

ALBERTA  
ENVIRONMENTAL APPEAL BOARD

Decision

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Date of Decision – August 22, 2001

**IN THE MATTER OF** sections 84, 85, and 87 of the  
*Environmental Protection and Enhancement Act*, S.A. 1992, c. E-  
13.3;

**-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 Limited v. Director, Enforcement and Monitoring, Bow Region,  
Regional Services, Alberta Environment.*

**BEFORE**

William A. Tilleman, Q.C., Chairman

**Appellants** Imperial Oil Limited and Devon Estates Limited represented by Mr. Ken Mills and Ms. Bernadette Alexander, Blake, Cassels & Graydon.

**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, McLennan Ross.

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

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

## EXECUTIVE SUMMARY

This is an appeal filed by the Appellants, Imperial Oil Limited and Devon Estates Limited (a wholly owned subsidiary of Imperial Oil), of an Environmental Protection Order issued to them with respect to the Lynnview Ridge residential subdivision in Calgary, Alberta.

The EPO states that Imperial Oil ran an oil refinery on the lands that are now the subdivision between 1923 and 1975. The EPO states that the majority of lands were then transferred to Devon Estates who developed them in conjunction with another company.

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

The purpose of this Decision is to determine which matters included in the Notice of Appeal will be included in the hearing of this appeal. The Board has determined that it will consider the following issues:

Issue 1: "Are the Appellants persons responsible under section 102? This question is limited to the issues of whether section 102 has retroactive effect."

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?"

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 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?"

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

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## I. BACKGROUND

[1] This is a decision, pursuant to section 87(2), (3) and (4)<sup>1</sup> of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 (the “Act” or “EPEA”), that determines which matters will be included in the hearing of the appeal filed by Imperial Oil Limited (“Imperial Oil”) and Devon Estates Limited (“Devon Estates”). Imperial Oil and Devon Estates (collectively the “Appellants”) filed a Notice of Appeal respecting Environmental Protection Order #EPO-2001-01 (the “EPO”) with the Environmental Appeal Board (the “Board”) on July 3, 2001. The EPO was issued to the Appellants on June 25, 2001 by the Director, Enforcement and Monitoring, Bow Regions, Regional Services, Alberta Environment (the “Director”) with respect to the Lynnview Ridge residential subdivision (the “Subdivision”) in Calgary, Alberta.

### A. The EPO

[2] The EPO states that Imperial Oil ran an oil refinery on the lands that are now the Subdivision between 1923 and 1975. The EPO states that the majority of lands that are now the Subdivision were then transferred to Devon Estates who developed them in conjunction with

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<sup>1</sup> Section 87(2), (3), and (4) of the Act provide:

“(2) Prior to conducting a hearing of an appeal the Board may in accordance with the regulations determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following:

- (a) whether the matter was the subject of a public hearing or review under the Natural Resources Conservation Board Act or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review;
- (b) whether the Government has participated in a public review in respect of the matter under the Canadian Environmental Assessment Act (Canada);
- (c) whether the Director has complied with section 65(4)(a);
- (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;
- (e) any other criteria specified in the regulations.

(3) Prior to making a decision under subsection (2) the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.

(4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”

another company. According to the EPO, Devon Estates is a wholly owned subsidiary of Imperial Oil.

[3] The EPO states that in 1999 and 2000, the City of Calgary undertook a review of the “...numerous environmental assessments that had taken place at the Subdivision...” According to the EPO this review was prompted by previous complaints from residents of the Subdivision. The EPO states that following this review, a monitoring program was implemented that resulted in “...sampling and monitoring for hydrocarbons and lead (the ‘Substances’)...” The EPO states that the analytical results included in a May 2001 draft report indicate that “...numerous high hydrocarbon vapour concentrations [were] confirmed...” and that “...a number of soil samples taken for lead analysis ... ranged over 1200mg/kg, and therefore exceed the Canadian Council of Ministers of Environment (CCME) soil limit of 140mg/kg.”

