

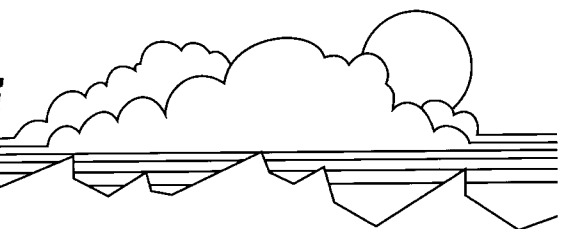
*North American Waterfowl  
Management Plan*



**Alberta's Wetlands:  
A Law and Policy Guide**

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Environmental Law Centre  
Edmonton, Alberta, for the  
North American Waterfowl  
Management Plan

**ENVIRONMENTAL LAW CENTRE**



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## THE ENVIRONMENTAL LAW CENTRE

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The Environmental Law Centre (Alberta) Society is a non-profit charitable organization operating in Alberta since 1982. The Society believes in making the law work to protect the environment and in support of this objective provides services in environmental law education and assistance, environmental law reform and environmental law research. The Society operates the Environmental Law Centre which is staffed by four full-time lawyers and a librarian.

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**FOR ALLEN, ELLY AND GINGER**



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## Introduction

### *Why the Guide*

Throughout my nearly eleven years at the Environmental Law Centre, I have devoted as much time as possible towards educating Albertans on law and policies relevant to protecting sensitive environmental areas and habitat, and in trying to improve our laws to better protect these invaluable resources. When the North American Waterfowl Management Plan (NAWMP), through Ducks Unlimited Canada, asked me to develop a proposal for a report on laws and policies that can affect Alberta's wetlands to assist those who deliver the NAWMP programs, I was frankly thrilled. I admire the NAWMP and its tremendous success in wetland habitat protection. As stated on its website, <[www.NAWMP.ca](http://www.NAWMP.ca)> the NAWMP is a partnership of federal, provincial/state and municipal governments, non-governmental organizations, private companies and many individuals, all who work towards achieving better wetland habitat for the benefit of migratory birds, other wetland-dependant species and people.

The project originally was meant to be a publication for primarily NAWMP use. However, as I developed the proposal it became clear that the information would be of value to a much wider audience. The NAWMP agreed, and we reached an arrangement to share copyright to the work between the Environmental Law Centre and the NAWMP.

### *The Guide and "wetland managers"*

The purpose of this Guide is to give users familiarity with the various laws and policies that may affect the condition or existence of Alberta's wetlands. The Guide focuses on the information needs of "wetland managers", meaning persons or agencies with an interest in the continuing existence of wetlands and in protecting them. Wetland managers could be any of a number of entities. They could be owners of properties that contain wetlands or staff of government agencies that have regulatory power over them. Wetland managers could be conservation organizations with an interest in wetlands or holders of conservation interests. Wetland managers could be simply citizens concerned about wetlands. The key to the concept of "wetland manager" does not rest so much with what category a person or organization falls under, but rather with what are his, her or its interests and objectives in relation to wetlands.

### *The Guide process including workshop/training sessions*

The process leading up to the Guide bears mentioning. The Alberta NAWMP circulated a first draft of the Guide early in 2001 to many of its partners for comment. The second draft was certainly improved by my making appropriate changes in light of comments. The NAWMP then arranged three workshops over the summer of 2001 for NAWMP partner staff: one in Brooks, one in Grande Prairie and one in Edmonton. There were two purposes for the workshops. One was to train NAWMP partner staff in many of the areas the Guide covers. Another was for me to solicit further comments to improve the Guide by making it more comprehensive and relevant to wetland managers. As a result of the sessions, I further developed and refined the text.

### ***The Guide's format***

The Guide contains three parts:

- Part I consists of a series of primers. The primers give general instruction on law and jurisdiction and provide the information needed to better understand the more detailed material in the chapters. The Guide contains seven primers: Constitutional Matters; Sources of Law and Legal Directives; Property Rights and Wetlands; Resource Acquisition, Exploration and Development; Statutory Authorizations; Environmental Assessment, and Municipalities and Wetlands.
- Part II consists of a series of chapters on particular areas of law that can impact wetlands. The Guide includes thirteen chapters: Wetlands, Riparian Rights and Statutory Alteration; Common Law of Drainage; Bed and Shores; *Water Act*; Alberta's *Wildlife Act*; Wetland Protection through Designation; Wetlands Conservation and Subdivision Development; Oil and Gas Development; Other Provincial Laws and Policies; Pipelines and Transmission Lines; Federal Laws and Policies; Wetlands and International Designations and Commitments, and Stewardship through Common Law Interests and Conservation Easements.
- Part III summarizes recommendations that the Guide has made relevant to improving our laws and policies.

### ***Closing comments***

In closing, I wish to commend the NAWMP for commissioning this Guide, and similar ones for the other prairie provinces. I wish to thank the NAWMP for entrusting this vital work as it pertains to Alberta to me and the Environmental Law Centre. I sincerely hope that the Guide provides those who care about Alberta's wetlands with the information needed to help preserve them. I also hope that the Guide brings greater awareness to government officials, law enforcers, administrative tribunals, legislators, public servants, resource users, developers and the public of the importance of our wetlands, and of the numerous activities that can affect them. Finally, I hope that through the Guide wetlands move closer to attaining the profile they warrant, as essential elements in maintaining our ecosystems, aesthetics, economic vitality, environmental health and heritage.

Arlene Kwasniak  
Executive Director  
Environmental Law Centre







# Part I Primers



# ***Primer #1***

## ***Constitutional Matters***

### **Primer #1: Constitutional Matters**

#### ***Wetland management and the constitution***

Legally speaking, the most basic power to manage a wetland lies with those possessing the right to regulate and set policy for its various aspects – land, water, air, wildlife, plants, other biota, and the relations between them. Determining who or what has the right to regulate and set policy for these aspects is no different from determining who or what has the right to regulate or set policy for any other matter in Canada. The place to start is with the Canadian Constitution as set out in the *Constitution Act*.<sup>1</sup>

The Canadian Constitution allocates what are called "heads of legislative power" between the federal and the provincial governments. The framers of the Constitution intended the allocation to be exclusive in the sense that if the Constitution gives one level of government the right to legislate a matter, it excludes the other level from legislating that matter. If one level of government passes a statute or regulation governing a matter over which the Constitution gives the other level exclusive power to legislate, a court may strike down the law as being *ultra vires*, meaning beyond authority given by the Constitution.

The question of which level of government -- federal or provincial -- has the right to regulate management of wetlands obviously was not on the minds of the framers of the *Constitution Act*. The gentlemen who drafted that document would not have discussed regulation of wetlands since wetlands' significance would not become apparent until deep into the twentieth century. Even wetland components – earth, water, air, wildlife, plants -- were not considered to be proper subjects of debate. However the framers did allocate some natural resource and management powers which are relevant to managing wetlands. From reviewing these management powers it is possible to ascertain aspects of regulatory authority over wetlands. These powers include:

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<sup>1</sup> *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

### ***Provincial constitutional powers, provinces may legislate***

- the management and sale of provincial public lands including timber and wood thereon (s. 92(5)),
- local works and undertakings (s. 92(10)),
- property and civil rights in the provinces (s. 92(13)) and local or private matters (s. 92 (16)), and
- penalties for violating provincial law (s. 92(15)).

### ***Federal constitutional powers, federal government may legislate***

- the public debt and federal public property (s. 91(1A)),
- trade and commerce (s. 91(2)),
- to raise money by taxation (s. 91(3)),
- navigation and shipping (s. 91(10)),
- sea coast and inland fisheries (s. 91(12)),
- regarding Indians and lands reserved for Indians (s. 91(24)),
- the criminal law (s. 91(27)),
- extra provincial works and undertakings (s. 92(10)(a)),
- works for the general advantage of Canada (s. 92(10)(c)),
- to establish peace, order and good government (opening and concluding clauses of s. 91), and
- to implement any international treaty which Great Britain entered on behalf of Canada (s. 132)<sup>2</sup>.

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<sup>2</sup> List adapted from A. Lucas, "Natural Resource and Environmental Management: A Jurisdictional Primer", in *Environmental Protection and the Canadian Constitution*, (Edmonton: Environmental Law Centre, 1990).

Although the *Constitution Act* does not specifically allocate powers in relation to wetlands, through years of courts interpreting the mentioned heads of power, it may be concluded that legislative jurisdiction relevant to wetlands is as follows:

- The federal government has the right to legislate over some wetland related matters, including:
  - ▶ ☐ wetlands on federal lands (e.g. wetlands in national parks or other federal reserved lands) and all resources on these lands (e.g. timber, water, range, wildlife and mines and minerals),
  - ▶ ☐ natural commercial, sport or recreational fishery habitat in wetlands, whether on federal or non-federal lands, and whether on privately owned or public lands,
  - ▶ ☐ ocean pollution, ocean mammals and
  - ▶ ☐ migratory birds and to a limited degree, migratory bird habitat (whether on federal or non-federal lands and whether on privately owned or public lands).<sup>3</sup>
- Provincial governments have the right to legislate over some wetland matters, including:
  - ▶ ☐ wetlands on provincial lands (e.g. wetlands in provincial parks or other provincial public lands) and all resources on these lands,
  - ▶ ☐ activities relating to the bed and shores of all naturally occurring permanent wetlands (since these are provincial lands by virtue of section 3 of the *Public Lands Act*<sup>4</sup>, and
  - ▶ ☐ wildlife, wherever it occurs in the province, whether on public or private lands, except for on federal lands.
- Although the provinces have the right to legislate and set policy for air and water pollution and soil contamination within provincial borders, the federal government also has the right to legislate some aspects of interprovincial pollution as well as

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<sup>3</sup> The federal government power relating to migratory birds and migratory bird habitat arises under a treaty, the 1916 *Migratory Birds Convention* between Great Britain, on behalf of Canada and the United States. The federal government may through legislation implement this treaty throughout Canada under section 132 of the *Constitution Act*, which gives the federal government power to implement British Empire treaties. Now that the United Kingdom no longer enters into treaties on behalf of Canada, the federal government may no longer rely on section 132 to pass legislation applying throughout Canada to implement treaties. The current legislation that implements this treaty is the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22.

<sup>4</sup> See chapter 3, *Bed and Shores*.

the right to regulate toxic substances, wherever they occur.<sup>5</sup>

Municipalities also have some regulatory powers relating to wetlands.<sup>6</sup> These powers are discussed in chapter 7 and primer #7 of this Guide. However, municipalities do not directly derive the power to regulate from the *Constitution Act*. Their powers must be authorized by provincial legislation. Accordingly, municipalities can have no greater constitutional authority to regulate matters than provinces.

Throughout, this Guide sets out which level or levels of government regulate matters relevant to wetlands, such as water diversion and drainage, management of fish habitat, migratory birds, and others. However the reader must be cautioned that not all questions regarding which level of government has the right to regulate wetland related matters have been answered. The following sections set out some criteria that courts use to determine regulatory authority.

### ***Unclear constitutional jurisdiction***

Sometimes it is not clear which level of government -- federal parliament or provincial legislature -- has jurisdiction over a subject matter. When faced with this situation our courts have three alternatives. First, they could find that the matter truly falls within the power of only one of the two levels. In determining this, courts will apply interpretation rules they developed through the years. Generally, with these rules, courts first try to characterize the essence of the regulated subject matter, and then they consider whether it falls under provincial or federal constitutional authority. For example, they might ask whether a provincial law prohibiting timber imports into a province really has to do with regulating provincial timber resources, (a matter within provincial authority) or whether it really has to do with trade and commerce (a matter within federal authority). If the essence of the law is the former, they will find the provincial law to be valid, but if it is the latter, they will declare the law to be *ultra vires* the Constitution.<sup>7</sup>

Second, courts could find that both levels may validly legislate some aspect of the matter. For example, consider water pollution. Provinces may pass legislation regulating water pollution, since provinces have the constitutional right to legislate to protect provincial and private property and civil rights. As well, federal parliament may pass legislation regulating water pollution that interferes with fish habitat since it has the constitutional right to legislate over inland and coastal fisheries. Both levels of laws may operate concurrently. However, if provincial and federal laws directly conflict, our courts will apply the doctrine of *paramountcy* to confirm the operation of the federal law, and to order the provincial law to be inoperative, to the extent that it conflicts with the federal law.

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<sup>5</sup> The Supreme Court of Canada confirmed this federal government right in *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213.

<sup>6</sup> See primer #7, *Municipalities and Wetlands*.

<sup>7</sup> See A. Lucas, "Natural Resource and Environmental Management: A Jurisdictional Primer", *supra* note 2 at 33.

Third, courts may find that the Constitution does not confer legislative authority to either level of government. In such case, the federal government should have legislative authority since the Constitution gives it the right to regulate residual matters.<sup>8</sup>

### ***International agreements and international commitments***

Under our Constitution, only the federal government has the right to enter into international agreements such as treaties and other conventions. Treaty obligations usually are implemented through laws. Where the treaty subject falls only under federal parliament's jurisdiction, then the treaty is implemented through the federal laws. The situation is not as easy when treaty implementation involves matters under provincial jurisdiction. Some have argued that there are good grounds for the argument that federal parliament still has the power to implement such treaties provided that federal legislation explicitly states that the law exclusively implement the treaty and does not go beyond the treaty's requirements.<sup>9</sup> Others, in particular, provincial rights advocates, would argue otherwise. In any event, it is probably safe to say that in this political climate it is unlikely that the federal government often will aggressively pursue any such implementation rights and will instead seek to get provincial buy in and cooperation.

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<sup>8</sup> The opening and closing words of section 91 of the *Constitution Act*, the peace order and good government clause, implies the federal right to legislate over residual matters. However, it is rarely the case that a matter is unquestionably residual. Usually the matter will concern elements of provincial jurisdiction and elements of federal jurisdiction.

<sup>9</sup> I. Attridge & P. Wood, "Introduction" in I. Attridge, ed. *Biodiversity Law and Policy in Canada: Review and Recommendations* (Toronto: Canadian Institute for Environmental Law and Policy, 1996) at 31.





# ***Primer #2***

## ***Sources of Law and Legal Directives***

### **Primer #2: Sources of Law and Legal Directives**

#### ***Introduction***

A myriad of statutes, regulations, policy directives and common law rules affect what activities may occur around and in wetlands. It can be confusing to sort out the distinctions between these different types of directives. This primer is designed to assist wetland managers in recognizing which category a directive falls under and understanding what it means if it falls under that category.

#### ***Laws -- statutes and regulations***

Included in the broad category of law are statutes (also referred to as "acts") and regulations. Statutes are called primary legislation because they are laws made by elected representatives in provincial legislature or federal parliament. Statutes create the framework for regulating a subject area, such as the environment, by setting out basic rules and legal requirements. Statutes also establish the powers of government and its officials in the subject area, including the power to make regulations. Major provincial statutes that are relevant to Alberta wetlands are the *Water Act*<sup>10</sup> and the *Public Lands Act*<sup>11</sup>. Major federal statutes relevant to Alberta wetlands are the *Fisheries Act*<sup>12</sup> and the *Navigable Waters Protection Act*<sup>13</sup>.

Regulations flesh out the regulatory framework provided by a statute. They are referred to as "subordinate legislation" because a person or body makes them other than the federal parliament or provincial legislature; for example, cabinet or a cabinet minister. Statutes may also give powers to make regulations to specific regulatory bodies or agencies, such as the Alberta Energy and Utilities Board.

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<sup>10</sup> S.A., 1996, c. W-3.5.

<sup>11</sup> R.S.A. 1980, c. P-30.

<sup>12</sup> R.S.C. 1985, c. F-14.

<sup>13</sup> R.S.C. 1985, c. N-22.

When properly created, statutes and regulations are legally binding and enforceable. The statutory delegates that administer them must do so strictly in accordance with their provisions or else be open to an action for judicial review. The persons to whom they apply must comply with their provisions or else be subject to enforcement action.

## ***Policies***

### **WHO IS SUBJECT TO GOVERNMENT POLICIES?**

Some government policies set out government's direction or objectives in an area. Sometimes policies are aimed at the government employees who administer laws and government programs. These set out how these people are expected to act when carrying out some government responsibility, such as considering an application for an approval under legislation. The public expects government representatives and employees to comply with such government policies. Other policies are aimed at the persons and companies who are not government employees. For example, a government policy might expect companies to operate an industrial activity in accordance with government directives.

### **FORMS OF POLICIES**

Policies take many different forms. For example, the *Wetland Management in the Settled Area of Alberta: An Interim Policy*<sup>14</sup> sets out the provincial government's vision regarding wetland management and its overall objectives and direction to sustain the benefits that functioning wetlands provide. However, it does not dictate hard and specific rules on how water legislation administrators are to act when confronted with an application to drain a wetland. Nevertheless, the administrators of water laws are meant to honour their government's policy when carrying out legislated duties.

Other policies are more specific. These may take the form of guidelines, standards or codes that apply to persons who carry out certain activities. These policies often resemble legislation in that they set out particular rules that the subject group is meant to comply with. These directives are often developed by government employees, but can also be developed by other organizations such as technical or scientific groups, such as the Canadian Standards Association, or policy development groups, such as the Canadian Council of Ministers of the Environment.

### **EFFECT OF POLICIES**

Although policy directives are meant to be followed by the persons to whom they apply, they normally are not legally binding in the sense that legal consequences likely would not follow if they are not complied with. This is a main way in which policies differ from laws. Non-compliance with policies, of course, might have consequences other than legal enforcement action. For example, a government employee who does not follow

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<sup>14</sup> *Wetland Management in the Settled Area of Alberta: An Interim Policy* (Edmonton: Alberta Water Resources Commission, 1993).

government policy in dealing with matters might be admonished. A member of the private sector who does not follow government policy with respect to an industrial activity might find more stringent approval conditions the next time he or she goes to renew it. For a policy to be made legally binding, it must be incorporated into a statute or a regulation. For example, a regulation might state that an approval holder must comply with certain guidelines or else the holder is guilty of an offence. In this case the guidelines are law and legally bind the holder.

#### **DETERMINING THE NATURE OF A DIRECTIVE**

To determine whether a directive that applies to a wetland is law or policy, a wetland manager should look to how it was created and by whom. As well, the manager can review the directive to find whether it creates offences and penalties, which is generally more consistent with laws. If there is a question, a lawyer should be able to advise whether a particular directive is law or policy.

#### ***Laws -- common law***

##### **INTRODUCTION TO COMMON LAW**

Only part of our law is composed of statutes and regulations. Much of it consists of principles that have been established by the courts in past decisions. This collection of judge-made law is called *common law*. Some principles of common law were established centuries ago in England. Other principles are as new as the most recent court decision. Lower courts are required to follow the principles set out by higher courts. The Supreme Court of Canada is the highest court in Canada and its decisions are binding on all other courts. Only a very small proportion of cases reach the Supreme Court of Canada. Most appeals in Alberta end at the Court of Appeal, which is the highest court in Alberta.

##### **COMMON LAW CAUSES OF ACTION AND WETLANDS**

A common law or civil action is a lawsuit between private individuals or organizations. The person initiating the civil action -- the plaintiff -- asks a court for specific relief, such as damages or an injunction, for some injury caused by the defendant to the plaintiff. A cause of action is a category for requirements recognized at common law that the plaintiff must establish in order to obtain the desired relief.

There are several common law causes of action relevant to activities that can affect wetland areas. These include nuisance, trespass, deceit, negligence, strict liability and riparian rights. Each of these is a *tort* which means a wrong or an injury other than a breach of contract for which recovery of damages is permitted by the law. This primer briefly describes all of these causes of actions. This Guide devotes an entire chapter to riparian rights since it is the most important category for wetland managers.

## **NUISANCE**

The most common cause of action used to deal with environmental damage is nuisance. Nuisance is the unreasonable interference with public or private rights to the enjoyment of property. If the interference is unreasonable it makes no difference if it is intentional, negligent or totally accidental. A nuisance can give rise to damages or can be restrained by an injunction. In very clear cases it is possible to obtain an injunction even before the offending project begins operation.<sup>15</sup> Only persons who have a right in the property affected by the nuisance have the right to bring an action for nuisance.<sup>16</sup>

## **TRESPASS**

The tort of trespass to land consists of entering onto land (which could include water) of another without justification. It also consists of "placing or projecting any object upon" that land.<sup>17</sup> For example, in the case of *Kerr v. Revelstoke Building Materials Ltd.*<sup>18</sup> the plaintiffs' motel had to be shut down because of the smoke, sawdust, flyash and objectionable sounds that came from the defendant's adjacent sawmill. The court found the interference to be a trespass and awarded the plaintiffs damages.

## **DECEIT**

An action for deceit or fraud involves the intentional misleading of the plaintiff with resulting harm to the plaintiff. A vendor of land advised the purchaser that a pile of slag, which he knew was radioactive, was excellent fill. Thus he induced the purchaser to buy. He was held to have acted deceitfully and ordered to compensate the purchaser for the decreased value of the property.<sup>19</sup>

## **NEGLIGENCE**

An action for negligence exists where all of the following circumstances are present:

- (i) the defendant owes a duty to the plaintiff,
- (ii) the duty has been breached by the defendant and
- (iii) the defendant has suffered damage because of the breach of duty.

Fault of the defendant is a necessary ingredient to a negligence claim. Damages are the usual remedy.

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<sup>15</sup> *Manicom v. Oxford (County)* (1985), 52 O.R. (2d) 137, 4 C.P.C. (2d) 113.

<sup>16</sup> *Waste Not Wanted Inc. v. Canada* (1987), 11 F.T.R. 253, 2 C.E.L.R. (N.S.) 24.

<sup>17</sup> R.F.V. Heuston and R.S. Chambers, *Salmond & Heuston on Torts*, 18<sup>th</sup> ed. (London: Sweet & Maxwell, 1981) at 36.

<sup>18</sup> (1976), 71 D.L.R. (3d) 134 (Alta. S.C.), [1976] W.W.D. 139 (Alta. S.C.T.D.).

<sup>19</sup> *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.* (1982), 2 W.W.R. 385 (B.C.C.A.).

## **STRICT LIABILITY**

The case of *Rylands v. Fletcher*<sup>20</sup> sets out the circumstances in which this cause of action will be met. This has been called the Rule in *Rylands v. Fletcher* and is stated in the case as follows: The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

Liability is described as "strict" because fault is not a factor. Liability will follow if the presence of a substance constitutes a dangerous use of land and that substance escapes from the land causing harm.

## **RIPARIAN RIGHTS**

At common law, owners of property adjacent to or crossed by bodies of water have certain rights to the water often without having property in or control of the water. These rights are subject to variation by statute. They can include:

- rights of access,
- rights relating to prevention of flooding
- rights and consequences relating to accretion and erosion, and
- right to a continued flow of water (quantity) and to unpolluted water (quality).

Injury to riparian rights is actionable even though the plaintiff has not sustained any real damage. In such instances the usual remedy is a prohibitory injunction although nominal or exemplary damages could be awarded in appropriate circumstances.<sup>21</sup>

## **DEFENCE OF STATUTORY AUTHORITY**

A plaintiff's likelihood of success for any of the mentioned common law actions will partly depend on whether government authorized the offensive activity, for example, under an *Environmental Protection and Enhancement Act* approval. A defendant may raise the defence of statutory authority if he or she is sued for injury resulting from an activity that he or she had a right to carry out under a statutory authorization. This defence should succeed only where the act complained of falls strictly within the statutory authority and is the inevitable result of carrying out the authority.<sup>22</sup>

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<sup>20</sup> (1866), L.R. 1 Ex. 265, aff'd (1868), L.R. 3 H.L. 330.

<sup>21</sup> Chapter 1, *Wetlands, Riparian Rights and Statutory Alteration*, further explores riparian rights as they relate to wetlands.

<sup>22</sup> E. Swanson and E. Hughes, *The Price of Pollution* (Edmonton: Environmental Law Centre, 1990) at 19. The text refers to *Friesen v. Forest Protection Limited*, (1978) 22 N.B.R. (2d) 146 (N.B.S.C.). Also see *Tock v. St. John's Metropolitan Area Board* [1989] 2 S.C.R. 1181.



# ***Primer #3***

## ***Property Rights and Wetlands***

### **Primer #3: Property Rights and Wetlands**

#### ***Ownership of water***

In Alberta, just as in other Canadian provinces, the provincial Crown owns all water in the province, including water in wetlands, as well as the right to divert and generally, to disturb water. The Crown has asserted this right for over 100 years, and the Alberta Crown currently asserts this ownership right in the *Water Act*.<sup>23</sup> It does not matter whether water is on private or on public land, the Crown owns it. It does not matter whether a wetland is permanent or intermittent, the Crown owns the water in it and the right to divert and generally disturb it. The question of permanency only is relevant to who owns the bed and shores of a water body, such as a wetland, since the Crown is the owner of the bed and shores of nearly all naturally occurring, permanent waterbodies in the province.<sup>24</sup>

The Crown gives itself and others the right to use, divert or disturb water through different types of *Water Act* statutory authorizations. One category of statutory authorization consists of exemptions from having to get any specific authority to use, divert or disturb water. Another category is specific statutory authorizations to use, divert or disturb water in the form of a license, approval, registration, preliminary certificate or notice.<sup>25</sup>

#### ***Ownership of land***

Although the Crown owns the water in a wetland, the surrounding land, and the bed and shores of non-natural or non-permanent wetlands can be owned privately. Wetland managers may be interested in what rights a private landowner has in respect of such privately owned land, since what the owner does on that land can affect wetlands and associated habitat.

According to our law, "private ownership" of land does not mean owning the

<sup>23</sup> *Supra* note 10, s. 3.

<sup>24</sup> *Supra* note 11, s. 3. See chapter 3, *Bed and Shores*.

<sup>25</sup> Chapter 4, *Water Act*, explains the statutory authorizations possible under the *Water Act*.

physical soil and what might be beneath or above the soil. Under our law, private ownership means the owner has rights relating to the land. Lawyers sometimes call these rights an *interest* or *estate* in land. At common law, the most comprehensive form of ownership -- the largest bundle of rights -- is called title in *fee simple*. Typical rights included in a fee simple title are the owner's right to:

- sell, mortgage, lease or will the estate in land,
- use or develop land in accordance with law,
- grant others some of the rights in the bundle of rights, for example, by way of easement, restricted covenant or *profit a prendre* (the right to enter onto land to take away some "profit" such as forage, berries, trees, etc.),<sup>26</sup> and
- exclude others from coming on to the land.

### ***Laws and private ownership rights statutory modification of private ownership rights***

Where authorized by statute, governments may regulate many aspects of what people may do with land that they own. For example the Alberta *Land Titles Act*<sup>27</sup> regulates land use by establishing a land registry system that sets out the procedures that must be followed in order to legally deal with land, for example to legally transfer, mortgage or lease land. Environmental laws limit land uses that could damage the environment. For example the *Environmental Protection and Enhancement Act* prohibits the carrying out of certain activities on land without the appropriate regulatory approval.<sup>28</sup> The same Act increases potential uses by allowing landowners to protect land forever by way of conservation easement, an interest in land unknown at common law.<sup>29</sup> Planning laws control, limit and allow land uses through zoning, other land use planning devices, and municipal bylaws.<sup>30</sup>

In limited circumstances a landowner may be entitled to compensation when

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<sup>26</sup> See chapter 13, *Stewardship through Common Law Interests and Conservation Easements*.

<sup>27</sup> R.S.A. 1980. c. L-5.

<sup>28</sup> S.A. 1992, c. E-13.3.

<sup>29</sup> *Ibid.*, s. 22.

<sup>30</sup> In Alberta, the *Municipal Government Act*, S.A. 1994, c. M-26.1 regulates these matters.



government takes action in respect of privately owned land. However, a landowner only has a right to compensation if a level of government takes an interest in land without the owner's consent, and the statute under which the taking occurred either explicitly or implicitly gives the owner the right to compensation.<sup>31</sup> In such case the government must compensate the owner.<sup>32</sup>

## ***Laws and public ownership***

### **FEDERAL PUBLIC LAND**

Many wetlands are found on federal public land. The federal government has the right to make laws in respect of federal Crown lands. Applicable federal legislation directs federal government authorities on what they may and may not do in respect of federal lands. As well, the federal government may adopt provincial laws in a federal statute so that the provincial law will apply. If a federal government authority does not act in accordance with applicable legislation, an interested party may ask a court to set aside the authority's action as being *ultra vires* authorizing legislation.

### **PROVINCIAL PUBLIC LAND**

The Crown in right of Alberta owns much land that contains wetlands in addition to owning the bed and shores of all naturally occurring permanent wetlands, whether on provincial public land or on private land. Applicable provincial legislation directs provincial government authorities on what they may and may not do in respect of provincial public lands. If a provincial government authority does not act in accordance with applicable legislation, an interested party may ask a court to set aside the authority's action as being *ultra vires* authorizing legislation.<sup>33</sup>

### **MUNICIPAL PUBLIC LANDS**

Municipalities also own many lands that contain wetlands. This is especially so in respect of lands taken as environment reserves or other reserves in the subdivision process.<sup>34</sup> The *Municipal Government Act* is the main Alberta statute that governs how municipalities may deal with their lands. Nevertheless, naturally occurring, permanent wetlands that are found on municipal land are the property of the provincial Crown. Like all public officials, if a municipal government authority does not act in accordance with applicable legislation, an interested party may ask a court to set aside the authority's action as being *ultra vires* authorizing legislation.

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<sup>31</sup> For example, the *Municipal Government Act* specifically states when compensation is and is not payable in respect of expropriation, dedication and other government action. Where a right to compensation is not explicit, courts will often look for an implicit right where an interest in land is actually expropriated by a government. In this context, actual expropriation of an interest in land may be contrasted with mere regulation that affects land uses.

<sup>32</sup> In Alberta, see the *Expropriation Act*, R.S.A. 1980, c. E-16.

<sup>33</sup> Chapters 3, 4 and 9 of this Guide discuss many provincial laws that apply to provincial public lands.

<sup>34</sup> Chapter 7, *Wetlands Conservation and Subdivision Development*, further discusses this matter.

## TREATY AND OTHER LANDS IN WHICH FIRST NATIONS HAVE AN INTEREST

Many Reserve lands and off Reserve traditional lands contain wetlands. Generally speaking, the federal government has the exclusive constitutional right to make laws that govern land related matters on Reserves,<sup>35</sup> subject to any constitutional, Aboriginal or treaty rights. Laws of general application that are within provincial jurisdiction may apply to Indians and Indian Reserves, again subject to any constitutional, Aboriginal or treaty rights. However, there are issues regarding ownership of bed and shores as well as Aboriginal water rights.

The provincial government has taken the position that the provincial Crown acquired ownership to the beds and shores of rivers, and presumably of naturally occurring permanent wetlands on reserves, by virtue of the *Natural Resources Transfer Agreement* of 1930.<sup>36</sup> It also has stated its position to be that any Aboriginal water rights are subject to provincial water legislation, so a Band would need a license to get a priority for use, just like any one who is not First Nations.<sup>37</sup> Legal scholars have taken the contrary view that there are good arguments that the beds and shores of water bodies and watercourses do not fall under provincial ownership, are subject to Aboriginal rights, and that there are Aboriginal water rights that give priorities independent of water legislation.<sup>38</sup> Although a number of court cases have clarified the nature and scope of Aboriginal rights, they have not yet clarified the ownership of bed and shores and water rights issues. Accordingly, should wetland managers wish to secure protection of wetlands within a Reserve or on traditional lands outside of a reserve, it might be prudent to get everyone with a potential interest on side.

## METIS

While Metis peoples are included in the definition of aboriginal peoples under section 35(2) of the *Constitution Act, 1982*<sup>39</sup> there is no reference to Metis peoples in the *Constitution Act, 1867*.<sup>40</sup> Under section 91(24) of the 1867 Act the federal government has jurisdiction over "Indians, and Lands reserved for the Indians" but there has not been a clear determination as to whether this section also includes Metis peoples. Likewise, there is some conflict as to whether Metis people have aboriginal rights due to

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<sup>35</sup> *Supra* note 1, s. 91(24).

<sup>36</sup> See discussion of the *Agreement* in footnote 46.

<sup>37</sup> *Water Management in Alberta, Background Paper #3, Aboriginal Water Issues* (Edmonton: Alberta Environment, 1991) at 1.

<sup>38</sup> See, for example, R. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights*, (Calgary: Canadian Institute of Resources Law, 1988).

<sup>39</sup> *Constitution Act, 1982*, s. 35(2), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

<sup>40</sup> *Ibid.*, s. 91(24).

reference to aboriginal rights in the context of pre-contact Indian activities.<sup>41</sup> However, Alberta has enacted provincial legislation relating to Metis lands, the *Metis Settlements Act*.<sup>42</sup> Under this Act there is statutory recognition for a right to fish for sustenance<sup>43</sup>, as well as a by-law making power for the local council to control the use of water sources to prevent contamination in respect to public health.<sup>44</sup> The province seems to have exerted its jurisdiction over the water rights in this area, but if Metis peoples are included in federal jurisdiction under section 91(24) a potential conflict exists.

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<sup>41</sup> C. Bell, "Metis Constitutional Rights in Section 35(1)" (1997) 36:1 Alta. L. Rev. 180.

<sup>42</sup> *Metis Settlements Act*, S.A. 1990, c. M-14.3.

<sup>43</sup> *Ibid.*, s. 132.

<sup>44</sup> *Ibid.*, Sch. 1, s. 12.



# ***Primer #4 Resource Acquisition, Exploration and Development***

## **Primer #4: Resource Acquisition, Exploration and Development**

### ***Ownership of mines and minerals***

In 1887 federal Parliament amended the *Dominion Lands Act*<sup>45</sup> -- the legislation governing Crown lands -- to effect an implied blanket reservation to itself of all mines and minerals and the power to work them. Mines and minerals reserved by the federal Crown passed to Alberta by virtue of the *Natural Resources Transfer Agreement* of 1930.<sup>46</sup> Both the *Provincial Lands Act* and its successor, the *Public Lands Act* carried forth the implied reservation.<sup>47</sup> Hence, since 1887, whenever the Crown disposes of an interest in land, unless the disposition specifically provided otherwise, the mines and minerals and the power to work them stay with the Crown. Consequently, in Alberta the provincial Crown owns over three-quarters of the mineral resources, such as oil, gas, coal and metallic minerals, within the province, much of which is under private land.<sup>48</sup> As well as owning the minerals in respect of private lands in the province, as owner of the fee simple, the Crown owns the minerals within public lands.

Mineral exploration and extraction can adversely affect wetlands. This primer provides general legal information that applies to most resource acquisition and development. Chapters 8, *Oil and Gas Development*, and 10, *Pipelines and Transmission Lines*, provide more specific information on resource developments that can affect wetlands.

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<sup>45</sup> *Dominion Lands Act*, S.C. 1872, 35 Victoria c. 23.

<sup>46</sup> When Alberta became a province in 1905, the federal government retained ownership of its public lands and natural resources, just as it had done with Manitoba and Saskatchewan. As owner of these lands and resources, federal parliament retained legislative authority over them. In 1930, however, the federal government transferred most of the retained lands and resources to the respective provinces by way of three *Natural Resources Transfer Agreements*. These agreements form part of the *Constitution Act, 1930* 20-21 George V, c. 26 (U.K.) and are attached as Schedules 1, 2 and 3. After these agreements each of these provinces gained legislative authority over the transferred public lands and natural resources within its borders.

<sup>47</sup> *Provincial Lands Act*, S.A. 1931, c. 43, s. 8. The current provision is the *Public Lands Act*, *supra* note 11, s. 34(1).

<sup>48</sup> Alberta Energy, Annual Report, 1989-90, at 10.

### ***Acquisition of Crown interests in minerals***

The Crown disposes of interests in minerals in accordance with authority given by statutes, primarily the *Mines and Minerals Act*<sup>49</sup> and the *Petroleum and Natural Gas Tenure Regulation*.<sup>50</sup> Disposition of mineral rights is by way of an agreement appropriate to the mineral such as a mineral tenure agreement or petroleum and natural gas lease.

Persons or companies obtain mineral rights only following an application and bidding process. The Minerals Tenure Branch of the Alberta Department of Resource Development administers this process. The interdepartmental Crown Mineral Disposition Review Committee reviews all applications for mineral rights dispositions. The Committee broadly assesses potential environmental impacts and recommends whether mineral rights should be granted, refused or granted with conditions.

Disposition of mineral rights (whether they are coal, gold, oil or gas) on public lands may be constrained by Crown designation under provincial legislation such as the *Public Lands Act*<sup>51</sup>, *Wilderness Areas, Ecological Reserves and Natural Areas Act*,<sup>52</sup> *Provincial Parks Act*<sup>53</sup> and the *Historical Resources Act*.<sup>54</sup> Notations of restricted land uses are compiled in the Restricted Area Book. The Mineral Access, Geology and Mapping Branch of the Department of Resource Development administers mineral access restriction information. This material currently is being transposed into a map format.

Private owners of mineral rights have the discretion to dispose of mineral estates without following the above processes.

### ***Access for exploration, survey and development***

#### **NEED FOR SURFACE ACCESS**

To acquire information on and to develop a mineral interest, the holder of a mineral right needs surface access. Usually there are three stages at which the company will want access rights to the surface of private lands. These stages are for exploration, surveying and development.

#### **EXPLORATION**

At the exploration stage, a company or other person holding a mineral interest conducts geophysical operations to determine whether or not there is enough subsurface accumulation of petroleum, natural gas or other resource to continue on to other stages. With oil and gas resources, the most common exploration method is seismic operation.

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<sup>49</sup> R.S.A. 1980, c. M-15.

<sup>50</sup> Alta. Reg. 263/97.

<sup>51</sup> *Supra* note 11.

<sup>52</sup> *Wilderness Areas, Ecological Reserves and Natural Areas Act*, R.S.A. 1980, c. W-8.

<sup>53</sup> *Provincial Parks Act*, R.S.A. 1980, c. P-22.

<sup>54</sup> *Historical Resources Act*, R.S.A. 1980, c. H-8.

The Alberta *Exploration Regulation*<sup>55</sup> prohibits surface entry to explore for minerals or to commit waste without the consent of the person having lawful possession of the land or that person's agent. Whether a wetland manager has *lawful possession* of the land depends on the interest the manager holds. Holding title in fee simple to the surface land certainly indicates lawful possession. But what about lesser interests, such as holding a lease, conservation easement or having a contract with a landowner?

At law, a possessory interest in land is one that gives at least some right to occupy it. A registered conservation easement or land lease, both being interests in land carrying with them at least some degree of right to occupy, should qualify as lawful possession. Accordingly, the holder of such interests should have opportunity to participate in decisions as to whether exploration activities will occur in the subject wetland area. However, what should happen is not always what does happen. When negotiating agreements with landowners, wetland managers should consider the potential for seismic and related activities. The agreements should require that the wetland manager be notified of potential exploration activities and should make sure that exploration access agreements require their consent, in addition to the titleholder.

## **SURVEYING**

Surveying refers to land surface operations to ascertain physical characteristics or boundaries. The *Surveys Act*<sup>56</sup> governs surface surveying, and authorizes a registered Alberta land surveyor and assistants to enter private property without the consent of the owner, as long as reasonable care is taken. Private owners have no right to exclude surveyors. The Act does however, make the survey team liable for any damages it may cause.

## **DEVELOPMENT**

### ***The Energy and Utilities Board***

At the development stage the company holding the mineral interest carries out drilling or related operations for the purpose of production or extraction. Prior to this stage the company will need a permit or other statutory authority from the Energy and Utilities Board<sup>57</sup> (EUB). If it appears to the EUB that its decision on an application may directly and adversely affect the rights of anyone, then the EUB is required to give notice to that person of the application, as well as an opportunity to make representations and give evidence.<sup>58</sup> It is important for wetland managers to establish that they will be directly and adversely affected if they wish to make representations regarding development of

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<sup>55</sup> Alta. Reg. 214/98.

<sup>56</sup> *Surveys Act*, S.A. 1987, c. S-29.1.

<sup>57</sup> The EUB is constituted under the *Alberta Energy and Utilities Board Act*, S.A. 1994, c. A-19.5., which grants the EUB "all the powers, rights and privileges of the ERCB" (s. 10(1)). The ERCB was amalgamated with the Public Utilities Board to form the Alberta Energy and Utilities Board. Detailed powers of the Board are set out in the *Energy Resources Conservation Act*, RSA 1980, c. E-11.

<sup>58</sup> *Energy Resources Conservation Act*, *ibid.*, s. 29.

resource interests that may affect a wetland. For example, if a wetland manager has a property interest, it is important that it be registered on title.

***Development access and compensation***

If the holder of a mineral right wishes to develop the interest, the holder must obtain a right of access to surface. The *Surface Rights Act* states that no one has a right of entry to the surface of land for the purpose of removing minerals or constructing structures in connection with the removal of minerals, unless either the consent of the owner and any occupants are obtained, or the Surface Rights Board issues a right of entry order.<sup>59</sup> Consent usually takes the form of a lease. If a satisfactory arrangement, including for compensation for surface disturbance, cannot be reached among the holder, the owner and any occupiers, then the holder may ask the Board to issue a right of entry order and to set compensation.

The *Surface Rights Act* defines "owner" as the titleholder, or the Crown for unpatented land. It defines "occupant" to mean anyone in possession of the land, who has a registered interest on title, or in the case of Crown land, a person shown on government records as having an interest in the land.<sup>60</sup> Accordingly, a wetland manager who owns the land on which a wetland is located or who has a registered interest in the land (such as a conservation easement) would have to give consent to entry or, failing giving consent, have the right to participate in a Surface Rights Board hearing. As well, such wetland manager is entitled to be compensated for damage to the interest held. Again, it is advisable that in negotiating agreements with landowners that wetland managers be sure to address surface access issues. Where a wetland manager is an occupant, agreements should state so and require the owner to give the wetland manager notice if a company asks for consent.

