Appeal No. 00-067-R

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

Date of Hearing via Written Submissions Only – November 7, 2001
Date of Report and Recommendations – December 7, 2001

IN THE MATTER OF sections 84, 86, 87, 91, and 93 of the *Environmental Protection and Enhancement Act,* S.A. 1992 c. E-13-3;

-and-

IN THE MATTER OF an appeal filed by McColl-Frontenac Inc. with respect to Environmental Protection Order No. 2000-08, issued on November 2, 2000, by the Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment to McColl-Frontenac Inc.

Cite as: *McColl-Frontenac Inc.* v. *Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment.*

WRITTEN HEARING BEFORE William A. Tilleman, Q.C., Chairman

APPEARANCES

Appellant:	McColl-Frontenac Inc. represented by Mr. Robert White, Q.C., and Ms. Jamie Dee Larkam, Lucas Bowker and White.
Director:	Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment, represented by Mr. Grant Sprague and Mr. William McDonald, Alberta Justice.
Other Party:	Al's Equipment Rentals (1978) Ltd., represented by Mr. Alex MacWilliam, Fraser Milner Casgrain.

EXECUTIVE SUMMARY

This is an appeal of an Environmental Protection Order (EPO) issued by Alberta Environment under the *Environmental Protection and Enhancement Act* (the Act). The EPO requires McColl-Frontenac Inc. (McColl) to assess the extent and nature of pollution at a site in northwest Calgary and to design and implement a plan for remediating that pollution.

McColl is the successor to several companies that owned the site and operated a gas station on it for roughly twenty-five years. However, the gas station ceased operating in the late 1970s. For much of the time since, the site has been used for the operation of two equipment rental businesses.

The Board heard the appeal through written submissions. In its submission, McColl argues that:

a. Alberta Environment violated the Legislature's intent by applying a section 102 EPO retrospectively to facts that occurred before the Act came into force;

b. Alberta Environment violated McColl's legitimate expectation that it would follow the *Guidelines for the Designation of Contaminated Sites*;

c. Alberta Environment erred by failing to name other parties as responsible persons; and

d. Alberta Environment erred by issuing the EPO under section 102 rather than under section 114 of the Act.

The Board recommends that the Minister affirm the EPO, while requiring the Director to consider in the future whether to designate the site as a contaminated site under section 110 of the Act and apply the remaining provisions of Part 4, Division 2 of the Act.

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I. INTRODUCTION

[1] This is an appeal of Environmental Protection Order No. 2000-08 (the "Order") issued by Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment (the "Director"), under the *Environmental Protection and Enhancement Act,* S.A. 1992, c. E-13.3 ("EPEA" or "the Act"). The Order states that there is pollution on the site located in the northwest of Calgary, Alberta and requires the Appellant, McColl-Frontenac Inc. ("McColl"), to assess the extent and nature of the pollution and to design and implement a plan for remediating that pollution.

[2] McColl is the successor to several companies that owned the site and operated a gas station on it for roughly twenty-five years. However, the gas station ceased operating in the late 1970s. For much of the time since, the site has been used for the operation of two equipment rental businesses. In McColl's view, other parties and the public should be required to bear the clean-up costs instead of McColl or, at least, to share those costs with McColl.

[3] Viewed in its broadest terms, this appeal raises fundamental questions about the government's "polluter pays" policy for assigning responsibility for cleaning up sub-surface pollution whose sole or partial source originated in the distant past. That policy is entrenched in section 2 of EPEA, which expresses the Act's purpose as to "…support and promote the protection, enhancement and wise use of the environment while recognizing…" a number of factors, including "…the responsibility of polluters to pay for the costs of their actions…"[1]

[4] While this principle sounds relatively straightforward, its implementation is actually very problematic. This difficulty arises, in part, because EPEA's purpose also recognizes other public welfare-type principles that may be difficult to align with the "polluter pays" principle.[2] In addition, the abstract "polluter pays" principle is itself ambiguous with respect to who should be considered a polluter.[3] But whoever pollutes, should pay.

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[1] For a discussion of the history of the "polluter pays" principle, and of the academic literature critiquing the principle, see N. Vlavianos, *Liability for Well Abandonment, Reclamation, Release of Substances and Contaminated Sites in Alberta: Does the Polluter or Beneficiary Pay?* (LL.M. Thesis, University of Calgary, Faculty of Law, 2000) at pages 16, 20-36.

[2] The other principles with perhaps the highest potential for conflict with the "polluter pays" principles are: the "…need for Alberta's economic growth and prosperity in an environmentally responsible manner…" (section

[5] These conceptual problems in applying the "polluter pays" principle are compounded by several practical problems: it is often difficult and expensive to determine the nature of the pollutants, the geographic extent of pollution, and the pollutants' fate; it is difficult, in many cases impossible, to determine precisely when the pollutants were released and who released them; assessments of the environmental and public health risks posed by the pollution are fraught with scientific uncertainties and require controversial policy judgments; cleanup remedies are typically expensive; and, people or companies responsible for the cleanup may be insolvent, deceased or defunct, or otherwise unable to pay.

[6] These conceptual and practical problems are considerable at any given polluted site. But there are numerous of these polluted sites - likely thousands throughout Canada - whose risks need to be assessed and whose pollutants cleaned up or otherwise properly managed. This task is a formidable one, to say the least. Its timely completion will require, at a minimum, the utmost of cooperative efforts among all public and private parties involved. It also requires that the Director have sufficient flexibility to issue an EPO whenever necessary.

[7] The Board decides this appeal mindful of these practical realities.

II. BACKGROUND

A. History of Use and Ownership of the Site

[8] The physical site is a triangular piece of land in northwest Calgary that is wedged between the Crowchild Trail (opposite the University of Calgary campus) to the west, and residential areas to the north, east, and southeast.[4]

2(b)); and, the "…shared responsibility of all Alberta citizens for ensuring…" environmental protection "…through individual actions…" (section 2(f)).

[3] As one writer recently commented:

> "The ['polluter pays'] principal is so often stated that one is left with the impression that its meaning is beyond question. ... But then ... we realize that, despite its common usage, there is no clear consensus on what the principle actually means. In particular, scholars hold diverse opinions about who a 'polluter' is when they invoke the principle as a ground for imposing legal liability for the costs of environmental clean-up."

Vlavianos (*supra.* note 1) at 23.

[4] Order at page 1 (1st Whereas Clause); Agreed Statement of Facts, paragraph 5; Oct. 18, 2000 Investigator's Memo (Director's Record #9) and accompanying maps; October 1998 Cirrus Report Section II.E (Director's Record

[9] The early history of industrial use of the site is somewhat cloudy, but the parties have stipulated that a gas station was located on the property between 1956 and 1981 and that, as part of the station's operation, gasoline was stored on the site in underground storage tanks.[5] Corporate records suggest the gas station was last operated in 1979, and that the underground storage tanks were removed sometime before July 1981.[6] However, there is no evidence before the Board as to how the tanks were removed and whether the removal actions included checking and remedying any hydrocarbon leakage associated with the underground tanks.

[10] The historical record of corporate ownership of the site and management of the gas station is also somewhat hazy. However, the parties agree on several basic facts: McColl-Frontenac Oil Company Ltd., a predecessor to McColl, purchased the site in May 1956. Five months later, McColl sold the property to Highway Realties Limited ("Highway Realties"), whose principal business was owning and leasing of service station properties. Highway Realties then leased the site back to McColl for a twenty-four year period ending in 1980.[7]

[11] The Agreed Statement of Facts implies that McColl was responsible for operating the gas station, but does not make this fact crystal clear. Other evidence suggests that McColl was not the sole operator. A business records search conducted by Alberta Environment indicated that, for thirteen years of its operation, the gas station was listed under a Texaco brand; it was listed as the Pleasant Service Center for ten other years. This research also lists seven different named individuals associated with the gas station, although the individuals' relationship to the station (or to McColl) is not specified.[8]

[12] Curiously, while the parties did not clearly name McColl as the direct operator of the gas station, or clarify the relationship between McColl and Texaco during this 1956-1979 period, they appear to agree that McColl was at least directly responsible for storing gasoline in the underground tanks.[9]

#40); Calgary City map (Director's Record #41).

5 Agreed Statement of Facts, paragraph 10.

6 Agreed Statement of Facts, paragraph 10 and Tab C.

7 Agreed Statement of Facts, paragraphs 6, 7, 8, and 9.

8 "Henderson Directory Information" (Director's Record #7).

9 Agreed Statement of Facts, paragraph 10.

[13] There is some speculation that Highway Realties was simply a real estate subsidiary of Texaco Canada Inc., although the evidence is hardly sufficient for the Board to find this linkage conclusive.[10] At any rate, the parties agree that Highway Realties sold the property to Texaco Canada Inc. in September 1980, and was struck as a corporate entity in 1981.[11]

[14] Texaco Canada Inc. itself was amalgamated with McColl-Frontenac Oil Company Ltd. to become McColl.[12] To make the corporate chain more complex, there is unrefuted evidence that McColl is itself a subsidiary of, and whose shares are owned completely by Imperial Oil Ltd.[13]

[15] After the gas station was closed in 1979, the site apparently was not used for commercial purposes until 1982, when its then-owner Texaco Canada Inc. (now McColl) leased the site to Al's Equipment Rentals (1978) Ltd. ("Al's Rentals") for the operation of an equipment rental company.[14] Al's Rentals leased the site until April 1986, when it purchased the site outright from Texaco Canada Inc. (now McColl),[15] thus ending McColl's formal, thirty-year connection to the site.

[16] In the contract for sale, Al's Rentals agreed to purchase the property "as it stands" and Texaco Canada Inc. made no representations or warranties regarding the property other than those expressed in the terms of the purchase agreement. None of those terms expressly address any possible pollution located on, or emanating from, the site.[16] In their written submissions, McColl and Al's Rentals dispute whether the purchase price was discounted to reflect the potential pollution problem.

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[10] Nov. 6, 2000 e-mail from Alberta Environment Investigator Peter Schonekess reporting speculation of last operator of the gas station (Director's Record #2); but see corporate records of Highway Realties Ltd. (making no reference of linkage to Texaco) (Director's Record # 43).

