



## Bearspaw Petroleum Limited

Complaint Respecting EUB Enforcement Actions and  
Allegation of Bias Against the EUB Red Deer Field Centre

November 6, 2007

**ALBERTA ENERGY AND UTILITIES BOARD**

Decision 2007-090: Bears paw Petroleum Limited, Complaint Respecting EUB Enforcement  
Actions and Allegation of Bias Against the EUB Red Deer Field Centre

November 6, 2007

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640 – 5 Avenue SW  
Calgary, Alberta  
T2P 3G4

Telephone: (403) 297-8311  
Fax: (403) 297-7040  
E-mail: [eub.infoservices@eub.ca](mailto:eub.infoservices@eub.ca)  
Web site: [www.eub.ca](http://www.eub.ca)

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**ALBERTA ENERGY AND UTILITIES BOARD**

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Calgary Alberta

**BEARSPAW PETROLEUM LIMITED  
COMPLAINT RESPECTING EUB  
ENFORCEMENT ACTIONS AND ALLEGATION OF BIAS  
AGAINST THE EUB RED DEER FIELD CENTRE**

**Decision 2007-090  
Application No. 1514422**

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**DECISION**

The Alberta Energy and Utilities Board (EUB/Board) has considered the findings and recommendations set out in the following Board Member's report, adopts the recommendations, and directs that the enforcement actions be confirmed or withdrawn as indicated in the report.

Dated in Calgary, Alberta, on November 7, 2007.

**ALBERTA ENERGY AND UTILITIES BOARD**

*<original signed by>*

William A. Tilleman, Q.C., J.S.D.  
Chairman



**BOARD MEMBER REPORT ON  
BEARSPAW PETROLEUM LIMITED  
COMPLAINT RESPECTING EUB  
ENFORCEMENT ACTIONS AND ALLEGATION OF BIAS  
AGAINST THE EUB RED DEER FIELD CENTRE**

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**1 RECOMMENDATIONS**

Having considered the evidence from all parties, the Board Member

- finds that there was no bias against Bearspaw Petroleum Limited (Bearspaw) by the Red Deer Field Centre (RDFC) or its Team Leader, L. Touchette, no lack of administrative fairness in the EUB enforcement process, and no lack of technical competence of the EUB staff in these matters;
- recommends that the Board adopt and act on the following recommendations intended to enhance the fairness and transparency of the EUB's inspection and enforcement process:
  - the EUB develop a written policy as part of its enforcement process respecting the disclosure of inspection/investigation results and enforcement information that includes specific timelines for the disclosure of information;
  - the EUB review its jurisdiction over upstream petroleum product odours emanating from oilfield trucks and issue a written clarification to industry of its policy;
  - each EUB Field Centre host an annual one-day program that provides information to licensees and answers questions from licensees about the EUB inspection and enforcement process;
  - each time the EUB conducts an inspection, a record of that inspection be entered into the EUB's recording system and a notification be provided to the licensee; further, that the EUB implement immediate changes to its Field Inspection System (FIS) to identify an appropriate status when enforcement actions are changed, withdrawn, or rescinded;
- recommends that enforcement action arising from the Big Valley odour incident be withdrawn for the reasons cited below in Section 5.1, including the lack of timely disclosure of information to Bearspaw;
- recommends that the enforcement action arising from the flame arrester matter be upheld as appropriate;
- recommends that the enforcement action arising from the 6-26 odour incident be upheld as appropriate;
- finds that the RDFC's response to the pipeline strike incident was appropriate; and
- finds that the RDFC inspection frequency of Bearspaw facilities was appropriate.

## 2 BACKGROUND

In February 2007, Bears paw wrote to then EUB Chairman M. N. McCrank, Q.C., P.Eng., respecting concerns it had about the EUB enforcement process. It also suggested that Bears paw had been subjected to unwarranted enforcement actions by the RDFC, which it believed were unfair and destructive to Bears paw's operations. It maintained that staff in the RDFC lacked expertise and had taken a selective, biased, and extreme approach to enforcement as it related to Bears paw. Further, the company maintained that the RDFC Team Leader, L. Touchette, acted in contravention of the EUB *Code of Conduct and Ethics* and specifically directed EUB staff to target Bears paw facilities due to his dislike of the company. Bears paw cited several enforcement actions that taken together represented institutional bias that justified action by the EUB Chairman.

On April 4, 2007, the EUB General Counsel wrote to Bears paw and indicated that the EUB would conduct a proceeding by a single Board Member, pursuant to Section 11 of the *Energy Resources Conservation Act*, to consider the specific enforcement actions against Bears paw, the allegation of bias, and Bears paw's overriding concern regarding the unfairness of the EUB enforcement process described in *Directive 019: EUB Compliance Assurance—Enforcement*. For the purposes of this proceeding, EUB staff, including the RDFC Team Leader, L. Touchette, Field Surveillance Operations Team Leader, R. Kennedy, and EUB Enforcement Advisor, D. Bartlett, formed the staff submission group referred to herein as the EUB Staff Group (ESG). The ESG participated in the proceeding in order to provide information on the matters before the Board Member.

## 3 HEARING

Acting Board Member R. C. Clark was authorized by the Board to investigate and report to the Board on matters involving Bears paw and the EUB Field Surveillance Group. The Board Member decided to hold a public hearing, which took place in Calgary, Alberta, September 12-14 and October 15-16, 2007. In addition, on October 30, 2007, the Board Member viewed the area of the Big Valley odour incident without Bears paw or the ESG present. The close of evidence for the hearing is therefore considered to be October 30, 2007. Those who appeared at the hearing are listed in [Appendix 1](#).

## 4 ISSUES

The Board Member considers the issues respecting the matter to be

- the key enforcement incidents raised by Bears paw, namely: the Big Valley odour incident, the High Level trucking incident, the flame arrester incident, the 6-26 odour incident, and the pipeline incident;
- other related incidents and the inspection and enforcement decisions and actions of the EUB associated with Bears paw's facilities and operations; and
- bias, administrative unfairness, and lack of technical competence on the part of EUB staff.



In reaching the determinations contained within this report, the Board Member has considered all relevant materials constituting the record of this proceeding, including the evidence and argument provided by each party. Accordingly, references in this report to specific parts of the record are intended to assist the reader in understanding the Board Member's reasoning relating to a particular matter and should not be taken as an indication that the Board Member did not consider all relevant portions of the record with respect to that matter.

## **5 KEY ENFORCEMENT INCIDENTS**

### **5.1 The Big Valley Odour Incident**

Bears paw said that on June 14, 2006, it had personnel on site and was conducting operations at Legal Subdivision (LSD) 13, Section 26, Township 35, Range 20, West of the 4th Meridian (the 13-26 site) to replace spooling associated with a pipeline at that location. Bears paw acknowledged that it had received a notification from the RDFC that students at Big Valley School, located about 500 metres (m) southeast of Bears paw's site, had evacuated the building due to sour gas odours. While Bears paw acknowledged that one of the hydrogen sulphide ( $H_2S$ ) monitors carried by its personnel or by contractors on site recorded  $H_2S$  readings, it stated that other monitors did not register  $H_2S$  and it disputed, in any case, that any of those readings were recorded off lease.

