

# REGULATORY OPTIONS FOR LIVESTOCK OPERATIONS

## *ENVIRONMENTAL LAW CENTRE RESPONSE*

*June 12, 1998*

### INTRODUCTION

The Environmental Law Centre (ELC) appreciates the opportunity to review and to respond to the Alberta Agriculture, Food and Rural Development Discussion Paper on *Regulatory Options for Livestock Operations* (March 1998). The matter of the regulation of the environmental effects of livestock operations in Alberta is an important one and the efforts of AAFRD and its partner Departments to generate public discussion through a discussion paper and public meetings is to be commended. Although the consequences of a new regulatory regime for livestock operations will affect livestock operators most directly, the failure to adequately control the environmental effects of livestock operations will have negative consequences for all Albertans.

The ELC has had the opportunity to participate extensively in public consultations on proposed environmental laws at the federal and provincial level. Legal staff and Board members have sat as members of hearing bodies, made presentations before hearing bodies, submitted briefs, participated in workshops, participated in specialized advisory bodies and appeared before Parliamentary Committees. In fact, our participation in law reform public consultation has been so extensive that we gathered our experiences together in a monograph called, *Public Consultation and Environmental Law Reform: Learning As We Go*, a copy of which is enclosed with this brief. The ELC would be happy to elaborate on our experiences with public consultation at the convenience of the Department. However, in short, it is our experience that the most successful law reform consultation processes are those where the government's objectives in the process are clear and transparent, the ultimate decision making process is as open as possible, and the rationale for policy choices are made known to participants. While some participants may be disappointed that their point of view was not adopted, they will usually respect the outcome of the process if they believe their views were heard and considered.

### ENVIRONMENTAL LAW CENTRE

The ELC is a non-profit charitable organization incorporated under the *Societies Act* in 1982. The ELC employs 4 experienced full-time lawyers who offer public interest

environmental law programming in education, information and referral, research and law reform. These programs are supported by the ELC's public library of environmental law, which contains over 14,000 specialized environmental law materials. Additional background material about the ELC is attached to this brief.

The goal of the ELC is to make the law work to protect the environment. In support of this goal, the ELC pursues 3 policy objectives: one, that good environmental laws are enacted by governments; two, that the public has an effective role in environmental regulatory and law-making processes; and three, that these processes offer a level playing field to participants. In previous law reform briefs, we have elaborated on the first point: what is good environmental law? In the ELC's 1990 *Response to the Discussion Draft of the Proposed Alberta Environmental Protection and Enhancement Legislation*, we suggested the following principles for evaluating draft environmental laws:

1. The objective and prime consideration of environmental legislation administered by Alberta Environment should be environmental protection. At the very least, this includes the following concepts: one, minimum standards should be determined by reference to the ecosystem and two, the ultimate objective of standards should be "zero discharge" of contaminants.
2. The law should be drafted so that it is clear and understandable.
3. All information relied on by environmental regulators in making decisions should be available to the public.
4. Environmental decision making should be guided by criteria which further and are relevant to the primary objective of environmental protection.
5. Judicial review of decision making should not be precluded.
6. The public should have the legal right to:
  - Have advance notice of environmental decision making
  - Be informed
  - Have input into the decision
  - Be involved in follow-up.
7. Any mandatory requirements should be in the act or regulations – not in guidelines or policy statements.
8. The law must apply equally to everyone – governments, industry and individuals.
9. Intervenor costs should be available so that public intervenors will not be at a disadvantage when participating in public review processes.
10. Any public participation process should meet the minimum requirements of natural justice.
11. All projects, irrespective of whether they are based on Alberta's renewable or non-renewable resources, should receive the level of environmental assessment warranted by their potential impacts.

Although this discussion does not focus exclusively on legislation enacted and administered by Alberta Environmental Protection, these principles are still applicable in this situation and form the basis of this brief.

## THIS BRIEF

This brief does not follow the format set out in the questionnaire included with *Regulatory Options for Livestock Operations*. It would have been our preference to simply provide brief comments in the space allocated in the questionnaire. However, our analysis of the law and policy options for livestock operations led us to the conclusion that it may not be possible or appropriate to “mix and match” the various options to result in a comprehensive legislative scheme. Should it prove difficult for Department officials to review and analyze these points, we would be happy to answer any questions and participate in any necessary discussions.

## OBJECTIVES AND ASSUMPTIONS

The *Regulatory Options* Discussion Paper states at the outset that the government wants to ensure that “our livestock industry continues to evolve and grow in a manner that is **environmentally sustainable and protects human health and the rights of individuals**”. On its face, this appears commendable. However, we would appreciate receiving further information on the implications of development “that protects the rights of individuals”. While we have no interest in suggesting that individual rights be overridden, we do not believe that any individual has a property right to cause environmental harm to others.

