



The Rainbow Spill:

A Case of Crime
and (No) Punishment

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Research and writing

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EXECUTIVE SUMMARY

The February 2013 findings of Alberta's Energy Resources Conservation Board (ERCB) investigation into the April 2011 Rainbow Pipeline spill were damning.

- The cracks in the Rainbow pipeline that caused it to spill oil into the wetlands near the Lubicon Cree community of Little Buffalo should have been identified and repaired by the pipeline's owner, Plains Midstream.
- The 28,000-barrel spill would have been much smaller if the company had not restarted the pipeline three times after the sounding of the first alarm indicating a leak.
- The company violated a number of provincial regulations and failed miserably in its responsibility to communicate with local communities harmed by the spill.¹

Yet despite these findings, neither the ERCB nor the provincial government pursued the available legal or financial sanctions against the company.

Instead – as internal documents obtained by Greenpeace under the Freedom of Information and Privacy Act reveal – the prime concern of both the regulator and the Alberta government was not to protect the affected communities or the environment but to limit the damage to the oil industry's public image. Our specific findings include:

- The ERCB leadership rejected a request from their own investigation team for a public inquiry into the spill. Such a public inquiry – if it had been carried out in 2011 – might well have helped to reveal the systemic problems that contributed to lax oversight and future leaks.
- When he was finally forced to launch a public investigation of pipeline safety in response to public pressure, Alberta's Energy Minister worked closely with the oil industry to structure the review in a way that would limit the damage to the sector's reputation.
- Regulators never did check to see if the company had conducted the required inspections of defective pipeline sleeves, even though the Alberta government was aware of Plains Midstream's poor safety record in the United States.
- The ERCB investigation report and public statements from the government misrepresented the results of air-testing at Little Buffalo school, thereby providing a false reassurance on the issue of health impacts.

- The ERCB downplayed the spread of oil contamination in local wetlands.
- The government relied on the company to take the water samples that would ultimately be used in a court case against them. Confidential government reports indicate that there were problems (such as missing samples) with the water samples submitted by the company, which may be one of the reasons why no charges were brought forward.

This response to the Rainbow pipeline spill is symptomatic of a more systemic problem: government agencies that have been 'captured' by the very same oil industry that they are supposed to regulate; as a result, they defend the interests of the industry over the public interest.

The Alberta government is in the process of establishing a new regulatory agency to oversee the oil and gas industry. The government's current plan will further entrench this regulator as a defender of the industry rather than of the public interest.

Greenpeace recommends that the government take the opportunity offered by the establishment of this new agency to:

1. Increase transparency through greater access to information.
2. Implement greater public involvement in decision-making, as a counterweight to the influence of the oil industry.
3. Put an end to the revolving door between industry lobby groups and the leadership of regulatory agencies.

A first step in this direction would be to revisit the decision to appoint oil industry insider Gerry Protti as the head of the new regulatory agency.



A view of the Rainbow Pipeline oil spill, the worst in Alberta for 35 years, that dumped 28,000 barrels of oil into a wetland area near the community of Little Buffalo in Lubicon Cree First Nation traditional territory.

THE RAINBOW PIPELINE SPILL

On April 28, 2011, 28,000 barrels of oil were spilled near the Lubicon Cree community of Little Buffalo in the Peace River region of Alberta.

The Rainbow Pipeline spill was one of the largest spills in provincial history, but it should not have been. An alarm indicating a leak first went off in the Plains Midstream control room at 6:32 p.m. on April 28, and the pipeline was shut down at 7:22 p.m.

The pipeline, however, was subsequently restarted three times after that thanks to what the ERCB investigation report describes as the company's "practice of placing higher priority on continued operation of the pipeline over any potential impacts related to a pipeline leak."²

The pipeline was finally shut down for good hours later, at 2:50 a.m. on April 29. Those extra eight hours of operation contributed greatly to the size of the spill.