It also was suspicious of  $H_2S$  readings provided by another operator's staff member who was off lease and then attended the Bears paw site. Bears paw believed this person was inexperienced, doubted the calibration of his monitor, and questioned the battery status of the unit. Bears paw maintained it could not be responsible for emitting  $H_2S$  odours off lease, as the gas it vented was less than 10 moles per kilomole, which could not account for the concentration necessary to produce the symptoms reportedly experienced by the school evacuees. Bears paw also said that meteorological information suggested that the wind direction at the time would have taken any odours at the Bears paw site away from the school property, not towards it. Further, Bears paw did not believe that correct parameters were used by EUB staff in a modelling calculation done at a later date in order to predict the  $H_2S$  concentration off lease based on the readings obtained on lease.

While Bears paw acknowledged that it was conducting activities that could have resulted in a release of  $H_2S$  gas, it believed it was not responsible for the incident. Bears paw stated that it had received a high risk unsatisfactory enforcement action from the RDFC and believed the enforcement was levied without justifiable evidence and in disregard of Bears paw's own evidence. Bears paw also believed the RDFC had made up its mind early in the investigation that Bears paw's site was the culprit and had focused its investigation almost exclusively on Bears paw's facility. Bears paw believed that the RDFC Team Leader played a significant role in focusing his staff on Bears paw. In addition, Bears paw expressed concern about the lack of timely disclosure of documents relied upon by the RDFC on this incident, which it believed hindered its ability to understand the enforcement and provide other data to dispute the finding of fault.

The ESG said that the RDFC had responded to a public complaint when it was contacted by an official of the Village of Big Valley at about 9:45 a.m. on June 14, 2006, who indicated that 94 students and other personnel from the local school had been evacuated due to  $H_2S$  odours. The ESG stated that it had contacted oil and gas operators in the area, including Bears paw, and

requested they investigate all possible sources of the odour and report back to the RDFC. It also dispatched EUB staff and the EUB air monitoring truck out of Calgary to the area. The ESG said the incident was called down about 2 ½ hours later, when no further odours were detected.

The RDFC stated that a full investigation was conducted over the next several days, which involved taking statements and gathering data from personal H<sub>2</sub>S monitors of Bears paw personnel and contractors and questioning personnel from other oil and gas companies. The RDFC also contacted school officials, officials from the Village of Big Valley, members of the public who had reported detecting odours, and a nearby trucking firm that provided statements and information on its operations on that date.

Ultimately, the RDFC issued a high risk noncompliance against Bears paw, which it identified as the source of the off-lease odour. While it acknowledged that not all of the data supported a finding that Bears paw was the undisputed source of the emission, the RDFC believed the balance of probabilities supported that finding. The ESG cited the following as supporting its decisions:

- an extensive search for other potential sources revealed none;
- the meteorological data were inconclusive, as the winds were highly variable and H<sub>2</sub>S dispersion would be affected by the hilly terrain and nearby treed area;
- heavier H<sub>2</sub>S does not always follow the wind direction and releases close to ground level behave differently; and
- both a Bears paw staff monitor and the monitor from another operator's personnel detected or alarmed and recorded H<sub>2</sub>S levels at between 2 and 6 parts per million (ppm) and 10 ppm respectively at or near the Bears paw site.

The ESG stated that it asked its air quality engineer in the EUB Environment Group to perform modelling in response to concerns raised by a parent who disbelieved the accuracy of the low H<sub>2</sub>S levels that were recorded, given the severity of symptoms reported by his child, who was one of the evacuees at the school.

With respect to Bears paw's concern that details were not promptly disclosed from the RDFC investigation, the ESG said that it had immediately provided the information to the EUB Law Branch for review. The Law Branch undertook to review the information to ensure that the disclosure to Bears paw would not result in a privacy breach contrary to the *Freedom of Information and Protection of Privacy Act*. The ESG stated and the Board Member accepts that the time taken to complete the privacy review was responsible for the delay in getting information to Bears paw. The ESG also acknowledged that it would normally hold a public meeting following such an event to provide factual information to the public but it had not yet done so in the case of the Big Valley incident.

The Board Member found the evidence respecting this particular incident to be sufficiently inconclusive so as to require a site visit to fully appreciate the information provided. The Board Member therefore conducted a visit to the area on October 30, 2007, and independently viewed the area around the 13-26 Bears paw site. The proximity of the 13-26 site to the school building, the two trucking businesses, and at least three other well sites in the area were noted, as well as the general terrain and the potential impact of the prevailing winds. Having considered all the above, the evidence in the hearing, and his personal observations during the area visit, the Board Member would not have come the same conclusion as the RDFC that the Bears paw facility was

the source of the odour. The Board Member acknowledges that Bears paw's own evidence was that H<sub>2</sub>S readings were recorded on its lease, but the H<sub>2</sub>S odours and readings on lease are not corroborated by a measurement off lease. The conflicting evidence of the possible sources of the odours, the topographic features noted in the area, and the wind reported at the time of the incident to be blowing from the southeast, all lead the Board Member to conclude that one cannot state with reasonable certainty that Bears paw's facility was responsible for off-lease odours on the day of the Big Valley incident. In making this recommendation the Board Member acknowledges that he has had the benefit of hindsight and that would not have been available to the ESG, or to Bears paw for that matter, during the course of the incident.

During the hearing, the ESG indicated that in the normal course of events the RDFC would hold a public meeting to discuss the findings of its investigation into the incident. The Board Member suggests that the RDFC proceed to hold a public meeting to fully discuss this incident with members of the Big Valley community and to disclose whatever information it can respecting measures taken to determine the source of the reported odours. It is the Board Member's view that this is an important step to ensure that the community members have the appropriate facts and information and that they are assured that the Board views these matters very seriously and will continue to monitor and respond to issues. The issue of the Board Member's findings respecting document disclosure are discussed more fully in Section 7.2 below.

## **5.2 The High Level Trucking Incident**

Bears paw explained that the EUB notified Bears paw that on June 6, 2006, an incident involving a contract tanker truck parked in the town of High Level had been investigated as result of an H<sub>2</sub>S odour complaint from the public. Bears paw acknowledged the truck had been hauling sour product from its High Level facility to the Rainbow Terminal and had offloaded the product and returned to town. By the time the truck driver was located, the odours had dissipated. The EUB inspector and the driver discovered that a cap on a vent line was not installed: it had either fallen off or had been deliberately removed. Bears paw maintained that this was such a minor incident that the trucking company failed to report the occurrence to Bears paw and that it only became aware of the incident over two weeks later when it received notice of a high risk enforcement action from the EUB. Bears paw strongly disputed the EUB's jurisdiction on trucking matters and, in any case, it believed the incident was of such a minor nature as to not warrant a high risk enforcement action. Bears paw further indicated that it believed that Mr. Touchette, of the RDFC, played some part in the enforcement action levied by the EUB High Level Field Centre (HLFC), because in 2001 Bears paw had received correspondence from and engaged in a discussion with Mr. Touchette about another trucking odour matter. Bears paw indicated that upon challenging the enforcement action, it was advised that the HLFC was withdrawing the enforcement, but Bears paw was disappointed that the corresponding record of noncompliance was not removed from its corporate record. Bears paw believed the record of the noncompliance should be expunged and was concerned that anyone accessing its corporate record would draw the wrong conclusions about the state of the enforcement, as the record status now stated "compliance demonstrated." Bears paw believed changes needed to be made to the EUB administration of compliance matters to accurately represent that an action was rescinded.