[4] The EPO concludes that the Director “...is of the opinion that a release of the Substances has occurred, and that the release of the Substances has resulted in an adverse effect...” Further, the EPO concludes that Imperial Oil and Devon Estates are “persons responsible” pursuant to section 1(ss)<sup>2</sup> of the Act.

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<sup>2</sup> Section 1(ss) of the Act provides:

“In this Act ... (ss) ‘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

[5] The EPO directs the Appellants to prepare an interim report that: delineates the release of the Substances, identifies short-term measures "...to address any imminent risks of exposure...", and details a communication and consultation plan with residents. The EPO requires the measures identified in the interim report to be carried out by the Appellants once the schedule of implementation has been approved by the Director. Further, the EPO directs the Appellants to prepare a remedial report that reviews all of the options to remediate the Substances and the associated adverse effects. The EPO requires that the Appellants carry out the option that is accepted by the Director. Deadlines are set with respect to each of the requirements in the EPO. These deadlines were subsequently extended following discussions with the Director.<sup>3</sup>

## **B. The Notice of Appeal**

[6] In the Notice of Appeal, the Appellants object to the EPO in its entirety, and in particular that the Director failed to "... to name other persons known to him as persons responsible...." The Appellants also reserve "... the right to continue to challenge more specifically the terms of the Order in the event the appeal is dismissed in whole or in part...."

[7] More specifically, the Appellants identify seven grounds of appeal. These grounds of appeal are:

1. The deadlines in the EPO are unreasonable and impractical.
2. The Director exercised his discretion unfairly by failing to name the City of Calgary, Calhome Properties Ltd. ("Calhome"), Nu-West Development Corporation Ltd. ("Nu-West"), Curtis Engineering & Testing Ltd. ("Curtis"), Entek Engineering Limited ("Entek"), Kidco Holdings Limited ("Kidco") and others as "persons responsible".
3. The Director exercised his discretion unfairly by failing to take into account a number of facts when he issued the EPO. These facts included:
  - (a) ownership of the Subdivision lands by other parties at various times;

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adverse effect of the release of a substance into the environment on that parcel...."

<sup>3</sup> With respect to the matter of the deadlines specified in the EPO, the Appellants also requested a Stay from the Board. However, the request for a Stay was withdrawn when the Director and the Appellants were able to reach an "...understanding..." as to how these deadlines would be applied. (Letter from the Appellants to the Board dated July 12, 2001.)

- (b) participation in the development process by the City of Calgary in a capacity other than a regulator;
  - (c) development, review and approval of remedial measures by other parties prior to development of the Subdivision;
  - (d) disposal of the contaminated soil;
  - (e) approval by the City of Calgary of zoning changes subject to approval of the remediation;
  - (f) timing and extent of business relationships between the Appellants and other parties;
  - (g) discussions between the City of Calgary and Alberta Environment and subsequent further development of the Subdivision in accordance with remedial measures;
  - (h) conflicting and additional data regarding contamination and the adverse impact; and
  - (i) changes in environmental guidelines.
4. Failure by the Director to consider legal precedents from other jurisdictions.
5. The Director improperly exercised his discretion in issuing the EPO pursuant to section 102 rather than section 114 of the Act.<sup>4</sup>

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Section 114 of the Act provides:

114(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;

6. The Director improperly exercised his discretion by applying section 102 of the Act retrospectively.<sup>5</sup>

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(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.

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Section 102 of the Act provides:

102(1) Subject to subsection (2), where the Director is of the opinion that

(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;

7. In the event that the Director was entitled to issue the EPO under section 102 of the Act, the Director improperly exercised his discretion by naming the Appellants as “persons responsible” under the Act because there has not been a release and in the event there has been a release, the release will not cause an adverse effect.

### C. Procedural History

[8] The Board acknowledged the appeal on July 3, 2001 and requested that the Director provide the records (the “Records”) related to this appeal. The Board received the Records on July 5, 13, and 23, 2001 and subsequently provided copies to the Appellants. Copies of these Records were also made available for review by the public by placing a copy in the Calgary Public Library.

