A Review of Legal Rights and Obligations Related to Transparency, Public Participation, and Accountability for Compliance in Current and Proposed Regimes for the Management of Air Emissions from the Alberta Electricity Sector

Prepared for

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1.Terms of Reference

This report was prepared with the intent of assisting and informing the Clean Air Strategic Alliance (CASA) Electricity Project Team review of alternative management regimes for air emissions from the Alberta electricity sector. The focus of the review is on environmental justice components of the management regime, inclusive of issues of transparency, participation, accountability, impact avoidance, mitigation and compensation in standard setting and project siting and approvals.

The report reviews key Alberta and federal laws for the management of air emissions from the electricity sector to identify public rights and opportunities and to identify any apparent gaps or constraints in the exercise of those rights and opportunities. The review includes processes for project review and approval, standard setting, monitoring and reporting and enforcement and compliance. Consideration is also given to proposed or tabled laws and new policy directions, including in particular new management approaches introduced through the provincial *Climate Change and Emission Management Act* (Bill *37)* and federal and provincial policy initiatives for use of sectoral agreements and emission trading.

The report reviews alternative approaches adopted by other jurisdictions for addressing environmental issues, with particular emphasis on addressing the needs and interests of especially affected communities in siting and permitting electricity facilities. Due to time and resource limitations for this review, in most cases alternative approaches are identified and not analyzed in any level of detail.

In addition, any detailed analysis of the proposed future federal and Alberta regimes for managing green house gases (GHG) was made difficult due the fact that neither order of government have finalized their legislative regimes. Bill 37 is primarily enabling legislation, leaving the majority of substantive implementing rules to yet to be promulgated regulations. As well, despite previous commitments to a Canada-Wide Standard (CWS) for mercury emissions emitted from coal- fired power plants, no standard or management regime is yet in place.[1] No federal regulatory regime has yet been promulgated to establish any national systems to implement international commitments for GHG and mercury.

[1] During the November 2001 hearings on the application by TransAlta Utilities to expand its Keephills coal-fired plant, Alberta and federal government officials testified that a Canada-Wide Standard for mercury emissions and revised federal emission standards were "imminent". On the basis of that testimony and concerns expressed by intervenors and expert witnesses, the EUB recommended that Alberta Environment (AENV) determine how the pending CWS for mercury will apply to Keephills 3 and 4 in its approval process. It also directed TransAlta to establish a mercury monitoring and management program with AENV and Sustainable Resource Development (ABSRD) prior to commissioning the expansions and to develop and implement a detailed study of mercury in fish tissue. (EUB Decision 2002-014, February 2002)). AENV approvals for the Genesee facility expansion require that EPCOR undertake a mercury assessment program and to "take all reasonable steps to design the facility to allow for the addition of future pollution abatement equipment necessitated by reasonably foreseeable emission limits or other emission performance criteria." (Approval No. 773-01-05, May 8, 2002)

The opinions and views expressed in the report are those of the authors and do not necessarily reflect the views of Environment Canada.

2. International, National and Provincial Commitments to Principles of Environmental Justice and Accountability in Environmental Management Regimes

2.1 *What are the Principles of Environmental Justice?*

The principles of "environmental justice" are now well established. They have been legally entrenched in international laws and in some instances incorporated into Canadian domestic laws. In some jurisdictions the precise language of environmental justice has been incorporated into law and policy, including the United States federal and numerous state laws. [2] Environmental Justice is generally understood to encompass three key principles. [3]

The first principle, *distributional justice*, requires that no community or identifiable group of persons should bear a disproportionate burden of actual or potential harm from development or activities. Stated as a positive right, the benefits of environmental protection, such as clean air and water, should be equally available to all. By way of example, laws must be in place to prevent unfair burden on vulnerable populations, for example native communities.[4] Consistent with that principle, decision- making criteria would preclude increased risks to already impacted communities and more equitable consideration would be given to rural and urban populations in siting criteria.

The second principle, *procedural justice,* requires that decisions be made through a fair and open process. This includes procedural fairness and effective ability to participate through access to resources necessary to play an active and constructive role in decisions and the right of affected communities to be involved in *all* stages of any planning or decision process.

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[2] For example *US Federal Government Executive Order* 12898 (1994) mandates the incorporation of environmental justice principles into federal agency activities. North Carolina, Georgia, Alabama, Louisiana, Michigan, New York, Arkansas and California have enacted laws to achieve environmental justice.

[3] See for example, *Principles of Environmental Justice, Proceedings of the First National People of Colour Environmental Leadership Summit* (October 24-27, 1991); Robin Lanette Turner and Diana Pei Wu, *Environmental Justice and Environmental Racism, an annotated Bibliography and General Overview focusing on U.S. Literature*, 1996-2002 (Institute of International Studies, University of California, Berkeley, August 2002); Center for International Environmental Law (CIEL), "One Species, One Planet: Environmental Justice and Sustainable Development" (Washington DC: CIEL, October 2002).

[4] See for example the interventions by the Paul First Nation and Mewassin Community Action Group (MCAG) in the review by the Alberta Energy and Utilities Board of the EPCOR Generation Inc. and EPCOR Power Development Corporation Application No. 2001173, EUB Decision 2001-111 and interventions by the Paul First Nation, MCAG and Lake Wabamun Enhancement and Protection Association (LWEPA) in the EUB review of TransAlta Energy Corporation Application N. 200-200, EUB Decision 2002-014.

The third principle, *entitlement*, is consistent with the "precautionary principle" and requires that efforts be made to prevent adverse effects, not merely to remediate or redress after the fact. It includes the principle of intergenerational distributive justice, that is, that development meets the needs of the present without compromising the ability of future generations to meet their own needs.[5] It also requires that communities prejudicially impacted by development decisions be granted a right to be compensated. This is a counterpoise to the more utilitarian approach of allowing identifiable populations or communities to be subjected to heightened actual or potential risks for a purported benefit to the majority.

2.2 Current Commitments to Environmental Justice Principles

Canada as signatory to various international or regional agreements, has committed to ensuring transparency and participation in decision- making related to management of air emissions, including facility siting, standard setting and monitoring and compliance. In other cases, commitment is made to extending rights and opportunities to parties at risk to harm with ready access to remedies. In other instances, as outlined below, the Government of Alberta has also specified its assent to the rights and principles outlined.

2.2.1 The North American Agreement on Environmental Cooperation (NAAEC)

The NAAEC[6] commits Canada to a process of advance notice and right of comment on any environmental laws, procedures or programs (art. 4). The *NAAEC* also commits Canada to ensure that its laws and regulations provide for high levels of environmental protection and to strive to continue to improve those laws and regulations. (art.3). This obligation is intended to prevent the parties from downgrading environmental protection standards to gain an economic or trade advantage. The *NAAEC* further requires the parties to extend the legal right to interested persons to compel an investigation and response; to sue for damages; to seek sanctions or remedies to mitigate the consequences of violations of environmental laws or regulations; and, to seek an injunction where the person suffers or may suffer loss, damage or injury. Under *NAAEC* Canada commits to administrative, quasi- judicial and judicial proceedings that are fair, open and equitable.

It may be noted that Alberta was the first of the provinces to declare its commitment to the *NAAEC*.

2.2.2 United Nations Framework Convention on Climate Change (UNFCCC)

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[5] World Commission on Environment and Development (WECD), *Our Common Future*, 3 (Oxford University Press, 1987)

[6] September 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 (entered into force on January 1, 1994).

Canada has ratified the UNFCCC[7] and the various implementing agreements including the Kyoto Protocol[8] and the Marrakech Accords[9]. These establish binding reduction targets and emission reporting and compliance and enforcement obligations and regimes. These include the obligation to submit annual national reports on emission reductions for scrutiny by an international body. The national system for monitoring and reporting will be also subject to scrutiny. In turn, Canada may be subject to penalties for failure to meet specified reduction targets or for non-compliance with monitoring or reporting requirements. Non- compliance may result in obligations to further reduction obligations. While some specific provision is made under the Marrakech implementing accords for transparency and public access, the details remain under negotiation.[10]

2.2.3 Heavy Metals Protocol

In 1998 Canada ratified the *Protocol to the 1979 Convention on Long- Range Transboundary Air Pollution on Heavy Metals*[11], thereby committing to specified actions to control emissions of specified heavy metals, including mercury emissions from specified industrial sources including electricity facilities. Commitment is given to developing and maintaining emission inventories and to achieving specific reductions by target dates for the annexed heavy metals. Compliance is to be reviewed regularly. The protocol is not yet in effect. The preamble makes specific note of the contribution of the private and non-government sectors to knowledge of the effects associated with heavy metals and available alternatives and abatement techniques and their role in assisting in the reduction of emissions of heavy metals. The Protocol comes into effect December 2003.

The North American Regional Action Plan on Mercury[12], commits Canada to help facilitate meaningful public participation including NGOs, business and industry, native North Americans, provincial, state and municipal governments, academics and technical and policy experts in accordance with the principles set out in the NAAEC. Commitment is also made to regular public reporting, audit processes to verify mercury reduction initiatives and periodic assessments of voluntary or regulatory mechanisms for reduction.

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[7] Opened for signature June 4, 1992, S. Treaty Doc. No. 102-38 (1992), 31 I.L.M. 849 (1992), entered into force March 21, 1994.

[8] U.N.F.C.C.C, Conference of the Parties, 3d Sess., U.N. Doc FCCC/CP/1997/L.7/Add.1 (1998), 3 I.L.M. 22 (1998).

[9] To reference the ongoing issues and discussions see for example www.unfcc.de

[10] See for example, Jutta Brunnee, "A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol", Tulane Environmental Law Journal, Vol. 13 summer 2000 Issue 2, p 223-270; Meinhard Doelle, "From Kyoto to Marrakech, A long Walk through the Desert: Mirage or Oasis?" (pre-publication draft).

[11] A specific Protocol to the original LRTAP (CTS1983/84) adopted in Geneva November 13, 1979. This recent protocol setting mercury reductions for thermal electric facilities was ratified by Canada on December 18, 1998.

[12] The Action Plans were developed pursuant to Resolution 95-05 on the Sound Management of Chemicals by the North American Council (of Ministers) of the North American Commission for Environmental Cooperation.

The Council directed that the Action Plans incorporate, as appropriate, pollution prevention principles and precautionary approaches to reduce risks associated with toxic substances.

In October 2000, Canada also signed the *Barrow Declaration* under which the eight Arctic States state their common concern with releases of mercury, call upon UNEP to initiate a global assessment as a basis for international action and encourage other nations to ratify the *Heavy Metal Protocol*.

2.2.4 Rio Declaration on Environment and Development

The Rio Declaration[13], ratified by Canada in 1992, commits Canada to a number of directly related principles including:

- Right to a healthy and productive life in harmony with nature
- Right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations
- Environmental issues are best handles with the participation of all concerned citizens….including appropriate access to information, opportunity to participate in decision- making; effective access to judicial and administrative proceedings, including redress and remedy
- States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage
- In order to protect the environment, the precautionary approach shall be applied…where there are threats of irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental damage.

The precautionary principle is in turn reflected in the *CCME Canada Wide Standards Sub-Agreement.* It provides that where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing the development and implementation of standards.

2.2.5 Canada-wide Accord on Environmental Harmonization and Sub-Agreements

Under the Harmonization Accord [14] and affiliated sub-agreements, Canada and Alberta commit that the public and stakeholders will have a meaningful opportunity to provide input on priorities and in the development and implementation of Canada-wide Environmental Standards (CWS). A further undertaking is made to report to the public on plans for the attainment of a CWS based on established timelines, performance criteria and to provide progress reports.