The ESG said that the HLFC responded to an anonymous public complaint about odours emanating from a tank truck parked in the Town of High Level on June 6, 2006. The ESG stated that an EUB inspector responded from the HLFC and upon locating the truck driver determined

that a cap was off one of the vents on the truck. The ESG said the truck was already unloaded at that point but the driver disclosed that he had recently hauled sour product from a Bears paw facility. The ESG said the HLFC issued a “High Risk Action 2 – Persistent Noncompliance” to Bears paw as a result of the incident. Although Bears paw had not formally appealed the action, the ESG reported that a meeting between Field Surveillance management and staff resulted in the rescission of the enforcement action when concerns were considered about the sufficiency of information used, whether the appropriate regulatory requirement was cited, and legal concerns were raised regarding the EUB managing odours from trucks on provincial roadways. In response to Bears paw’s concerns respecting the EUB’s compliance record of the incident, the ESG explained that certain functionality in the EUB electronic FIS system would not permit the deletion of an enforcement action that was withdrawn. It said the inspection results on this specific matter had been modified to show that compliance was demonstrated and that notes within the specific record indicated enforcement was withdrawn by the issuing field centre and would not factor into any escalation by any other field centre. The ESG stated that the EUB had been taking enforcement action on odours from trucks transporting products from well sites or facilities for decades and believed it had the jurisdiction to continue to do so.

The Board Member heard that the enforcement action arising from this incident was consistent with action taken for many years by the various field centres. The Board Member finds no evidence that either Mr. Touchette or the RDFC had any involvement in the HLFC bringing the enforcement action. The Board Member understands that the enforcement action was withdrawn following discussions between EUB staff about the specific incident and the EUB’s trucking policy in general. The Board Member recognizes that the evidence concerning the High Level trucking incident indicates that the EUB’s jurisdiction to bring enforcement action against an operator as a result of odours escaping from a truck that contains only the residue of an operator’s product is not clear and believes this policy must be clarified. In addition, the Board Member believes that the EUB records should clearly differentiate between enforcement being withdrawn and “compliance demonstrated,” and the Board Member will recommend changes to the EUB FIS system as a result.

### **5.3 The Flame Arrester Incident**

Bears paw said that an inspector from the RDFC conducted an inspection at its facility located at LSD 11-16-39-20W4M (11-16) on February 2, 2007, and ultimately issued a high risk noncompliance enforcement action when it found that one of the three nuts associated with the cover on the flame arrester unit was missing. Bears paw stated that its operator immediately repaired the item and maintained that the missing part did not affect the actual operation of the flame arrester and therefore any enforcement was inconsistent with the fact that the missing nut did not pose an actual safety hazard. Bears paw said its management pursued the matter with the inspector involved and suggested to the inspector that the RDFC Team Leader, Mr. Touchette, disliked Bears paw and therefore discretion that could have been exercised in Bears paw’s favour was not, with the result that Bears paw was subject to an enforcement action that was not appropriate given the minor nature of the transgression. Bears paw indicated that it was also advised that a follow-up inspection was conducted at the site in March 2007 by the original inspector, the RDFC Team Leader, and an EUB technical specialist. During that inspection, Bears paw said EUB staff identified further defects in the flame arrester unit, namely, that a sheared bolt and missing gasket were discovered, along with indications that the underground tankage on site had no records to establish that integrity tests had been done on a required

schedule. Bears paw stated that it commissioned a technical report from an engineering consultant on flame arresters, which concluded that this specific unit was not compromised by the initial missing nut, but the specialist would not conclusively commit to the unit being safe with the combination of the missing nut, the sheared bolt, and the missing gasket. Bears paw's specialist did suggest that EUB staff should have conducted additional tests to determine the workability of the unit.

The ESG stated that a staff member from the RDFC had conducted a routine inspection of Bears paw's 11-16 facility, as directed by the EUB's "OSI" system. It explained that the OSI system is a risk-based scoring system that relies on factual information to select sites to be inspected based on operator performance, site sensitivity, inherent risk, and other factors. The ESG stated the OSI system had independently scored Bears paw's 11-16 facility for inspection in the 2006-2007 year. The ESG explained that the high risk noncompliance resulting from the RDFC's February 2007 inspection of the facility was prescribed by the Risk Assessed Noncompliance matrix the EUB had established with input from an industry-EUB committee and that the on-site inspector had no discretion to find otherwise if he determined the requirement was not met. In considering the views represented in Bears paw's challenge of the enforcement action to the RDFC, the ESG said that the original inspector, the RDFC Team Leader, and Shawn Woodford, the EUB provincial technical specialist for gas facilities, reinspected the 11-16 facility. A detailed examination of the equipment at that time determined that a gasket was missing and a bolt had been sheared off at the back of the flame arrester unit. The ESG acknowledged that Bears paw undertook to repair the defects and eventually provided information on integrity tests for the underground tanks. The RDFC said it did not escalate enforcement against Bears paw for the new concerns identified in the second inspection. Subsequently, the RDFC inspector contacted the supplier of the specific flame arrester, who advised that the flame arrester was designed to operate with all parts in place and that it would not guarantee the unit's proper operation without the identified nut in place. Based on all of the above, the RDFC denied Bears paw's appeal of its enforcement action.

The Board Member is aware that while Bears paw has acknowledged each of the defects identified during two separate inspections of its 11-16 facility, it steadfastly maintains that the functionality of the flame arrester unit was not compromised. In fact, an expert for Bears paw suggested that additional field tests should be applied to evaluate the safety of the unit before concluding that any enforcement is merited. The Board Member does not accept that this would be a reasonable approach and believes that EUB field staff are entitled to rely on observable features and function when assessing compliance and should not be required to conduct field testing before making a decision. The Board Member also relies on the statements of the supplier of the unit, who would not guarantee its functionality without proper installation and maintenance of all the unit's parts, as well as the conclusions of EUB staff who conducted not one, but two inspections of the unit. The Board Member concludes that the EUB staff were qualified to make their findings and did so appropriately given the description and parameters of the infraction as described in *Directive 064: Requirement and Procedures for Facilities*. The Board Member therefore recommends that the Board uphold the enforcement action on the flame arrester incident.

## 5.4 The 6-26 Odour Incident

On January 30, 2007, Bears paw said it was notified that the EUB air monitoring unit had detected off-lease H<sub>2</sub>S readings from Bears paw's 6-26-36-20W4M (6-26) site. While Bears paw acknowledged that its operator investigated a leak thought to be from a valve on the top of the production tank, it later determined the source of the leak to be loose piping and fitting below the valve, which were promptly repaired. Bears paw believed the readings recorded by the highly sensitive equipment on the EUB air monitoring unit of 11 parts per billion (ppb), taken outside the plant gate, were below a detectable level for odours and that it was unreasonable for the EUB to issue enforcement based on such a low level. Bears paw acknowledged that as a result of its discussion with the air monitoring technician, it became aware of several service companies that had similar state-of-the-art equipment, but it maintained that the EUB's use of such sophisticated equipment in this manner was unfair. It argued that the leak was of a very minor nature and that, in any case, because Bears paw owned the entire southeast quarter section and not just the fenced area of the facility, any measurement from outside the gate did not indicate that an off-lease emission had actually occurred.