In its assessment of the incident, released on Feb. 26, 2013, the ERCB found that Plains Midstream "appeared to have a total lack of appreciation of the affects a spill of this magnitude has beyond its own on-site operational response." Moreover, the company "failed to comply with a number of regulatory requirements in relation to the incident."³

The leak itself was determined to be a result of a defective weld on a "Type B" sleeve. The rules regarding Type B sleeves were changed in 1990 due to problems identified in previous spills, yet Plains Midstream could not provide any evidence that the required inspections were ever made after those rules were changed.⁴ According to the ERCB incident report, the company should have found the crack during a routine inspection.⁵ Inspections done after the spill identified 10 similar cracks.⁶

In spite of all the problems identified in the ERCB's incident report, neither the regulator nor the provincial government imposed a penalty on the company. The only proviso was that the company would have to "engage a third party to conduct a communications audit that focuses on the company's ability to manage communications during a crisis or incident."⁷ Given that the spill resulted in what internal briefings refer to as "significant media coverage on a local, national and international level,"⁸ a cynic might interpret this requirement as a direction to make sure the company would better manage media relations the next time a spill happened.

This mild slap on the wrist delivers a key message: the ERCB is more concerned with public relations than with performance. This impression is reinforced by internal documents stating that in "an unprecedented move by the ERCB," as a requirement for restarting the pipeline Plains Midstream would have to develop a "public relations plan."⁹

Nor did the provincial government pursue legal action against the company, even though an internal briefing note prepared for the Energy Minister stated: "Alberta Environment will move forward with enforcement action under the *Environmental Protection and Enhancement Act* swiftly if required at any time. The maximum penalty for each section would be \$500,000 as well as fully enforcing the company to continue with clean up."¹⁰

In this report, we assess some specific examples of the provincial government and/or regulator taking actions which appear to be more focused on protecting the oil industry's reputation than on protecting the environment or affected communities, and then turn to the broader systemic issue of 'regulatory capture'.

THE ALBERTA GOVERNMENT AND PLAINS MIDSTREAM: A POOR SAFETY RECORD

Plains Midstream Canada ULC is an indirect subsidiary of the U.S.-based firm Plains All American Pipeline, L.P. (commonly known as Plains All American). According to the company's websites, Plains All American owns 26,000 kilometres of active crude oil, natural gas liquids (NGL), and refined products pipelines, and associated gathering systems, including 5,000 kilometres of pipelines in Canada.

Members of the Alberta government were aware of Plains' "unfortunate" safety record in the United States. Their internal speaking points acknowledged this point, but claimed that the situation was different in Alberta because of the province's rigorous inspections system. Yet the ERCB's own report found that the leak probably would not have happened if there had been an inspection of the "Type B" sleeves, as required by the National Energy Board for the pipelines that fall under its regulations.

The ERCB blames this failure to inspect the sleeves (or at least to document that the inspection had been carried out) on the company. Yet surely it is the government's job to ensure that companies follow the rules.

Speaking notes prepared for the Minister of Environment and Sustainable Development claimed that the Rainbow Pipeline had "been inspected at least six times, in its entirety or in sections, over the last five years. The ERCB conducts inspections of pipeline construction and operation, and follows up on incidents with the pipeline owners."

This willingness to trust that the company was following the rules is particularly tragic, in light of the ensuing major spill from Plains Midstream's pipeline near Sundre in 2012.



Greenpeace Campaigner Melina Laboucan-Massimo speaks with government officials at the Little Buffalo school.

What the Environment Minister was told to say about Plains' safety record¹¹

"If asked about Plains All American's track record:

The company's **track record in the U.S. is unfortunate; however, we haven't experienced the same issues with the company in Alberta.**

In Alberta, pipeline regulations are incredibly strict, and as a result, pipeline leaks in this province are rare.

In 2009, Alberta's pipeline industry set record-low pipeline failure rate of 1.7 per 1,000 km of pipeline, bettering the previous record-low of 2.1 set in 2008 and 2007.

The Rainbow pipeline **has been inspected at least six times, in its entirety or in sections, over the last five year.**

The ERCB **conducts inspections of pipeline construction and operation, and follows up on incidents with the pipeline owners.**"

[emphasis added]

Reality: ERCB never checked to see if Plains had done the required inspections of defective sleeves¹²

"In 1990, following an incident investigation involving a Type B sleeve fillet weld failure on a pipeline that it regulated, the National Energy Board (NEB) directed pipeline licensees under its jurisdiction to inspect/reinspect circumferential fillet welds associated with these sleeves. As the Rainbow NPS 20 pipeline was not under NEB jurisdiction at that time, the license would not have been subject to this requirement. As discussed in more detail in section 3.1.4 of this report, both third-party consultants engaged by Plains in connection with the incident have assumed that the licensee "prudently" conducted those inspections in response to the NEB requirements.