[11] Agreed Statement of Facts, paragraphs 6 and 9.

[12] Agreed Statement of Facts, paragraph 8. For simplicity, the Board will hereinafter refer to both Texaco Canada Inc. and McColl-Frontenac Oil Company Ltd. as the "McColl," unless otherwise noted.

[13] Environmental Protection Order No. 2000-08 at 2 (1st Whereas Clause referring to Imperial Oil as the "parent corporation" of McColl); see also Alberta Environment e-mail referring to Imperial Oil as the "sole shareholder" of McColl) (Director's Record #17) and hand-written notes referring to Imperial Oil as the "100% SH" of McColl (Director's Record #29).

[14] Agreed Statement of Facts, paragraph 11.

[15] Agreed Statement of Facts, paragraphs 6 and 11.

[16] Agreed Statement of Facts, paragraph 12; Director's Record #42.

[17] On December 30, 1998, Al's Rentals sold the property to another company, 810546 Alberta Ltd.[17] This company continues to operate an equipment rental business on the property.[18] A quick review of the October 2001 Calgary Yellow Pages entries for "Rental Equipment" lists the name "United Rentals" for the company operating at the relevant address (2505 24th St., NW). Thus, for simplicity, the Board will refer to the present owner and operator of the site as United Rentals.

B. The Government's Involvement

[18] Prior to its 1998 sale of the property and in connection with that sale, Al's Rentals hired a consultant, Cirrus Environmental Services ("Cirrus"), to make a Phase I Environmental Site Assessment of any actual or potential on-site contamination.[19] In its report, Cirrus concluded that, although it had found no prior reports of pollution, there was a "*high* potential for significant negative environmental conditions" at the site. The report noted that several above-ground fuel storage tanks and drums used by Al's Rentals were "sources of potential problems" but did not make it clear Cirrus believed these sources, alone, were the cause of the "high risk of negative environmental conditions".[20]

[19] As a result of this report, Cirrus conducted a follow up, Phase II Environmental Site Assessment that consisted, in part, of on-site measurements throughout the site of sub-surface hydrocarbon vapours (known as "soil vapour headspace readings"). These on-site readings showed hydrocarbon vapour levels of concern at several locations near the former gas station facilities, but not near the locations of Al's Rentals' above-ground fuel storage containers.[21]

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17 Agreed Statement of Facts, paragraph 6.

18 Agreed Statement of Facts, paragraph 11 (citing Director's Record #38 which includes a Cirrus Feb. 14, 200 letter implying that Al's Rentals no longer runs the equipment rental business at the site).

19 Agreed Statement of Facts, paragraph14; October 1998 Cirrus Report, Executive Summary (Director's Record #40); Feb. 14, 2000 Cirrus Letter at 2 (Director's Record #38).

20 October 1998 Cirrus report (Phase I), Executive Summary (Director's Record #39).

21 *Ibid.* at 5 (table of vapour readings) and Appendix A (maps showing sampling locations).

[20] Cirrus also collected samples of soils from three locations: one at each of the two former gas pump sites; and one at the probable site of the former underground gas tank.[22] Lab tests of hydrocarbon vapours in these samples showed that they all exceeded applicable provincial soil risk management criteria.[23] Tests of samples taken at the eastern residential edge of the site (bordering 24th street) also showed exceedances of provincial soil risk management criteria for hydrocarbon vapours.

[21] Based on all of its sampling, Cirrus concluded that there was a "…possible presence of subsurface organic vapours…" at the site.[24]

[22] Although the Board's appeal record is unclear, it appears that Cirrus provided Alberta Environment with timely notice of the site assessments as early as February 1, 1999.[25] Notwithstanding this notice, the Board's appeal record suggests there was no follow-up action for over a year, until February 11, 2000, when Al's Rentals informed Alberta Environment that "…hydrocarbon contamination had impacted the soil beneath the property."[26] Al's Rentals also indicated, among other things, that they had attempted to get Imperial Oil (the parent company and sole shareholder of McColl) to deal with this matter but that Imperial had "rebuffed" those attempts on the ground that, under the contract between Al's Rental's and Texaco Canada Inc., Al's Rental's had purchased the property on an "as is, where is" basis.[27]

[23] In a separate follow-up letter, Cirrus provided additional details about the site's history and the results of Cirrus' assessments. In its letter, Cirrus concluded that portions of the site have been "…contaminated with petroleum hydrocarbons…" and that the "…contamination

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22 January 1999 Cirrus Report, Executive Summary and Appendix A – Map of Oct. 23, 1998 Monitoring Wells (Director's Record #39).

23 *Ibid.*, Executive Summary (Director's Record #39).

24 *Ibid.*, Executive Summary and Appendix A – 25 Nov., 1998 Monitoring Wells.

25 See January 1999 Cirrus report (Director's Record #39) (cover page including Alberta Environment on the "distribution" list and with a February. 1, 1999 "receipt" stamp); see also February 11, 2000 letter from Al's Rentals (Director's Record # 38) at page 2 (stating that the "results" of the Cirrus assessments "have all been provided to Alberta Environment in a timely fashion); and 14 February, 2000 Cirrus letter (stating that Cirrus' client has "made every effort to disclose the results of the Phase II, Investigation(s) to Alberta Environment (AE) in a timely fashion.") (Director's Record #38).

26 February 11, 2000 letter from Al's Rentals to Alberta Environment (Director's Record #38).

27 *Ibid.*

has migrated off-site and has impacted property owned by the City of Calgary, along 24th Street N.W."[28]

[24] In a statement that is not echoed expressly in the narrative portions of either of its site assessments, Cirrus also claimed that its client did not cause any of the pollution and that the pollution had resulted, instead, from the former gas station. Cirrus then noted that Al's Rentals had tried to obtain information from Imperial Oil about how the underground tanks were removed and what efforts, if any, had been made to deal with related pollution when the gas station was closed. According to Cirrus, however, Imperial Oil had not provided any of the requested information.[29]

[25] The Board regrets the dilatory approach taken by Imperial Oil. Even if Imperial's contractual argument was correct, had Imperial Oil provided the requested information, there might have been a more timely and appropriate response by Al's Rentals, Cirrus, Alberta Environment, or others. This outcome, of course, is one of the Act's objectives.[30] The Board strongly believes that the parties' views on liability should not stand in the way of information sharing and other cooperative efforts to solve environmental problems. Besides, the outcomes of legal disputes are likely to be more favorable to those parties that have exhibited a cooperative attitude toward solving the underlying problems.

[26] Apparently in response to this prodding from Al's Rentals and from Cirrus, Alberta Environment became actively involved in the site. From the start, Alberta Environment took the initial view that Imperial Oil was solely responsible for the pollution because of its relationship with Texaco and under the "polluter pays" principle reflected in EPEA.[31] Given this position, Alberta Environment staff attempted to meet in person with Imperial Oil representatives to discuss the matter, but Imperial Oil rejected those entreaties based on its view

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[28] 14 February, 2000 letter from Cirrus to Alberta Environment (Director's Record #38) at 2.

[29] 14 February, 2000 letter from Cirrus at 2-3 (Director's Record #38); see also Alberta Environment notes of March 30, 2000 phone conversation with Cirrus who stated that Imperial had given a "flat 'no' to collaboration on this project" (Director's Record #37).

[30] See *EPEA* section 2.

[31] Alberta Environment notes of March 20, 2000 discussion (Director's Record #37) and March 29, 2000 fax from Alberta Environment to Imperial Oil (Director's Record #37) ("[T]he issue is in the hands of Imperial Oil as they took over Texaco. Our basis is that the polluter is responsible.").

that Al's Rentals had contractually inherited whatever pollution problem had been created by the gas station.[32]

[27] For the next several months, Alberta Environment reviewed the Cirrus reports, conducted title searches and other investigations (with the cooperative assistance of Al's Rentals) to clarify the historic use of the site, and began drafting the Order.[33]

[28] With a draft Order in hand, Alberta Environment was finally able to convince Imperial Oil to participate in a face-to-face meeting, which occurred on October 31, 2000. Notes from that meeting suggest that the Director advised Imperial Oil of the draft Order and requested additional information. Rather than discuss information needs and practical solutions, Imperial Oil again fell back on its claim that the contract of sale between Texaco Canada Inc. and Al's Rentals legally absolved Imperial Oil of any responsibility for the pollution problem.[34]

[29] The Director issued the Order on November 2, 2000, shortly after the meeting with Imperial Oil.

C. The Appeal Proceedings

[30] McColl filed its Notice of Appeal pursuant to section 84(1)(h) of EPEA, which allows the recipients of various environmental protection orders, including orders issued under section 102, to appeal the orders to this Board. McColl's Notice of Appeal requested that the Board stay the Order pending the outcome of the appeal and that the Order be quashed altogether at the conclusion of the appeal.[35]

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[32] See Notes of phone conversations and written communications in Director's Record #37; May 24 and 25, 2000 E-mails between Alberta Environment Director Jay Litke and Tom Dickson regarding Imperial Oil's lack of response to phone call request for further discussion (Director's Record #35); May 26, 2000 Fax cover sheet from Imperial Oil's lawyer Peter Miller to Tom Dickson of Alberta Environment enclosing court decision on contractual liability (Director's Record #34);

[33] The scope of the government's work is reflected in the various documents in the Director's Record at #s 7-33.

[34] Notes of October 31, 2000 meeting (Director's Record #6); Agreed Statement of Facts, paragraph 6.

[35] Notice of Appeal at pages 1-2. The Board does not have authority to grant this relief directly, but only to make a recommendation to the Environment Minister on whether this relief should be granted. See *EPEA* s. 91(1) (for specified appeals, including appeals of s. 102 orders, the Board must submit a "report" with "recommendations" to the Environment Minister).