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[13] 13, June 1992, 31 I.L.M. 874
[14] Signed January 29, 1998.

2.2.7 Framework for Effective Compliance and Enforcement

In addition to the above, the now internationally recognized framework for ensuring effective environmental enforcement and compliance, also incorporates a number of components directed towards transparency, accountability for compliance and specifies a public role:[15]

1. Institutional commitment to ensure compliance with and effective enforcement of environmental standards;
2. A clear, public enforcement and compliance strategy for implementing any measures or standards;
3. Consistent, measurable definition of what constitutes compliance (for example by regulation, approval, or binding term of a negotiated agreement);
4. Specified strategies for promoting compliance (for example education, incentives, credible enforcement threat);
5. Systems for monitoring and reporting on compliance (for example self-monitoring, independent audit, government surveillance, community watch, published compliance reports);
6. Clearly prescribed enforcement powers, sanctions and penalties that deter non-compliance;
7. Commitment to regular evaluation of enforcement and policies and strategies (through use of indicators, program audits, transparent, results based review of management tools).

In addition to recognizing the need for measurable, enforceable standards, the *framework* reflects a need to clarify public rights and roles in standard setting, monitoring and compliance processes. Most Canadian environmental agencies, including Environment Canada and Alberta Environment have issued formalized enforcement and compliance policies reflecting these key components. It is also widely recognized that any compliance strategy, inclusive of public roles, to be effective must be developed in tandem with any new environmental laws or management tools.

[15] Framework for Effective Environmental Compliance and Enforcement as reviewed and discussed in Proceedings of the Conferences of the International Network on Environmental Compliance and Enforcement (www.inece.org). See also chapters by Linda F. Duncan, and Alastair Lucas on regulatory legislation and enforcement and compliance in E.L. Hughes et al (ed.) *Environmental Law and Policy,* Emond Montgomery (1993, 1998 and 2003 editions).

3. Overview of Rights and Opportunities in the Current and Proposed Regime for Management of Alberta Air Emissions

The following summarizes existing rights, opportunities and obligations regarding public involvement in decision making on air emission standards in Alberta and federal laws. Any significant gaps or limitations to rights and opportunities are similarly identified. The review includes the proposed air emission management regime provided under *Bill 37*, with particular attention given to potential impacts on rights of transparency and participation through reliance on emission trading and sectoral agreements.

Experiences of other jurisdictions in extending rights of transparency and participation are shared, subject to the limited time and resources available to examine those regimes. It is recommended that more detailed information be pursued on the experiences of other jurisdictions in incorporating public rights into their alternative air emission management regimes.

3.1 Guidelines, Standards, EIA, Approvals

It is generally accepted that a sound compliance regime requires some form of standard -setting or approval regime to ensure certainty, fairness and enforceability. The following summarizes the legal rights and obligations for ensuring participation and transparency within the Alberta and federal regime for air emissions management.

3.1.1 Provincial

Alberta Environmental Protection and Enhancement Act (EPEA)

Consistent with these principles, the approach adopted by the Government of Alberta has been to establish sector- wide guidelines for specified emissions and to impose legally binding standards through facility-specific approvals.

The EPEA provides for standard setting through issuance of regulations, ambient objectives, or guidelines. In practice, the provincial government gives preference to use of its guideline power to establish sector- specific emission "standards". As a consequence, emission standards are made legally binding and enforceable only where referenced in project specific approvals. EPEA also empowers the Minister of the Environment to develop and implement, by regulation, economic or financial instruments and market based approaches, inclusive of emission trading in order to achieve environmental quality goals. No provision is found in EPEA for use of sectoral agreements to set emission standards.

Notice

The EPEA requires the Director responsible for environmental impact assessment (EIA) or a proponent, under certain limited situations, to provide notice of draft terms of reference for an environmental impact assessment. The proponent is required to provide notice where the Director deems that further assessment is required for any activity not on the mandatory review list. The Director is obligated only to post the final decision in the register and to notify "concern filers". There is no duty to provide advance public notice of the Director's consideration of the need for an assessment nor any notice that a decision was made to not require an EIA. The Director is obligated to make a screening report available to the public in accordance with the regulations. The proponent is required to post notice and make available copies of any draft terms of reference (TOR) for an EIA and EIA. The Director must publish notice of any final TOR.

The Director is obligated to provide or require the proponent to provide public notice of an application for approval or extension or amendments of an approval, in accordance with the regulations and subject to broad discretion to waive notice. The regulations provide no clarification on the proper exercise of that duty. The Director is only obligated to notify concern filers of any decision to waive notice. The Director is also obligated to circulate the proposed decision or particulars to "concern filers" and any other persons he deems appropriate.

Where the Director proposes any amendments, additions or deletions to an approval he is obligated to provide public notice in accordance with the regulations, except where he is satisfied that it is an emergency, it involves a "routine matter" or adequate notice has previously been given. The regulations are silent on the notice requirements but do require that the Director circulate any proposed approval, or amendment to persons who have filed statements of concern and any other persons he deems appropriate. It is not clear how persons may be notified so as to become concern filers, where notice is waived in this or the previous decision making process. Where the Director refuses any amendment, addition or deletion, he must notify concern filers and other persons he deemed necessary.

There is no similar broad duty to notify the public of any standard setting processes. The EPEA imposes no duty to notify the public of the intent to enter into negotiation of environmental agreements initiated under this Act, such as those negotiated under the LEAD program.

Neither EPEA nor regulations thereunder provide for notice to the public or potentially affected individuals or communities of any decisions related to reclamation, either in the reviews, terms or final issuance of reclamation certificates.

Duty to Consult/Consider Input

As noted previously, both the provincial and federal governments have committed under various international and multi-lateral agreements [16]and inter-governmental accords [17] to provide advance notice and opportunity to comment on environmental standards. The latter commits the signatories to notify and engage the public in the process of developing Canada Wide Standards (CWS). The EPEA provides for the promulgation of regulations specifying duties to consult the public in development of ambient environmental quality objectives. Absent regulations, the Minister is obligated to consult the public, only as he "considers appropriate". The Minister is however obligated to give due consideration to any public input he receives. No such regulations have yet been promulgated.

Departmental Guidelines issued in 2000 specify that general public, public interest groups, the scientific community, municipalities and industry are to be consulted in any process to develop or update ambient quality guidelines. There is no similar requirement for public consultation in the development of guidelines or objectives to meet other environmental protection goals. The Minister is obligated to consult the public, *to the extent he deems appropriate*, prior to the promulgation of any regulations setting environmental standards including concentrations, amounts, levels or rates. It is however the general policy and practice of the department to issue standards in the form of guidelines or approvals.

The EPEA extends limited rights to *directly affected persons* to comment on specific approvals. In practice, the department in certain circumstances initiates contact with or responds to requests by affected communities to be engaged in the drafting of terms and conditions of project approvals or renewals. There appears to be no consistent policy or practice *vis a vis* who is consulted or the nature and extend of the consultation, or consideration of the input.

There is no right accorded to the public, including potentially affected communities, to participate in processes for defining "non-attainment" areas, designating "clean areas" or determining best available or achievable technology. An opportunity has been extended to NGOs (not necessarily including concerned or affected communities) through processes such as the Clean Air Strategic Alliance (CASA) for participation in development or review of air emission standards or management tools. Some of these processes have incorporated broader consultation with the public.

The Director responsible for environmental assessment is obligated to consider to any statements of concern by directly affected persons of which he is aware in deciding whether to require an EIA. The EPEA requires (subject to discretion of the Director to vary) that a proponent include in any EIA, information on the proposed method of public consultation and to report on the actual consultation conducted. Only persons *directly affected* by an approval have the right to submit written statements of concern regarding any decision by the Director to require an EIA for a non-mandatory activity. They are not

[16] For example the *NAAEC; Agenda 21*.
[17] For example the *Harmonization Accord*.

accorded any similar right where a decision is made to not require an EIA. The Director is obligated to consider comments prior to issuing final TOR for an EIA. There is no legal duty imposed on the government to consider any public comments in rendering their decision to approve an EIA.

The EPEA imposes no duty to consult nor any right to be consulted in the negotiation of environmental agreements initiated under this Act, such as those negotiated under the Leaders Environmental Approval Document (LEAD) Program. However, guidelines issued for the LEAD program specify the need for a local community involvement program. An evaluation of the program concludes that the success of the program and building trust may depend on a willingness of all parties to participate, including "public environmental groups", suggesting potential limiting of participation to NGOs rather than locally affected communities.

Neither EPEA nor regulations thereunder extend any right or opportunity for consultation with public or affected individuals or communities regarding reclamation reviews, conditions or approvals, including reclamation or mitigation of any impacts related to contamination from air emissions.

Access to Information

The EPEA obligates industry to publicly disclose and make available copies of EIA screening reports, final terms of reference for EIAs and final EIA reports. EIAs must (subject to discretion of Director to vary) include a public consultation plan and process for reporting the results of the EIA. The Director is obligated to establish a register of environmental assessment information for public use and must provide notice of any decision to order an EIA and post final EIAs on the register. The AEPEA also imposes specific obligations on the department to disclose any information provided to the department for the purpose of administration of the Act, including information related to approvals, certificates of variance, environmental and emissions monitoring data, reclamation certificates, remediation certificates, enforcement orders and environmental protection orders, subject to specified procedural rules. The department is, however, also granted broad discretion to deny access to any information accepted by department as confidential and deemed to relate to a trade secret, process or technique.

Bill 37-Climate Change and Emissions Management Act

Bill 37 provides for the management of specified gas emissions, "including any gas that traps heat near the earth's surface and includes, without limitation, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride". Bill 37 introduces multiple alternative mechanisms for establishing emission targets, objectives and levels for these specified gases. Third reading and proclamation of the Bill has been postponed to the fall 2003 session of the Legislature.

While the Bill provides that sectoral agreements will provide the core mechanism for imposing standards for gas emissions (s.4), it also provides for additional mechanisms to establish reduction targets for specified gas emissions including regulation, and adoption by reference into regulation any "standards" established under a code, guideline or other rule (presumably including any voluntary codes). Alberta has advised that it is their intent to define the metrics for calculating CO_2 emission intensity as part of the process of negotiating individual sectoral agreements, processes that exclude the public.

Bill 37 empowers the Minister, subject to approval of the Lieutenant Governor in Council, to enter into agreements with "representatives of different sectors of the Alberta economy" (s. 4). Sectoral agreements may be used to establish:

- objectives for the purpose of meeting emission targets;
- minimum energy efficiency levels for operations and undertakings;
- maximum levels of emissions of specified gases;
- schedules for achieving emission targets;
- baselines for establishing emission targets;
- options for meeting targets.

Bill 37 provides that the following may be established by regulation:

- limits on the levels of specified gases which may be released from any source or type of source;
- maximum levels of emissions of specified gases per unit of energy input or output;
- operating, technological and performance standards for operations and undertakings for purpose of reducing or limiting specified gas emissions;
- government standards for and validation etc of sinks and emission offsets;
- provisions for enabling and implementing sectoral agreements, including making sectoral agreements binding on persons not party to any agreement;
- processes for determining gas emission targets.

Notice

Bill 37 accords no public right of notice or opportunity to comment nor duty to provide notice of intent on the part of government to utilize any of the alternative mechanisms for managing any of the specified emissions, whether by proposed or final guidelines, standards, regulations, caps, or sectoral agreements.