The ESG stated that an RDFC staff member attended a Parkland Airshed Management Zone (PAMZ) meeting in September 2006 and was advised that a PAMZ stationary monitoring unit located at LSD 2-5-37-20W4M had registered high sulphur dioxide (SO<sub>2</sub>) readings in the Fenn Big Valley area. As the readings were the highest of any recent monitoring, the PAMZ asked the EUB to investigate and provide a report. The RDFC therefore requested that one of the EUB air monitoring units take measurements throughout sites in the area to determine the possible source of the SO<sub>2</sub>. This monitoring was conducted in late January 2007. The EUB air monitoring technician reported that in the course of driving through the area, the air monitoring unit registered H<sub>2</sub>S readings of 5-9 ppb approaching the gate to Bears paw's 6-26 facility. The readings peaked at 11 ppb outside the gate and beyond the fenced site. After the EUB contacted the operator, Bears paw personnel attended at the site and completed repairs that remedied the leak. The RDFC acknowledged that it issued a high risk enforcement action against Bears paw as a result of the inspection. The ESG said that Bears paw had not raised the issue of ownership of the quarter section until submissions were made to this hearing. The RDFC stated that it was not its normal practice to ascertain through the examination of a survey plan a specific lease boundary but would instead rely on fencing as an assumed boundary.

The Board Member recognizes that Bears paw did not dispute that a leak occurred resulting in H<sub>2</sub>S emissions from its production tank. Instead, the Board Member heard Bears paw attempt to minimize the event by stating that the volume of product released was low and the H<sub>2</sub>S concentration that was detected was low, resulting in this being a very minor incident. The Board Member understands that Bears paw is of the view that the EUB detecting such leaks with the use of its state-of-the-art air monitoring unit is unfair, but the Board Member disagrees that any tolerance or discretion should be applied in these circumstances. The Board Member believes that Bears paw does not entirely appreciate the role of the EUB and its responsibility to conduct surveillance in order to confirm compliance, and that it is most certainly an expectation of the public that these types of emissions do not occur at any time or at any concentration. The Board Member is also not persuaded by Bears paw's argument that the recordings at the gate and outside the fence were not technically off lease, since Bears paw itself was the owner of the entire quarter section. This relatively unique land holding does not excuse Bears paw from meeting EUB requirements intended to safeguard the public and to inspire confidence that the industry

can operate in proximity to other land users without placing them at risk of exposure to harmful substances. The Board Member therefore finds that the enforcement was appropriate.

## **5.5 The Pipeline Incident**

Bears paw discussed an incident that occurred on May 30, 2007, when a farmer plowing his field struck a Bears paw pipeline that had been installed in the 1950s. Subsequent to reporting the incident to the RDFC, Bears paw was asked to conduct a depth of cover survey for all lines of similar age in the area, and acceptance of this request was tied to the pipeline in question being allowed to resume operation. Bears paw said that the RDFC eventually agreed that a pressure test of the specific pipeline would suffice to allow it to resume operating the pipeline, but Bears paw felt bullied by being required to conduct a depth of cover survey on other lines. It believed that the RDFC's request exceeded the EUB's authority to require that work be done. Bears paw said under cross-examination that it was unaware of any other operators that had been required by the EUB to conduct this type of survey.

The ESG explained that Bears paw self-reported the pipeline incident to the RDFC. The ESG stated that it was very common for EUB field staff to ask operators to conduct depth of cover surveys in areas where an incident had occurred and the problem would seem to have been caused by inadequate cover to protect the pipeline from damage by activities taking place on the surface.

With respect to the RDFC request for Bears paw to conduct a depth of cover survey in the area given the age and demonstrated shallow installation of the pipeline, the Board Member finds that it is entirely reasonable and prudent to explore the extent of the problem that has been identified. While Bears paw represented this request as an inappropriate consequence to the self-declared incident described, the Board Member believes this perception may be directly linked to Bears paw's poor relationship with the RDFC and not due to Bears paw not seeing the merits of this request. The Board Member would expect Bears paw to reconsider and to plan to participate in this important survey work in the area of the pipeline to ensure that public safety and confidence are maintained.

## **6 OTHER RELATED INCIDENTS AND EUB ACTIONS**

Bears paw cited a number of other incidents where it perceived that the EUB treated it differently from other operators. Bears paw discussed two other incidents where other operators in the Big Valley area had experienced leaks from their respective facilities but it believed neither had received enforcement action from the EUB. Bears paw disputed that the other companies had self-declared the infractions before the incidents were discovered by the EUB and said it believed that enforcement action was warranted. It compared the events cited to its own incidents for which it was subject to enforcement action and maintained that the other operators' incidents were far more serious and should have resulted in substantial enforcement action by the EUB.

Bears paw had one of its field operators from the High Level region detail an event when an EUB air monitoring technician provided a "satisfactory" inspection slip to its operator but failed to enter that inspection into the EUB FIS system. That action led Bears paw to suspect that the EUB may not record all inspections in its system, especially when compliance was demonstrated.

Bears paw stated that it had become concerned about the increase in inspections it was subjected to in 2006-2007 by the RDFC, as evidenced in the RDFC's own inspection records. While it acknowledged that it was the licensee of over 300 wells and facilities in the RDFC area, it noted that EUB records confirmed that 14 random inspections had been carried out on Bears paw facilities in 2006-2007 and that that number was much higher than in previous years. In Bears paw's view, the increased inspections of its facilities amounted to regulatory terrorism. It believed that the significant increase in inspections was specifically attributable to direction given by Mr. Touchette of the RDFC and demonstrated bias against Bears paw, as discussed in Section 7 below.

With respect to the incidents involving the other operators that Bears paw cited, the ESG stated that enforcement was consistently applied, as set out in *Directive 019*, when the EUB was the first to discover a problem. The ESG explained that self-disclosure did not result in enforcement actions being applied, as set out in the directive. The ESG said that off-lease odour, for example, was not treated with a sliding scale of seriousness based on the released volumes, but rather was considered a high risk noncompliance regardless of the off-lease area affected.

In response to the concern raised by Bears paw regarding inspections not being entered into the FIS system, the ESG said it did not believe this problem was widespread but it had occurred in this instance due to the admitted inexperience of a new technician who had left an inspection slip with a Bears paw staff member he encountered, even though he had not conducted an inspection of the Bears paw facility. An EUB air monitoring technician testified that he was trying to reach another operator's site to conduct an inspection and was taking video recordings at various intervals along his route in order to fulfill certification requirements on a newly acquired infrared camera used to detect hydrocarbon leaks. The technician acknowledged that the video he recorded as a test of the camera at a Bears paw site revealed a small fuel gas (propane) leak and that he showed the Bears paw operator the results so that it could repair this almost undetectable leak and reduce its costs. The technician indicated that he had not appreciated the significance of the inspection slip to Bears paw but would follow up and enter the results into the EUB FIS system.

The ESG explained that the EUB's records of inspections needed to be examined to fully understand the data represented. It said that inspections could be triggered by a number of reasons, including the OSI process outlined in Section 5.3 above, complaints or incidents, flaring or venting operations, reinspection of facilities, baseline inspections, random inspections, and requests from other EUB groups. It stated that for each inspection, the reason for the inspection was the first information entered in the record. The ESG said that in Bears paw's case, 13 of the 14 random inspections were conducted during an air monitoring sweep in November 2006 that the EUB agreed to conduct when requested to do so by officials of the Village of Big Valley. The ESG pointed out that all of the 13 inspections carried out by the air monitoring technician yielded satisfactory results and were recorded in its FIS database.