[31] In response to McColl's stay request, the Director indicated that he was willing to defer enforcing the Order pending the appeal and, thus, that a formal stay was unnecessary.[36] McColl did not object to the Director's suggestion and the Board accepted it, so no formal stay has been entered.[37]

[32] Six months after McColl initiated the appeal, Al's Rentals requested permission to participate in the appeal. Neither McColl nor the Director objected to this request, and the Board subsequently included the Al's Rentals in the proceedings due to its obvious interest in the outcome of the appeal.[38]

[33] Following an unsuccessful settlement effort, the parties conducted a streamlined appeal procedure, by preparing an Agreed Statement of Facts and providing individual written submissions, and agreeing to forego both written affidavits and an oral hearing.[39] The Board commends the parties for collaborating in producing the Statement of Facts and in agreeing to the overall, streamlined appeal process.[40]

[34] In response to a Board letter requesting clarification of its Notice of Appeal, McColl stated simply that it objected to the entire Order, including:

1. the designation of McColl as the person responsible;
2. the retroactive effect of the Order;
3. the requirement that investigation must be undertaken by McColl;
4. the condition of the site does not present a harm to the public;
5. the choice of the Director in proceeding with an order under section 102 of the Act; and
6. the failure to designate other parties as persons responsible.

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[36] November 14, 2000 letter from Grant Sprague of Alberta Justice to the Board.

[37] November 15, 2000 letter from the Board to the parties.

[38] See April 6, 2001 letter from Al's Equipment Rentals (requesting permission to participate); April 9, 2001 letter from the Board (noting the rental company's interest in the appeal but seeking the parties' views on whether the rental company should be allowed to participate); April 24, 2001 letter from Sprague (no objection from the Director); and April 25, 2001 letter from White (no objection from McColl).

[39] Under section 86(2) of EPEA, the Board may hold a written hearing in lieu of an oral hearing subject to the principles of natural justice.

[40] Nevertheless, the Board questions the length of time it took the parties to produce the agreed statement, in responding to several of the Board's queries, and in conducting other preliminary phases of the appeal.

McColl further explained that it sought to reverse the Order or, in the alternative, to vary the Order's terms.[41]

[35] With the parties' consent, the Board subsequently accepted McColl's six objections as the list of issues the Board would address in hearing the merits of the appeal.[42] However, McColl's written submission lists only four grounds for appeal, namely, that:

1. the Director violated the Legislature's intent by applying a section 102 Order retrospectively to facts that occurred before *EPEA* came into force;
2. the Director violated McColl's legitimate expectation that he would follow the *Guideline for the Designation of Contaminated Sites*;
3. the Director erred by failing to name other parties as responsible persons; and
4. the Director erred by issuing the Order under section 102 rather than under section 114 of the Act.[43]

[36] These four grounds do not appear to address McColl's original grounds 1, 3, and 4, so the Board considers those original grounds waived for further purposes of this appeal.

[37] In addition, the Board notes with some consternation that the appeal grounds in McColl's written submission do not cleanly track the remaining original list of appeal grounds.[44] However, because McColl's mismatch of appeal grounds does not appear to be intended to add *new* issues, or to otherwise significantly prejudice the parties or the Board, the Board now accepts the appeal grounds in McColl's written submission as the official set of issues for this appeal. The Board has re-phrased these grounds as issue questions and re-ordered them by focusing first on the issues that primarily concern section 102 of EPEA and then on the issues that directly address section 114 of the Act.[45]

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41 December 14, 2000 McColl's letter to the Board.

42 August 9, 2001 Board letter to the parties at page 2.

43 McColl's October 11, 2001 Submission at page 1.

44 It appears to the Board that McColl's original grounds 2 and 6 correspond to grounds (a) and (c) in McColl's written submission, respectively. McColl's original ground 5 appears to subsume grounds (b) and (d) in McColl's written submission.

45 This distinction is not a perfect one, because for all practical purposes all four issues address the single underlying theme, that the Director should have proceeded under section 114 rather than under section 102.

III. ANALYSIS AND DISCUSSION

A. The Board's Standard of Review of the Director's Order

[38] The Board reviews the Director's decisions under the correctness standard. This non-deferential standard is warranted by several factors: the *de novo*[46] nature of the Board's review; the Board's own expertise; the Board's role in recommending the correct decision to the Minister; and the courts' deferential review of the Board's own decisions.[47]

[39] Therefore, while the Board's review is non-deferential in theory, the Board may afford the Director some deference as a practical matter, in part, because the Board's appeal record is usually based largely on the Director's own decision-making record.[48] This factor is particularly relevant in the specific context of the Board's review of an appeal of an environmental protection order directed at McColl.

[40] Perhaps in an ideal world, the Director would issue a remedial order only if the Director had a comprehensive, definitive description of all the relevant facts. However, this ideal scenario is wholly unrealistic, because of the costs and time required to determine these facts at all sites needing to be investigated, and also because some facts are simply inherently difficult to determine. Thus, the Director must decide whether to require persons responsible to investigate and remediate a polluted site, based often on a limited or imperfect factual record. This policy is implicit in section 102, which allows the Director to issue an environmental protection order if he believes that there "may" be pollution that "may" cause environmental harm, and to require the person to whom the order is directed to "investigate the situation" and to take other action that the Director "considers necessary". These terms would be meaningless if the Board expected the Director to have definitive proof of all relevant facts prior to issuing an order.[49] That is not, in the Board's opinion, what the statute requires.

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[46] A *de novo* review will sometimes require the Board to gather evidence that may be outside of the Director's own record; we often need additional non-record information to complete the historical background or to ensure the Director considered all of the relevant factors and fully explicated his decision or its grounds.

[47] See, *e.g.*, *Ash v. Director, Alberta Environmental Protection* (June 8, 1998), No. 97-032 at pages 7-8.

[48] *Ibid.* at page 10.

[49] Of course, if further investigation by a person named in an order reveals new, material facts, the Director should consider whether the new facts warrant a modification of the order.

[41] The Board is mindful of this constraint, in assessing the Director's factual findings under the Board's theoretically non-deferential, correctness standard of review. As a practical matter, the Board also typically defers to Alberta Environment in policy matters especially where, as here, EPEA provides wide latitude in establishing the policies at issue on appeal.

B. A General Comparison of Sections 102 and 114 of EPEA

[42] As noted above, McColl's submission raises four discrete appeal grounds, but they all raise common questions about the functional relationship between the Director's powers under sections 102 and 114 of EPEA. Thus, the Board believes that it is appropriate to start with a general discussion of those sections, before addressing McColl's discrete appeal grounds.

[43] Sections 102 and 114 both appear in Part 4 of EPEA that is titled "Release of Substances". The two sections are also generally alike in giving the Director broad authority to issue an environmental protection order requiring a person responsible for pollution to assess, clean up, and otherwise minimize the environmental risks of, the pollution.

[44] Sections 226 and 227 of EPEA (in Part 11 – "Miscellaneous Provisions"), contain additional rules governing environmental protection orders issued under both sections 102 and 114. One of these generic rules (in section 226(1)) is that all persons named in an order are jointly responsible for implementing the order and jointly and severally liable for the costs of doing so, and for those of the Director's costs that are recoverable under the Act.

[45] Notwithstanding these general similarities between orders issued under sections 102 and 114, the text and contexts of those sections differ in several fundamental respects, as explained below.

[46] As relevant here, section 102(1) empowers the Director to issue an environmental protection order to the person responsible for a release of a substance into the environment that "…may occur, is occurring or has occurred…" and that "…may cause, is causing or has caused an adverse effect…." Under section 102(2), the order may require the recipient of the order to

take whatever steps the Director considers necessary including steps to determine the scope and nature of the pollution and to clean it up.[50]

[47] As relevant here, section 1(ss) of EPEA defines "person responsible" for a released substance as:

- the owner and a previous owner of the substance,
- every person who has or has had charge, management or control of the substance including the handling, use, storage, and disposal of the substance, and
- any successor of a person who is otherwise responsible under that definition.

[48] Section 114, which is in Division 2 of Part 4 (entitled "Contaminated Sites"), authorizes the Director to issue an environmental protection order requiring a person responsible for a contaminated site to take a broad range of steps that the Director considers necessary to address the contamination, including the investigation and remediation steps listed in section 102.

[49] What are the practical differences between the remedial authorities granted under these two sections?

[50] One difference is that section 114 orders are predicated on more rigorous substantive (or jurisdictional) facts than section 102 orders. As noted above, section 102 orders may be predicated, not only on ongoing and past substance releases, but also on releases that "may occur". This is relatively broad. By contrast, a contaminated site designation (required for a section 114 order) can only be made when a substance is already "present" in the environment.[51]

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[50] McColl does not dispute that there has been a "release" of a "substance" into the "environment" for purposes of section 102, so the Board will not discuss the legislative definitions of those terms. Suffice it to say that the definitions are very broad. See EPEA sections 1(t), (ggg), and (kkk). McColl's submission also does not contest that the released substances "may cause, is causing or has caused an adverse effect" under section 102(1)(b). EPEA section 1(b) defines "adverse effect" broadly as "impairment of or damage to the environment, human health or safety or property".

[51] It may be theoretically possible that there are circumstances where a substance would be considered "present," for contaminated site purposes, even if it has not yet been released, so that a section 114 order could have the prospective application that a section 102 order is plainly allowed to take. However, the clear emphasis of the contaminated sites provisions—including section 114 orders—is on past releases.

[51] In addition, a contaminated site designation requires a release that poses an actual or threatened "*significant* adverse effect" (section 110(1)) whereas a section 102 order need only be predicated on a mere "adverse effect".

[52] Another obvious difference is that the process for issuing a section 114 order is much more cumbersome than the process for issuing a section 102 order, in several fundamental respects.[52] Other than making the required jurisdictional findings, the Director can issue a section 102 order without needing to take any prior, official steps. By contrast, a section 114 order may be issued only when the Director has formally designated the site as contaminated. That designation may be made only after public notice and consideration of written statements of concern submitted by persons who are directly affected by a proposed designation. And those persons may appeal a contaminated site designation to this Board.[53]

[53] Besides the extra public process for designating contaminated sites, the Director's process for issuing a section 114 order is itself more rigorous than the process for issuing a section 102 order. Under section 114(2) and (3), the Director shall give consideration to twelve or so express factors in deciding whether to name a particular person responsible in the order. The legislative factors bear on the person's culpability for the pollution and the overall fairness of requiring the person to bear all or a portion of the costs of remedying the pollution problem.

