the remediation that will be implemented by the Federal Government in Nova Scotia.[232]

[301] The Appellants also asked the Director if he had contacted his counterparts in other jurisdictions to determine how they had or would respond in similar circumstances. The Board is of the view that this type of enquiry is not a prerequisite to assist the Director in

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230 Transcript, dated February 5 and 6, 2002, at pages 1081, lines 10 to 15. (Background levels discussed.)

231 Exhibit 22. *Canadian Soil Quality Guidelines for Contaminated Sites, Human Health Effects: Inorganic Lead, Final Report, The National Contaminated Sites Remediation Program* (March 1996), at page 40.

232 Transcript, dated February 5 and 6, 2002, at pages 1086 to 1088 and 1129 to 1130.

reaching his decision on the appropriate cleanup requirements for a specific site in Alberta. Indeed, if the Director undertook such enquiries, his decisions may be open to challenge on the basis that he is delegating his decision making power or subverting the position of the Alberta government to adopt the safest threshold promoted by the CCME.

e. Expectations of Future Scope of Remediation

[302] Finally, the Board will consider whether the Director's requirement to remove some soils beneath 0.3 metres was reasonable given the scope of the Order. We conclude that it was.

[303] The relevant provisions of the Order do not refer to depths of remediation but in outlining the requirements of the Remedial Options Report, focuses on options to "remediate, risk-manage and/or remove and dispose of the Substances and the resulting adverse effects to the Subdivision Lands, and to any off-site area." The Order also indicates that the applicable remedial criteria are subject to the approval of the Director. We cannot find anything under the Order that would lead to an expectation that only remediation of the first 0.3 metres of soil would be required.

f. Conclusion

[304] The Board also finds that it is not too remote from the recommendations of the Remedial Options Report to require Imperial Oil to meet the CCME Guidelines to a depth of 1.5 metres at the currently identified 4 to 5% of the areas where lead concentrations of greater than 140 ppm have at least twice been identified. This is reasonable.

[305] In the Board's view, the fundamental requirement of the Order was to clean up the contamination found at the site in order to properly protect the environment and human health. In the Board's view, the Order properly supports the Director's direction to remove the soil from 0.3 metres to 1.5 metres. A reasonable person reading the EPO would have reasonably expected that in order to clean up the contamination found on the site and protect human health, the removal of soil would be required. The only question is to what depth, which is a pure question of the circumstances of the particular case, and which properly forms part of the adaptable process founded in good science and environmental management. In this regard, the Order was reasonable and sufficiently precise.

5. Removal of Soils Beneath Semi-Permanent Structures

[306] The Director's September 11, 2001 letter stated:

> "On all private residential property within Lynnview Ridge, IOL [(Imperial Oil)] shall remove the top 0.3 metres of soil and replace with clean topsoil, except for under houses, multi-family buildings and garages. This includes the removal of soil from beneath all decks, fences, driveways, patios, sidewalks on private property, gardens, shrubs and trees."

[307] By contrast, the Appellants' Remedial Options Report recommended the same site-specific Tier 3 criteria it recommended for soil removal below 0.3 metres, for soil in inaccessible locations such as below street, sidewalks, and buildings.[233] The Appellants Submission reiterated, in their letter to the Director dated October 10, 2001:

> "…[T]here is no technical justification for removal of soil beneath private residential driveways and concrete side walks in order to meet the 140 ppm guideline, as there was limited potential for exposure to soil beneath both driveways and sidewalks. While Imperial [Oil] noted that it was willing to consider application of the CCME Guideline for soil beneath private driveways and sidewalks of single home properties, the Tier 3 criteria for the multi-family lots was justified, especially given that all soil samples to date in those areas were below the CCME Guideline."[234]

[308] On this point, we agree with the Appellants, whose arguments with respect to the removal of soil beneath semi-permanent structures relied on a *barrier* to exposure; the Appellants' arguments in this situation are more compelling than those with respect to a 0.3 metre soil barrier. Essentially, the difference lies in the permanence of the barrier. While it is easy to think of situations in which a landowner would dig in his yard, it is more difficult to think of circumstances in which a landowner would remove a semi-permanent structure, such as a driveway, and not replace it in the same location. In the Board's view, the likelihood of the removal of these semi-permanent structures is comparable to the removal of a detached garage, and the Director has not required the replacement of soil beneath garages. On this point (removal of soil beneath semi-permanent structures) the Director was unreasonable.