In considering all of the above instances, the Board Member is not convinced that the information supports the contention that Bears paw is being treated differently or inconsistently compared to other operators. Bears paw's admitted unfamiliarity with *Directive 019* procedures, the self-disclosure protocol, and the basic enforcement actions themselves suggests that it may have misunderstood how these other events fit into the inspection processes. The Board Member believes that the air monitoring technician who provided an inspection slip to Bears paw and then



did not enter inspection results into FIS may also have misunderstood the importance of that decision to Bears paw. In this instance, the Board Member finds no deliberate or bad intent on the part of the technician, but supports the EUB Field Surveillance management taking the necessary steps to clarify how and when inspection results should be gathered and ensuring that appropriate training of new staff occurs. In addition, the Board Member recommends that the Board require the Field Surveillance Group to review its procedures and consider creating a tracking system related to the issuing of inspection slips to ensure that 100 per cent of inspections in which slips are issued result in corresponding FIS entries. This should be accomplished to provide assurance that inspection results are accurately reflected in the licensee record.

Regarding Bears paw's view that it was unfairly targeted with a disproportionately high number of inspections in 2006-2007 by the RDFC, the Board Member finds no evidence to substantiate this allegation. The Board Member accepts that the air monitoring sweep conducted as a result of a request by an official of the Village of Big Valley accounts for the vast majority of random inspections at Bears paw's facilities and notes that all were represented as satisfactory in the FIS system.

## **7 BIAS, ADMINISTRATIVE UNFAIRNESS, AND LACK OF TECHNICAL COMPETENCE**

Bears paw alleged that its treatment by the EUB was contrary to the rules of natural justice and the legal requirements of administrative fairness. It contended that this treatment was the result of deficiencies in the EUB enforcement process arising from any or all of the following:

- bias on the part of the RDFC, in particular its Team Leader, Mr. Touchette, whereby Bears paw had been unfairly targeted for inspection and enforcement action;
- lack of administrative fairness within the EUB enforcement process; and
- lack of training or competency by EUB inspection and enforcement staff.

### **7.1 Bias**

As stated in the opening portion of this report, Bears paw was of the view that the RDFC, and in particular its Team Leader, Mr. Touchette, treated Bears paw differently from how they treated other operators in the area for reasons not consistent with the EUB's statutory mandate or its *Code of Conduct and Ethics*. In its written submissions and during the course of the oral hearing, Bears paw described this treatment by the RDFC in a number of ways, including as

- bias
- regulatory terrorism
- bad faith
- unfairness or breach of duty to be fair
- misuse of statutory authority and abuse of discretion
- breach of the EUB *Code of Conduct and Ethics*

The common thread in these allegations is that one or more EUB staff members were considered to have made inspections and enforcement decisions that unfairly targeted Bears paw. For the purposes of this report, these allegations are addressed collectively under the label “bias.”

When asked how the RDFC’s bias against Bears paw had been demonstrated, the Bears paw witnesses stated that bias was indicated through the decisions made and the steps taken by the RDFC in the course of the incidents described above and by the increased inspections of and enforcement action against Bears paw facilities in general. It contended that the bias was motivated by the RDFC Team Leader’s personal dislike of Bears paw and his desire to punish Bears paw in a way that was vindictive and unfair. The Board Member considers these allegations to be the most serious of all the matters raised in this proceeding and stated so to the parties a number of times during the hearing. Bears paw stated that it did not take lightly the decision to bring these allegations against the EUB staff.

The test for personal bias is well established in law as follows: whether a reasonable and right-minded person, being properly informed and having thought the matter through, would conclude it is more likely than not that the decision-maker would not decide the matter fairly. When institutional bias is alleged, the same conclusion must be drawn when a substantial number of cases are considered. The test has a twofold objective element: the person considering the allegation of bias must be reasonable, and the apprehension of bias itself must be reasonable in the circumstances. Furthermore, the reasonable person must be an informed person, having knowledge of all the relevant circumstances.

The Board Member has considered the bias allegations in relation to each of the incidents and in relation to the incidents as a whole. Applying the test established in law, the Board Member is not convinced that actual bias or a reasonable apprehension of bias exists in the RDFC’s treatment of Bears paw. Given the serious nature of an allegation of reasonable apprehension of bias, the threshold or standard of proof for such a finding is high. The standard has been described as requiring a “real likelihood of bias” and the sense that bias is probable, rather than a mere suspicion. A lengthy discussion of the standard that has been applied in this proceeding is not particularly helpful, as the Board Member has decided that the allegations of bias are not established even on the standard of the preponderance of evidence.

The evidence concerning the High Level trucking incident is clear that neither Mr. Touchette nor the RDFC directed that inspection or the consequent enforcement action, which was ultimately withdrawn. The inspection was a response to an odour complaint that originated in High Level. The enforcement action was withdrawn after further consideration by a cross-section of EUB staff, including legal counsel and field staff from areas other than RDFC. Bears paw argued that the decision to withdraw enforcement in the face of Bears paw’s court challenge was itself an indication of bias, as Bears paw was thereby deprived of the opportunity to challenge the EUB’s trucking policy. The Board Member is not persuaded that this is a reasonable conclusion.

Bears paw asserted that the EUB’s quick decision that Bears paw’s 13-26 facility was responsible for the odours that caused the evacuation of the Big Valley School and the RDFC’s failure to thoroughly investigate other possible sources of the odours indicate RDFC’s bias against Bears paw. Bears paw contended that the RDFC never seriously considered any alternative sources, but instead within a matter of one or two hours concluded that the odours were from Bears paw’s facility. As stated above, the Board Member is not convinced that the Bears paw

facility was the source of the odours. However, being wrong in drawing that conclusion does not mean that the RDFC's decision was motivated by bias. Bears paw conceded in evidence that the operations taking place at the time of the odour complaint could, if not conducted properly, have resulted in H<sub>2</sub>S odours off lease. A worker for another operator whose personal sensor recorded H<sub>2</sub>S readings also concluded that the Bears paw facility was the source, and he shared this view with the RDFC. This was not a situation where no facts existed at the time of the investigation that would indicate Bears paw might be the source of the odours. Certainly the RDFC had reasonable grounds to suspect that Bears paw might be the source of the odours.

The Board Member has come to a similar conclusion in regard to the 6-26 off-lease odour incident. In that case, the EUB's air monitoring operator registered H<sub>2</sub>S readings in a location that appeared to be outside the Bears paw lease. Upon inspection of the facility, it was determined that an equipment failure was responsible for the H<sub>2</sub>S emissions. Bears paw owned the entire parcel within which the facility was located, which appears to be a somewhat unique arrangement. Bears paw argued that none of the readings taken by the air monitoring operator were in fact "off-lease" and that in any event the readings were below levels at which an individual could detect an odour. Bears paw argued that in these circumstances the EUB's decision to proceed with enforcement demonstrated bias against Bears paw. In the Board Member's view, the air monitoring technician's assumption that he was off Bears paw's lease when the readings were taken, combined with the discovery of the faulty equipment, would lead to a reasonable conclusion that Bears paw was responsible for off-lease odours.

