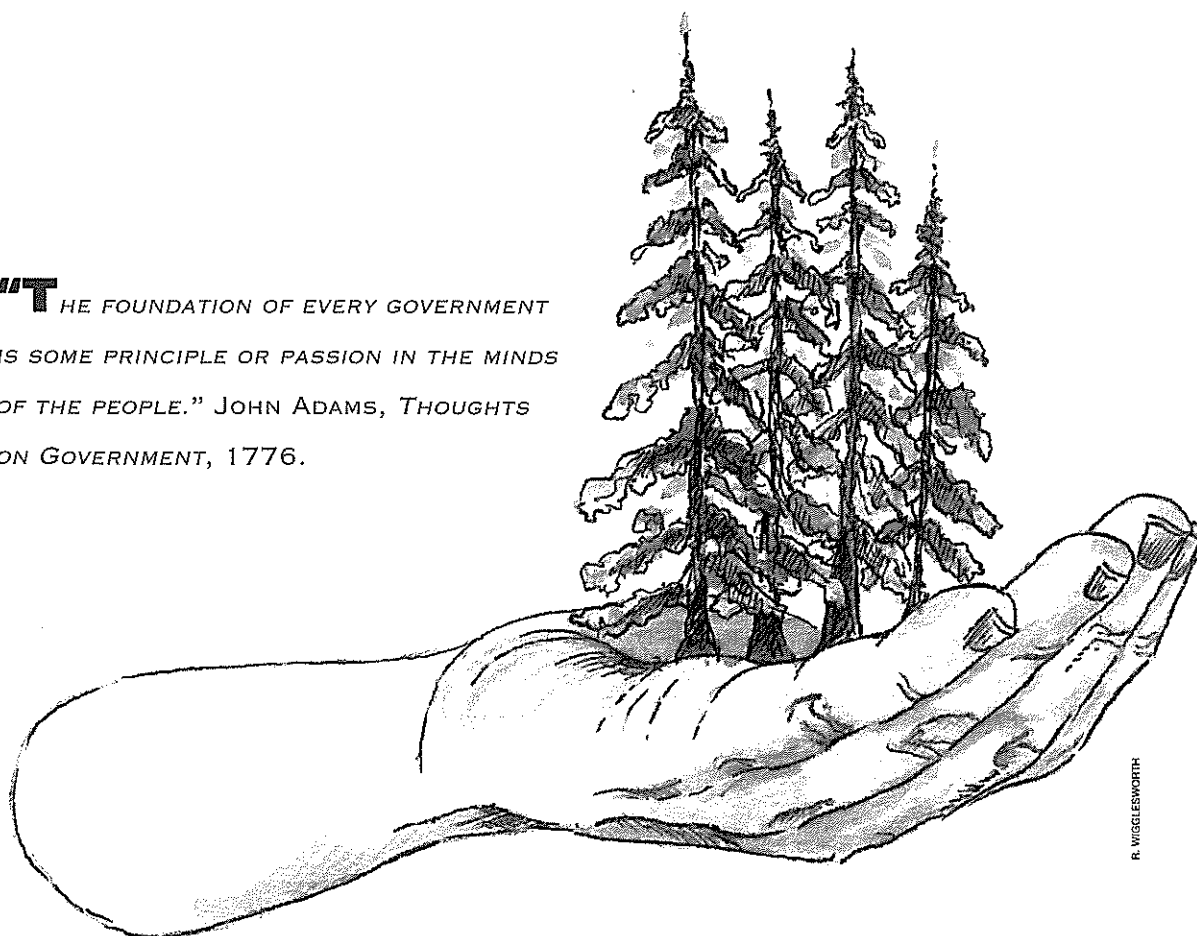


Passions of the People

New Developments in Environmental Law

"THE FOUNDATION OF EVERY GOVERNMENT
IS SOME PRINCIPLE OR PASSION IN THE MINDS
OF THE PEOPLE." JOHN ADAMS, *THOUGHTS*
ON GOVERNMENT, 1776.



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It would be an over-statement to suggest that the present march toward stricter environmental regulations and enforcement is the foundation of our current governments, but one might be excused for thinking so. In the past decade little else in North America has stirred the passions of the people and their governments as has environmental regulation.

Governments have responded with comprehensive sets of rules to protect and improve the state of the natural environment. Alberta is one of the best examples of a jurisdiction which embarked on a lengthy period of broad consultation and review, culminating in new legislation. The *Environmental Protection and Enhancement Act* was passed in June 1992, but was not actually proclaimed in force until September 1, 1993 when the detailed regulations applying to it were drafted. This article will briefly describe some of the principles which underlie this and other similar legislation in North America and will set out the major contours of it. (For more specific information, please consult Volume 16 Number 8 of *LawNow*, entitled "Enforcing Environmental Law", which was dedicated entirely to the subject.)

The Philosophical Framework of Modern Environmental Legislation

The new environmental protection statutes are based upon a number of assumptions and objectives, some of which are set out in section 2 of the Act. The first

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is that a healthy economy and standard of living are dependent upon a healthy environment. Also the physical environment is to be considered a matter of high public interest as a common resource and legacy to future generations.

The public has a shared responsibility. It should, therefore, have generous access to information if it is to be an effective partner in the regulatory processes of reporting and enforcement. Large scale developments will be reviewed for their impact on the environment through an approach which recognizes the interdependence among all water, air and land resources.