[54] By contrast, EPEA's plain text does not require the Director to consider those factors in deciding whom to name as persons responsible in a section 102 order. Under common notions of legislative interpretation, the absence of this procedural requirement in section 102, and its presence in section 114, would suggest that the intent to allow the Director to issue a section 102 order without considering the section 114-type factors.

[55] While section 114 orders are predicated on more rigorous procedural steps and substantive facts than section 102 orders, the Director has certain powers under section 114 (and related contaminated sites provisions) that are lacking under section 102. Under section 109 of EPEA Part 4, Division 2 ("Contaminated Sites"), the Minister of Environment may adopt programs and other measures for the government's assumption of a broad range of the costs

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[52] The Board does not mean to use the term "cumbersome" in a pejorative sense.

[53] See EPEA sections 84(1)(j), 111, 112, and 114(1). For clarity, the Board will hereafter use the term "contaminated site(s)" to refer only to sites officially designated as "contaminated" under section 110.

associated with remediating contaminated sites, when a persons responsible cannot be identified or are simply unable to pay those costs. (The costs attributable to these persons are commonly referred to as "orphan shares" of total costs.)

[56] There is no equivalent express authority under EPEA for the government's assumption of orphan shares incurred under section 102 orders.

[57] Section 116 of EPEA also authorizes the Minister of Environment to compensate third parties for any loss or damage they suffer as a direct result of the issuance of a section 114 order or application of other contaminated sites provisions.

[58] In addition, the scope of persons responsible that can be named in a section 114 order is textually broader than the scope of persons responsible that can be named in a section 102 order. The former consists of the scope of persons responsible under section 102, as well as:

- any other person who the Director considers caused or contributed to the pollution;
- the owner of the contaminated site;
- any previous owner of the site who owned it at any time when the pollution was in, on or under the contaminated site;
- a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of the above persons; and,
- a principal or agent of the above persons.[54]

[59] The Board is not clear why the Legislature made the scope of persons responsible for section 114 orders expressly broader than the scope of persons responsible under section 102.

[60] The Director or Minister of Environment have several other powers in connection with section 114 orders that are not expressly authorized under section 102:

- the Director can apportion costs among responsible parties in a section 114 order (section 114(4)(b)) in lieu of the default joint and several liability approach mandated for all environmental protection orders, pursuant to section 226(1), as discussed above;

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[54] *EPEA* section 96(1)(c) (definition of "person responsible for the contaminated site"). There are certain limitations on those categories that are not relevant for purposes of this discussion. See section 96(1)(c)(vii) and (viii) and 226(3) and (4).

- the Minister can control and prohibit the use of a contaminated site or products coming from the site (section 117); and
- the Director may enter into an agreement with responsible persons for the remediation of a contaminated site.[55] (Section 113)

[61] Once again, however, the Board is unclear whether these express differences between the Director's powers in issuing orders under sections 102 and 114 are really significant, as a practical, matter. The Director may well have implied authority under section 102 when combined with other EPEA provisions to exercise the same or equivalent powers as those that are made express in connection with contaminated sites.

[62] There could well be other, more subtle differences between sections 102 and 114 that become apparent only in the context of particular fact scenarios that are not before this Board.

[63] Based on the above comparison, the Board has difficulty determining the Legislative intent regarding the functional differences between section 102 and 114 orders. To make matters more challenging, EPEA provides no express guidance on when the Director should use one section or the other, or even what factors the Director should consider in choosing between the two sections.

[64] McColl's clear preference is for a section 114 order and related contaminated sites processes. As explained below, the Board believes that the Director was correct in issuing the Order to McColl. We also believe the Director should, in the future, consider (based on more information as it becomes available) whether to use the contaminated sites process as the overall means for remediating the site.

C. First Issue: Does the Order Violate Judicial Presumptions Against Interpreting Legislation to have Retrospective Application?

[65] McColl's first appeal ground is that the Legislature did not intend section 102 to apply to pollution that originated before EPEA came into force. Citing the judicial presumption against retrospective application of statutes, McColl argues that the September 1, 1993

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[55] When approved by the Director and "carried out" by the parties, this agreement precludes the Director from issuing a section 114 order to those parties.

proclamation date of EPEA should be implied as a historical limit on past releases covered by that section.

[66] The Board disagreed with an identical challenge to a section 102 order, in *Legal Oil and Gas Ltd.* v. *Director, Land and Reclamation Division, Alberta Environmental Protection*.[56] That decision provides a template for the Board's analysis of McColl's retrospectivity claims.

[67] In *Legal Oil*, the Board explained that the retrospectivity claim raises two issues: first, whether the Director's order applies section 102 retrospectively; and, if so, whether that application is contrary to the Legislature's intent.[57] The Board will address each of these issues in turn.

1. Does the Director's Order Apply Section 102 Retrospectively?

[68] As the Board explained in *Legal Oil*, section 102 of EPEA would be applied retrospectively if it was being used to impose new legal consequences on conduct that occurred prior to the Act's coming into force.[58] Thus, this concept has two components that must be assessed: whether section 102 is being applied to conduct that occurred before EPEA came into force; and, if so, whether section 102 imposes new legal obligations on that conduct.[59] The Board will address each of these components in turn.

The Conduct

[69] The appeal record is clear that McColl's ownership and operation of the site ended when its predecessor Texaco Canada Inc. sold the property to Al's Rentals in 1986. Thus, McColl's direct relation to the site ceased before the 1993 EPEA proclamation date. The Order stems from McColl's contractual relationship to the site and thus, to this extent, the Order applies to conduct that ceased before EPEA came into force.

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56 (July 23, 1999), No. 98-009-R (E.A.B.), *aff'd*, *Legal Oil and Gas Ltd.* v. *Alberta (Minister of Environment)* (2000), 84 Alta. L.R. (3d) 159 at pages 167-168 (Alta. Q.B.), Clackson J.

57 *Legal Oil* (E.A.B.) at 12 paragraph 26.

58 *Ibid.* at 11 paragraph 25 and n. 17 (citing E.A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978) Can. Bar. Rev. 264 at 276; R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 510).

59 *Legal Oil* (E.A.B.) at 12 paragraph 27.

[70] As discussed in above, the Cirrus Phase II Environmental Site Assessment showed sub-surface pollution adjacent to the underground fuel storage tanks and related equipment used for the former gas station. At this stage in the remediation process, it is fair to assume that the gas station facilities were the source of the pollution found by Cirrus.[60] Because the gas station ceased operating in 1979 and the tanks were supposedly removed before July 1981, the Board also presumes that the pollution sources ceased releasing additional pollution by 1981, well before EPEA came into force in 1993.[61] Thus, since the Order stems from the pollution source, to this extent the Order applies section 102 to conduct that ceased before EPEA took effect.

[71] However, these retrospective aspects of the Order are accompanied by a significant prospective one. The Cirrus Phase II Environmental Site Assessment shows that the pollution has lingered long past EPEA's 1993 proclamation date and, in fact, it is continuing to occur in the environment. The Board notes with particular concern that, since high hydrocarbon vapour levels were observed at the eastern boundary of the site, along 24th street, the Order correctly notes that the pollution is potentially expanding in its geographic scope by migrating off-site.[62]

[72] Of course, the *raison d'etre* for the Order is not that pollution was ever released in the first place, but that it has never been cleaned up. Because of its focus on an ongoing pollution problem, the Order has a considerable prospective character.[63]

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[60] If further investigations by McColl disprove this linkage, McColl can request that the Director modify the Order accordingly.

[61] The Board makes this factual presumption hesitantly, since there was no direct documentation of the tanks' removal. Further investigations conducted pursuant to the Order might reveal continuing *sources* of pollution associated with the gas station. For purposes of this issue, the Board also assumes that the rental equipment companies did not contribute additional pollution to the site. The Board will revisit this assumption later in this Decision.

[62] Order at 3 (Director's Record #4). The Board is also concerned about potential ongoing ground-water contamination, which could have wide geographic consequences due to ground-water flow, but there simply has been insufficient investigation to date to assess this problem. The Cirrus Phase II study was unable to test for groundwater contamination due to the lack of groundwater in seven of eight of the test holes that were made. Cirrus January 1999 report at Executive Summary, and 3-4 (Director's Record #39). However, these 'negative' results do not preclude the risk that groundwater is being exposed to the subsurface pollution.

[63] For chronological purposes, the Board has distinguished above between the *source* of (or conduct or instrument that gave rise to) the pollution, on the one hand, and the pollution's lingering presence in the environment, on the other. The former clearly falls with the legislative definition of a "release", for purposes of applying the jurisdictional prerequisite in section 102(1)(a). See EPEA section 1(ggg) (defining "release" as

[73] The facts in *Legal Oil* provide a somewhat more compelling case than here for prospective application of section 102 because, unlike McColl, the recipient of the order in Legal continued to have ownership and control over the pollution and that, we find, is a valid legislative objective.[64] Nevertheless, both the Order at issue here and the order in *Legal Oil* were prospective in the sense of focusing on an ongoing pollution problem.[65] Thus, the Board disagrees with McColl's assertion that the facts are significantly different than those in *Legal Oil*.[66] Notably, Justice Clackson, of the Court of Queen's Bench, expressly relied on the ongoing nature of the pollution as partial grounds for affirming the Board's decision on the retrospectivity claim in *Legal Oil*.[67]

The Historical Antecedents of Section 102

[74] As explained above, McColl's retrospectivity claim requires a determination of whether the Director's use of EPEA section 102 imposes new legal obligations on conduct that occurred before EPEA was proclaimed into force.

[75] In addressing this element, McColl's chronological focus is on the September 1, 1993 proclamation date of EPEA. In the Board's view, this focus is mistaken. As the Board noted in *Legal Oil*, one of the Legislature's principal purposes in enacting EPEA was to consolidate several then-existing environmental statutes.[68] These predecessor statutes included

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"includ[ing] to spill, discharge . . . deposit, leak, seep, pour, [and] emit. . . ."). The Board need not address whether "release" also includes the ongoing presence of the pollution, as well.

64 *Legal Oil* at 12 paragraph 27.

