

# Buying a Better Environment?

Market-Based Instruments & the *Alberta Land Stewardship Act*

*Volume 3: Conservation Offsets under the Alberta Land Stewardship Act*



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The Environmental Law Centre (ELC) believes that law is the most powerful tool to protect the environment. Since it was founded in 1982, the ELC has been and continues to be Alberta's only registered charity dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in the Province of Alberta. The ELC's mission is to educate and champion for strong laws and rights so all Albertans can enjoy clean water, clean air and a healthy environment.

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## Acknowledgements

The ELC is publishing a series of four volumes concerning Market-Based Instruments & the *Alberta Land Stewardship Act*. This work is to encourage the use of MBIs in a way that benefits the environment and to identify what regulations or other legal changes are necessary to do so.

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# Buying a Better Environment?

## Market-Based Instruments & the *Alberta Land Stewardship Act*

### *Volume 3: Conservation Offsets under the Alberta Land Stewardship Act*

#### Executive Summary

The Environmental Law Centre (ELC) has undertaken this project to review the market based instruments (MBIs) that are enabled by the *Alberta Land Stewardship Act (ALSA)*. Our goal in this project is to encourage the use of MBIs in a way that benefits the environment and to identify what regulations or other legal changes are necessary to do so.

The results of this project are published as a report in four volumes:

- Volume 1: *An Introduction to Market-Based Instruments & the Alberta Land Stewardship Act*
- Volume 2: *Transfer of Development Credits under the Alberta Land Stewardship Act*
- Volume 3: *Conservation Offsets under the Alberta Land Stewardship Act*
- Volume 4: *Stewardship Units & the Exchange under the Alberta Land Stewardship Act*

This particular volume looks in detail at Conservation Offsets. Volume 1 proposes and describes criteria for the assessment of MBIs; this volume applies these criteria to Conservation Offsets.

This report defines MBIs as a form of regulation albeit different from conventional command and control regulation. As generally believed, *ALSA* has significant potential to advance use of MBIs. In *ALSA*, MBIs are placed within a comprehensive suite of conservation tools that include options for voluntary or coerced conservation and which make tools available for public and private lands. Because these conservation tools have similar purposes, this should allow them to work together such that the protective tools secure the conservation outcomes of the MBIs.

While *ALSA* provides a broad mandate to develop MBIs, this report focuses on those MBIs that are specifically provided for by *ALSA*. These are:

- **Transfer of Development Credits (TDCs)**, a tool used primarily by municipalities to redirect future development.
- **Conservation Offsets** which involve actions to compensate for the ecological impacts of development.

- **Stewardship Units and the Exchange** which could be understood as credits and the trading platform that could help facilitate TDCs and offsets.

All of these specific *ALSA* tools can be considered true “market” instruments in that all involve buying, selling or trading between private parties rather than simply the provision of financial incentives for environmentally beneficial behaviour.

This report proposes and applies three major criteria for the assessment of MBIs under *ALSA*. These criteria are the need for:

- guiding environmental principles;
- sufficient resolution of property law issues; and
- a strong regulatory framework.

These criteria are applied both to the general scheme of *ALSA* and to the specific MBIs contemplated by *ALSA*. Upon analyzing the general scheme of *ALSA* in light of these criteria, several conclusions can be made:

- *ALSA* is significant for recognizing principles of sustainable development and cumulative effects management that are lacking in provincial land and resource legislation.
- *ALSA*'s potential adverse effect on property rights is likely overstated. *ALSA* largely provides purpose for use of pre-existing regulatory authority and it may have some impact on the existing property rights regime by offering compensation for regulatory action and incentives for voluntary private conservation.
- *ALSA* provides multiple options to strengthen the regulatory framework for MBIs through regional plans or regulations of general application. Regional plans have more ability to overcome systemic barriers to MBI use created by the larger framework for regulation of land and natural resources, while regulations of general application are more suited where the need is for principles and rules of general application.

However, *ALSA* is an imperfect platform for MBIs in other ways:

- *ALSA* does not ensure a principled approach to MBIs. Sustainable development and cumulative effects have proven hard to operationalize through regulatory decisions without more specific sub-principles. *ALSA* leaves need to rely on other legislation for principles of pollution prevention and polluter pay, and it continues trends of restrictive public participation and no precautionary principle under provincial legislation.
- *ALSA* does not provide a private conservation tool for public lands or recognize property interests that could protect private conservation against minerals activity.

*ALSA* also leaves uncertainty around compensation for regulatory restrictions on property interests or property values.