Duty to Consult/Right to Participate

While the Alberta Government has provided extensive opportunity for public review and comment on the draft Bill, no provision is made within the Bill, as tabled, to impose or enable consultation in the implementation of the management mechanisms to be established. Nor does it provide the public or competing sectors a right to be consulted or to participate in any of the "standard" setting or emissions management mechanisms. No rights are accorded to the public to participate:

- in the development any sectoral agreements, including establishment of any general framework for such agreements;
- in the delivery of an emissions trading program;
- in inter-jurisdictional cooperation programs;
- in the design and management of the Climate Change and Emissions Management Fund.

Unlike EPEA, no power is extended to the Minister to issue guidelines or promulgate regulations establishing ground rules for public consultation.

Bill 37 imposes no duty to consult and no right to be consulted in the process of promulgation of regulations. The provincial government has recently solicited views on possible consultation options for the design of the Alberta emissions trading regime. Bill 37 provides that documents that set out standards or codes guidelines or rules may be incorporated into regulations. No right is accorded to the public to participate in any decision to adopt such codes or guidelines. A limited duty is imposed on the Minister to provide access *after the fact* to any person on a *request basis.*

The Bill on its face provides minimal clarity as to the intended framework for the application of these various management tools. It does specify that the regulations will supercede provisions of any sectoral agreement or other mechanism under the Bill.

If the intent is to establish terms for emission controls through agreements negotiated between the government and the sector, the effect, unless otherwise provided, will be to limit right of participation in the negotiation and enforcement to parties to each agreement. Bill 37 imposes no obligation on the Minister to engage the public in the negotiation process nor does it extend the right to the public to participate. If the intent is to exclude the public from the negotiation processes, and then that represents a significant retraction of even the limited rights and opportunities accorded under standard setting processes of the EPEA.

Access to information

Bill 37 grants a *discretionary power* to the government to promulgate regulations to create, operate and manage public registries related to emission offsets. The Minister *may* disclose information on reported gas emissions or exceedences. However the obligation to report emissions and exceedences is contingent on a decision by government to promulgate a regulation to that effect. Bill 37 *prohibits* the disclosure of "prescribed information" and provides that these limitations prevail over any rights accorded under the *Freedom of Information and Protection of Privacy Act*. The Minister is obligated, on request basis**,** to provide copies of any standard, code, guideline or other rule. These provisions are at variance with the access provisions under EPEA, which provide for more open ready public access.

Energy Resources Conservation Act (ERC) and Hydro and Electric Energy Act

Pursuant to the *ERC* and *Hydro and Electric Energy Act*, the Energy and Utilities Board (EUB) is granted powers to provide a public review of any electric energy project proposal. Where the EUB deems that an application may directly and adversely affect the rights of any person, it is obligated to provide notice and opportunity to file objections. The EUB has broad discretion to determine if any parties are affected and whether the concern is sufficient to issue notice or to call a hearing. Rulings may however be appealed. Once a decision is made to provide public notice, the EUB must provide reasonable opportunity to the public to obtain information related to the application, a reasonable opportunity to submit evidence. Until its retroactive amendment in 2003, the *Hydro and Electric Energy Act* required the EUB in rendering decisions on hydro and electric projects to be satisfied that it was in the public interest having regard to present and future needs. The law now prohibits consideration of evidence related to electricity demand. The law does not specify that the EUB must consider the statements, objections or evidence it receives regarding an application.

Any persons may participate in an EUB hearing to submit evidence, and/or to cross- examine witnesses. The EUB has broad powers to compel information related and extensive powers to impose directions or conditions on approvals, including requirements for public consultation. No evidence or information submitted by an applicant or intervenor shall be classified as confidential or withheld from persons interested. The EUB has broad discretion to conduct its reviews by way of mediation, scientific interrogatory or formal public hearing.

The EUB has the discretion to make an award of costs to a "local intervenor", including an advance of costs. Local intervenors are limited to persons, groups or associations with an interest in or in actual occupation or entitled to occupy land that is or may be directly and adversely affected by a Board decision. The Board has broad discretion to determine the amount of costs that will be paid and the persons who are liable for the payment of the award. An intervenor may request the Board conduct a review of its determination of the award of costs. An award of costs may also be registered in the courthouse and once filed, is entered as a judgment of the Court of Queen's Bench and may be enforced.

An application may be made to the Board for a hearing on a matter related to an order or direction made by the Board that affected that person, without the holding of a hearing. There is a time limitation of 30 days after the date of the order. Also, a person affected by an order or direction of the Board after a hearing who did not receive direct notice of the hearing also has the right to appeal for a variance, amendment or rescinding of the order within 30 days of the decision. The Board has the discretionary authority to suspend its order or direction upon request by a person who is exercising their right to review an order or to hold a hearing. The Board must hold a public hearing on an application after providing notice to all affected persons and may confirm, vary or rescind the order or direction.

There is a right to appeal a decision or order of the Board to the Court of Appeal, providing it is on a question of law or jurisdiction. Leave to appeal must be obtained by the Court of Appeal within one month after the order or decision is made. Subject to the above, every action, decision and order of the Board is final and not open to question or review in a court.

The EUB also issues directives relating to such maters as minimum siting requirements for and emission standards for specified electricity operations and facilities. The EUB must hold a public hearing on application by any persons affected by orders or directions. Such persons may apply to have an order or direction suspended, varied, amended or rescinded.

GENERAL ISSUES RELATED TO USE OF NEW MANAGEMENT APPROACHES, IN PARTICULAR EMISSIONS TRADING AND SECTORAL AGREEMENT MECHANISMS:

1. There is lack of certainty on how signatories to sectoral agreements and their respective corporate entities are to be made legally culpable for compliance with terms of the agreements.
2. It is unclear if or how sectoral agreements will provide for avenues of redress by third parties, including potentially affected communities, where the mechanism is relied upon, in whole or part, as the means to impose emission control obligations.
3. The law does not specify whether the public, in particular potentially affected communities will be consulted in processes for reviewing and revising targets, standards or caps.
4. It is not known if the intent of the government is to adopt any or all of the terms recommended by the CASA EPT team as the terms for the electricity sectoral agreement, or if the electricity sectoral agreements will be negotiated at a separate table.
5. If the intent is to use emission trading as a management mechanism for all or some of the substances regulated under both AEPEA and Bill 37, it is unclear if the process for developing the implementing regulations or rules will include public involvement.
6. The intended interrelationship between the various emissions control mechanisms including guidelines, approvals, sectoral agreements and trading is unclear. It is particularly unclear where the junctures for public participation, with affected communities, will occur.
7. There has been inconsistent application of the CCME CWS commitments to public consultation in the development and implementation of CWS. Most notably, consultation with the public on CWS for mercury emissions from coal fired power plants has been limited compared with the process adopted for the CWS for particulate matter.

3.1.2 Federal Law

Canadian Environmental Protection Act (CEPA)

CEPA requires the federal Minister of Environment to publish any objectives, guidelines or codes of practice issued, or to give notice of them in the Canada Gazette. In carrying out the duties related to preserving environmental quality the Minister *may* consult with

persons interested in the quality of the environment. CEPA provides for Ministerial appointment of a board of review to inquire into the nature and extent of the danger posed by a substance which is either the subject of a proposed order, regulation or instrument to control the substance or a decision *not* to control the substance. In such cases a right is accorded to any person to appear to present evidence or to make presentations. Cost may be awarded. The report is public.

The Minister has discretionary authority to issue guidelines for the purposes of interpretation and application of provisions for controlling toxic substances, and *may* consult with persons interested in assessing and controlling toxic substances. If guidelines are issued regarding the control of toxic substances, the Act requires they be made available to the public and notice be provided in the *Canada Gazette*. The Minister is granted a discretionary power to issue guidelines and codes of practice for responding to environmental emergencies and has the discretion to consult the public.

The public is provided opportunities under the Act to file comments or notice of objection to agreements, lists of toxic substances, failure to determine if a substance specified on the Priority Substances List is toxic or capable of becoming toxic within 5 years, and every order or regulation proposed by the Minister or Governor in Council. The Act also provides opportunities for the public to request that a board of review be established by the Minister. In certain cases such as with respect to proposed regulations governing release into the air or water of substances that could contribute to pollution, the Minister is required to establish a board of review board.

The Minister has the power to require preparation and implementation of pollution prevention plans for *CEPA*-toxic substances. This includes the power to require any Canadian sources of international air or water pollution to submit pollution prevention plans. The Minister may also require "virtual elimination plans" for substances designated for virtual elimination because they are persistent, bioaccumulative and toxic. He is required to develop guidelines respecting the circumstances in which and the conditions under which pollution prevention planning is appropriate. For purposes of developing the guidelines the Minister has a broad discretion to consult with any persons interested in the quality of the environment. The public was consulted in the development of the current guidelines. All pollution prevention plans, interim progress reports, requests for time extensions and waivers are posted on the Green Lane and *CEPA* Registry. The federal government through the National Office of Pollution Prevention has issued a *Policy Framework for Environmental Performance***.** The intent is to use such agreements, among other purposes, to reduce the use and emission of select pollutants, inclusive of toxic substances. The Policy provides that the negotiation process for agreements must be transparent and accountable, provide for meaningful consultation with affected stakeholders, and provide for a minimum of annual reporting.

The federal Minister of Health, pursuant to her mandate to preserve and improve public health under the Act, is required to issue objectives, guidelines and codes of practice with respect to elements of the environment that may affect the life and health of Canadian citizens. She has the discretion to consult specified parties, including aboriginal people,

representatives of labour, industry and municipal authorities and those persons interested in the preservation and improvement of public health. She is also obligated to distribute available information to inform the public about the effects of substances on human health.

The Act requires the Minister of Environment to establish an environmental registry to facilitate access to documentation relating to matters under the Act. The registry must contain: notices and other documents published or made publicly available by the Minister; notice of approvals granted; copies of every policy and every proposed regulation or order made under the Act; and, copies of documents submitted to a court by the Minister related to any environmental protection action. The *CEPA* Registry has been established as an on-line service, providing information on proposed laws and polices, public consultation processes in progress and advising where to submit comments.

The Act provides that the Minister *may* establish advisory committees for purposes of carrying out the Minister's duties under the Act; any report of a committee including recommendations and reasons has to be made public.

CEPA empower*s* the Minister to establish guidelines, programs and measures to develop and issue economic instruments and market based approaches, including deposits and refunds and tradeable units. Th*e Act* provides a detailed framework for the development of any regulations to implement any emission- trading regime, including creation, management and operation of a public registry.

With some exceptions, public notice of any proposed order or regulation must be published in the Canada Gazette. Anyone may request a board of review. Any regulation regarding preventative or control actions in relation to a toxic substance must be similarly published within 2 years of the Ministers' decision to list the substance. The Act provides the Minister with an emergency regulation making power in relation to establishing a list of substances that may be harmful or dangerous to the environment or human life if they enter the environment. The Act does not specify any notice requirement for this particular process.

Canadian Environmental Assessment Act (CEAA)

CEAA provides a discretionary power to a designated 'responsible authority' (RA) to decide when public participation in the screening of a project is appropriate, before a final decision in made. If considered appropriate, the RA shall give the public notice and an opportunity to examine and comment on the screening report, and any record that has been filed in the public registry in respect of the project. There is no statutory requirement for public consultation in the screening.