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<sup>59</sup> S.A. 1983, c. S-27.1, s. 12.

<sup>60</sup> *Ibid.*, ss. 1(f) and (i).



# ***Primer #5***

## ***Statutory Authorizations***

### **Primer #5 Statutory Authorizations**

#### ***Overview of statutory authorizations***

This primer deals with statutory authorizations. Since the term "statutory authorization" is used throughout this Guide, it is important to understand what this term means. It can be broken into two parts: "statutory" and "authorization". If an authorization is "statutory", it means that a law passed by government creates it. That law can be either an act or a form of delegated legislation like a regulation or an order. Regardless of the form of the document, because government has enacted it and made it mandatory, those to whom it applies are required by law to act in compliance with it.

The term "authorization" is a generic one. Different laws use different terms when describing an "authorization". Examples are permits, licenses, approvals, registrations, authorizations, certificates and notices, or, statutory exemptions from having to obtain any of the foregoing.

Regardless of the name, the law establishing an environmental authorization will typically (though not always) require an applicant to submit certain information and apply for an authorization in order to legally commence its operation. Usually the applicable statute will give the decision maker considerable discretion on whether to issue an authorization and to impose conditions. The authorization itself may require that the holder operate in a certain manner and report to the government on a periodic basis.

Each statutory authorization has its own specific objectives and processes. Regarding process, some authorizations have no requirement for public or other interested party participation. Some have extensive requirements. Some statutory authorizations have many information and reporting requirements, some have few or none. Some give rise to serious enforcement potential if the holder of the authorization fails to comply: with others, non-compliance may have little consequences.

## ***Wetlands and statutory authorizations***

### **INTRODUCTION**

To lawfully carry out many activities that can affect wetlands the person proposing to carry out the activities -- the proponent -- will need statutory authorization. Later chapters in this Guide will describe requirements for the statutory authorizations most commonly associated with activities that can affect wetlands. This primer provides a short summary of kinds of statutory authorizations that may be necessary to lawfully carry out activities that can affect wetlands.

### ***ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT* STATUTORY AUTHORIZATIONS**

The *Environmental Protection and Enhancement Act* (EPEA) prohibits anyone from carrying on an activity that the regulations state requires statutory authorization unless the person obtains the appropriate authorization.<sup>61</sup> The three main EPEA statutory authorizations are approvals, registrations and notice activities. The *Activities Designation Regulation*<sup>62</sup> sets out which activities that affect the environment require these statutory authorizations to be lawfully carried out. The activities generally involve physical constructions, water or land disruptions, or emissions or discharges that may have an adverse environmental effect.

The activities that potentially have the most environmental effect require an **approval**. Approvals involve the most process, including mandatory public notice and comment period. The approval document will set out the conditions under which the activity may be carried out.

Activities with potentially less environmental effect may require a **registration**. There is no mandatory public notice for registration activities. To lawfully carry out a registration activity the proponent must comply with a Code of Practice developed by the government.

**Notice activities** cover activities that potentially have the least environmental effect. To lawfully carry out a notice activity the proponent must give notice to the government that the activity will be carried out.

### ***Municipal Government Act* statutory authorizations**

Alberta's *Municipal Government Act*<sup>63</sup> prohibits anyone from commencing a development unless they have obtained a development permit under the municipality's land use by-law. Municipal development permits are usually thought of in connection with plans to build office buildings and strip malls, but the requirement also applies to facilities whose construction and operation could negatively impact wetlands.

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<sup>61</sup> *Supra* note 28, ss. 58 and 59.

<sup>62</sup> Alta. Reg. 211/96.

<sup>63</sup> *Supra* note 30, s. 683.

As well, the *Municipal Government Act*, subject to limited exceptions, prohibits the subdivision of land unless the developer holds a subdivision approval under the Act.<sup>64</sup> Since municipal subdivision and consequent development can have such devastating effects on wetlands, this Guide devotes a chapter (7) to this topic.

#### **ENERGY AND UTILITIES BOARD STATUTORY AUTHORIZATIONS**

The Energy and Utilities Board (EUB) has responsibility for the development of energy resources in Alberta. One of its purposes, set out in the *Energy Resources Conservation Act*, is to "control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy".<sup>65</sup> The EUB is required to hold a hearing if anyone whose rights may be directly and adversely affected by an energy project so requests. The requirements for the various statutory authorizations issued by the EUB are found in other Alberta legislation including the *Oil and Gas Conservation Act*<sup>66</sup> (oil and gas wells, and gas plants), *Pipeline Act*<sup>67</sup> (pipelines), *Hydro and Electric Energy Act*<sup>68</sup> (transmission lines), *Coal Conservation Act* (coal extraction), and the *Water, Gas, and Electric Companies Act*<sup>69</sup> (utilities and telecommunications).

#### **NATURAL RESOURCES CONSERVATION BOARD APPROVALS**

The Alberta Natural Resources Conservation Board (NRCB) was created in 1991 under the *Natural Resources Conservation Board Act*.<sup>70</sup> The Act gives the NRCB the responsibility to decide whether certain proposed resource developments in the province are in the public interest and should be allowed to proceed, following the board's determination and assessment of the development's likely economic, social and environmental impacts. The NRCB review process can apply to certain types of forest industry projects, recreational or tourism projects, metallic or industrial mineral projects, water management projects, and others specifically assigned to the NRCB. Like the EUB, the NRCB must hold a hearing if anyone "directly affected" by the proposed project submits his or her concerns to the NRCB.

#### **CONNECTION BETWEEN THE EUB, NRCB AND EPEA STATUTORY AUTHORIZATIONS**

A key connection between the EUB, NRCB and the EPEA concerns the role of an environmental impact assessment. When an environmental impact assessment report ordered under EPEA is complete, the EUB is to be notified if the project is reviewable by that Board, and the NRCB is to be notified if the project is reviewable by that Board. Another connection concerns board statutory authorizations and EPEA statutory authorizations. At the point where statutory authorizations are being considered under EPEA, a relevant decision of the EUB or NRCB must be given consideration. The order

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<sup>64</sup> *Ibid.*, s. 652.

<sup>65</sup> R.S.A. 1980, c. E-11, s. 2(d).

<sup>66</sup> R.S.A. 1980, c. O-5.

<sup>67</sup> R.S.A. 1980, c. P-8.

<sup>68</sup> R.S.A. 1980, c. H-13.

<sup>69</sup> R.S.A. 1980, c. C-14, and R.S.A. 1980, c. W-4.

<sup>70</sup> S.A. 1990, c. N-5.5.

in which the various processes occur typically is: EPEA environmental impact assessment, NRCB/EUB approval, EPEA statutory authorization (approval, registration or notice).

### **CONNECTION BETWEEN MUNICIPAL STATUTORY AUTHORIZATIONS, EUB APPROVALS AND NRCB APPROVALS**

The *Municipal Government Act*<sup>71</sup> states that an authorization of the NRCB or the EUB prevails over a municipality's planning and development approval processes. This means that if the EUB or NRCB approves a project, a municipality cannot prevent it from going ahead by refusing to issue a subdivision or development permit. As well, if the EUB or NRCB place limitations or restrictions on a proposed development, a municipality cannot allow it to go ahead without the limitations or restrictions. However, notwithstanding an EUB or NRCB approval, a municipality may still use its statutory authority to place conditions on subdivision or development, provided the conditions are imposed in good faith and are consistent with the other EUB or NRCB approval.

### ***WATER ACT* STATUTORY AUTHORIZATIONS**

To lawfully withdraw water from a water source or to disturb water in a natural state or to drain it, a person must have statutory authorization under the *Water Act*.<sup>72</sup> *Water Act* statutory authorizations include exemptions from any further requirement, statutory authorization to use, disturb or drain water, or giving notice to the government regarding use or disturbance of water. Chapter 4 of this Guide discusses the *Water Act*.

### ***Federal government statutory authorizations***

#### ***FISHERIES ACT, MIGRATORY BIRDS CONVENTION ACT, NAVIGABLE WATERS PROTECTION ACT***

There are three main federal environmental statutory authorizations relevant to wetlands. The *Fisheries Act*<sup>73</sup> prohibits anyone from carrying on any type of work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat without statutory authorization. The Act also prohibits the deposit of deleterious substances into water frequented by fish.

The *Migratory Birds Convention Act*<sup>74</sup> prohibits anyone from doing anything that could harm migratory birds or their nests without statutory authorization. It also prohibits the deposit of oil, oil wastes or any other substances harmful to migratory birds in any waters frequented by them, without statutory authorizations.

The *Navigable Waters Protection Act*<sup>75</sup> prohibits anyone from carrying on any

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<sup>71</sup> *Supra* note 30, s. 619.

<sup>72</sup> *Supra* note 10, especially ss. 35(1) and 36(3).

<sup>73</sup> *Supra* note 12.

<sup>74</sup> *Supra* note 3, especially ss. 5.6 and 35.

<sup>75</sup> R.S.C. 1985, c. N-22, s. 5.

activities that could interfere with navigability of water without statutory authorization.

Chapter 11 of this Guide – *Federal Laws and Policies* – provides more information on the federal laws that are relevant to wetland protection.

### ***Enforcement of statutory obligations***

#### **ABOUT ENFORCEMENT**

Laws and statutory authorizations issued under laws would be of little effect if non-compliance had no adverse consequences. Accordingly, statutes and regulations normally make non-compliance an offence. They create arrays of penalties for those who commit offences. Usually penalties are more severe for intentional, wilful non-compliance and less severe for inadvertent non-compliance. Sometimes statutes, regulations or even common law, provide defences to some offences, such as a demonstration of exercising due diligence on a balance of probabilities. As well, statutes and regulations provide tools to enable government to monitor compliance and to investigate potential offences. This Guide describes enforcement mechanisms as they relate to many laws that are relevant to wetland managers.

#### **PRIVATE PROSECUTION**

Government holds primary responsibility for enforcing laws and prosecuting offenders. However, government can choose not to enforce violations – sometimes when government itself is the violator. When government fails to prosecute a suspected violation of law, any citizen has the right to bring evidence of the breach before the court.<sup>76</sup> This right of action is an important civil liberty and safeguard against government inaction and laxity.<sup>77</sup>

Subject to any statutory bar, the citizen right to institute a private prosecution applies to all statutory offences, including those described in this Guide. However, there must be a statutory offence for a private prosecution to proceed. Attention must be paid to the sections of the law creating the offence to ensure that non-compliance constitutes a violation without the need for further government action. For example if a statute states that an action is a violation if a minister is of the opinion that it is, then there can be no private prosecution unless the minister has somehow made it clear that he or she is of that opinion. However, most offences are not so discretionary. Most are more direct in that they simply state that certain behaviour, such as violating a statutory authorization, is an offence.

A citizen, or the citizen's agent or legal counsel commences proceedings by laying an information before a local justice of the peace or provincial court judge in the

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<sup>76</sup> For a comprehensive, though somewhat dated, discussion on private prosecutions see L. Duncan, *Enforcing Environmental Law: A Guide to Private Prosecution* (Edmonton: Environmental Law Centre, 1990).

<sup>77</sup> J. Swaigen, "Introduction", *ibid.*

jurisdiction where the alleged offence occurred. An *information* is a statement by the citizen, the private informant, summarizing allegations and evidence in a prescribed form.<sup>78</sup> Before laying an information, it always is advisable that the informant first makes a formal complaint to the government authority responsible for enforcing the law in question.

The justice of the peace or judge who receives an information must hear and consider *ex parte* (without notice to the alleged offender) the informant's allegations and any witnesses. The judge or justice of the peace in his or her discretion may commence the actual prosecution by issuing *process* – a summons or warrant compelling the accused to appear. If the judge or justice declines to issue process, it is open to the private informant to repeat the process with another judge or justice of the peace.<sup>79</sup>

The Attorney General has the power to intervene and exercise control over a prosecution. The Attorney General may apply to the court to withdraw the charges, or simply enter a stay of prosecution and then not proceed. Under our law, if the Attorney General enters a stay and fails to proceed within one year, the proceedings are deemed never to have occurred.<sup>80</sup> In the past the Attorney General has proven quite willing to exercise this power.<sup>81</sup> Nevertheless, in appropriate circumstances, it still can be effective to commence a private prosecution. It might move government to prosecute where it might not have otherwise and can expose unlawful action to public scrutiny.

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<sup>78</sup> Form 2, Part XXVII of the *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>79</sup> There is case authority that the informant must swear a new information. See *R. v. Allen*, 20 C.C.C. (2d) 447.

<sup>80</sup> *Criminal Code*, *supra* note 78, s. 579(2).

<sup>81</sup> For example, Dr. Martha Kostuch successfully laid numerous informations in respect of violations of the *Fisheries Act* in connection with the construction of the Oldman Dam. The Attorney General stayed each prosecution. See I. Cartwright, "A Private Prosecution in Alberta – A Painful Process" in (1991) 1 J.E.L.P. 110 and E. Swanson, "Kostuch vs. Kowalski – Seven Informations Later" 6:1 *Environmental Law Centre Newsletter*, at 2.

# ***Primer #6***

## ***Environmental Assessment***

### **Primer #6: Environmental Assessment**

#### ***About environmental assessment***

Primer #5 explained how laws give governments power to decide whether to allow certain business or industrial projects, here called *activities*, to proceed, when they might harm the environment. These laws usually give this power by making it an offence for persons or businesses to carry out some activities unless the proponent has first obtained a statutory authorization. As we have seen, "statutory authorizations" include, among others, approvals, licenses, permits or project go-aheads from boards such as the Natural Resources Conservation Board or the Energy and Utilities Board.

Government decision-makers need information in order to decide whether to issue a statutory authorization. This is especially so if a proposed activity could have significant environmental effects or other social costs. Environmental impact assessment, or "EIA", offers governments a planning tool for preventing or mitigating environmental problems that will likely result from some proposed activities. Through the EIA process governments may become aware of the overall impact on the environment of development projects proposed by the public and private sectors. Armed with this awareness, governments are in a position to decide whether they should issue the required statutory authorization so that the activity may go ahead, issue the authorization with conditions, or decide not to issue the authorization at all. In Alberta, environmental assessment of a project may be required by the provincial government, under the *Environmental Protection and Enhancement Act*<sup>82</sup> or by the federal government under the *Canadian Environmental Assessment Act*.<sup>83</sup>

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<sup>82</sup> *Supra* note 28.

<sup>83</sup> *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, [*hereinafter* CEAA].

## *Federal environmental assessment*

### **THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT**

The *Canadian Environmental Assessment Act* (CEAA) sets out the circumstances that give rise to federal environmental assessment, who must oversee and carry out the assessment, the mechanics of the assessment process, and what happens after the assessment is completed. Readers who desire detailed information on these should consult the Canadian Environmental Assessment Agency (the "Agency") website at <www.ceaa.gc.ca>. This Guide summarizes key aspects of the process. The reader should be warned, however, that CEAA currently is undergoing a required five year review that will likely result in amendments sometime in 2002.

### **WHEN DOES A PROJECT TRIGGER CEAA?**

Unless a project is on the *Exclusion List Regulations*<sup>84</sup>, the federal environmental assessment process is applied whenever:

- A federal authority exercises one or more of the following duties, powers or functions in relation to a project:
  - ▶ ☐ proposes a *project*,
  - ▶ ☐ sells, leases, or otherwise transfers control or administration of land to enable a project to be carried out,
  - ▶ ☐ contributes money or any other form of financial assistance to the project,
  - ▶ ☐ exercises in relation to the project a regulatory duty (such as a statutory authorization) that is included in the *Law List Regulations*<sup>85</sup>,
- or if the Minister of the Environment determines that a project could have significant adverse transboundary effects and he or she calls for an environmental assessment.

The *Exclusion List Regulations* sets out which projects do not need to be assessed under the CEAA.

A *project* means any undertaking in relation to a physical work (such as a building, a bridge, a wharf, a dam etc.) or an undertaking that is included in a regulation called the *Inclusion List Regulations*.<sup>86</sup>

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<sup>84</sup> S.O.R./94-639.

<sup>85</sup> S.O.R./94-636.

<sup>86</sup> S.O.R./94-637.



The *Law List Regulations* sets out sections of federal statutes that describe the regulatory duty that will give rise to the CEAA environmental assessment process. An example is a proponent applying for an approval to disrupt fisheries habitat under the *Fisheries Act*, or to interfere with a navigable water under the *Navigable Waters Protection Act*.

#### CATEGORIES AND TYPES OF CEAA ASSESSMENTS

There are two categories of CEAA assessments: *self-directed assessments* and *independent assessments*. **Self directed assessments** are carried out by the government agency or official that exercises the authority that triggered the Act. This agency or official is called the "responsible authority". A mediator or panel independent of the responsible authority conducts independent assessments.

There are four types of environmental assessments: *screenings* (including *class screenings*), *comprehensive studies*, *mediations* and *panel reviews*. About 99% of federal environmental assessment are screenings or comprehensive studies. Both of these are self-assessments.

A responsible authority conducts a **screening**. It is the most flexible type of assessment, and accommodates a range of projects, but mostly routine or small projects. The screening report documents the environmental effects of a proposed project and sets out what could be done to eliminate or minimize these effects. Screenings vary in time, length, and depth of analysis. Some result in a short, one or two-page report but others are much longer and more detailed.

Some screenings of what are considered "routine" projects are conducted with a **class screening**. Examples include some projects involving dredging, culvert installations, highway maintenance, shoreline stabilization and building construction. CEAA enables the responsible authority to apply to the Agency to allow for class screening reports for a type of project. If approved by the Agency, a responsible authority may use such a report in whole or in part in respect of projects of the same type.

The *Comprehensive Study List Regulations*<sup>87</sup> sets out projects that must be assessed as a **comprehensive study**. These mainly are large projects having the potential for significant adverse environmental effects. Examples include large oil and natural gas developments, projects in national parks, larger projects that can cause harm in migratory bird sanctuaries or wildlife areas, major electrical-generation projects, and large industrial plants.

**Mediation** and **panel review** fall under the independent assessment category.

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<sup>87</sup> S.O.R./94-638.

**Mediation** is a process of negotiation in which an independent mediator assists parties in resolving disputes and issues involving a proposed project. The Minister of Environment appoints the mediator. Mediation may deal with all aspects of environmental assessment. It may be used in combination with a panel review.

A **panel review** is the most formal and likely the most comprehensive and extensive environmental assessment review. Only the Minister of Environment may order a panel review though a responsible authority may recommend a panel review before, during or following a screening or comprehensive study. In the case of a screening the responsible authority must recommend a panel review or mediation where, as a result of a screening or comprehensive study public concerns warrant further study, or, if taking into account mitigation measures, it still is uncertain whether the project will have significant environmental effects. In the case of a comprehensive study, the minister must order a panel review or mediation in such circumstances.<sup>88</sup>

#### OPPORTUNITIES FOR PARTICIPATION IN FEDERAL ENVIRONMENTAL ASSESSMENT

CEAA gives varying levels of public participation opportunities depending on the type of assessment:

- **Screenings:** the Act authorizes, but does not require public notification of a screening report. However, where the public comments on a report, the comments must be considered.<sup>89</sup>
- **Comprehensive studies:** CEAA requires public notice of the comprehensive study report and of any public comments on it.<sup>90</sup>
- **Mediation:** the mediator may allow "interested parties" to participate in the mediation, which could include interested non-governmental organizations or other groups.<sup>91</sup>
- **Panel review:** panel review hearings must provide the public an opportunity to participate in the assessment.<sup>92</sup>
- **Participant funding:** CEAA does not specifically provide for funding for

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<sup>88</sup> CEAA, *supra* note 83, ss. 20 and 23.

<sup>89</sup> *Ibid.*, s. 16. Data compiled in 1999 indicates that public participation occurred in 10-15% of screenings. See T. Shillington, *Background Study on Public Participation in Screening and Comprehensive Studies: Final Report Prepared for the Five-Year Review Team Canadian Environmental Assessment Agency*, (1999), online: Canadian Environmental Assessment Agency <[www.ceaa-acee.gc.ca/0007/0002/0002/bkstd10\\_e.htm](http://www.ceaa-acee.gc.ca/0007/0002/0002/bkstd10_e.htm)> (last modified 01 December 2001).

<sup>90</sup> CEAA, *supra* note 83, s. 22.

<sup>91</sup> *Ibid.*, s. 31.

<sup>92</sup> *Ibid.*, s. 34.

participants in the environmental assessment process. However, participant funding may be available for panel reviews and mediation. The Agency administers participant funding.<sup>93</sup>

## THE ROLE OF A CEAA ENVIRONMENTAL ASSESSMENT IN GOVERNMENT DECISIONMAKING

### *Regarding government action to be taken*

- **Screenings:** the responsible authority determines the next step as follows:<sup>94</sup>
  - ▶ □ If the project shows no likely significant adverse effects that cannot be mitigated, then the responsible authority takes appropriate action (such as granting a regulatory statutory authorization, or granting money or land for the project).
  - ▶ □ If the project shows likely significant adverse effects that cannot be mitigated and the responsible authority finds that the adverse environmental effects cannot be justified in the circumstances, then the responsible authority cannot support the project.
  - ▶ □ If the project shows likely significant adverse effects that cannot be mitigated but the responsible authority finds that the adverse environmental effects can be justified in the circumstances, then the responsible authority may support the project.
  - ▶ □ If it is uncertain whether the project is likely to cause significant adverse effects; or, the project will cause significant adverse effects but it is uncertain whether these effects are justified in the circumstances, or public concerns warrant it, then the responsible authority must refer the matter to the minister for a referral to mediation or public panel review.
- **Comprehensive studies:** the Minister of the Environment determines the next step as follows:<sup>95</sup>
  - ▶ □ If the project shows no likely significant adverse effects that cannot be mitigated then the minister must refer the project back to the responsible authority for appropriate action (such as granting a regulatory statutory authorization, or granting money or land for the project).

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<sup>93</sup> See the Participant Funding Program Guide and Application Form on the CEAA website.

<sup>94</sup> CEAA, *supra* note 83, s. 20.

<sup>95</sup> *Ibid.*, s. 23.

- ▶ □ If the project shows likely significant adverse effects that cannot be mitigated, then the minister must refer the project back to the responsible authority for appropriate action. If the adverse environmental effects are significant and cannot be justified, the responsible authority cannot support the project.
- ▶ □ If it is uncertain whether the project is likely to cause significant adverse effects, or, the project will cause significant adverse effect but it is uncertain whether these effects are justified in the circumstances, or public concerns warrant it, then the minister will refer the project for further review through mediation or a public panel review.
- ***Mediation or Panel Review:*** the responsible authority determines the next step as follows:<sup>96</sup>
  - ▶ □ If the project shows no likely significant adverse effects that cannot be mitigated, then the responsible authority takes appropriate action (such as granting a regulatory statutory authorization, or granting money or land for the project).
  - ▶ □ If the project shows likely significant adverse effects that cannot be mitigated, and the responsible authority finds the effects cannot be justified in the circumstances, the authority cannot support the project.

#### **MITIGATION AND FOLLOW-UP**

For every type of environmental assessment that is carried out, the question is the same: will the project, taking into account any mitigation measures, likely result in significant adverse environmental effects? It is critical that the decision maker seriously considers mitigation measures since the Act provides that the responsible authority must ensure that mitigation measures are implemented.<sup>97</sup> In fact, the Act places an obligation on the responsible authority to design and arrange for the implementation of a follow up program to ensure that mitigation measures have been carried out.<sup>98</sup> There might well be a role for wetland managers in assisting to design and carry out mitigation measures and follow up programs for projects that affect wetlands.

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<sup>96</sup> *Ibid.*, s. 37.

<sup>97</sup> *Ibid.*, ss. 20(2) and 37(2).

<sup>98</sup> *Ibid.*, s. 38.

## Alberta environmental assessment under the *Environmental Protection and Enhancement Act*

### INTRODUCTION

Prior to the 1992 enactment of the Alberta *Environmental Protection and Enhancement Act* (EPEA) there was no detailed legislated environmental assessment process for projects that could adversely affect the Alberta environment. EPEA changed that by including Part 2, Division 1, which is dedicated to environmental impact assessment (EIA). Details of the process are provided under these EPEA regulations: *Environmental Assessment (Mandatory and Exempted Activities) Regulation*<sup>99</sup> and *Environmental Assessment Regulation*.<sup>100</sup>

### PURPOSES FOR EPEA EIA

The stated purposes for the EPEA environmental impact assessment process are to:

- support the goals of environmental protection and sustainable development,
- integrate environmental protection and economic decision making at the earliest stages of planning,
- predict the environmental, social, economic and cultural consequences of a proposed activity and assess plans to mitigate any resulting adverse impacts, and to
- involve the public, proponents and government departments and agencies in the review of proposed activities.<sup>101</sup>

### PROJECTS SUBJECT TO EPEA EIA

EPEA requires that some proposed activities be subjected to an EIA. As well, EPEA exempts some proposed activities from the EIA process. Both kinds of activities are listed in the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*. Under this regulation, mainly large-scale projects such as sizeable pulp mills, oil refineries and dams, are always subject to the EIA process, whereas certain other projects, including drilling of water wells, oil wells, or gas wells, are exempt. However, EPEA gives the Environment Minister the right to order an EIA on any proposal to carry out an exempt activity.<sup>102</sup>

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<sup>99</sup> Alta. Reg. 111/93.

<sup>100</sup> Alta. Reg. 112/93.

<sup>101</sup> EPEA, *supra* note 28, s. 38.

<sup>102</sup> *Ibid.*, s. 45.

## EPEA EIA AND WATER RELATED "ACTIVITIES"

Under EPEA only *activities* may be the subject of an EIA. An "activity" for the purposes of EPEA means any activity or part of an activity listed in the Schedule to the Act. The Schedule provides a fairly comprehensive list of projects and other activities that could affect the environment.<sup>103</sup> Included among them are:

Any activity, diversion of water, operation of works or transfer of an allocation under a license for which an approval, license or an approval of a transfer of an allocation under the *Water Act* is required. ... [and] anything defined as an activity in the regulations under the *Water Act* for the purposes of that Act.<sup>104</sup>

The schedule specifically defines "activity" for the purposes of the schedule in a very broad manner. The definition includes drainage as well as just about anything that may alter flow or location of water, that may cause siltation or erosion, or that may cause an effect on the aquatic environment. This means that nearly any activity that may cause an effect on water, its environs or the aquatic environment could be subject to an EPEA EIA.

## EPEA EIA STEPS AND STAGES

Like CEAA with respect to federal assessment, with EPEA there are different steps and stages for provincial EIA. Briefly, under EPEA, the first step is the *initial review*. The initial review begins when a director -- meaning someone appointed as a director under EPEA -- becomes aware of a proposed activity. This awareness may come about by the proponent, other government departments, local authorities or anyone else informing a director of a new project, or a director becoming aware of it him or herself, by, for example, reading about it in the newspaper. If the director feels that potential environmental impacts warrant a closer look, then he or she must refer the proposal to the person appointed under EPEA as an assessment director. If the proposed activity is mandatory under the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, then the assessment director must order the proponent to conduct an EIA. If not mandatory, and not exempt, then the director must decide if further consideration is warranted. If no further consideration is warranted, then the director sends the proponent on his or her way to seek whatever statutory authorization is needed to carry out the activity. If the director decides that further consideration is needed, he or she takes the assessment inquiry to the second part of initial review, called a *screening*.

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<sup>103</sup> Interestingly absent from the Schedule are any activities dealing with forestry operations *per se*, like cutting and harvesting of trees. However, activities directly relating to pulp and paper mills are on the list.

<sup>104</sup> EPEA, *supra* note 28, Sch. of Activities, s. 9.

As part of the screening process, EPEA requires the proponent to publish notice of the proposal in a newspaper. Any member of the public who would be *directly affected* by the proposed activity may file a statement of concern within 30 days of this notice. The class of directly affected persons is much narrower than the public. Cases considering the meaning of the words "directly affected" indicate that directly affected persons usually are only those who live in the area, have a property interest in direct proximity of the proposed activity, have a direct personal or property interest that likely will be affected by the activity, or whose health or economic well being may be directly affected by it.

After the 30-day period has expired, the director prepares a screening report, based on the information obtained through the screening process, and then decides if an EIA report is required. The *Environmental Assessment Regulation*<sup>105</sup> sets out what must be in this report including the proposed activities location, purpose and potential impact on the environment. The report must be made available to the public. If the director decides an EIA report is not required, he or she must so advise the proponent. If an EIA report is required, he or she will direct the proponent to prepare one. The *Environmental Assessment Regulation* requires the director to provide notice of this decision.

The next stage of the EIA process is the EIA report itself, if one is required. To help determine an EIA report's contents, the proponent must propose terms of reference for review by the director. The terms are reviewed and must be made available for public review and comment. After a reasonable time, the director finalizes the terms of reference on which the proponent must base the EIA report. EPEA<sup>106</sup> sets out what the EIA report must contain, unless the director indicates otherwise. The proponent then prepares the EIA report and submits it to the director. The director decides when the report is complete. EPEA authorizes the director to compel the proponent to publish the report and make it available for review.

#### **ROLE OF AN EPEA EIA REPORT IN DECISION-MAKING**

When the EIA report is conducted under EPEA it is a bit complex to ascertain how the report plays a role in decision-making, since there are a range of possible decision-makers. For example, if the proponent proposes to carry out an energy project that requires the approval of the Energy and Utilities Board (EUB) then the report is directed to the EUB so that it can consider the report in accordance with its legislation. If the proponent proposes to carry out a project that will affect Alberta's natural resources and requires the approval of the Natural Resources Conservation Board (NRCB) then the report will be forwarded to the NRCB so that it can consider the report in accordance with its legislation, the *Natural Resources Conservation Board Act*.<sup>107</sup> Or, if the proponent proposes to carry out an activity which will affect Alberta's water resources

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<sup>105</sup> *Supra* note 100.

<sup>106</sup> EPEA, *supra* note 28, s. 47.

<sup>107</sup> *Supra* note 70.

and requires an approval under the *Water Act*<sup>108</sup> the report will be forwarded to the administrators of that Act so they can consider it in accordance with it. Where none of the mentioned bodies must give its approval for the proposed activity, then the report is referred to the Environment Minister who may advise proponents requiring an EPEA approval or registration that they can apply for it. Note that nothing in either the *Water Act* or EPEA requires the director to even consider the EIA report in making his or her decision.

#### **WHERE BOTH EPEA AND CEAA APPLY**

In rare instances a provincial law may require provincial environmental assessment for the same project that requires a CEAA assessment.<sup>109</sup> In Alberta, (and some other provinces), federal/provincial agreements apply so that both levels of government may meet their legislative requirements under a single, joint assessment process.<sup>110</sup> This bilateral agreement between Canada and Alberta should apply so that the proponent needs to prepare only one EIA that is designed to meet the requirements of both levels of government. If a hearing is required, the agreement enables a joint hearing, provided that the interests of both levels of government are accommodated. The bilateral agreement requires both levels of government to use the results of the joint assessment in making decisions regarding the proposed project. However, each government retains its legislative authority to make decisions on a proposed project independent of the other government.

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<sup>108</sup> *Supra* note 10.

<sup>109</sup> A background paper for the CEAA Five Year Review indicates that this happens in only about 2% of all CEAA assessments. See D. Lawrence, *Multi-Jurisdictional Environmental Assessments: Prepared for [the] Canadian Environmental Assessment Agency*, (1999), online: Canadian Environmental Assessment Agency <[www.ceaa-acee.gc.ca/0007/0002/0002/bkstd07\\_e.htm](http://www.ceaa-acee.gc.ca/0007/0002/0002/bkstd07_e.htm)> (last modified 01 December 2001).

<sup>110</sup> In 1998, the Canadian Council of Ministers of the Environment (with the exception of Quebec) signed the *Canada-Wide Accord on Environmental Harmonization* and the *Sub-agreement on Environmental Assessment*. This accord provides a framework for dealing with overlapping constitutional jurisdiction relating to environmental matters. Provinces and the federal government have entered into a number of sub-agreements under this Accord that deal with specific matters. The *Sub-Agreement on Environmental Assessment* deals with the application of environmental assessment when laws require two or more governments to assess the same proposed project. It provides for shared principles, common information elements, a defined series of assessment stages, and a single assessment and public hearing process. Bilateral agreements between the federal government and individual provinces implement the subagreement. To date, British Columbia, Alberta, Saskatchewan and Manitoba have developed bilateral agreements with the federal government.



# ***Primer #7***

## ***Municipalities and Wetlands***

### **Primer #7: Municipalities and Wetlands**

#### ***Municipal sources of powers***

The *Municipal Government Act*<sup>111</sup> (MGA) is the statute that creates Alberta municipalities and gives them their main powers. Under the MGA every municipality has two sources of powers. The first source is its *natural person* powers from the MGA's declaration that municipalities are "natural persons". This means that unless limited by statute, a municipality may do anything a natural person may do. For example, like other natural persons a municipality may borrow money, lend money, buy land, sell land, and enter into leases and so forth without specific legislative authority.

Municipalities' second source of powers enables them to do things that other natural persons cannot do. The statutes, regulations and municipal by-laws and plans give these powers. Although municipalities get most of their powers from the MGA, other statutes also give them powers. For example, the *Environmental Protection and Enhancement Act* authorizes municipalities to be granted conservation easements -- something most natural persons cannot do.<sup>112</sup>

Like all statutory creations, municipalities have no authority beyond the powers expressly or implicitly conferred by legislation. If a municipality acts beyond these powers, an affected person may ask a court to judicially review the action, and to nullify it. The court will comply if it finds that the municipality or its delegates acted beyond authority given by the legislation in question. In other words, it will find the municipal action to be *ultra vires* legislative authority, and consequently of no effect. To understand what a municipality may and may not do in regards to wetland conservation, one must look at how laws authorize and restrict municipal action.

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<sup>111</sup> *Supra* note 30.

<sup>112</sup> *Supra* note 28.

### ***Wetlands conservation and general municipal bylaws***

Part 1, Division 1 of the MGA gives municipalities considerable general powers to pass bylaws. The MGA intends that the Part 1, Division 1 powers be construed broadly and to "enhance the ability of councils to respond to present and future issues".<sup>113</sup> With a little ingenuity a municipality could use a number of these powers to control a variety of activities that could affect wetlands.<sup>114</sup>

### ***Wetlands conservation and municipal planning and development***

#### **INTRODUCTION**

The MGA gives municipalities considerable mandate to regulate private land use. The Act requires municipalities to map out its land use objectives. It charges municipalities with the duty to pass bylaws specifying what kind of developments it will allow and what kind of developments it will prohibit. The Act gives municipalities a limited right to take reserves when a landowner applies to subdivide land. This primer describes the land use planning processes of municipalities. Chapter 7 of this Guide sets out information relevant to subdivision and development.

#### **STATUTORY PLANS**

A municipality carries out its authority to regulate land uses through plans the MGA authorizes or requires ("statutory plans"). Statutory plans have a number of purposes. They range from setting out the general direction a municipality wishes to proceed regarding future land use to establishing firm rules for deciding subdivision and development applications.

The broadest in scope and most general of statutory plans is the municipal development plan (MDP). The municipal development plan sets out a municipality's goals and objectives for the future. It is not a regulatory plan in that it does not tell decisionmakers how to decide development applications. Instead, it sets forth the municipality's policies on land use and development.

The MGA requires a MDP to address policies on future growth and anticipated infrastructure including roads and transportation corridors to accommodate that growth. The MGA allows that a MDP may address many other matters including development policy in regards to environmentally sensitive areas.<sup>115</sup> The MDPs of a number of Alberta municipalities contain policy statements relevant to the conservation of identified environmentally sensitive areas. These policy statements should be of value to wetland managers who are interested in conserving wetlands in such areas, especially if the area could be subject to development. Wetland managers should try to be involved in the development of these plans to do what they can to see that the plans contain policy statements that urge wetland preservation.

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<sup>113</sup> *Supra* note 30, s. 9.

<sup>114</sup> General bylaw making powers are in the MGA, *ibid.*, s. 7.

<sup>115</sup> *Ibid.*, s. 632.

### **AREA STRUCTURE PLANS**

Although still general, area structure plans are more specific than the MDP. An area structure plan applies to a geographical area of primarily undeveloped land within a municipality ranging from only a few acres to several sections of land.<sup>116</sup> The Act intends that area structure plans provide a framework for subdivision and development of the subject area. An area structure plan must describe the proposed sequence of development, land uses, density and the general location of major transportation routes and public utilities. An area structure plan may contain any other matters council considers necessary.<sup>117</sup>

### **AREA REDEVELOPMENT PLANS**

Area redevelopment plans are like area structure plans except that the former deal with redeveloping developed areas. These plans could address redevelopment to wetland conservation, habitat protection or wildlife corridors.

### **LAND USE BYLAWS AND DISTRICTING**

The MGA requires every municipality to pass a land use bylaw.<sup>118</sup> The land use bylaw is the regulatory tool by which a municipality carries out its statutory plans. The major purpose of a land use bylaw is to regulate and control the use and development of land and buildings in a municipality.<sup>119</sup> A land use bylaw typically has two elements: one that creates the administrative structures to deal with subdivision and development applications; the other to create specific rules to be applied in the development and subdivision process. Administrative structures would include establishing a development authority to decide development permit issues as well as a process to apply, issue, cancel and alter development approvals.

The MGA requires that the land use bylaw divide the municipality into districts, commonly known as "zones", in such number and at such places as council may decide.<sup>120</sup> Familiar districts include residential, commercial, agricultural, and industrial. However, a municipality may establish various others. The land use bylaw must state what uses are permitted and what uses are discretionary for each district.<sup>121</sup> It may state that when issuing a development permit for a permitted use a development officer may impose such conditions as deemed necessary, and when issuing a development permit for a discretionary use the development officer may impose such conditions as required to ensure compliance with the bylaw. The MGA requires an approving authority to issue a permit if the proposed development conforms to a permitted use. Accordingly, conditions probably may only be imposed for permitted uses where the bylaw gives the development officer a discretion which may be properly exercised by way of a condition, for example,

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<sup>116</sup> F. Laux, *Planning Law and Practice in Alberta*, 1<sup>st</sup> ed. (Toronto: Carswell, 1990) at 56.

<sup>117</sup> *Supra* note 30, s. 633.

<sup>118</sup> *Ibid.*, s. 639.

<sup>119</sup> *Ibid.*, s. 640(1).

<sup>120</sup> *Ibid.*, s. 640(2).

<sup>121</sup> *Ibid.*, s. 640(2).

to set landscaping standards.<sup>122</sup> However, with discretionary uses, provided that the authority has rational planning grounds, an approving authority has greater discretion to impose conditions.<sup>123</sup>

Of the many districts that a land use bylaw may establish, some show promise for wetlands protection, for example, open space and direct control districts.<sup>124</sup> The objective of open space districting is to conserve environmentally sensitive areas with unique natural qualities, or to minimize development that, owing to the physical characteristics of the land, may prove hazardous.<sup>125</sup> Open space districting achieves its objective by only allowing non-intensive land uses consistent with conservation. Direct control districting is more open-ended than conventional districting. The MGA authorizes a land use bylaw to direct control districts, where, subject to any applicable land use plan, council may regulate and control development as it considers necessary.<sup>126</sup>

In the past, municipalities also have preserved environmentally sensitive land through the use of holding districting. Usually a holding district or holding zone would only apply to recently annexed rural land adjacent to urban land. The zone is meant, in effect, to restrict uses to hold off on development lest it prove to be disorderly and premature.

#### **SUBDIVISION, COMPULSORY DEDICATIONS AND WETLANDS CONSERVATION**

Subject to narrow exceptions, the MGA prohibits the Registrar of Land Titles to register any instrument having the effect of subdividing land unless the subdivision has been approved under the MGA.<sup>127</sup> Accordingly, any landowner wishing to subdivide land must get permission from the municipality in which the land is located unless an exception applies. A wetland manager might be concerned about the fate of a wetland in an area targeted for residential subdivision. Chapter 7 of this Guide addresses the subdivision and development and wetland conservation.

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<sup>122</sup> F. Laux, *Planning Law and Practice in Alberta*, 2nd ed. (Toronto: Carswell, 1996) at 9-24.

<sup>123</sup> *Ibid.*, at 9-23.

<sup>124</sup> Others indirectly also show promise. For example, agricultural districting may in effect keep land from being fragmented into smaller parcels.

<sup>125</sup> *Supra* note 122 at 6-25.

<sup>126</sup> *Supra* note 30, s. 641.

<sup>127</sup> *Ibid.*, s. 652. The exceptions are for a quarter section; a river lot, lake lot or settlement shown on an official plan as defined in the *Surveys Act* that is filed or lodged in a Land Titles Office; a part of a parcel of land described in a title if the boundaries are shown and delineated in a plan of subdivision.

***Municipal management over wetlands, other water bodies and watercourses***  
Section 60(1) of the MGA states:

Subject to any other enactment, a municipality has the direction, control and management of the rivers, streams, watercourses, lakes and other natural bodies of water within the municipality, including the air space above and the ground below.

Note that this provision is not limited to permanent wetlands or watercourses and so should apply to all naturally occurring water bodies or watercourses, including intermittent ones.