[9] In its letter of July 3, 2001, the Board also requested that the parties identify other parties that may have an interest in this appeal. The other parties that were identified were the City of Calgary, Calhome, Nu-West, Curtis, Entek, Kidco, and the Lynnview Ridge Residents Action Committee (the “Residents Committee”). The Board subsequently received intervention requests from the City of Calgary, Calhome, and the Residents Committee.<sup>6</sup>

[10] Further, according to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

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(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.

<sup>6</sup> The Board also received two other intervention requests. The Board’s decision respecting the intervention requests is provided in another decision.

[11] In consultation with the parties, on July 27, 2001, the Board set a hearing with respect to this appeal for September 12, 13, and 14, 2001 in Calgary. Notice of this Hearing was published in the Calgary Herald and the Calgary Sun on July 31, 2001 and August 1, 2001.

[12] On July 31, 2001, the Appellants filed an application with the Board to compel the production of certain documents in the possession of the City of Calgary. On August 2, 2001, the Appellants also provided a legal brief regarding the Board's jurisdiction to compel the production of the documents.

[13] In response to this application the Board decided hold a conference call between the Board's General Counsel and the legal counsel for the various parties.<sup>7</sup>

[14] On August 3, 2001, the Board received a letter from the Director proposing "...that the Board determine, in accordance with s.87(2) of the *Environmental Protection and Enhancement Act*, those matters that will be included in the hearing."

[15] On August 3, 2001, the Board wrote to the parties regarding the proposed conference call and indicated that "...it appears that it may be necessary for the issues to be determined prior to determining whether to order the City of Calgary to provide the documents requested by..." the Appellants. The Board continued, "...it would seem prudent to add the topic of issues and procedural matter to the conference call ... [and t]herefore, the topics for discussion at the conference call will be: 1. production of documents, 2. issues, 3. procedural and scheduling matter."

[16] Following the conference call, on August 8, 2001, the Board wrote to the parties and confirmed that

"...the participants agreed that the possible issues that could be considered by the Board at the hearing of this appeal are:

1. Is Imperial Oil a person responsible as specified in the Order?
2. Is there an adverse effect or a significant adverse effect on the lands identified in the Order?
3. Whether the Director properly exercised his discretion to issue the Order pursuant to section 102 as opposed to section 114?

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<sup>7</sup> The parties involved in the conference call were the Appellants, the Director, the City of Calgary, Calhome, and the Residents Committee.

4. Whether the Director properly exercised his discretion to not name additional persons as persons responsible under the Order?

Based on the discussion of yesterday morning, the Board is prepared to receive submissions on these issues, including proposals on how to address these issues. For example, it may be possible to address one or more of the issues by written submissions prior to the hearing.”

The Board then established a schedule for receiving submissions on these issues.

[17] On August 9, 2001, the Board received the initial submissions from the parties. On August 10, 2001, following an initial review of the submissions, the Board wrote to the parties and stated:

“... the Board wishes to make sure that the parties understand that *it is the Board's intention*, based on the initial submission provide yesterday, and the response submission that are to be provided ... *to make a decision as to which matters included in the notices of appeal will be included in the hearing of the appeal*. The Board will make this decision in accordance with section 87(2), (3), and 94) of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3. In addition to this, the Board wanted to hear proposals on how to best address the issues that it determines. *If there was any miscommunication in this regard, please contact the Board immediately.*” (Emphasis in the original.)

[18] On August 10, 2001, the Board wrote to the parties and indicate that based on a telephone conversation between the Board's General Counsel and legal counsel for the Appellants, the “...Board is prepared to receive a supplemental initial submission from the Appellants....” The Board subsequently received the supplemental initial submission from the Appellants and the response submissions from all of the parties.