When a project has been referred to a review panel, the panel has four basic requirements: to obtain information for the assessment and make it available to the public; to hold public hearings in a manner that provides an opportunity for the public to

participate; to prepare a panel report; and, to submit the report summarizing public comments to the Minister and the RA. It is the responsibility of the Minister to provide notification and make the report public in any manner the Minister considers appropriate in order to facilitate public access.

The Act provides for mandatory establishment of a *public registry* to facilitate public access to records relating to environmental assessments. The registry must include all records produced, collected or submitted for an environmental assessment of a project and includes any report to the public, public comments, records, terms of reference for a mediation or panel review, and documents regarding implementation of mitigation measures. An RA must maintain a public registry for a project from the time the environmental assessment has begun until any follow-up program for that project is completed.

The Act does not specify public concerns that will require a reference to a mediator or review panel for hearing. Following a screening report the RA must refer the project to the Minister if the RA determines that public concerns warrant a mediator or review panel. Subject to this requirement, an RA at any time may request the Minister to refer a project to a mediator or review panel for hearing if public concerns warrant it. The Minister also has the discretion, after considering public concerns regarding a comprehensive study report, to refer a project to a mediator or review panel for hearing.

Federal GHG Initiatives

A review of rights and opportunities accorded to transparency and participation at the federal level was made difficult by the fact that while Canada has ratified the *Kyoto Protocol,* no federal legal regime is yet in place or tabled in draft form. The federal government has initiated consultations on certain aspects of the proposed regime including a proposed GHG offset system, which would also involve the electricity generation sector within a category of sources dubbed the large industrial emitters system (LIES). [18] While as outlined above, CEPA provides a detailed framework for regulations to establish an emission trading regime, the proposed legislative framework for managing GHGs is apparently to be initiated by Natural Resources Canada and would be implemented through a system of covenants and offsets. It is not yet clear what the legal instrument would be. Natural Resources Canada, through LIES, is reportedly already pursuing negotiation of over 600 covenants with major emitters of GHG. The stated intent is to "compel" agreements on reductions of emission intensity through economic or regulatory backstop.

The stated principles for the federal offset regime include "a transparent and consistently applied review process". Possible dual registries are proposed to enable tracking of domestic and international compliance. The proposal suggests more limited information access for the public, restricted to "non-confidential information". It is unclear which

[18] Government of Canada, *Climate Change, Achieving Our Commitments Together, Offset Discussion Paper*, 2003 and presentations at June 2003 consultations, Calgary.

level of government will establish the review regime for any Canadian hosted joint implementation projects (JI) allowed under *Kyoto*, and what the rules will be related to openness and transparency for these mechanisms.

ISSUES:

1. As observed by the experts in the *Alberta Emissions Trading Feasibility Study,* it will be highly desirable to link federal, national and Alberta GHG emission trading programs to avoid making facilities subject to two separate regimes, with separate rules and separate compliance regimes. Of equal concern will be the need for clarity on how the various combined programs are to be assessed for compliance with international obligations.
2. Of potential concern is the initiation of processes to negotiate covenants in advance of any finalized legislative regime, clarifying the intended reliance on alternative implementing mechanisms such as covenants or offsets and prescribing rights and duties for transparency and for public notice and comment.

3.1.3 CCME Canada Wide Standards (CWS) Process

Under the *Harmonization Accord* and sub-agreements made thereunder, as discussed above, emission targets are also established through committees created through the Canadian Council of Ministers of the Environment (CCME). A number of the current standard setting processes directly relate to the electricity sector, including for example, CWS for PM and more specifically for mercury emissions from coal fired electricity facilities. As outlined above, the federal and Alberta governments commit under the Canada-Wide Environmental Standards Sub-Agreement to the Accord to providing meaningful opportunity to the public and stakeholders in setting priorities and in the development and implementation of any CWS.

In practice, multi-stakeholders advisory groups have been utilized to develop CWS, leaving the approaches to public consultation on the implementing phase to the respective governments. Concerns have been expressed about the inconsistent observance of the participation commitments, most notably failure to inform and engage the public representatives in the process for CWS on mercury.[19] Concerns have also been raised regarding the lack of transparency and consultation by the province and federal government in determining their respective positions for CWS processes.

ISSUES:

1. Where CCME processes are utilized to establish national "standards" or air emission targets, including for the electricity sector, what are the implications for observance of public rights to transparency and engagement to be otherwise provided under federal or provincial law or policy?
2. Are there adequate systems in place to monitor observation of transparency and participation commitments in any CWS process and to intervene where required?

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[19] See for example the correspondence from Anna Tilman, public representative on the CCME Mercury Management Advisory Group (MAG) to the CCME, June 2003.

3.1.4 Other Approaches

Standards, Guidelines, Regulations

Ontario Environmental Bill of Rights (EBR)

The *EBR* was proclaimed in February, 1993, and was intended to introduce better public participation and greater accountability of government decision makers into the environmental decision making process. The purpose of the *EBR* is to make government law and policy- making more transparent and accessible for the public. This was initiated in a number of ways: by establishing the environmental registry whereby the public could comment on new laws, regulations, instruments and policies; by allowing for third party appeals of decision on prescribed instruments such as permits, approvals, licenses, or orders, ability to make an application for review of environmentally significant laws, policies and instruments, application for investigation for contravention of prescribed Acts, regulations and instruments; and by extension of the a right to sue if there is a contravention of the law or a breach of the terms of a prescribed instrument causing significant harm to a public resource. The *EBR* is designed to allow for exceptions to public participation when equivalent participation has been undertaken under the provincial *Environmental Assessment Act* or other acts and programs.

The majority of the postings on the Environmental Registry are instruments such as approvals and permits, orders, instructions, directions and pesticide classifications. The public can comment on any proposed instrument, and may apply for a review or investigation into existing instruments. The regulation specifies the instruments that must be listed in the Registry. There are three classes of instruments requiring different notice and comment periods or requirements for a full public hearing prior to a decision. The relevant minister is required to do everything in his or her power to give notice to the public of a class I, II or II proposal at least 30 days before a decision is made to implement the proposal. Once the public has been given an opportunity to comment on a proposal, a notice of decision will be posted up to 60 days after the original license application was submitted. The EBR requires the Minister to take every reasonable step to consider public comments on proposals. Many of the proposals are routine matters such as permits to burn waste oil, for air emissions, altering landfills sites, water removal, or waste system site approvals. The Registry provides a means for citizens to monitor activities that affect the environment in the province, or in a local region.

Each ministry subject to the *EBR* is required to prepare a statement of environmental values which involves an overarching policy statement outlining each ministry's approach to more environmentally significant decision making. If the relevant minister thinks that a proposal for a policy, or act could significantly affect the environment, and believes the public should have an opportunity to comment, the minister must do everything in his or her power to give notice within 30 days prior to implementation. While there is no specific requirement to provide notice of proposed regulations, where a minister thinks any proposal could significantly effect the environment, he or she must do

everything possible to notify the public. The EBR requires that the public be consulted prior to making environmentally significant policies.

As required by the EBR, Ontario maintains a public registry providing advance notice of proposed policies, laws, regulations, instruments, decisions and events that could effect the environment, inclusive of any action that provides an Ontario resident the right to sue.

New Directions Group

The New Directions Group asserts that any credible and effective system of covenants has three essential attributes: performance, transparency and accountability. (Griss 2002) They further assert that credible and effective voluntary initiatives must be developed and implemented in a participatory manner that enables the interested and affected parties to contribute equitably and allows transparency in their design.

USEPA

Federal Clean Air Act 1990

The U.S. federal *Clean Air Act* sets limits on how much of a pollutant can be in the air anywhere in the United States ensuring that all Americans have the same basic health and environmental protections.[20] Under the Act, states are required to develop state implementation plans (SIPs), which are a collection of the regulations a state will use to clean up polluted areas. The states are obligated to involve the public, through hearings and opportunities to comment, in the development of the plans. EPA has an oversight role with power to approve each SIP and where not acceptable, can intervene to enforce the federal law directly in that state. The Act enables the public to request level or EPA action to enforce the Act or to directly file suit against the government, or pollution source owner or operator to seek action on enforcement. The EPA is also required to make publicly available all reports required under the Act and all monitoring data and to establish and maintain a public clearinghouse on air pollution control technology.

Environmental Justice Program

The USEPA has established a separate Environmental Justice Office to provide an oversight role in the observance of environmental justice principles (as outlined earlier) in all federal and state level environmental programs, inclusive of policies, guidelines, and permitting processes. In addition, a National Environmental Justice Advisory Council (NEJAC) was established by charter in 1993 as a federal advisory committee to provide independent advice to the Administrator of the USEPA on matters related to environmental justice. The intent is to ensure that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal or commercial operations or the execution of federal, state, local and tribal policies and programs. The end objective is meaningful involvement and equal

[20] http://www.epa.gov/oar/oaqps/peg_caa/pegcaa02.html

access by all communities to decision -making processes, consideration of that input by decision-makers and that public involvement be actively sought.

Since the establishment of the Office of Environmental Justice and the Council, significant efforts have been made across EPA to integrate environmental justice into how the Agency conducts its day to day operations. Headquarters and all regional EPA offices have an environmental justice coordinator. Reports issued by the NEJAC have included recommendations for improving access to permitting processes, including for example recommending:

- initial hearings or informal meetings with potentially affected communities immediately after receipt of a permit application;
- identify community leaders accurately, not rely on local government reps
- develop a plan for community involvement in conjunction with the community
- describe discharges/emissions in lay terms in public notices
- extend public comment periods for complicated permits.

It may be noted similar recommendations have been made for the review of Alberta approvals for coal- fired plants, with some limited, informal implementation to date. Alberta law currently does not specifically provide for hearings on approvals. Most recently, the NEJAC made recommendations on improved public involvement in the emission- trading program. A 2001 *EPA Guideline for Improving Air Quality Using Economic Incentive Programs* (including emissions trading) specifies principles which must be observed in use of economic incentive program including that the programs must:

- seek to protect all segments of the population equally from health and welfare damage caused by emissions
- achieve an environmental benefit, such as reducing emissions faster than traditional regulatory approaches
- involve all stakeholders in their design, implementation and review

Further issues regarding environmental justice and emissions trading remain under investigation by the Inspector General.

Sectoral Agreements

Ontario Framework

The Ontario Framework for Cooperative Agreements provides for transparency and public accountability, clear objectives, and measurable targets. The Ontario Framework establishes conditions precedent for participation in any cooperative agreement, including requirements that each individual facility:

- have a good compliance record or a clear plan in place to achieve compliance. Another approach would be to impose the requirements on the corporate entity, rather than facility by facility (USEPA criteria for programs such as XL)

- have an environmental management system in place
- submit a report verifying the facility is in compliance with Regulation 346 which establishes point of impingement limits intended to protect communities against local adverse impacts for stationary industrial/commercial sources
- submit a report specifying reduction targets, info on site specific and local issues, strategies and actions to achieve reductions
- option is to engage in a consultative risk management process with the Ministry to determine reduction targets

The focus of the Ontario Agreements is on new improvements that take participants *beyond compliance*. Facilities may not rely on actions that are necessary to comply with existing laws. Previous reductions will not be credited.

The Ontario process requires stakeholder communication and community consultation.