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233 Appellants' Submission, dated January 25, 2002, at page 15, paragraph 52.

234 Appellants' Submission, dated January 25, 2002, at page 17, paragraph 56.

[309] For example, the Board also reviewed a map showing the extent of paved areas on private property at the Subdivision Lands.[235] The Board notes that one of the largest paved areas on private lands is the parking area for the townhouses. The Board is of the view that this area is unlikely to be removed unless the townhouses are demolished because otherwise a very large alternative parking area would need to be found. The Board finds, in respect of the townhouse parking area, that the costs of removing the soil and replacing the paved area far outweigh the benefits of having soil that meets the 140 ppm lead standard beneath this area.

[310] Again, in the Board's view, the fundamental requirement of the Order was to cleanup the contamination found at the site in order to properly protect the environment and human health. In the Board's view, the Order properly supports the removal of soil under all deck, fences, gardens, shrubs, and trees. A reasonable person reading the Order would have reasonably expected that in order to clean up the contamination on the site and protect human health, the removal of soil under the semi-permanent structures would be required. Again, the extent to which the removal of the soil under these semi-permanent structures is a question that properly forms part of the adaptable process, the Order was reasonable and sufficiently precise.

[311] However, the Board does not believe that a reasonable person reading the Order would have reasonably expected that in order to clean up the contamination on the site and protect human health, that they would be expected to remove structures such as driveways, patios, and sidewalks any more than they would have been expected to remove the soil under houses, multi-family units, or garages. In the case of structures such as driveways, patios, and sidewalks, the Director has not demonstrated that they would cause a risk to the environment or human health. As a result, the Order is not sufficiently precise to require this work. Had it been the intention of the Director to require this, then, in the interests of fairness, the Order should have provided some indication that this was a possible requirement and if it became apparent to the Director through the adaptable process that this would be necessary, then the Director should have issued a new order.

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[235] Exhibit 24. *Paved Areas on Private Property Map*, February 1, 2002.

[312] The Board, therefore, recommends that the Order be amended to specify that the removal of soil for the purposes of remediating the site does not include the removal of soil beneath houses, multi-family units, garages, driveways, patios, or sidewalks.

6. Restoration to the Satisfaction of the Property Owner

[313] The Director's September 11, 2001 letter stated:

> "Upon completion of remediation, IOL [(Imperial Oil)] shall restore all private residential property to its pre-disturbance condition to the satisfaction of the property owner."

[314] The Appellants submitted that this requirement, together with the nature of remedial work requiring each resident's consent before beginning, "…permits the residents to delay or interfere with [Imperial Oil's] performance of its terms."[236] The Appellants also submitted that this requirement gives each resident unrestricted privileges and is in conflict with the terms of section 102 of EPEA.[237] The Appellants note that section 102(3) provides:

> "An environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary including, but not limited to any or all of the following: ...
>
> (e) restore the area affected by the release to a condition satisfactory to the Director."

[315] The Appellants contended, "…by giving the residents the authority to fix the standard to which Imperial [Oil] must restore private residential property, the Director delegated the power given to him."[238]

[316] The Director's intention in setting this requirement was clarified during examination at the hearing:

> "Mr. McDonald: Specifically, the Imperial Oil submission at paragraph 71, and I am paraphrasing again, suggests that the restoration of property is to be to the satisfaction of the property owner. Do you feel that you delegated your responsibility of the EPO in making this statement?
>
> Mr. Litke: No. I certainly don't. What our intention was there, and

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236 Appellants' Submission, dated January 25, 2002, at page 21, paragraph 71.

237 Appellants' Submission, dated January 25, 2002, at page 21, paragraph 71.

238 Appellants' Submission, dated January 25, 2002, at page 22, paragraph 72.

> this has not been raised, at least not that I can recall, in either discussions or in correspondence with me, what our intention was there is that after remediation has finished, is that the properties be returned to a state that the homeowner would be agreeable to.
>
> So what we were suggesting to Imperial [Oil] in this particular provision or condition was that they work with the property owner to leave it in a state that is to their satisfaction. If they can't achieve that, I may have to become involved again in that process, and in my understanding, Imperial Oil has begun those discussions with the property owners and I am hopeful that that will -- those will be good discussions and that they will reach agreements as to what will be left at the end. ... I don't think the homeowners - at least in my discussions - want anything more or anything less than they have.
>
> Obviously when remediation is finished, it won't be exactly the same, so, you know, there may be an opportunity for a homeowner to try and get more than what they had before. That's possible. So we put the condition in to try and protect both parties, come to an agreement as what would be reasonable to be left when you are finished. That was the idea of that."[239]