The extent of power given to a municipality by virtue of this section is not certain. For example, it could be argued that it implies an access right over private lands to enable a municipality to carry out direction, control or management of a wetland on the land. On the other hand, it could be argued that more direct statutory language would be needed to give a municipality such right. In any case, it is clear that this provision gives municipalities authority relevant to conservation of wetlands containing wetlands or watercourses. To aid in municipalities' confidently exercising authority under section 60(1) of the *Municipal Government Act*, it is a recommendation of this Guide that the Province develop explicatory regulation or policy.

***Municipal management and water related approvals under other legislation***

Carrying out development on private land that contains surface water often requires statutory approvals. As other parts of this Guide detail:

- Under the *Water Act*<sup>128</sup> any drainage activities will require an approval. It is not relevant whether a water body is permanent or intermittent. As well, most water diversions require a license.
- Diversion, drainage or other activities affecting fish habitat or involving depositing some substances frequented by fish will require a permit under the federal *Fisheries Act*.<sup>129</sup>
- Doing things that could harm migratory birds or their nests, or involve depositing oil, oil wastes or any other substance harmful to migratory birds in any waters or any area frequented by migratory birds requires a permit under the *Migratory Birds Convention Act*<sup>130</sup> unless allowed by regulations.
- A permit is needed under the federal *Navigable Waters Protection Act* to carry out activities that could interfere with navigable water.<sup>131</sup>

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<sup>128</sup> *Supra* note 10.

<sup>129</sup> *Supra* note 12, ss. 35(1) and 36(3).

<sup>130</sup> *Supra* note 3, ss. 5.6 and 35.

<sup>131</sup> *Supra* note 13, s. 5.

- An approval or registration could be required under the *Environmental Protection and Enhancement Act* to carry out water related activities that can pollute. The authority given to Alberta municipalities by section 60(1) of the MGA should give them the right to participate in applications for any of the above approvals relating to wetlands, other water bodies or watercourses. The authority should also give them standing in relation to any required environmental assessments relating to approvals.

### ***Toolbox chart***

This primer of the Guide discussed many of the things that Alberta municipalities may do to assist in conserving wetlands within their boundaries. The discussion did not, however, cover every possible mechanism available. The chart attached as an appendix to this Guide contains a more comprehensive list of tools ranging from statutory designations to tax incentives.

# Part II

## Chapters





# Chapter One

## *Wetlands, Riparian Rights and Statutory Alteration*

### Chapter One: Wetlands, Riparian Rights and Statutory Alteration

#### ***Introduction***

Primer #2 explained how only part of our law is composed of statutes and regulations. Another part consists of principles that have been established by the courts in past decisions called "common law". Many common law actions are relevant to environmental matters. This chapter focuses on one category of common law actions very important to wetland managers -- riparian rights. Like other common law rights, riparian rights continue to exist unless altered by statute. As noted in primer #2, any effective alteration requires express statutory language or language that necessarily implies the alteration. This chapter also sets out how statutes have altered riparian rights.

#### ***Riparian rights***

##### **WHO HAS RIPARIAN RIGHTS?**

Riparian rights belong to owners or occupants of land that abuts on water. A riparian owner whose land abuts the shore of a lake or a wetland is called a *littoral* or *lacustrine* proprietor. For simplicity, this Guide refers to riparian, littoral and lacustrine rights as "riparian rights".

In some cases it might not be clear whether a person holds riparian rights. The following summary of caselaw on this issue should shed light on hard cases:

- Riparian rights do not depend on ownership of bed and shores.<sup>132</sup> Accordingly, the fact that the provincial Crown owns bed and shores of natural water bodies and watercourses does not affect the riparian rights of the owner or occupier of abutting land.
- Where there is a non-navigable marsh between land and open water, the owner or occupier may not be able to claim riparian rights.<sup>133</sup>

<sup>132</sup> *Attril v. Platt* (1884), 10 S.C.R. 425 at 489.

<sup>133</sup> *Merritt v. Toronto* (1912), 6 D.L.R. 152; aff'd, (1913) 48 S.C.R., 1. In this case the non-navigable marsh separated the plaintiff's land and Lake Ontario. The plaintiff claimed riparian rights to the lake and unsuccessfully sought an injunction and damages against the City of Toronto for interfering with his access to the water by digging a channel.

- To enjoy riparian rights, there must be no separation between the owner's or occupier's land and the water,<sup>134</sup> such as a reserved strip of provincial Crown or municipal land. In such case the owner or occupier of the land abutting the Crown or municipal land has no riparian rights.
- Riparian rights arise only in respect of natural watercourses or bodies. Accordingly, there are no riparian rights in respect of an artificial channel<sup>135</sup> or, normally, an artificial lake, human made wetland or constructed reservoir.

#### THE RANGE OF RIPARIAN RIGHTS

Riparian rights include:

- rights relating to **use and quantity**
- rights relating to **quality**
- rights of **access**
- rights relating to **prevention of flooding**, and
- rights and consequences relating to **accretion and erosion**.

#### USE AND QUANTITY AT COMMON LAW

At common law, a riparian has the right to have the water continue to flow in its natural state. For use for *domestic* purposes on the land itself, generally there is no limitation on how much a riparian could take. "Domestic purposes" include water for drinking, cooking, fire control, and for watering a reasonable number of domestic livestock.<sup>136</sup> If a use was for what was called an "extraordinary" purpose, such as a commercial enterprise, the riparian use must be reasonable, and must be returned to the watercourse substantially unaltered in quantity and quality.<sup>137</sup> If an extraordinary use decreases flow, or pollutes the water, an affected riparian could sue the landowner causing the problem.

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<sup>134</sup> *Kerr (F.) Co. v. Seely* (1911), 44 S.C.R. 629 [N.B.].

<sup>135</sup> *George v. Humphrey* (1912), 3 W.W.R. 170 (B.C.C.A.)

<sup>136</sup> See, for example, *Re Burnham* (1895), 22 O.A.R. 40 (Ont. C.A.); *Ahern v. Booth* (1903), 2 O.W.N. 696.

<sup>137</sup> See, for example, *Miner v. Gilmour* (1858), 12 Moo. P.C. 131, 14 E.R. 861.

## STATUTORY ALTERATION OF USE AND QUANTITY RIGHTS

### *Sections 21-23 of the Water Act*

Alberta statute law has affected use and quantity rights more than any other incidence of riparian rights. To appreciate the extent to which the Act limits and preserves riparian rights it is useful to refer to sections 21 and 22 of the *Water Act*. This chapter sets out these sections verbatim, and interprets them below through a series of questions and answers that a wetland manager might ask.

Sections 21 and 22 read:

21(1) Subject to subsection (3) and section 23 and any exemptions specified in the regulations, a person who owns or occupies land that adjoins a river, stream, lake, natural watercourse or other natural water body

(a) has the right to commence and continue the diversion of the water that adjoins that land for household purposes, whether or not that water is reserved under section 35, and

(b) may not obtain a license for the diversion of water that adjoins that land for household purposes.

(2) Subject to subsection (3) and section 23 and any exemptions specified in the regulations, a person who owns or occupies land under which groundwater exists

(a) has the right to commence and continue the diversion of the groundwater for household purposes, and

(b) may not obtain a license for the diversion of the groundwater for household purposes.

(3) The number of households on a parcel of land for the purposes of this section is limited to

(a) the number permitted under an applicable approved water management plan, or

(b) if there is no applicable approved water management plan, the number permitted by an order of the Minister.

(4) A person who diverts water under subsection (1) or (2) may, without an approval, license or registration, pump or otherwise convey water to the point of use for household purposes.

22(1) Notwithstanding the common law, a riparian owner, riparian occupant or person who owns or occupies land under which groundwater exists has the right to divert water only in accordance with section 21 and may not divert water for any other purpose unless authorized by this Act or under an approval, licence or registration.

(2) A person described in subsection (1) may commence an action with respect to a diversion of water only in respect of a diversion of water that is not authorized by this Act or under an approval, licence or registration.

(3) Nothing in this Act is to be construed so as to repeal, remove or reduce any rights held at common law by a riparian owner or occupant of land or by a person who owns or occupies land under which groundwater exists, other than the right to the continued flow or diversion of water.

#### **INTERPRETATION OF STATUTORY LIMITATIONS AND PRESERVATION OF RIPARIAN RIGHTS**

Sections 21-23, subject to any water management plan (none exist at date of writing) may be relevant to wetland managers. In interpreting them a wetland manager might ask:

##### ***To which wetlands do the riparian owner or occupant sections apply?***

**Answer:** The sections apply to any wetland that is a "natural water body". The Act defines "water body" to include wetlands. It does not matter whether the wetlands are permanent or intermittent, for example, forming only as a result of flooding, or snow melt.

##### ***Do the sections apply to non-natural or constructed wetlands?***

**Answer:** No, the sections do not apply to non-natural, constructed wetlands. However, other parts of the *Water Act* do apply. For example, to legally create a wetland where none previously existed, the landowner must obtain an approval under the *Water Act*. As well, even though a wetland is artificial, the captured water and the right to divert it, like all water in the province, still belongs to the government.<sup>138</sup> Chapter 4 of this Guide addresses statutory authorization under the *Water Act*. At this point it is sufficient to say that any diversion rights relating to an artificial wetland in all likelihood would be determined during the approval process. Any such rights would form part of a license attenuate to the approval. Alberta Environment treats an artificial wetland no differently from an artificial water body created for an irrigation reservoir. Where there is such licensed or approved works, Alberta Environment would not grant access to or provide a right to water except through the person who holds the licence or approval. In other words, the Crown would not grant rights to water, no matter what the purpose, without the licensee or approval holder having a say in the matter.<sup>139</sup>

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<sup>138</sup> *Supra* note 10, s. 3.

<sup>139</sup> Ss. 36 and 1(b), *Water Act*, *supra* note 10, definition of "activity", and email correspondence with E.

***Does a riparian need a Water Act license or other statutory authorization to divert water from a natural wetland?***

**Answer:** A riparian owner or occupant needs a license or other statutory authorization unless the *Water Act* specifically permits diversion without a license or other statutory authorization.

***How much water may a riparian withdraw from a natural wetland without a Water Act license?***

**Answer:** The *Water Act* permits a riparian to withdraw a maximum of 1250 cubic metres of water per year from all water sources.<sup>140</sup> So, for example, if a riparian has a number of natural sources such as groundwater, a river and a wetland, the maximum that he or she may withdraw is 1250 cubic metres.

***For what purposes may a riparian withdraw water from a natural wetland without a license?***

**Answer:** The *Water Act* allows a riparian to withdraw up to the maximum only for what it calls "household purposes", which means for the purposes of human consumption, sanitation, fire prevention and watering animals, gardens, lawns and trees.<sup>141</sup>

***What happens if another water user interferes with a riparian user's right?***

**Answer:** The *Water Act* gives the domestic user's right limited priority over all other uses except another riparian household user, whether or not the other use is licensed or otherwise authorized. However, the *Water Act* allows a riparian to sue the user who interferes with the riparian's *Water Act* household user rights only if the interfering right is not authorized by the *Water Act*.<sup>142</sup> If it is authorized, then the household user's remedy is to complain to the government.

***What if a riparian user is withdrawing more than 1250 cubic metres of water from a natural wetland?***

**Answer:** Unless the user has statutory authority to withdraw more than the household use limit, he or she is breaking the law and could be prosecuted under the *Water Act*. Other statutory authorities are an *exempted agricultural user*, a *registration* or a *license*. These are explained in chapter 4 on the *Water Act*.

## **RIPARIAN QUALITY RIGHTS**

***The right and remedy for interference with the right***

At common law a riparian has a right to the water flow " ... without sensible alteration of its character or quality".<sup>143</sup> There is case authority that injury to riparian rights is

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Hui, Head, Licensing and Permitting Standards Branch, Water Management, Alberta Environment (1 August 2000).

<sup>140</sup> *Supra* note 10, s. 1(y), definition of "household purposes".

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*, ss. 22(2) and 27.

<sup>143</sup> *John Young & Co. v. Bankier Distillery Co.*, [1893] A.C. 691 (H.L.).

actionable even though the plaintiff has not sustained actual damage.<sup>144</sup> The usual remedy is prohibitory injunction and, if appropriate, nominal or exemplary damages.<sup>145</sup> This right could be of interest to wetland managers. It might be relevant if a wetland traverses more than one parcel of land, one owned by the wetland manager and the other by someone else. If the other person pollutes the wetland the wetland manager might be able to sue for interference with riparian rights. A plaintiff's likelihood of success will partly depend on whether government authorized the polluting activity, for example, under an *Environmental Protection and Enhancement Act* approval.<sup>146</sup> A defendant may raise the defence of *statutory authority* if sued for injury resulting from an activity that he or she had a right to carry out under a statutory authorization. This defence should succeed only where the act complained of falls strictly within the statutory authority and is the inevitable result of carrying out the authority.<sup>147</sup>

#### **NO APPARENT STATUTORY ALTERATION OF THIS RIGHT**

Since the *Water Act* has not specifically taken away this right, and since the Act specifically preserves riparian rights that it does not limit, this right presumably still exists. Accordingly, if a person carries on an activity that pollutes water, an affected riparian can sue for interference with riparian rights, subject to the defence of statutory authority mentioned above.

#### **ACCESS RIGHTS**

Riparian owners or occupants have the right to access and leave the watercourse or water body. This right does not appear to have been limited by statute.

#### **PREVENTION OF FLOODING**

At common law a riparian has the right to divert water in order to prevent water from flooding land, provided that two conditions are met. First, the purpose for the diversion (for example by constructing a dyke or berm, or digging a ditch) must be to prevent the flooding of land. Accordingly, there is no right if there is no flooding, or imminent danger of flooding. Second, the diversion of floodwaters must not result in harm to others, for example a neighbouring landowner.<sup>148</sup>

A number of cases have demonstrated that this right can provide a defence for diversions not authorized by the *Water Resources Act*.<sup>149</sup> However, it remains to be seen whether the *Water Act* limits or abolishes this defence. Arguably the *Water Act's* specific requirement for an approval for flood control activities is sufficient to override

<sup>144</sup> *MCI v. C.V. Co.*, [1949] S.C.R. 212.

<sup>145</sup> Swanson and Hughes, *supra* note 22 at 41.

<sup>146</sup> *Supra* note 28. Primer #5 discusses statutory authorizations.

<sup>147</sup> Swanson and Hughes, *supra* note 22 at 19. The text refers to *Friesen v. Forest Protection Limited*, (1978) 22 N.B.R. (2d) 146 (N.B.S.C.). Also see *Tock v. St. John's Metropolitan Area Board*, *supra* note 22.

<sup>148</sup> *R. v. Fisher* (20 June, 2000), Red Deer 991000020 S-6 0101-3 (Alta. Q.B.)

<sup>149</sup> *Tottrup v. Alberta* (1979) 10 Alta. L.R. (2d) 117, 17 A.R. 563, 102 D.L.R. (3d) 42 (C.A.) leave to appeal to S.C.C. refused (1979) 19 A.R. 188n (S.C.C.); *R. v. Starosielski* (21 December 1999), Edmonton 9903-0050-S1 (Alta. Q.B.) and *R. v. Fisher*, *supra* note 148.

the common law. However, a court might have to finally resolve this matter.

## ACCRETION AND EROSION

### *The legal requirements*

"Accretion" means an increase in land owned by riparians owing to the gradual, imperceptible retreat of waters, normally by virtue of natural processes. "Erosion" means a decrease in land through gradual, imperceptible, and normally natural processes. The right to accreted lands is an incident of riparian ownership and similarly, the non-compensable loss of land through erosion is an incident of riparian ownership. Where there is accretion in respect of a parcel of land adjacent to a Crown owned bed and shores, the adjacent landowner's land increases and the Crown's land ownership of bed and shores decreases. Where there is erosion, the adjacent landowner's land decreases and the Crown's land ownership of bed and shores increases.<sup>150</sup>

Case law makes it clear that it is fairly difficult to establish accretion. The following summarizes the case law:

- **Title documents requirements:** For accretion to apply, the title documents (e.g. certificate of title, registered subdivision plan) must make it clear that the watercourse or water body in respect of which a claim of accretion is made, constitutes a boundary of the property.<sup>151</sup> If title documents do not make this clear, there can be no accretion.<sup>152</sup>
- **Location of land requirements:** For accretion to apply the landowner must own the land bordering the land claimed to be accreted. So, for example, the formation of islands unconnected to anyone's land other than the Crown (as

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<sup>150</sup> For example, as pointed out by Dickson, J.A. in *Chuckry v. The Queen*, [1973] S.C.R. 694, [1973] 5 W.W.R. 339, 35 D.L.R. (3d) 607, adopting the dissenting opinion of Dickson J.A. in [1972] 3 W.W.R. 561, 27 D.L.R. (3d) 164 (Man. C.A.).

<sup>151</sup> In *Clarke v. Edmonton (City)*, [1930] S.C.R. 137, [1929] 4 D.L.R. 1010 the title in question read "All that portion of River Lot Twenty-one of the Edmonton Settlement ... lying North of the North boundary of the Dowler Hill Road ... ". Based on the plan and patent the Court concluded that the East and West boundaries ran to the Saskatchewan River and that the River formed a boundary, thus giving the owners riparian rights. Another example is *Robertson v. Alberta (South Alberta Land Registration District)*, [2000] A.J. No. 551, Action No. 9701-10813. In *Chuckry v. The Queen*, *supra* note 150, title to the parcel in question described it as bounded by the Assiniboine River.

<sup>152</sup> In *Nastajus v. North Alta. Land Registration Dist.* (1989), 64 Alta. L.R. (2d) 300 (sub nom. *Nastajus v. Edmonton Beach (Summer Village)*) 92 A.R. 363 (C.A.) a number of landowners (the respondents) sought a court declaration that certain land had accreted to their properties at Edmonton Beach, where a number of subdivision plans were registered between 1907 and 1959. The landowners' lots were shown on a subdivision plan that made a straight line to show the lots' border and not the lake itself. Subdivision plans for other lots on the lake depicted the lake as a border. The Court of Appeal found there was no accretion. Belzil, J.A. for the court stated "In the absence of other cogent evidence with respect to this particular subdivision, the registered plan must be accepted as conclusively fixing the boundaries of the land owned by the respondents ... as conclusive proof that these lands do not border the waters of the lake. There has accordingly been no accretion to them".

owner of bed and shores) would not constitute accretion and the islands would belong to the Crown.<sup>153</sup> Or, if a municipal reserve separates a lot from a watercourse or water body, there can be no accretion to the lot.

- **Gradual and imperceptible requirement:** To apply the doctrine of accretion, the change must be gradual and imperceptible.<sup>154</sup> For example:
  - A quick change in a watercourse or water body, called *avulsion* does not change the boundary from accretion.
  - Exposure of land from a quick drying out is avulsion and not accretion.<sup>155</sup>
  - The drying up of the riverbed due to the formation of silt dykes was found not to be accretion because it was not gradual or imperceptible.<sup>156</sup>
  - Vertical development through sedimentation, which was not a gradual extension of existing upland, did not establish any accretion.<sup>157</sup>
- **Change through natural or lawful artificial causes requirement:** A leading case on accretion states that the "increase must also result from the action of the water in the ordinary course of the operations of nature and not from some unusual or unnatural action by which a considerable quantity of soil is suddenly swept from the land of one man and deposited on, or annexed to, the land of another".<sup>158</sup> However, "the fact that the increase is brought about in whole or in part by the water, as the result of the employment of artificial means, does not prevent it from being a true accretion, provided the artificial means are employed lawfully and not with the intention of producing an accretion, for the doctrine of accretion applies to the result and not to the manner of its production".<sup>159</sup>

#### ***Amendment to title to reflect accretion***

Where accretion has occurred relative to a natural permanent water body or watercourse, the landowner, or the Crown (as owner of bed and shores) may apply to the Registrar of Land Titles to amend the property description on title to reflect the current location of the natural boundary. The applicant must provide evidence that the natural boundary has changed. In the case of a change of a natural boundary, the

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<sup>153</sup> *Re Bulman* (1966), 57 D.L.R. (2d) 658 at p. 662, 56 W.W.R. 225, per Ruttan, J. A newly formed island will belong to the owner of the lakebed.

<sup>154</sup> *Chuckry v. The Queen*, *supra* note 150.

<sup>155</sup> *Ibid.*

<sup>156</sup> *A.G. B.C. v. Neilson* (1956), 5 D.L.R. (2d) 449 at p. 455, [1956] S.C.R. 819, per Rand, J.

<sup>157</sup> *Supra* note 153.

<sup>158</sup> *Clarke v. The City of Edmonton*, *supra* note 151 at 149.

<sup>159</sup> *Ibid.* The *Clarke* case refers to the following as authority for this statement: *Stanley v. Perry* (1879) 3 Can. S.C.R. 356. and *Brighton and Hove General Gas Co. v. Hove Bungalows, Limited* [1924] 1 Chy. 372.



applicant must submit a survey or other evidence satisfactory to the Registrar that the natural boundary has indeed changed. Where a natural boundary no longer exists, then the applicant must submit evidence satisfactory to the Registrar that it no longer exists. If the Crown is not the applicant, the applicant must first obtain the Crown's consent. As well, the applicant must provide the consent of any landowner who may be adversely affected by an amendment.<sup>160</sup>

***Potential legal consequences for using Crown land that has not legally accreted***

A landowner who treats land as his or her own that has not legally accreted could face legal consequences. If this land still forms part of the bed or shores, then it is public land and subject to the *Public Lands Act*. That Act specifically states that no one may acquire prescriptive rights to public land, so the fact that the landowner has treated Crown land as his or her own for a long time does not give the landowner any rights to it.<sup>161</sup> Moreover, the Act creates a number of offences for those who use public lands in an unauthorized manner. These offences are set out in chapter 9 of this Guide, *Other Provincial Laws and Policies*.

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<sup>160</sup> *Supra* note 27, s. 90.

<sup>161</sup> *Supra* note 11, ss. 3 and 4.



# Chapter Two

## *Common law of drainage*

### Chapter Two: Common Law Of Drainage

#### ***No private rights to drain without statutory authority***

Proposed drainage activities in Alberta have been subject to statutory controls since 1894 with the federal *Northwest Irrigation Act*.<sup>162</sup> The Act required anyone who contemplated drainage to first obtain a licence. Following the transfer of public lands and natural resources from the federal government to the province in 1930, Alberta passed its first *Water Resources Act*.<sup>163</sup> This Act, just as all subsequent Alberta water diversion statutes through to the current *Water Act*, required statutory authorization to drain land. Although any right to drain without statutory authorization has been removed by statute, arguably, in limited circumstances, common law drainage rules may still be relevant.

#### ***Drainage in Alberta and common law***

The common law of drainage in Alberta concerns whether the owner of higher, upper land has the right to drain water from his or her land and discharge it onto lower land and whether the owner of the lower land has any obligation to accept water drained from higher land. The two common law rules for Alberta may be summarized as follows:

1. Owners of upper land may discharge naturally accumulating water from their lands to their neighbour's lower land in the following circumstances:
  - a) the upper owner drains the water into a flowing watercourse with a distinct bed and bank, or,
  - b) the upper owner drains the water into what is not a flowing watercourse but rather is a channel with natural gullies, ravines or a natural depression. The channel or natural depression does not need to have a distinct bed or marked banks or edges.

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<sup>162</sup> *Northwest Irrigation Act*, S.C. 1894, c. 30, s. 4.

<sup>163</sup> *The Water Resources Act*, S.A. 1931, c. 71.

In either case, the owner of the lower land may not obstruct the flow of water in a manner so that it flows back onto the upper owner's land. For example, the lower owner may not construct a berm or dam to repel the water back onto the upper owner's land.

2. Owners of upper land may not discharge merely diffuse accumulating surface water onto lower land where there is no natural watercourse with bed and bank, or channel or natural depression. In such circumstance, the lower owner has no obligation to accept the drainage water and may obstruct it.<sup>164</sup>

### ***Possible limited applicability of Alberta common law rules***

#### **INTRODUCTION**

As noted earlier, drainage activities require statutory authorization to be legally carried out. If a drainage activity was authorized through a statutory approval or permit, it is unlikely that the Alberta common law could be relevant provided that any damage was the inevitable result of carrying out an authorized activity. (See the *Defence of Statutory Authority* in primer #2). As well, the construction of a berm or a dam to block waters from coming onto lower land normally would require statutory authorization.<sup>165</sup> However, there still are two situations in which the common law could be relevant.

#### **REMNANT UNREGULATED DRAINAGE, OR EXEMPTIONS UNDER THE *WATER ACT***

The first is where some aspect of drainage remains unregulated. It is conceivable that the statutory prohibitions and limitations on drainage without approval do not cover every aspect of drainage. If this is so, then the common law will apply to determine rights. Or, it is possible that in the future the Alberta Government will provide an exemption from the approval requirements for some drainage activities, perhaps for a given amount of casual diffused surface water on an agricultural field. In this case, unless the regulatory exemption provides otherwise, the common law would apply to the drainage activity.

#### **UNAUTHORIZED, UNAPPROVED DRAINAGE**

The second concerns drainage activities that required a statutory authorization but the

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<sup>164</sup> These rules are summarized from David Percy's text *Wetlands and the Law in the Prairie Provinces of Canada* (Edmonton: Environmental Law Centre, 1993) at 13-18. The leading case Percy relies on is *Makowecki v. Yachimyc* [1917] 1 W.W.R. 1279, 34 D.L.R. 130 (Alta. S.C., A.D.). See his text for several other cases that follow *Makowecki*. Percy notes how Alberta's rules on drainage differ from the other prairie provinces which limit the upper landowners right to drain to the circumstances described in 1(a) in the above text. By including 1(b) Alberta departed from the established common law and adopted the civil rule of Quebec. By including 1(b) the Alberta rules allowed more drainage than the other prairie provinces. Specifically, Percy notes at p.17, that the Alberta rules allowed more drainage of marshes and small wetlands than would be allowed under the established common law.

<sup>165</sup> For a possible exception, see chapter 1 of this Guide, on riparian rights relating to the prevention of flooding.

persons carrying out the activities failed to obtain them. Given that the common law developed in Alberta and elsewhere at a time when drainage activities required statutory authorization,<sup>166</sup> this Guide would be remiss in not considering this second situation.

Consider an example. Suppose an upper landowner without statutory authorization drains a natural shallow marsh into a stream with a defined bed and bank and the water flows onto lower land. Further suppose that the owner of the lower land constructs a dam to reverse the flow onto the upper land. Assume that, for whatever reason, the government is not interested in prosecuting either the upper landowner for draining without a *Water Act* approval, or prosecuting the lower landowner for constructing a dam, without an approval. In determining civil rights between the upper and lower landowner, the common law rules could apply. Since the drainage water flowed into a flowing stream the upper landowner might sue the lower landowner for damages resulting from the reverse flow.

On a strict application of the Alberta common law the plaintiff should succeed. However, the plaintiff's chances of success in this example could be hindered by his or her lack of statutory authority. In the course of legal proceedings the lower landowner could raise the plaintiff's lack of statutory approval. If the judge finds that this lack materially contributed to the damage, then it is unlikely that the upper landowner would be successful. For example, if the Court found that the government would not have granted an approval without the lower landowner's consent, then the upper landowner's case likely would fail.<sup>167</sup>

As well, what is called the "unclean hands principle" might dictate that the plaintiff should not succeed. This principle is that one who has unclean hands is not entitled to the sought relief if the wrongdoing has a proximate relation to the subject of the controversy.<sup>168</sup>

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<sup>166</sup> At page 36 of his text *Wetlands and the Law in the Prairie Provinces of Canada*, *supra* note 164, Percy notes that of all of the drainage cases he considers, only one raised the issue of lack of statutory authorization. That case was inconclusive regarding whether the lack of statutory authority was relevant to the outcome.

<sup>167</sup> In his text, *Wetlands and the Law in the Prairie Provinces of Alberta*, *ibid.*, Percy relates that it is government policy not to grant a statutory authorization to drain where another person's land is affected, unless that other person consents to the drainage.

<sup>168</sup> *Black's Law Dictionary*, 1968, *s.v.* "unclean hands principle".



# Chapter Three

## *Bed and Shores*

### Chapter Three: Bed and Shores

#### *Bed and shores issues*

This section discusses many issues relating to determining ownership of bed and shores of wetlands and circumstances under which ownership may change. As the reader will see, the issues are complex and to some extent unresolved.

#### *Public Lands Act and Crown ownership of bed and shores of permanent water bodies*

##### INTRODUCTION

The provincial Crown owns the bed and shores of many Alberta wetlands. The extent of this ownership depends on the correct legal interpretation of sections 3 and 4 of the *Public Lands Act*,<sup>169</sup> which reads:

**3(1)** Subject to subsection (2) but notwithstanding any other law, the title to the beds and shores of

- (a) all permanent and naturally occurring bodies of water, and
- (b) all naturally occurring rivers, streams, watercourses and lakes,

is vested in the Crown in right of Alberta and a grant or certificate of title made or issued before or after the commencement of section 3 of the *Public Lands Amendment Act, 1984* does not convey title to those beds or shores.

**(2)** Subsection (1) does not operate

- (a) to affect a grant referred to in subsection (1) that specifically conveys by express description a bed or shore referred to in subsection (1) or a certificate of title founded on that grant,

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<sup>169</sup> *Supra* note 11.

(b) to affect the rights of a grantee from the Crown or of a person claiming under him, when those rights have been determined by a court before June 18, 1931, or

(c) to affect the title to land belonging to the Crown in right of Canada.

(3) For the purposes of subsection (1), a river, stream or watercourse does not cease to be naturally occurring by reason only that its water is diverted by human act.

(4) No person may acquire by prescription an estate or interest in public land.

Through a series of questions and answers, this section examines these provisions and sets out their consequences, both legal and practical, that will be of interest to a wetland manager.

***Is a wetland a "water body" for the purposes of the Public Lands Act?***

**Answer:** The *Public Lands Act* does not define "water body". Nevertheless, there is no doubt that sections 3 and 4 of the Act clearly applies to water bodies that are wetlands provided they are permanent, naturally occurring and have a bed and shore.<sup>170</sup>

***How distinct must the bed and shore be in order for section 3 of the Public Lands Act to apply?***

**Answer:** The *Public Lands Act* does not define "bed" or "shore" of a natural water body. However sections 17(2) and (3) the *Surveys Act*<sup>171</sup> characterises them as follows:

**17(2)** When surveying a natural boundary that is a body of water, the surveyor shall determine the position of the line where the bed and shore of the body of water cease and the line shall be referred to as the bank of the body of water.

(3) For the purpose of this section, the bed and shore of a body of water shall be the land covered so long by water as to wrest it from vegetation or as to mark a distinct character on the vegetation where it extends into the water or on the soil itself.

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<sup>170</sup> See *Despins v. St. Albert (City)*, [1996] A.J. No.816, DRS 97-00954 (Alta. C.A.). At page 2, McClung, J.A. for the Court states "Mr. Willis points to evidence that within the community the water body was generally regarded and referred to as a slough, or at best a pond, but that usage neither repeals the Public Lands Act or refutes Dr. Godfrey's evidence confirming the naturally-occurring character of the water body and its permanence".

<sup>171</sup> *Supra* note 56.



Under section 17(3), for there to be a bed and shore there must be at least a distinct character of vegetation from the land that no longer constitutes the bed and shore. Accordingly, it follows that marshland or other wetland vegetation should form part of the bed and shore of a wetland.

***Where does the bed and shore of a permanent, naturally occurring wetland end?***

**Answer:** Under the *Surveys Act* sections set out above, the bed and shores of a water body ends at the *bank*. The definition of the "bank" from section 17(2) and (3) of the *Surveys Act* sets out what this Guide calls the "legal definition". Using this definition, Crown ownership of bed and shores of a permanent, naturally occurring wetland extends to the line constituting the bank. Accordingly, where a water body borders private land, Crown ownership covers an area up to the bank and private ownership begins at the bank.

***How does one locate the bank of a wetland?***

**Answer:** Three concepts have been used to determine the bank of watercourses and water bodies in Alberta. These are: the legal definition from the *Surveys Act*, noted in the preceding paragraph, the common law concept "normal or ordinary high water mark" and a government policy based concept "normal or ordinary height of water". Answering this question requires a discussion of these concepts.

**CONCEPT #1: THE *SURVEYS ACT* LEGAL DEFINITION**

The first concept is what this Guide calls the legal definition. As noted above, under the legal definition, the bank is the physically ascertainable line where long action of water has caused the bed and shore to have no vegetation, distinct vegetation or a distinct soil. A knowledgeable and observant person should be able to locate this line by looking.

**CONCEPT #2: NORMAL OR ORDINARY HIGH WATER MARK**

At common law, courts have located the bank using another concept, the normal or ordinary high water mark. Where there is an ordinary high water mark relating to a water body, the bank determined by the legal definition should correspond to it, since that is where there will be a wrest from vegetation or a distinct vegetation. The normal or ordinary high water mark also can be located by observation by a person qualified in such matters. Although using the concept of ordinary or normal high water mark and applying the legal definition likely will locate the same line, the *Surveys Act* prescribes the legal definition. Accordingly, it is the proper test under Alberta law for surveyors to locate the bank.

**CONCEPT #3: NORMAL OR ORDINARY HEIGHT OF WATER**

A 1991 Alberta Forestry Lands and Wildlife, Public Lands Division, document entitled *Principles of Water Boundaries*, prescribes a different method to locate the bank from that set out in the *Surveys Act*. This different method is "normal or ordinary height of water". This concept departs from both the common law ordinary high water mark and the legal definition. In theory normal or ordinary height of water is the place roughly halfway between highest recorded water levels and lowest recorded water levels. Using this method the bank cannot be located by looking. This method requires obtaining and analyzing detailed information on water elevation over several years and using surveying equipment. The line could vary, depending on overall time period used to compute ordinary height, weather conditions during that period (since drought or excessive rains will vary the line) and availability and accuracy of records.

**ANSWERING THE QUESTION, HOW DOES ONE LOCATE THE BANK: THE CORRECT CONCEPT TO USE AND POTENTIAL CONSEQUENCES OF USING A DIFFERENT CONCEPT**

The *Surveys Act* requires that the legal definition be used to determine the bank. It is the correct concept. Although the government has used the normal or ordinary height of water method to ascertain the bank, in our view doing so is legally incorrect. This test does not comply with the *Surveys Act*. Indeed surveyors who apply the normal or ordinary height of water test (or any other method) and who reach a different result than they would have had they followed the legal definition, technically are in breach of the *Surveys Act*. Although it is not possible to examine the issue in this Guide, there could be exposure to liability where using the inappropriate method leads to damage.<sup>172</sup> It is a recommendation of this Guide that the government develop clear policy that requires that the legal definition from the *Surveys Act* be used to locate the bank.

***When is a wetland "permanent"?***

**Answer:** The *Public Lands Act* does not address the issue of when a water body is permanent and when it is intermittent. According to a government document, permanent water bodies are those that do not become dry on more than rare occasions. It states that extraordinary or extreme droughts will not render a water body non-permanent so as to remove it from Crown ownership.<sup>173</sup> A representative from Public Lands indicated that a precise definition of permanency is an outstanding issue.<sup>174</sup> However, the Department uses several criteria in determining permanency including documentary evidence such as air photo history and land and title descriptions over time. It is a recommendation

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<sup>172</sup> For example, consider a proposed subdivision development adjacent to a lake. Typically a surveyor will determine the location of the bank, and hence the end of Crown property. The municipality will then determine an environmental reserve (at least six metres in width) from the line constituting the bank. A misdetermination of the bank by not using the legal definition could result in houses being built too close to the water's edge. That could result in flooding, or leaky foundations.

<sup>173</sup> Alberta Agriculture, Food and Rural Development, *About Public Lands, Water Bodies and the Management of Bed and Shores*, online: Alberta Agriculture, Food and Rural Development <[www.agric.gov.ab.ca/publiclands/publan23.html](http://www.agric.gov.ab.ca/publiclands/publan23.html)> (last revised/reviewed 18 September 2001).

<sup>174</sup> Telephone discussion between an Environmental Law Centre legal researcher and G. Haekel, Public Lands Department (July 2000).

of this Guide that the government develop precise methodology and criteria for determining whether a wetland is permanent.

***When is a wetland "naturally occurring"?***

**Answer:** The *Public Lands Act* does not define "naturally occurring". However, exercising common sense will reveal easy cases -- human made water bodies such as irrigation reservoirs are not naturally occurring, and permanent natural wetlands that have not been altered by humans are naturally occurring.

***Can a water body lose its naturally occurring status through human activity, such as a drainage?***

**Answer:** An answer to this question is not simple. Recall that section 3(3) of the *Public Lands Act* reads:

(3) For the purposes of subsection (1), a river, stream or watercourse does not cease to be naturally occurring by reason only that its water is diverted by human act.

Note that 3(3) does not say that a *water body* does not cease to be naturally occurring by virtue of human activity. Nevertheless, common sense tells us human triggered water diversions would not usually render a water body to be not naturally occurring. For example, digging out a boat launch on the shores of Lac la Biche would not render the lake to be not naturally occurring. But what about harder cases? What if a landowner drains and fills a small, but permanent, naturally occurring wetland on his or her property? After the drainage, there is no naturally occurring wetland, since there is no wetland at all. Does this mean that a landowner can enlarge his or her private holdings and acquire Crown land by draining and filling a wetland so as to render it non-naturally occurring? The answer raises complexities.

Consider a case where the drainage was not authorized by a *Water Resources Act* license or permit, or by a *Water Act* approval. Can a landowner who drains or fills a wetland benefit by acquiring Crown land through the unlawful acts? This question may be addressed in the following four-point analysis:

- First consider the fact that the *Public Lands Act* and regulations<sup>175</sup> prescribe the manners in which the Crown may grant or transfer public land, which would include beds and shores of naturally occurring, permanent water bodies. Generally, the Crown may not grant interests in public land to the private sector unless it is sold at fair market value and in accordance with regulated processes.

Obviously unlawful drainage or filling are not Crown grants and are not fair market value transactions. Following this line of thought, notwithstanding that

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<sup>175</sup> *Dispositions and Fees Regulation*, Alta. Reg. 54/2000.

after the unlawful activity the wetland no longer is naturally occurring, what were the bed and shores were not transferred in accordance with the law and remain in Crown ownership.

- Second, note that section (4) of the *Public Lands Act* states:

(4) No person may acquire by prescription an estate or interest in public land.

Under this section, if the land that was the bed and shores remained in Crown ownership, then the fact that a landowner has incorporated them into his or her activities on the land, does not affect the Crown ownership.

- Third, under the *Public Lands Act*, *Water Resources Act* and the *Water Act*, the Crown could compel the offender to undo the unauthorized deed and to restore the wetland to its natural state.
- Fourth, if a case ever got to Court, it is unlikely that a Court in exercising its equitable jurisdiction would allow a landowner to benefit from his or her own misdeed. Accordingly, a court might well resolve any legal unclarity in favour of the Crown.

***Can a water body lose its permanent status through unlawful human activity, such as unauthorized draining or filling?***

**Answer:** Again, an answer to this question is not simple. However, the analysis that was given for the last question, applies to this one. Accordingly, there are good reasons in law to conclude that a water body cannot lose its permanent status through unlawful human activity such as draining or filling.

If the analysis is correct, it means that Alberta is dotted with public lands that were once beds and shores of permanent, naturally occurring wetlands that were drained or diverted without government authorization. Looking back in time, the point is probably mostly academic since government likely will not try to activate these Crown interests, especially in light of its history of non-enforcement of permit provisions. However, given government's increasing vigour in enforcing the *Water Act*, the point could become more than academic for future unlawful drainage and diversion activity.

***Can a water body lose its permanent status through lawful human activity, such as authorized draining or filling?***

**Answer:** This question considers the case where a landowner drains and fills a permanent wetland with the owner's, the government's, permission in accordance with a *Water Resources Act*, or *Water Act* permit. Does the Crown still own what were the bed and shores, or are these now the property of the landowner?

If the Crown grants the interest to the bed and shores along with the permit or approval, there is no question that property passes to the landowner. However it probably has often been the case that the Crown has granted a permit or approval to drain without also transferring ownership of the resulting exposed bed and shores. In the absence of a grant or transfer does the Crown retain ownership?

If the issue were ever litigated, a court might likely find an implied grant by the Crown given that the Crown granted the drain and fill. However, it is almost inconceivable that the issue would ever be tested against a landowner who followed the law to carry out an authorized drainage plan.

It is a recommendation of this Guide that the government develop policy that addresses the difficult questions raised in this chapter on whether a water body can lost its permanent or naturally occurring status through human activity.



# Chapter Four

## *Water Act*

### Chapter Four: *Water Act*

#### ***About the Water Act***

The *Water Act*<sup>176</sup> deals with water rights, activities that can disturb water and water resources planning and implementation. Regarding water rights, the Act addresses how a person, company or other entity such as a municipality or irrigation district may obtain rights to access and use water and how rights are regulated. Regarding activities, the Act regulates activities that might interfere with water resources such as drainage or filling. Regarding water resources planning and implementation, the Act requires the province to establish an overall framework for water management planning and enables more specific water management plans. It also provides mechanisms to carry out plans. This chapter discusses each of these aspects of the *Water Act* and indicates why each is of interest to wetland managers.

#### ***Water legislation backgrounder***

##### **CROWN OWNERSHIP OF WATER RESOURCES AND THE RIGHT TO USE THESE RESOURCES**

The Alberta Crown, like its predecessor in title, the federal Crown, owns all water in the province. Assertion of ownership of water in what is now Alberta and the right to use it was first made by the federal Crown in the *Northwest Irrigation Act* of 1894.<sup>177</sup> The *Northwest Irrigation Act* of 1894 governed water rights and use in Alberta from the time of early European settlement in the prairies until the transfer of public lands and natural resources from the federal government to the province in 1930. Following the transfer, Alberta, the provincial Crown, legislatively claimed ownership in the *Water Resources Act*.<sup>178</sup> The 1999 *Water Act*,<sup>179</sup> which repealed and replaced the *Water Resources Act*, legislatively carries through the ownership to the present.