Recycling and waste reduction will be priorities to address the *pollution* of consumption. Environmental clean-up will be governed by the *polluter pay* principle. Penalties will be strengthened to discourage pollution and to encourage effective and timely clean-up. On the other hand, novel methods will be countenanced to achieve the manifold purposes of the Act. Examples include the economic and financial and *market-based approaches* of tradeable emission permits, recycling incentives, subsidies, waste disposal fees and differential levies.

Previous owners and operators and corporate officers and directors will also be personally accountable for environmental offenses that took place or were present during their watch. The natural environment will now be protected by a philosophy of *cradle to grave* public management and private accountability.

Outline of the Alberta Environmental Protection and Enhancement Act (AEPEA)

CONSOLIDATION:

The Act consolidates and simplifies provisions from a number of existing Acts to eliminate duplication and to bring about a *one window* source of all related environmental legislation in the Province of Alberta. A set of regulations provides more detail to the general rules.

GOVERNMENTAL DISCRETIONARY AUTHORITY AND THE ENVIRONMENTAL APPEAL BOARD:

When charged with protecting and enhancing something as infinite and nebulous as the natural environment, the Department of the Environment and its officials must necessarily possess considerable discretionary power. They must be able to quickly gather facts and make judgments, which in turn result in administrative decisions and orders. At the same time, however, they must be fair and objective in the decision-making process. The Act does confer broad discretion on the Department, but it also establishes the Environmental Appeal Board. This Board serves as an independent tribunal. Decisions of the Department which are rendered under the Act may be reviewed to ensure that they were both fair and appropriate.

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RELEASE OF SUBSTANCES:

It is unlawful to release any substance into the environment in an amount or at a rate which is specifically contrary to the law. If nothing is specifically expressed in the law about a particular substance, it cannot be released in any manner which would cause "a significant adverse effect". Few substances are actually identified in the Regulations, and most of these relate to industrial emissions. For most people, what constitutes illegal pollution is that which has a significant adverse effect on the environment.

Polluters are required to immediately report the contamination and undertake

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remediation under the watchful eye of environment department officials. Sites which are already contaminated may be designated for clean up as well. An order by the department to clean up the contamination may be made, but the preferred approach is a voluntary action plan with the "person responsible".

Several different categories of people may be legally responsible for existing contamination. Obviously these would include the actual polluter, but it would also include the present owner, whoever is responsible for the offending substance, and anyone who earlier owned the land when the contamination existed. Moreover, the department may assign responsibility to anyone else it considers to have contributed to the pollution. Legal responsibility also signifies financial responsibility.

CONSERVATION AND RECLAMATION:

Not all degradation of the environment is caused by spills and other releases of harmful substances. In some cases, the degradation is the result of simple consumption or exploitation of the environmental resources. The Act seeks to ensure that proper practices are undertaken to conserve and reclaim specified land affected by industrial activities. Sustainable development means that industrial development should never exceed the ability of the natural environment to sustain itself for future generations. Reclamation responsibility will continue with respect to matters not apparent to the inspector when he or she issued the Reclamation Certificate.

ENVIRONMENTAL IMPACT ASSESSMENT AND APPROVALS:

In keeping with the principle that the environment is a priceless resource shared by all citizens for all time to come, the Act provides a process for orderly development. The Environmental Impact Assessment process outlined in the Act is designed to ensure that economic development in Alberta occurs with the full knowledge of the public and in an environmentally responsible manner.

Primarily, major developments with spin-off effects will be of concern here. The impact assessment process is more likely to be invoked in particular where the negative impacts are irreversible, or significant in terms of space and time (much will depend upon the environmental sensitivities involved), or cumulative, or where the activity generates a serious level of public concern.

The assessment will consider more than purely natural environment factors. It will also take into account the social, economic and cultural consequences (and steps put forth to mitigate harmful ones) of a proposed activity. The Department officials first must determine whether the proposed development, such as a tourist resort in a fragile alpine ecosystem, calls for the benefit of full consideration under the environmental assessment process. If so, the Department conducts an initial review and then may request that a detailed and comprehensive impact assessment report be prepared and published. The ultimate decision will be made by the Minister of the Environment.

Certain high risk operations are designated by the Regulations to require specific approval from the Department. Waste management facilities, oil and gas operations, manufacturing plants for chemicals, construction materials, metals, foods, and power plants are examples of some of the kinds of enterprises which require formal application and approval in advance.

WASTE MINIMIZATION:

Considered the cornerstones of any effective public environmental management program, waste minimization and

recycling initiatives are to be encouraged and implemented whenever possible. Funds are available for education, research, and incentives to promote these actions.

MISCELLANEOUS:

The Act contains special measures for a variety of other activities. Standards for competence are set for water well drillers to protect and conserve ground waters. Drinking water quality is also protected once it enters the waterworks and distribution systems. Guidelines exist to control and regulate the use, handling, and disposal of hazardous substances to prevent contamination of animals, plants, food or drink. The storage, sale, handling, distribution, and application of pesticides receive particular treatment in the Act.

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LIABILITY AND ENFORCEMENT:

All the good intentions of environmental protection would scarcely convert to positive action if it were not for sanctions to enforce compliance to the rules. In the past, the Department of the Environment worked with polluters to abate environmental damage and prevent it from happening again. The possibility for negotiated solutions between polluter and regulator continues to exist. The Act, nevertheless, contemplates that more firm and decisive measures may be required.

This acute environmental awareness in Canada and around the world has resulted in not only the enactment, but *the spirited enforcement*, of environmental protection regulations. Recent experience