However, the ERCB was not able to ascertain whether those inspections did, in fact, occur....

Had it assessed the records with respect to the sleeve repairs, the ERCB believes Plains could have identified and properly mitigated the risks associated with Type B sleeve fillet repair welds."

[emphasis added]

AIR-MONITORING RESULTS AT THE LITTLE BUFFALO SCHOOL: A MISREPRESENTATION

Little Buffalo, a Lubicon Cree community of about 350 people, was the closest human settlement to the spill – about 30 kilometres away by road, but only 12 kilometres as the crow flies. On Friday, April 29, the morning after the spill happened, the principal of the local school, Brian Alexander, closed it down after hearing complaints "about a strong odour" and discovering that a large number of students were complaining of dizziness and nausea. According to a report in the *Globe and Mail* a few days later, the principal initially believed that the problem was "a propane leak."¹³

When the school reopened on the following Monday morning, staff and students were largely unaware of the spill because they still had not been notified by the ERCB.¹⁴ That day, after more smell and health complaints, students were again sent home.

According to the *Globe and Mail* article, people in Little Buffalo reported the smell to be "at times, nearly overwhelming." It was only later, after Alexander was told about the leak, that he and others in the small community concluded that the Rainbow spill was to blame.

In what was said to be "a confusing twist," Davis Sheremata, spokesperson for Alberta's Energy Resources Conservation Board, stated that the Board had found "zero readings of hydrocarbons" in the area. At the time he downplayed the possibility that the oil-like odours experienced by the children were related to the oil spill. He said air monitors had been set up on the spill site (although this did not happen until five days after the spill), with no readings in excess of Alberta Ambient Air Quality Objectives and Guidelines.

“There have been no readings even at the site itself,” Sheremata said, “that have been in exceedance of Alberta ambient air quality guidelines.... Our staff are certain that any odour problems that have been experienced have nothing to do with the leak.”

Community members had a distinctly different point of view. They expressed little doubt that the odour of crude oil was there – and that it was powerful. Garrett Tomlinson, a communications consultant for the Lubicon Lake Cree First Nation, said, “The air has a thick smell of oil in the mornings and evenings, when the air cools down.” There were reports of headaches, nausea, burning eyes, and even near-fainting.¹⁵

The air-monitoring results that Greenpeace was able to obtain under Freedom of Information tell a more nuanced story. The monitoring report from the provincial Mobile Air Monitoring Laboratory (MAML) stated that on Thursday May 5, the first day on which the MAML gathered data, the wind was blowing airborne contaminants away from the school. The report concluded, “We are unable at this time using the data collected by the MAML on May 5th to infer the impact of the oil spill on air quality at the school.”¹⁶

Given this finding, public statements – such as the one on May 5 (repeated in the ERCB Incident report) stating “MAML data indicated that there was no evidence of risk resulting from airborne contaminants” – appear intended to provide false reassurance to parents whose children became sick and to downplay the impact of the spill on residents’ health.

Just as important, the data from air-quality monitoring testing was supposed to be released publicly. An October 3, 2012, email from a media relations co-ordinator for Alberta Environment and Sustainable Resource Development regarding the air-quality monitoring data gathered by the Ministry stated:

The ERCB has asked if we could share this data summary (attached) with them so they can post along with their final report on the Plains Midstream release. The information would be public, since it would be part of the appendices of the ERCB’s report. From a communications perspective, we’re okay with that. I just wanted to ensure you were OK with that too.¹⁷

Yet that data was not included as an appendix to the ERCB report, nor have we been able to find any evidence that it was ever made public.



A child looks out of a window. The school had been closed due to students and teachers getting sick after an oil spill near Little Buffalo.