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<sup>176</sup> *Supra* note 10.

<sup>177</sup> *Supra* note 162. See primer #3 for more information on this topic.

<sup>178</sup> *Supra* note 163.

<sup>179</sup> *Supra* note 10, s. 3.

As owner of all water the Crown may enable others to use it and disturb it, through human activities. The Crown enables others to use or disturb Crown resources through laws.<sup>180</sup> Water laws set out rules that tell the Crown how it may allow others to use or disturb water resources and how people and other entities may acquire the right to use or disturb water resources. Both in Alberta's current water legislation, the *Water Act*, and previous water legislation, the main statutory authorization for legal use or diversion are a license, or a statutory exemption from a license requirement. Under the *Water Act*, the main statutory authorization for authorized interference with water, typically through some land use activity, is an approval. Prior to the *Water Act*, this authorization was a permit.

### ***Principle of prior allocation***

A core concept in western water law is the principle of prior allocation. Since 1894, water rights legislation applicable to what is now Alberta has incorporated this principle. Under the principle of prior allocation, applicants for water licenses have priority based on date of completed application. A person holding a license in respect of a water source with an application date earlier than another person is called a "senior licensee". Any person with an application date for a license regarding the same water source later in time than a senior licensee is called a "junior licensee". Under the principle of prior allocation, in times of shortage, a senior licensee is entitled to obtain the entire quantity of water allocated under the license before a junior is entitled to any water at all.

### ***Wetlands and Water Act "water bodies"***

#### **WATER RIGHTS**

### ***Water rights and relevance to wetland managers***

#### ***Five categories of water rights***

There are five categories of water rights under the *Water Act*: household users; traditional agricultural users; existing licenses; new licenses; including regular new licenses and temporary diversion licenses; and regulatory exempted diversions. The text that follows describes each category and indicates how it might be relevant to wetland managers.

#### ***Category #1: household users***

##### **ABOUT THE HOUSEHOLD USE EXEMPTION**

The household user right applies to riparian owners-- those whose land directly borders a watercourse or water body -- and to owners with groundwater. The household user provisions replace any common law right of a landowner to quantity of water on or under land.<sup>181</sup> Concerning the household user right:

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<sup>180</sup> Provincial legislatures may regulate over Property and Civil Rights. Federal parliament may regulate over federal public property. See *Constitution Act*, *supra* note 1.

<sup>181</sup> See chapter 1, *Wetlands, Riparian Rights and Statutory Alteration*.



- a) A household user has the right to divert up to a maximum of 1250 cubic metres (about 1 acre-foot) per year for household purposes, or such amount specified in the regulations, without a license.
- The 1250 cubic metres is a maximum amount per household taking into account all household use water sources.
  - A household user may pump or otherwise convey the water for household uses.
  - The number of households on a parcel of land is limited to the number permitted in an approved management plan (discussed below under *Water Act planning and aquatic protection*), or if there is none, by order of the Minister of Environment.
  - The household user right has priority over other uses, though a household user may only sue unauthorized users to protect the right.
  - A household user may not obtain a license for this use.<sup>182</sup>

#### WETLAND MANAGERS AND THE HOUSEHOLD USE EXEMPTION

Several points are of interest to a wetland manager:

- The household user rights apply to water bodies. The Act defines "water body" as any place where water flows or is present, including but not limited to wetlands.<sup>183</sup> Normally, irrigation reservoirs and other artificial bodies of water are not considered to be water bodies under the Act. The household user right, therefore, applies to naturally occurring wetlands.
- Unless the regulations otherwise specify the 1250 cubic metres is a maximum per household. This means that if a household has more than one source of water (for example, groundwater, a river and a wetland) the maximum amount that may be diverted without license considering all sources is 1250 cubic metres. If the household uses 1250 cubic metres a year from groundwater, no amount may be taken from the river or wetland under the household use exemption.
- Wetland managers will want to ensure that any land use agreements they have with landowners and occupiers consider the household user rights. For example, if a wetland manager does not want an owner to access and use water in a wetland for household purposes, then the agreement must specifically restrict this statutory exemption.

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<sup>182</sup> All bulleted items are from the *Water Act*, *supra* note 10, ss. 21-22.

<sup>183</sup> *Water Act*, *supra* note 10, s. 1(1)(hhh).

## ***Category #2: traditional agricultural user***

### **ABOUT THE TRADITIONAL AGRICULTURAL USE EXEMPTION AND REGISTRATION**

This right applies to riparian owners and owners of land containing groundwater whom traditionally have used up to 6250 cubic metres (about five acre-feet) of water a year for applying pesticides or raising animals. The *Water Act* allows users to continue to divert the amount historically used for these purposes up to a maximum of 6250 cubic metres a year without a license. This use has no priority unless the user registers the use with Alberta Environment by January 1, 2002. Once registered the use has priority as of the date the water source was first used for raising animals or applying pesticides. The annual allocation amount is the volume of water being used for these purposes on the date the *Water Act* came into force, namely, January 1, 1999, up to 6250 cubic metres.<sup>184</sup>

### **CONCERNING THE TRADITIONAL AGRICULTURAL USE:**

- A traditional agricultural user may pump or otherwise convey the water for stockwatering or pesticide application.
- The traditional agricultural use right is additional to the household use right.
- The 6250 cubic metres is a maximum amount for the traditional agricultural use exemption considering all sources of water used for pesticide application or stockwatering.
- Any amount of water required over and above the traditional agricultural user amount and the household use amount must be licensed under the Act.<sup>185</sup>

### **WETLAND MANAGERS AND THE TRADITIONAL AGRICULTURAL USER RIGHT**

These points may interest a wetland manager:

- The traditional agricultural user rights apply to water bodies, and therefore apply to naturally occurring wetlands. This means that owners of land with wetlands on them may avail themselves of this right and may continue to divert up to the maximum per year taking into consideration all sources of water for this use.

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<sup>184</sup> *Water Act Fact Sheet: Protecting Agriculture Water Supplies* (Edmonton: Alberta Environment, July, 1999).

<sup>185</sup> All bulleted items are from the *Water Act*, *supra* note 10, ss. 24-25.

- Wetland managers will want to ensure that any land use agreements they have with landowners and occupiers consider the traditional agricultural use exemption. For example, if a wetland manager does not want an owner to access and use water in a wetland for traditional agricultural purposes, then the agreement must specifically restrict this statutory right.

### *Category #3: existing licenses*

#### ABOUT EXISTING LICENSES

"Existing licenses " mean water diversion licenses issued under the *Water Resources Act* or earlier legislation. Regarding existing licenses:

- The *Water Act* deems existing licenses to be issued under the *Water Act*.
- The *Water Act* allows holders to continue their diversions in accordance with their licenses enjoying their original priorities. If there is a conflict between terms in an existing license and a provision of the *Water Act*, the terms of the license prevail.<sup>186</sup>
- Most existing licenses were issued in perpetuity, meaning they do not expire.

#### WETLAND MANAGERS AND EXISTING LICENCES

Of interest to wetland managers:

- A licensee entitled to withdraw water from a water body that is a wetland may continue to exercise diversion rights in accordance with the license.
- It might be possible to negotiate limitations on such rights in an agreement between a wetland manager and the holder. Limitations could concern the manner of withdrawing water and maintenance of a quantity of water to support a healthy wetland ecosystem. Caution should be exercised, however, since the *Water Act* enables the government to cancel a license if water rights have not been exercised for over three years and it appears that there is no prospect that the holder will resume diversion.<sup>187</sup>
- An existing licensee may apply to have terms or conditions added to a license. These could address wetland ecosystem concerns.<sup>188</sup>

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<sup>186</sup> *Supra* note 10, s. 18.

<sup>187</sup> *Ibid.*, s. 55(1)(f).

<sup>188</sup> *Ibid.*, s. 54 enables amendments on application of the licensee.

## *Category #4: new licenses*

### ABOUT NEW LICENSES

New licenses are water allocation licenses issued under the *Water Act*. Regarding them:

- Provided that a means can be provided to access water and a person has an authorized reason for a license, anyone can apply for a license under the Act. As with licenses under previous legislation, the applicant need not be adjacent to a watercourse or water body.
- New licenses are more flexible than existing licenses. The Act gives government some authority to alter conditions when necessary. This is not available in respect of existing licenses.
- In contrast to existing licenses, new licenses are issued for a term. The usual term is ten years, though the government may issue a license for a different term.<sup>189</sup>

### WETLAND MANAGERS AND NEW LICENSES – AQUATIC HABITAT CONSERVATION OR ENHANCEMENT LICENSES

A point that should interest wetland managers is that regulations under the *Water Act* state that a license may be issued for the management of fish or wildlife, to enhance habitat, for recreation, or for water management.<sup>190</sup> Accordingly, a wetland manager or other person could apply for a license to keep water in a wetland to conserve wetland aquatic habitat and diversity.

The new *Water Act* license is similar to the "natural state" license under the *Water Resources Act* that enabled licenses to obtain a priority to leave water in a water body or water course for "...conservation, recreation or the propagation of fish or wildlife or for like purpose".<sup>191</sup> Only one natural state license exists in the province, and that is for the Wagner Bog, west of Edmonton, though at least one more was applied for.<sup>192</sup>

The possibility of a natural state license for any water body or water in the South Saskatchewan River Basin was foreclosed upon in 1991 by the *South Saskatchewan Basin Water Allocation Regulation* under the *Water Resources Act*.<sup>193</sup> The main objectives of the *South Saskatchewan Basin Water Allocation Regulation* were to cap irrigation expansion and provide some basic protection of the watercourses in the South Saskatchewan River Basin. The Regulation did this by the Crown reserving unallocated water in the basin, capping the amount that could be allocated for specified

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<sup>189</sup> *Water (Ministerial) Regulation*, Alta. Reg. 205/98 s. 12.

<sup>190</sup> *Ibid.*, s. 11.

<sup>191</sup> *Water Resources Act*, R.S.A. 1980, c. W-5, s. 11(1)(c).

<sup>192</sup> Trout Unlimited Canada applied for a natural state license in respect of the Highwood River.

<sup>193</sup> *South Saskatchewan Basin Water Allocation Regulation*, Alta. Reg. 307/91.

irrigation projects, fixing minimum instream flow for given watercourses, and setting out purposes for which new licenses may be issued. The purposes did not include for a natural state license.

With the *Water Act* the situation has changed. It now is possible for a natural state type license to be issued for any place in Alberta, including the South Saskatchewan River Basin. This is because the *Water Act*, in effect, carried over the irrigation cap and instream flow provisions of the *South Saskatchewan Basin Water Allocation Regulation* while opening up potential licensing for any purpose allowable under the *Water Act*.<sup>194</sup> Thus a new important tool is available to wetland managers in respect of any water body or watercourse for which an allocation is available in Alberta.<sup>195</sup> A wetland manager may assist in protecting aquatic habitat by applying for a priority to leave water in a water body or watercourse for that purpose.

### *Temporary diversion licenses*

- As with other new licenses, a temporary diversion license must be applied for and will be issued by the director.
- The term of the license can be up to one year, but the director can reissue a temporary diversion license upon application.
- No notice is required for an application for a temporary diversion license, unless required by the regulations.<sup>196</sup>
- No one may appeal the issuance of a temporary diversion license.<sup>197</sup>
- Temporary diversion licenses are not transferable.
- Some temporary diversions do not require a license at all. Hydrostatic testing of pipelines can temporarily divert water without a license, but does require notice to the director and following of the applicable Code of Practice.<sup>198</sup> Oil and gas wells in the Green Area of the province can be drilled without a temporary diversion license as long as they follow the departmental guideline.<sup>199</sup> Likewise, a

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<sup>194</sup> Combined effect of ss. 172 (1)(5) of the *Water Act*. This interpretation was confirmed by e-mail from E. Hui, Head, Licensing and Permitting Standards, Natural Resources Services, Water Management, Alberta Environment, (January, 2001).

<sup>195</sup> This would be subject to any applicable water management plans.

<sup>196</sup> *Water Act*, *supra* note 10, s. 108(3)(a).

<sup>197</sup> *Ibid.*, s. 115(2)(b).

<sup>198</sup> *Water (Ministerial) Regulation*, *supra* note 189, Sch. 3(1)(h).

<sup>199</sup> *Ibid.*, Sch. 4.

temporary diversion of up to 5000 cubic metres is allowable in the Green Area of the province without a license as long as it complies with the applicable surface disposition of the land.<sup>200</sup>

#### WETLAND MANAGERS AND TEMPORARY DIVERSION LICENSES

The fact that temporary diversion licenses do not require notice and cannot be appealed can be frustrating to wetland managers. Temporary diversions in reality can have the same impact as regular licenses and it is difficult to see why the Act allows them to be issued without notice and without opportunity for those directly affected to appeal. The licenses can allow a diversion of a considerable amount of water and can be renewed. Issuing them in respect of water bodies can affect water levels needed to support waterfowl and other wildlife. It is a recommendation of this Guide that the *Water Act* and regulations be amended as appropriate to require notice of application for temporary diversion licenses and to allow appeals of their issuance, renewal or amendment.

#### *Category #5: Regulatory exempted diversions*

The regulations<sup>201</sup> allow a number of diversions to be made without the need for a license. These include:

- A diversion of water of up to 1250 cubic metres per camp per year for human consumption, sanitation, fire prevention and other camp purposes. "Camp" includes an industrial camp, a recreational camp and temporary campsites.
- A diversion of groundwater from a water well equipped with a manual pump, provided that the pump is used to divert the water.
- Unless an approved water management plan otherwise specifies, a diversion of water from a dugout provided that
  - (i) the water is naturally compounded in the dugout from surface water runoff and no pumping has facilitated the impoundment,
  - (ii) the dugout is not situated within a watercourse, lake or wetland at anytime,
  - (iii) the capacity of the dugout is no more than 12,500 cubic metres in volume, and
  - (iv) the total annual diversion is no more than 6,250 cubic metres.
- A diversion of surface water to operate an alternative watering system for livestock that are generally grazed.
- A diversion of saline groundwater.
- A diversion of the water to a sand and gravel pit or construction site provided

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<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*, Sch. 3.

that

- (i) the water diverted as a result of the dewatering is moved into and retained in an on site pit without using the water, or is diverted back into a water body without using the water and it is of the same quality as water originally diverted,
  - (ii) the dewatering site, the water body and the on site pit referred to in (i) above are hydraulically connected,
  - (iii) there is no adverse effect on the aquatic environment or on a household user, licensee or traditional agricultural user, and
  - (iv) in the case of a construction site, there is no adverse effect on any parcel of land and the maximum duration of the watering operation is six-months or less for the entire construction project.
- A diversion of water for the purposes of fire fighting.

The regulations also allow specified diversions and associated operations of works within the Green Area of the province.<sup>202</sup> These are:

- a temporary diversion of water in the Green Area for the use of drilling and oil or gas wells if the diversion is carried out in accordance with the *Guideline on Oil Rig and Camp Water Supply Wells*,
- a temporary diversion of up to 5000 cubic metres of water per year in the Green Area if the diversion is made in accordance with the applicable surface disposition and to any specific instructions of the local Forestry Office. This exemption does not apply to diversions for hydrostatic testing.<sup>203</sup>

## WETLAND MANAGERS AND REGULATED EXEMPTIONS

### *Dugouts*

Of interest to wetland managers is that there is no exemption for withdrawals from any dugouts situated in a watercourse, lake or wetland, unless otherwise allowed by an approved water management plan (*see below: Approved water management plans and non-approved water management plans*). Wetland managers will want to ensure that they are involved in the water management planning process if they are concerned over the possibility of a plan allowing withdrawals from dugouts in wetlands without a license.

### *Lack of protection measures, questions regarding priorities, difficulty in enforcement*

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<sup>202</sup> *Ibid.*, Sch. 4. The Green area contains about 129,000 square miles of non-settled forested public lands managed primarily for timber resources. The designated Minister classifies land as the Green and White areas (settled areas) pursuant to the *Public Lands Act*, *supra* note 11, s. 10.

<sup>203</sup> *Ibid.*, Sch. 4, s. 1. The regulation states that the Guideline is published by Alberta Environment and is dated the date of the Act's proclamation.

Wetland managers might be concerned over the openness of the exemptions. Their exercise, for example, is not subject to conditions, such as not causing adverse effect on the aquatic environment. An unclarity is that neither the Act nor regulations specify what priority exemptions hold. As well, exemptions are difficult to enforce. An example raised at one of the workshops held in connection with this publication (see the *Introduction*) dealt with the 5000 cubic metre withdrawal limit in the Green Area. Obviously withdrawals of this magnitude can impact the aquatic environment. Frustration was expressed owing to vagueness in the legislative language making it difficult to determine which agency can enforce the 5000 cubic metre limitation. As mentioned above, this exemption is subject to the applicable surface disposition and to any specific instructions of the local Forestry Office. The difficulty arises because Alberta Environment enforces the *Water Act*, and another Ministry, Sustainable Resource Development, enforces forestry dispositions as well as, presumably, any "specific instructions of the local Forestry Office".

In light of the above, this Guide recommends that the legislation be amended to:

- a) put appropriate conditions on exemptions, such as their exercise being subject to having no adverse effect on the aquatic environment,
- b) clarify priorities of exemptions,
- c) clearly make Alberta Environment the enforcement authority for exemptions, and
- d) change at least some of the exemptions to at minimum, require notice to Alberta Environment so that it is in a position to enforce the law against those who withdraw amounts additional to amounts exempted.

### ***Regulated Activities***

#### **APPROVAL TO AFFECT WATER THROUGH LAND RELATED ACTIVITIES**

The *Water Act*, just as its predecessor legislation, prohibits anyone from carrying on any activity that can interfere with water unless that person has statutory authorization. As mentioned earlier, in the *Water Act* the authorization takes the form of an *approval*. Under the *Water Resources Act* it was called a *permit*. Under both, without the statutory authorization, no one can legally construct or place stream crossings, culverts, dugouts, berms, or drain water.<sup>204</sup> Although in the past government often turned a blind eye to unauthorized activities, current enforcement trends indicate that it now is getting tough.

Under the *Water Act* the only exceptions to the approval requirement are any activities that the regulations state require only notice to the government, and not an

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<sup>204</sup> The provisions under the *Water Act* are ss. 1 and 36.



approval, and any activities that the regulations state are exempted from the approval requirements.<sup>205</sup>

### **NOTICE ACTIVITIES – WATERCOURSE CROSSINGS AND *CODE OF PRACTICE FOR WATERCOURSE CROSSINGS***

The regulations currently designate two activities that may be carried out only after notice to Alberta Environment. These activities must be conducted in accordance with a Code of Practice. They are:

- activities relating to pipeline or telecommunication lines crossing a watercourse or water body, and
- activities relating to other watercourse crossings.<sup>206</sup>

See chapter 10, *Pipelines and Transmission Lines* for information on the first bulleted activities.

Regarding the second bulleted activities, the Department's *Code of Practice for Watercourse Crossings* sets out the rules that a proponent must comply with to legally carry out this activity. Although the Code's title uses the phrase "watercourse crossings", it defines that term to include structures or works to provide crossing over or through a water body. The Code defines "water body" to mean a water body with defined bed or banks, whether or not water is continuously present, but not including fish bearing lakes. By implication, water bodies that have no defined bed or shores, or which are fish bearing lakes, require an approval.<sup>207</sup>

Schedule 6 to the Code refers to maps of areas of the province on which watercourses (including water bodies) are classified as Class A, B, C or D. The Code classifies types of crossing as Type 1, 2, 3 or 4. It specifies requirements and restrictions depending on the class of watercourse and type of crossing. Anyone who carries out a watercourse crossing activity without giving notice or in a manner that does not comply with the Code commits an offence.<sup>208</sup>

### **EXEMPTIONS FROM APPROVAL AND NOTICE REQUIREMENTS**

#### ***General exemptions***

The current regulations do exempt a number of activities that could affect natural

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<sup>205</sup> In addition, arguably the common law right to protect land from flooding in an emergency situation without statutory authority might have survived these *Water Act* provisions. See chapter 1, *Wetlands, Riparian Rights and Statutory Alteration, Prevention of flooding*.

<sup>206</sup> *Water (Ministerial) Regulation*, *supra* note 189, ss. 3 and 4.

<sup>207</sup> See the discussion in chapter 10, under "*Water Act and Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body*" for further discussion of this implication.

<sup>208</sup> *Water (Ministerial) Regulation*, *supra* note 189, s. 4(3) and *Water Act*, *supra* note 10, ss. 142(1)(f) and (h) and 142(2)(f).

wetlands from the approval requirements. These include:

- (a) activities relating to a floating platform or a portable or seasonal pier, boat launch or dock in or adjacent to a water body;
- (b) constructing, installing, maintaining, replacing or removing a fence in or adjacent to a water body;
- (c) placing, constructing, installing, maintaining, replacing or removing a crossing in a water body where (i) the water body is not frequented by fish, (ii) the hydraulic, hydrologic or hydrogeological characteristics of the water body are not altered at flood events below the one in 25 year flood event, (iii) the size of the culvert used in constructing the crossing, if applicable, is 1.5 metres or less in diameter, (iv) there is no diversion of water from the water body, and (v) the installation of the crossing is not part of a causeway through a lake, slough, wetland or other similar water body;
- (d) landscaping that is not in a watercourse, lake or wetland if the landscaping does not result in (i) an adverse effect on the aquatic environment on any parcel of land, or (ii) any change in the flow or volume of water on an adjacent parcel of land;
- (e) installing a water supply line in, adjacent to or beneath a water body for the purpose of diverting water from the water body, if the line is installed by directional drilling or boring, and if a license is not required for the diversion of the water;
- (f) installing a portable pump or portable water supply line in or adjacent to a water body if there is not a significant alteration or disturbance of the bed or shore of the water body;
- (g) removal of debris from a water body that is not frequented by fish if the person removing the debris owns or occupies the land adjacent to the water body where the debris is located;
- (h) removal of a beaver dam from a water body if the person removing the beaver dam owns or occupies the land adjacent to the water body where the beaver dam is located, or has been authorized to remove the beaver dam under section 95 of the Water Act;
- (i) drilling a water well if (i) the person drilling the water well is the owner of (A) the land on which the water well is to be located, and (B) the drilling machine, and (ii) the water from the water well is to be used solely for household purposes under section 21 of the Act;
- (j) drilling or reclaiming an exploratory test hole or borehole if the purpose of the drilling is unrelated to groundwater exploration or the drilling of a water well, and the drilling or reclaiming does not occur in a watercourse, lake or wetland;
- (k) reclamation of a water well;
  
- (l) constructing, installing, maintaining, replacing or filling in a dugout, except where the dugout is located in a watercourse, lake or wetland;
- (m) commencing, continuing or carrying out pipeline or watercourse crossings

that require compliance with a code of practice (*See* chapter 10, *Pipelines and Transmission Lines*).<sup>209</sup>

### ***Exemptions for designated areas***

The regulations exempt activities relating to ice bridges or snow fill, unless they are located in specified portions of major rivers in the province.<sup>210</sup>

### **WETLAND MANAGERS AND REGULATED ACTIVITIES**

Of interest to wetland managers:

- The legislated permit and approval provisions apply whether a wetland is permanent or whether it is intermittent; in either case statutory authorization is required to carry on activities such as drainage.
- The regulations do not exempt any drainage activities from the approval requirements for natural wetlands.
- Activities relating to dugouts in a natural wetland require an approval.
- If a wetland manager suspects that an activity is being carried on without lawful authorization, the manager should contact the government *Water Act* enforcement authorities at the Department of Environment to investigate.

### ***Water Act planning and aquatic protection***

#### **WETLANDS AND PROVINCIAL PLANNING FRAMEWORK**

The *Water Act* requires the Environment Minister to establish a provincial water management planning framework for the province within three years of the Act coming into force. Government currently is carrying out this requirement. Relevant to wetlands the Plan must include a strategy for protecting the aquatic environment and may include matters relating to the integration of water management with land and other resources.

In June of 1999 the government published a draft *Framework for Water Management Planning* for public review and comment. This draft document is posted on the Alberta Environment website. Wetland managers should contact Alberta Environment or regional contacts if they wish to become involved in the development of the Provincial-planning framework.<sup>211</sup>

#### **WETLANDS AND OTHER WATER MANAGEMENT PLANS**

The *Water Act* authorizes the minister to require a water management plan to be

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<sup>209</sup> All from the *Water (Ministerial) Regulation*, *supra* note 189, Sch. 1.

<sup>210</sup> *Ibid.*, Sch. 2.

<sup>211</sup> The regional contacts are posted on the Alberta Environment website at <www3.gov.ab.ca> link to Water, link to Legislation, then link to Regional Contacts.

developed. Of interest to wetland managers, a water management plan:

- may adopt an integrated approach to planning with respect to water, land and other resources,
- may involve the cooperation of any persons or organizations, any level of government or government agencies including jurisdictions other than Alberta,
- may relate to any area (e.g. a watershed, water basin, lakeland area, series of wetlands, etc.), and
- if approved by the minister or by the Lieutenant Governor in Council, may allow for transfers of water allocations.

The *Water Act* does not state how a management plan for an area is initiated. It is a recommendation of this Guide that the government establish regulations or policy setting out how interested persons can initiate the process. For now, it is open to wetland managers to recommend or lobby for the initiation of a water management plan.

#### **APPROVED WATER MANAGEMENT PLANS AND NON-APPROVED WATER MANAGEMENT PLANS**

A water management plan that is approved by the Minister or the Lieutenant Governor in Council *must* be considered in all licensing, approval or transfer applications. Other water management plans *may* be considered. Wetland managers will want to participate in the water management planning process, especially for plans that are intended to be approved water management plans.

#### **WATER CONSERVATION OBJECTIVES AND IMPLEMENTATION**

The Act authorizes a director to establish water conservation objectives for water bodies or watercourses. A "water conservation objective" means the amount of water a director establishes as necessary to:

- protect a natural water body or its aquatic environment,
- protect tourism, transportation or waste assimilation uses, or
- manage fish or wildlife.

A water conservation objective may set a desired flow rate or instream flow

requirements.<sup>212</sup> A water conservation objective may be implemented in a variety of ways including:

- building it into water management plans for consideration in licensing applications,
- through Crown reservations, where the Crown reserves unallocated water and sets out the purposes for which the water may be used,<sup>213</sup>
- through the Crown issuing a license to itself for the purpose of implementing a water conservation objective having a priority of the date of the *Water Act* coming into force (January 1, 1999) if issued within 5 years of that date,<sup>214</sup> or
- through issuing a regular priority aquatic habitat conservation or enhancement license (see discussion above *Category #4: New Licenses*).

It is a recommendation of this Guide that the Crown establish water conservation objectives under the *Water Act* to help protect Alberta's natural water bodies and their aquatic environment. It is a further recommendation that the Crown take advantage of the unique opportunity offered by section 29(b) of the Act and secure a priority in implementing objectives.

### ***Water Act and environmental assessment***

#### ***ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT ENVIRONMENTAL ASSESSMENT AND THE WATER ACT***

Like most other environmental regulatory legislation, the *Water Act* ties into environmental assessment processes. Regulations to the *Environmental Protection and Enhancement Act*<sup>215</sup> set out which allocation or activity proposals will give rise to the environmental assessment provisions and which are exempt.<sup>216</sup> As indicated in Primer #6, under the *Environmental Protection and Enhancement Act* the Environment Minister has discretion to require an environmental assessment in respect of exempted activities. If an environmental assessment is neither exempted nor mandatory, then it is discretionary.

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<sup>212</sup> *Water Act*, supra note 10, ss. 1(1)(iii).

<sup>213</sup> *Ibid.*, s. 35. Section 12 of the *Water Resources Act* also contained this Crown power.

<sup>214</sup> *Ibid.*, ss. 29(2)(b).

<sup>215</sup> *Supra* note 28.

<sup>216</sup> *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, supra note 99.

The following list summarizes which water-related activities affecting a wetland could require an environmental assessment and which are exempted.<sup>217</sup>

#### **MANDATORY ASSESSMENT FOR WATER RELATED ACTIVITIES**

The construction, operation or reclamation of:

- a dam greater than 15 metres in height when measured to the top of the dam from the natural bed of the watercourse at the downstream toe of the dam, in the case of a dam across a watercourse, or from the lowest elevation at the outside limit of the dam, in the case of a dam that is not across a watercourse
- a water diversion structure and canals with a capacity greater than 15 cubic metres per second
- a water reservoir with a capacity greater than 30 million cubic metres.

#### **EXEMPTED ASSESSMENT FOR WATER RELATED ACTIVITIES**

- a waterworks system that is subject to the *Potable Water Regulation* or a wastewater system that is subject to the *Wastewater and Storm Drainage Regulation*<sup>218</sup>
- a subsurface sewage disposal system
- the drilling or reclamation of a water well
- the drilling or reclamation of a water observation well or monitoring borehole
- the maintenance and rehabilitation of a water management project, including a dyke, dam, weir, floodgate, breakwater, drain, groyne, ditch, basin, reservoir, canal, tunnel, bridge, culvert, crib, embankment, headwork, fishway, flume, aqueduct, pipe, pump or measuring weir.

#### ***Water Act enforcement***

##### **ABOUT *WATER ACT* ENFORCEMENT**

The *Water Act* creates a variety of offences, offers a number of investigation and enforcement mechanisms and provides an array of penalties for contravention. This section briefly summarizes them.

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<sup>217</sup> *Ibid.*

<sup>218</sup> *Potable Water Regulation*, Alta. Reg. 122/93; *Wastewater and Storm Drainage Regulation*, Alta. Reg. 119/93.

## **WATER ACT OFFENCES AND PENALTIES**

The *Water Act* contains three categories of offences:

- *Mens rea* offences, meaning that liability follows only if it can be shown beyond a reasonable doubt that the activities that constituted the offence were carried out with intent.
- *Strict liability* offences, meaning that the government need not prove intent but due diligence is a defence. This means that it is a defence if the person who committed the offence can show on a balance of probabilities that he, she or it, took reasonable steps to prevent the commission of the offence.
- Offences that do not require a proof of intent, nor to which due diligence is an explicit defence. These presumably are what are called *absolute liability* offences at law.

The *Water Act* lists offences in sections 142(1), (2) and (3). They range from minor infractions such as failing to provide a record or report as might be required under an approval to more serious ones such as deliberately carrying out unauthorized diversions or activities where the offender knows an authorization is required.

Penalties range depending on the seriousness of an offence and depending on whether an individual person or a corporation committed it. Generally:

- For *mens rea* offences, an individual is liable to a fine of not more than \$100,000 or imprisonment up to one year, and a corporation to a fine of not more than \$1,000,000.
- For *strict liability* offences, an individual is liable to a fine of not more than \$50,000, and a corporation to a fine of not more than \$500,000.
- For the rest, an individual is liable to a fine of not more than \$250, and a corporation to a fine of not more than \$1,000.

Other points relevant to offences and penalties are:

- Offences are continuous, meaning that a new offence is deemed committed for each day an offence continues.<sup>219</sup>
- There are provisions for corporate director or officer liability and public official liability<sup>220</sup> in certain circumstances where they had control or influence regarding the commission of the offence.

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<sup>219</sup> *Water Act*, *supra* note 10, s. 145.

<sup>220</sup> *Ibid.*, ss. 146 and 147.

- The Act contains provisions for creative sentencing, meaning the court can order a range of penalties including taking action to mitigate harm to any damage caused to an aquatic environment and other avenues of compensation for the injury caused.<sup>221</sup>

#### **WATER ACT INVESTIGATION AND ENFORCEMENT TOOLS**

The Act contains an array of inspection and investigation tools.<sup>222</sup> Generally, the inspectors' job is to monitor for compliance and investigators will not come on the scene until there is reason to believe that an offence has been committed. Investigators have greater powers than inspectors do since their job is to determine whether there is enough evidence to charge a person with an offence under the Act.

Once it has been established that in all likelihood an offence has been committed, the Act offers a variety of enforcement mechanisms including:

- **Administrative penalties:** For minor infractions set out in the regulations, the Act allows for a director to require an offender to pay a monetary penalty. If the offender pays it, there can be no charge relating to the offence.
- **Enforcement orders:** A director may issue an enforcement order to any person that he or she believes has contravened the *Water Act*. In an enforcement order the director may order many things, including:
  - ▶ ☐ the suspension or cancellation of an approval, license, registration or preliminary certificate in certain circumstances,
  - ▶ ☐ the shut down of activities or diversions in certain circumstances,
  - ▶ ☐ the cessation of construction, operating, repairing, controlling etc.,
  - ▶ ☐ that plans be submitted to the director,
  - ▶ ☐ the removal of unauthorized works or that unauthorized activities be rendered ineffective, and
  - ▶ ☐ that remedial work be done in specified ways to minimize environmental, health or safety adverse effects.<sup>223</sup>

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<sup>221</sup> *Ibid.*, s. 148.

<sup>222</sup> *Ibid.*, Part 10, Division 1 and Division 2.

<sup>223</sup> All bullets based on the *Water Act*, *supra* note 10, s. 136.



- **Prosecutions:** Here the Crown formally charges an alleged violator and may commence trial proceedings to prove its case. Upon conviction, a court will order a penalty in accordance with the Act. As with other legislation creating offences, in addition to the Crown prosecuting, it is possible for a citizen to commence a private prosecution.<sup>224</sup>

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<sup>224</sup> See primer #5, *Statutory Authorizations*, for more information on private prosecutions.



# Chapter Five

## *Alberta Wildlife Act*

### Chapter Five: *Alberta Wildlife Act*

#### ***About the Wildlife Act and Regulations***

The *Wildlife Act*<sup>225</sup> and regulations are the primary Alberta laws governing non-fish vertebrates as resources in the province. Of relevance to wetland managers, this legislation:

- regulates hunting, trapping and possession of wildlife on public and private land in Alberta,
- to a limited degree, regulates wildlife habitat and addresses endangered species, and
- provides for the establishment of wildlife sanctuaries.

This chapter deals with the first two bulleted items insofar as they may be relevant to wetland managers. Chapter 6, *Wetland Protection through Designation*, deals with the third.

#### ***Wildlife Act, hunting, trapping and possession***

The *Wildlife Act* states that the property of all wildlife in the province vests in the provincial Crown.<sup>226</sup> The Act outlines the ways property may pass from the Crown to others in connection with legal hunting, possession, and commerce in wildlife and exotic species. The regulations under the Act set out hunting and guiding license requirements, bag limits and generally, prohibitions regarding the hunting, possession and transport of wildlife.

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<sup>225</sup> S.A. 1984, c. W-9.1.

<sup>226</sup> *Ibid.*, s. 10.

### ***Wildlife Act and habitat protection***

Of particular interest to wetland managers are *Wildlife Act* provisions that protect habitat associated with wetlands. Although the Act primarily is designed to regulate wildlife hunting, one section of the *Wildlife Act* in a limited manner addresses habitat. Section 38 states that without authorization, a person shall not wilfully "molest, disturb or destroy a house, nest or den of prescribed wildlife or a beaver dam in prescribed areas or at prescribed times". Authorization may be given under the *Agricultural Pests Act*<sup>227</sup> or the *Water Act*,<sup>228</sup> by or under a license authorizing the control of wildlife depredation or the collection of wildlife, by regulations regarding wildlife depredation, or by written authorization of the minister.

Accordingly, unless authorized, it is a *Wildlife Act* offence to carry out any wilful activity on either public or private land that could harm a nest or den of prescribed wildlife. "Prescribed wildlife" means:

- wildlife animals that are endangered animals,<sup>229</sup> throughout Alberta and throughout the year,
- migratory game birds, migratory insectivorous birds and migratory nongame birds as defined in the *Migratory Birds Convention Act* (Canada) throughout Alberta and throughout the year,
- snakes and bats, throughout Alberta and from September 1 in one year to April 30 in the next,
- the houses and dens of beaver, on any land that is not privately owned land,
- the houses, nests and dens of all wildlife, in a wildlife sanctuary throughout the year, and to the nests of game birds, in a game bird sanctuary throughout the year, and
- the dens of prairie rattlesnakes used as hibernacula, throughout Alberta and throughout the year.<sup>230</sup>

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<sup>227</sup> *Agricultural Pests Act*, S.A. 1984, c. A-8.1.

<sup>228</sup> *Supra* note 10.

<sup>229</sup> The Act defines endangered animal in section 1 to be an animal prescribed in the regulations. The Act defines "animal" to mean a vertebrate animal other than a human being or fish. The following animals are currently prescribed: swift fox, bison, whooping crane, peregrine falcon, woodland caribou, barren ground caribou, northern leopard frog, trumpeter swan, ferruginous hawk, burrowing owl, (recent amendments have changed listing of species) any hybrid resulting from the crossing of two endangered animals, and bison within specified northern boundaries. *Wildlife Regulation*, Alta. Reg. 143/97, Sch. 6.

<sup>230</sup> *Ibid.*

It is important to note that first, these provisions only apply to nests and dens, and not to habitat generally. Second, they apply only to "wilful", presumably meaning intentional molestations or disturbances. Any unauthorized, intentional direct disturbance of a nest or den (for example, intentionally destroying a nest by hand) clearly would constitute an offence. Although the author is not aware of any case authority on the issue, presumably, any unauthorized, intentional, but indirect disturbance also would constitute an offence.<sup>231</sup> An example of the latter would be a forestry operator, without authorization under the *Wildlife Act*, draining a wetland at a time that the operator knows it contains waterfowl nests and eggs that will be destroyed by the activity.

### ***Endangered Species Conservation Committee***

Wetland managers may be concerned about species at risk that may be present in a wetland area. Pursuant to 1996 amendments to the *Wildlife Act*, the Minister of Environment established the Endangered Species Conservation Committee. The functions of this committee are to advise the minister about endangered species and to make recommendations for preparing and adopting Recovery Plans. "Endangered species" means endangered animals, endangered invertebrates, endangered plants, algae, fungi and fish. If the minister determines that a Recovery Plan is appropriate, the minister will strike a recovery team to prepare plans. Fish and Wildlife Division, Alberta Sustainable Resource Development coordinates the implementation of endangered species programs. Wetland managers interested in protecting local endangered species should contact their local Fish and Wildlife office.

### ***Note on proposed federal legislation – the Species at Risk Act***

Wetland managers should be aware that the federal government has proposed species at risk legislation, the *Species at Risk Act*.<sup>232</sup> Once passed into law, the *Species at Risk Act* could affect the kinds of activities that may be carried out in respect of wetlands that contain listed species or designated critical habitat. As well, through the Act wetland managers might be able to apply for financial assistance to protect listed species and their habitat.

This controversial bill received second reading early in 2001, and at the time of writing is before the federal Standing Committee on Environment and Sustainable Development. There is little doubt that the Committee will put forward a number of amendments to the bill. Following Committee amendments, most likely the House, and potentially even the Senate, will further amend the bill. Because it is not known what the Act will finally look like, this Guide will not cover the provisions of the bill.

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<sup>231</sup> See chapter 11, Federal Laws and Policies, *Migratory Birds Convention Act, 1994 -- Hunting, takings and indirect takings, by for example, draining*, for a discussion of indirect takings and how this federal law applies to them.

<sup>232</sup> Bill C-5, *Species at Risk Act*, 1<sup>st</sup> Sess., 37<sup>th</sup> Parl., 2001.



# Chapter Six

## *Wetland Protection through Designation*

### Chapter Six: Wetland Protection through Designation

#### ***Introduction***

Government designation of a wetland area as protected is one of the best ways of protecting a wetland. This chapter briefly describes available designations under provincial, municipal and federal legislation. As will be seen, most designations apply only to public land, although a few have application on private land.

#### ***Special Places 2000 Designation process***

Special Places 2000 is an Alberta government policy initiative to coordinate the designation of natural landscapes of Alberta. Inclusion of an area under the Special Places program confers no legal protection. To be legally protected an area must be designated under one or more of the laws noted below. Nevertheless, identification as a special place gives profile to an area and puts it on a path to protection. A wetland manager interested in engaging the provincial designation process for a wetland area should consider nominating the area as a special place. More information about the nomination procedure is available through contacting Alberta Environment or visiting its website.

#### ***Primary provincial public land designations***

##### **SUMMARY OF PRIMARY DESIGNATIONS**

Wetlands on provincial public lands may be protected through a statutory designation. The primary designations in Alberta are:

- Wilderness Areas, Ecological Reserves, and Natural Areas under the *Wilderness Areas, Ecological Reserves and Natural Areas Act*.<sup>233</sup>
- Provincial Parks, Wildland Parks or Recreation Areas under the *Provincial Parks Act*.<sup>234</sup>

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<sup>233</sup> *Supra* note 52.

<sup>234</sup> *Supra* note 53.

- A designation as a type of sanctuary under the *Wildlife Regulation*<sup>235</sup> made under the *Wildlife Act*. Sanctuaries include migratory bird sanctuaries, wildlife control areas and habitat conservation areas.
- A reservation/notation identifying land use decisions on permitted uses or interests of government agencies.