#### **D. Initial Submissions**

[19] In its initial submission, the Appellants recharacterize the issues stated in Board's letter of August 8, 2001 as follows:

- “1. Whether [the Appellants are]... a ‘person responsible’ under section 102 of EPEA?
2. Whether there has been a release as defined by section 1(ggg) of the EPEA and if so, whether that release has caused an adverse effect?
3. Whether the Director erred in law or exceeded his jurisdiction by using the EPO pursuant to section 102 rather than proceeding under section 114 of the EPEA? Alternatively, whether the Director misused or improperly

exercised any discretion vested in him to choose section 102 over section 114 of the EPEA, which is intended to deal with contaminated sites?

4. Whether the Director exercised his discretion unfairly by failing to name ...[other parties known to him] as ‘persons responsible’ for the alleged release of the Substances pursuant to section 1(ss) of the EPEA?”<sup>8</sup>

The Appellants argue that the four issues they identify are interrelated and that it would be prejudicial for the Board to hear any of the issues separately.

[20] In its supplemental initial submission, the Appellants state that “...the legitimate and relevant issue which arise from the EPO are set out in its Notice of Appeal and ought to be heard by the Board.” The Appellants further restate the issues:

- “1. Having regard to issues ... [(2) and (3)] below, whether ... [the Appellants] are ‘persons responsible’ under section 102 of the EPEA?
2. Whether there has been a release as defined by s.1(ggg) of the EPEA or whether we are dealing with a case of historical contamination and what difference that makes under EPEA?
3. Whether the Director erred in law or exceeded his jurisdiction by issuing the EPO pursuant to s.102 rather than proceeding under s.114 of the EPEA? Alternatively, whether the Director misused or improperly exercised any direction vested in him to choose s.102 over s.114 of the EPEA, which is intended to deal with contaminated sites?
4. Whether the Director exercises his discretion unfairly by failing to name ... others know to the Director as ‘persons responsible’ for the alleged release of the Substances pursuant to s.1(ss) of the EPEA?”

[21] The Appellants then proceed to review these four issues and provide legal arguments supporting the inclusion of the four issues in the hearing of the appeal. These arguments go to the merits of the issues and appear to be an attempt to demonstrate a *prima facie* case with respect to the issues.

[22] The Director argues that based on the information before it, the Board is in a position to make a summary determination of the first two issues as stated in the Board’s letter of August 8, 2001. In support of this argument, the Director points to a number of “...facts [that] are inescapable...” from the Director’s perspective. Further, the Director argues that the third

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<sup>8</sup> Section 1(ggg) of the Act provides:

“In this Act...(ggg) ‘release’ includes to spill, discharge, dispose of, spray, inject, inoculate, abandon, deposit, leak, seep, pour, emit, empty, throw, dump, place and exhaust....”

and fourth issues are interrelated such that once the Board deals with the third issue, the fourth will be moot. As a result, it is the Director's position that the only issue that the Board ought to consider is the third issue.

[23] The City of Calgary essentially concurs with the Director that the third and fourth issues are interrelated in such a manner that once the Board deals with the third issue, the fourth "...could very well [be] resolve[d]...."

[24] Calhome essentially concurs with Director with respect to he first issue identified in the Board's letter of August 8, 2001 and states that "... it seems to us that the first issue is needful only if the appellants have evidence they intend to adduce that would establish that the lead and hydrocarbons on the lands were put there by some other party or parties." Calhome also argues that the second and third issues could be combined.

[25] The Residents Committee also concurs with the Director that the first and second issues identified in the Board's letter of August 8, 2001 are "...wholly without merit and the Board should therefore exercise its discretion ... and decline to consider those issues at the hearing." With respect to the third issue, the Residents Committee is of the view that "... it is a question of law which does not depend on an adjudication of facts." The Residents Committee agrees that the fourth issue should be included in the hearing of the appeal.

#### **E. Response Submissions**

[26] In its response submission, the Appellants argue that "...it is important to not abrogate or unreasonably limit the rights of appeal of..." the Appellants. The Appellants argue that this should "...include not taking steps to either summarily dismiss or redefine the issues other than what has been set out clear in the Notice of Appeal...." With respect to whether the Appellants are "persons responsible" the Appellants argue that the arguments it will make "...are legal arguments which relate to whether section 102 has retrospective effect and whether there has been a 'release' where in this case we are dealing with a matter of historical contamination." The Appellants do not dispute the fact that they "...had at one point in time care, management or control of the Substances...."