Other Proposals

A number of parties have recommended establishment of a regulatory framework for negotiated agreements (EDC; Moffet; Griss). It has also been suggested that particular care be taken in developing any regulatory framework for negotiated agreements to avoid potential problems which may arise including: (Moffet; Lucas; Webb):

- potential increased government liability if the agreement is ineffective;
- if the agreement addresses behaviour otherwise subject to regulatory control, such a linkage may increase the potential for officially induced error;
- agreements which circumscribe future government intervention may raise concerns about fettering government discretion to act;
- individualized agreements provide differentiated approaches to the same issue which may introduce issues of fairness and "rule of law";
- legislative approval of agreements negotiated between government and industry without procedural safeguards similar to those associated with regulations may enhance concerns about regulatory capture or lack of transparency;
- industry perceptions of a "heavy hand" (e.g. enforceable terms, penalties) may serve as disincentives to participate.

It has been suggested that where the terms of a negotiated agreement are to be later referenced in a license or approval, failure to provide notice and comment may be deemed to violate basic rules of procedural fairness (Moffet et al 1998, 2002; Lucas 2000). Approaches adopted or recommended for adoption to avoid these problems include the following:

- engage multi-stakeholder consultation in the design of a model framework for sectoral agreements, prior to negotiation of any specific electricity agreement (Griss)

- establish a public advisory committee to oversee development of sectoral agreements (Griss)
- ensure multi-stakeholder involvement in the negotiation and oversight of all agreements. The public often favours regulatory processes because they require transparency. A transparent process could help defray claims of regulatory capture.
- Prescribe clear performance targets, where appropriate by legislation
- stipulate (in law or policy) overarching targets to which all agreements must contribute. Ensures fairness and certainty.
- ensure transparency through ongoing public reporting of results
- enhance public confidence by inviting public involvement in the setting of objectives which the frame negotiation of "Target Group" covenants and require reporting on performance (Netherlands) (Moffet et al 1998)
- specify overarching targets in government policy to serve as the baseline for any specific sectoral agreements and individual target group covenants (Netherlands) (Moffet et al, 1998)
- both German and French government-industry negotiated packaging waste reduction agreements were premised on statutorily imposed overall reduction targets. (Moffet 2003)

Emission Trading

The Ontario *Emission Trading Regulations O.R. 397/01* require the Minister of Environment to establish, maintain and operate an Ontario Emissions Trading Registry in both official languages and specifies the information which must be provided. An *Ontario Emissions Trading Code* issued January 2003 details the information requirements for the Registry. Consistent with the policy of openness and transparency in the regime, the government provided a one month opportunity to the public to comment of the draft *Code* and implemented some of the suggestions in the final *Code* (Andzelm et al). A comprehensive public Emissions Trading Registry has been established, intended to be maintained by a private party through a publicly accessible website. A transitional registry provides public notice of distribution and retirement of NO and SO2 emission reduction credits (ERCs). Access is similarly provided to all support documentation submitted in support of an application to create an ERC including the protocol and the Emission Reduction Report. The registry, as prescribed by the regulations, provides pubic notice of the following:

- distribution and retirement of NO, SO2 emission allowances;
- applications for and creation of NO and SO2 ERCs;
- documents submitted in support of applications to create ERCs; and
- decisions about credit creation and allowance retirement.

RECOMMENDATIONS:

1. Amend *EPEA* to extend more consistent public rights and opportunities for constructive engagement in all stages of the environmental assessment, review and approval and decommissioning processes, including imposing the obligation on government:
    a) to notify the public and in particular any potentially directly affected individuals or communities, of any standard setting processes, inclusive of regulations, guidelines, amendment of approvals, agreements and codes of practice;
    b) to revisit the notification processes to provide more user friendly and timely notification to potentially interested and affected parties;
    c) to provide a notice and comment process for EIA reports, and require due consideration to any comments given prior to approval;
    d) to consult the public, and in particular any directly affected individuals or communities, in relation to processes to define "non-attainment areas", to designate any "clean areas" or in any processes for determining appropriate pollution control technologies (e.g. BATEA) and compliance targets;
    e) to provide notice and opportunity for public comment for any reclamation plans, certificates and decommission conditions, schedules or approvals.

2. Give consideration to amending EPEA to provide a legislative framework for the development and implementation of airshed management plans, possibly modeled after the Alberta *Water Act* watershed management and mitigation plan legislative framework.

3. Institute safeguards to ensure that affected parties or "concern filers" have been consulted on any concerns related to new or revised approvals for the electricity sector and to ensure that any such comments are given due consideration, as required by law. Towards this end, it is recommended that Alberta Environment undertake a review of the current approval process with the objective of identifying issues and solutions to ensure consistent and constructive engagement of the concerned public.

4. Revise relevant federal and provincial laws to extend a right and opportunity to the public, or at a minimum to "directly affected persons", to be engaged in any processes for the development of sectoral agreements, including:

    - provide opportunity for consultation on the overall framework for sectoral agreements;
    - prior to finalization of the terms of any sectoral agreements, provide public notice and opportunity for comment and require due consideration of any comments given.

4. Extent the right and opportunity for public involvement in the development and management of the Alberta Climate Change and Emissions Management Fund by amending the *Bill*, or by regulation or policy directive.

5. Extend the right to the public to have access to information and to participate (and/or obligation on the minister to consult the public) in any decisions related to development and implementation of any emission trading and offset programs including decisions on:

- allocation of offsets, credits and sink rights;
- determinations and adjustments for caps;
- emissions trading regime rules;
- establishment and operation of public registries;
- monitoring, verification; and
- compliance policies and strategies.

6. Establish mechanisms and guidelines for access by concerned and affected parties to reasonable reimbursement of costs and access to necessary expertise to enable their timely and constructive participation in any standard setting processes for air emissions.

7. Amend Bill 37 to provide for the issuance of departmental guidelines for providing financial assistance to public participants involved in the development of any air emission guidelines, regulations, standards, framework for sectoral agreements or rules for any emissions trading regimes.

8. Consistent with the *Harmonization Accord*, and in support of any consultative processes established under the CCME, both federal and provincial governments should issue directives requiring public notice and opportunity to comment on any proposed Canada-wide standards, including measures for their implementation. Clear processes should be outlined to enable timely consultation with the public and in particular potentially effected communities in the deliberation by both orders of government. Attention should be given to providing reasonable access to any public representatives appointed to any CWS processes to necessary independent experts and to reimbursement of costs, including costs incurred in consulting constituents.

3.2 Monitoring and reporting

3.2.1 Provincial laws

EPEA

The Department is obligated to publicly disclose environmental and emission monitoring data and the processing information necessary to interpret any data provided by an approval holder. In some instances, additional obligations regarding accessibility of emission data may be imposed as a condition to any facility approval. The Minister is granted the discretionary power to disclose further information, beyond that specified in the Act. The Minister is granted broad powers regarding the process for providing information.

Any industry or other person required to provide information may request that the information be deemed confidential (where the information relates to a trade secret, process or technique). Where the department accepts this designation, public access is prohibited. It may be noted that where emission data or study results are provided to government on a voluntary basis, as a result of a voluntary monitoring program or otherwise outside of a regulatory requirement, there is no duty to disclose and no right of public access. By way of example, when government assented to an industry request for a confidential designation for monitoring data on mercury emissions, the effect was denial of access to public representatives on the CCME CWS for mercury emissions from coal fired power plants Management Advisory Group (MAG).

Pending proclamation of Bill 37, Alberta has imposed GHG reporting requirements by amendments to some electricity (and other) facility approvals. It may be noted that EPEA and Bill 37 access to information requirements differ.

It is also noteworthy that there appears to be an increasing reliance on emissions monitoring and reporting through industry initiated voluntary programs external to processes established and accountable under law. Recent examples include the GHG reporting and management scheme under the Voluntary Challenge Program and the voluntary emission monitoring and testing program for mercury emissions from the coal-fired electricity sector. One effect of reliance on voluntary programs is exemption from any legal obligations to consult the public or concerned communities in the design of the program and any duties to disclose the results.

Bill 37

Bill 37 provides that sectoral agreements may be used as the mechanism for establishing:

- reporting requirements, including method and manner of reporting, to determine progress towards meeting emission targets and

- the methods and procedures for conducting sampling analyses, tests, verification and monitoring of emissions, energy efficiency and energy conservation.

Alberta Environment have presented in their consultation sessions on the proposed provincial GHG Reporting program that performance measures will be necessary, including to assess compliance with sector obligations and the need for accountability to Albertans. The department has specified that confidentiality of GHG emission data will be maintained; only disaggregated GHG emission data according to primary and secondary source categories will be publicly available. [21]

The Bill imposes no obligation nor does it extend any right to participate in the development or implementation of the programs described. In practice the government has been circulating its draft plans and seeking comments. One of the tasks assigned to the Alberta Technical Working Group is " to identify publicly inaccessible data from sensitive industry sectors requiring aggregation". The Group does not include any public representatives.

Bill 37 limits the reporting requirement to specified gases at "levels at or in excess of levels" or as prescribed by regulations under that Act. As reporting requirements are prescribed under AEPEA, it will be important to ensure clarity and consistency between the laws.

The Ontario Framework requires that participants in any cooperative agreement report annually to the public. All reports from industry are placed on the Ministry website.

3.2.2 Federal

CEPA

The federal Minister of the Environment is required to establish, operate and maintain a system for monitoring environmental quality. The Minister is provided discretion in exercising the establishment of the system to act in cooperation with other governments, agencies, aboriginal people or any person who has established or proposes to establish such a system. And with respect to conducting research and studies related to pollution prevention, the Minister has discretion to consult with any person and may sponsor or assist in any of their research. No obligation is imposed for public consultation in these matters.

A determination on whether monitoring or inspection of federal standards will be conducted by federal or provincial authorities is determined on a regional basis, in

[21] "Alberta Greenhouse Gas Reporting Program Guidance", 1st Draft, June 6, 2003, Evaluation and Reporting Section, Environmental Monitoring and Evaluation Branch, Environmental Assurance, Alberta Environment; presentations at consultation seminar, June 6, 2003, Edmonton.

accordance with the criteria spelled out in the *Inspections and Enforcement Sub-agreement.*

Environment Canada provides public access to its monitoring results through its on-line Environmental Registry.

A National Pollutant Release Inventory (NPRI) has been established reporting information on emission releases and pollutant transfers from over 2500 facilities across Canada. The data is made publicly accessible on the Environment Canada website, providing year to year comparisons of data; information on interpretation of the data; details on the data sources and reporting criteria; and information on how individual citizens can play a role in changes to the NPRI. Commencing in 2002, the NPRI directly collected information on Criteria Air Pollutants on behalf of Alberta Environment.

Federal GHG Program

As noted in the *Alberta Feasibility Study*, it will be important to ensure that any Alberta trading regimes, in particular for GHG gases, be consistent with or at a minimum coordinated with any federal or national compliance regimes to avoid conflicting or duplicitous monitoring and reporting requirements. It should be noted that *Kyoto* requires the establishment of a national GHG compliance regime for purpose of reporting on adherence with international commitments.

It is not clear if the intent is to rely on the *CCME Inspections and Enforcement Sub-agreement* to determine respective roles for monitoring, audit and reporting for GHGs. This may be of particular relevance for the federal obligations to report on international commitments or obligations.

3.2.3 Other Approaches

Ontario Environmental Bill of Rights

The EBR allows any two residents of Ontario to apply for a review of an existing policy or prescribed act, regulation or instrument, or for a review of the need for a new policy, act or regulation.