What the ERCB's Investigation Report (page 6) said

As a result of odours identified, on Friday, April 29, 2011, the Lubicon Lake, First Nation Little Buffalo School, which is located approximately 12 km from the site, was voluntarily closed by the school administration as a precautionary measure. The school remained closed the following Monday as a result of further odour complaints. Plains deployed an air monitoring unit (AMU) to the school, which was operating by 11:00 a.m. on Monday, May 3, 2011. No hydrocarbon readings were recorded by the AMU at the school. On May 4, 2011, the AENV Mobile Air Monitoring Laboratory (MAML) was deployed and arrived at the school to measure for volatile hydrocarbons at and in the vicinity of the school.

MAML data indicated that there was no evidence of risk resulting from airborne contaminants.

[Emphasis added.]

Consequently, the unit was demobilized and removed from the area on or about May 14, 2011 (see Appendix B). From Appendix B (a May 5, 2011 Information Bulletin from The Government of Alberta):

Response to air-quality/ health concerns raised by local residents:

- Two air monitoring stations have been set up: one at the site of the incident and one at the school. Both stations have been monitoring air emissions since May 3.
- May 4th, Alberta Health Services sent an Environmental Health Officer to the community to conduct monitoring.
- AHS has reviewed all air monitoring data conducted for this area thus far - including ambient air quality and indoor air quality at the school - and all results are well below the maximum acceptable concentration guidelines set by Health Canada.
- The Mobile Air Monitoring Lab has been deployed by Alberta Environment and is on site to measure for Volatile Organic Compounds around the school.
- Based on the current data, there is no evidence that the air quality poses risk of long term health impact, at this time.
- Alberta Environment, ERCB and AHS will continue to review the air monitoring data. AHS will advise on all health-related aspects of the oil spill response, and exposure to related air quality concerns over time.

What the Air Monitoring report said¹⁸

Air Quality Monitoring:

May 5, 2011 – Little Buffalo School

Summary of Findings

Air quality monitoring in the area near pipeline leak north east of Peace River started on May 3rd. Monitoring is being conducted at two sites: at the site of the incident and at Little Buffalo School. Alberta Environment deployed the department's Mobile Air Monitoring Laboratory (MAML), to conduct air quality monitoring outside of the Little Buffalo School. Monitoring for using the MAML started on May 5th, 2011. This report summarizes the data collected for approximately 7 hours on May 5th, 2011 using the MAML. The wind direction on the May 5th sample period was from the west and south west (illustrated in Figure 2). **This places Little Buffalo School (MAML monitoring site) upwind from the oil spill site. Thus we are unable at this time using the data collected by the MAML on May 5th to infer the impact of the oil spill on air quality at the school.**

[Emphasis added.]

[Note: Greenpeace obtained no other information on air-quality readings through our Freedom of Information requests.]



Air monitoring system set up at the school in Little Buffalo.

THE ERCB: DOWNPLAYING WATER AND ECOSYSTEM CONTAMINATION

There is no doubt as to whether the Rainbow Pipeline spill contaminated water: the pictures alone show that it did. The government and ERCB were at great pains, however, to claim that this contamination was limited and that it would be cleaned up.¹⁹

Internal briefing notes, however, informed government officials that much of the oil would remain in the ecosystem and that full restoration of the area was unlikely:

Most of the 28,000 barrels of light crude that spilled is being held in the muskeg, although some did enter a wetland. Approximately a third of the oil has been recovered but much remains in the muskeg.... Capturing the majority of the oil will take, approximately, six months. Full restoration of the localized area is unlikely.²⁰

The documents obtained by Greenpeace show that the contamination did extend beyond the immediate spill site, with exceedences recorded downstream from the site. The only contaminant measurement (toluene) included in the documents was recorded at ten times higher than the acceptable level.²¹

There were, however, indications of problems with the water testing. The Situation Report for May 8 included the following update:

Water Monitoring: *Company has provided sample analysis from April 30 to May 5 to AENV*

for interpretation. Northern Region has done an assessment and has relayed concerns regarding missing samples, parameter exceedences, and trends. Further sample analysis will be provided by the company and will be evaluated for any indication of subsurface migration.²²

This highlights a potential conflict of interest when the government relies on the company to take the water samples, which will ultimately be used to determine whether or not the government presses charges against the company.

So it is curious that in the many hundreds of pages of documents Greenpeace obtained, there is no detailed assessment of water contamination or even a summary of the measurements made by the Alberta Energy and Sustainable Resource Development ministry.