[317] The Board is sympathetic to the Director's reasoning in stating that properties should be restored after remediation to the satisfaction of the homeowner. Nevertheless, section 102 of EPEA does specifically state that one of the measures that the Director may order is to "…restore the area affected by the release to a condition satisfactory to the Director." The Board does not see that it would cause any hardship to the residents or the Appellants if the Director has the final say on restoration of the properties after remediation. Indeed, the Board would expect that the Director is likely to be the most objective of the Parties.

[318] It is not reasonable that an EPO include within its own terms and conditions, or to permit as a term or condition of the adaptable process, that work be performed to the satisfaction of a third party, who of course would add terms beyond the EPO, EPEA, or regulations. In the Board's view, EPOs should contain a general provision that the work shall be performed either to an objective standard (based on EPEA) or to the satisfaction of the Director. Any EPO that does not include this principle either explicitly or implicitly is unreasonable. This is because, *inter alia*, the failure to comply with an EPO is a prosecutable offense. It is not reasonable, to permit a prosecution to be founded on the subjective standards of a third party.

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[239] Transcript, February 5 and 6, 2002, at pages 991 and 992, lines 16 to 27, and 1 to 19 respectively.

[319] The Board therefore recommends that the Order be amended to require that work under the Order shall be performed to an objective standard or to the satisfaction of the Director.

I. Further Letters – March 19 and 26, 2002

[320] As indicated, subsequent to the Board receiving final arguments and closing the hearing, the Board received a reconsideration motion from the Appellants. The basis of the reconsideration motion was two additional letters, dated March 19 and 26, 2002, provided to the Appellants by the Director as part of the adaptable process. The Board notes that these letters were provided to the Board, just as the Board was concluding its closing written arguments. In response to these letters, the Board asked for the comments of the Parties as to whether the Board should receive these letters as additional evidence with respect to Issue 5 and if the Board did accept these letters as additional evidence, what should the Board conclude regarding these letters.

[321] While the Board has reviewed these letters, the Board notes that a number of the Parties, including the Appellants, have expressed reservations about not being able to fully present their arguments on these letters. The Board agrees, and therefore has decided not to address these letters specifically. However, the Board is of the view that the same principles that it has applied to the September 11 and 12, 2002 letters apply here. In the Board's view, for an adaptable direction of the Director to be valid, the EPO must reasonably and with sufficient precision contemplate that direction.

[322] With this in mind, the Board is hopeful that the Appellants and the Director can resume their adaptable dialog on the issues included in the new letters and come to a resolution between themselves within 45 days of the Minister's decision in this matter. However, if the Appellants or the Director are not able to come to a resolution, either the Appellants or the Director are free to apply to the Board for a reconsideration of the Order in light of these new letters.

[323] The Board notes in this regard, that the Appellants have also filed a reconsideration motion in response to the March 19 and 26, 2002 letters. Given the Board's disposition of this matter, the Board will adjourn the reconsideration motion *sine die*.

IV. CONCLUSIONS

[324] Having regard to all of the evidence and submissions presented to the Board and the forgoing discussion and analysis the Board concludes:

1. the Board has applied the proper burden of proof, the onus of proof is on the Appellants;
2. the presumption against retrospectivity does not limit the application of section 102 in this case;
3. the Appellants are persons responsible under section 102;
4. a release may occur, is occurring, or has occurred on the Subdivision Lands within the meaning of section 1(ggg), even taking into account the release's historic nature;
5. the potential for an adverse effect to occur continues to exist while high levels of released hazardous substances remain in the soil;
6. that sufficient evidence existed and continues to support the Director's decision to issue the Order;
7. the Director has the discretion to choose between issuing the Order under section 102 and section 114;
8. the Director's discretion to choose between issuing the Order under section 102 and section 114 was properly exercised;
9. the Director did not violate principles of natural justice by issuing the Order without formally applying the Guideline for Designating Contaminated Sites;
10. the Director exercised his discretion reasonably by not naming others, including the City of Calgary, Calhome, Nu-West, Entek, Curtis, and Kidco;
11. the Order was reasonably and sufficiently precise such that it provides a proper foundation for the requirement in the September 11 and 12, 2001 letters to require the removal of soils containing greater than 140 ppm of lead between 0.3 metres and 1.5 metres;
12. the Order was reasonably and sufficiently precise such that it provides a proper foundation for the requirement in the September 11 and 12, 2001 letters to require the removal of 0.3 metres of soil under decks, fences, gardens, shrubs and trees;
13. the Order was not reasonably and sufficiently precise to provide a proper foundation for the requirement in the September 11 and 12, 2001 letters to require the removal of 0.3 metres of soil under driveways, patios, and sidewalks on private property, and the Order should be varied to make it clear that this is not within the scope of the Order;
14. the Order was not reasonable and sufficiently precise to provide a proper