[27] With respect to adverse effect, the Appellants note that this argument is presented in the alternative and "...may not even need to be considered once determination has been made with respect to the..." first issue. The Appellants suggest that this matter be left to the end of the hearing or scheduled for a subsequent date.

[28] With respect to the third issue, the Appellants concurs with the Director this issues is appropriate for hearing before the Board. The Appellants indicate that with respect to this matter, they intend to lead evidence relating to "...the historical nature, knowledge and management of the contamination." With respect to the fourth issue, the Appellants argue that the matter is not rendered moot by the determination of the third issue.

[29] In his response submission, the Director expresses concern with the statement that the Appellants "...reserves the right to continue to challenge more specifically the terms of the EPO in the event the appeal is dismissed in whole or in part..."<sup>9</sup>

[30] In response to the arguments raised by the Appellants on the fairness of result as it relates to the Director's choice to issue the EPO under section 102 instead of section 114, the Director states that he is under no obligation to be "...fair in terms of results."

[31] The City of Calgary states that it appears "...to be the consensus of all parties that the issue of whether the Director properly exercised his discretion in issuing the EPO pursuant to section 102 as opposed to section 114 can be dealt with by written submissions and determined by the Board pursuant to section 87(2)."

[32] Calhome argues that the first issue is moot and that it would be more appropriate for the Board to first deal with the issue of whether the Director properly exercised his discretion by issuing the EPO under section 102 instead of section 114. Calhome then expresses concern at being identified as one of the other parties that the Appellants wish to see added to the EPO. They argue that

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<sup>9</sup> The Director indicates that there are two possible interpretations to statement. The first is that the Appellants want to reserve the right to raise additional grounds of appeal in the event they are unsuccessful on the grounds they have raised. The Director would object to this on the basis that raises "...concerns about the integrity of the appeal process..." The second interpretation is that the Appellants are reserving the right to "appeal" future decisions of the Director. The Director argues that if this is the case, such considerations are hypothetical and premature.

“...there is no merit to the appeal as it applies to Calhome.... Because there is no factual or legal basis for naming Calhome ... as a ‘person responsible’ ... [Calhome] therefore request[s] that the Board dismiss the Notice of Appeal pursuant to section 87(5)(a)(I) of the Act insofar as it seeks to name Calhome as a ‘person responsible’.”

[33] The Residents Committee provides more of response the arguments on merit that the Appellants have provide and objects to the issue of whether section 102 has retrospective effect based on *Legal Oil and Gas Ltd. v. Director, Land Reclamation Division, Alberta Environmental Protection*.<sup>10</sup>

## II. Analysis

[34] The task before the Board is to determine which matters included in the Notice of Appeal will be included in the hearing of the appeal. The Board is authorized to make this determination by section 87(2), (3) and (4) of the Act. These sections provided:

“(2) Prior to conducting a hearing of an appeal the Board may in accordance with the regulations determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following:

- (a) whether the matter was the subject of a public hearing or review under the Natural Resources Conservation Board Act or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review;
- (b) whether the Government has participated in a public review in respect of the matter under the Canadian Environmental Assessment Act (Canada);
- (c) whether the Director has complied with section 65(4)(a);
- (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;
- (e) any other criteria specified in the regulations.

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<sup>10</sup> *Legal Oil and Gas Ltd. v. Director, Land Reclamation Division, Alberta Environmental Protection* (June 23, 1999) E.A.B. Appeal No. 98-009. See also *Legal Oil and Gas Ltd. v. Alberta (Minister of Environment)* (2000), 34 C.E.L.R. (N.S.) 303 (Alta.Q.B.).

(3) Prior to making a decision under subsection (2) the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.