With respect to the flame arrester incident, as stated previously in this report, the initial inspection at that facility was a routine inspection that was prompted by the EUB OSI system, and therefore the question of bias does not arise regarding the original inspection. Bears paw argued that the RDFC's decisions to issue enforcement based on one nut missing from the arrester cover, to conduct a second "surprise" inspection during which other deficiencies were noted and enforcement action followed, and to refuse to withdraw or rescind enforcement after Bears paw provided a technical report that indicated the unit was not compromised in any way by the deficiencies all exhibited bad faith and improper intention on the part of the RDFC. As stated in Section 5.3 of this report, the Board Member is satisfied that EUB staff were qualified to make their enforcement decisions regarding the deficiencies found with Bears paw's flame arrester and has recommended that the enforcement action be upheld.

The applicable regulation requires an "adequate flame arrester." The regulation does not define the word "adequate." The RDFC stated that its interpretation of the regulation was guided by Section 5.9 of Appendix 1 in *Directive 064*, which states: "check to ensure flame arrester has all bolts, is not saturated with oil, is properly fitted, and has gasket where required." *Directive 064* speaks clearly to the deficiencies noted in this case: two missing fasteners and one missing gasket. Bears paw argued that the EUB should have exercised discretion and decided that the safe operation of the flame arrester was not compromised by the deficiencies. In fact, Bears paw argues that the EUB had an obligation to investigate and determine if and to what extent the unit was compromised by the deficiencies before issuing or deciding to maintain enforcement action. The Board Member notes that Bears paw did not suggest that the missing fasteners and gasket did not need to be replaced, and in fact Bears paw appears to have been diligent in completing that work.

In the Board Member's view, the RDFC's conduct and enforcement in relation to the flame arrester does not give rise to a reasonable apprehension of bias. The distributor of this particular unit stated that the missing fasteners and gasket could create a hazard. The RDFC interpreted the regulatory requirement to be that the flame arrester must have all fasteners and gaskets in place at the time of inspection. That is a reasonable interpretation of the regulatory requirement; it is the standard to which the RDFC enforced in Bears paw's case and it is the standard the RDFC stated it would continue to enforce. Bears paw's argument that the inspector had or should have had some discretion within which he could have disregarded the missing arrester cover nut (after it had been replaced) is not borne out by either *Directive 064* or *Directive 019*, nor, in the Board Member's view, is it a satisfactory approach when the proper functioning of such equipment is a matter of safety.

While the Board Member has not found bias in the flame arrester incident, the circumstances of the incident are useful to illustrate the demeanor of the parties throughout many of the matters that were considered in this proceeding. In the Board Member's experience, when allegations of bias arise from a perception that biased treatment is motivated by one individual's personal dislike of another person or organization, there is often a history of direct interaction between the key individuals involved. Bears paw stated in its written submission that the unreasonableness and bias on the part of the RDFC was the result of a personality conflict between Mr. Touchette and Mr. Kaplan, a Bears paw director and supervisor of operations. It is clear from the evidence that Mr. Touchette and Mr. Kaplan have had little or no history of direct personal interaction. Mr. Touchette did not recall ever meeting Mr. Kaplan at any time prior to the hearing. Mr. Kaplan believed he had spoken with Mr. Touchette on the telephone on at least one occasion and that he had perhaps met him in person on one occasion. The Board Member considers it somewhat remarkable that allegations of personal bias such as these could arise and persist with little or no personal contact between the individuals concerned. It is remarkable and it is also regrettable as, in the Board Member's view, the relationship between the RDFC and Bears paw suffered greatly from a lack of direct personal contact between the individuals responsible for guiding their respective organizations. The Board Member alluded to this in comments to the parties during hearing, pointing out that many of the misunderstandings that fostered the present difficult relationship between Bears paw and the RDFC may have been avoided if key Bears paw and EUB personnel had met face to face or spoken on the phone in the early stages of these incidents. Bears paw and the RDFC each have a need to rehabilitate the working relationship they share, and it is hoped that these comments will assist them in that task.

In a previous section of this report, the Board Member found that the RDFC's response to Bears paw's pipeline break was reasonable and authorized by legislation. Bears paw argued that by insisting it undertake a depth of cover survey as a condition of allowing the pipeline to resume operation, the RDFC was "leveraging" its authority to suspend the pipeline in order to extract Bears paw's agreement to conduct a survey that it was not legally required to do. RDFC stated that other operators had been asked to do pipeline surveys as part of an effort to determine the extent of the "shallow pipe" problem in the Red Deer area. The Board Member does not find a reasonable apprehension of bias in the RDFC's response to the Bears paw pipeline break.

With respect to the air monitoring inspections of Bears paw facilities in the High Level area, which are addressed in greater detail above, the RDFC played no role in those inspections and the Board Member does not find that a reasonable apprehension of bias arises in connection with them.

With respect to the air monitoring inspections undertaken during the “sweep” of facilities in the Red Deer area, Bears paw argued that the RDFC had formed an opinion that Bears paw was a “problem operator” and that the sweep clearly indicated bias because it only targeted Bears paw facilities. The RDFC stated that the sweep was done in response to a request from an official with the Village of Big Valley. The official had asked the RDFC to check Bears paw facilities for odour emissions because individuals in the community had complained to village officials about odours from Bears paw facilities. The RDFC stated in its written submission that another operator in the area and four residents of Big Valley had also identified Bears paw facilities as the source of odours. The RDFC requested the sweep of Bears paw facilities in response to these complaints and requests. In the Board Member’s view, the RDFC responded appropriately with a program of inspections that attempted to verify the complaints. Bears paw was not impacted by the sweep, with the exception that a number of additional satisfactory random inspections were added to its compliance record. In the Board Member’s opinion, the Red Deer air monitoring sweep does not evidence bias against Bears paw on the part of the RDFC.

Bears paw also stated that the RDFC Field Centre Team Leader’s bias against Bears paw put him in contravention of the EUB *Code of Conduct and Ethics*. The code guides EUB employees in their conduct with other EUB personnel and with individuals outside the organization. The Board Member considers that the allegation that Mr. Touchette is in breach of the code arises from the same conduct or circumstances upon which Bears paw has based its more general allegation of bias, i.e., there is not a different set of facts that must be considered in relation to the allegation that Mr. Touchette is in breach of the code. For the reasons described in this report, the Board Member has determined that Mr. Touchette’s conduct in relation to Bears paw is not contrary to the EUB *Code of Conduct and Ethics*.

Bears paw asked for a recommendation that regulatory authority over and responsibility for all Bears paw facilities and operations presently under the jurisdiction of the RDFC be removed from the RDFC and moved to another EUB field centre. Based on Bears paw’s evidence, it appears that would involve about one-half of all Bears paw facilities and operations. Having regard for the findings and recommendations made in this report, in the Board Member’s view there is no basis upon which to make that recommendation.

There is one other aspect of Bears paw’s bias allegations on which the Board Member wishes to comment. The Bears paw principals who participated in the hearing were unwavering in their position that the RDFC was biased against Bears paw. Bears paw stated that it was “factually impossible” for it to be responsible for the Big Valley odour incident, although Mr. Kaplan did state that the activities at the Bears paw site that day were of a type that could have (but in his view did not) resulted in H<sub>2</sub>S being released. Bears paw acknowledged responsibility for the shallow pipeline that was hit by a farming implement, but insisted that the EUB did not have specific authority to require Bears paw to do a survey to identify other shallow pipe. Mr. Kaplan was visibly upset when the RDFC witnesses discussed the air monitoring sweep of Bears paw facilities and the 13 random inspection reports that resulted from it.