Regarding the last bullet, the Alberta Government uses a registration system to record and manage various interests in public lands. Reservations and notations identify the interests. Current types of reservations include Disposition Reservation (DRS), that sets out permitted uses and Holding Reservation (HRS) that indicates an interest in the land and restricts uses to accommodate that interest. For example, a land record might include a HRS notation since the land is being considered as a potential ecological reserve. To maintain its ecological character, the record will also include notations limiting dispositions. Current types of Notations include Protective Notation (PNT) where a resource agency has determined that the land or its resources require protection to ensure integrity and Consultative Notation (CNT) setting out which agencies should be consulted prior to making any land use decisions. Although the reservation/notation system confers policy and not legal obligations, government officials, public land disposition holders and the public expect land administrators to abide by them.<sup>236</sup>

The degree of protection conferred by a designation depends upon statutory and regulatory prohibitions and limitations on industrial development and other uses in a designated area. Generally, Wilderness Areas and Ecological Reserves enjoy the most protection from uses that could adversely affect ecological values. Protection for Natural Areas varies with permitted uses and limitations set out in regulations or in management plans. Permitted uses for Provincial Parks and Wildland Parks are those set out in the *Provincial Parks Act Dispositions Regulations*,<sup>237</sup> more specific regulations made that relate to a particular park, or in a park management plan. Hunting and other restrictions in *Wildlife Act* sanctuaries are set out in the *Wildlife Act* regulations.

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<sup>235</sup> *Supra* note 229.

<sup>236</sup> The Alberta Government Public Lands Division maintains detailed information on these systems that may be accessed at <[www.gov.ab.ca/env/land/LAD](http://www.gov.ab.ca/env/land/LAD)>.

<sup>237</sup> *Dispositions Regulations*, Alta. Reg. 241/77.



### ***Permanent wetlands and provincial designations***

It must not be forgotten that the bed and shores of all naturally occurring, permanent wetlands in the Province are public land.<sup>238</sup> Accordingly, there is potential for a natural, permanent wetland to be designated as, for example, a Natural Area, under the *Wilderness Areas, Ecological Reserves and Natural Areas Act* and the uses regarding it to be limited by regulation, even where the wetland is on private land. Of course, access, monitoring and enforcement, would require cooperation of the private owners and occupants.

### ***Other provincial and municipal designations***

#### **INTRODUCTION**

Other designations that could protect wetlands include the following:

- restricted development areas and water conservation areas,
- *Forests Act*<sup>239</sup> forest land use zones, and
- historic resource designation under the *Historical Resources Act*.<sup>240</sup>

#### **RESTRICTED DEVELOPMENT AREAS AND WATER CONSERVATION AREAS**

Under the *Government Organization Act*<sup>241</sup> provincial cabinet may establish restricted development areas (RDAs) and water conservation areas (WCAs) on private or public land by regulation. RDAs and WCAs may be established as necessary in the public interest to coordinate and regulate the development and use of land for a number of purposes. Purposes relevant to wetland protection include:

- preventing, controlling or stopping damage to any natural resources in or adjacent to RDAs or WCAs,
- protecting watersheds, and
- preventing the deterioration of environmental quality.

#### **FOREST LAND USE ZONES**

Under the *Forests Act* provincial cabinet may make regulations declaring any area of public forest land to be a forest land use zone. The *Forest Recreation Regulation*<sup>242</sup> provides administrative and management details concerning forest land use zones. Specific prohibitions and permitted uses are established by regulation.

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<sup>238</sup> See chapter 3, *Bed and Shores*.

<sup>239</sup> *Forests Act*, R.S.A. 1980, c. F-16, s. 46(a).

<sup>240</sup> *Historical Resources Act*, R.S.A. 1980, c. H-8.

<sup>241</sup> *Government Organization Act*, S.A. 1994, c. G-8.5.

<sup>242</sup> *Forest Recreation Regulation*, Alta. Reg. 343/79.

### ***HISTORICAL RESOURCES ACT* DESIGNATIONS**

The Alberta *Historical Resources Act* authorizes four types of designations on private or public land. They are: registered historic resource, provincial historic resource, provincial historic area, and municipal historic resource. Each designation relates to a "historic resource" which the Act defines as "any work of nature or of man that is primarily of value for paleontological, archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest including, but not limited to, a paleontological, archaeological, prehistoric, historic or natural site, structure or object".<sup>243</sup> Although most designations comprise historical buildings, paleontological or archaeological sites, designations may be made for natural sites, which could include a wetland. Once a site is designated a registered historic resource, no one may alter or disturb it without ninety-day notice to the minister. Once a site is designated a provincial historic resource, no one may alter or disturb it without the minister's approval.<sup>244</sup>

The *Historical Resources Act* gives municipalities authority to pass a bylaw designating a historic resource "whose preservation it considers to be in the public interest, together with any land in or on which it is located that may be specified in the bylaw, as a Municipal Historic Resource".<sup>245</sup> The Act prohibits anyone from disturbing it in any way without written approval. The Act also gives municipalities the right to pass a bylaw designating a Municipal Historic Area. The bylaw may regulate uses, including land controls, for the Area. Although perhaps not the main focus of the legislation, there is no reason in principle why a Municipal Historic Resource or Area could not be a natural wetland area that has the appropriate importance to a municipality.

In either the case of a Municipal Historic Resource or Municipal Historic Area, the Act requires a municipality passing a bylaw to pay compensation to the owner of land or buildings where the bylaw decreases their value. Council may, with the agreement of the owner, provide the compensation by grant, tax relief or other means.

### **MUNICIPAL PARK DESIGNATION**

A wetland area on municipal land may be protected through a park designation. In such case the municipality limits uses and may protect municipal land containing wetlands by bylaw.

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<sup>243</sup> *Supra* note 240, s. 1(f).

<sup>244</sup> *Ibid.*, ss. 15(5) and 16.

<sup>245</sup> *Ibid.*, ss. 22, 23, 24 and 46.

## ***Related provincial and municipal topics***

### **CONSERVATION EASEMENTS**

Wetland areas may be protected through the placement of a conservation easement under the *Environmental Protection and Enhancement Act*.<sup>246</sup> Conservation easements technically are not designations and they can be granted to entities other than a level of government. Chapter 13, *Stewardship through Common Law Interests and Conservation Easements* further discusses conservation easements.

### **DEDICATIONS TO A MUNICIPALITY**

Many wetlands are lost during the subdivision and development process. However some could be saved through compulsory dedication under the *Municipal Government Act*. Chapter 7, *Wetlands Conservation and Subdivision Development* discusses dedications.

## ***Federal designations and agreements***

### **ABOUT FEDERAL DESIGNATIONS AND AGREEMENTS**

A few federal laws could be relevant to wetlands in Alberta that are on federal public lands, or in limited circumstances as described below, other wetlands. In Alberta federal public lands would include:

- national parks, military lands, soldier settlement lands, Indian Reserves and the waters on or under these lands, and
- any lands bequeathed or otherwise transferred to the federal government.

### **MIGRATORY BIRD SANCTUARIES**

Federal cabinet may create migratory bird sanctuaries to carry out Canada's obligations under the *Migratory Birds Convention* as set out in the *Migratory Birds Convention Act, 1994*<sup>247</sup> and the *Migratory Bird Sanctuary Regulations*.<sup>248</sup> The Act enables cabinet to prescribe protected areas by regulations and designate them as migratory bird sanctuaries. Once designated, the Canadian Wildlife Service manages them. Although bird sanctuaries will almost always be located on federal land, the legislative provisions are broad enough to enable designation on private, provincial or municipal lands, provided that the owner consents.<sup>249</sup>

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<sup>246</sup> *Supra* note 28, s. 22.

<sup>247</sup> *Supra* note 3.

<sup>248</sup> *Migratory Bird Sanctuary Regulations*, C.R.C., c. 1036.

<sup>249</sup> Section 12 of the *Migratory Birds Convention Act, 1994*, *supra* note 3, sets out cabinet regulation making powers.

## CANADA *WILDLIFE ACT* AGREEMENTS AND DESIGNATIONS

### ***Introduction***

The *Canada Wildlife Act* could be relevant to wetlands in Alberta that are on federal public lands, or in limited circumstances wetlands on other lands. The Act applies to "wildlife" which it characterises as "any animal, plant or other organism belonging to a species that is wild by nature or that is not easily distinguishable from such a species" and its habitat.<sup>250</sup>

### ***Agreements***

The Act enables the federal Environment Minister to enter into agreements with any level of government, or with any person or non-governmental organization to undertake and contribute to payment of wildlife research, conservation, and interpretation and implementation programs. Where such agreement is with a municipality or any other organization, the minister must obtain the agreement of the relevant province.<sup>251</sup>

These agreements could apply to any land including wetlands in a province. A wetland manager might find a source of support and funding through such agreements.

### ***Land acquisition***

The *Canada Wildlife Act* enables cabinet to agree that the federal government acquire any lands by purchase or lease for the purpose of research, conservation and interpretation in respect of migratory birds. With the agreement of the provincial government, such acquisitions may be made for other wildlife.<sup>252</sup> Once such land is acquired, the federal government cannot dispose of it, nor may anyone occupy it, except in accordance with the Act or regulations.

### ***Gifts and bequests***

Where anyone donates land or money to the federal government for any purpose relating to wildlife, the *Canada Wildlife Act* requires that the land or money be used for such purpose.<sup>253</sup> This alters the common law rule that otherwise limits the enforceability of conditions put on gifts. This *Canada Wildlife Act* provision could be useful for persons who wish to donate land for protection of wildlife values, but who do not want to place a conservation easement, restrictive covenant or other legal interest that limits use of the property.

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<sup>250</sup> R.S. 1985, c. W-9, s. 2(4).

<sup>251</sup> *Ibid.*, ss. 6-7.

<sup>252</sup> *Ibid.*, s. 9.

<sup>253</sup> *Ibid.*, s. 10.

### ***National Wildlife Areas***

Regulations under the *Canada Wildlife Act* provide for the designation of National Wildlife Areas from federal public lands. Once Cabinet designates an area as a National Wildlife Area, the *Wildlife Area Regulations*<sup>254</sup> and any applicable management plan restricts activities, including hunting, fishing, or disturbing an area, without a permit. Currently there are three National Wildlife Areas in Alberta.<sup>255</sup>

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<sup>254</sup> *Wildlife Area Regulations*, C.R.C., c. 1609.

<sup>255</sup> Blue Quills National Wildlife Area, Spiers Lake National Wildlife Area and Meanook National Wildlife Area. Web information indicates that the Suffield Military Base in Southern Alberta was made a National Wildlife Area in 1992, however, the *Canada Wildlife Act* regulations have not yet been amended to add this area.



# Chapter Seven

## *Wetlands Conservation and Subdivision Development*

### Chapter Seven: Wetlands Conservation and Subdivision Development

#### ***Introduction***

In most instances, a landowner requires subdivision approval from the local municipality in order to subdivide land. The *Municipal Government Act*<sup>256</sup> (MGA) gives municipalities considerable mandate to regulate private land use in the context of subdivision. Where the land in question contains wetlands, the municipality often possesses the legal tools necessary to conserve them. In the end, this often can be a "win-win" situation. A municipality may benefit by carrying out its environmental programs. The developer may benefit by having a subdivision with an attractive natural wetland on it that could serve as natural drainage and even help improve ground water quality.

This chapter addresses municipal tools that may be used to conserve wetlands in the subdivision process. Primer #7 on municipalities gives further information on municipal powers as they may relate to environmental matters.

#### ***Municipalities and reserves***

##### **RIGHT TO TAKE RESERVES AND EXCEPTIONS TO THE RIGHT**

Subject to the exceptions noted below, the MGA gives the subdivision authority the right to require an applicant for subdivision approval to dedicate land as reserve without compensation for purposes specified in the MGA. The exceptions are, no dedication of environmental or municipal reserve may be required where:

- the subdivision creates only one lot out of a quarter section,
- the subdivision creates lots of 16 hectares or more which solely will be used for agricultural purposes,
- the land to be subdivided is .8 hectares or less, or

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<sup>256</sup> *Supra* note 30.

- land or money in lieu of land was provided in respect of an earlier subdivision creating the parcel in respect of which subdivision now is sought.<sup>257</sup>

Relevant to wetland conservation are municipal reserves and environmental reserves.

#### **MUNICIPAL RESERVES**

Land may be taken as municipal reserve only to be used for the following purposes: a public park, a public recreation area, a school, or to separate areas of land that are used for different purposes. Taking land as municipal reserve to achieve protection of a wetland may be appropriate where the reserve land being used for one or more of the authorized purposes may meet those objectives. Ordinarily, the municipality may take as municipal reserve no more than 10% of the land, after subtracting any required environmental reserve, or such lesser amount set forth in the municipal development plan.<sup>258</sup>

#### **ENVIRONMENTAL RESERVES**

Land may be taken as environmental reserve only if it consists of a swamp or a gully; is land that is subject to flooding, or in the opinion of the subdivision authority, is unstable; or is a strip of land not less than 6 metres in width abutting the bed and shore of any lake, river, stream, or other body of water to prevent water pollution or to provide public access. Taking land as environmental reserve to achieve wetland protection objectives may be appropriate where those objectives may be met by the reserve land being used for one or more of the authorized purposes.<sup>259</sup> The MGA does not give a maximum percentage that may be required as environmental reserve.

#### **ENVIRONMENTAL RESERVES EASEMENTS**

Where the municipality and the landowner agree, environmental reserve may be taken as environmental reserve easement. The main difference between environmental reserve and environmental reserve easement is that with the latter, title to the reserve land remains in the name of the landowner. An environmental reserve easement may be registered on title by caveat in favour of the municipality. Land subject to an environmental reserve easement

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<sup>257</sup> *Ibid.*, s. 663.

<sup>258</sup> *Ibid.*, s. 666(3).

<sup>259</sup> However, legal expert Fred Laux says that in practice environmental reserve often is taken for purposes that go well beyond the statutory categories. He notes that in the "real world, knowledgeable developers recognize that environmental reserves are somewhat like apple pie and, therefore, are generous in their offerings". Laux states developers expect concessions in return, such as higher densities, reduced road dedications, levies or servicing costs. *Supra* note 122 at 14-9.



must remain in a natural state.<sup>260</sup> It is important to note that if environmental reserve easement is taken instead of environmental reserve in respect of land abutting a watercourse or water body, any accretion will accrue to the landowner instead of the municipality. This is because title to the reserve remains with the landowner.

### ***Subdivision, wetlands conservation and voluntary transfers***

#### **VOLUNTARY TRANSFERS WHERE NO RESERVE MAY BE TAKEN**

Where under the MGA a municipality may not take reserve since an exception to dedication applies, there still might be ways for the municipality to conserve a wetland. For example, the MGA gives a subdivision authority the right to reject a subdivision application on the ground of unsuitability.<sup>261</sup> Although the notion of "unsuitability" is not crystal clear in law, an argument may be made that where land falls under the characterization for environmental reserve, (even though environmental reserve may not be taken), it is unsuitable for development. Where the subdivision authority has legal right to reject the application on this ground, it may be open to it to, as one expert says, "negotiate a "voluntary" dedication of problem areas of land".<sup>262</sup> However, the subdivision authority must be careful not to abuse its authority or act beyond statutory right. The municipality also must make sure that the voluntary nature of the transfer to the municipality is well documented lest some future landowner attempt to have a court set it aside as being an *ultra vires* extraction of a dedication.

### ***Conservation easements instead of reserve***

Provided that a municipality does not run contrary to anything in its statutory plans or bylaws, as a qualified organization and a natural person it may accept grants of conservation easements.<sup>263</sup> It may benefit both the landowner seeking subdivision and the municipality if the owner voluntarily grants a conservation easement instead of the municipality taking reserve or full reserve. For example, when a municipality takes environmental reserve, title to the land usually transfers to the municipality and the land must be left in its natural state or be used as a park.<sup>264</sup> An environmental reserve easement must be kept in a natural state.<sup>265</sup> A landowner would benefit by granting a conservation easement instead of giving reserve or a reserve easement. Regarding reserve, he or she retains ownership of the land. Regarding both, he or she may negotiate what uses may be made of the land, and whether there should be any public access. As well the landowner might find a municipality more willing to make discretionary concessions if the owner voluntarily and informedly offers to grant a suitable conservation easement instead of the municipality taking reserve. In addition, the landowner might enjoy some property tax reductions. Although the conservation

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<sup>260</sup> *Supra* note 30, s. 664(3).

<sup>261</sup> *Ibid.*, s. 654(1)(a).

<sup>262</sup> *Supra* note 122 at 14-9.

<sup>263</sup> Chapter 13 contains some information on conservation easements. For more information see A. Kwasniak, *A Conservation Easement Guide for Alberta* (Edmonton: Environmental Law Centre, 1997).

<sup>264</sup> *Supra* note 30, s. 671.

<sup>265</sup> *Ibid.*, s. 664(3)(b).

easement area remains in the taxpayer's name, the assessment might be lowered given its loss of development potential. Finally the owner might consider the economic and other development benefits of an attractive subdivision containing an environmentally significant area.

A municipality may benefit by entering a conservation easement rather than taking reserve since it does not have to become owner of bits and pieces of reserve land and it retains the right to tax the entire subdivided property. As well, the municipality might be able to fulfil conservation objectives of its plans and by-laws where the conservation easement area does not all technically fit under the definition of "environmental reserve". Finally, if the municipality and the landowner agree, they might get some qualifying organization other than the municipality to hold and enforce the conservation easement. This would relieve the municipality of some management and financial responsibility and might be more attractive to some landowners.

### ***Conservation easements as a condition of subdivision***

The MGA gives subdivision authorities only limited powers to impose conditions on subdivision. As to the extent of the power, according to an expert, if the subdivision approving authority has the power to refuse an application "... as a matter of discretion, it has the collateral right to approve the subdivision but subject to such conditions which will ameliorate the concerns that would have caused a refusal".<sup>266</sup> Accordingly, it may be said that a subdivision authority has the right to impose a conservation easement as a condition of subdivision where the authority had a valid, legal right to refuse the subdivision and imposing the condition would ameliorate the concerns that would have based the refusal.<sup>267</sup> Expert legal advice should be sought if there is a question as to whether the subdivision had a valid, legal right to refuse the application and whether the conservation easement would ameliorate the concern. If a condition goes beyond legal right, an interested party may appeal the condition. The first appeal would be to the subdivision and development appeal board or Municipal Government Board, which hears appeals from subdivision authorities. If the party fails at that level, he or she may appeal to the Court of Queen's Bench on a question of law or jurisdiction.<sup>268</sup>

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<sup>266</sup> *Supra* note 122 at 12-23.

<sup>267</sup> The words "valid, legal right" are used most intentionally. A subdivision authority has, for example, a valid, legal right to refuse a subdivision on the basis of directives in land use plans or by-laws only if those plans or bylaws do not go beyond the authority of the MGA.

<sup>268</sup> *Supra* note 30, ss. 686 and 688. The subdivision and development appeal board hears appeals from a decision of a subdivision authority unless the subdivision concerned some issue of importance to the province, such as the presence of permanent bodies of water on the land subject of the subdivision.

## ***Permanent wetlands, subdivision and development***

### **PROVINCIAL CROWN OWNERSHIP**

As explained in chapter 3 of this Guide, under section 3 of the *Public Lands Act*, the Provincial Crown owns the bed and shores of permanent, naturally occurring wetlands and naturally occurring watercourses. As owner, the Provincial Crown must be involved in any proposed subdivision or development that includes any wetland, other water body or watercourse, that falls under section 3 of the *Public Lands Act*. Since the owner of the surrounding land usually does not own the bed and shores of any wetland, other water body or watercourse falling under section 3, it follows that he or she is limited regarding compensation or related claims where prohibitions or restrictions are placed on development of them.

### **THE BANK AND ENVIRONMENTAL RESERVE AND ENVIRONMENTAL RESERVE EASEMENT**

Any environmental or other reserve to be taken by a municipality will begin at the bank. Chapter 3 of this Guide describes how to find the legal bank. A wetland manager will want to do what he or she can to ensure that the bank is properly determined. It is important to note that if environmental reserve easement is taken instead of environmental reserve any accretion will accrue to the landowner instead of the municipality.<sup>269</sup> This is because title to the reserve remains with the landowner.

### ***Additional municipal tools to conserve wetlands and other environmentally sensitive areas***

This chapter provides considerable information to municipalities on tools available to them to conserve wetlands in the subdivision and development process. Further information is contained in the chart attached as an Appendix to this Guide containing a more comprehensive list of tools ranging from statutory designations to tax incentives.

### ***Recommendation***

Municipal subdivision and development are major sources of wetland loss. With the hope of curbing this loss, it is a recommendation of this Guide that the provincial government develop strict mandates, binding on municipalities, that provincial interests in wetlands be recognized in all subdivision and development applications and that municipalities be required to forward and incorporate the objectives of the *Wetland Management in the Settled Area of Alberta: An Interim Policy* (see chapter 9 *Other Provincial Laws and Policies*) in carrying out their responsibilities under the *Municipal Government Act*.

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<sup>269</sup> See chapter 1, on riparian rights and accretion.



# Chapter Eight

## *Oil and Gas Development*

### Chapter Eight: Oil and Gas Development

#### ***Oil and gas development and wetlands***

Primer #4 gave general information on acquiring, developing and exploring resources interests. The primer covered matters such as how companies and other operators acquire interests, how access works in respect of surveying, exploring and developing interests, compensation for access, and the role of regulators, in particular the Energy and Utilities Board (EUB). This chapter will not repeat this information. Instead, this chapter focuses only on issues involving proposed development in wetland areas.

#### ***Application requirements***

If an application for a well is correctly filled out, it should include information on potentially affected water bodies. The application requirements are found in the *Oil and Gas Conservation Regulations*.<sup>270</sup> The application must be in prescribed form, and must meet the criteria in Guide 56.<sup>271</sup> There are different requirements for different types of wells. The applications must be accompanied by plans showing location of the well, distance and relationship to boundaries, the surface topography, including elevations, water bodies, drainage pattern within 200 metres of the well, and relation to improvements such as buildings, water wells, and working or abandoned coal mines.<sup>272</sup> Where it is proposed to drill the well in a water covered area, the application must include the depth of the water.<sup>273</sup>

EUB Guide 56 contains forms and checklists for operators to better ensure they have provided all the necessary information in their applications. The Guide's site map checklist includes a requirement that the application show locations of "all lakes, streams, and other surface bodies of water".<sup>274</sup> Under the checklist for surface impacts, set back requirements are referred to as well as 'sensitive areas' as defined by Alberta

<sup>270</sup> *Oil and Gas Conservation Regulations*, Alta. Reg. 151/71.

<sup>271</sup> *Ibid.*, s. 2.010.

<sup>272</sup> *Ibid.*, s. 2.020.

<sup>273</sup> *Ibid.*, s. 2.020 (3)(e).

<sup>274</sup> Alberta Energy and Utilities Board, *Guide 56: Energy Development Application Guide*, 3<sup>rd</sup> ed., vol. 2 (Calgary: EUB, 2000) Appendix 1 "Wells: Technical Guidelines".

Environment.<sup>275</sup> For any criteria not met, or differing from designated requirements, the operator could be required to provide supporting documentation. For example if the setback requirements from a water body are not being followed the Guide states: "...you must attach a detailed explanation. The EUB will review the circumstances and decide if an exemption is warranted." It also states "Failure to meet the setback requirements may result in suspension or cancellation of your licence".

Guide 56 also requires EUB approval to drill a well within 100 metres of the high water mark of a body of water.<sup>276</sup> Any request to deviate from this minimum requirement must be accompanied by documentation of a plan to prevent pollution of the water. The technical guidelines also discuss the Alberta Environment environmentally sensitive areas requiring notification to an Alberta Environment inspector prior to the application to the EUB.

### ***Factors that the EUB considers when reviewing an application***

#### **List of factors**

Factors that the EUB has considered in well license applications include:<sup>277</sup>

1. need for the well,
2. well location,
3. mitigative considerations,
4. serious hazard to people,
5. unacceptable impact on the environment,
6. whether there is an equally acceptable alternative available that would significantly reduce surface impact,
7. whether the economic impact on the surface exceeds the economic benefit that would be derived from the subsurface resource,
8. consequences for other landowners, including inconvenience, noise, dust, odour, impact on land values, and other costs,
9. proposed development plan,
10. economics of vertical and directional drilling,
11. future production operations,
12. future development options, and
13. access route to the well, location and impact.

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<sup>275</sup> Alberta Energy and Utilities Board, *Guide 56: Energy Development Application Guide*, 3<sup>rd</sup> ed., vol. 1 (Calgary: EUB, 2000) at 94.

<sup>276</sup> *Ibid.* at 49 and 106.

<sup>277</sup> Canadian Institute of Resources Law, *Canada Energy Law Service: Alberta*, (loose-leaf), (Toronto: Carswell, 1990) p.30-3163.

## Wetland managers and the factors

A wetland manager who is making representations regarding an application will want to focus on relevant criteria. In many cases, the criteria with the closest relationship to wetland issues are the location of the well, possible mitigation, impact on the environment, equally acceptable alternatives, and access routes. Relevant to addressing these factors:

- If the location of a well will cause significant surface impacts, the operator likely will submit evidence to the board in its application to show why the chosen location is preferred over alternatives. Wetland managers will want to gather and submit evidence as to why a route or site that adversely affects a wetland should not be chosen.
- The surface impacts considered in well site applications are set out in the EUB Informational Letter titled "Well Site and Access Road Construction Prior to the Issuance of a Well Licence".<sup>278</sup> The general criteria or concern indicators used in site assessment include: side or top hill cuts, cut and fill construction, elevation differences across the well site or access road, proximity to sensitive areas, soil conditions, access road length, location of site and road in relation to dry sloughs, wet areas, rivers, lakes, and valley breaks, construction of a pad, topographical changes adjacent to road or well site, proximity to buildings and other improvements.<sup>279</sup>
- The wetland manager should be aware that Alberta Environment has a *Code of Practice for Oil Production Sites* that deals with development close to wetlands. S. 2(1)(i) of the Code defines a watercourse as "the bed and shore of a river, stream, lake, creek, lagoon, swamp, marsh or other natural body of water, or a canal, ditch, reservoir or other man-made surface feature, whether it conveys water continuously or intermittently".<sup>280</sup> The operator must notify an inspector, and possibly face an on site inspection if proposed construction is 30 metres or less from such a watercourse.<sup>281</sup>
- The wetland manager or his or her representative should be aware of EUB and ERCB decisions that support and counter his or her position in applying the factors. The following section should aid the wetland manager. It summarizes relevant decisions from 1977 to spring, 2001.

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<sup>278</sup> Alberta Energy and Utilities Board, Informational Letter IL 90-20, *Well Site and Access Road Construction Prior to the Issuance of a Well Licence* (23 November 1990).

<sup>279</sup> *Ibid.*

<sup>280</sup> Alberta Environmental Protection, *Code of Practice for Oil Production Sites* (Edmonton: Queen's Printer, 1997).

<sup>281</sup> *Ibid.*, s. 3(1)(b).

### *EUB Decisions potentially relevant to wetland managers*

*Application by Consolidated Oil and Gas (Canada) Ltd. for a Licence to Drill a Well in the Ghost Pine Area* (17 October 1977), Decision 77-18 (Alberta Energy Resources Conservation Board) as discussed in *Shell Canada Ltd. Application for a Well Licence, Waterton Field* (22 December 1988), Decision D 88-16 (Alberta Energy Resources Conservation Board) Application 880557.

In discussing Consolidated's application, the Board set out four situations where a well licence application may be denied or be subject to surface relocation or safety considerations. These were where:

- there is a serious hazard to people,
- there would be an unacceptable impact on the natural environment,
- there is an equally acceptable alternative that would reduce surface impacts, and
- the economic impact on the surface would be greater than the subsurface economic benefits.

*Dome Petroleum Ltd. Well Licence Application, Waterton Field* (1 February 1989), Decision D 88-20 (Alberta Energy Resources Conservation Board) Application 880983.

Dome applied for a well approval twenty-one kilometres west of the Town of Pincher Creek and three kilometres west of the Hamlet of Beaver Mines. The well was to be a critical sour gas well. There were four different locations proposed for the well. One of the proposed locations was close to a creek. The Board did not favour this location because of concerns over impacts on the stream ecosystem. The Board considered impacts on populations of Long-toed salamanders and spotted frog populations in making its decision. The Board approved the application for one of the alternate sites.

*Amoco Canada Petroleum Co. Ltd., Whaleback Ridge Area* (6 September 1994) Decision D 94-8 (Alberta Energy Resources Conservation Board) Application 931598.

In this exploratory well application, the Board refused to grant the application and cited as one of the reasons lack of information on the part of the proponent to justify the proposed environmentally sensitive location.<sup>282</sup> Amoco failed to provide sufficient information regarding alternative locations, and regarding why the proposed location would be most suitable. An Integrated Resource Plan, a government policy document on acceptable land uses for the area, had resource and habitat protection as priorities. Amoco's access road would have increased potential for public access and could have long term impact on habitat and wildlife.

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<sup>282</sup> Pp. 14 and 35.



*Application by Suncor Energy Inc. for Amendment of Approval No. 8101 for the Proposed Project Millennium Development (23 July 1999), Addendum D to Decision 99-7 (Alberta Energy and Utilities Board) Application 980197.*

While this case dealt with oil sands mining and processing units, it refers to wetlands and aquatic issues that may be useful in a discussion of well sites. The Suncor Millennium project was in the municipality of Wood Buffalo, located approximately thirty five kilometres north of Fort McMurray. The project would impact water levels and wetlands around Shipyard Lake and Creek. Part of the project and approval included a Wetland Working Group that would report recommendations to a committee called the "Reclamation Advisory Committee". The mandate of the Group was to prepare a manual on re-establishing wetlands in the reclaimed landscape of oil sands leases. The Group represented the local community, government, industry, non governmental organizations, and academia.

*Range Petroleum Corporation Application for a Well Licence Lsd 4-35-70-24W5M, Sturgeon Lake Area (5 July 1999), Decision 99-18 (Alberta Energy and Utilities Board) Application 1019406.*

This was an application for a sour oil well that would have a bottom-hole location beneath Sturgeon Lake. The well would produce sour oil from the Leduc Formation. There were objections to the application from local landowners, ranchers, residents, and farmers. The interveners expressed concern about the project's potential release of lost circulation drilling material or production and its effect on their water wells, the quality of Sturgeon Lake, the quality of recreational activities at the lake and the local fishery. The Board decided that the well could be safely drilled if certain conditions were complied with. One of the conditions was: "Range must test the appropriate number of water wells for quality and quantity prior to spudding the Lsd 4-34 well". There remained a risk that fluids might migrate from an in-ground pit or a bermed site and potentially reach groundwater and the lake. For this reason, above ground pits and a secondary containment around the tanks were required. Due to the setting and location close to the lake, there was an outstanding issue of the Emergency Response Plan. The Board deferred its decision on approval of the well until there was an approved plan in place.

*Startech Energy Inc. Application to Drill a Noncritical Level-1 Sour Gas Well, Turner Valley Field (25 October 1999), Decision 99-26 (Alberta Energy and Utilities Board) Application 1027549.*

This was an application for a sour gas well. The proposed access road would be close to a pond on the surface owner's property, but would make use of an existing trail.

The dugout pond was directly west of the proposed road. In accordance with the landowner's request, Startech would strip the topsoil and put the soil in salvage piles on the east side of the north/south-running access road and on the south side of the east/west-running access road to create a barrier against water runoff from higher elevations. Startech stated that the landowner recognized this as more environmentally benign and gave his approval to use the trail. However, there was concern that runoff or erosion from the road might contaminate the water in the pond that was used as drinking water by both domestic animals and wildlife. The Board required Startech to test the pond water prior to road preparation and construction, and to prevent runoff and erosion from entering the pond. The Board approved the well licence subject to Startech providing additional information and emergency plans and subject to conditions including water testing for area wells and the dugout pond prior to drilling.

*Stampede Oils Inc. Application for a Well Licence, Turner Valley Field* (14 December 1999), Decision 99-30 (Alberta Energy and Utilities Board) Application 1031511.

This application involved a sour gas well to be directionally drilled to obtain gas from the Turner formation. The Board was concerned about the surface location, emergency planning, emissions and the public consultation process. The Company considered, but rejected, an alternate surface location. The reason for the rejection was that the location was "environmentally unacceptable due to its proximity to an intermittent watercourse and surface ponds". The proposed well site location was further away from two ponds in the area. Stampede recognized that water quality was important and committed to conducting water quality testing on water wells and dugouts identified by the area residents. The two ponds downslope of the proposed well were connected by a seasonal watercourse to a creek that runs near a number of residences. Runoff from the area of the proposed well site supplies this creek and stock watering dugouts adjacent to several residences.

The Board found that the company did not adequately address the issues of runoff, ponds and downstream water users. Additionally, Stampede failed to fulfil the application requirements when it did not consult with the Alberta Environment inspector, as required, prior to filing its application. The decision stated "The EUB application process relies on correct information being submitted for evaluation. Errors and omissions such as those in Stampede's application undermine the integrity of the EUB's process and can have a considerable impact on the public's ability to make an informed decision". The Board denied the application, finding that there were outstanding issues around planning and public consultation that needed to be addressed. On the matter of surface impacts from a well and access road, the Board decided that they could be mitigated.

*Berkley Resources Inc. Application to Re-enter a Sweet Oil Well, Leduc-Woodbend Field* (22 February 2000), Decision 2000-8 (Alberta Energy and Utilities Board) Application 1041795.

The Board denied this re-entry application. Surface owners expressed significant concerns. One concern was that the proposed well was eighty metres from a creek and surface owners feared creek and groundwater contamination. The Board found that surface and groundwater impacts would be minimal, but stated that if future approval is granted the Company would be required to conduct water well testing.

*Petro-Canada Oil and Gas Steam-Assisted Gravity Drainage Project, MacKay River Project, Athabasca Oil Sands Area* (14 July 2000), Decision 2000-50 (Alberta Energy and Utilities Board) Application 1032550.

This application involved an oil sands project and was approved by the EUB. Interveners expressed concern over the project's effect on water levels in wetlands and over its impact on woodland caribou and Canadian toad populations. The proponent prepared an impact assessment. Alberta Environment stated, "that it was prepared to accept Petro-Canada's findings that there would be no significant effects on wildlife". Alberta Environment recommended that Petro-Canada monitor the wetland water levels, due to the presence of Canadian toads.

*Shell Canada Limited Application for a Well Licence Shell PCP Ferrier 7-7-38-6W5, Ferrier Field* (20 March 2001), Decision 2001-9 (Alberta Energy and Utilities Board) Application 1042932.

The hearing considered whether the development of the proposed sour gas well would be in the public interest. It included an examination of the unique topographic and demographic conditions in the vicinity of the proposed well in conjunction with the potential release rate from the well under reasonable worst-case conditions. The Board found that the emergency response plan proposed by Shell was not adequate. While there were no issues relating to wetlands in this application and hearing, the issues set out at the beginning of the decision provide a good example of the analysis that the Board follows in evaluating well site applications. At the outset of the decision the Board stated the issues affecting the application. "On the basis of the evidence adduced at the public hearing, the Board considers the issues respecting the application to be: need for the well, location of the well, risk and hazard assessment, emergency preparedness, land-use impacts, public consultation, and other matters".



# Chapter Nine

## *Other Provincial Laws and Policies*

### Chapter Nine: Other Provincial Laws and Policies

#### ***Introduction***

This chapter addresses Alberta laws or policies relevant to wetland managers that are not more specifically dealt with in other sections of the Guide.

#### ***Laws include provisions from:***

1. the *Irrigation Districts Act*,<sup>283</sup>
2. the *Public Lands Act*,<sup>284</sup>
3. the *Environmental Protection and Enhancement Act*,<sup>285</sup>
4. laws governing public land forestry operations including the *Forests Act*,<sup>286</sup> the *Timber Management Regulation*,<sup>287</sup> the *Alberta Timber Harvest Planning and Operating Ground Rules*<sup>288</sup> Standards and Guidelines for Operating Beside Watercourses,<sup>289</sup>
5. the *Drainage Districts Act*,<sup>290</sup> and
6. the *Weed Control Act*.<sup>291</sup>

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<sup>283</sup> *Irrigation Districts Act*, S.A. 1999, c. I-11.7.

<sup>284</sup> *Supra* note 11, s. 3.

<sup>285</sup> *Supra* note 28.

<sup>286</sup> *Supra* note 239.

<sup>287</sup> *Timber Management Regulation*, Alta. Reg. 60/73.

<sup>288</sup> *Alberta Timber Harvest Planning and Operating Ground Rules* (Edmonton: Alberta Environmental Protection, 1994).

<sup>289</sup> "Standards and Guidelines for Operating Beside Watercourses" in *Alberta Timber Harvest Planning and Operating Ground Rules* (Edmonton: Alberta Environmental Protection, 1994) at 15.

<sup>290</sup> *Drainage Districts Act*, S.A. 1998, c. D-39.1.

<sup>291</sup> *Weed Control Act*, R.S.A. 1980, c. W-6.

***Policies include:***

1. *Wetland Management in the Settled Area of Alberta: An Interim Policy*,<sup>292</sup>
2. *Beyond Prairie Potholes: A Draft Policy for Managing Alberta's Peatlands and Non-settled Area Wetlands*,<sup>293</sup>
3. *Cows and Fish Program*,<sup>294</sup> and
4. *Management Strategy for Exposed Bed and Shore Public Lands in the North East and North West Regions*.<sup>295</sup>

***Provincial Laws***

***IRRIGATION DISTRICTS ACT***

***Irrigation districts backgrounder***

The major consumer of water in Alberta is irrigation. Over 1,400,000 acres of land are irrigated in southern Alberta, which constitutes about four percent of Alberta's cultivated land base.<sup>296</sup>

The first irrigation legislation in the province was the *Irrigation Districts Act* passed in 1915. Under this Act farmers were allowed to establish their own administrative and operational organizations to facilitate irrigation in otherwise dry areas. This Act in time was changed to the Alberta *Irrigation Act*<sup>297</sup>, and in 1999, was amended and renamed the *Irrigation Districts Act*. The current *Irrigation Districts Act* regulates the constitution and activities of districts.

Districts are quasi-municipal bodies. Districts manage their affairs through an elected board of directors that oversee operations. There are thirteen irrigation districts in the province. Each district holds water licenses under the *Water Act*.<sup>298</sup> The *Irrigation Districts Act* enables any person with land within the district, to apply to enter into an agreement with the district for the conveyance of water for irrigation purposes, household purposes, and sometimes for other purposes.<sup>299</sup>

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<sup>292</sup> *Supra* note 14.

<sup>293</sup> *Beyond Prairie Potholes: A Draft Policy for Managing Alberta's Peatlands and Non-settled Area Wetlands* (Edmonton: Alberta Water Resources Commission, 1993).

<sup>294</sup> Cows and Fish: Alberta Riparian Habitat Management Program, online: Alberta Riparian Habitat Management Program <[www.cowsandfish.org](http://www.cowsandfish.org)> (date accessed: 2001).

<sup>295</sup> *Management Strategy for Exposed Bed and Shore Public Lands in the North East and North West Regions* (St. Paul: Alberta Agriculture, Food and Rural Development, 1994).

<sup>296</sup> *Water Management in Alberta, Background Paper, Volume 8, Water Management Projects* (Edmonton: Alberta Environment, 1991).

<sup>297</sup> *Irrigation Act*, R.S.A. 1980, c. I - 11.

<sup>298</sup> *Supra* note 10.

<sup>299</sup> *Supra* note 283, ss. 21(1), 20, and 24.

It should be mentioned that not all irrigation in the province falls under the *Irrigation Districts Act*. In addition to the thirteen districts, there are more than 2500 individual *Water Act* irrigation projects relating to approximately 278,000 acres of Alberta farmland.<sup>300</sup>

#### ***Irrigation reservoirs, similar constructed bodies and wetland managers***

Irrigation reservoirs and similar artificial bodies and watercourses used in irrigation can benefit wildlife, in particular waterfowl and other birds. It is important for wetland managers to appreciate who has the right to control these artificial bodies and courses and to understand what laws govern them.

#### ***Ownership of irrigation reservoirs and similar constructed bodies and watercourses***

The *Irrigation Districts Act* defines "irrigation works" to mean any structure, device, contrivance or thing, or any artificial body of water or watercourse used or to be used by a district, including any dike, dam, weir, breakwater, reservoir, canal, tunnel, bridge, culvert, embankment, headwork, aqueduct, pipe or pump floodgate.<sup>301</sup> The common elements to all of these is that in the usual case the work is human made and artificial. The "bed" and "shores" of an irrigation work that is totally human made, can be privately owned, and are often owned by an irrigation district. They do not fall under the Crown ownership provisions in section 2 of the *Public Lands Act*.<sup>302</sup>

#### ***Applicability of the Water Act to irrigation works and irrigation districts***

Here are some key points regarding how the *Water Act* applies to irrigation works and irrigation districts<sup>303</sup>:

- Under the *Water Act*, constructing any "works" – including artificial water bodies – requires an approval.<sup>304</sup> Generally speaking, "works" for the purposes of the *Water Act* should include anything that falls under the definition of "irrigation works" in the *Irrigation Districts Act*.
- A *Water Act* approval may be required for activities associated with constructing irrigation works, including removing or disturbing ground, vegetation or other material that may alter or may be capable of altering the flow or level of water or changing the location of water.

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<sup>300</sup> *Private Water Licenses for Irrigation in Alberta*, online: Alberta Agriculture, Food and Rural Development <[www.agric.gov.ab.ca/irrigate/stats/private.html](http://www.agric.gov.ab.ca/irrigate/stats/private.html)> (date accessed: 2001).

<sup>301</sup> *Supra* note 283, s. 1(w).

<sup>302</sup> See chapter 3, *Bed and Shores*.