65 *Ibid.*

66 McColl's Submission at 4 paragraph 10. McColl also attempts to distinguish *Legal Oil* by mis-characterizing that decision as focusing on the ongoing nature of the "release". McColl's Submission at 5 paragraph 11 (citing *Legal Oil* at paragraph 27) and paragraph 12. The paragraph of the *Legal Oil* decision cited by McColl stated that, like the ongoing pollution at the site here, the "*contamination itself*" was ongoing in *Legal* (emphasis added). The Board made no finding that the *source* of the pollution was continuing. McColl also distinguishes the Board's observation in *Legal Oil*, that the geographic extent of the pollution was expanding in that case. McColl's Submission at 5 paragraph 11 (citing *Legal Oil* paragraph 9). This is an inappropriate factual distinction, because there simply has been an insufficient effort to date to determine whether the pollution emanating from the old gas station is continuing to migrate. However, as noted above, the Cirrus Phase II study suggests that there is a serious risk of off-site migration that needs to be addressed further. Of course, one of the Order's purposes is to require McColl to determine off-site migration, so McColl's argument really seeks to put the cart before the horse. Had McColl presented evidence negating the risk of off-site migration, the Board might be more reluctant to apply its decision in *Legal Oil*.

67 *Legal Oil and Gas Ltd.*, 84 Alta. L.R. (3d) at 167-168.

68 *Legal Oil* (E.A.B.) at 13 paragraph 29 (citing EPEA's transitional provisions). See also, *e.g.*, *Syncrude Environmental Assessment Coalition v. Alberta (Energy Resources Conservation Board)* (1994), 17 Alta. L.R. (3d)

the *Clean Air Act*, *Clean Water Act*, and *Hazardous Chemicals Act*, each of which authorized the government to issue remedial orders that are roughly comparable in scope to an EPEA section 102 order, for the environmental media or pollutants covered by each of those statutes.[69]

[76] In particular, section 6(1) of the *Hazardous Chemicals Act* authorized the Environment Minister to issue a chemical control order when, in the Director's opinion, the "…use, handling, storage . . . [or] disposal … [of a] hazardous chemical … adversely affects or is likely to adversely affect the health or safety of any person…." This is a more restrictive threshold than that in section 102, but there is a reasonable argument that the subsurface hydrocarbon pollution observed at the site would cross even this more restrictive threshold given the risks that the pollution may be migrating toward residential areas and given the lack of any evidence that the pollution will not reach groundwater.

[77] Under section 6(2) of the *Hazardous Chemicals Act*, an order could require the person responsible for the released substance to limit or stop the release and to comply with any directions in the order regarding the "… manner in which a hazardous chemical or a substance or thing containing a hazardous chemical or any container of either of them may be handled, stored, used, [or] disposed of...." The Board believes this section provided the government with authority to require a person responsible to investigate and clean up a hazardous chemical that had been released.[70]

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368 at 370 (Alta. C.A.) (referring to EPEA as an "…omnibus environmental statute which repealed some prior environmental legislation…"); Vlavianos, *supra* note 1, at 61-62; Roger Cotton and Alastair R. Lucas, *Canadian Environmental Law*, 2d ed. (Ontario: Buttersworths Canada Ltd., 1991), Vol. 1 at Commentary:8:1.

[69] See *Clean Air Act*, R.S.A. 1980, c. C-12, s. 13 ("emission control orders" requiring "procedures to be followed in the control or elimination of the contaminant"); *Clean Water Act*, R.S.A. 1980, c. C-13, s. 14 (same, in context of water pollution); *Hazardous Chemicals Act*, R.S.A. c. H-3, s. 6 ("chemical control orders"); see also Vlavianos, *supra* note 1 at 61-62 ("Prior to the enactment of EPEA in 1993, a number of environmental statutes addressed the issue of releases of substances into the environment..... With significant modifications, many of the features of these former statutes were brought forward in the EPEA and, in particular, in Part 4, Division 1, entitled 'Release of Substances Generally'."); Cotton and Lucas, *supra* note 67, Vol. 1 at Commentary:8:1 n. 5 (referring to the *Hazardous Chemicals Act* "control order" and *Clean Water Act* stop work order as "predecessor provisions" to *EPEA* s. 102).

[70] See *Bavarian Lion Co. v. Alberta (Director of Pollution Control)* (1990), 76 Alta. L.R. (2d) 394 (Alta. C.A.), *appeal denied*, [1991] 1 S.C.R. vi (affirming s. 6 order requiring off-site disposal of PCB-contaminated material stored by the recipient of the order). But see *Appealing Chemical Control Orders in Alberta* (1991), 6 Environmental Law Centre Newsletter No. 1 at 1 and n.3 (citing a contrary conclusion reached by the "Hazardous Chemicals Advisory Committee," in *Alchem Inc. and Sokil Express Lines Ltd. v. Director of Pollution Control* (22 December 1989) (H.C.A.C.), but speculating that the Advisory Committee's decision was overruled by the Alberta Court of Appeal's decision in *Bavarian Lion Co.*).

[78] The *Hazardous Chemicals Act* was enacted and proclaimed into force on September 15, 1978 and, thus, like EPEA, it may have post-dated the date pollution was first released at the site.[71] But the *Hazardous Chemicals Act* was in effect roughly one year before the gas station ceased operating and roughly eight years before McColl's predecessor Texaco sold the site to Al's Rentals. In all likelihood, Texaco's continued ownership would have been sufficient for it to be named a person responsible under that Act and, thus, the government could have issued Texaco a chemical control order requiring the same actions as those required by the Director's Order to McColl.[72]

[79] No doubt, McColl might have questioned whether the Legislature intended the *Hazardous Chemicals Act* to apply to the site, since the pollution source began and may well have ceased prior to that Act's coming into force.[73] A partial response to this claim, however, is that McColl's predecessors faced potential legal liability for the pollution even before the *Hazardous Chemicals Act* took effect, under the historic common law tort of nuisance.[74]

[80] McColl's legal risks under the common law and even the *Hazardous Chemicals Act* were arguably less significant than under EPEA. The Board's point is simply that EPEA section 102 has considerable historical antecedents. As the Board previously concluded, "….

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[71] S.A. 1978, c. 18. Proclaimed into force on September 15, 1978 (74 Alberta Gazette No. 18 at 3210).

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

[73] But see *Legal Oil* (E.A.B.) at 12 paragraph 27 (EPEA section 102 order was being applied prospectively in that it was directed at present well-site owner who, by lease, remained legally responsible for all contamination related to operation of the well).

[74] This liability risk was likely related to the risks of off-site, including groundwater, contamination. See, *e.g. Legal Oil* (E.A.B.) at 13 paragraph 28 (citing *Colonial Developments (IV) v. Petro-Canada*, [1996] A.J. No. 1140 (Alta. Q.B.) (imposing tort liability for off-site hydrocarbon contamination from defendant-oil company's land, even assuming the company had not itself caused the release but had simply 'adopted the nuisance' created by prior owners)); *Canada v. Sun Diamond (The)*, [1984] 1 F.C. 3 at 25-30 (F.C.T.D.), Walsh, J. (allowing public nuisance action to recover public costs for abating an oil spill in navigable waters). See also, *e.g.*, Allen M. Linden, *Canadian Tort Law*, 5th ed. (Toronto: Buttersworth, 1993) at 503-534 (describing common law tort of "nuisance"); Beth Bilson, *The Canadian Law of Nuisance* (Toronto: Buttersworth, 1991) at 45 (referring to common law of nuisance as a "constructive adjunct" of modern anti-pollution legislation and to latter as an "extension" of the former). This legislative 'codification' and enhancement of the common law is a consistent pattern in the environmental field. See, *e.g.*, *Friends of the Oldman River Society v. Canada* (1992), 88 D.L.R. (4th) 1 (S.C.C.) at 37 ("However, the . . . [Navigable Waters Act] was merely declaratory of the common law. To the extent that a structure interfered with the public right of navigation, it was a public nuisance. . . ."); Cotton and Lucas, *supra*, Vol. 1 at Commentary:18:1 ("Long before environmental quality became a significant public concern in Canada, private civil actions were brought to protect a person's rights to clean air and water. Actions of this type were . . . brought to obtain either damages or injunctive relief.").

the obligations created by that section did not spring up from a legal vacuum when the Legislature proclaimed . . . [EPEA] into force."[75]

The Bottom Line: There is No Bright Line

[81] As in *Legal Oil*, the Board concludes that it is impossible to decide, in perfect black and white terms, whether the Order applies section 102 retrospectively. Rather, the Board views retrospectivity in terms of a spectrum. The Order's location on the spectrum, in turn, should determine the strength of the presumption against retrospective application or, in other words, the extent to which the presumption should apply.[76]

[82] Using this approach, the Board concludes that the Director's application of section 102 has retrospective aspects, but it cannot be described solely or even largely as retrospective. The legal obligations under section 102 of EPEA have significant historical roots, and the Order applies section 102 in a prospective fashion with respect to the Order's focus on ongoing pollution.

[83] McColl appears to take issue with this spectrum approach, by stating that "…[t]here is no law of shading. This is not a labelling [sic] issue. This is substantive law."[77] The Board is sympathetic to McColl's desire to apply the retrospectivity concept in black and white terms, but the Board simply cannot do so. As explained above, the Order has retrospective elements, but cannot be characterized solely or even largely in retrospective terms.[78]

2. Is the Director's Application of Section 102 Contrary to Legislative Intent?

[84] According to the Supreme Court of Canada, "…statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act."[79] However, this presumption is simply one of

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75 *Legal Oil* (E.A.B.) at 14 paragraph 30.

76 *Legal Oil* (E.A.B.) at 14, paragraph 31.

77 McColl's Submission at 4 paragraph 8.

78 If forced to use either/or terms, the Board would conclude that, on balance, the Order does not apply section 102 retrospectively, because of the Order's focus on ongoing pollution and because of the historical roots of section 102.

79 *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271 at 279; *Legal Oil* (E.A.B.) at 15 paragraph 32 and n. 27.

several judicial tools for interpreting legislation in order to give effect to the Legislature's intent.[80] At the very least, these other tools remain relevant for determining whether a retrospective application is required expressly or by necessary implication.