If put in the position of the Bears paw principals and considering the course of events in each of the incidents discussed in this proceeding, one can appreciate how Bears paw came to conclude that it was being targeted by the EUB for special treatment. However, in the Board Member’s view, Bears paw was not adequately informed about the EUB’s inspection and enforcement requirements, processes, and policies, and that likely played a large role in Bears paw coming to

conclude that it was being treated unfairly by the RDFC. When he was asked if he had reviewed *Directive 019*, Mr. Kaplan stated, “Specifically, no. However, I do have a basic understanding of it through the conversations I’ve had with the EUB personnel that I’ve been involved with.” When asked if Bears paw participated in any way in the EUB’s Compliance Assurance Initiative that resulted in *Directive 019* being issued, Mr. Kaplan responded, “No. We were busy trying to run a company, make a living.” The Bears paw principals did not appear to have any better knowledge of *Directive 064* or the Response Matrix that forms part of that document. Neither of them indicated that Bears paw had staff or consultants who were familiar with and had advised Bears paw on the EUB’s inspection and enforcement practices. In giving his rebuttal evidence, Mr. Wright remarked that Bears paw’s escalating involvement with EUB investigations and enforcement actions had caused him to become more familiar with the EUB’s regulations and procedures, as though doing that was a chore forced upon him. Bears paw stated that it was a member of the Canadian Association of Oilwell Drilling Contractors (CAODC), but not of other industry organizations, such as the Canadian Association of Petroleum Producers (CAPP) or the Small Explorers and Producers Association of Canada (SEPA C). The Board Member is aware that the latter two organizations are regularly engaged with the EUB on policy initiatives and the development of policy documents, and this has included the EUB’s Compliance Assurance Initiative, which led to the EUB’s current inspection and enforcement system.

The Bears paw witnesses gave their evidence openly and honestly and the Board Member does not doubt their conviction that Bears paw was being unfairly targeted by the EUB. However, the Board Member is concerned about Bears paw’s apparent lack of working knowledge about the EUB’s inspection and enforcement procedures and requirements. The test for bias requires that the reasonable person charged with assessing bias be properly informed of the matters touching on the issue. In the Board Member’s view, Bears paw’s principals were not sufficiently knowledgeable of the EUB’s inspection and enforcement requirements and practices to meet that standard. Had they been so informed, the relationship between Bears paw and the RDFC staff would not so easily have deteriorated to the point where Bears paw felt compelled to raise the allegations that were considered in this proceeding. Mr. Kaplan stated that he was too busy running the company to participate in the EUB’s Compliance Assurance Initiative. Running a company includes the responsibility to ensure that the company has a working knowledge of the regulatory requirements affecting its operations and to use that knowledge to interact responsibly and appropriately with the regulator. That responsibility is owed not only to the regulator but also to Bears paw’s own personnel, who rely upon the corporation’s officers to ensure there is effective and knowledgeable leadership in all aspects of the organization’s affairs. The Board Member strongly encourages Bears paw to become actively involved in the process by which industry engages with the EUB in the development and sharing of information about regulatory policy and requirements. Bears paw can choose to participate directly or through industry organizations that undertake that initiative on their members’ behalf, but it needs to become involved in some capacity.

To assist industry, in particular smaller operators that, like Bears paw, may choose not to be represented by industry-member organizations, the Board Member recommends that each EUB field centre host, on an annual basis, a one-day program that provides information to licensees about the EUB’s inspection and enforcement process. The suggestion is that part of the day be dedicated to EUB staff providing information or presentations to participants and another part be dedicated to the EUB staff answering questions from participants.

## 7.2 Lack of Administrative Fairness Within the EUB's Enforcement Process

Bears paw submitted that the EUB's current enforcement system was administratively unfair and provided an opportunity for the EUB staff, particularly field centre leaders, to misapply technical requirements and to manipulate enforcement to make the system function to their liking. In support of its position, Bears paw cited a number of deficiencies it perceived in the EUB's enforcement process, which are summarized as follows:

- EUB enforcement staff failed to consider fairly all relevant facts relating to an incident. Bears paw cited the Big Valley odour incident and the flame arrester incident as cases where EUB staff ignored or gave little weight to compelling information provided by Bears paw, and instead issued or continued enforcement based on much weaker or no evidence that Bears paw had contravened EUB requirements.
- EUB staff cited or applied regulatory provisions in support of enforcement action, when in fact such provisions did not exist or did not properly apply in the circumstances. Bears paw cited the High Level trucking incident, the 6-26 off-lease odour incident, and the pipeline survey requirement as examples.
- Enforcement letters from the EUB to Bears paw failed to correctly identify facility locations or correctly state the noncompliance for which Bears paw was being investigated or enforcement action was being brought. Bears paw believed this was purposely done to conceal that the EUB in fact had no regulatory authority in the matter or was applying its authority incorrectly and to deprive Bears paw of the ability to fully understand the noncompliance and to defend its interests. Bears paw cited the Big Valley odour incident as an example of this.
- The EUB failed to provide disclosure of information relating to enforcement actions in a timely manner.
- There are no clear rules regarding the entry of inspection information on Bears paw's record of inspections. Bears paw's experience was that unsatisfactory inspections appeared on its record almost instantly but satisfactory inspections either never appeared or were slow to appear. Bears paw cited the air monitoring inspections of its High Level facilities as an example of this.
- The appeal process under *Directive 019* does not meet the requirement of impartiality because the decision-maker is an EUB staff member.

Generally speaking, Bears paw's evidence in support of these allegations was based on its experience with the EUB in the course of the incidents considered in this proceeding. That is to say, where Bears paw disagreed with the outcome of a particular investigation or enforcement action, it also concluded that the EUB's methods, decisions, or motives were improper. Bears paw's approach might be characterized as follows: because the result was unjustified, Bears paw questioned and ultimately found fault with the means and motives leading to the result.

In the previous portions of this report, the Board Member has determined that in most cases the enforcement decisions made by the EUB were justified and authorized by law. The Board

Member has also concluded that Bears paw's allegations of lack of administrative fairness are not borne out by the evidence. That is not to say that Bears paw's allegations have no merit at all, and the following paragraphs contain recommendations intended to enhance the fairness of the EUB's enforcement process.

The RDFC witnesses acknowledged that the time the EUB took to provide Bears paw with disclosure documents relating to enforcement actions—10 months from the date of Bears paw's request in one instance—was too long. The Board Member agrees that the EUB did not provide timely disclosure of information to Bears paw. The evidence clearly indicates that RDFC was diligent and responsible in compiling information for production to Bears paw and that the delay arose elsewhere within the EUB. This is "not good enough."

The obligation to provide timely disclosure arises as a general principle of administrative fairness. Bears paw and the EUB witnesses were asked to specify where disclosure obligations are addressed within the EUB's existing enforcement documentation. Neither could identify a specific disclosure requirement. The Board Member finds that there is no specific disclosure requirement in the EUB's enforcement documentation, and in the Board Member's view the failure of the EUB to make timely disclosure to Bears paw is a direct result of that. Bears paw and the RDFC were forced to develop an *ad hoc* disclosure process, which ultimately did not provide for a timely disclosure. The Board Member therefore recommends that the EUB develop and include in its enforcement process a written policy governing the disclosure of inspection/investigation results and enforcement information. The EUB should be guided by administrative fairness in determining what information must be disclosed and when that information must be disclosed. When questioned about appropriate disclosure timeframes, the parties' responses were in a range extending to as long as seven months. Based on the evidence, the Board Member cannot decide what an appropriate timeframe for disclosure would be, but in the Board Member's view, seven months would be too long for any of the incidents considered in this proceeding. Under the *Freedom of Information and Protection of Privacy Act*, a public body such as the EUB must normally respond to a request for access to information within thirty days. The Board Member is not specifically recommending that timeframe be adopted for the disclosure of enforcement information, but does recommend that the EUB consider that standard when it establishes a timeframe for disclosure.