foundation for the requirement that the remediation work be done to the satisfaction of the individual landowners, and the Order should be varied to require that the work under the Order should be performed to the satisfaction of the Director;

15. the Appellants and the Director should work together to resolve the dispute regarding the March 19 and 26, 2002 letters based on the Board's approach to the September 11 and 12, 2001 letters, and in the event that either the Appellants or the Director are unable to agree, the are free to apply to the Board for a reconsideration on these issues; and

16. the reconsideration motion that the Appellants have filed as a result of the March 19 and 26, 2002 letters is adjourned *sine die*.

V. RECOMMENDATIONS

[325] In accordance with section 91 (now section 99) of the Act, the Board recommends that the Minister of the Environment:

1. confirm the Director's decision to issue the Order and that the Order properly applied section 102 (now section 113) to the pollution at the site, even to the extent the pollution originated before EPEA came into force;

2. confirm the Director's decision to forego naming parties other than Imperial Oil Limited and Devon Estates Limited in the Order;

3. confirm that the Director's decision to issue the Order was reasonably and sufficiently precise so as to provide a proper foundation for the requirement in the September 11 and 12, 2001 letters to require the removal of soils containing greater than 140 ppm of lead between 0.3 metres and 1.5 metres;

4. confirm that the Director's decision to issue the Order was reasonably and sufficiently precise so as to provide a proper foundation for the requirement in the September 11 and 12, 2001 letters to require the removal of 0.3 metres of soil under decks, fences, gardens, shrubs, and tree;

5. vary the Order issued by the Director to make it clear that requirement to remove 0.3 metres of soil under driveways, patios, and sidewalks on private property where they provide an effective barrier to the lead in the soil is not within the scope of the Order;

6. vary the Order issued by the Director to require that the work under the Order should be performed to the satisfaction of the Director; and

7. direct the Director to continue to apply the Order under section 102 (now section 113) and, if new evidence supports it, to apply the procedures in Part 4, Division 2 (now Part 5, Division 2) to the site.

[326] Attached for the Minister's consideration is a draft Ministerial Order implementing these recommendations. (Note that the draft Ministerial Order makes reference to the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.)

[327] Finally, with respect to sections 92(2) and 93 (now sections 100(2) and 103) of the Act, the Board recommends that copies of this Report and Recommendations and of any decision by the Minister be sent to the following parties:

1. Mr. Ken Mills, Ms. Bernadette Alexander, Mr. Paul Jeffrey, and Mr. Dalton McGrath, Blake, Cassels and Graydon, LLP on behalf of Imperial Oil Limited and Devon Estates Limited;
2. Mr. William McDonald and Mr. Grant Sprague, Alberta Justice on behalf of Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment;
3. Mr. Ron Kruhlak and Mr. Corbin Devlin, McLennan Ross on behalf of the City of Calgary;
4. Mr. Ted Helgeson, Helgeson & Chibambo Law Office on behalf of Calhome Properties Ltd;
5. Mr. Gavin Fitch, Rooney Prentice on behalf of Lynnview Ridge Residents Action Committee;
6. Mr. David Wood, Donahue Ernst Young on behalf of Calgary Health Region;
7. Ms. Debbie D. Laing, Rio Verde Properties Ltd.; and
8. Mr. Ken Bailey, Q.C., Parlee McLaws on behalf of Glenayre Technologies Inc.

VI. COSTS

[328] Prior to the close of the hearing, a number of the Parties indicated to the Board that they reserved the right to claim costs. The Board requests that any of the Parties who have reserved the right to claim costs, should provide a submission on costs to the Board within two weeks from the date of the Minister's Order with respect to this Report and Recommendations.