In support of this view, we would draw your attention to the common law rights that offer protection against environmental damage. In circumstances where animal wastes are released from property, they may give rise to civil claims in negligence, riparian rights, the rule in *Rylands v. Fletcher*, trespass and private nuisance if the polluter is not meeting the standards called for in the *Agricultural Operation Practices Act*. As well, it should be noted that s. 207 of the *Environmental Protection and Enhancement Act* (EPEA) expressly states that anyone suffering loss or damage as a result of conduct that resulted in a conviction under the Act can sue for damages. It is our experience that participants in discussions of new environmental regulations often lose sight of the fact that the courts, through civil proceedings, can provide a remedy where damage has resulted from pollution. Accordingly, even though there may not be legislation prohibiting certain behavior by livestock operators, it does not mean that they can cause environmental damage with impunity.

The ELC’s objective in commenting on this issue is to ensure that new legal processes are implemented which deal effectively and fairly with the problem of pollution from livestock operations. We believe that there is no reason not to treat livestock operations in the same manner as other businesses and industries whose activities can cause environmental harm. It is also our belief that the environmental rules that apply to livestock operations should be set out in an act and regulations and that they should be enforceable. There should be consultation of the development on the legal

requirements, and they should be clear, but if there is an infraction, there should be certainty of enforcement action.

It is also our view that the resulting regulatory scheme should deal in a comprehensive way with each aspect of livestock operations from small operations to large ones and including existing livestock operations and new ones. It may be that these categories of operation will be dealt with in different ways, and it may be that requirements for existing operations will be phased in over time. Nonetheless, to achieve environmental protection objectives, it is important that each category is dealt with in a comprehensive way in the resulting regulatory regime.

## INSTITUTIONAL ARRANGEMENTS

A key question in this discussion is which level or levels of government should regulate the environmental impacts of livestock operations – provincial or municipal or both.<sup>1</sup>

In general, we think that it is appropriate that municipalities exercise their existing responsibilities for planning type considerations and that the provincial government accepts responsibility for regulating and enforcing environmental regulations applicable to livestock operations. In this way, individual municipalities will have the authority to regulate development within their jurisdictions to reflect the priorities and needs of their communities. In respect to planning matters, it is reasonable that different municipalities will adopt different standards depending on the intensity and nature of existing development, the natural characteristics of their area, and their overall objectives for economic development.

On the other hand, Alberta Environmental Protection is currently responsible for regulating most sources of environmental degradation in the province. Department staff have a high degree of technical expertise and are experienced in both issuing approvals and enforcing environmental standards. Coordinating environmental regulations through Alberta Environmental Protection will ensure that the rules are applied consistently and fairly across the province and that there is coordination amongst regulators of various industries. To leave environmental regulation to local governments, regardless of how highly motivated they are, could result in the adoption of different standards in different municipalities and uneven and ineffective enforcement. More detail is provided below.

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<sup>1</sup> We are assuming that the federal government does not play a major role at this time in regulations applicable to livestock operations. However, we should point out that statements in the *Discussion Draft* that “AEP is responsible for enforcing the *Fisheries Act* in Alberta” might overstate the situation somewhat. Although it is currently the practice for AEP to lay charges under the *Fisheries Act* in Alberta, federal officials and members of the public are not precluded from doing so.

## APPROVALS/OPERATIONS

The *Discussion Draft* presents 3 options for approvals: the first represents the status quo and the second and third supplement the existing development approval process with a requirement for provincial registration or approvals.

We conclude that option 1 is unworkable since as a matter of law, it cannot provide municipalities with sufficient authority to impose and enforce the full range of requirements in the current *Code of Practice*. While it is likely appropriate for municipalities to address siting and facilities in their development approval process, it is unlikely that they could include operational matters in the same way. A good example is the requirement in the *Code of Practice* regarding “maximum annual application limits”. Municipalities might have the authority to pass by-laws dealing with these matters, but we would question their ability, in a practical sense, to enforce such by-laws.

Options 2 and 3 combine municipal development permits with provincial registration and approvals, respectively. These proposals require more detailed review and comment. Although not stating so expressly, both options make reference to the two major regulatory authorizations established in EPEA: registrations and approvals. For the purposes of this brief, we are assuming that the range of provisions in EPEA applicable to registrations and approvals would be applicable here. If this is not the case, we would want to rethink our response since EPEA registrations and approvals include important provisions for public notice and appeals, for example, which are not addressed in the *Discussion Draft*.

The description of registrations in the *Discussion Draft* is necessarily brief and may not give readers a full understanding of the process. Although the term “registration” implies “signing up”, the EPEA registration process is considerably more complex and involved. Anyone requiring a registration must apply for the registration; the Director has the discretion to issue or not to issue a registration. Information must be submitted with an application for a registration. It is an offence to operate an activity without a registration if one is required. Once a registration is issued, the activity must be operated in accord with an industry specific code of practice. Failure to comply with a code of practice is an offence. Monitoring and record keeping is required. The requirements in AEP codes of practice authorized by the legislation are directive and mandatory.