<sup>303</sup> See chapter 11, *Federal Laws and Policies, Fisheries Act*

<sup>304</sup> Activities require approvals and the definition of "activity" includes constructing a work. See ss. 1(1)(b) and 36 of the *Water Act*, *supra* note 10, and chapter 4 of this Guide.

- The provisions of the *Water Act* that apply to a "water body" do not apply to irrigation works if the irrigation works are subject to a license and are owned by the licensee, unless the regulations specify otherwise.<sup>305</sup>
- Irrigation works may be subject to a water management order issued by the director, to, for example, maintain or repair works in accordance with an approval.<sup>306</sup>
- Irrigation districts, like any other water user, are entitled to use and acquire water only in accordance with the *Water Act*. An irrigation district obtains a license from the province for a certain amount of water and distributes it to water users who have agreements with the district in accordance with the *Irrigation Districts Act*.

***Water agreements with an irrigation district relevant to wetland managers***

The *Irrigation Districts Act* authorizes a district to enter into a variety of agreements. As the major purpose of the Act is to facilitate irrigation, most agreements deal with use of water and irrigation works for irrigation purposes. However some authorized agreements may assist wetland managers in providing water, for example, to maintain the quality of a wetland or for mitigation activities. These provisions are:

- The Act authorizes a person, including an individual, group of individuals, partnership, a trust or body corporate, or a government, to enter into an agreement with a district for use of irrigation works for purposes other than the delivery or removal of water. If the use of works agreement is with an owner of a parcel, the parcel must be contiguous to or passing through an irrigation works or a natural water body, on watercourses or reservoir fed by water diverted by means of irrigation works of the district. The agreement may be registered at Land Titles.<sup>307</sup>
- The Act authorizes any person to enter into a water conveyance agreement with a district. A water conveyance agreement may authorize the delivery of water for purposes other than irrigation or household purposes, or the removal of drainage water, storm water or wastewater from an area.<sup>308</sup>

***Applicability of the Fisheries Act to irrigation works***

See chapter 11, *Federal Laws and Policies, Artificial water bodies and the Fisheries Act* for a discussion of this issue.

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<sup>305</sup> *Supra* note 10, s. 1(1)(hhh).

<sup>306</sup> *Ibid.*, s. 99.

<sup>307</sup> *Supra* note 283, s. 20.

<sup>308</sup> *Ibid.*, s. 21.



## ***PUBLIC LANDS ACT***

### ***About public lands and the Public Lands Act***

For the purposes of land administration the province is divided into two areas known as the Green Area and White Area. The Green Area contains about 129,000 square miles of forested land managed primarily for timber resources. The White Area contains about 16,000 square miles of public lands in the more settled areas of the province.<sup>309</sup> All public lands in both the White and Green areas are administered under the *Public Lands Act* unless administration has been transferred<sup>310</sup>. The Minister of Sustainable Resource Management currently administers Green Area public lands and White Area public lands. The Minister of Sustainable Resource Management also currently administers any area of public lands subject to a timber disposition pursuant to the *Forests Act*<sup>311</sup> whether the area is located in the Green Area or the White Area. Designated protected public lands are administered in accordance with applicable legislation such as the *Wilderness Areas, Ecological Reserves and Natural Areas Act*<sup>312</sup> or the *Provincial Parks Act*.<sup>313</sup>

This section of the Guide deals with public lands administered under the *Public Lands Act*. These primarily will be lands to which no dispositions pertain to, or lands that are subject to one or more Crown dispositions, such as a grazing lease or permit, hay permit, license of occupation, mineral surface lease, or miscellaneous lease, among others.

Also of interest to wetland managers, are the bed and shores of naturally occurring permanent water bodies, since under section 3 of the *Public Lands Act*, these are public lands. Although this chapter applies to these bed and shores since they are public lands, it does not focus on this section of the Act since chapter 3 of the Guide addresses it.

### ***Sections of the Public Lands Act of relevance to wetland managers***

The following sections of the *Public Lands Act* are relevant to wetland managers, whether the wetland is located on a tract of public land or on private land if the wetlands are public land by virtue of being naturally occurring and permanent.

Comments are provided in italics.

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<sup>309</sup> *About Public Lands* (Edmonton: Government of Alberta, Forestry, Lands and Wildlife, 1988) at 2 and 9. Information on White Area lands updated by G. Haekel, Public Lands, Sustainable Resource Development (March 2001).

<sup>310</sup> *Supra* note 11, s. 2.

<sup>311</sup> *Supra* note 239, s. 6.

<sup>312</sup> *Supra* note 52.

<sup>313</sup> *Supra* note 53.

## REGULATIONS

The Lieutenant Governor in Council may make regulations "permitting, prohibiting or regulating the use of any public land that is not the subject of a disposition".<sup>314</sup>

- ▶ *Under this provision the government could, for example, regulate the use of naturally occurring permanent wetlands, even if they are completely contained within private lands. As well, the government could regulate the use of any wetland areas within public lands.*

## CLASSIFICATION OF PUBLIC LANDS

The minister may classify public land and declare permissible uses.<sup>315</sup>

- ▶ *Under this provision the government could, for example, classify naturally occurring permanent wetlands as a category of public lands and declare permissible uses. As well, the government could classify other public lands with wetlands and declare permissible uses.*

## RESTRICTING USES OF PUBLIC LANDS

The minister may put restrictions on the use of any public land when it is sold, which may be registered at the Land Titles Office and run with the land, binding successors in title.<sup>316</sup>

- ▶ *The minister may place conditions to protect wetland water and land areas prior to transferring the land out to private ownership; this would include any transfer of the bed and shore of any naturally occurring permanent wetland.*

## OFFENCES

The *Public Lands Act* states that unless a person has government authorization, no one "shall cause, permit or suffer the accumulation of waste material, debris, refuse or garbage on public land" and that anyone who does is guilty of an offence.<sup>317</sup>

- ▶ *This provision applies to naturally occurring, permanent wetlands wherever they are located, to intermittent wetlands on public land and to any public lands including those that contain intermittent wetlands, unless allowed by a disposition or other authorization.*

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<sup>314</sup> *Supra* note 11, s. 9.

<sup>315</sup> *Ibid.*, s. 10.

<sup>316</sup> *Ibid.*, s. 20.

<sup>317</sup> *Ibid.*, ss. 51(1)(a), 51(1.1), and 53.

- The *Public Lands Act* states that unless a person has government authorization, no one shall do anything "on public land that may injuriously affect watershed capacity".<sup>318</sup>
  - ▶ □ *This provision applies to naturally occurring, permanent wetlands wherever they are located; and to any public lands including those that contain intermittent wetlands, unless allowed by a disposition or other authorization.*
- The *Public Lands Act* contains a number of discretionary offences that could be relevant to naturally occurring, permanent wetlands wherever they are located, and to public lands including those that contain intermittent wetlands. These offences include: No person shall cause, permit or suffer:
  - ▶ □ the existence on public land of any structure or excavation of any kind that is undesirable in the minister's opinion,
  - ▶ □ the existence on public land of any condition which, in the opinion of the minister, may cause danger by fire to life, property or forest growth,
  - ▶ □ the disturbance of any public land in any manner that results or, in the opinion of the minister, is likely to result in injury to the bed or shore of any river, stream, watercourse, lake, or
  - ▶ □ the creation of any condition on public land which, in the minister's opinion, is likely to cause soil erosion.<sup>319</sup>

#### OFFENCES AND USE OF CROWN LAND BY ADJACENT LANDOWNER

It is no secret that some landowners use adjacent exposed bed and shores of Crown land for personal use. In some cases the Crown authorizes such use with, for example a hay permit or a license of occupation under the *Public Lands Act*. However where such use is not authorized, the landowner could be in violation of the *Public Lands Act*. Such violations could occur unwittingly by a landowner where he or she mistakenly believes that exposed Crown bed or shore has accreted to his or her property. As noted in chapter 1, *Wetlands, Riparian Rights and Statutory Alteration, Accretion and erosion*, the legal rules to establish accretion are quite strict. From the author's discussions with participants at the workshops held in conjunction with this Guide (*see the Introduction*) it appears that in some cases landowners are treating exposed areas as accreted land where the strict legal rules to establish accretion have not been met.

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<sup>318</sup> *Ibid.*, ss. 51(1)(d) and 51(1.1).

<sup>319</sup> *Ibid.*, ss. 51(1)(b), (c), (e) and (f).

## RECOMMENDATION

It is a recommendation of this Guide that the government in a pro-active manner use its enforcement tools under the *Public Lands Act* to better protect provincial interests in wetlands and that it develop enforcement policies that forward and incorporate the objectives of the *Wetland Management in the Settled Area of Alberta: An Interim Policy*.

## ***ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT***

### ***Introduction***

Other parts of this Guide deal with environmental assessment, regulatory approvals, and conservation easements under the *Environmental Protection and Enhancement Act* (EPEA). This chapter deals with the following sections, which should also interest wetland managers. Comments are in italics:

- The Act gives the minister authority to establish economic instruments including financial incentives to protect the environment.<sup>320</sup>
  - ▶ *□The minister could establish financial incentives to protect wetlands, for example to fence off wetlands from livestock or to provide an off-site watering system.*
- The Act prohibits the release into the environment (which would include wetlands) of any substance that might cause a significant adverse effect, unless the quantity of the release is authorized.<sup>321</sup>
  - ▶ *□Any authorized release into a wetland that might cause a significant adverse effect falls under this prohibition.*
- Subject to one exception, the Act prohibits the disposal of any waste on public land except in a waste container.<sup>322</sup>
  - ▶ *□"Public land" includes any naturally occurring, permanent wetlands wherever they are located, and any other public lands including those with intermittent wetlands on them.*
- If the minister is of the opinion that it is in the public interest that an activity should not proceed, the minister may order that no approval or registration be issued in respect of the activity.

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<sup>320</sup> *Supra* note 28, s. 13.

<sup>321</sup> *Ibid.*, s. 98.

<sup>322</sup> *Ibid.*, s. 169. The exception is disposing of waste in accordance with the *Forest and Prairie Protection Act*, R.S.A. 1980, c. F-14, or regulations under that Act. The Act deals with fire prevention and control.

- ▶ □ *It is possible for the minister to prohibit proposed activities that could harm wetlands and other water bodies. For example, in 2000 the then Environment Minister Gary Mar, issued an order that it is in the public interest that no road be built through Lily Lake.*

### ***Pesticides***

Part 8 of EPEA deals with hazardous substances and pesticides. The Act itself does not provide many details, however, government has made two pesticide regulations. Provisions from these regulations that are relevant to wetland managers include:

- The *Pesticide Ministerial Regulation* contains a general prohibition of use or application of pesticides in or on an open body of water and a restriction of what can be applied within 30 metres of an open body of water.<sup>323</sup>
- The regulation provides for a special use approval to allow application in and around water bodies.<sup>324</sup>
- The regulation also sets out pesticide use recording and reporting requirements, one of which is the location and distance of any pesticide used or applied within 30 metres of an open body of water.<sup>325</sup>
- The regulation provides for a specific class of certificate for aquatic vegetation pesticides.<sup>326</sup>
- The *Pesticide Sales, Handling, Use, and Application Regulation* restricts crossing open bodies of water with pesticide mixing, storage, or application equipment.<sup>327</sup> It also restricts drawing water to mix with pesticides<sup>328</sup> and aerial application of pesticides over open bodies of water.<sup>329</sup>

An important point to note is that the *Pesticide Sales, Handling, Use, and Application Regulation* defines 'open body of water' to exclude "reservoirs, lakes, marshes or other bodies of water that are completely surrounded by private land, that have an area of less than 4 hectares and have no outflow of water".<sup>330</sup> This Regulation also excludes the same water bodies on public land having an area of less than 0.4 hectares.<sup>331</sup> As well, it excludes dry streams with bed and shore of 0.5 metres or less.<sup>332</sup>

<sup>323</sup> Alta. Reg. 43/97, s. 9.

<sup>324</sup> *Ibid.*, s. 9.

<sup>325</sup> *Ibid.*, s. 11(1)(i).

<sup>326</sup> *Ibid.*, Sch. 5(3).

<sup>327</sup> Alta. Reg. 24/97, s. 7.

<sup>328</sup> *Ibid.*, s. 8.

<sup>329</sup> *Ibid.*, s. 9.

<sup>330</sup> *Ibid.*, s. 1(II)(ii).

<sup>331</sup> *Ibid.*, s. 1(II)(iii).

Neither EPEA nor the *Pesticide Ministerial Regulation* provide an alternate definition for 'open body of water', so the restrictions and requirements regarding pesticides in and around water might not apply to the private land, public land and dry streams exempted in the above definition.

## LAWS GOVERNING FORESTRY OPERATIONS ON PUBLIC LANDS

### *Forests Act dispositions*

The Alberta *Forests Act* and regulations authorize the disposition of timber rights in respect of Alberta public lands in the Green Area. The Act and regulations authorize disposition by way of timber *permits*, timber *quotas* and *licenses* and *forest management agreements*. Permits are for a number of trees ranging from one or a few (Christmas tree permits) to a relatively greater number (commercial permits). Quotas are for a volume of timber in a specified area. A licence is required to exercise quota rights. Forest management agreements typically cover larger tracts of public land and require holders to establish, grow and harvest timber in a sustainable manner in accordance with the agreement, and applicable legislation, guidelines and policy. The disposition agreement relating to any of these dispositions could set out rules regarding exercising rights in areas containing water bodies.

### *Wetlands, the Forests Act, the Timber Management Regulation and Operating Ground Rules*

There are no provisions under the *Forests Act* that deal directly with watercourses or wetlands. However, there are some provisions under the *Timber Management Regulation* that do so.

- The *Timber Management Regulation*<sup>333</sup> specifies that every person who harvests timber or conducts reforestation on public land must maintain all his campsites in a tidy and sanitary condition and ensure that the disposal of any refuse or debris, or the location of any structure or excavation does not impede the natural flow of water in any watercourse or contaminate or pollute any river, stream, lake, or other body or source of water.
- The Regulation requires any person clearing land for industrial use to take necessary precautions to minimize soil erosion and to avoid pollution of any waters or waterways.<sup>334</sup>
- Compliance with the provisions and requirements of the Alberta *Timber Harvest Planning and Operating Ground Rules* is a standard condition of all commercial or deciduous timber licences and permits. The ground rules include "Standards and Guidelines for Operating Beside Watercourses"<sup>335</sup> to better ensure watercourses

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<sup>332</sup> *Ibid.*, s. 1(II)(viii).

<sup>333</sup> *Supra* note 287, ss. 100 and 142.8.

<sup>334</sup> *Ibid.*, s. 146.

<sup>335</sup> *Supra* note 289 at 15.

are protected. They specify standards regarding roads, landing and bared areas depending on the classification of the watercourse. They also include water area protection buffers.

### ***Wetlands in the Green Area and the Water Act***

See chapter 4, *Water Act, Category #5, regulatory exempted diversions* for a discussion of this matter.

### **THE *DRAINAGE DISTRICTS ACT***

The *Drainage Districts Act* enables the organization of drainage of entire regions of the province. The *Drainage Districts Act*, first passed in 1903, authorizes the drainage of an area in the province following a petition to cabinet by 2/3 of the landowners in the area and cabinet approval. Approved drainage is carried out through a government-like institution created under the Act, called a "drainage district". The drainage district charges landowners benefited by a drainage scheme a fee, much like a local municipal assessment. All drainage must be approved under applicable water legislation and is regulated by the drainage district.

The Alberta *Drainage Districts Act*, like similar Acts in the other prairie provinces, "was designed to facilitate the drainage of large areas of land by co-operative community action, when, prior to its passage, schemes of this magnitude could be easily frustrated by the refusal of a single opponent to cooperate in the project".<sup>336</sup> Currently there are nine districts in the province covering about 188,780 acres, of which about 42,116 are classified as benefited by the drainage for the purpose of assessment. Although the creation of a new drainage district is possible, it is unlikely, as none have been created since 1956.<sup>337</sup>

### **THE *WEED CONTROL ACT***

Wetland areas usually contain a variety of natural vegetation, some indigenous and some alien, introduced species. The *Weed Control Act* could apply to some of this vegetation and could compel a manager to remove it or otherwise control it.

The *Weed Control Act* requires the occupant of land, (whether privately or publicly owned) or if the land is unoccupied, the owner of the land, to:

- destroy all *restricted* weeds located on the *land* to prevent the spread, growth, ripening or scattering of the restricted weeds,
- control in accordance with the Act and the regulations all *noxious* weeds located on the land to prevent the spread, growth, ripening or scattering of the noxious

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<sup>336</sup> *Supra* note 164 at 53.

<sup>337</sup> *Ibid.* Percy relies on Alberta Environment statistics.

- weeds, and
- prevent the spread or scattering of *nuisance* weeds.

"Land" includes the land down to the low water mark of a stream, lake or other body of water that is contiguous to or located on land.<sup>338</sup> The *Weed Designation Regulation*<sup>339</sup> sets out which plants are restricted, noxious and nuisance. Pertinent points regarding the Act are:

- Although the Act is under the administration of the Minister of Agriculture, Food and Rural Development, the minister commonly delegates administration to the local municipality.
- A municipality may by bylaw designate its own list of restricted, noxious and nuisance weeds. However, if the municipality contains any of the weeds designated in a regulation, the bylaw must also designate the weeds.
- Inspectors appointed under the Act may enter land for the purpose of determining compliance.
- The minister may exempt from the operation of the Act or any provision of the Act, a tract of land that is, in the minister's opinion, waste land or sparsely inhabited land.<sup>340</sup>

### ***Provincial policies***

#### ***WETLAND MANAGEMENT IN THE SETTLED AREA OF ALBERTA: AN INTERIM POLICY***

In 1993, the Alberta Water Resources Commission -- an independent advisory board to government on water management (now disbanded) -- developed the *Wetland Management in the Settled Area of Alberta: An Interim Policy*. The stated objectives of this policy include:

- to conserve slough/marsh wetlands in a natural state, in particular permanent wetlands,
- to mitigate degradation or loss of slough/marsh wetland benefits as near to the site of disturbance as possible, and
- to enhance, restore or create slough/marsh wetlands in areas where wetlands have been depleted or degraded.<sup>341</sup>

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<sup>338</sup> *Supra* note 291, s. 1(g).

<sup>339</sup> *Weed Designation Regulation*, Alta. Reg. 138/80. This Regulation was repealed and replaced by the *Weed Regulation*, Alta. Reg. 171/2001, effective August 29, 2001.

<sup>340</sup> *Supra* note 291, ss. 2, 3, 7, 11 and 28.

<sup>341</sup> *Supra* note 14 at 3.



Strategies to meet objectives include to:

- manage wetlands as ecosystems and to sustain wetland benefits through government programs and activities,
- manage wetlands on a regional basis with local contacts and authorities,
- promote public awareness and understanding of wetland functions and importance,
- apply the policy to the management of public lands, including permanent, naturally occurring wetlands that the Crown owns even if surrounded by private land,
- encourage public involvement in wetland decisions, and
- coordinate a provincial wetland inventory and research base.<sup>342</sup>

This policy has been approved by Cabinet, as a provincial policy. Accordingly, the policy reflects our legislators' intent for the management of wetlands and wetland resources. As a result of this policy, Alberta Environment coordinates interdepartmental wetland management planning at the watershed level. Although policy implementation will not prohibit drainage approvals, in many cases the policy gives a *Water Act* director valid grounds to refuse applications. Moreover, the policy provides a framework for realizing integrated wetland management objectives.

#### ***BEYOND PRAIRIE POTHoles - A DRAFT POLICY FOR MANAGING ALBERTA'S PEATLANDS AND NON-SETTLED AREA WETLANDS***

Also in 1993, the Water Resources Commission produced the Draft Policy, *Beyond Prairie Potholes: A Draft Policy for Managing Alberta's Peatlands and Non-settled Area Wetlands*. Unlike the Interim Policy, this Draft Policy focuses on the Green Area of the province. This Draft Policy provides principles by which wetland management should be guided and recommendations about conservation and preservation and drainage. For instance, it recommends that socio-economic and environmental values of wetlands be considered when making decisions concerning development that may alter a wetland. Further, it recommends that proposals involving drainage of wetlands include comparing costs and benefits of drainage with costs and benefits of leaving it in its natural state.

#### **STATUS OF INTERIM POLICY AND DRAFT POLICY AND RECOMMENDATION**

The Interim Policy and Draft Policy were developed prior to the enacting of the *Water*

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<sup>342</sup> This summary is from P. Lynch-Stewart et al., *Wetlands and Government: Policy and Legislation for Wetland Conservation in Canada* (Ottawa: North American Wetlands Conservation Council (Canada), 1999) at 37.

*Act.* The two policies are undergoing review and eventually likely will be combined to produce a comprehensive wetland management policy for Alberta.

It is a recommendation of this Guide that government finalize and strengthen the *Wetland Management in the Settled Area of Alberta: An Interim Policy* and the *Beyond Prairie Potholes - A Draft Policy for Managing Alberta's Peatlands and Non-settled Area Wetlands* and incorporate and forward their wetland and peatland protection and enhancement objectives in laws and policies that currently have the potential to adversely affect wetlands and peatlands.

## **COWS AND FISH**

In 1992, Public Lands initiated the *Cows and Fish Program*. The *Cows and Fish Program* is a partnership between the Alberta Cattle Commission, Trout Unlimited Canada, the Canadian Cattlemen's Association, Alberta Environment, Alberta Agriculture, Food and Rural Development, Fisheries and Oceans Canada and eleven southern Alberta ranches. This program has applied riparian grazing strategies to restore riparian areas or shared existing grazing practices that have been effective in maintaining riparian health. The objectives of the program include:

- to work with ranch families to foster a better understanding of how improvements in grazing management on riparian areas can enhance landscape health and productivity, for the benefit of ranchers and others who use and value riparian areas,
- to promote an understanding of riparian health and function,
- to communicate the benefits of good riparian management,
- to promote non-regulatory solutions to riparian area conflicts, and
- to demonstrate the value of cooperative, interdisciplinary and community efforts in resolving resource conflicts.<sup>343</sup>

## **MANAGEMENT STRATEGY FOR EXPOSED BED AND SHORE PUBLIC LANDS IN THE NORTH EAST AND NORTH WEST REGIONS**

Lastly, in 1994, the Regional Office of the Public Lands Division, Agriculture, Food and Rural Development in St. Paul, Alberta, developed a *Management Strategy for Exposed Bed and Shore Public Lands in the North East and North West Regions*. The strategy provides for limited short-term non-intensive agricultural opportunities while the bed is exposed during climatic periods of low water. This Management Strategy "provides principles and guidelines for the North East and North West Regions to give direction in dealing with ecological and agricultural concerns relating to these newly exposed bed

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<sup>343</sup> *Ibid.*

and shore areas".

These guidelines stipulate that:

- generally, no grazing dispositions will be allowed on the bed and shore,
- authority to graze exposed public land bed and shore may be given when grazing within that same quarter is an existing use; fences will be temporary and removed when waters return,
- agricultural uses of the area will be seasonal only (e.g., hay permits, heat tax permits), and
- projects with the objective of draining the bed and shore lands will not be permitted.



# Chapter Ten

## *Pipelines and Transmission Lines*

### Chapter Ten: Pipelines and Transmission Lines

#### *Introduction*

Project proposals to route pipelines or electrical power transmission lines through or in the area of wetlands are not unusual. Wetland managers might well be concerned over the effects that these projects could have on wetlands and the waterfowl and other wildlife that depend on them. This chapter sets out information on the regulatory procedures involved in approving pipeline and transmission line projects and other points relevant to wetland managers.

#### *Wetlands and Pipelines*

##### REGULATORY JURISDICTION OVER PIPELINES

Under the *Constitution Act, 1867*, federal parliament has authority over "works and undertakings connecting the province with any other or others of the provinces."<sup>344</sup>

Accordingly, a pipeline that connects Alberta to another province or country will fall under federal regulation. By contrast, any pipeline completely within Alberta will fall under provincial regulation. A pipeline within the province that connects to a pipeline or pipelines that traverse the Alberta border could be regulated federally, or provincially, depending on its importance to the overall system. Provincial pipelines fall under the regulation and administration of the Alberta Energy and Utilities Board (EUB).

Interprovincial or international pipelines fall under the regulation and administration of the National Energy Board (NEB) pursuant to the *National Energy Board Act*.<sup>345</sup>

#### *Pipelines under provincial jurisdiction and regulated by the EUB*

##### SURFACE ACCESS AND COMPENSATION

The *Pipeline Act* states that "no person shall construct a pipeline or any part of a pipeline or undertake any operations preparatory or incidental to the construction of a pipeline unless he is the holder of a permit."<sup>346</sup> The EUB requires the proponent of a pipeline to consult with those who may be affected by it. The board's granting of a

<sup>344</sup> *Supra* note 1, combined effects of ss. 92(10)(c) and 91(29).

<sup>345</sup> *National Energy Board Act*, R.S.C. 1985, c. N-7.

<sup>346</sup> *Supra* note 67, s. 7(1).

pipeline permit depends on obtaining the consent of the landowner and occupier of the land through which the pipeline is proposed to run. If disputes arise during negotiations of surface rights or compensation, the pipeline proponent may apply to the Surface Rights Board (or proceed under the *Metis Settlements Act*<sup>347</sup> for land patented under that Act) to attain a right of entry order to undertake the proposed work despite the lack of consent.<sup>348</sup> The Surface Rights Board will also decide upon compensation for affected parties.

#### **A WETLAND MANAGER AS "OWNER" OR "OCCUPIER"**

If a wetland manager is an owner or occupier, then the manager's consent must be acquired prior to the EUB's granting a pipeline permit. If the wetland manager's consent is required, then he or she may be able to negotiate a route that does not damage the wetland or at least be able to negotiate compensation for wetlands mitigation. If negotiations fail, the wetland manager could put his or her concerns before the Surface Rights Board.

The *Pipeline Act* regulations define "occupier" as follows:

- (i) a person, other than the owner, who is in actual possession of land,
- (ii) a person who is shown on a certificate of title or by contract as having an interest in land,
- (iii) an operator granted a right of entry as defined in the *Surface Rights Act* in respect of land pursuant to a right of entry order as defined in that Act,
- (iv) in the case of Crown land, a person shown on the records of the department or other body administering the land as having an interest in the land, or
- (v) the holder of a permit for a coal mine;

The regulations define "owner" as:

- (i) the person in whose name a certificate of title has been issued pursuant to the *Land Titles Act*, or
- (ii) if no certificate of title has been issued, the Crown or other body administering the land.<sup>349</sup>

As noted in primer #4, if a wetland manager holds an interest in land, for example by being the owner, having an interest under a agreement for sale, being a lessee, or by holding a conservation easement, restrictive covenant, profit a prendre or easement, it is critical that the manager register this interest on title. Registration of the interest should be an effective way to give notice to prospective proponents and to better ensure opportunity to participate in surface access and compensation negotiations.

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<sup>347</sup> *Supra* note 42.

<sup>348</sup> See *Pipeline Act*, *supra* note 67, s. 48(1)(b) and *Surface Rights Act*, *supra* note 59, s. 15.

<sup>349</sup> *Pipeline Regulation*, Alta. Reg. 122/87.

## **EUB PERMIT PROCESS**

As mentioned above, a proponent of a provincial pipeline must apply for a permit from the EUB. As set out in primer #4, anyone whose rights could be directly and adversely affected by the EUB's decision has a right to make representations, give evidence and potentially to qualify for intervener funding.

## **CRITERIA USED IN EUB PIPELINE DECISIONS**

In determining whether to grant a pipeline application, the EUB will focus on two issues: the necessity and the purpose of the proposed pipeline. In determining necessity, the board has said that it must "appraise the necessity of the pipeline in relative terms by comparing the public interest aspects of the proposed pipeline to the public interest alternatives to that pipeline".<sup>350</sup> In evaluating purpose, the board has considered matters such as conservation of gas being flared, need for integrated systems and transport efficiency,<sup>351</sup> need for the facility, and the proposed route. Of interest to wetland managers, in the past the EUB has considered the following environmental matters:

- impact of a proposed pipeline on the recreational value of a lake,<sup>352</sup>
- impact on a provincial park,<sup>353</sup>
- effects of noise, visual impact, effect on wildlife and the possibility of leaks and spills,<sup>354</sup> and
- effect on ground water springs.<sup>355</sup>

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<sup>350</sup> *Supra* note 277 at para. 500.

<sup>351</sup> *Ibid.* at para. 502.

<sup>352</sup> *Ibid.* at para. 506.

<sup>353</sup> *Ibid.*

<sup>354</sup> *Ibid.*

<sup>355</sup> *Ibid.*

**ALBERTA ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT STATUTORY AUTHORIZATION**

Depending on the class of the pipeline, an approval under the *Environmental Protection and Enhancement Act* (EPEA) may be required.<sup>356</sup> To determine in which class a pipeline will fall, an index value is calculated by multiplying the diameter of the pipeline in millimetres by the length of the pipeline in kilometres. Class I pipelines are those with an index value greater than 2690 while a lesser index value indicates a Class II pipeline. For example, a pipeline that is 230 millimetres or about 10 inches in diameter will be Class II at 11 km, with an index of 2530, but will be a Class I at 12 km, with an index at 2760.

Class I pipelines require an EPEA conservation and reclamation approval prior to a proponent disturbing the surface of the land.<sup>357</sup> As with all activities that require an approval under EPEA, the proponent must usually give notice of the pipeline proposal.<sup>358</sup> The approval requirements for Class I pipelines include notice provision. Wetland managers who are directly affected have opportunity to submit a statement of concern regarding the development.<sup>359</sup>

Although Class II pipelines do not require an approval, an Alberta Environment publication states that they may be "subject to environmental protection orders and must meet the criteria for reclamation certification".<sup>360</sup> All classes of pipelines however are meant to comply with Alberta Environment guidelines for the planning, routing, construction and reclamation of pipelines.

**WATER ACT AND CODE OF PRACTICE FOR PIPELINES AND TELECOMMUNICATION LINES CROSSING A WATER BODY**

***Exemption from approval and code of practice***

Under the *Water Act* no person shall commence or continue an activity except pursuant to an approval unless otherwise authorized under the Act or exempted by the regulations.<sup>361</sup> The *Water (Ministerial) Regulation* exempts pipelines that are to cross water bodies from the approval requirements, but the proponent must abide by a government *Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body* (the "Code").<sup>362</sup> To determine whether the Code applies to wetlands it is necessary to look at the definition of "water body".

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<sup>356</sup> See primer #5, *Statutory Authorizations*.

<sup>357</sup> See the *Activities Designation Regulation*, *supra* note 62, Sch. 1, Division 3, (b) & s. 2(3)(h) for definition of "pipeline".

<sup>358</sup> See primer #5, *Statutory Authorizations*.

<sup>359</sup> *Environmental Protection and Enhancement Act*, *supra* note 28, ss. 69 and 70 and *Activities Designation Regulation*, *supra* note 62, s. 2 (3)(h) and Sch. 1, Division 3(b). Also see primer #5, *Statutory Authorizations*.

<sup>360</sup> Alberta Environmental Protection, Conservation and Reclamation Information Letter 94-5, "Environmental Protection Guidelines for Pipelines", (July 1994).

<sup>361</sup> *Supra* note 10, s. 36.

<sup>362</sup> *Water (Ministerial) Regulation*, *supra* note 189, s. 3(1).



### ***Code of practice and water bodies***

"Water body", as defined by the Code, is limited to "a water body with defined bed and banks, whether or not water is continuously present, but does not include fish bearing lakes".<sup>363</sup> The government guide to the Code notes that, defined as such, a fen or muskeg, lacking in a defined bed and bank, will not be classified as a water body.<sup>364</sup> One may safely conclude then, that the Code applies to any wetland with a defined bed and bank that is not a fish bearing lake. But what about fens and muskegs and fish bearing lakes? What applies to them?

### ***Fens, muskeg and fish bearing lakes***

It is curious that the Code limits its application to water bodies to those with a defined bed and bank (whatever that might mean) and that the government guide to the Code states that the Code does not apply to fens and muskegs. As noted in chapter 3 of this Guide, the bank is correctly and legally determined by virtue of change of vegetation and accordingly, a fen or muskeg normally will have a bank. Further, the *Water Act* itself defines "water body" more broadly to include wetlands of all types.<sup>365</sup> Given these disparities one must reach one of two conclusions. First, the government guide to the Code is wrong and the Code applies to fens and muskeg. Or, one might conclude the government guide interpretation is correct. If this is so, then under the *Water Act*, pipelines that go through fens or muskeg are not exempt from the approval requirements and must obtain an approval.

It is a recommendation of this Guide that government clarify and correct as appropriate, the *Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body* and interpretory material to ensure consistency with the *Water Act* and the *Surveys Act* and to best protect all wetlands, including fens and muskeg.

### ***Where the Code applies***

The Code of Practice outlines the procedures and requirements that must be undertaken when constructing a pipeline crossing of a water body, including notice, construction and contravention reporting requirements. Enforcement of the Code of Practice falls to Alberta Environment. The *Water (Offences and Penalties) Regulation* outlines offences and penalties.<sup>366</sup>

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<sup>363</sup> Alberta Environment, *Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body* at s. 1(2)(x).

<sup>364</sup> *Guide to the Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body, Including Guidelines for Complying with the Code of Practice* (Edmonton: Alberta Environment, 2000) at 5.

<sup>365</sup> *Supra* note 10, s. 1(1)(hhh). Also see chapter 4.

<sup>366</sup> Alta. Reg. 193/98.

## PROVINCIAL ENVIRONMENTAL ASSESSMENT

A pipeline with an index of less than 2690 is exempt from the environmental assessment provisions of the *Environmental Protection and Enhancement Act*. Environmental assessment of all other pipeline proposals is at the discretion of a director.<sup>367</sup>

## *Federal jurisdiction over pipelines*

### NATIONAL ENERGY BOARD

Pipelines regulated federally fall under the jurisdiction of the NEB. The NEB pipeline approval process is similar to that of the EUB. In making its approval decisions, the NEB takes into consideration safety, environmental protection, and social and economic impacts. Typically the proponent will negotiate an easement to acquire the land interests necessary to route a pipeline, though the board does have authority to expropriate land for this purpose. The board can hold a hearing to settle surface rights and compensation in the event of disagreement.

The Act requires that notice is given to all landowners "from whom land or land rights are required" and there must be a public notice in the affected area.<sup>368</sup> It requires a public hearing for pipelines over 40 kilometres in length, and for other applications when public interest warrants. Opposition to the application can be filed with the secretary of the board within 30 days of receiving the notice or within 30 days of the last day of its publication.<sup>369</sup> An affected landowner or someone with a sufficient interest that would be adversely affected by the routing of the pipeline may apply for a hearing on the matter.<sup>370</sup> A hearing also may be held by the NEB following an application for a certificate of public convenience and necessity from a company wishing to construct or expand a pipeline.<sup>371</sup>

To participate in NEB processes, interested persons or groups must send a letter or facsimile of intervention to the secretary of the NEB stating their interest, reasons for wanting to participate and any issues they want to resolve. Or, interested persons or groups may submit what are called "letters of comment". Once registered as an intervener, parties will receive a copy of the proponent's application and any other material filed by the applicant or other interveners. At the hearing, interveners may

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<sup>367</sup> *Supra* note 99. See primer #6, Environmental Assessment.

<sup>368</sup> *National Energy Board Act*, *supra* note 345, s. 34. Also see NEB Information Bulletin 13, "Pipeline Regulation: An Overview for Landowners and Tenants", (February 1997) at 2.

<sup>369</sup> Intervention by non-owner parties is provided for in the NEB Act *supra* note 345, at s. 34(4), which states that the owner of lands that may be adversely affected may oppose a selected route.

<sup>370</sup> *Ibid.*, at ss. 34(3) and (4).

<sup>371</sup> Notice of the application, "given by publication in newspapers or otherwise", is required by the Board in s. 32 of the *National Energy Board Act*, *supra* note 345.

cross-examine the proponent's witnesses and present their own evidence.<sup>372</sup> Although the NEB has no current authority for awarding intervener funding, during a detailed route hearing, the board may award reasonable costs incurred by a person or group making representation.<sup>373</sup>

#### ***FISHERIES ACT AND PIPELINES***

The crossing of waters frequented by fish requires an approval under the federal *Fisheries Act*.<sup>374</sup> In the absence of an approval, the construction and subsequent alteration and likely deleterious deposit into the waterway would be a violation under section 35(1) or section 36(3) of the Act. The alteration of habitat may also allow the Fisheries Minister to mandate the construction of a fish way during construction operations (s. 22(2)). The minister may also require the equivalent of a screening environmental assessment for potential alterations to or deposits of deleterious substances in fish habitat (s. 37).<sup>375</sup>

#### ***MIGRATORY BIRDS CONVENTION ACT, 1994 AND PIPELINES***

A pipeline proponent must obtain a permit under this Act if the pipeline activity will "disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird".

#### ***NAVIGABLE WATERS PROTECTION ACT***

Section 5 of the *Navigable Waters Protection Act* requires that any work that is undertaken in navigable water must receive approval under the Act. A pipeline is a work for which an approval would be required so long as the waters in question are navigable.<sup>376</sup> However, the *National Energy Board Act* relieves the proponent of this requirement in circumstances where the *National Energy Board Act* statutory authorization process covers matters pertinent to a *Navigable Water Protection Act* statutory authority.<sup>377</sup>

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<sup>372</sup> *Ibid.*

<sup>373</sup> NEB Information Bulletin 13, *supra* note 368, pp 1-5.

<sup>374</sup> *Supra* note 12.

<sup>375</sup> See chapter 11, *Federal Laws and Policies, Fisheries Act*.

<sup>376</sup> See chapter 11, *Federal Laws and Policies, Navigable Waters Protection Act*.

<sup>377</sup> *Supra* note 345, ss. 108 and 109.

### ***CANADIAN ENVIRONMENTAL ASSESSMENT ACT***

The *Canadian Environmental Assessment Act* requires an assessment be conducted for many pipeline activities including:

- any pipeline activities for which a hearing has been ordered by the NEB,<sup>378</sup> and
- activities that require authorization under the *Fisheries Act*, the *Migratory Bird Convention Act* and the *Navigable Waters Protection Act*.<sup>379</sup>

### ***Wetlands and Transmission Lines***

#### **REGULATORY JURISDICTION OVER TRANSMISSION LINES**

The construction of most electrical transmission lines and associated facilities falls within provincial jurisdiction. However the federal government, through the NEB, regulates the construction of certain international or interprovincial transmission lines, or segments of such lines.

### ***Transmission lines under provincial jurisdiction***

#### **EUB STATUTORY AUTHORIZATION AND OVERSIGHT**

The *Hydro and Electric Energy Act* states that no person shall construct a transmission line or any part of a transmission line without an EUB permit, or significantly extend or alter a transmission line without an amended permit.<sup>380</sup> The permit provisions do not apply to a person transmitting power over his or her own land for personal use if the means of transmission do not cross a public highway.<sup>381</sup> Where no permit is required, other statutory authorizations may yet be needed.<sup>382</sup> The Act also gives the EUB, with cabinet approval, the authority to authorize, reject and generally oversee proposed relocations of powerlines, connections of power plants, transmission lines and electrical distribution systems.<sup>383</sup>

#### **SURFACE ACCESS AND COMPENSATION**

Under the *Hydro and Electric Energy Act*, when a proponent requires an estate or interest in Crown land for a transmission line, the proponent may acquire it from the Crown. In other cases, the proponent is to acquire it by negotiation with the owner. At this stage, compensation for entry normally will be settled. However, if no agreement

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<sup>378</sup> See primer #6, *Environmental Assessment*.

<sup>379</sup> See chapter 11, *Federal Laws and Policies* for details.

<sup>380</sup> *Supra* note 68, s. 12.

<sup>381</sup> *Ibid.*, s. 15.

<sup>382</sup> For example, if the placement of power lines requires interference with a wetland, the owner would have to apply for a *Water Act* approval. See chapter 4, *Water Act*.

<sup>383</sup> *Supra* note 68, s. 17.

on entry or compensation has been reached, then the parties will take these matters for determination under the *Surface Rights Act*, (or the *Metis Settlements Act* for lands falling under that Act).<sup>384</sup>

#### **A WETLAND MANAGER AS "OWNER" OF AN ESTATE OR INTEREST**

If a wetland manager is an owner of an estate or interest in land, then the manager's consent must be acquired prior to the EUB's granting a transmission line permit. If the wetland manager's consent is required, then the manager may have input into the route of a transmission line. If negotiations fail, the wetland manager could put his or her concerns before the Surface Rights Board.

The *Hydro and Electric Energy Act*, unlike other resource statutes, does not define "owner" and does not mention "occupier" in this context. Nevertheless, if a wetland manager is the registered owner of land that a transmission line traverses, the manager will surely have to give consent. Also, it is reasonable to assume that if the wetland manager owns a registered interest in the land that will be affected by a transmission line, the wetland manager's consent will be required. A registered interest in land might include a conservation easement.<sup>385</sup>

#### **TRANSMISSION LINES CROSSING WATERCOURSES AND WATER BODIES**

The Act gives proponents the right to construct a transmission line over any water bodies or watercourses owned by the Crown without acquiring any estate or interest in the land, even if the water body or watercourse is surrounded by private land.<sup>386</sup> However, this right is subject to any estates or interests held by anyone other than the Crown.<sup>387</sup> Wetland managers who are concerned about potential transmission line development might attempt to acquire conservation interests in wetlands from the Crown, for example, by way of conservation easement.