ISSUES AND RECOMMENDATIONS

1. Ensuring consistency and avoiding duplication amongst provincial, federal and voluntary GHG monitoring and reporting programs

There appears to be consensus in all sectors for the need for clarity, consistency and avoidance of unnecessary duplication in the monitoring and reporting for greenhouse

gases and other substances such as mercury. At the same time, concern has been voiced that both ederal or provincial regimes should enable compliance with international monitoring and reporting requirements. It is important that any federal or provincial regimes comply with any obligations under *Kyoto* and its sidebar agreements related to transparency, monitoring and reporting in the national and local regimes. There remains a lack of clarity in the mechanisms to engage the public in the systems which will be implemented to ensure compliance with the obligations and commitments for monitoring, inspection, surveillance and reporting under related international laws and agreements identified earlier, for example the *Kyoto Protocol*, the *Heavy Metals Protocol* and the *North American Regional Agreement on Mercury.*

2. Ensuring that the *Harmonization Accord* objectives of friendly federal provincial relations not undermine commitments to environmental action

In making determinations as to the "best situated" authority to impose monitoring and reporting requirements, it will be important to ensure that the objective of maintaining friendly federal-provincial relations does not override any valid exercise of federal jurisdiction and powers, for example where a substance is of clear national concern or where an obligation exists to report internationally. It may be noted that CEPA vests a specific power in the federal government to issue regulations establishing standards for toxic substances of application to "a part of Canada" in order to protect the environment, its biological diversity or human health. (s. 330 CEPA) Consequently, if a toxin is listed or regulated under CEPA, regardless of any administrative arrangements made with provinces or private bodies to undertake monitoring, the federal government remains accountable for review, necessary follow up regulatory action and ultimately, compliance.

3. Ensuring legal clarity, and enforceability of monitoring requirements

Despite commitments by federal and provincial governments and related directives by the EUB and AEVN, no clearly specified mandatory monitoring or reporting requirements appears to be in place for some priority substances, outside of voluntary initiatives or vaguely stated and possible future obligations. In some instances voluntary monitoring and testing programs were instituted absent public consultation. In other instances, conditions to approvals related to monitoring and reporting of priority substances provide only vague reference to potential future monitoring and reporting as well as control requirements which may or may not be imposed at some unspecified later date. For example the EPEA approval issued in 2002 to EPCOR for the expansion of its Genesee Generation facility provides[22]:

3.1.3 The approval holder shall take all reasonable steps to design the facility to allow for the addition of future pollution abatement equipment necessitated by any reasonably foreseeable emission limits or other emission performance criteria endorsed by Alberta Environment applicable to thermal electric power plants.

[22] Approval No. 773-01-05.

...

6.1.18 The approval holder shall submit a proposal for a "Mercury Assessment Program" to the Director by December 31, 2002.

...

6.1.22 The approval holder shall submit a proposal to the Director to conduct an "Emission Monitoring Program" by December 31, 2002.

Of equal concern, the above approval imposes no obligation to consult the public or affected communities in the process of determining "the reasonable steps" or "the additional abatement requirements". The approval holder is required only to consult Alberta Environment in the process of determining volume and deposition of mercury emissions and deposition patterns in the Wabamun-Genesse region, despite the well-documented regional concerns. Neither is any obligation imposed requiring public involvement in determining the representative baseline data or the selected ecological receptors; the assessment of long term trends in emissions inclusive of mercury, other metals, VOC or PAHs; their effects; or, any decisions on timelines for implementation and frequency of reporting. The effect, of questionable legality, may be to remove otherwise legally imposed obligations to consult affected parties, inclusive of concern filers.

4. Implications of the shift from voluntary to mandatory monitoring and reporting systems (or vice versa)

Both governments initially relied on the Voluntary Challenge Program as the system for reporting and managing greenhouse gases was principally the Voluntary Challenge Program. As the program was voluntary, it provided no assurances of public involvement in the design or scrutiny of its reports. Alberta Environment has recently imposed reporting requirements for specified gases under EPEA. It is not clear what degree of public access will be afforded to reporting systems set up under Bill 37 or the federal system. If the intent is to have continued reliance on voluntary programs for monitoring and testing of emissions, what assurance is there that requirements for public consultation in design of the system and data disclosure under government imposed monitoring systems will be honored?

5. Responsibility for Ambient Monitoring

Significant gaps remain in providing ambient monitoring coverage for areas adjacent to or downwind of electricity facilities, the Wabamun/Genesee/Edmonton area being a prime gap. If the intent is to provide this service through private multi-stakeholder airshed associations, higher priority must be given to establishing the necessary forum to undertake the monitoring and evaluation and response to ensure that all interested and concerned parties have the opportunity to be involved. If the decision is to delegate this monitoring role to private entities, governments must assume a leadership role in ensuring critical areas are covered and interested or affected individuals and communities

are accorded the opportunity to select monitoring locations and to receive and interpret data.

6. Monitoring Directives

Further amendments to the Alberta "Industrial Monitoring and Reporting Directive" may be necessary as the current Directive is issued pursuant to powers granted under EPEA, not Bill 37. At a minimum it will be important to ensure consistency among the various directives.

7. Harmonization Accord

The *Harmonization Accord* may provide a potential mechanism to clarify roles and responsibilities for imposing monitoring, reporting requirements, and protocols for GHG monitoring and for ongoing assessment of emission trading regimes. It is recommended that federal and provincial agencies sponsor an open evaluation of efficacy of the existing *Accord* and sub- agreements in meeting current national and regional environmental protection priorities and objectives.

8. User-Friendly Access to Monitoring Data

Alberta Environment should give consideration to establishing a separate more user-friendly repository for electricity sector monitoring data to include data from voluntary and mandatory programs, data analyses, updated research reports commissioned on a mandatory or voluntary basis, and any other ambient or stack monitoring information for the sector.

9. Legal Consistency

Consideration should be given to an open public review of existing and proposed laws, policies, and accountability mechanisms related to the monitoring, reporting and evaluation of emissions from the electricity sector, towards ensuring any inconsistencies or gaps are remedied.

3.3 Appeal procedures

3.3.1 Provincial

EPEA

The EPEA extends the right, to a specified limited category of persons, to appeal approvals and enforcement orders to the Alberta Environmental Appeal Board (AEAB). The EPEA and regulations prescribe detailed rights and procedures for appeals. Appeals involve both mediation and formal hearings. The law does not provide for advance rulings on costs; provides a high risk on costs recovery and a significant deterrent to accessing legal and technical expertise. Appellants may apply for reimbursement of costs at the close of a hearing. Unlike the EUB, the AEAB is not empowered to consider or order any advance of funds to an appellant. Despite the policy of encouraging mediation of disputes, no cost awards are available for associated costs, such as technical or legal assistance. Concerns have been expressed by various appellants and legal counsel regarding the limitations of the current appeals process to provide a fair and constructive forum for review of approvals, for example:

- time limitations for presentation of evidence and witnesses, cross examination
- inability of the AEAB to provide cost advances for preparation, expert witnesses
- reluctance to provide cost awards to appellants.

It is not clear if any role would be imposed on the AEAB review of disputes under any EPEA emission trading regimes, including appeals of compliance orders.

Bill 37

Bill 37 provides no right of appeal on any decisions but does allow for the promulgation of regulations establishing an appeals procedure related to a compliance order. There may be a need to assess the capabilities of AEAB to handle appeals under Bill 37.

Energy Resources Conservation Act

Intervenors may appeal to the EUB any order or direction of the EUB including determinations on applications, decisions not to hold a hearing, denial of standing and cost awards. A decision of the EUB may be appealed to the courts on a question of law or jurisdiction. Subject to this limited right of appeal, the decisions of the EUB are final.

3.3.2 Other Approaches

Public accountability and transparency are purported centerpieces of both the US and Ontario emission trading programs (Danuta Andzelm, et al). These governments have chosen to ensure accountability by retaining legal authority for transparency including

public dissemination of information and for monitoring of compliance with the regime. As noted earlier, Ontario intends to contract out the maintenance of its Registry. It may be noted that Alberta has in some instances contracted out information management tasks, by way of example the contract with the Environmental Law Center to maintain a registry and search service on government enforcement actions under EPEA.

Another suggested alternative to enable participation in or scrutiny of the terms of any negotiated agreements would be to allow for a right of appeal on the provisions, to interested third parties (Moffet 2002).

RECOMMENDATIONS

1. In lieu of a right of appeal, in advance of finalization of any sectoral agreements for the sector, consideration could be given to providing a legal right, or at minimum an opportunity to any interested or potentially affected parties to scrutinize and comment on any terms. This would be particularly appropriate for terms or undertakings related to emission monitoring, reporting or control, so as to ensure protection of interests of any potential third party. It is recommended that the provincial government evaluate identify and evaluate potential mechanisms to protect these rights.
2. In the course of designing any emission trading regimes, consideration should be given to the intended appeals regime, including right of standing for potentially affected parties.
3. Consideration should be given to undertaking an open public review of the EPEA appeals process, to examine issues such as standing, costs, procedures and general ability to provide a fair and constructive review of such technically complex matters as management and control of emissions, including for the electricity generation.

3.4 Audit, Verification, Inspection, Surveillance

3.4.1 Provincial Law

EPEA

EPEA extends a right to any two Alberta adult residents to apply to the Director for an investigation of a suspected violation of the Act. The Director is obligated to investigate the complaint and to report back.

The EPEA also clearly prescribes detailed inspection and investigation powers and procedures.

Bill 37

Verification of compliance with an emission -trading regime will necessitate a broad category of information gathering including information to:

- ensure the veracity of information used to back up credits;
- verify that sufficient credits are held by an emitter to offset emission ;
- assess validity of banked credits;
- verify veracity and leakage from sinks;
- verify that regulatory requirements have not been waived by the use of credits.

Information Disclosure

Bill 37 obligates anyone who releases or permits the release of specified gases into the environment at or in excess of regulated levels, to report the release. However, regarding transparency of compliance information, Bill 37 provides only that the Minister *may, subject to the regulations,* disclose information regarding reported exceedences. The Bill is silent on availability of information arising from inspections or audits.

Inspection, audit powers

It has been suggested that in some instances it may be necessary to expand powers of inspection, investigation, search and seizure. It is not clear if the intent is to provide for 3rd party audits, and if so whether that will result in any limitations on public access to results. It is not clear if the department *Compliance Assurance Principles* will apply.

Inspection capacity

It has been suggested that the process of assessing the veracity of credits and the implementation of approved emission reduction projects may require regulators to undertake activities outside the normal range of activities or skills. This may include

review of private audits (Rolfe p.213). It is not yet clear if the provincial monitoring and verification program will remain the responsibility of the department or be assigned to a third party. If assigned to a third party it is unclear if that will in any way limit ready public access to related information. It nonetheless may be useful to undertake an evaluation of the skills base and training needs and hiring strategy in tandem with the drafting of the law and implementing regulations to ensure the department is capable of implementing the inspection, audit and surveillance responsibilities once the system is enacted.

Clarified provincial, federal roles

It is not clear whether the intent is to rely on the *Harmonization Accord, Inspections and Enforcement Sub Agreement* for allocation of respective federal and provincial responsibilities for delivery of any Canadian GHG management program.

3.4.2 Federal Law

CEPA

CEPA extends the right to any Canadian resident 18 years or more to apply for the investigation of an offence under the Act. The Act requires response and reporting back. No specific right is accorded for access to information related to inspections or investigations. The CEPA Registry provides information on enforcement actions taken including prosecutions. Information is provided on a request basis on enforcement actions related to specified incidents.