[85] In *Legal Oil*, the Board analyzed the terms of EPEA together with extrinsic interpretation guides, and concluded that the Legislature intended to apply section 102 to the circumstances giving rise to the Order under appeal.[81] The Board reached this conclusion, in part, based on its view that the order had little retrospective application and, thus, that a weak presumption was warranted. However, the Board also advised that it would have reached the same conclusion even viewing the presumption at full strength.[82]

[86] In a synopsis, the Board's conclusions in *Legal Oil* were based on:

- the plain text of section 102(1), which applies to present, future, and past releases;[83]
- the definition of "person responsible" in section 1(ss), which includes persons based on past relationships to the released substances;[84]
- a comparison of these textual provisions with similar and contrasting provisions in EPEA;[85]
- a reading of these sections in light of EPEA's far-reaching environmental objectives and the presumption, in section 10 of the *Interpretation Act*,

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80 See, *e.g.*, Pierre-Andre Cote *The Interpretation of Legislation in Canada*, 2nd ed. (Quebec: Yvon Blais, Inc., 1991) [Cote, 2nd ed.] at 112 (In resolving a retrospectivity issue, "[t]he role of both judge and reader is to detect this [legislative] intent, using all available indications. The text of the enactment itself, the presumptions and the appreciation of its consequences are merely guides to the discovery of legislative intent."); *ibid*. at 132 (the presumption against retrospective legislation is not a constitutional rule or rule of law, just a "'rule of construction'" (citation omitted)) (cited in *Legal Oil* (E.A.B.) at 15 n. 26).

81 In light of the Board's roughly seven-page analysis of legislative intent in *Legal Oil*, the Board is frankly puzzled by McColl's criticism that the Board's decision in *Legal Oil* "does not say how . . . [the Legislature's] intention is to be determined." McColl's Submission at 3 paragraph 5(a). Justice Clackson expressly referenced and affirmed the Board's legislative interpretation. *Legal Oil and Gas Ltd.*, 84 Alta. L.R. (3d) at 168. McColl attempts to distinguish Justice Clackson's decision because it was based on "only the narrow reasons given there. . . ." McColl's Submission at 4 paragraph 9. But this point ignores the fact that Justice Clackson's so-called "narrow reasons" included an express affirmation of the Board's analysis of the Legislature's intent.

82 *Legal Oil* (E.A.B.) at 21 paragraph 43.

83 *Legal Oil* (E.A.B.) at 16 paragraph 34. McColl's argument, that *EPEA* Part 4, Division 1 generally "deals with releases that occur after the proclamation of the Act," fails to acknowledge the express reference to past releases in section 102. McColl's Submission at 4 paragraph 7.

84 *Ibid.*

85 *Ibid.* at 16-18 paragraphs 35-36.

R.S.A. 1980, c. I-7, favoring a fair, large, and liberal interpretation to best ensure achievement of the Act's objectives;[86] and

- the applicability of the public protection exception to the presumption against retrospective application.[87]

[87] The Board adopts its analysis in *Legal Oil* here and, thus, need not repeat that analysis in full.

[88] McColl seeks to refute that legal interpretation, in part, by arguing that section 102 must be read in light of the other provisions of EPEA Part 4, Division 1, especially sections 97-101, "…all of which are clearly prospective."[88] The Board does not find this contextual argument compelling, in part, because most of the remaining sections of Part 4, Division 1 mirror the temporal language of section 102 and, in some cases, provide follow up steps to section 102 orders.[89] Because of their similarity and direct relationship to section 102, these later sections can hardly be said to provide an express prospective context for interpreting narrowly the plain reference in section 102 to past releases.

[89] In short, the Board finds that Part 4, Division 1 provides a comprehensive legislative scheme for addressing past, present, and future pollution and in a manner that builds on, and is integrated with pollution legislation that preceded EPEA. A retrospective application

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[86] *Ibid.* at 15 paragraph 32 and 18 paragraph 37. McColl claims that Legislature's rule of interpretation, in section 10 of the *Interpretation Act*, is "circumscribed" by the judicial rule against retrospectivity (McColl's Submission at 3 paragraph 5(c)), but McColl cites no legal authority explaining why or how that legislative rule should be circumscribed. *But see Legal Oil* (E.A.B.) at 15 n. 28 (citing a Supreme Court of Canada decision that the federal *Interpretation Act* trumps a historical judicial presumption regarding construction of criminal statutes). At any rate, the Board has trouble accepting that judicial rules of legislative interpretation should negate or even take precedence over the Legislature's generic rules for interpreting its own statutes.

[87] *Ibid*. at 15-16 paragraph 33 and n. 29 and at 18 paragraph 38. Justice Clackson's decision noted especially the Board's consistency with this "public protection" exception. *Legal Oil and Gas Ltd.*, 84 Alta. L.R. at 168 (citing *Brosseau v. Alberta Securities Commission,* [1989] 1 S.C.R. 301); *cf.* McColl's Submission at 3 paragraph 5(d) (arguing that *Brosseau* was "flawed").

[88] McColl's Submission at 4 paragraph 7. *EPEA* sections 97 and 98 prohibit substance releases under varying circumstances. Sections 99 and 100 impose reporting requirements for various persons associated with prohibited releases. Section 101 requires responsible persons to take actions to remedy certain substance releases.

[89] Sections 103 and 104 provide Alberta Environment with authority to require emergency measures, based on present, future, and past releases, using terms nearly identical to those used in section 102. Section 105, dealing with orders to abate offensive odours, also uses temporal terms that are similar to those in section 102. Sections 105.1 – 105.3 provide the Director with authority to grant "certificates" approving the remediation of past releases pursuant to the terms of a section 102 order. The remaining sections of Part 4, Division 1 provide the Environment Minister and Lieutenant Governor in Council authority to adopt various regulations relating to substance releases.

of section 102 would appear to be a necessary implication from this comprehensive regulatory approach.[90]

[90] Notably, McColl does not appear to deny that EPEA was intended to address persistent pollution that originated before EPEA came into force; McColl simply implies that the contaminated sites provisions in Part 4, Division 2, rather than section 102 orders, were intended to serve that role. The Board finds this contextual argument unpersuasive, because the temporal references in section 102 and Part 4, Division 2 are roughly identical. As the Board explained in *Legal Oil*, they both refer to past releases without distinguishing between releases that originated before and after EPEA came into force.[91] There is simply no textual grounds for concluding that both apply to historical pollution, but that only one applies to historical pollution that originated before EPEA.

[91] As evident from the discussion above, the Board is not perfectly clear as to the precise division of labour between environmental protection orders issued under section 102 (of Part 4, Division 1) and section 114 (of Part 4, Division 2). But the Board *is* convinced that any definition of this division that hinges on the proclamation date of EPEA makes no sense whatsoever.[92]

[92] In sum, the Board concludes that the Legislature intended to allow the Director to issue the section 102 Order at issue here, given the Order's focus on an ongoing pollution problem and the terms and overall context of section 102.

D. Second Appeal Issue: Should the Director Have Named Other Parties as Responsible Persons in the Order under Section 102?

[93] McColl argues that, even if the Director had legal authority to issue an order under section 102, the Director erred by failing to name Highway Realties and Al's Rentals as persons responsible in the Order.

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[90] This comprehensive approach is inferable as well by the title of Part 4, Division 1—"Release of Substances *Generally*" (emphasis added).

[91] *Legal Oil* (E.A.B.) at 17-18 paragraph 36.

[92] McColl raises equitable arguments for basing an Order on section 114, and related contaminated sites provisions in Part 4, Division 2, instead of section 102. See *infra* Part III.D and E. Whatever their strength on equitable grounds, these arguments have nothing to do with whether pollution at a given site originated immediately

[94] This appeal ground raises the threshold legal issue of whether EPEA allows the Director to name more than one person responsible in a section 102 order. Section 102(1)(b) authorizes the Director to issue an order to "*the* person responsible" for the pollution (emphasis added). Notwithstanding this reference to a singular person, the definition of "person responsible," in section 1(ss) of *EPEA*, clearly contemplates that multiple people may be simultaneously responsible. Section 226(1) confirms this reading, by providing for joint and several liability for all *EPEA* environmental protection orders issued to more than one person. Thus, the Director clearly has authority to name more than one person in a section 102 order.

[95] While section 102 allows the Director to name more than one person responsible, the Board does not read that section as requiring the Director to name all persons who fall within that category. Rather, the EPEA Director allows the wide discretion in deciding which persons responsible to name in a section 102 order.

[96] With this legal context in mind, the Board addresses below McColl's claims with respect to each of the other alleged persons responsible.

1. Highway Realties

[97] McColl argues that Highway Realties should have been added as a person responsible due to its roughly twenty-four year ownership of the property, during which time it leased the site (to McColl's predecessors) for the operation of a gas station.

[98] The Board disagrees. Even assuming Highway Realties is a person responsible under section 102; the Board sees no practical purpose in adding Highway Realties to an order issued under section 102, because the company no longer exists. In addition, there is no clear evidence that there are individuals or companies who should be held indirectly responsible through their relationship with Highway Realties.[93]

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before or after the *EPEA* proclamation date.

[93] Ironically, the evidence suggests a possibility that Highway Realties was a subsidiary of Texaco Canada Inc. and, thus, is linked to McColl as Texaco's successor. See *supra* Part II. The Board can only speculate on this linkage, but even if it was true, it would simply reinforce McColl's liability and the uselessness of adding Highway Realties as an additional "person responsible".

[99] McColl argues that Highway Realties' "…inability to pay is not grounds for failing to name it and failure to do so is an error."[94] However, McColl's legislative cites for this proposition are all in Part 4, Division 2, relating to the government's assumption of responsibility for orphan shares at officially designated contaminated sites. Those provisions are inapplicable to the Board's issuance of an order under section 102 which, as noted above, gives the Director wide discretion to choose among responsible persons. This discretion undoubtedly includes discretion to forego naming a party that no longer exists.[95]

2. Al's Rentals

[100] McColl tries to shift part, or all, of its burden, to Al's Rentals, based on two grounds: pollution allegedly caused directly by Al's Rentals; and, Al's Rentals' voluntary assumption of responsibility - through its contract with Texaco Canada Inc. - for any pollution caused by McColl's corporate predecessors. In response, the Director appears to argue that Al's Rentals is not a person responsible on either of these grounds. The Board agrees, based on the current facts.