In addition, while designed to implement the *Land Use Framework (LUF)*, *ALSA* does not fully address all the policy gaps identified in the *LUF* nor does it fully implement all the strategies proposed by the *LUF*. *ALSA* also fails to directly fill the policy gaps which with MBIs might help.

There are some universal considerations respecting the regulatory framework for MBIs under *ALSA*:

- The legal effect of *ALSA* depends almost entirely on future regulations or regional plans for which *ALSA* provides Cabinet with broad discretion and little substantive guidance.
- *ALSA* is not a platform for development approvals that would be conditional on conservation, so there is ongoing need for the other land and resource legislation.
- *ALSA* was not necessarily needed for the MBIs in question, as authority to establish simple TDCs likely existed under the *MGA* and authority to require offsets on regulatory approvals exists under multiple other provincial statutes. The main need from *ALSA* was (and remains) guidance for use of these tools.
- *ALSA* does not clearly require legal securement of conservation activities related to TDCs, offsets or the recognition of Stewardship Units.

To date, *ALSA* has been primarily used for its regional planning provisions. Several needs can be identified from that experience: clear objectives, regulatory limits on the impact of activities, coordination of multiple uses, stronger direction to regulators, legal protection of identified conservation areas, and more attention to administrative functions. These motherhood issues with *ALSA* may become even more important if *ALSA* is to regulate the implementation of MBIs in Alberta.

### General Recommendations

1. Adopt the precautionary principle in any policies, regional plans or regulations that could provide direction on the use of MBIs, especially the biodiversity frameworks.
2. Formalize public and stakeholder participation in the development and implementation of MBIs.
3. Protect private conservation activity carried out in pursuit of public policy objectives from the impacts of minerals activity, beginning with Conservation Easements.



4. Clarify and require legal securement tools for all conservation activities related to MBIs.
5. Explore direct use of regional plans and Conservation Directives as means to designate and protect conservation areas associated with MBIs.

### Conservation Offsets Recommendations

A starting point for discussion of Conservation Offsets under *ALSA* is that the concept is ill-defined in the legislation and the provisions for regulations allow practically anything. Much interest in the tool concerns offsetting large industry impacts on biodiversity and species at risk, which receives variable support within the conservation community.

Use of Conservation Offsets in Alberta raises numerous unsettled issues of law and policy. The principles of Conservation Offsets are very specialized compared to the established principles of environmental law and are subject to debate over their practical applicability in Alberta. Conservation Offsets in Alberta also face systemic challenges flowing from the nature of property interests in public lands and resources. Minerals activity can undermine conservation outcomes on public or private land. On public lands there are no tools directly available to private parties seeking to conduct and secure conservation activities. Provincial regulatory involvement is necessary either under *ALSA* or other legislation, and this does not preclude need for reform to the natural resource tenure regime.

The above issues were identified before *ALSA* and warrant resolution before moving to a regulated offset system under *ALSA*. The province of Alberta has recently developed a non-legislated conservation offset framework. This is significant for endorsing regulated use of offsets and it could provide the basis for *ALSA* regulations, however, it defers settling most of the issues to future specific offset programs. The offset framework also incorporates multiple elements of the provincial carbon regime and wetlands regimes that appear more aimed at the mechanics of offsetting than at conservation outcomes. Administration of offset systems is a known need that has received less attention in the policy groundwork.

At this point regional plans may be the better vehicle for regulated offsets under *ALSA*. Regional plans have more potential to assist with specific program objectives, to link offsets to cumulative effects management if desired and to help overcome the systemic challenges to Conservation Offsets. Regional plans can also do most things that *ALSA* contemplates for offset regulations such as: defining offsets, identifying impacts requiring offsets, and directing regulators to impose offset conditions on approvals.

Accordingly, we recommend:

1. Any policies, regulations or regional plans concerning offsets should prescribe: the mitigation hierarchy and how it should be applied, limits on what can be offset, goals of



at least net neutral outcomes, and a duration of offsets that meets or exceeds the duration of impacts.

2. Any allowance for fees in lieu of offsets should attempt to match the fee to the cost of real offsets and require the fund to prioritize activities that provide direct ecosystem benefits like those of real offsets.
3. Develop tools to allow access to public lands and securement of offsets against incompatible uses prior to encoding any policy into regulations that would give credit for offsets on public lands.
4. Pursue missing offset pilot projects including conservation of White Area (agricultural) public lands, and administration of offset systems (including enforcement).

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# Buying a Better Environment?