3.4.3 Other Approaches

The Southern California Regional Clean Air Incentives Market (RECLAIM) system of meticulous monitoring, reporting and record keeping and public reporting of all transactions in emissions allowances through a bulletin board, has been credited with contributing to a high degree of public confidence in the environmental effectiveness of the system.[23]

RECOMMENDATIONS

1. Consideration should be given to incorporating into any federal and provincial laws establishing alternative emissions management regimes, the rights and procedures granted under EPEA and CEPA for triggering investigation of complaints.
2. Public right of access should be provided for compliance information and reports associated with alternative emissions management regimes, inclusive of emissions

[23] ICF Consulting, "Exploring the Potential for an Air Emissions Trading System for Alberta: Lessons Learned from Existing Trading Regimes", Final Report Submitted to Alberta Environment, June 2002.

trading and undertakings within sectoral agreements or other non-binding or voluntary emission management or reporting initiatives.

3.5 Compliance Promotion

3.5.1 Provincial

EPEA

The Minister is granted the power to establish programs to promote the reporting of actions detrimental to the environment and offences under *EPEA*. The department's *Compliance Assurance Principles* provide that education and prevention will be used along side enforcement to achieve compliance and that AENV will foster partnerships with other agencies and the public to promote compliance. The previously mentioned LEAD Program is intended to reward good environmental performance with greater regulatory flexibility. The Program design specifically identifies the need to engage the community or possibly NGOs to enhance credibility of the initiative as a measure to trigger or reward compliance.

Bill 37

Bill 37 empowers the Minister to establish or participate in a broad category of programs directed at GHG gas reduction, inclusive of programs involving industry and consumers. Provision is also made for the establishment of a Climate Change and Emissions Reduction Management Fund, to support various gas reduction and measurement and adaptation programs. No specific provision is made for any public role in the design or delivery of such programs, including those with consumers.

The Bill also provide that agreements regarding emissions reduction projects and demonstration projects may be initiated as terms of specific sectoral agreements. It is not clear whether incentives will be provided to consenting to enter into agreements. For example will they in turn receive reduced monitoring or reporting requirements, relaxed regulatory requirements in return for performance commitments, time extensions on licenses and approvals or undertakings by government not to impose legally binding emission targets? The *Alberta Climate Action Plan* makes no provision for specific incentives or disincentives to trigger commitments by the electricity sector to reduce emissions. If the public is excluded from the negotiation tables, the effect will be to deny openness and transparency in establishing the compliance regime.

The department's *Compliance Assurance Principles* purport to apply to all legislation for which AENV is responsible, so absent a specific exemption, it would appear to apply to *Bill 37*.

3.5.2 Federal law

As mentioned above, when the revised CEPA was enacted in 1999, a new part was added to the law entitled Pollution Prevention. While no specific provision is made for public

notice or consultation in either determination on the need for or in the preparation of pollution prevention plans, a subsequent policy framework provides that the process for development must be open, transparent and provide for consultation. The Minister is granted the discretion to publish notice of a decision to require preparation of a pollution prevention plan on a substance, group of substances specific to any commercial, manufacturing or processing or other activity. Guidelines have been issued specifying procedures for public notice and comment and rules on public access to plans. Pollution Prevention plans are not posted on the website and are made accessible to the public on the limited basis of a request made pursuant to the federal *Access to information Act*.

3.5.3 Other Approaches

The Ontario Framework for Cooperative Agreements provides for conditions precedent for participation in any cooperative agreement, including requirements that each individual facility:

- have a good compliance record or a clear plan in place to achieve compliance. Another approach would be to impose the requirement on the corporate entity, rather than facility by facility (USEPA criteria for programs such as XL)
- have an environmental management system in place
- submission of a report verifying the facility is in compliance with Regulation 346 which establishes point of impingement limits intended to protect communities against local adverse impacts from stationary industrial/commercial sources

The Ontario program also provides a number of incentives to encourage industries to sign on to agreements. These include, for example, providing policy certainty through guarantees for consultation on future policies or regulations and some form of regulatory relief such as streamlined permitting processes. Where these benefits are promised regardless, any incentive to participate or to volunteer pollution reductions is removed.

The US XL Program, as a precondition to participation in the program, requires a good compliance history. (CEC, 1998)

The UK Climate Change Levy provides for a tax levy on industry for the use of energy, which may be reduced if industry enters into a binding agreement with the government to reduce its emissions. (Griss).

There is a need to address and deter free riders. (Griss; CEC).

RECOMMENDATIONS

1. Extend the right or at a minimum provide an opportunity to any interested persons to participate in any emission reduction/pollution prevention programs initiated under Bill 37, inclusive of the LEAD Program.

2. By legal amendment or regulation, specify that the membership of the Climate Change and Emissions Management Fund will include representatives of the public.
3. Clarify the intended compliance strategy for the greenhouse gas management regime, inclusive of the parallel international, federal and provincial regimes. Regardless of whether the current policy for EPEA is applied or a separate policy envisioned, the public should be consulted on compliance principles, enforcement and compliance roles and responsibilities, incentives and mechanisms for compliance promotion.
4. Give consideration to consulting with the public, in particular potentially affected communities, on the possible use of the CEPA pollution prevention plan process as an alternative approach to preventing or mitigating impacts associated with emissions from the electricity sector.

3.6 Enforcement

3.6.1 A Credible Enforcement Threat

Analyses of emission management systems, including trading, indicate that a key factor in the success of the regimes has been a credible threat of enforcement action. That includes reasonable threat of detection of falsified reporting or other illegal activity, and penalties that represent a genuine deterrent to illegal action or fraud. As self- reporting is the backbone of the Alberta regulatory regime, significant threat of detection and enforcement action for violations including false reporting will be key to the credibility of the system. It may be additionally noted, for example, that compliance with *Kyoto* requires that emission reduction credits must be based on actual reductions which are surplus to regulatory requirements, and be quantifiable, enforceable and permanent. (Rolfe)

Provincial Laws

EPEA

The *EPEA* provides a strong potential deterrent to false reporting by establishing a specific offence with severe penalties for failure to provide information or to provide false or misleading information. It is presumed these would apply equally to any system of emission trading established under the Act. The province has prosecuted parties for failure to report.

EPEA makes specific provision for innovative sentencing, and in some instances court orders were requested and issues requiring offenders to support the efforts of environmental organizations, including for the training of communities in pollution monitoring and reporting.

Bill 37

Bill 37 provides no clarity on this matter. It establishes no specific offences or penalties, but leaves it to the discretion of the government to establish by way of separate regulation any offences or penalties, including for false reporting.

As *Bill 37* provides for sectoral agreements, rather than individual agreements with specified emission sources, it is not clear how the agreements are to be made enforceable on individual emissions sources. It is equally unclear how the agreements are to be made binding on entities who choose not to sign. Provision is made for the promulgation of regulations making any sectoral agreement binding on non-parties. The intent of this provision is unclear, except perhaps as a mechanism to encourage signing. It could be deemed contrary to natural justice if those parties were excluded from the negotiations.

Bill 37 provides that a sectoral agreement may specify the terms for enforcement of the agreement including liability for specified penalties. It is not clear whether the government intends to promulgate regulations providing for consistency in all sectoral agreements or if those terms will vary for each individual agreement. It is similarly unclear if that provision allows for the addition of terms allowing for non-parties to enforce the agreement. The provincial draft GHG Reporting Program provides that emission reports are to be signed by a source official, a verification protocol is under development and that reporting will be subject to enforcement. It is not clear if the intent is to establish legally enforceable reporting provisions similar to *EPEA* (e.g. offence to fail to report, or falsely report) requirements by amendments to the Bill or by promulgation of regulation thereunder.

Absent regulations, *Bill 37* provides minimal enforceable standards or rules for gas emission management.

Federal laws

CEPA

Part 10 of CEPA clearly specifies enforcement powers and procedure and makes provision for alternative enforcement responses. Included among these are compliance orders and environmental protection alternative measures. Of relevance to the public role in enforcement, the court may among other actions direct the offender,

- to publish the facts related to the conviction
- to notify any persons affected or aggrieved by any order
- direct the offender, on application by the Minister, to provide additional information related to the offender's activities
- to perform community service
- to pay for research related to treatment or disposal of the relevant substance or for ecological effects monitoring
- to pay monies to a specified environmental, health or other group to assist in their work in the community where an offence was committed

Environment Canada is developing a Compliance Analysis and Planning (CAP) database to better assess compliance within the department's regulatory framework and to better determine where it should place priority to improve compliance and to establish enforcement priorities.[24] Public access to enforcement and compliance information is made accessible through the CEPA registry and on a request basis.

[24] See International Network on Environmental Compliance and Enforcement (INECE) April 2003 newsletter at <www.inece.org>

Other Approaches to Verification and Enforcement of Alternative Emission Management, Trading Regimes

Both the USEPA and Ontario emission trading legal regimes impose obligations on government (as opposed to 3rd parties) to verify and enforce their respective emission trading regimes, including: verification of emissions and emissions reductions; quality assurance of the measurement and monitoring program; tracking transfers of allowances and ERCs; and, ensuring that allowances cover annual emission allotments. The *2001 USEPA Guidance Document for Improving Air Quality using Economic Incentives Programs* provides that any emission trading program or other economic incentive program, must have integrity, meaning they must be quantifiable, enforceable and permanent. As well the reductions must be surplus, and not already required under another program.

French and German packaging agreements are backed up by legal decrees specifying that regulatory provisions apply if the agreement fails.

3.6.2 Enforcement and Compliance Policy

Federal and provincial authorities have issued official enforcement and compliance polices for their respective environmental laws. The stated intent of the policies is to ensure consistency and transparency in enforcement and compliance by specifying enforcement roles and procedures, clarifying monitoring and inspection processes, criteria to be applied in responding to any violation and by clarifying policies and incentives for triggering compliance, inclusive of audit policies. It is generally understood as good practice to give consideration to strategies and policies for ensuring compliance or responding to violators, in tandem with any law or rule making process.[25]

An enforcement and compliance policy or strategy will also be given greater legitimacy if it is developed in consultation with those affected. Environment Canada has generally provided advance notice and period of comment in the development of their enforcement and compliance policies. The *CEPA Enforcement and Compliance Policy* clarifies rights and roles of the public in the enforcement process.

3.6.3 Enforcement Authority

The *EPEA* contains more than fifty provisions specifying powers and procedures for all stages of the administrative and criminal enforcement proceedings inclusive of powers of inspection, investigation, search and seizure, cost recovery, administrative and court orders and sentencing.

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[25] See for example, Government of Canada, *A Strategic Approach to Developing Compliance Policies: A Guide,* Regulatory Affairs Series Number 2 (Ottawa: Minister of Supply and Services, 1992); L.F. Duncan, "Enforcement and Compliance", chapter in *Environmental Law and Policy*, 2nd edition, ed. E.L.Hughes, A.R. Lucas, W.A. Tilman (Calgary: Emond Montgomery, 1998)

While *EPEA* directly assigns enforcement powers to a Director, Bill 37 vests those powers in the Minister, subject only to potential delegation by regulation. For purposes of consistency, timeliness and efficiency in implementing the trading regime it may be appropriate to assign necessary enforcement powers for inspection, audit, surveillance or enforcement to a Director.