#### **EUB PERMIT PROCESS**

As mentioned above, a proponent of a transmission line must apply for a permit from the EUB. As set out in Primer #4, anyone whose rights could be directly and adversely affected by the EUB's decision has a right to make representations, give evidence, and potentially to qualify for intervener funding.

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<sup>384</sup> *Ibid.*, s. 34.

<sup>385</sup> See chapter 13, *Stewardship through Common Law Interests and Conservation Easements*.

<sup>386</sup> If the line also transverses the privately owned land, the landowner's consent would be needed. In negotiating consent, it is open to the landowner to attempt to get the line routed so that it does not affect the wetland.

<sup>387</sup> *Supra* note 68, s. 32. See chapter 3, *Bed and Shores*.

## CRITERIA USED IN EUB TRANSMISSION LINE DECISIONS

In determining whether to grant a permit to construct, alter or extend a transmission line the EUB will focus on two issues: the need for the facility and the proposed route. In considering need, the board focuses on what facilities are needed to handle projected load requirements. In considering route, the EUB has looked at the following regulatory considerations: safety of residents, economic and technical matters, planning and land use, and environmental concerns.<sup>388</sup> In the past, the board has considered the following environmental effects:

- visual impact of transmission lines,
- consequences for wildlife, in particular the risk of birds colliding with the lines,<sup>389</sup> and
- impact on environmentally sensitive areas.<sup>390</sup>

## ALBERTA *ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT* STATUTORY AUTHORIZATION

Any proposed transmission line with a voltage of over 130 kilovolts for which an environmental assessment is required will require an approval under the *Environmental Protection and Enhancement Act* (EPEA).<sup>391</sup>

### *Water Act approval*

Under the *Water Act* no person shall commence or continue an activity except pursuant to an approval unless otherwise authorized under the Act or exempted by the regulations.<sup>392</sup> Since no exemption applies to transmission lines, activities involving the placing or constructing of a transmission line that disturb water normally would need an approval under the *Water Act*.<sup>393</sup>

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<sup>388</sup> *Supra* note 277 at paras. 603, 604 and 605.

<sup>389</sup> *Ibid.* at para. 608.

<sup>390</sup> *Ibid.* at para. 605.

<sup>391</sup> See the *Activities Designation Regulation*, *supra* note 62, s. 2(3)(l). Also see primer #5, *Statutory Authorizations*.

<sup>392</sup> *Supra* note 10, s. 36.

<sup>393</sup> See chapter 4, *Water Act*.

## PROVINCIAL ENVIRONMENTAL ASSESSMENT

A proposal to construct, operate or reclaim a transmission line with a voltage of 500 kilovolts or greater must be assessed under the environmental assessment provisions of the *Environmental Protection and Enhancement Act*. A proposal involving a transmission line with a voltage of less than 130 is exempt from assessment. Environmental assessment of all other transmission line proposals is discretionary on a director.<sup>394</sup>

## *Federal jurisdiction over transmission lines*

### NATIONAL ENERGY BOARD'S LIMITED JURISDICTION

The NEB Act states that the provincial permitting processes will apply in respect of transmission lines, with certain exceptions. The exceptions under which the NEB process applies are:

- for segments that are not covered by a federal cabinet order stating that provincial legislation applies,<sup>395</sup>
- if the proponent elects that the federal process apply in respect of international transmission lines,<sup>396</sup>
- for international transmission lines where the facility is under federal jurisdiction,<sup>397</sup>
- interprovincial transmission lines subject to a federal cabinet order stating that the NEB process applies,<sup>398</sup> or
- for international transmission lines to be constructed on, along or under a navigable water.<sup>399</sup>

The *National Energy Board Act* generally relies on provincial processes for the proponent acquiring the necessary interest in land to construct a transmission line.

### NATIONAL ENERGY BOARD PROCESS

The proponent must publish notice of application to construct a transmission line in local newspapers. An interested party (not limited to directly affected) has opportunity to make a submission to the NEB. The NEB will review submissions and any response by the proponent and any further public reply. The board then either issues a permit,

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<sup>394</sup> *Supra* note 99. See primer #6, Environmental Assessment.

<sup>395</sup> *Supra* note 345, ss. 58.17 and 58.28.

<sup>396</sup> *Ibid.*, ss. 58.23 and 58.28.

<sup>397</sup> *Ibid.*, s. 58.28.

<sup>398</sup> *Ibid.*, ss. 58.28 and 58.4.

<sup>399</sup> *Ibid.*, s. 58.28.

or makes a recommendation to federal cabinet to designate the application. If cabinet accepts the recommendation, a public hearing will be held. Following the hearing, the NEB decides whether to issue a certificate or license.<sup>400</sup>

In making its approval decisions, the NEB's environmental considerations relating to the construction of transmission lines have included:

- land use conflicts,
- soil conservation and surface geology,
- habitats of land animals, wetland furbearers, waterfowl and of rare or endangered plant species,
- spawning beds and fish habitat,
- public recreational values and proximity of parks, historic and archaeological sites and ecological reserves, and
- aesthetics.<sup>401</sup>

#### ***FISHERIES ACT AND TRANSMISSION LINES***

The crossing of waters frequented by fish normally requires an approval under the *Fisheries Act*.<sup>402</sup> In the absence of an approval, the construction and subsequent alteration and likely deleterious deposit into the waterway would be a violation under section 35(1) or section 36(3). The alteration of habitat may also allow the Fisheries Minister to mandate the construction of a fishway during construction operations (s. 22 (2)). The minister may also require a screening environmental assessment for potential alterations or deposits of deleterious substances to fish habitat (s. 37).<sup>403</sup>

#### ***MIGRATORY BIRDS CONVENTION ACT, 1994 AND PIPELINES***

A transmission line proponent must obtain a permit under this Act if the activity will "disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird".<sup>404</sup>

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<sup>400</sup> NEB Information Bulletin 8, "Electricity" (1998) at 3.

<sup>401</sup> NEB Information Bulletin 9, "Protection of the Environment" (August 1996) at 3-4.

<sup>402</sup> *Supra* note 12.

<sup>403</sup> See chapter 11, *Federal Laws and Policies, Fisheries Act*.

<sup>404</sup> *Migratory Birds Regulations*, C.R.C., c. 1035, s.6. Also see chapter 11, *Federal Laws and Policies*.



### ***NAVIGABLE WATERS PROTECTION ACT***

Section 5 of the *Navigable Waters Protection Act* requires that any work that is undertaken in navigable water must receive approval under the Act. A transmission line would be a work for which an approval would be required so long as the waters in question are navigable.<sup>405</sup> However, the *National Energy Board Act* relieves the proponent of this requirement in circumstances where the *National Energy Board Act* statutory authorization process covers matters pertinent to a *Navigable Water Protection Act* statutory authority.<sup>406</sup>

### ***CANADIAN ENVIRONMENTAL ASSESSMENT ACT***

The *Canadian Environmental Assessment Act* requires an assessment be conducted for many transmission line activities including:

- transmission line activities for which a hearing has been ordered by the NEB,<sup>407</sup> and
- activities that require authorization under the *Fisheries Act*, the *Migratory Birds Convention Act* and the *Navigable Waters Protection Act*.<sup>408</sup>

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<sup>405</sup> See chapter 11, *Federal Laws and Policies, Navigable Waters Protection Act*.

<sup>406</sup> *Supra* note 345, s. 58.3.

<sup>407</sup> See primer #6, *Environmental Assessment*.

<sup>408</sup> See chapter 11, *Federal Laws and Policies* for details.



# Chapter Eleven

## *Federal Laws and Policies*

### Chapter Eleven: Federal Laws and Policies

#### *Federal laws or policies that may apply to wetlands*

A number of federal laws or policies can apply to wetlands. In many cases the laws apply whether the wetlands are located on federal, provincial, municipal, or private lands. This chapter discusses federal laws and policies not addressed in depth elsewhere in this Guide. They are:

#### FEDERAL LAWS

- *Fisheries Act*<sup>409</sup>
- *Navigable Waters Protection Act*<sup>410</sup>
- *Migratory Birds Convention Act, 1994*<sup>411</sup>

#### FEDERAL POLICIES

- *The Federal Policy on Wetland Conservation*<sup>412</sup>
- *The Federal Policy on Wetland Conservation Implementation Guide for Federal Land Managers*<sup>413</sup>

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<sup>409</sup> *Supra* note 12.

<sup>410</sup> *Supra* note 13.

<sup>411</sup> *Supra* note 3.

<sup>412</sup> *The Federal Policy on Wetland Conservation* (Ottawa: Environment Canada, 1991).

<sup>413</sup> *The Federal Policy on Wetland Conservation Implementation Guide for Federal Managers* (Ottawa: Environment Canada, 1996).

## ***Fisheries Act***

### **SECTION 35(1) -- FISH HABITAT ALTERATION**

#### ***Introduction***

Section 35(1) of the *Fisheries Act* is called the "habitat alteration, disruption or disturbance" or "HADD" provision. It prohibits the harmful alteration, disruption or destruction of fish habitat without authorization from the federal Minister of Fisheries and Oceans in accordance with any regulations. There are no regulations at this time.

#### ***Fish habitat and wetlands***

Several points are relevant in determining whether a particular wetland constitutes *fish habitat* for the purposes of section 35(1) of the *Fisheries Act*.

- The conventional view, based on an interpretation of case law, has been that the wetland must contain habitat relevant to a recreational, sport or commercial fishery since the *Fisheries Act* applies only to such fish.<sup>414</sup> However, this view recently has been challenged in a scholarly report suggesting that the *Fisheries Act* applies to all fish, and not just those that are relevant to human fisheries.<sup>415</sup> It remains to be seen whether the Department of Fisheries and Oceans (DFO), the administrator of the Act, will officially adopt the "a fish is a fish" view, or continue with its current more anthropocentric view that the Act only applies to fish of importance to recreation, sport or subsistence.
- Fish need not actually be present at the time of the disrupting activity for section 35(1) to apply.<sup>416</sup>

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<sup>414</sup> *R. v. MacMillan Bloedel Limited* (1984), 3 F.P.R. 459 in which several small species were found not to constitute a fishery and therefore not garner the protection of the Act. The fish were separated from commercially viable or sport fish by a waterfall. The court quoted Martland J. in the decision of *R. v. Northwest Falling Contractors Ltd.* [1980] 2 S.C.R. 292, "the area involved in this appeal would have to contain fish having a commercial value, or perhaps a sporting value, or would have to form part of the habitat of the anadromous fish below the waterfalls" (at 461). In dissent Craig J.A. interpreted Martland to protect those commercially insignificant fish as part of the ecosystem, noting Martland wrote "[t]he power to control and regulate that resource must include the authority to protect all those creatures which form a part of that system" (at 466). Also see *R. v. Scobey* (1993), 6 F.P.R. 155 (Yk Terr. Ct) where the court noted "[i]t would be dangerous and naive to take too compartmentalized a view of an ecosystem" (at para. 14) but went on to find that evidence of the necessary link to a fishery was lacking and therefore no violation occurred.

<sup>415</sup> See M. Wenig, *The Fisheries Act as a Legal Framework for Watershed Management* (Master of Laws, University of Calgary, Faculty of Law, 1999) [unpublished], especially chapter 3. This thesis is available for loan at the Environmental Law Centre library. As well, it may be found at the National Library of Canada.

<sup>416</sup> For example, the provision has been found to apply to dredging a portion of a creek. In this case, a farmer excavated a portion of the bed and banks of a creek when it was fairly dry. Although there were no fish present at that time, the court found that it was still viable fish habitat within the meaning of the Act, since it served as habitat at various other times of the year. The court convicted the farmer for violating this section. See *R. v. Brown* [1994] O.J. No.4283, Ont. C.J.

- "Habitat" includes spawning grounds and nursery, rearing, food supply, and migration areas on which fish depend directly or indirectly in order to carry out their life processes.
- DFO guidelines provide further elucidation on what constitutes fish habitat. They include habitat that currently produces fish that are harvested in a subsistence, commercial or recreational fishery:
  - ▶ □ although not directly supporting fish that provides nutrients and/or food supply to adjacent or downstream habitat or that contribute to water quality for fish;
  - ▶ □ that could sustain a new fishery in the future, and, has been identified by the Department of Fisheries and Oceans or a provincial fisheries agency as a candidate for enhancement.<sup>417</sup>

### **SECTION 36(3) - DEPOSIT OF DELETERIOUS SUBSTANCE IN WATER FREQUENTED BY FISH**

#### ***Introduction***

Section 36(3) is called the "pollution prevention" provision. It states that no person shall deposit or permit the deposit of a *deleterious substance* of any type in *water frequented by fish* unless it is done in accordance with regulations. In addition, no person shall deposit or permit the deposit of any deleterious substance in a manner so the substance or any other deleterious substance that results from the deposit may enter any water frequented by fish.

#### ***Frequented by fish***

Section 36(3) could only apply to wetlands that are frequented by fish or that are connected to waters that are frequented by fish. The *Fisheries Act* defines "frequented by fish" to mean "Canadian Fisheries waters" meaning "all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada".<sup>418</sup> The "frequented by fish" includes at least all of those waters, coastal or inland, which are of importance to a commercial, sport or recreation fishery. It may apply to waters frequented by other fish if the view described under the first bullet under *Fish habitat and wetlands* above is accepted.

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<sup>417</sup> Fisheries and Oceans Canada, *Habitat Conservation and Protection Guidelines*, 2<sup>nd</sup> ed., (Ottawa: Fisheries and Oceans Canada, 1998), online: Fisheries and Oceans Canada <[www.ncr.dfo.ca/habitat/c&pguide/english/index\\_e.htm](http://www.ncr.dfo.ca/habitat/c&pguide/english/index_e.htm)> (last modified: 23 September 1999).

<sup>418</sup> *Supra* note 12, s. 2.

### ***Deleterious substance***

The *Fisheries Act* defines the deleterious substance as:

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water.<sup>419</sup>

The breadth of this definition allows for many substances to fall within the purview of section 36(3). However, large allowances for deposition of deleterious substances of many industries (primarily industrial effluent) are nevertheless allowed through regulations under this Act. Many prosecutions revolve around industry exceeding levels prescribed by regulations or violating their approvals.

Case law has provided many points on deleterious substances:

- To be designated a "deleterious substance" the water itself need not be proved to be deleterious rather only the substance must be shown to be deleterious to fish.<sup>420</sup>
- Seemingly inert substances may come under the definition of deleterious substance as deposition of silt, sand, clay, and logging debris have all been considered valid for prosecution under the Act.<sup>421</sup>
- Nevertheless, the deleterious nature will often turn on the facts of the case.<sup>422</sup>

### **SECTION 32 – DESTRUCTION OF FISH**

This section prohibits anyone from destroying fish by any means other than fishing, unless in accordance with a statutory authorization or as authorized by regulations. It is narrower than section 35(1) and 36(3) in that it applies only to fish destruction and not to habitat.

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<sup>419</sup> *Ibid.*, s. 34.

<sup>420</sup> *Regina v. MacMillan Bloedel (Alberni) Limited*, (1979) 2 F.P.R. 182 (B.C.C.A).

<sup>421</sup> *R. v. Boise Cascade Canada Ltd.*, (1994) 6 F.P.R. 264 (O.C.J. Gen. Div.), *R. v. Jack Cewe Ltd.* (1981) 3 F.P.R. 73, *R. v. Goodland Developments Ltd. et al* (1986) 4 F.P.R. 225.

<sup>422</sup> See *R. v. West Fraser Mills Ltd #1* (1992) 6 F.P.R. 70, (B.C. Prov. Ct).

### **ARTIFICIAL WATER BODIES AND THE *FISHERIES ACT***

The *Fisheries Act* applies to artificial water bodies as well as natural water bodies provided that the water body is habitat for the purposes of the Act. In other words if a water body provides spawning grounds and nursery, rearing, food supply, and migration areas on which fish depend directly or indirectly in order to carry out their life processes, the *Fisheries Act* applies, regardless of whether the water body is natural or human made. This means, for example, that some irrigation reservoirs and canals are subject to the *Fisheries Act*. According to a representative of Alberta Environment, Fisheries and Wildlife Division<sup>423</sup> an understanding has been reached between the province and the Department of Fisheries and Oceans as to when a *Fisheries Act* authorization is required in the construction and operation of irrigation canals and reservoirs.

### **ENVIRONMENTAL ASSESSMENT AND THE *FISHERIES ACT***

Applying for a statutory authorization to carry out otherwise prohibited *Fisheries Act* activities will trigger the environmental assessment provisions of the *Canadian Environmental Assessment Act*. Regulations under the Act<sup>424</sup> specifically make the following subject to federal environmental assessment:

- The destruction of fish by any means other than fishing, where the destruction requires the authorization of the Minister of Fisheries and Oceans under section 32 of the *Fisheries Act* or authorization under regulations.
- The harmful alteration, disruption or destruction of fish habitat by means of physical activities carried out in a water body, including dredge or fill operations, that require the authorization of the Minister of Fisheries and Oceans under section 35(1) of the *Fisheries Act* or authorization under regulations.
- The harmful alteration, disruption or destruction of fish habitat by means of draining or altering the water levels of a water body that require the authorization of the Minister of Fisheries and Oceans under section 35(1) of the *Fisheries Act* or authorization under regulations.
- The harmful alteration, disruption or destruction of fish habitat by means of erosion control measures adjacent to a water body that require the authorization of the Minister of Fisheries and Oceans under section 35(1) of the *Fisheries Act* or authorization under regulations.

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<sup>423</sup> E-mail from K. Crutchfield, Head, Resource Conservation and Planning Branch, Fisheries and Wildlife Management Division, Alberta Environment, (7 July, 2001). Mr. Crutchfield provided this information in response to questions raised at workshops in Brooks and Edmonton (*see* the Introduction).

<sup>424</sup> From the *Law List Regulations*, *supra* note 85 and the *Inclusion List Regulations*, *supra* note 86.

- The harmful alteration, disruption or destruction of fish habitat by means of the removal of vegetation in or adjacent to a water body that requires the authorization of the Minister of Fisheries and Oceans under subsection 35(1) of the *Fisheries Act* or authorization under regulations.
- The deposit of a deleterious substance that requires authorization under regulations.

## ENFORCEMENT OF THE FISHERIES ACT

### *Enforcement tools*

Violating sections 35(1), 36(3) and 32 (among other sections) are offences under the *Fisheries Act*. The Act provides considerable enforcement tools including:

- the right to require and review plans, proposals and specifications relating to activities that could impact a fishery,<sup>425</sup>
- limited powers of inspection and seizure,<sup>426</sup> and
- for section 35(1) and 36(3) offences, fines ranging from a maximum of \$300,000 to \$1,000,000 per day that the offence is being committed and, in some cases, imprisonment of the offender.

### *Private prosecutions and the potential to split penalties with private informant*

The *Fishery (General) Regulations*<sup>427</sup> provide that where a prosecution proceeds by way of private information that one half of the proceeds of any penalty resulting from conviction, and one half of the net value of any goods forfeited by virtue of the offence and prosecution, shall be paid to the private informant. This unique provision offers some monetary incentive for citizens to assist government with the prosecution of offences under this Act.<sup>428</sup>

### *Enforcement authority*

Current enforcement of the *Fisheries Act* is as follows:

- Enforcement falls primarily to DFO and its officers. However, through a Memorandum of Understanding, Environment Canada oversees the administration and enforcement of the pollution prevention provision (s.36 (3)).

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<sup>425</sup> *Supra* note 12, s. 37.

<sup>426</sup> *Ibid.*, s. 38.

<sup>427</sup> SOR/93-53, ss. 60-62.

<sup>428</sup> For more information on private prosecutions, see primer #5 – *Statutory Authorizations*.



- Some of the enforcement responsibilities under section 36(3) have also been given to several of the provinces through federal provincial agreements such as the *Canada-Alberta Administrative Agreement for the Control of Deposits of Deleterious Substances Under the Fisheries Act*.<sup>429</sup>
- The HADD provision (section 35(1)) of the *Fisheries Act* remains within DFO enforcement.

The DFO has opened new offices in the prairie provinces including ones in Edmonton, Peace River, Lethbridge and Calgary to more effectively administer and enforce the HADD provisions.

### ***Navigable Waters Protection Act***

#### **SECTION 5**

Section 5 of the *Navigable Waters Protection Act* may be relevant to the protection of wetlands. This section prohibits any work from being "built or placed in, on, over, under, through or across any navigable water" without the approval of the Minister of Transport. "Work" is defined as "any bridge, boom, dam, wharf, dock, pier, tunnel or pipe and the approaches or other works necessary or appurtenant thereto, any dumping of fill or excavation of materials from the bed of a navigable water, any telegraph or power cable or wire, or any structure, device or thing, whether similar in character to anything referred to in this definition or not, that may interfere with navigation" (s. 3).

#### **OWNERSHIP OF BED, SHORE AND WATER AND THE *NAVIGABLE WATERS PROTECTION ACT***

The purpose of this Act is to protect the public right of navigation on the waterways within Canada. As such, the right of public navigation is not subjected to the owner of the bed and shores of the water body, even when it is the Crown.<sup>430</sup> Moreover, the provinces are constitutionally unable to alter or revoke the right to public navigation.<sup>431</sup> Only federal parliament or a minister with authority under the Act may authorize a work to go ahead if there is an affect on the public right to use waterways for navigation. This holds as much true for a recreational canoe as it does for a commercial tanker.<sup>432</sup>

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<sup>429</sup> Online: <[www.pnr-rpn.ec.gc.ca/pollution/e00s62.en.html](http://www.pnr-rpn.ec.gc.ca/pollution/e00s62.en.html)>.

<sup>430</sup> See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 54, [1992] 2 W.W.R. 193 as cited in *International Minerals & Chemicals Corporation (Canada) Limited v. Canada (Minister of Transport)* (26 November 1992), T-1354-92 (F.C.T.D.).

<sup>431</sup> *Ibid.*

<sup>432</sup> *International Minerals & Chemicals Corporation (Canada) Limited v. Canada (Minister of Transport)*, *supra* note 430.

## **WETLANDS AND NAVIGABLE WATERS**

Section 5 will prohibit any works to be legally built or placed in relation to a wetland without a statutory authorization, if the wetland is a navigable water. It is therefore important to a wetland manager to determine whether a wetland is a navigable water if a proponent proposes any development, drainage or other work. The Act defines "navigable water" to include "a canal and any other body of water created or altered as a result of the construction of any work".<sup>433</sup> Courts have made many statements relevant to navigable waters including:

- The federal court's concept of an "aqueous highway" used to describe the right, implies that the waterway must be of use for travel. This would suggest that "navigable water" would not include such water bodies as isolated ponds or small lakes, or a "prairie slough that fills with spring melt and virtually dries up in late summer".<sup>434</sup>
- Similarly rivers and streams which are only navigable during heavy runoff (which is short in duration) will likely not fit the "navigable water" definition.<sup>435</sup>
- A watercourse need not be used for navigation in fact. The potential for such use is sufficient.<sup>436</sup>
- The navigation potential need not be continuous, in time or in flow, as with a navigable river having rapids or waterfalls.<sup>437</sup>

Applying the above, section 5 would apply only to certain wetland areas. For example, a work on a small isolated pond or marsh may not require an approval under the Act while a pond which is connected by a potentially navigable stream or other potentially navigable waters probably would.

## **ENVIRONMENTAL ASSESSMENT AND THE *NAVIGABLE WATERS PROTECTION ACT***

Activities that require a statutory authorization under section 5 of the Act trigger the environmental assessment provisions of the *Canadian Environmental Assessment Act*.<sup>438</sup>

## **ENFORCEMENT OF THE *NAVIGABLE WATERS PROTECTION ACT***

The Act creates a range of offences and penalties for non-compliance, though generally they are lower than those of the *Fisheries Act*. The Canadian Coast Guard is responsible for administration and enforcement of the Act.

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<sup>433</sup> *Supra* note 13, s. 2.

<sup>434</sup> *Supra* note 432.

<sup>435</sup> *Ibid.*

<sup>436</sup> *Ibid.*, citing *Re Coleman v. Ontario (Attorney General)* (1983), 143 D.L.R. (3d) 608 (Ont. H.C.) at 613-615.

<sup>437</sup> *Ibid.*

<sup>438</sup> *Law List Regulations*, *supra* note 85, s. 2.

## ***Migratory Birds Convention Act, 1994***

### **ABOUT THE ACT AND RELEVANT PROVISIONS**

The *Migratory Birds Convention Act, 1994* ("MBCA") implements a 1916 treaty between the United Kingdom, on behalf of Canada, and the United States. This Act applies to migratory birds throughout Canada whether they are on federal, provincial or municipal public land, or on private land.<sup>439</sup>

For the purposes of the Act, "migratory birds" means:

1. Migratory Game Birds:—

- (a) Anatidae or waterfowl, including brant, wild ducks, geese, and swans;
- (b) Gruidae or cranes, including little brown, sandhill, and whooping cranes;
- (c) Rallidae or rails, including coots, gallinules and sora and other rails;
- (d) Limicolae or shorebirds, including avocets, curlew, dowitchers, godwits, knots, oyster catchers, phalaropes, plovers, sandpipers, snipe, stilts, surf birds, turnstones, willet, woodcock, and yellowlegs;
- (e) Columbidae or pigeons, including doves and wild pigeons.

2. Migratory Insectivorous Birds: Bobolinks, catbirds, chickadees, cuckoos, flickers, flycatchers, grosbeaks, hummingbirds, kinglets, martins, meadowlarks, nighthawks or bull bats, nuthatches, orioles, robins, shrikes, swallows, swifts, tanagers, titmice, thrushes, vireos, warblers, waxwings, whippoorwills, woodpeckers, and wrens, and all other perching birds which feed entirely or chiefly on insects.

3. Other Migratory Nongame Birds: Auks, auklets, bitterns, fulmars, gannets, grebes, guillemots, gulls, herons, jaegers, loons, murre, petrels, puffins, shearwaters, and terns.<sup>440</sup>

The Act and regulations regulate hunting and similar takings of migratory birds and disturbing, destroying or taking nests or eggs of migratory birds. The main regulations are the *Migratory Bird Sanctuary Regulations*<sup>441</sup> which apply only to federally designated migratory bird sanctuaries, and the *Migratory Bird Regulations*<sup>442</sup> which apply everywhere else in Canada.

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<sup>439</sup> *Supra* note 3.

<sup>440</sup> Article I of the *Migratory Birds Convention*, attached as a Schedule to the *Migratory Birds Convention Act, 1994*.

<sup>441</sup> *Supra* note 248.

<sup>442</sup> *Supra* note 404.

## HOW IS THE ACT RELEVANT TO WETLANDS

### ***Bird sanctuaries and beyond***

There are four federal bird sanctuaries in Alberta.<sup>443</sup> Regulations that apply inside sanctuaries are similar to those that apply outside of sanctuaries. This section focuses on information relevant to wetlands outside of federal sanctuaries. Should an issue arise relating to a federal bird sanctuary, a wetland manager should consult the *Migratory Bird Sanctuary Regulations*.

### ***Hunting, takings and indirect takings, by, for example, draining***

Section 5 of the *Migratory Birds Regulations* prohibits anyone the hunting of a migratory bird without a permit. The Regulation defines "hunt" broadly to mean chase, pursue, worry, follow after or on the trail of, lie in wait for, or attempt in any manner to capture, kill, injure or harass a migratory bird, whether or not the migratory bird is captured, killed or injured.<sup>444</sup> The Act applies to both direct and indirect takings. A direct taking occurs where a taking is the direct result of an action. An example is killing a bird as a direct result of a hunter shooting it. An indirect taking occurs when the taking is incidental to some other activity.<sup>445</sup> For example, killing birds through logging operations. Here the direct result is felling trees, and the indirect, incidental result is killing of birds that nested in the trees. Indirect takings normally will be unintentional, whereas, direct takings normally are intentional. Other common activities that could involve indirect takings include resource development such as mining, oil and gas development, agricultural activities, and water development activities such as diversions and drainage.

### ***Migratory bird nests and eggs***

Section 6 of the *Migratory Birds Regulations* states that no person shall disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird, unless he or she has a permit. This provision applies to both direct and indirect takings.<sup>446</sup> For example, it applies if a person snatches migratory birds' eggs out of

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<sup>443</sup> Blue Quills, Meanook, Spiers Lake and Saskatoon Lake.

<sup>444</sup> *Supra* note 404.

<sup>445</sup> It is not always clear whether the regulations apply to indirect takings. However, a recent PowerPoint presentation by Environment Canada's Canadian Wildlife Service clarifies the federal government's position. The second slide states "Incidental Take • Is unintentional take, incidental to some other activity, prohibited by the Migratory Bird Convention? – Yes". A later slide provides "• there is not solid basis to provide an exemption to the Convention's prohibitions in the case of incidental take". Copy of slide presentation provided by P. Gregoire, Wildlife Biologist, Canadian Wildlife Service, Habitat Conservation and Assessment Division, (2001).

<sup>446</sup> *Ibid.*

nests for a tasty breakfast without a permit under the *Migratory Birds Convention Act, 1994* (a direct taking) as well as to a person who drains a wetland and unintentionally destroys migratory birds' eggs without a permit under that Act (an indirect taking).<sup>447</sup>

#### **DEPOSIT OF OIL OR OTHER SUBSTANCES HARMFUL TO MIGRATORY BIRDS**

Section 35 of the *Migratory Birds Regulations* states that "no person shall deposit or permit to be deposited oil, oil wastes or any other substance harmful to migratory birds in any waters or any area frequented by migratory birds" unless allowed by regulations, or allowed by permit. Currently there are no regulations under this section.

A question of interest to wetland managers is whether section 35's prohibition is limited to oil, oil wastes and like substances, or whether the prohibition extends to substances harmful to migratory birds. The Alberta Federal Court Trial Division in *Alberta Wilderness Association v. Cardinal River Coals Ltd.*<sup>448</sup> (the Cheviot Mine Case) broadly interpreted section 35 to mean any harmful substance. The substances in question in that case were rocks. The Court said "while rock might indeed be inert...millions of tonnes of it deposited into creek beds constitutes a threat to the preservation of migratory birds that nest there, and, therefore, in such circumstances is "harmful" and, thus, within the meaning of that term as used in s. 35(1) of the [*Migratory Birds Regulations*]" .

#### **ENVIRONMENTAL ASSESSMENT AND THE *MIGRATORY BIRDS CONVENTION ACT, 1994***

Applying for a statutory authorization to carry out otherwise prohibited *Migratory Birds Convention Act, 1994* activities will trigger the environmental assessment provisions of the *Canadian Environmental Assessment Act*. Regulations under the *Canadian*

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<sup>447</sup> The North American Commission for Environmental Cooperation (NACEC) may soon speak to the issue of indirect takings as they relate to the United States' legislation enacting the *Migratory Birds Convention*. The NACEC was established under the North American Agreement on Environmental Cooperation (NAAEC) that was made pursuant to the North American Free Trade Agreement between Canada, the United States and Mexico. The NACEC Council is composed of the environment ministers (or equivalent) of Canada, Mexico and the United States. Article 14 of the NAAEC authorizes the Secretariat to consider any submission asserting that a Party to the NAAEC has failed to effectively enforce its environmental law.

In response to a dozen citizen submissions to the NACEC that alleged that the United States is failing to enforce its *Migratory Bird Treaty Act* (MBTA), the NACEC Secretariat recommended to the NACEC Council that a factual record be developed. If the Council pursues this course, the information it obtains from the factual record will enable it to give its view on whether the United States has failed to enforce the Act.

The citizens' submissions focus on a provision in the U.S. MBTA that is relevantly equivalent to section 5 of the Canadian *Migratory Birds Convention Act, 1994*. The section of the MBTA in question prohibits any person from killing or "taking" migratory birds "by any means or in any manner", unless the U.S. Fish & Wildlife Service (FWS) issues a valid permit. The submission alleges, "the United States deliberately refuses, however, to enforce this clear statutory prohibition as it relates to loggers, logging companies, and logging contractors. As a matter of internal policy, the United States has exempted logging operations from the MBTA's prohibitions without any legislation or regulation that authorizes such an exception". These allegations are from submission SEM-99-002 brought forward by the Alliance for the Wild Rockies, Center for International Environmental Law (CIEL), et al., in 1999.

<sup>448</sup> [1999] 3 F.C. 425, (1998), 165 F.T.R. 1 (F.C.T.D.).

*Environmental Assessment Act*<sup>449</sup> specifically make the following subject to federal environmental assessment:

- The killing of a migratory bird or the taking of a migratory bird or its nest or eggs that requires a scientific permit under the *Migratory Birds Regulations*.
- The killing of an endangered migratory bird that is considered to be a danger to aircraft operating at an airport that requires a permit under the *Migratory Birds Regulations*.
- The collection of eiderdown from migratory birds that requires a permit under the *Migratory Birds Regulations*.
- The introduction into Canada for the purpose of sport, acclimatisation or release from captivity of a species of migratory bird not indigenous to Canada that requires consent in writing under the *Migratory Birds Regulations*.
- The deposit of oil, oil wastes or any other substance harmful to migratory birds in waters or in any area frequented by migratory birds that requires an authorization under the *Migratory Birds Regulations*.
- The killing, capture or possession of any migratory bird or the collection or possession of carcasses, eggs or nests of any migratory bird that requires a special permit under the *Migratory Birds Regulations*.

#### **ENFORCEMENT OF THE *MIGRATORY BIRDS CONVENTION ACT, 1994***

The Royal Canadian Mounted Police, federal Canadian Wildlife Service officers and Alberta Natural Resources Service Conservation Officers enforce the Act in Alberta.<sup>450</sup> The Natural Resources Service Conservation Officers are appointed as a class under section 6(1) of the Act and there is an agreement with the province under 6(2).

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<sup>449</sup> From the *Law List Regulations*, *supra* note 85 and the *Inclusion List Regulations*, *supra* note 86.

<sup>450</sup> Section 6 of the Act states that the minister may designate any person or class of persons to act as game officers for the purposes of this Act and the regulations, and all members of the Royal Canadian Mounted Police are game officers for the purposes of this Act and the regulations. Alberta Natural Resources Services officers are appointed under section 6 and there is a bi-lateral agreement between the province and the federal government.

## *Federal policies*

### *The Federal Policy on Wetland Conservation and No Net Loss, Implementing "No Net Loss" Goals to Conserve Wetlands in Canada*

#### **INTRODUCTION**

*The Federal Policy on Wetland Conservation* commits the federal government to wetland conservation in carrying out federal programs. As the document says:

Although wetland conservation is a shared federal, provincial, and territorial responsibility, the federal government has a particular role to play. Wetlands are critical to federal responsibilities for maintaining the quality of the environment, migratory bird populations, inland and ocean fisheries, and international or transboundary resources such as water and wildlife.<sup>451</sup>

The Policy objective is that "the Federal Government promote the conservation of Canada's wetlands to sustain their ecological and socio-economic function, now and in the future". In support of this objective, the policy sets out goals that the federal government will strive to achieve in cooperation with the provinces and territories and the Canadian public. The goals include:

- recognition of wetland functions in resource planning, management and economic decision making with regard to all federal programs, policies and activities,
- securement of wetlands of significance to Canadians,
- recognition of sound, sustainable management practices in sectors such as forestry and agriculture that make a positive contribution to wetland conservation while also achieving wise use of wetland resource,
- utilisation of wetlands in a manner that enhances prospects for their sustained productive use by future generations, and
- no net loss of wetland functions on all federal lands and waters.

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<sup>451</sup> *Supra* note 412 at 4.

## NO NET LOSS PRINCIPLE

Key among the Policy's strategies is the *no net loss* principle. To DFO, "no net loss" means "the Department will strive to balance unavoidable habitat losses with habitat replacement on a project-by-project basis so that further reductions to Canada's fisheries resources due to habitat loss or damage may be prevented".<sup>452</sup> The Federal Policy commits all federal departments to the goal of *no net loss of wetland function*. This would include implementation:

- on federal lands and waters,
- in areas affected by the implementation of federal programs where the continuing loss or degradation of wetlands has reached critical levels, and
- where federal activities affect wetlands designated as ecologically or socio-economically important to a region.

### *Implementation Guide for Federal Land Managers*

This document gives direction to federal land managers on how to implement *The Federal Policy on Wetland Conservation*. The Guide states that it does not cover policies, programs or projects not related to federal land management, though suggests that such a guide might be prepared in the future.<sup>453</sup> The Policy is intended to provide direction to assist federal land managers when "making decisions that may affect wetlands, whether these involve granting permits, constructing facilities, buying, selling or leasing land, or preparing a master land use plan".<sup>454</sup>

The Guide makes it the responsibility of each federal authority to develop plans and directives for wetland conservation that are specific to their operations.<sup>455</sup> It encourages federal land managers to take a proactive approach by conducting wetland inventories and evaluations, developing wetland conservation guidelines, establishing contacts and partnerships and integrating the Policy into decision making.<sup>456</sup> Regarding developing no net loss of wetland function guidelines, the Guide states that no net loss directives should contain the following elements:

- a sequence of mitigation alternatives (e.g. avoidance, minimisation and compensation, with criteria for applying each alternative),
- compensation requirements,
- compensation alternatives to restoration or creation of wetlands,

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<sup>452</sup> *The Department of Fisheries and Oceans Policy for the Management of Fish Habitat* (Ottawa: Department of Fisheries and Oceans, 1986), at 14.

<sup>453</sup> *Supra* note 413 at 7.

<sup>454</sup> *Ibid.*

<sup>455</sup> *Ibid.* at 16.

<sup>456</sup> *Ibid.* at 7.



- monitoring and maintenance, and
- recognition that the Policy came into effect in 1992 and is not retroactive.<sup>457</sup>

The Guide also includes advice to federal authorities who are responsible authorities under the *Canadian Environmental Assessment Act* on how to carry out their duties.<sup>458</sup> Of note, it states that in assessing a potential project:

- efforts should be made to avoid adverse effects through project siting and design,
- compensation cannot be used to reduce the significance of effects, in making a determination whether there are significant adverse effects,<sup>459</sup>
- if the responsible authority determines that there are no significant adverse effects that cannot be mitigated, the authority must nevertheless ensure the implementation of appropriate avoidance and compensation mitigation measures for any residual effects on wetland functions.

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<sup>457</sup> *Ibid.* at 18.

<sup>458</sup> *Ibid.* at 24. See primer #6, *Environmental Assessment*.

<sup>459</sup> *Ibid.* at 24.



# Chapter Twelve

## *Wetlands and International Designations and Commitments*

### Chapter Twelve: Wetlands and International Designations and Commitments

Bestowing a wetland with international recognition is one way of giving it profile that should naturally lead to its protection. This chapter discusses the following three important international designations:

1. *Ramsar Convention on Wetlands of International Importance*,<sup>460</sup>
2. *Important Bird Areas*,<sup>461</sup>
3. *Western Hemisphere Shorebird Reserve Network*.

#### ***Ramsar Convention on Wetlands of International Importance***

The Ramsar Convention arose out of a United Nations international meeting held at Ramsar, Iran, in 1971. The Convention provides a framework for national action and international cooperation for the conservation and wise use of wetlands and wetland resources. Currently there are 23 contracting parties to the Convention. Under the Convention, contracting parties agree to designate sites for inclusion on the List of Wetlands of International Significance and to pursue protective measures to designated sites. Ramsar sites are designated for a site's uniqueness, value for support of plants and animals, and other related criteria. Currently there are 1050 designated sites covering 78.7 hectares. There are 36 Canadian sites, 4 of which are in Alberta.<sup>462</sup>

Designation as a Ramsar site does not in and of itself legally protect a wetland from all development. However it should be very relevant regarding any development proposals. First, contracting parties have agreed to pursue protective measures, such as under the pertaining protective areas legislation.<sup>463</sup> Second, contracting parties agree to provide signage for every Ramsar site describing that the wetland is protected under the

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<sup>460</sup> *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, 2 February 1971, 11 I.L.M. 963 (1972) (in force 1975).

<sup>461</sup> *Important Bird Areas* is a program of Birdlife International; information is available on the website <[www.ibacanada.com](http://www.ibacanada.com)> (date accessed: January, 2001).

<sup>462</sup> "About the Convention on Wetlands (Ramsar, Iran, 1971)" online: Ramsar Convention on Wetlands <[www.ramsar.org/index\\_about\\_ramsar.htm](http://www.ramsar.org/index_about_ramsar.htm)> (date accessed 29 January 2001).

<sup>463</sup> See chapter 6, *Wetland Protection through Designation*.

Convention and stating who is responsible for protection and management. The signage itself should thwart development interest. Third, there should be pressure by the levels of government involved in the designation to conserve the site since the Convention requires regular reporting and loss of wetland conservation values could lead to de-designation. Fourth, designation gives rise to community involvement and preservation oriented management plans, both which will assist in maintaining the values that lead to the RAMSAR designation.

### ***Important Bird Areas***

An Important Bird Area, or an "IBA" is a designation under an international program called "Birdlife International", which started in Europe in the 1980's. IBAs provide essential habitat for species of breeding or non-breeding birds.<sup>464</sup> Birdlife Partners work with all levels of government to encourage IBA designation. The IBA program identifies standard criteria for designation including a site's holding significant numbers of endangered or threatened species; threatened or endangered species within restricted ranges; an assemblage of species restricted to a biome or unique/threatened natural community type; and a site where birds concentrate in significant numbers when breeding, in winter or during migration.