As the *Discussion Draft* correctly states, the requirements for obtaining an approval are more onerous, although most requirements are identical to those for registration. The differences between approvals and registrations are these: approvals are documents designed specifically for each activity – the operating requirements, monitoring and reporting requirements may vary from facility to facility; with certain exceptions, there must be public notice of an application for an approval; the applicant and those directly affected by the application can appeal the Director’s decision to the Environmental Appeal Board who, in most cases, makes recommendations to the Minister of Environmental Protection who makes the final decision; and monitoring data

is submitted to the Department who is required to make that information publicly available.

The difficult judgement to make is when an activity should require a registration and when it should require an approval. At the time EPEA was amended to provide for the registration process, various activities were moved from the approval schedule in the *Activities Designation Regulation* to the registration schedule. Our understanding is that the decision to switch an activity in this manner was based on two criteria: one, there was no need for individualized approvals as those carrying out the business operated in a similar manner; and two, there were no public complaints about the way the activity operated. More recent codes of practice authorized under the *Waste Control Regulation* respecting landfills may not meet these criteria.

As illustrated above, the approval process for “registrations” and “approvals” is tied very directly to operations, and ultimately to enforcement as offences are created for a failure to comply with approval and operational requirements. Accordingly, it is difficult to separate the two issues. The *Discussion Draft* proposes two options for operations: one, the status quo and two, new manure storage and handling regulations. The difficulty is determining how option 2, in particular, would mesh with the approval options.

It is our recommendation that the government proceed with a combination of the options in respect to approvals and operations. It is assumed that municipalities will continue to effect legitimate planning considerations through their development approval process. We agree with operational option 2. We believe that there is value in having enforceable rules that apply to anyone in the province handling and disposing livestock manure. The rules would apply to all operations, existing and new, large and small. They would also apply to others disposing of manure who are not themselves livestock producers. We assume that the content of this law will be based more or less on the existing *Code of Practice*; to be enforceable, it will need to be written in a more directive manner.

In addition to this general regulation, we recommend that intensive livestock operations require an approval under EPEA. This was initially proposed in early drafts of EPEA and the regulations and was removed following opposition from livestock producers. However, we believe that evidence from recent studies demonstrates that the current arrangement using a non-binding code of practice is ineffective. The existing Schedule to EPEA includes “designated livestock operations” (s.5(n)) and s. 35(b) authorizes Cabinet to define “designated livestock operations” for the purpose of the Act.) The Minister could, by regulation, add “intensive livestock operation” to the *Activities Designation Regulation* pursuant to s. 81(1) of EPEA. The issuance of an approval by AEP to intensive livestock operators would enable the Department to tailor make the approval to the needs of the particular operator and to consider the important matter of cumulative effects. Intensive livestock operations are big business and they should be required to meet the environmental requirements of similar types of

businesses. It should be noted that these legislative changes would raise the possibility of the environmental assessment provisions of EPEA being triggered, which we support.

Registrations are an appropriate mechanism to regulate the environmental effects of livestock operations that are not classified as intensive livestock operations, given their less onerous requirements. Nonetheless, the statutory requirements under EPEA for registration give the regulator the authority to require compliance with minimum environmental standards. We would recommend that the code of practice that would apply to these smaller livestock operations have the status of regulations unlike current codes which do not. This would not make any difference to the issue of enforceability since it is now an offence not to comply with a code of practice. The main advantage of giving a code of practice the status of a regulation is that it makes the information more accessible; current codes of practice are not filed in the same manner as regulations, making them difficult to locate, especially for non-lawyers.

## ENFORCEMENT

Laws and regulations applicable to livestock operations should be enforced by a public agency meeting these qualifications: independent, trained, skilled and adequately funded. Independence means both independence from political influence and independence from those whose job is to promote agricultural development. It is our experience that in cases where these criteria are not met, enforcement of environmental laws is ineffective resulting in a lack of public confidence in the regulatory regime.

It is our recommendation that enforcement be divided between municipalities and the province. Municipalities should be responsible for enforcing their own planning requirements as is now the case. (This is based on the assumption that there is separate provincial environmental legislation applicable to livestock operations.)

It is also our recommendation that the provincial laws applicable to livestock operations be enforced by Alberta Environmental Protection. We are not aware of any other public authority that meets the criteria set out above. Should the practicalities of the situation require that enforcement is assigned to another authority, it should come under the close supervision of Alberta Environmental Protection with that Department ready to step into the breach in the event of a failure to meet enforcement responsibilities.

Specific advice is sought in the *Discussion Draft* as to sources of revenue to support enforcement activities. Although application fees are likely unfamiliar to most agricultural producers, they are increasingly used in other sectors such as energy approval and environment approvals to support government's direct costs. Reasonable fees would be appropriate in this case.

## CONCLUSION

Due to limitations in time and resources, these comments are necessarily general. The ELC would be pleased to provide further advice and comment on this topic as government discussion continues and proposals are refined. The preparation of the *Discussion Draft* and the ensuing public consultations are an important and commendable start to the development of a workable and responsive regulatory system for Alberta's livestock operations.