CEPA similarly delineates inspection and enforcement powers as well as alternative enforcement measures. The federal Minister is specifically empowered to issue an order setting conditions for trading or to suspend or cancel trading where both Health and Environment Ministers are of the opinion that the trading may have an immediate or long term harmful effect on health or the environment. The *CCME Inspections and Enforcement Sub-Agreement* provides that enforcement of *CEPA* may be assigned to the province. However, the Agreement provides that regardless, the federal government remains accountable and legally responsible. It is not clear what mechanisms are in place or intended to enable this oversight.

It may be noted that in the United States the automatic penalty provisions for emission trading are administered by the Emission Trading Directorate of the EPA, while all other enforcement actions remain the responsibility of their Enforcement Office.

ISSUES:

1. It is not yet clear who will be assigned responsibility to inspect and enforce provincial emission trading regimes and whether due consideration has been given to required special skills and training.
2. Will the administration of enforcement and compliance for emissions trading regimes be covered by current harmonization agreements?

3.6.4 Offences and Penalties

Alberta

Bill 37 does not prescribe offences or penalties, as is the case under *EPEA.* It merely provides that penalties *may* be set by regulation.

As honest, accurate and timely emission forecasting, monitoring and reporting are considered the cornerstone of any effective emission trading regime, it is significant that while *Bill 37* requires the reporting of gas releases, it does not establish any offence or penalty for false or misleading information. Such provisions are normally incorporated into any pollution control regulation, in particular those premised on self- monitoring and reporting so as to ensure consistency and to provide a general deterrent to false reporting. The Minister is granted a discretionary power to include in any sectoral agreement, provisions specifying reporting requirements, manner and method of reporting to "determine progress towards meeting emission targets", methods and procedures for sampling, analyses, tests, measurements, verification and monitoring of emissions,

energy efficiency and energy conservation. In other words, under Bill 37, the terms for meeting compliance with all aspects of this regime can be determined in a closed- door negotiation process between government and representatives of a sector.

The Bill also provides for the potential issuance of regulations governing the reporting of releases and disclosure of the information.

The Bill also allows for establishment of penalties within specific sectoral agreements, subject to agreement of the parties.

In setting penalty rates, it will be important to balance the objective of encouraging participation in sectoral agreements and emission trading regimes, with the need to deter non- compliance. It has been suggested that when penalties for non- compliance with agreements are prescribed by statute or regulation, they increase the likelihood of compliance and decrease the chance of "free- riders". (Moffet et al).

Federal

The federal government has not yet specified any compliance or enforcement framework or penalty structure for the national greenhouse gases regime.

Other Experiences

Key factors in achieving high rates of compliance under the USEPA Title IV NOx and SO2 programs have been attributed to the following [26]:

- the strict monitoring protocols requiring continuous emission monitoring;
- the high penalties;
- the design of the cap and trade program, which provides for a precise standard and automatic, immediate assessment of penalties; and
- no exemptions are allowed.

American officials and commentators have expressed the common view that the automatic penalty provisions under their emission trading regime have been a major factor in triggering a high rate of compliance. It may also be noted that in the United States the automatic penalty provisions for emission- trading are administered by the Emission Trading Directorate of the EPA, while all other enforcement actions remain the responsibility of their Enforcement Office.

[26] Byron Smith, "How Environmental Laws Work: An Analysis of the Utility Sector's Response to Regulation of Nitrogen Oxides and Sulfur Dioxide Under the Clean Air Act", 14 *Tulane Environmental Law Journal* 309 (Summer 2001)

3.6.5 Public Role in Compliance and Enforcement

Provincial

EPEA

The *EPEA* establishes a process allowing Alberta residents to apply to the Director of Enforcement to investigate any suspected offence under the Act. The department is obliged to investigate and report back.

Bill 37

Bill 37 excludes any provisions similar to *EPEA* enabling citizens to compel investigations of suspected violations. Similarly, any potential public role in tracking compliance with Bill 37 will be hindered if data on specific emission sources is deemed confidential.

Bill 37 extends no rights on private citizens or affected communities to play any role in the enforcement of standards or obligations imposed. Where sectoral agreements are utilized to impose binding conditions for monitoring, reporting, reduction or control of emissions, such terms are enforceable only by the parties to the agreement. If the only signatories are government and industry, the public will have no right to enforce the terms.

Federal laws

CEPA

CEPA extends the right to any Canadian resident over 18 years to apply to the federal environment Minister to investigate any alleged offence under the Act. The Minister is obligated to investigate or discontinue investigation of the allegation and to report back within prescribed time limits. The on-line CEPA Environmental registry provides updates on allegations filed and official responses.

The Act provides the right to any individual who has applied for an investigation to bring an environmental protection action in the courts if the Minister fails to conduct an investigation and report within a reasonable time or if his response was unreasonable. A claim may be made for a declaratory order, an order including an interlocutory order to stop any action that may constitute an offence or prevent the continuation of an offence, an order to negotiate a mitigation plan and any other appropriate relief including costs of the action. Notice of such action must be provided to the Attorney General of Canada and to the Minister who in turn must post it on the Registry. CEPA also provides that a court may allow any person to participate in an environmental protection action to provide fair and adequate representation of private and public interests and may make a determination on payment of costs.

Federal Laws for Greenhouse Gases

No clarification has yet been provided on rights and opportunities to be accorded under laws implementing the federal emission management regime for greenhouse gases. If as has been suggested, the mechanism will not be CEPA, then the rights and opportunities accorded thereunder will not apply.

Other Approaches

Ontario Environmental Bill of Rights (EBR)

The EBR provides that any two Ontario residents may apply for an investigation if they believe a prescribed Act, regulation or instrument has been contravened. Any resident of Ontario can bring an action again a person who has contravened an Act, regulation or instrument and has caused significant harm to a public resource, providing the plaintiff has applied for an investigation.

RECOMMENDATIONS

1. As recommended above, consideration should be given to enforcement and compliance policies and strategies in tandem with development of new emission management tools of application to the electricity sector.
2. It is recommended that consistent with prior practice, both levels of government initiate open processes for the development of enforcement and compliance policies and strategies, including any special consideration or approaches that may be proposed for the electricity sector.
3. In the design of any new air management regimes, consideration should be given to extending similar rights to the public to trigger investigations, as currently provided under EPEA and CEPA.
4. As a potential means to ensure 3rd party rights and interests are considered and protected, consideration should be given to extending rights and opportunities to third parties, inclusive of directly affected individuals or communities, to obtain information on the adherence to commitments and undertakings in any sectoral agreements.
5. Ready public access should be provided to any information related to compliance records and enforcement actions under any emission trading regime.
6. Clarification should be provided on whether the Harmonization Accord agreements related to monitoring and inspection roles will apply to management of greenhouse gases and to management regimes under sectoral agreements and emission trading regimes.
7. In the process of designing any emission trading regimes, consideration should be given to the experiences of other jurisdictions in incorporating measures to deter non-compliance, inclusive of appropriate penalty structures.

3.7 Measures Related to Risk Avoidance and Mitigation or Compensation for Damages Resulting from Air Emissions

3.7.1 Provincial Laws

EPEA

The *EPEA* extends a number of specific rights to persons suffering loss or damage as a result of violation of the Act, including the right to seek an injunction or damages. The Act also clarifies that civil remedies otherwise available are unaffected. The Act empowers the Minister, subject to regulations, to pay compensation to any person who suffers loss or damage associated with contaminated sites.

Bill 37

Bill 37 makes no specific provision on rights to seek injunctions or compensation for violations of the Act. It assigns property rights to a sink, and declares that any instrument for the trading of rights in relation to a sink is personal property.

Bill 37 introduces the potential issue of possible compensation claims by owners of lands, mine, mineral or pore space which may be deemed a sink under regulations (yet to be promulgated) including where the surface lands are expropriated for any purpose, and access to sink limited. Assignment of liability for releases of gases from sinks has been identified as a potential concern.[27] (Rolfe)

3.7.2 Federal Laws

CEPA

CEPA extends an array of rights to individuals to apply for court injunctions or redress for damages to environment or health arising from a violation of CEPA. CEPA provides that an individual who has applied for an investigation may bring an "environmental protection action" if the Minister failed to conduct and investigate and report in a reasonable time or the response was unreasonable. The claim may include an order or interlocutory order requiring the defendant to refrain from or to do specified actions; to the parties to negotiate a plan to correct or mitigate the harm to the environment or health; and, other appropriate relief.

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[27] The issue was additionally raised by a number of participants at the June 2003 consultations on the federal *Offset System Discussion Paper*.

3.7.3 CCME

The Canada-Wide Environmental Standards Sub-Agreement provides that one of the principles under-pinning the development and attainment of Canada- wide standards is adherence to the "precautionary principle". The *Sub-Agreement* specifies that lack of full scientific certainty shall not be used as a reason for postponing the development and implementation of standards where there are threats of serious or irreversible environmental damage.

3.7.4 Other Approaches

The USEPA has established an Environmental Justice Advisory Committee to provide advice on ensuring environmental justice in the development and implementation of federal environmental programs, inclusive of their emission-trading regime. In response to concerns raised by the Committee, the USEPA has developed the Hazardous Air Pollutant (HAP) initiative under which potential hot spots are identified in the design and delivery of the air pollution management program. A framework has been established to screen for potential hotspots so that they may be addressed. The Committee identified particular concerns with the open market trading regime. As a result of these and other concerns expressed, the Inspector General is in the process of reviewing the adequacy of the trading regime to address pollution hotspots and ability to ensure environmental justice.

The USEPA has also initiated an environmental incentives program under which targeted assistance is provided to communities suffering particular environmental or health risks. The program provides legal and technical assistance to ensure communities are able to participate effectively in environmental decision- making processes. A Public Advisory Committee has been appointed to provide oversight of the activities of the division. In response to a Committee resolution, the Inspector General has initiated an investigation into the public aspects of the federal emissions trading regime.

The Ontario *EBR* accords expanded access to the courts for public nuisance claims for damages, by waiving necessity of prior consent of the Attorney General. Provision is also made for any resident to seek leave to appeal to the courts from a decision on a Class I or II instrument for which notice was required. The class reflects the level of risk and extent of potential harm to the environment and include decisions made on a proposal where there is a discretionary power to hold a public hearing.

RECOMMENDATIONS

1.In designing and implementing a new management regime for air emissions from the electricity sector it will be important to ensure that any new processes for siting,

assessing and approving electricity generation incorporate the principle of distributional justice. In other words, no Alberta community or identifiable group of people should bear an inequitable burden of actual or potential harm as a result of the siting or operation of electricity generation facilities. This appears consistent with the principle adopted by the Clean Air Strategic Alliance (CASA), that all Albertans should have equal right to clean air.

2. Consideration should be given to adopting improved processes and mechanisms for avoidance, mitigation or compensation for damages associated with air emissions, including:

- extend and enable the right of potentially affected communities ("hotspots") to participate in any negotiation processes for sectoral agreements, determination of caps, decisions on allowance for trading of particular emissions, facility assessments, approvals and licenses where they relate to setting or altering air emission standards for the sector;
- establish formal processes for the determination and arbitration of compensation claims related to air emissions;
- ensure that any processes for project siting and approval or operating standards, adopt a precautionary approach by requiring substantive consideration and response to potential health and environment risks associated with air emissions, in particular to potential "hot spots" and subsequent adoption of means to avoid, reduce, mitigate or compensate for such risks;
- in any prescribed criteria for siting electricity generation facilities, incorporate the precautionary principle by requiring due consideration of alternatives to prevent cumulative effects on adjacent or downwind populations or ecosystems.

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APPENDIX II Persons contacted or interviewed

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