Pollution from Facilities Operated by Al's Rentals

[101] McColl claims the Director failed to consider the "… probability that some, and probably all, of the contamination came from Al's Rentals' use of the property...." In support of this assertion, McColl cites both: the Cirrus Phase I Environmental Site Assessment, which observed the presence of Al's Rentals' above-ground fuel storage facilities and some staining of ground near a few of those facilities; and, the actual pollution monitored in the Phase II Environmental Site Assessment.[96] The Board concurs with the Director that the evidence to date does not link the pollution to Al's Rentals.

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94 McColl's Submission at 13 paragraph 37.

95 On the other hand, Highway Realities' involvement in the site would seem relevant for purposes of deciding whether to issue an order under section 102 or 114. The Board addresses that discretionary decision below in part III.E.

96 McColl's Submission at 14-15 paragraphs 42-43.

[102] While the Phase I report observed some surficial staining from Al's Rentals' fuel storage containers, the Phase II on-site vapour tests near those containers suggest the staining has not penetrated beneath the asphalt surface.

[103] By its very nature, the Phase I above-ground visual assessment could not identify any problems that may have been caused by the gas station, since there did not appear to be any above-ground facilities associated with the gas station when the assessment was done.[97] However, the Phase II assessment found sub-surface pollution adjacent to the location of the former gas station's underground tanks.

[104] In short, there is ample evidence at this time to link the sub-surface pollution, which is deep, to the former gas station.[98]

[105] This being said, if further investigation by McColl pursuant to the Order reveals that Al's Rentals did cause pollution, McColl may request that the Director add Al's Rentals to the Order on that basis.

Al's Rentals' Purchase of the Site

[106] As noted above, McColl's claim also relies on Al's Rentals' agreement with Texaco Canada Inc. to purchase the property "as it stands."[99] The Board disagrees with McColl that Texaco's contractual relationship with Al's Rentals should absolve McColl of liability under the Order. The liability created by section 102 is to the public and is determined, not by private contract principles, but by EPEA.[100] McColl is clearly a person responsible based on its relationship to the site before it was sold to Al's Rentals. The Board finds nothing in section

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97 The Board notes the irony of McColl's reliance on this unavoidably limited assessment, given McColl's own unwillingness to conduct on-site assessments or even to provide any documentation of its predecessors' removal of the underground tanks and decommissioning of the gas station.

98 The Board notes the additional irony of McColl's attempt to pin the pollution on Al's Rentals, while McColl also arguing that Al's Rentals should have considered the "reasonable possibility" the site was polluted when Al's Rentals purchased the site (McColl's Submission at 15 paragraph 45) and that the purchase price had been discounted to account for this pollution (*ibid.* at 16 paragraph 48).

99 McColl's Submission at 15-16.

100 McColl may well have a contractual claim against Al's Rentals for indemnity for any liability that McColl incurs under the Order, but that dispute is not before this Board.

102 or related provisions of EPEA that allow a person responsible for pollution to unilaterally end that legal status through private contractual arrangements.[101]

[107] The Board also disagrees with McColl that Al's Rentals' purchase of the site renders Al's Rentals a person responsible under section 102. As noted previously, section 1(ss) of EPEA defines "person responsible" for a substance to include the owner and a previous owner of the substance and "…every person who ... has had charge, management or control of the substance...." The Legislature defined these categories in relation to the pollution, not the overall property where the pollution is located. The Board finds it difficult to equate the two, especially, when that definition is read in light of the section 96 definition of "person responsible for a contaminated site" for purposes of section 114 orders. The latter definition consists of persons responsible for the substance causing the contamination (i.e. the categories of "persons responsible" in section 1(ss) for purposes of section 102 orders) as well as the contaminated site owner and any prior site owner who owned the site when the pollution occurred. If the Legislature had intended that these site owners were already subsumed within the definition of "persons responsible" for the substance, in section 1(ss), the Legislature would have had no need to list those owners as additional categories of "persons responsible" in section 96.

[108] The Board recognizes the potential unfairness of construing section 102 (and the "person responsible" definition in section 1(ss)) to be inapplicable to current and past owners, by virtue of their ownership alone.[102] This result may be particularly unfair where, as McColl alleges here, the owner purchased the site either knowing of its polluted condition or of the risk that it might be polluted. However, there is some remedy for this potential inequity: the person named in the section 102 order may request that the Director consider designating the site as contaminated under section 110 and related provisions of Part 4, Division 2. If that designation

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[101] By the same token, a party may become a person responsible due to private contractual arrangements with other parties. This issue is discussed in more detail below.

[102] The Board stresses this qualifying phrase, because site owners may qualify as "persons responsible" for reasons other than their mere ownership, for example, if a property owner conducts activities on the property that discharges pollution. Even if an owner leases the property to another party who releases pollution, the owner may also be considered to have had "ownership" or "charge, management, and control" of the pollution. In addition, a person who purchases a polluted site and takes affirmative action that exacerbates the polluted condition might also be considered a "responsible person" under section 102. These examples are consistent with the Board's decision in *Legal Oil*, that the current well site lessee was a "responsible person" because he assumed responsibility for the pollution under the well-site lease.

is warranted, from the standpoints of both the legal requirements for designation and in the Director's discretionary opinion, that designation would allow the Director to expand the ambit of liability to present and past site owners who, by contract, assume responsibility for the pollution.

[109] If, as here, a section 102 order has already been issued, but the Director later designates the site as contaminated under section 110, the Director can then convert the section 102 order to a section 114 order, with whatever modifications are appropriate including, potentially, the naming of site owners as additional persons responsible under the order.

E. Third Appeal Issue: Did the Director Violate Rules of Natural Justice by Failing to Formally Follow Alberta Environment Guidelines for the Designation of Contaminated Sites?

[110] McColl argues that the Director failed to follow Alberta Environment's April, 2000 "Guideline for the Designation of Contaminated Sites Under the *Environmental Protection and Enhancement Act*" (the "Guideline") and that this failure was a breach of natural justice because McColl had a legitimate expectation that the Guideline would be followed.

[111] The Board's answer to this claim is that the Guideline addresses the process for *designating* a contaminated site under Part 4, Division 2; it does not purport to apply to the Director's procedure for issuing an order under section 102 of Part 4, Division 1. This focus is evident from the Guideline's title, which refers to the "Designation of Contaminated Sites" and from the Guideline's introduction on page 1, which specifically distinguishes the Director's authority to issue orders for substance releases - i.e. section 102 orders - from the Director's designation of contaminated sites under Part 4, Division 2 of *EPEA*. The remainder of the Guideline expressly applies to the designation process in section 110 of Division 2, as well as to other procedural steps in that Division. Thus, McColl did not have a legitimate expectation that the Director would apply the Guideline for purposes of issuing an order under section 102.

[112] McColl argues as well, however, that the Guideline provided McColl with a legitimate expectation that the Director would consider designating the site as contaminated under section 110 of Part 4, Division 2. McColl bases this argument on the first page of the Guideline that states that a proponent may request that Alberta Environment consider designating

a site as contaminated, if Alberta Environment does not initiate that process on its own. According to McColl, Al's Rentals' submission of the Cirrus Phase I and II assessment to, and related communications with, Alberta Environment constituted a proponent's request for a contaminated site designation.[103]

[113] This claim fails for two reasons. First, the Cirrus Reports and related records do not on their face purport to reflect a request for contaminated site designation, as attested by McColl's inability to provide any direct quotes from those records in order to support its claim.[104]

[114] Second, even if Al's Rentals did make a designation request, the legitimate expectations of a Director's response should inure to Al's Rentals, not to McColl. Yet, through its denial of ever having made such a request,[105] Al's Rentals clearly does not desire a designation. The Board doubts that principles of natural justice allow one party to enforce the legitimate expectations of a second party, at least, where the second party is itself uninterested in that supposedly expected result.

[115] The Board notes that McColl has been free to make its own request that the site be designated as contaminated, but McColl has apparently chosen not to do so.

[116] While concluding that McColl has no legitimate expectation that the Director would apply the Guideline, the Board also adds that the Board's recommendations in this Decision will address many of the supposed Guideline violations that McColl alleges, relating to the Director's consideration of other persons responsible and of applying the contaminated sites process in Part 4, Division 2.

[117] The Board also notes, with amazement, the following two violations alleged by McColl:

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[103] McColl's Submission at 7 paragraph 21.

[104] In fact, the Guideline is dated April, 2000, so it was not even produced until well after the Cirrus Reports and even after the February 11 and 14, 2000 communications to Alberta Environment from counsel for Al's Rentals and from Cirrus, respectively. Thus, the Reports and follow-up communications could not possibly have made designation requests pursuant to the Guideline.

[105] Submission of Al's Rentals at 11 paragraph 40 ("At no time did Al's Rentals request to have the property designated as a contaminated site. . . .").

- The Director failed to contact McColl to give McColl a chance to express its concerns about being named a person responsible and about the existence of other persons responsible.[106]
- "There were no negotiations between the several available responsible persons ... in an attempt to reach a voluntary agreement concerning site remediation and cost allocation...."[107]

[118] The record belies these two claims. As discussed in the background section above, the appeal record reflects that Al's Rentals attempted to work out the pollution problem with McColl - through its parent company Imperial Oil - but Imperial Oil rebuffed those attempts with the assertion that it was legally immune from liability, period.

[119] As soon as it took up the file in earnest, Alberta Environment requested a meeting with Imperial Oil to discuss the problem, but Imperial Oil declined this invitation, as well. It was not until the Director was on the verge of issuing the Order that he could convince Imperial Oil to meet face-to-face and, even then, Imperial volunteered no new information but simply stood behind its legal position.

[120] Finally, there is no evidence Imperial Oil/McColl offered to share the costs of the Cirrus Site Assessments, or to conduct additional studies of its own to help define the scope, nature, and possible origins of the pollution problem. And most of the research of corporate ownership and use of the site appears to have been conducted by Alberta Environment, Cirrus, and Al's Rentals. Other than agreeing to facts that were evident from the few records that could be found by the other parties, Imperial Oil/McColl appear to have provided little help in clarifying the corporate chain and operation of the site, and the manner and timing of removal of the underground storage tanks and decommissioning of the overall gas station.