Dated on May 21, 2002 at Edmonton, Alberta.

- original signed by -

William A. Tilleman, Q.C., Chair

- original signed by -

Ron V. Peiluck, Member

- original signed by -

Dr. Curt Vos, Member

VII. EXHIBIT LIST

HEARING

October 16, 17 and 18, 2001, and February 5 and 6, 2002

Calgary, Alberta

Imperial Oil and Devon Estates

Environmental Protection Order No. 2001-01

E.A.B. Appeal No. 01-062

E X H I B I T L I S T

Exhibit No.	Description
1	Advertisement placed in the Calgary Herald August 1 and 2, 2001 and the Calgary Sun on July 31, 2001 and August 1, 2001, advising of the hearing to take place on September 12-14, 2001. A news release was also placed on the Government web site on July 27, 2001 and distributed to 95 daily newspapers, radio stations and television stations within Alberta. Advertisement placed in the Calgary Herald and Calgary Sun on September 24, 2001 advising that the hearing has been rescheduled to October 16, 17 and 18, 2001. A news release was also placed on the Government web site on September 11, 2001 advising the hearing has been adjourned and distributed to 95 daily newspapers, radio stations and television stations within Alberta. A news release was also placed on the Government web site on September 19, 2001 advising the hearing has been rescheduled and distributed to 95 daily newspapers, radio stations and television stations within
2	Notice of Appeal filed by Imperial Oil Limited and Devon Estates Limited dated July 3, 2001.
3	Map "Preliminary Results of Soil and Vapour Analysis for Hydrocarbons"
4	Curriculum Vitae of Lesbia F. Smith, MD and Articles: • A multi-element profile of house dust in relation to exterior dust and soils in the city of Ottawa, Canada; • Seasonal Influences on Childhood Lead Exposure; • A Multivariate Linear Regression Model for Predicting Children's

Exhibit No.	Description
	Blood Lead Levels Based on Soil Lead Levels: A Study at Four Superfund Sites; • The relationship of lead in soil to lead in blood and implication for standard setting; • Lead Screening Report/Eastside Community, Port Colborne/April – June 2001. **AND** Curriculum Vitae of Donald B, Davies, Vice President, Scientific Programs, Cantox Environmental Inc., and articles: • Determination of Residential Soil Quality Guideline (RSQG) for Inorganic Lead Using the CCME "Protocol" (1996); • Dietary Intake of Lead and Blood Lead Concentration in Early Infancy; • Absorption and Retention of Lead by Infants; • Erythrocyte Nucleotides in Children – Increased Blood Lead and Cytidine Triphosphate; • Low Level Lead and Inhibition of Erythrocyte Pyrimidine Nucleotidase; • Electrocardigraphic studies in children with lead poisoning; • Effects of Low to Moderate Lead Exposure on Brainstem Auditory Evoked Potentials in Children; • Fatal and Infant Lead Exposure: Effects on Growth in Stature.
5	City of Calgary Witness Materials.
6	Federal Register/Part III/Environmental Protection Agency/40 CFR part 745/Lead; Identification of Dangerous Levels of Lead; Final Rule.
7	Map of Lynnwood Heights dated 1980.
8	Large Map of overlay of refinery.
9	Large Map of present property owners.
10	Curriculum Vitae of Brent Thomas Friesen.
11	E-Mail from Robert Dabeka to Tim Lambert.
12	Relations of Bone and Blood Lead to Cognitive Function: The VA Normative Aging Study. **AND** Cognitive Deficits Associated with Blood Lead Concentrations <10 ug/dL in US Children and Adolescents.