Although IBA designation in itself provides no legal protection, IBA partners promote complementary statutory protection such as designation as a reserve or a park, and private stewardship arrangements. IBA partners typically will include key provincial agencies, non-governmental organizations and local stakeholders. IBA partners encourage minimizing adverse effects and maximizing positive effects of legislation or policies which can significantly impact IBAs such as laws or policies on agriculture, forestry, land-use planning, privatization, land ownership, environmental impact assessment, and hunting. IBAs have been designated in over 100 countries. Canada launched its IBA program in February 1996 and since then 36 IBA sites have been designated in this country totalling over 13 million hectares of designated wetlands and associated uplands,<sup>465</sup> including Beaverhill Lake near Tofield, Alberta.

### ***Western Hemisphere Shorebird Reserve Network***

The Western Hemisphere Shorebird Reserve Network (WHSRN) is a voluntary coalition of over 160 private and public organizations in North and South America who work together to conserve, restore and manage critical shorebird habitat in the Americas. The WHSRN Council consists of the National Audubon Society, the Canadian Wildlife Service, the International Association of Fish and Wildlife Agencies, the World Wildlife Fund, the Manomet Centre for Conservation Sciences situated in Manomet, Massachusetts, and representatives from Costa Rica and Argentina. Manomet serves as

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<sup>464</sup> "Frequently Asked Questions" online: Important Bird Areas of Canada <[www.ibacanada.com/faq.htm](http://www.ibacanada.com/faq.htm)> (date accessed: 27 January 2001).

<sup>465</sup> Online: Environment Canada, The Green Lane, <[www.cws-scf.ec.gc.ca/habitat/Ramsar](http://www.cws-scf.ec.gc.ca/habitat/Ramsar)> (date accessed: 27 January 2001).

the WHSRN Secretariat.<sup>466</sup> WHSRN was established in 1985. It evolved out of internationally coordinated research carried out that identified key shorebird habitat in the Americas and discussed the need for protection. Forty-six sites have received WHSRN designation totalling more than 20 million acres in North and South America. Five sites are in Canada, one being Beaverhill Lake in Alberta.

There are four categories of WHSRN sites:

- *Hemispheric Site* - sites that support at least 500,000 shorebirds annually or 30% of a species flyway population,
- *International Sites* - sites that support at least 100,000 shorebirds annually or 15% of a species flyway population,
- *Regional Sites* - sites that support at least 20,000 shorebirds annually or 5% of a species flyway population, and
- *Endangered Species Sites* - sites that are critical to the survival of endangered species (no minimum number of birds required).

While designation as a WHSRN site does not in and of itself bestow legal protection to a site, nevertheless it is relevant to the site's protection. Like Ramsar and IBA designation, WHSRN designation brings profile to a wetland and makes it more likely to be a candidate for legislated legal protection, or through stewardship arrangements with governmental and non-governmental organizations.

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<sup>466</sup> See the website <[www.manomet.org](http://www.manomet.org)> (date accessed: 29 January 2001).



# Chapter Thirteen

## *Stewardship through Common Law Interests and Conservation Easements*

### Chapter Thirteen: Stewardship through Common Law Interests and Conservation Easements

This chapter canvasses a number of legal stewardship tools that a wetland manager might be interested in when looking for ways to protect wetland areas. They are stewardship tools in that they rely on the notion that landowners are stewards of the ecological values of their land. The tools enable landowners voluntarily to place binding restrictions on land use to protect their natural values. The extent of protection depends on the nature of the tool and legal restrictions. This chapter focuses on stewardship common law tools and special issues concerning statutory conservation easements.

#### ***Caution regarding need for Crown consent and Water Act authorization***

In reading this chapter, wetland managers must remember that the bed and shores of naturally occurring permanent wetlands belong to the Crown.<sup>467</sup> No legal agreement can bind the Crown as owner of bed and shores unless the Crown signs on. As well, any work or mitigation that can affect bed or shores should be done only with the Crown's written permission. In addition, agreements must take into account that no one has a right to disturb or divert water from water bodies or watercourses without the appropriate statutory authorization under the *Water Act*.<sup>468</sup> No work or undertaking should proceed that requires authorization under the *Water Act* unless it has been obtained.

#### ***Common law tools***

This part briefly describes tools rooted in common law which may be used by private landowners and, if authorized by legislation, any level of government. The part first describes the nature of the tool and then describes how it might be used to aid wetland area protection.<sup>469</sup>

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<sup>467</sup> See chapter 3, *Bed and Shores*.

<sup>468</sup> See chapter 4, *Water Act*.

<sup>469</sup> This part incorporates a revised version of a portion of A. Kwasniak, *Reconciling Ecosystem and Political Borders: A Legal Map* (Edmonton: Environmental Law Centre, 1997) pp. 97-102.

## CONTRACTS

### **Nature of tool:**

At common law, a contract is a binding agreement between two (or more) parties which creates reciprocal rights and obligations. A valid contract requires that: (1) the parties be "competent" (i.e. neither minors, under duress nor mentally unqualified); (2) "consideration" passes between the parties (i.e. either money, exchange of promises, or other valuable consideration); (3) there is a mutual understanding of what is agreed upon; and (4) the subject matter of the contract is legal (cannot contract to violate the law). A contract may either be in writing or be oral. Contracts bind only the parties to the agreement and no one else. For example, a contract between a conservation organization and a landowner under which the landowner agrees not to log a forest, will not bind future landowners.

### **Use of tool:**

There are many uses for contracts to assist in wetland protection. Examples include contracts between conservation organizations and landowners to refrain from land use practices that could adversely affect wetland values, or contracts to monitor or restore wetland areas.

## EASEMENTS

### **Nature of tool:**

Common law easements belong to a family of real property rights called *incorporeal hereditament*. At law, real property is classified as either a *corporeal* or an *incorporeal hereditament*. *Hereditament* simply means may be inherited. A *corporeal hereditament* means the land itself including fixtures, whereas an *incorporeal hereditament* means only a right relating to the land, but not a right to the land itself. Examples of an incorporeal hereditament include a right to cross over land (as in an easement) or a right to go onto land and remove something from it, such as trees, as in timber rights in the nature of a *profit a prendre* (see entry for profit a prendre).

An easement generally gives the easement holder, the owner of one parcel of land (the grantee), a right to use the land of another (the grantor) for a specific purpose. Easements run with the land and bind subsequent owners in perpetuity. The common law requirements for an easement may be summarized as follows:

- There must be a *dominant tenement* and a *servient tenement*. The dominant tenement is the parcel of land that benefits from the easement. The servient tenement is the parcel of land that is subject to the easement and benefits the dominant tenement.
- The easement must benefit the dominant tenement in the sense of making it a better or more convenient property.



- The dominant and servient tenements must be separate parcels of land not owned and occupied by the same person.
- Although negative easements may be possible,<sup>470</sup> easements usually are positive in character in that they permit the owner of the dominant tenement to utilize the servient tenement for a purpose. For example, an easement might give the owner of the dominant tenement a right-of-way to pass over, or put something on the servient tenement, or the right to discharge water onto the servient tenement.

The *Land Titles Act* specifically recognizes easements.<sup>471</sup> However, registration under the Act does not make easements run with the land and therefore be enforceable as against subsequent purchasers of the land. To run with the land, in addition to being registered, an easement must meet the common law conditions listed above.

***Use of tool:***

Provided that the common law conditions are met, easements could have a number of uses for wetland protection. For example, suppose a conservation organization has entered into a restrictive covenant with a landowner (*see* entry for restrictive covenants) and requires access to the servient tenement to carry out government authorized wetland restoration. The organization could obtain the right to access by way of common law easement registered against title to the servient tenement.

**LEASES**

***Nature of tool:***

At common law, a lease is an agreement under which a person who owns land, the *lessor* (or *landlord*) agrees to lease (rent) land to some other person called the *lessee* (or *tenant*) for a period of time. A properly drawn lease constitutes an interest in land that runs with property provided that it is registered at the relevant Land Titles Office, if it needs to be registered. The *Land Titles Act* states that every lease for over three years must be registered if it is to bind future purchasers of the land.<sup>472</sup>

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<sup>470</sup> At common law there are a few categories of negative easements, whereby the owner of the servient tenement could be restricted from doing certain things with his property to benefit the dominant tenement. These negative easements restrict development on the servient tenement to enable light, air, support, or flow of water to benefit the dominant tenement. *See* S.G. Maurice, *Gale on Easements*, 15<sup>th</sup> ed. (London: Sweet & Maxwell, 1986) at 38. It is moot whether new categories of negative easements are legally permissible. *See* A.J. McLean, "The Nature of an Easement" (1966) 5 *Western L. Rev.* 32. More than likely, any potential new class of negative easements would fall under restrictive covenants.

<sup>471</sup> *Supra* note 27, s. 70.

<sup>472</sup> *Ibid.*, s. 98.

With certain noted exceptions, the *Municipal Government Act* forbids the registration of any document at the Land Titles Office if it has the effect of sub-dividing land where subdivision approval would otherwise be necessary.<sup>473</sup> This means that a person cannot avoid going through the subdivision procedures in order to transfer ownership type rights by way of a long-term lease to a part of a parcel of land.

***Use of tool:***

Leases may prove to be a valuable tool if an owner does not want to permanently part with the land containing a wetland. For example, an owner might lease a quarter section out of a larger parcel to an organization to restore waterfowl habitat.

## LICENSES

***Nature of tool:***

A license is a contract that gives a right to a person to enter onto the property of another person to do something. A license may be in writing or simply be a verbal agreement. A license does not normally create an interest in land. Accordingly, a license is a personal agreement only. It does not "run with the land" and is not binding against future owners.

***Use of tool:***

Licenses have any number of uses to promote wetland and associated ecosystem protection. For example, a conservation organization could enter into a license agreement with a landowner to enter onto the owner's property to enhance and monitor nesting sites near a wetland. The license would be for a set term, for example, five years. However, if the owner sells his or her property prior to the expiry of the five-year term and the new owner does not adopt the license agreement, the new owner will not be bound by the agreement and may bar the conservation organization from the property.

## PROFIT A PRENDRE

***Nature of tool:***

A profit a prendre is a common law tool consisting of the right to enter on the land of another person and to take some "profit" of the soil. The profit must be capable of being owned, such as minerals, oil, stones, trees, grass, etc. for the use of the owner of the right. For example, Joan Smith may purchase a profit a prendre from Barry Brown, the owner of land, to enter onto it and remove hay, since hay is capable of being owned.

Common law has recognized a variety of profits a prendre and there is no reason to think that the class of profits a prendre is closed. Profits a prendre may exist *in gross*. This means there is no need for a dominant and a servient tenement. A property owner may, for example, convey to another person the exclusive right to come on to his or her land and remove a profit such as timber without that other person owning any land to

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<sup>473</sup> See chapter 7, *Wetlands Conservation and Subdivision Development*.

serve as a dominant tenement. As well, since the right may exist in gross, the person holding a profit a prendre may assign the right to someone else.

Profits a prendre, like easements, are common law property interest in the family of interests called incorporeal hereditament (*see* discussion under easements). Although the *Land Titles Act* does not specifically mention them, the *Law of Property Act* deems them to be included in the definition of "land" under the *Land Titles Act*.<sup>474</sup> As an interest in land, notice of a profit a prendre may be registered at a Land Titles Office by way of caveat. A properly registered, valid profit a prendre runs with the land, and binds successors in title.

***Use of tool:***

A profit a prendre could be useful to aid in wetland area protection. For example, a conservation organization could hold a registered profit a prendre consisting of the exclusive right to graze livestock on land in the proximity of a wetland. It may acquire this right even though it intends never to let animals out to graze the area. As long as the organization holds the exclusive right, no one else may have grazing rights for the area. However since the conservation organization holds the exclusive right via the profit a prendre, it may graze livestock on the area if it wishes to.

## RESTRICTIVE COVENANTS

***Nature of tool:***

A restrictive covenant, like easements and profits a prendre, is a common law interest known as an incorporeal hereditament. (*See* discussion on easements). To constitute a valid common law restrictive covenant, the owner of one parcel of land, the dominant tenement, places restrictions on the uses of another parcel, the servient tenement. To be valid, the restrictions on the servient tenement must in some demonstrable way benefit the use and enjoyment of the dominant tenement. A restrictive covenant may only contain restrictions on use; any positive rights of the owner of the dominant tenement relating to the servient tenement may be unenforceable and could invalidate the entire restrictive covenant. Changes of use or circumstances also may invalidate the restrictive covenant. The common law rules require that the dominant and servient tenements be owned and occupied by separate persons, although in Alberta the *Land Titles Act* allows the separate titled parcels to be owned by the same person.<sup>475</sup>

***Use of tool:***

Although of fairly limited application because of the strict and cumbersome common law rules, in the appropriate circumstances restrictive covenants could prove quite powerful in protecting areas containing wetlands. For example, adjoining landowners might wish to enter criss-cross restrictive covenants to protect areas abutting a common wetland. Or, consider a person who owns more than one parcel of land abutting a wetland. The person wants to maintain the ecological values around the wetland but also wants to sell

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<sup>474</sup> *Law of Property Act*, R.S.A. 1980, c. L-8, s. 14(e).

<sup>475</sup> *Supra* note 27, s. 71.

one parcel. The person could place restrictive covenants on each parcel in favour of the other. Then the person could sell one parcel subject to the restrictions.

### ***Conservation easements***

In 1996 the Alberta *Environmental Protection and Enhancement Act*<sup>476</sup> (EPEA) was amended to increase landowners property rights. The amendments give landowners a new tool so that they can choose -- forever or for a term -- not to develop land in order to preserve land's natural values. The tool allows landowners, in effect, to cancel some development rights to land while retaining ownership and other land use rights. The tool is the conservation easement.

A conservation easement is a voluntary legal agreement landowners may enter into to protect the natural values of all or a part of their land for any of the purposes set out in EPEA. A conservation easement agreement registered on title at Land Titles binds not only the owner who originally granted the easement, but also future landowners. While the conservation easement is in effect, no one may exercise the development rights transferred with the easement. The beauty of a conservation easement is that even though a landowner transfers some development rights, he or she does not lose full control of the land. Title to the land covered by the conservation easement does not change and the owner may retain rights to the land, as set out in the conservation easement agreement. Of special interest to wetland managers is that a conservation easement may be granted to certain qualifying non-profit, conservation organizations with charitable status.

This Guide will not provide detailed information on conservation easements. This information is available from other sources including the Environmental Law Centre's *Conservation Easement Guide for Alberta*.<sup>477</sup> This Guide focuses only on one issue pertinent to conservation easements and Crown owned wetlands.

### ***Conservation easement wetland special issue***

The provincial Crown owns the bed and shores of all naturally occurring permanent wetlands pursuant to section 3 of the *Public Lands Act*.<sup>478</sup> Does this mean that the Crown must be notified that a conservation easement will be placed on private land that contains or abuts a Crown wetland?

It would not appear to be necessary, although there might be reason to notify the Crown. At law, a conservation easement will bind only the grantor – the landowner who grants the easement -- and the grantee, the qualifying organization that is granted and enforces the easement. If neither of these entities is the Crown, then the Crown will not be affected by the easement. Any rights that the Crown has regarding the wetland before the placement of the conservation easement will be retained after its placement. The easement, might, however, contain terms that limit the grantor in what

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<sup>476</sup> *Supra* note 28.

<sup>477</sup> A. Kwasniak, *Conservation Easement Guide for Alberta* (Edmonton: Environmental Law Centre, 1997).

<sup>478</sup> See chapter 3, *Bed and Shores*.

he or she may do vis-à-vis a wetland. For example, the conservation easement agreement could state that the grantor:

- agrees not to apply for an approval to drain or to conduct any other activities that require a *Water Act* approval,
- agrees not to exercise any riparian rights to divert wetland water or access it,
- agrees not to apply under the *Water Act* for any diversion rights,
- agrees to maintain the land up to the bank,
- agrees not to conduct any activities that require *Water Act* approval without the consent of the holder of the conservation easement,
- agrees not to carry out any agricultural practices which may be detrimental to wetland function (e.g. cultivation that would remove nest cover or allow more siltation to enter wetland), or
- agrees to provide alternative watering sources for livestock.

Even though it may not be necessary to give the Crown notice of a conservation easement covering land containing or abutting a Crown wetland, there might be reason to do so. For example, if the shoreline of the wetland is dry in some years, the grantee might be concerned that the Crown not lease it out for grazing purposes or other agricultural disposition. Or, the grantor and grantee might seek Crown expertise and perhaps financial assistance in carrying out conservation programs involving wetland aquatic habitat. As well, if maintenance of the area involves activities directly relating to the wetland, the parties must obtain Crown consent and approval and so it would make sense to involve the Crown.



# Part III

## Recommendations

## Summary of Recommendations

### ***Primer 7, Municipalities and Wetlands and Chapter 7, Wetlands Conservation and Subdivision Development***

- To aid in municipalities' confidently exercising authority under section 60(1) of the Alberta *Municipal Government Act*, (municipal management over watercourses and waterbodies), the province should develop explicatory regulation or policy. Such regulation or policy should forward and incorporate the objectives of the *Wetland Management in the Settled Area of Alberta: An Interim Policy*.
- Municipal subdivision and development are major sources of wetland loss. With the hope of curbing this loss, it is a recommendation of this Guide that the provincial government develop strict mandates, binding on municipalities, that provincial interests in wetlands be recognized in all subdivision and development applications and that municipalities be required to forward and incorporate the objectives of the *Wetland Management in the Settled Area of Alberta: An Interim Policy* in carrying out their responsibilities under the *Municipal Government Act*.

### ***Chapter 3, Bed and Shores***

The provincial government should develop clear policies that

- require that the legal definition from the *Surveys Act* be used to locate the bank.
- set forth precise criteria and methodology for determining whether a wetland is permanent.
- address the difficult questions raised in this chapter on whether a water body can lose its permanent or naturally occurring status through human activity.

### ***Chapter 4, Water Act***

- The provincial government should establish regulations or policy setting out how interested persons can initiate the process for establishing a water management plan for an area.
  
- The provincial Crown should establish water conservation objectives under the



*Water Act* to help protect Alberta's natural water bodies and their aquatic environment. It is a further recommendation that the Crown takes advantage of the unique opportunity offered by section 29(b) of the Act and secures priorities in implementing objectives.

- The *Water Act* and regulations should be amended as appropriate to require notice of application for temporary diversion licenses and to allow appeals of their issuance, renewal or amendment.
- The legislation should be amended to:
  - a) put appropriate conditions on exemptions, such as their exercise being subject to having no adverse effect on the aquatic environment,
  - b) clarify priorities of exemptions,
  - c) clearly make Alberta Environment the enforcement authority for exemptions, and
  - d) change at least some of the exemptions to at minimum, require notice to Alberta Environment so that it is in a position to enforce the law against those who withdraw amounts additional to amounts exempted.

### ***Chapter 8, Oil and Gas Development***

The Alberta Energy and Utilities Board with the approval of the Minister of Environment should make regulations under the *Oil and Gas Conservation Act* restricting drilling and producing operations in water covered areas and prescribing special measures to be taken in those operations. Such regulations should forward and incorporate the objectives of the *Wetland Management in the Settled Area of Alberta: An Interim Policy*.

### ***Chapter 9, Other Provincial Laws and Policies***

- The provincial government should in a pro-active manner use its enforcement tools under the *Public Lands Act* to better protect provincial interests in wetlands and should develop enforcement policies that forward and incorporate the objectives of the *Wetland Management in the Settled Area of Alberta: An Interim Policy*.
- The provincial government should finalize and strengthen the *Wetland Management in the Settled Area of Alberta: An Interim Policy* and the *Beyond Prairie Potholes: A Draft Policy for Managing Alberta's Peatlands and Non-settled Area Wetlands* and incorporate and forward their wetland and peatland protection and enhancement objectives in laws and policies that currently have the potential to adversely affect wetlands and peatlands.

- ***Chapter 10, Pipelines and Transmission Lines***

The provincial government should clarify and correct as appropriate the *Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body* and interpretory material to ensure consistency with the *Water Act* and the *Surveys Act* and to best protect all wetlands, including fens and muskeg.

## APPENDIX

### LEGAL TOOLS FOR MUNICIPALITIES TO CONSERVE ENVIRONMENTALLY SENSITIVE AREAS

(Adapted from the Environmental Law Centre's (Arlene Kwasniak) contribution to *Conserving Edmonton's Natural Areas: A Framework for Conservation Planning in an Urban Landscape* (Alberta Environmental Network and City of Edmonton 2001) (by Westworth Associates Environmental Ltd., The Dagny Partnership, the Land Stewardship Centre of Canada and the Environmental Law Centre).

#### CATEGORY 1: DESIGNATION TOOLS

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Sale to and establishment by the federal government as a national park, park reserve, national historic site, migratory bird sanctuary or national wildlife area	<ul style="list-style-type: none"> <li>• High degree of protection</li> <li>• Difficult to undo</li> <li>• Flexible protection</li> <li>• Federal government carries out monitoring, upkeep and enforcement, less costly to municipality and developer</li> </ul>	<ul style="list-style-type: none"> <li>• Dependent on action from the federal government</li> <li>• Provincial government must agree</li> <li>• Costly to the federal government</li> <li>• Difficult to meet criteria</li> </ul>	<ul style="list-style-type: none"> <li>• See the <i>Canada National Parks Act</i>, the <i>Migratory Birds Convention Act</i>, 1994, the <i>Canada Wildlife Act</i></li> </ul>

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
<p>Gift to and establishment by the federal government as a national park, park reserve, national historic site, migratory bird sanctuary or national wildlife area</p>	<ul style="list-style-type: none"> <li>• High degree of protection</li> <li>• Difficult to undo</li> <li>• Flexible protection</li> <li>• Federal government carries out monitoring, upkeep and enforcement; less costly to municipality and developer</li> <li>• Tax advantages if a gift of capital property</li> <li>• Could be an ecological gift</li> </ul>	<ul style="list-style-type: none"> <li>• Dependent on action from the federal government</li> <li>• Provincial government must agree</li> <li>• For best tax benefits must qualify as an ecological gift</li> <li>• Costly to the land owner</li> <li>• Difficult to meet criteria</li> </ul>	<ul style="list-style-type: none"> <li>• See the <i>Canada National Parks Act</i>, the <i>Migratory Birds Convention Act, 1994</i>, the <i>Canada Wildlife Act</i></li> </ul>
<p>Sale to and designation by the provincial government as a provincial park, wildlands park, recreation area, ecological reserve, natural area, wilderness area or wildlife sanctuary</p>	<ul style="list-style-type: none"> <li>• Varying degrees of protection depending on designation</li> <li>• Some designations are difficult to undo</li> <li>• Flexible protection</li> <li>• Provincial government carries out monitoring, upkeep and enforcement; less costly to municipality and developer</li> </ul>	<ul style="list-style-type: none"> <li>• Dependent on action from the provincial government</li> <li>• Costly to the provincial government</li> <li>• Difficult to meet criteria</li> </ul>	<ul style="list-style-type: none"> <li>• See the <i>Wilderness Areas, Ecological Reserves and Natural Areas Act</i>, the <i>Provincial Parks Act</i> and the <i>Wildlife Act</i></li> </ul>

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
<p>Designation under the <i>Historical Resources Act</i> as a Municipal Historic Resource.</p> <p>The Act defines "historic resource" to include works of nature. Applies to privately owned land, is done through by-law after 60 day notice to landowner</p>	<ul style="list-style-type: none"> <li>• Simple to accomplish, do not need landowner's consent, is done through by-law after 60 day notice to landowner</li> <li>• Once designated, no one may alter or disturb without council's approval</li> </ul>	<ul style="list-style-type: none"> <li>• May be politically difficult</li> <li>• If designation decreases economic value, municipality must pay compensation</li> <li>• Council could give approval to disturb area</li> </ul>	<ul style="list-style-type: none"> <li>• See ss. 22, 23, 24 and 1 (f) of the <i>Historical Resources Act</i></li> <li>• The land must have value for its palaeontological, archaeological, prehistoric, cultural, natural, scientific or aesthetic interest</li> <li>• Must be in the public interest</li> </ul>
<p>Designation under the <i>Historical Resources Act</i> as a Municipal Historic Area. Applies to private or other land in the designated area</p>	<ul style="list-style-type: none"> <li>• Fairly simple to accomplish, not need landowners' consent</li> <li>• Once designated, area is deemed to form part of the municipality's land use by-law</li> <li>• The municipality may prohibit, regulate or control use and development of area and the demolition, removal, construction or reconstruction of buildings</li> </ul>	<ul style="list-style-type: none"> <li>• May be politically difficult</li> <li>• If designation decreases economic value, municipality must pay compensation</li> <li>• Council could allow disturbance</li> </ul>	<ul style="list-style-type: none"> <li>• See ss. 23, 24 and 1(f) of the <i>Historical Resources Act</i></li> <li>• Must be in the public interest</li> </ul>

## CATEGORY 2: SALES AND PURCHASE TRANSACTIONS

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Sale to the municipality	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible protection</li> <li>• High degree of protection if municipality agrees</li> </ul>	<ul style="list-style-type: none"> <li>• Costly for the municipality</li> <li>• Land owner must be willing to sell the land</li> <li>• Municipality free to develop land in future</li> <li>• Does not bind future owners</li> </ul>	
Sale of Conservation Easement to municipality or other Government Body	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible protection</li> <li>• High degree of protection</li> <li>• Binds future owners</li> <li>• Less costly than sale of land itself</li> </ul>	<ul style="list-style-type: none"> <li>• Costly to the municipality or other government recipient</li> <li>• Easement must fit within purpose set out in s. 22.1(2) of EPEA</li> <li>• Easement can be terminated by agreement or by the Minister of Environment</li> </ul>	<ul style="list-style-type: none"> <li>• The municipality, Alberta or government agencies qualify to accept a grant of a conservation easement</li> </ul>
Sale to an ENGO	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible</li> <li>• Unlikely to be undone</li> <li>• ENGO carries out monitoring, upkeep and enforcement; less costly to municipality and developer</li> </ul>	<ul style="list-style-type: none"> <li>• Costly to the ENGO</li> <li>• Land owner must be willing to sell the land</li> </ul>	

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Sale of Conservation Easement to ENGO	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Terms of the agreement can be modified by agreement</li> <li>• Binds future owners</li> <li>• ENGO carries out monitoring, upkeep and enforcement; less costly to municipality and developer</li> </ul>	<ul style="list-style-type: none"> <li>• Costly to the ENGO who must pay market value for the easement</li> <li>• Easement must fit within a purpose set out in s. 22.1(2) of EPEA</li> <li>• Easement can be terminated by agreement or by the Minister of Environment</li> </ul>	<ul style="list-style-type: none"> <li>• The ENGO must be a "qualified organization" as set out in s. 22.1(1)(e)(iv) of EPEA</li> </ul>

### CATEGORY 3: GIFTS

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Gift to municipality	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible protection</li> <li>• Tax benefits if a gift of capital property</li> <li>• Could be an ecological gift</li> <li>• High degree of protection if municipality agrees</li> </ul>	<ul style="list-style-type: none"> <li>• Costly to owner</li> <li>• Land owner must be willing to give the land</li> <li>• For best tax benefits must qualify as an ecological gift</li> <li>• Municipality free to develop land in future if not an ecological gift</li> <li>• Does not bind future owners if not an ecological gift</li> </ul>	<ul style="list-style-type: none"> <li>• An ecological gift must be land that is certified by the federal Minister of the Environment to be ecologically sensitive land</li> <li>• A sale, transfer or land use change of land donated as an ecological gift without the approval of the federal Minister of Environment will give rise to a tax penalty</li> </ul>
Gift of Conservation Easement to municipality or other Government Body	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible protection</li> <li>• High degree of protection</li> <li>• Binds future owners</li> <li>• May be tax deductible if capital property</li> <li>• Could be an ecological gift</li> <li>• Less costly than sale of land itself</li> </ul>	<ul style="list-style-type: none"> <li>• Easement must fit within a purpose set out in s. 22.1(2) of EPEA</li> <li>• For best tax benefits must qualify as an ecological gift</li> <li>• Costly to land owner</li> </ul>	<ul style="list-style-type: none"> <li>• An ecological gift can be an easement if certified by the Minister of the Environment to be ecologically sensitive land, the conservation and protection of which is important to the preservation of Canada's environmental heritage</li> </ul>



TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Gift to an ENGO	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Certain</li> <li>• May be tax deductible if capital property</li> <li>• Could be an ecological gift</li> <li>• ENGO carries out monitoring, upkeep and enforcement; less costly to municipality and developer</li> <li>• High degree of protection</li> </ul>	<ul style="list-style-type: none"> <li>• Costly to owner who gives up the difference between market value of the land and the value of any tax deduction for a gift to charity</li> <li>• For best tax treatment must qualify as an ecological gift</li> <li>• Land owner must be willing to give the land</li> </ul>	<ul style="list-style-type: none"> <li>• An ecological gift must be land that is certified by the Minister of the Environment to be ecologically sensitive land. The beneficiary of the gift must be a registered charity, one of the main purposes of which is the conservation and protection of Canada's environmental heritage</li> </ul>
Gift of Conservation Easement to ENGO	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Terms of the agreement can be modified by agreement</li> <li>• May be tax deductible if capital property</li> <li>• Could be an ecological gift</li> <li>• High degree of protection</li> <li>• ENGO carries out monitoring, upkeep and enforcement; less costly to municipality and developer</li> <li>• Binds future owners</li> </ul>	<ul style="list-style-type: none"> <li>• Easement must fit within a purpose set out in s. 22.1(2) of EPEA</li> <li>• For best tax treatment must qualify as an ecological gift</li> </ul>	<ul style="list-style-type: none"> <li>• The ENGO must be a "qualified organization" as set out in s. 22.1(1)(e)(iv) of EPEA</li> </ul>



**CATEGORY 4: PERSONAL, TERM AND COMMON LAW PARTIAL INTERESTS**

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Voluntary action by owner to refrain from or limit development	<ul style="list-style-type: none"> <li>• Simple</li> </ul>	<ul style="list-style-type: none"> <li>• Easy to undo</li> <li>• Expensive to land owner</li> <li>• Does not bind future owners</li> <li>• Limited protection</li> </ul>	
Lease to municipality	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible</li> <li>• Unlikely to be undone during term of lease</li> <li>• Municipality carries out monitoring, upkeep and enforcement</li> </ul>	<ul style="list-style-type: none"> <li>• Could be costly to municipality</li> <li>• Leases usually must be of an entire parcel and not to part of a parcel</li> <li>• Land owner must be willing to lease land</li> <li>• No protection after term expires</li> </ul>	<ul style="list-style-type: none"> <li>• Must be registered at Land Titles for over three years in order to bind future purchasers</li> </ul>
Lease to ENGO	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible</li> <li>• Unlikely to be undone during term of lease</li> <li>• ENGO carries out monitoring, upkeep and enforcement; less costly to municipality</li> </ul>	<ul style="list-style-type: none"> <li>• Could be costly to ENGO</li> <li>• Leases usually must be of an entire parcel and not to part of a parcel</li> <li>• Land owner must be willing to lease the land</li> <li>• No protection after term expires</li> </ul>	<ul style="list-style-type: none"> <li>• Must be registered at Land Titles for over three years in order to bind future purchasers</li> </ul>

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
License to municipality or ENGO	<ul style="list-style-type: none"> <li>• Owner could give a license to enter onto land to carry out a conservation program</li> </ul>	<ul style="list-style-type: none"> <li>• Is not an interest in land, so does not bind future purchasers</li> <li>• Could be costly to municipality or ENGO</li> <li>• No protection after term expires</li> </ul>	
Profit a Prendre to municipality <i>(right to enter onto land and take some "profit" of the soil)</i>	<ul style="list-style-type: none"> <li>• Owner could give municipality exclusive right to trees or other vegetation. While municipality holds right, no one else may remove vegetation</li> <li>• Municipality carries out monitoring, upkeep and enforcement</li> <li>• High degree of protection if rights not exercised</li> <li>• Could be for a term or be granted in perpetuity</li> </ul>	<ul style="list-style-type: none"> <li>• Could be costly to municipality to purchase right</li> <li>• Conservation goal only realised if municipality chooses not to exercise right</li> <li>• Land owner must be willing to sell a profit a prendre</li> </ul>	<ul style="list-style-type: none"> <li>• Profits a prendre are interests in land and bind subsequent purchasers if registered on title</li> </ul>

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Profit a Prendre to ENGO <i>(right to enter onto land and take some "profit" of the soil)</i>	<ul style="list-style-type: none"> <li>• Owner could give ENGO exclusive right to trees or other vegetation while ENGO holds right, no one else may remove vegetation</li> <li>• ENGO carries out monitoring, upkeep and enforcement so less costly to municipality</li> <li>• High degree of protection if rights not exercised</li> <li>• Could be for a term or be granted in perpetuity</li> </ul>	<ul style="list-style-type: none"> <li>• Could be costly to ENGO to purchase right</li> <li>• Conservation goal only realised if ENGO chooses not to exercise right</li> <li>• Land owner must be willing to sell a profit a prendre</li> </ul>	<ul style="list-style-type: none"> <li>• Profits a prendre are interests in land and bind subsequent purchasers if registered on title</li> <li>• May exist <i>in gross</i>, meaning, no need for a dominant tenement as in easements and restrictive covenants</li> </ul>
Common law easement from owner regarding neighbouring land	<ul style="list-style-type: none"> <li>• Binds future owners</li> <li>• May contain positive or negative covenants</li> <li>• Less expensive than sale of land itself</li> <li>• Could be for a term or be granted in perpetuity</li> </ul>	<ul style="list-style-type: none"> <li>• Easement on a parcel (servient tenement) must benefit another land (dominant tenement)</li> <li>• Can be undone by owner of the dominant tenement</li> </ul>	<ul style="list-style-type: none"> <li>• See ss. 71 &amp; 72 of the <i>Land Titles Act</i></li> </ul>

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Restrictive Covenant regarding neighbouring land	<ul style="list-style-type: none"> <li>• Binds future owners</li> <li>• Less expensive than sale of land itself</li> <li>• Could be for a term or be granted in perpetuity</li> </ul>	<ul style="list-style-type: none"> <li>• Restriction on one parcel (servient tenement) must benefit another parcel (dominant tenement)</li> <li>• Covenants can only be negative and not positive</li> <li>• Can be undone by owner of dominant tenement</li> <li>• Can be removed by the Court in the public interest</li> </ul>	<ul style="list-style-type: none"> <li>• See s. 52 of the <i>Land Titles Act</i></li> </ul>

**CATEGORY 5: ADMINISTRATIVE AND PLANNING TOOLS, TRADITIONAL**

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Municipal Reserve required by municipality	<ul style="list-style-type: none"> <li>• May be required by the subdivision authority as a condition for subdivision</li> <li>• Simple</li> <li>• Not costly to municipality</li> </ul>	<ul style="list-style-type: none"> <li>• Is only triggered by an application for subdivision</li> <li>• Amount of land is limited by ss. 666 and 668 of the <i>Municipal Government Act</i></li> </ul>	<ul style="list-style-type: none"> <li>• See ss. 661 - 670 of the <i>Municipal Government Act</i></li> <li>• Municipal reserve is dedicated without compensation</li> </ul>
Environmental Reserve required by municipality	<ul style="list-style-type: none"> <li>• May be required by the subdivision authority as a condition for subdivision</li> <li>• High degree of protection</li> <li>• Simple</li> <li>• Difficult to undo</li> <li>• Not costly to municipality</li> </ul>	<ul style="list-style-type: none"> <li>• Is only triggered by an application for subdivision</li> <li>• Must comply with s. 664(1) of the <i>Municipal Government Act</i> so does not apply to all environmentally sensitive land</li> </ul>	<ul style="list-style-type: none"> <li>• See s. 664 of the <i>Municipal Government Act</i></li> <li>• Environmental reserve is dedicated without compensation</li> </ul>

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
<p>Environmental Reserve Easement required by municipality</p>	<ul style="list-style-type: none"> <li>• If the owner and city agree can replace the environmental reserve</li> <li>• High degree of protection</li> <li>• Simple</li> <li>• Flexible</li> <li>• Not costly to the municipality</li> </ul>	<ul style="list-style-type: none"> <li>• Is only triggered by an application for subdivision</li> <li>• Costly to the developer as the easement is granted without compensation</li> <li>• Must comply with s. 664 of the <i>Municipal Government Act</i> so does not apply to all environmentally sensitive land</li> </ul>	<ul style="list-style-type: none"> <li>• See s. 664(2) &amp; (3) of the <i>Municipal Government Act</i></li> <li>• Environmental reserve easement is dedicated without compensation</li> <li>• Title stays in name of the developer</li> </ul>
<p>Natural Area Land Use Designation under Land Use Bylaw of municipality and other exercising of municipal authority involving downzoning to regulate land use</p>	<ul style="list-style-type: none"> <li>• Uses the municipal Land Use Bylaw and zoning powers</li> <li>• Simple</li> <li>• Flexible</li> <li>• Binds future owners unless changed by municipality</li> <li>• If a legitimate use of zoning powers no compensation is payable</li> </ul>	<ul style="list-style-type: none"> <li>• May be politically difficult for the municipality</li> <li>• Requires the definition of new land use category</li> <li>• Can be changed by the municipality</li> <li>• Downzoning must be in pursuit of long term planning objectives</li> </ul>	<ul style="list-style-type: none"> <li>• See s. 640 of the <i>Municipal Government Act</i></li> <li>• Caselaw has shown that there is ample scope to downzone land for protection of environment without having to pay any compensation. See F. Laux, <i>Planning Law and Practice in Alberta</i>, 2<sup>nd</sup> ed. (Toronto: Carswell, 1996), c. 8</li> </ul>



**CATEGORY 6: ADMINISTRATIVE/PLANNING NOVEL**

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Conservation easement instead of environmental or municipal reserve	<ul style="list-style-type: none"> <li>• Could be more flexible than municipal or environmental reserve</li> </ul>	<ul style="list-style-type: none"> <li>• Can be discharged by the Minister of Environment in the public interest</li> </ul>	<ul style="list-style-type: none"> <li>• <i>See Environmental Protection and Enhancement Act, s. 22.1</i></li> <li>• Title remains with the landowner</li> </ul>
Formal transfer of development potential by municipality to developer from one parcel to another	<ul style="list-style-type: none"> <li>• Equitable</li> <li>• Cost effective</li> <li>• Complex if possible</li> <li>• Flexible</li> <li>• Could have high degree of protection</li> </ul>	<ul style="list-style-type: none"> <li>• Would require legislative changes</li> </ul>	<ul style="list-style-type: none"> <li>• Is not specifically anticipated by existing legislation</li> </ul>
Informal transfer of development potential by municipality to developer from one parcel to another	<ul style="list-style-type: none"> <li>• Equitable</li> <li>• Cost effective</li> <li>• Simple</li> <li>• Flexible</li> <li>• Could have high degree of protection</li> </ul>	<ul style="list-style-type: none"> <li>• May be legally challenged if part of process is municipality taking reserves in excess of those technically allowed by law in exchange for approval of other development</li> <li>• Is voluntary</li> <li>• Owing to novelty of tool, may be difficult to get municipal staff and Council "on-side"</li> </ul>	<ul style="list-style-type: none"> <li>• "Informal" means that current legislation does not specifically authorize transfers of development potential</li> <li>• "Potential" is used instead of "right" since all relevant development is subject to municipal regulatory approvals</li> </ul>

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
<p>Bareland Condominium</p> <p><i>(unit owners own a common interest in a portion of parcel)</i></p>	<ul style="list-style-type: none"> <li>• Flexible</li> <li>• Allowed by current legislation</li> <li>• Unit owners manage natural area for mutual benefit</li> <li>• Could use in conjunction with a conservation easement over common area to better protect natural values</li> </ul>		<ul style="list-style-type: none"> <li>• <i>See the Land Titles Act and the Condominium Property Act</i></li> </ul>
<p>Bonusing</p> <p><i>(municipal approving authority provides added subdivision or development potential, for example, density, in return for protecting an area.)</i></p>	<ul style="list-style-type: none"> <li>• Flexible</li> <li>• Unlikely to be undone</li> </ul>	<ul style="list-style-type: none"> <li>• May be legally challenged if part of process is municipality taking reserves in excess of those technically allowed by law in exchange for approval of other development, e.g. greater density</li> <li>• Is voluntary</li> <li>• Owing to novelty of tool, may be difficult to get municipality staff and Council "on-side"</li> </ul>	

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Building scheme restrictive covenants	<ul style="list-style-type: none"> <li>• Binds future owners</li> </ul>	<ul style="list-style-type: none"> <li>• Covenants may only be negative and not positive</li> <li>• Can be removed by the Court in the public interest</li> </ul>	<ul style="list-style-type: none"> <li>• Has been used in Strathcona County in a subdivision to protect natural values in conjunction with conservation easements</li> </ul>

**CATEGORY 7: REGULATORY AND ADMINISTRATIVE TOOLS**

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Municipality's general bylaw making	<ul style="list-style-type: none"> <li>• Could regulate many aspects of land uses (e.g. Surrey BC has a tree cutting bylaw)</li> <li>• Can protect land before subdivision and development stage</li> <li>• Flexible protection</li> <li>• Municipality must carry out monitoring, upkeep and enforcement</li> </ul>	<ul style="list-style-type: none"> <li>• Must have Council on side</li> <li>• Could be unpopular with landowners</li> <li>• Could be challenged if conflicts with Provincial regulation or goes beyond municipal jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>• See Part I, Division 1, of the <i>Municipal Government Act</i></li> </ul>
Municipal taxation	<ul style="list-style-type: none"> <li>• In limited circumstances could be used to lower or exempt taxes where landowner helps realize natural area municipal policy</li> </ul>	<ul style="list-style-type: none"> <li>• Exemption or reduction only allowed by <i>Municipal Government Act</i> in limited circumstances</li> </ul>	