In July 2012, six months after the cleanup was supposedly complete, Greenpeace visited a neighbouring wetland and found it covered in what looked, smelled, and felt like oil. Greenpeace's release of photos and samples triggered the announcement of a public review of pipeline safety and brought a public commitment from the Ministry of Environment and Sustainable Resource Development to investigate.²³ Yet the documents obtained under Freedom of Information provided no indication that this investigation was ever done.



Crews work to clean up at the Rainbow Pipeline oil spill.

What the ERCB's Investigation Report (pages 6-7) said

"Water monitoring following the incident was under the direction and supervision of AENV. To verify effective containment efforts, Plains initiated a water monitoring program that considered three sampling/testing criteria:

1. Surface water sampling and testing: Sampling locations were selected in areas representative of surface water flow characteristics. Eight sample locations were chosen. Sample analysis indicated that containment was secure and **contaminated water was not migrating off-site.**
2. Groundwater well installation, sampling, and testing: A total of 14 groundwater wells were installed at 3 depth intervals. At the time that failure site monitoring criteria were released, no groundwater samples had been collected, as groundwater conditions had not reached hydrologic equilibrium due to seasonal run-off and inclement weather conditions. Visual monitoring of groundwater wells did not indicate any oil migration or contamination.
3. Sand-point (screen-point) samplers and testing: A total of seven sand-point samplers were installed at the organic surface/mineral soil layer interface in areas where contamination migration could pose a challenge. **The test results did not suggest contamination migration.**"
[emphasis added]

What the Energy Minister's May 6, 2011 Briefing Note said²⁴

"Results from May 2 sampling indicate there are some exceedances of hydrocarbons downstream from the wetlands. **Exceedances of toluene (.0227 mg/litre) have been recorded in the area of the wetland. The water quality objective for toluene is .002 mg/litre for fresh water.** Toluene is non carcinogenic. Additional results are expected today.

All sample results are being submitted on daily basis and will continue. To reduce the migration of product, containment trenching has taken place to ensure containment.

Water sampling will continue including adding monitoring for polycyclic aromatic hydrocarbons, metals and potentially other contaminants of concern. A full water monitoring program will need to be developed and implemented for the full lifecycle of the incident." [emphasis added]

IN WHOSE INTEREST? HOW THE OIL INDUSTRY HAS "CAPTURED" ITS REGULATORS

The ERCB report on the Rainbow Pipeline spill is highly critical of the company, and justifiably so. In the first place, Plains Midstream did not properly maintain its pipeline. In the second place, despite an early alarm warning it decided to keeping the oil flowing rather than shut off the flow and avoid the possibilities of a continuing spill. In doing so it clearly violated provincial regulations.

Internal government documents reveal that the provincial government has been equally negligent in its oversight of the province's pipeline system.

The documents related to the Rainbow pipeline spill and its aftermath illustrate how Alberta's regulator and provincial government are primarily concerned with defending the oil industry's interests rather than ensuring the public good.

A July 2012 talking point prepared on "pipeline integrity" for Alberta Energy spokespeople encapsulates the underlying attitude: "Having high level political leaders defending pipelines will result in the industry having to be more accountable to the government."²⁵

Given that the government already has the power to make and enforce the rules governing pipeline companies' operations, why would cultivating the industry's gratitude through a defence of pipelines be more effective than enforcing the law – or strengthening laws if they are deemed inadequate in preventing future oil spills?

Equating unconditional political support for an industry under fire with increased accountability only makes sense from a perspective that sees the interests of government and industry as naturally aligned and in opposition to those of a hostile public.

This logic is clearly at work in the establishment of the pipeline safety review in 2012 (see BOX A), in which the government's primary consideration appeared to be how to limit the reputational damage to the industry's reputation as a result of oil spills, rather than limit the damage to community health or the environment.