Exhibit No.	Description
13	Biography of Owen Tobert and Presentation Re: Planning and Subdivision of Lynnwood Phase 4.
14	Binder containing Certified copies of Statement of Claim, Statement of Defence and Affidavit on production of the City of Calgary in Sprung v. The City of Calgary and Imperial Oil Limited.
15	Curriculum Vitae of Wilfried J. Staudt, Ph.D.
16	Letter dated October 16, 2001 from Lorne Olsvik of Alberta Urban Municipalities Association to Chairman of the Environmental Appeal Board.
17	Article: Cognitive Deficits Associated with Blood Lead Concentrations <10 ug/dL in US Children and Adolescents.
18	Article: Preventing Lead Poisoning in Young Children.
19	Soil Investigation and Human Health Risk Assessment Report for the Rodney St. Community, Port Colborne – Ontario, Ministry of the Environment, October 2001.
20	Ontario Ministry of the Environment News Release – Ministry of the Environment Issues Draft Order to Inco Ltd. to Clean Up Soil in Port Colborne, October 30, 2001.
21	Alberta Hansard, May 23, 2001, 1:30 p.m. Oral Question Period.
22	Canadian Soil Quality Guidelines for Contaminated Sites Human Health Effects: Inorganic Lead, Final Report, The National Contaminated Sites Remediation Program, March 1996.
23	Resume of Donald B. Davies, Vice President, Scientific Programs, Cantox Environmental.
24	Paved Areas on Private Property Map, February 1, 2002.
25	Distribution of Subsurface Hydrocarbons Map, November 9, 2001.
26	Letter dated April 30, 1970 from D.H.A. Sellers, Imperial Oil Limited to Mr. J.W. Long, J.W. Long and Associates regarding Ogden property. Letter dated April 16, 1971 from Bruce Lawrence, Nu-West Land Development to Mr. D. Sellers, Imperial Oil Limited regarding Ogden property. List entitled Documents the Appellants were Ordered to Produce Pursuant to the EAB's Order of December 10, 2001.
27	Estimation of Soil Intake Required to Achieve a "Steady State" Blood Lead Level of 15 ug/dL in a Child for Various Lead-Affected Soils.
28	Submission on Soil Ingestion Requested by EAB, Alberta Environment/CHR.
29	Updated Curriculum Vitae of Timothy W. Lambert.
30	Fatal Pediatric Lead Poisoning - New Hampshire, 2000.

Exhibit No.	Description
31	Give Residents Option of Moving from Coke Ovens Area Mayor Says, The Halifax Herald Limited, December 13, 2001.
32	Soil Ingestion: A Concern for Acute Toxicity in Children, Environmental Health Perspectives, Volume 105, Number 12, December 1997.

VIII. Draft Order

Ministerial Order
/2002

Environmental Protection and Enhancement Act,
R.S.A. 2000, c. E-12.

Order Respecting Environmental Appeal Board
Appeal No. 01-062

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeal Board Appeal No. 01-062.

Dated at the City of Edmonton, in the Province of Alberta this ____ day of _____, 2002.

_____

Honorable Dr. Lorne Taylor
Minister of Environment

Draft Appendix

With respect to the decision of Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Regional Service, Alberta Environment (the "Director"), to issue Environmental Protection Order #EPO-2001-01 (the "EPO") dated June 25, 2001, under the *Environmental Protection and Enhancement Act*, to Imperial Oil Limited and Devon Estates Limited, I, Dr. Lorne Taylor, Minister of Environment:

1. Order that the decision of the Director respecting the EPO is confirmed, subject to the following;
2. Order that the decision of the Director respecting the EPO is varied by adding to the EPO: "This Environmental Protection Order shall be interpreted such that the removal of soil under driveways, patios, and sidewalks will not be required where they provide an effective barrier to lead in the soil.";
3. Order that the decision of the Director respecting the EPO is varied by adding to the EPO: "All work performed under this Environmental Protection Order shall be performed to the satisfaction of the Director."; and
4. Further order the Director to continue to require compliance with the EPO under section 113 (previously section 102) and, if new evidence supports it, to give due consideration to applying the procedures in Part 5, Division 2 (previously Part 4, Division 2) to the site.

Ministerial Order
19/2002

Environmental Protection and Enhancement Act,
R.S.A. 2000, c. E-12.

Order Respecting Environmental Appeal Board
Appeal No. 01-062

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeal Board Appeal No. 01-062.

Dated at the City of Edmonton, in the Province of Alberta this 22nd day of July, 2002.

"original signed by"

Honorable Dr. Lorne Taylor
Minister of Environment

Appendix

With respect to the decision of Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Regional Service, Alberta Environment (the "Director"), to issue Environmental Protection Order #EPO-2001-01 (the "EPO") dated June 25, 2001, under the *Environmental Protection and Enhancement Act*, to Imperial Oil Limited and Devon Estates Limited, I, Dr. Lorne Taylor, Minister of Environment:

1. Order that the decision of the Director respecting the EPO is confirmed, subject to the following;
2. Further order the Director to continue to require compliance with the EPO under section 113 (previously section 102) and, if new evidence supports it, to give due consideration to applying the procedures in Part 5, Division 2 (previously Part 4, Division 2) to the site.