[121] In short, McColl was given ample notice of the Director's action, ample opportunity to make its case to the Director, and ample chance to negotiate a cooperative solution to the problem. The spirit, if not the letter, of the Guideline's procedures has been upheld.

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106 McColl's Submission at 8 paragraph 23.

107 McColl's Submission at 9 paragraph 26.

F. Fourth Appeal Issue: Should the Director Have Addressed the Site Under the Contaminated Sites Provisions in Section 114 of EPEA Rather Than Through an Order Under Section 102?

[122] McColl's fourth and final appeal ground is that the Director exceeded his jurisdiction or otherwise erred by issuing the Order pursuant to section 102 rather than section 114 of EPEA.[108]

[123] The Board notes, at the outset, that McColl's focus on section 114 as an alternative to section 102 is somewhat misleading. As explained above, the Director's issuance of a section 102 order involves a stand-alone process; by contrast, a section 114 order must be preceded by a comprehensive public process for designating the site as contaminated and other procedures outlined in Part 4, Division 2. Thus, the Director can consider applying Part 4, Division 2 generally as an alternative to issuing a section 102 order, but the Director's commencement of the contaminated sites process does not mean that a section 114 order will ultimately be issued and certainly not in the time it would take to issue a section 102 order. Given this reality, the Board is wary that McColl's suggestion of a section 114 order, as an alternative to a section 102 order, may reflect a desire to invoke a cumbersome, time-consuming process simply to forestall the Director's issuance of *any* remedial order - i.e. under either section 114 or 102 - that includes McColl.

[124] McColl's jurisdictional claim rests on its views that only the contaminated sites provisions in Part 4, Division 2 were intended to apply to historical pollution and to be applied retrospectively.[109] The Board has previously made clear, however, that section 102 expressly applies to pollution that "has occurred" - i.e., to *past* or historic pollution generally. And, the

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[108] Within its discussion of this ground, McColl also claims that the relief required by the Order does not fall within the scope of remedial work that the Director is authorized to require in an order issued under that section. McColl's Submission at 19-20 paragraphs 61-63. This claim is patently incorrect, in part, because it ignores the broad authority granted by section 102(3), which allows the Director to require the person named in the order to "take any measures that the Director considers necessary. . . ." In addition, the basic remedial steps required in the Order are consistent with the steps that are listed in section 102(3)(a-i), as specific subsets of the Director's broad general remedial authority in that section, even if the requirements of the Order do not match those listed steps word-for-word.

[109] McColl's Submission at 17-18. McColl's submission is unclear as to whether McColl treats these quoted terms synonymously. For purposes of this appeal ground, the Board views "historic" pollution as pollution that originated at any time in the past; "retrospectivity" refers to a sub-set of historic pollution—i.e. pollution that originated before *EPEA* came into force.

Board has already explained its disagreement with McColl's retrospectivity claim. Thus, the Board disagrees that there has been any jurisdictional error.

[125] The Board treats McColl's claim of non-jurisdictional error as a claim of erroneous exercise of discretion. In addressing this claim, the Board notes at the outset that EPEA provides no express criteria for guiding the Director's exercise of discretion in deciding whether to issue an order under section 102 or to apply the contaminated sites process in Part 4, Division 2.

[126] Ordinarily, the absence of express legislative criteria for a discretionary decision suggests that the decision-maker has quite broad discretion. However, the Board notes several factors that bear on the Director's discretion here.

[127] First, the record shows that Alberta Environment has never issued an order under section 114, but has used section 102 (or 103) relatively frequently.[110] The Board suspects that the relative disuse of section 114 may be overstated because there are instances where the designation of a site as contaminated under section 110 prompts the parties to reach a negotiated solution that precludes the need for a formal section 114 order.[111] Nevertheless, the Board remains concerned that Alberta Environment's apparent preference for section 102 over section 114 might render the latter meaningless and, thus, would frustrate the Legislature's intent in adopting section 114.

[128] Second, absent legislative criteria for choosing between section 102 and the contaminated sites process in Part 4, Division 2, the Board would hope that Alberta Environment adopts its own generic criteria for making this choice. Yet, the only criterion evident is the statement, in the Guideline (page 1), that the contaminated sites designation "…will only occur as a last resort when there are no other appropriate tools."

[129] The Board presumes that Alberta Environment adopted this last resort policy due to the cumbersome, time-consuming and resource-intensive nature of the contaminated sites process, and to the relatively rigorous "*significant* adverse effect" standard for designating

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[110] Agreed Statement of Facts at paragraphs 21-24 and accompanying exhibits.

[111] The record does not show the relative use of sections 102/103 and the designation of contaminated sites under section 110. This might be a more relevant comparison than comparing the number of section 102/103 orders and the number of section 114 orders.

contaminated sites.[112] In these respects, the contaminated sites process may provide the slowest tool for actually cleaning up a polluted site.

[130] On the other hand, the contaminated sites provisions offer considerable benefits that other tools - including section 102 orders - may not provide. From McColl's standpoint, of course, these benefits include the chance for an allocation of some of the cleanup responsibility to a present or recent owner who may have contractually assumed responsibility for the pollution. This allocation is arguably more equitable than the joint and several liability for complying with section 102 orders. While joint and several liability is theoretically more efficient from the public's standpoint, an equitable allocation may better achieve environmental objectives by engendering a greater buy in to the remedial solution among the responsible parties. In other words, the fairest solutions may also be those that provide the greatest degree of environmental protection, as well.

[131] The Board offers these observations, not as hard-and-fast rules, and nor to suggest that there should be an implied *presumption* in favor of using the contaminated sites process over issuing section 102 orders. The Board's point is simply that Alberta Environment's justification for its last resort policy should be continually reviewed.

[132] In summary, the Board believes that the section 102 Order should remain in place and become immediately effective, so that McColl can begin work to further delineate the nature and magnitude of the pollution problem. While McColl may ultimately be able to convince the Director that its liability should be shared with (or, perhaps, entirely to) other parties in a contaminated sites process, there is ample evidence at present to warrant requiring McColl to get on with the overall remediation process at this time. In particular, the nature and magnitude of the risks to adjacent residences and to groundwater should be determined as soon as possible.

[133] In sum, the Board believes the section 102 Order should remain in effect. If, new evidence appears that implicates a current owner or anyone else, and in particular someone who has not only owned, but managed the property at the time that release occurred, the Director can

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[112] See *supra* Part III.A. The Board suspects that the high levels of subsurface hydrocarbons found adjacent to 24th st, directly across from residences, may be enough to cross the "significant adverse effect" threshold in s. 110 for designating the site as contaminated under section 110. However, the Board leaves this determination to the Director, in the first instance.

commence the contaminated sites designation process - i.e., the section 102 Order can be converted to a section 114 order, and modified as appropriate, if issuance of the latter becomes warranted.[113]

IV. RECOMMENDATIONS

[134] For the reasons given above, the Board recommends that the Minister:

1. confirm that the Order properly applied section 102 to historic pollution at the site, even to the extent the pollution originated before *EPEA* came into force;
2. confirm the Director's decision to forego naming Highway Realties and Al's Rentals in the Order;
3. confirm that the Director did not violate principles of natural justice by issuing the Order without formally applying the Guideline for Designating Contaminated Sites; and
4. direct the Director to activate the existing Order immediately under section 102 and, if new evidence supports it, to apply the procedures in Part 4, Division 2 to the site.

[135] Attached for the Minister of Environment's consideration is a Ministerial Order implementing these recommendations.

[136] Pursuant to section 93 of the Act, the Board recommends that notice of this decision be given to:

- Mr. Robert White, Q.C., and Ms. Jamie Dee Larkam, Lucas Bowker and White, representing McColl-Frontenac Inc.;
- Mr. Grant Sprague and Mr. William McDonald, Alberta Justice, representing Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment; and
- Mr. Alex MacWilliam, Fraser Milner Casgrain, representing Al's Equipment Rentals (1978) Ltd.

Dated on December 7, 2001, at Edmonton, Alberta.

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William A. Tilleman, Q.C.

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[113] The Board cautions, however, that a negative contaminated site designation is not necessarily a valid reason for rescinding the section 102 order.

V. DRAFT MINISTERIAL ORDER

Ministerial Order

/2001

Environmental Protection and Enhancement Act
S.A. 1992, c. E-13.3

Order Respecting Environmental Appeal Board
Appeal No. 00-067

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 92 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order respecting Environmental Appeal Board Appeal No. 00-067.

Dated at the City of Edmonton, in the Province of Alberta this _____ day of _____, 2001.

_____
Honourable Dr. Lorne Taylor
Minister of Environment

Draft Appendix

With respect to the decision of Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment (the "Director"), to issue Environmental Protection Order No. 2000-08 (the "EPO") dated November 2, 2000, under the *Environmental Protection and Enhancement Act*, to McColl-Frontenac Inc., I, Dr. Lorne Taylor, Minister of Environment:

1. order that the decision of the Director respecting the EPO is confirmed; and

2. further order the Director to activate the EPO immediately under section 102 and, if new evidence supports it, to apply the procedures in Part 4, Division 2 to the site.

Ministerial Order

01/2002

Environmental Protection and Enhancement Act
S.A. 1992, c. E-13.3

Order Respecting Environmental Appeal Board
Appeal No. 00-067

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 92 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order respecting Environmental Appeal Board Appeal No. 00-067.

Dated at the City of Edmonton, in the Province of Alberta this 10th day of January, 2002.

"original signed by"
Honourable Dr. Lorne Taylor
Minister of Environment

Appendix

With respect to the decision of Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment (the "Director"), to issue Environmental Protection Order No. 2000-08 (the "EPO") dated November 2, 2000, under the *Environmental Protection and Enhancement Act*, to McColl-Frontenac Inc., I, Dr. Lorne Taylor, Minister of Environment:

1. Order that the decision of the Director respecting the EPO is confirmed; and

2. Further order the Director to activate the EPO immediately under section 102 and, if new evidence supports it, to give due consideration to applying the procedures in Part 4, Division 2 to the site.