This approach is deeply rooted in Alberta. Political scientist Angela Carter, who has studied the regulatory process for oil and gas in the province, argues that the provincial government has come to see what is good for the oil industry as being synonymous with the public interest:

The power of the oil industry is now entrenched and institutionalized, in great part through oil industries' donations to Progressive Conservative (and Liberal) political campaigns and their intense lobby of government, as well as due to the government's great dependence on the energy sector (which represents 30% of government revenues). Anecdotes abound about the close professional and personal relationships between various levels of government and the oil industry as well as about the revolving door between government positions and oil industry appointments. Likewise, in the words of David Eggen, NDP member of Alberta's Legislative Assembly and energy and environmental critic, the government has "retooled" itself around supporting this industry and spending its revenues. Hence the repeated analogy of Alberta as [a] 'company' province: what is good for the oil industry is considered good for Alberta.²⁶



A view of the clean up operations at the Rainbow Pipeline oil spill.

BOX A

ALBERTA'S PIPELINE SAFETY REVIEW: FROM PUBLIC PRESSURE TO PUBLIC RELATIONS

In July 2012, in the wake of the 2011 Rainbow Pipeline spill and three other major spills within the space of a month in the following year, the Alberta government initiated a review of pipeline safety in the province.

The review was established in response to public opinion after more than 50 organizations co-signed an open letter to Alberta Premier Alison Redford calling for an independent review to address their concerns regarding pipeline safety.²⁷ The government did not respond to this letter, nor did it meet with any of the organizations that signed it to discuss their concerns.

Alberta's Energy Minister did, however, meet with 14 pipeline company CEOs, the Canadian Association of Petroleum Producers (CAPP), and the Small Producers and Explorers Association of Canada (SEPAC) to discuss how such a review could be structured.

According to internal government emails,²⁸ the oil industry executives expressed their “overwhelming support” for the Minister's proposal on how a safety review could be designed so as to best “communicate our safety commitment”. In other words, the problem was framed primarily as one to be solved through better public relations practice than through performance.

Minister Ken Hughes's invitation to the CEOs stated:

As you know, the industry operates under a world-leading regulatory regime, and has a strong and improving safety record. Some recent incidents and ongoing media attention about energy and environmental issues have given us all the opportunity to reflect not just on how we ensure safety, but also on how we communicate our safety commitment. With this in mind, I would appreciate the opportunity to meet with you.

The industry executives were then presented with a proposal outlining how the review would be conducted. In his report on the meeting, Jim Ellis (Deputy Minister, Alberta Energy) told Dan McFadyen (Chair of the Energy Resources Conservation Board) implies that the government can move forward on a review of pipeline safety because the pipeline industry was supportive of how it was framed and who would do the review:

Overall the meeting was very productive and we are confident we can move this forward. Their overwhelming support for the ERCB as the regulator was good to hear and their advice for you to do a review was also reassuring.²⁹

The “overwhelming support” for the ERCB to lead this review was likely related to the fact that (as discussed below), the Chairman of the ERCB had previously been the lead lobbyist for the pipeline industry in Canada.

The groups that had called for the review subsequently criticized the Energy Minister's plan for being too limited in scope (it focused on whether Alberta regulations were consistent with industry “best practices” rather than on the actual state of Alberta's pipeline system and regulatory oversight). The groups also criticized the choice of the ERCB, on the grounds that it was effectively investigating itself.³⁰

In November 2012 (fifteen weeks after announcing the review and one week after Greenpeace filed its Freedom of Information request that obtained the documents on the government's consultations with industry on the review), the Alberta government announced that it would hold public consultations on pipeline safety. Yet by April 2013 the government had still not released the third-party review that it received in December 2012 and had not announced its plans for public consultation.

ALBERTA: EMBRACING REGULATORY CAPTURE

The tendency for government agencies to see themselves as the defender of the industry they were initially established to regulate is not a uniquely Albertan phenomenon. It is so common that it is the subject of an extensive academic literature on what is called “regulatory capture,” or “the process by which vested interests bias the incentives of regulators and governments to act in their interests rather than in the broader public interest.”³¹

Recognizing the tendency towards regulatory capture, many jurisdictions have put mechanisms in place to prevent it.³² These can include:

- a commitment to transparency (open access to information);
- public involvement in decision-making (to provide alternative views and evidence as a counterweight to the influence of industry and its paid experts); and
- independent regulators (to avoid the “revolving door,” where senior officials move back and forth between the industry and the regulator).

Yet within Alberta’s oil and gas sector, regulatory capture seems to be embraced as if it were a good thing.