(4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”

[35] The intent of section 87(2) is to permit the Board to identify those issues included in the Notice of Appeal that it is prepared to consider in the hearing of the appeal. The wording of the section is clear that it permits the Board to *choose* which matters included in the Notice of Appeal are to proceed to a hearing. In this regard, the Board has a broad discretion, particularly with regard to such preliminary issues.<sup>11</sup> A review of the subsections of section 87(2) make it clear that the purpose behind making this choice is to have an efficient and effective hearing. The subsections speak of having regard to other regulatory processes to ensure that there is no duplication of review and to look to new information which may be relevant to ensure that the best decision possible is made. Further, it is clear that the Board’s power to choose which issues it will hear is binding in that section 87(4) prohibits parties from making representations on matters that the Board has decided not to include.

[36] The Appellants have asked the Board to consider four issues. The four issues are:

- “1. Whether [the Appellants are]... a ‘person responsible’ under section 102 of EPEA?
2. Whether there has been a release as defined by section 1(ggg) of the EPEA and if so, whether that release has caused an adverse effect?
3. Whether the Director erred in law or exceeded his jurisdiction by using the EPO pursuant to section 102 rather than proceeding under section 114 of the EPEA? Alternatively, whether the Director misused or improperly exercised any discretion vested in him to choose section 102 over section 114 of the EPEA, which is intended to deal with contaminated sites?

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<sup>11</sup> The Board relies on *Alberta Environment v. Environmental Appeal Board* (25 April 2000), Edmonton 9903-23265 (Alta.Q.B.) Murry J. at paragraph 20: “The Act gives the Board broad powers on appeal which are not specifically limited. The Board is an expert tribunal established to consider appeals from environmental approvals. The Legislature has signalled its intention for the Board and the Minister to deal with these issues through the strong privative clause. There is no reason why the Board should not be able to decide the preliminary question of jurisdiction to hear such an appeal.”

4. Whether the Director exercised his discretion unfairly by failing to name ...[other parties known to him] as ‘persons responsible’ for the alleged release of the Substances pursuant to section 1(ss) of the EPEA?”

[37] In considering these four issues, it is important to remember the context in which the issues are raised. The Appellants have been named in an EPO that requires them to undertake potentially extensive and costly remediation work of a residential Subdivision. The Appellants have appealed to ensure that they are only liable for obligations that the Act properly imposes upon them. The Board is prepared to accept, therefore, that these Appellants are entitled to advance all *reasonable* defenses to the EPO that are available to them. The Appellants may not win at the end of the day, but they are entitled to present arguments to the Board that are reasonable connected to the EPO and the stated grounds of appeal.

[38] The residents of the Subdivision are equally, if not more so, impacted by the work required by this EPO. The residents of the Subdivision want to ensure that their health and safety is protected. As well, they wish to preserve the economic value of their homes. There is also the general public interest to be considered in protecting the environment. As a result, it is clear the stakes are high for all parties in this matter and it is appropriate that the issue of adverse effects be argued.

[39] In exercising its discretion to determine the matters that will be including in the hearing of this appeal, the Board must balance all of these interests.<sup>12</sup> In this case, in order to ensure that the Board is in the position to make the best decision that it can on the merits of this appeal, the Board is of the view that it should generally be inclusive in determining the matters to be included. Therefore, the Board is of the view that all four of the issue identified by the Appellants should be considered in some form at the hearing of this appeal.

[40] With respect to the first issue – the Appellants as “persons responsible” - and the second issue – release and adverse effect - the Board finds reasonable the comments of the Director that there are certain inescapable facts that support the summary disposition of these matters. While the Board will not make a summary decision at this time, the Board is not prepared to foreclose the argument. The Board notes the comments of the Appellants that there “...are legal arguments which relate to whether section 102 has retrospective effect and whether

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<sup>12</sup> See section 2 of the Act.

there has been a ‘release’ where in this case we are dealing with a matter of historical contamination...” and the Board is therefore prepared to limit the scope of these issue along that line. The Board therefore determines that the following issues shall be included in the hearing of the appeal:

Issue 1: “Are the Appellants persons responsible under section 102? This question is limited to the issues of whether section 102 has retroactive effect.”