The evidence concerning the High Level trucking incident indicates that the EUB's jurisdiction to bring enforcement action against an operator as a result of upstream product odours escaping from a truck that contains only the residue of the operator's product is not clear. This policy must be clarified. The Board Member recommends that the EUB review its jurisdiction over trucking and issue a written clarification of its policy and position.

While the Board Member has found that Bears paw's concerns about the accuracy and completeness of its inspection record do not give rise to a reasonable apprehension of bias, it is a matter of concern if an operator's enforcement record is not a complete record of inspections and other enforcement-related activity. The Board Member recommends that each time the EUB inspects a facility, a record of that inspection be entered and the facility operator receive a copy of the inspection record or a notice stating where it may obtain or view the inspection record. With specific reference to the High Level trucking incident, the Board Member strongly recommends that the EUB provide within its inspection recording system a function that allows the record to indicate when an enforcement action has been withdrawn or rescinded.



Bears paw stated that the overlapping of functions within the EUB's enforcement process gives rise to a reasonable apprehension of bias. In particular, Bears paw was concerned that members of the RDFC, all of whom were subject to direction from Mr. Touchette, were responsible for dispatching inspectors, reviewing investigation results, deciding on enforcement action, and hearing a working group review under *Directive 019*.

The Board Member has considered Bears paw's arguments on this point and the evidence provided in the hearing and is satisfied that the EUB's enforcement process does not give rise to a reasonable apprehension of bias. In reaching this conclusion, the Board Member has relied in part on the fact that a number of opportunities for appeal are available to an operator who does not believe that enforcement has been properly issued against it. Under *Directive 019*, the first level of appeal is to the EUB group that issued the enforcement. If that were the end of the appeal process, the Board Member may have come to a different conclusion on this point. However, there are further appeals and procedural safeguards available to an operator subject to enforcement action. A decision by the EUB group to uphold the enforcement can be appealed to the EUB Enforcement Advisor, who is not part of the Field Surveillance Group. He is part of and reports to leaders in the Corporate Compliance Group. A decision of the Enforcement Advisor can be appealed to the Board itself.

In addition to the appeal process under *Directive 019*, the Board Member has considered the following in relation to Bears paw's allegations of lack of procedural fairness:

- The EUB Risk Assessed Noncompliance matrix prescribes the enforcement consequences for the vast majority of noncompliance events that may be encountered. There is little, if any, discretion afforded to an inspector once he or she has determined that noncompliance has occurred. In addition, the matrix dictates whether a particular noncompliance event is to be treated as high or low risk. The inspector has no discretion to assign risk.
- Section 26 of the *Energy Resources Conservation Act* authorizes the EUB to make any order or direction that it is authorized to make without holding a hearing, unless otherwise expressly provided in the act. If operations at a facility or pipeline are suspended as a result of enforcement action, there is a statutory right to a hearing before the Board.
- None of the incidents for which Bears paw was subject to enforcement action resulted in a suspension of operations. (The Board Member does not consider that the pipeline that was hit was suspended as a consequence of enforcement action. It was not permitted to resume operations until it was found to be safe to operate.) Bears paw was required to take corrective action and to submit an action plan that indicated the cause of the noncompliance and the steps it intended to take to prevent a recurrence. The Board Member considers that these consequences have had a relatively low impact on Bears paw.
- Generally speaking, the EUB's legislation affords it considerable discretion in determining how it will undertake its inspection and enforcement functions.

The decision *Baker v. Canada (Minister of Citizenship and Immigration)* was cited as an authority on procedural fairness, and the Board Member has also considered the factors identified in that decision. In the Board Member's view, the EUB's inspection and enforcement process is procedurally fair and does not give rise to a reasonable apprehension of bias.

### 7.3 Lack of Training or Competency by the EUB Inspection and Enforcement Staff

Bears paw argued that a lack of training or competency on the part of EUB Field Surveillance Group staff caused or contributed to enforcement action being wrongfully brought or maintained against Bears paw. Bears paw recommended the following in relation to that perceived deficiency:

- That the EUB adopt a policy that all EUB technical specialists be required to hold a Professional Engineer designation and that they either complete industry training or demonstrate field competence (on the basis of sufficient and substantial practical experience) in all facilities and operations that they are authorized to serve.
- That technical, regulatory, and legal training and certification be mandated for all field centre staff, in particular the RDFC staff.
- That the EUB adopt a policy that any field centre decision to commence an enforcement action only be made after the subject breach is confirmed in writing by both (1) a technical specialist holding a Professional Engineer designation and having appropriate experience relating to the facility, equipment, or operation concerned, and (2) EUB legal counsel.
- That all EUB rules, policies, and protocols and any revisions to them must be approved by a committee that is appointed by the EUB for that purpose and that includes members with appropriate engineering and legal accreditation.

For the reasons set out in this report, the Board Member has concluded that the enforcement decisions made by EUB staff in relation to the matters considered in this proceeding were reasonable and authorized by law, although the Board Member has reached a different conclusion about the Big Valley incident for the reasons cited in Section 5.1. The Board Member has also concluded that no reasonable apprehension of bias exists in relation to the RDFC's treatment of Bears paw in inspection and enforcement matters. Given those conclusions, the Board Member is not prepared to support or make to the Board the four Bears paw recommendations set out above.

## 8 OTHER MATTERS

The Board Member appreciates that the members of the ESG came together to provide complete information at this proceeding. However, the role of the EUB Enforcement Advisor is particularly unique and he would be expected to have virtually no *ex parte* contact with staff from other business units of the EUB in relation to matters on which he may sit in appeal of the decisions made by those business units. In the Board Member's view, it would have been a better choice for the ESG to have continued that important degree of separation by sitting two separate panels—one being the Enforcement Advisor and the other being the Field Surveillance staff and management. The Board Member also notes that the Enforcement Advisor offered a specific commitment to not sit on any future Bears paw enforcement appeal. As future appeals are not before the Board Member in this proceeding, the Board Member will not comment on that recommendation but is confident that the Enforcement Advisor will make an appropriate decision concerning his participation in any future Bears paw matters, if and when those arise.

Dated in Calgary, Alberta, on November 6, 2007.

**ALBERTA ENERGY AND UTILITIES BOARD**

*<original signed by>*

R. C. Clark  
Acting Board Member

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**APPENDIX 1 HEARING PARTICIPANTS**

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**Principals and Representatives  
(Abbreviations used in report)****Witnesses**

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**Bears paw Petroleum Limited (Bears paw)**

J. Gruber  
K. Slipp

J. Kaplan, P.Eng.  
P. Wright, P.Eng.  
A. Toews, P.Eng., of  
Perfex Consulting Ltd.  
C. D. James

**EUB Staff Group (ESG)**

J. P. Mousseau  
W. Cao, Student-at-Law

R. Kennedy  
D. Bartlett  
L. Touchette  
R. Wagener  
J. V. Grant

**Alberta Energy and Utilities Board staff**

G. Perkins, Board Counsel  
L. D. Wilson-Temple  
G. Brosinsky

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