A Lack of Transparency

With important information being kept from the public, gaining access to the required documents through Freedom of Information requests becomes highly time-consuming and expensive. Greenpeace’s initial request for documents related to the Rainbow Pipeline spill from the ERCB resulted in a cost estimate of \$4,864 – so high that we had to narrow the scope of materials requested.

Furthermore, much of the material in these documents was redacted (that is, not released, based on criteria set out in the FOI legislation) even though the documents in question were prepared by provincial civil servants and paid for by citizens.

The air and water quality test results were never released, which not only prevents independent assessments of the damage but also helps to shield the company from private prosecutions under the Fisheries Act. That legislation requires private

prosecutions to be launched within a two-year period after an incident is reported to the government; the Alberta government’s decision to wait nearly two years before releasing the results of its investigations thus further hampered the initiation of private prosecutions.

Limiting Public Involvement

When it comes to public involvement, Alberta pioneered the practice of limiting participation in hearings to those who are “directly affected.” This is a blatant attempt to block public interest groups (such as environmental organizations, but also community groups) from playing a role in decision-making. These rules to limit participation are now being replicated at the federal level, under the new laws brought in as part of the 2012 omnibus budget bills.³³

Limiting public involvement may expedite approvals (and thus make the oil industry, which pushed for those changes, happy),³⁴ but it can lead to inappropriate decisions. A 2008 study by the U.S. National Research Council found:

Substantial evidence indicate(s) that public participation is more likely to improve than to undermine the quality of decisions.... Although scientists are usually in the best position to analyze the effects of environmental processes and actions, good analysis often requires information about local conditions, which is most likely to come from residents. Moreover, public values and concerns are important to frame the scientific questions asked, to ensure that the analyses address all of the issues relevant to those affected.

*It also suggests that public participation increases the legitimacy of agency decisions and builds citizens’ knowledge of the scientific aspects of environmental issues assisting the effectiveness and efficiency of implementation.*³⁵

In the case of the Rainbow pipeline, internal documents show that the ERCB staff tasked with investigating the spill requested a public inquiry on September 13, 2011. A public inquiry might have allowed for many of the pipeline safety concerns that

have been raised since by environmental, Aboriginal, labour, and landowner groups to be addressed. But that recommendation was rejected by the ERCB's Chief Operating Officer on October 8, 2011.³⁶

If that public inquiry had gone ahead, it would (at least) have sent a clear message to the industry that the status quo was unacceptable. That kind of a shakeup might have helped to prevent the major pipeline spills that occurred in May and June 2012, which led the provincial government to announce a third-party review in July 2012 (see BOX A).

As of April 2013 (nine months after the review was first announced), the third-party review completed in December 2012 had still not been made public, nor had there been any announcement of how or when the promised public consultations would proceed.

This approach bears the hallmark of a government desperate to control the agenda and limit public debate. It represents a lost opportunity because the findings of a truly independent public review could be invaluable in informing the establishment of the new regulatory agency in the province.

Industry and the Regulator: A Revolving Door

The movement of senior staff between industry lobby groups and regulatory agencies creates a reasonable perception of bias that undermines the credibility of the Alberta regulatory process.

Supporters of this “revolving door” argue that it ensures a higher quality of information in the making of regulatory decisions. Critics point to the many opportunities for conflicts of interest and question how a pro-industry perspective comes to dominate within the regulatory agency. After all, how can someone who has made a career of advancing the interests of the regulated companies suddenly become an independent defender of the public interest?

Not only does Alberta have its revolving door between the oil industry and provincial regulatory agencies; but the oil industry also publicly praises individuals who move from lobby groups to head up the provincial regulatory agencies, lauding them for helping the companies get what they want.

For example, before his appointment as Chairman of the ERCB, Dan McFadyen was the Vice-President for Regulatory Affairs and Public Policy of the Canadian

Energy Pipeline Association (CEPA). In short, he was the top lobbyist for the pipeline industry in Canada.