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?”

The Board notes the comments of the Residents Committee that the issue of the retroactive effect of section 102 was previously addressed in *Legal Oil and Gas Ltd.* before the Board and before the Court of Queen’s Bench.<sup>13</sup> The parties should be mindful of these decisions. Further, the Board notes that these two issues are principally legally in nature and as a result, the Board anticipates that the issues should be able to be substantially addressed in written arguments.

[41] The only area where there seems to be substantial agreement between the parties is that the main issue of this appeal is the distinction between an EPO issued under section 102 and an EPO issued under section 114 of EPEA. The Board therefore determines that the following issue shall be included in the hearing of the appeal:

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 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?”

As stated, the Board views this as the main issue in this appeal, and the Board expects that the parties will focus the majority of their presentation on this matter at the appeal hearing.

[42] The parties also agree generally that the fourth issue should be included (although the parties differ as to whether the Board will have to address it). The Board determines that the following issue shall be included in the hearing of the appeal:

Issue 4: “Did the Director exercises his discretion unreasonably by not naming others know to the Director as persons responsible under the EPO?”

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<sup>13</sup> *Legal Oil and Gas Ltd. v. Director, Land Reclamation Division, Alberta Environmental Protection* (June 23, 1999) E.A.B. Appeal No. 98-009. *Legal Oil and Gas Ltd. v. Alberta (Minister of Environment)* (2000), 34 C.E.L.R. (N.S.) 303 (Alta.Q.B.).

[43] The Board notes Calhome's objection to the inclusion of this issue and Calhome's application for a summary disposition of this issue by dismissing the request by the Appellants to have them added to the EPO. The Board is not prepared to make such a determination at this time as that would require to skate too closely to the merits of the appeal.

[44] The Board also notes the concern expressed by the Director with the statement that the Appellants "...reserves the right to continue to challenge more specifically the terms of the EPO in the event the appeal is dismissed in whole or in part..." The Board notes the two possible interpretations put forward by the Director. The first is that the Appellants want to reserve the right to raise additional grounds of appeal in the event they are unsuccessful on the grounds they have raised. The Director would object to this on the basis that raises "...concerns about the integrity of the appeal process..." The second interpretation is that the Appellants are reserving the right to "appeal" future decisions of the Director. The Director argues that if this is the case, such considerations are hypothetical and premature.

[45] On this point the Board will deal with future appeals as they arise, and not before. When such an appeal is filed, the Board will review it in the ordinary course. However, the Board wishes to make it clear that this hearing scheduled for September 12, 13, and 14, 2001 is the only hearing with respect to this particular EPO. The Appellants should not expect to be able to later raise additional grounds of appeal respecting this EPO in the event that they are unsuccessful on the merits. There is of course the reconsideration power found in section 92.1<sup>14</sup> of the Act, but that power has been narrowly construed by the Board in the past.<sup>15</sup>

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<sup>14</sup> Section 92.1 of the Act provides:  
"Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

<sup>15</sup> See: Whitefish Lake First Nation Request for Reconsideration: *Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment* re: *Tri-Link Resources Ltd.* (September 28, 2000), E.A.B. Appeal No. 99-009-RD; Laidlaw Environmental Services (Ryley) Ltd. Request for Reconsideration, re: *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (April 7, 1998), E.A.B. Appeal No. 96-059; Kozdrowski Request for Reconsideration, re: *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (February 9, 1999), E.A.B. Appeal No. 96-059.

### **III. DECISION**

[46] Pursuant to section 87(2) of the Act, the Board determines that the following matters will be included in the hearing of the Appeal:

Issue 1: “Are the Appellants persons responsible under section 102? This question is limited to the issues of whether section 102 has retroactive effect.”

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?”

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 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?”

Issue 4: “Did the Director exercises his discretion unreasonably by not naming others know to the Director as persons responsible under the EPO?”

Dated on August 22, 2001, at Edmonton, Alberta.

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William A. Tilleman, Q.C., Chair