His tenure at the ERCB has been highly praised by the oil industry (the ERCB will be replaced by a new agency in 2013, so McFadyen will be stepping down from his position as Chair). In December 2012 Dave Pryce, the Vice-President of the Canadian Association of Petroleum Producers (CAPP), skipped over MacFadyen's role with CEPA but Pryce said McFadyen “had earned many friends in the industry” for his rulings at the ERCB and before that as deputy minister of Alberta Energy. According to a news report:

Pryce said McFadyen will be remembered fondly for helping the industry fight higher royalty rates imposed by the Ed Stelmach government in 2007 when he was deputy energy minister.

“We went through some challenging times,” he said, “and Dan was instrumental in trying to find a fair outcome for that. Another piece he's contributed to on behalf of Alberta.”³⁷

In most jurisdictions, this kind of gushing praise from a lobby group for its regulator would be viewed as a cause for concern. It certainly calls into question how much weight was given to other stakeholders' views or interests.

McFadyen clearly played a very active role within the ERCB. With respect to the Rainbow Pipeline spill, internal ERCB correspondence shows that he made personal edits to the draft of the Incident Report document in October 2012 and to the final version in January 2013. The October edits were extensive, as an internal ERCB email revealed: “Is it possible for you to send me the Plains report as a word document. The Chairman has made a number of comments and we need to make changes in the report. I know the format may change a bit but we will work around that.”³⁸

A FRESH START, OR MORE OF THE SAME?

The ERCB is now in the process of being replaced by Alberta's new super-regulator, the Energy Regulatory Board (ERB). The ERB will take over the regulatory functions of the Energy Resources Conservation Board and the Environment and Sustainable Resource Development department with respect to oil, gas, tars sands, and coal extraction.

The establishment of this new agency represented an opportunity to start anew. The Alberta government's decision to appoint oil industry insider Gerry Protti to head up this new organization, however, indicates that the government intends to maintain the status quo.

Protti served as the "industry advisor" for the Alberta government's Regulatory Enhancement Project, which established the one-stop regulatory body that he now heads.³⁹ So he has gone from representing the oil industry at the design stage to running the agency now that it is established.

Protti worked for over 15 years at the oil and gas company EnCana and its predecessor companies. He was the founding president of the Canadian Association of Petroleum Producers (the oil industry's main lobby group). At the time of his appointment he was a registered lobbyist for the Energy Policy Institute of Canada, an oil industry lobby group.

His appointment raised eyebrows even amongst some of the strongest supporters of the industry. Deborah Yedlin, a *Calgary Herald* columnist and fierce defender of the oil industry, wrote: "It's tough not to think about Gerry Protti's appointment as chair of the new Alberta Energy Regulator as putting the fox in charge of the hen house. After all, Protti is anything but an industry outsider."⁴⁰

The oil industry lauded his appointment; the government defended it. CAPP Vice-President David Pryce referred to it as "an important next step in establishing the single regulator." He added: "We are very encouraged they have appointed someone of Gerry's experience and background because it cuts across so many lines."

Energy Minister Ken Hughes stated that Protti's work "at CAPP, in the public service and the private sectors, means he has one of the most diverse sets of experience in the energy sector and brings a well-rounded perspective. . . . He understands the role of the public interest, the economic fundamentals of the industry, the importance of having a social license to operate and the environmental considerations that are important to Albertans."⁴¹

This new agency is also seen as further restricting public involvement. Alberta landowner groups have criticized the legislation that created the province's new energy regulator (Bill 2) as "dictatorial" and a disaster for citizens who live near energy projects in rural Alberta.⁴²

According to lawyer Keith Wilson, this legislation effectively takes away the rights that landowners now have to contest and oppose projects not in the community interest. He says the new regulator "now gets complete unfettered discretion in deciding whether landowners get any notice or can have any right to a hearing or other participation in the process. There is nothing in Bill 2 that creates any rights for landowners."⁴³

In combination with the reticence of the Alberta government to proceed with its promised public consultations on pipeline safety, these new limits on public involvement and the appointment of an industry insider as the head of the new regulatory agency indicate that this new agency will favour project proponents and limit the opportunity of public interest advocates to raise valid concerns.

If the government proceeds along this path, the result will be further damage to the credibility of regulatory process, faulty decisions, and a failure to protect Alberta's communities and ecosystems from future preventable disasters like the Rainbow Pipeline spill.

Albertans deserve better.

ENDNOTES

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