## Market-Based Instruments & the *Alberta Land Stewardship Act*

### *Volume 3: Conservation Offsets under the Alberta Land Stewardship Act*

#### Introduction

As discussed in Volume 1 of this report, a conservation offset can be loosely defined as actions that compensate for the ecological impacts of development. Similar concepts include “compensatory mitigation”, “conservation allowances” and “habitat conservation” though these terms may not be perfectly synonymous.<sup>1</sup>

Exactly what is a conservation offset for the purpose of *ALSA* is a key issue in this volume of the report. *ALSA*’s provisions on “conservation offset programs” consist completely of power to make regulations to “counterbalance” the effect of an activity.<sup>2</sup> The main types of regulatory power include [paraphrased]:

- defining “counterbalancing”;
- requiring decision makers to impose conditions requiring counterbalancing on activities seeking approvals;
- setting limits on the effect of activities beyond which counterbalancing may be required;
- adopting guidelines or best practices on counterbalancing; and
- requiring use of Stewardship Units to counterbalance activities.

Thus, *ALSA* provides some implied goal or outcome of an offset but minimal guidance on what conservation offset is or in which context it would be used.

The context for discussion of Conservation Offsets is usually around biodiversity loss, habitat, and species at risk.<sup>3</sup> Conservation Offsets are often considered with reference to policy goals like keeping land disturbance below defined levels, use of management frameworks, and need to supplement species at risk legislation, parks and protected areas and private conservation. In Alberta, some situations raising interest in Conservation Offsets include caribou and oil sands, sage grouse and native grasslands, and perhaps grizzly bear habitat on the eastern

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<sup>1</sup> David Poulton, *Biodiversity and Conservation Offsets: A Guide for Albertans*, CIRL Occasional Paper #48 (Calgary: Canadian Institute of Resources Law, 2015), online: University of Calgary <<http://prism.ucalgary.ca/retrieve/44155/BiodiversityOP48x.pdf>> [Offset Guide].

<sup>2</sup> *Alberta Land Stewardship Act*, SA 2009, c A-26.8, s 47 [ALSA].

<sup>3</sup> Offset Guide, *supra* note 1.

slopes. These situations are generally characterized by impacts of the natural resource industries (especially oil and gas) on species at risk, wildlife habitat, and ecosystems of a special nature.

It is important to recognize at the outset that there is disagreement around the use of Conservation Offsets for species at risk and that Alberta lacks true species at risk legislation. Conservation Offsets under *ALSA* or otherwise cannot fill all gaps in the provincial legislative framework around biodiversity conservation. It is worth noting that the Federal *Species at Risk Act* might be considered a latent driver of Conservation Offsets in Alberta in the sense that it creates pressure for provincial action on species at risk.

It is also important to recognize at the outset that *ALSA* is not limited to a model where oil and gas pays, and offsets are produced by forestry, agriculture and private landowners. These assumptions pre-date *ALSA*, are intertwined with discussion of ecosystem service payments, and have since become supported by an array of studies and pilots. However, these pilots have also shown interest in broader applications like targeting utilities and gravel for offsets, or enabling oil and gas to produce its own offsets. Notably, one of the examples of MBIs provided elsewhere in this report was forestry paying for its ecological impacts.

Conservation Offsets can be implemented or delivered in multiple ways.<sup>4</sup> Offsets can be:

- completely voluntary;
- a regulatory requirement imposed in an ad-hoc or one-off manner on a specific development;
- required as a routine matter by policy or regulations; or
- one of multiple compliance options for regulated activities.

Prior to *ALSA*, there were multiple recommendations for a formalized or regulated conservation offset system in Alberta. At the time, some recurrent arguments that remain relevant were that:

- Successful offset programs occur within supportive regulatory regimes where government sets objectives and guides actions.
- Regulated system creates certainty, clarity, consistency, a level playing field and confidence in the system.
- Voluntary offsets and project-specific regulatory requirements are insufficient to address cumulative effects and are an inefficient way to pursue land use plans and conservation objectives.

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<sup>4</sup> *Ibid.*

Several publications collectively capture a large number of the most noted issues, options, and recommendations relevant to a regulated offset system under *ALSA*. In loose chronological order, some examples cited repeatedly in this report include:

- An exploration of offsets in the boreal region that actually predates *ALSA*, however it expressly foresees the *LUF* and identifies offset issues that *ALSA* has not yet resolved (Boreal Offsets).<sup>5</sup>
- A proposal for a Conservation Offset Framework by the Alberta Conservation Association (ACA Offset Proposal).<sup>6</sup>
- An Alberta Innovates evaluation of AI Offset Options focused on forested public lands in Alberta (AI Offset Options paper).<sup>7</sup>
- A Conservation Offset Guide for Albertans (Offset Guide).<sup>8</sup>
- A law and policy issues paper comparing multiple jurisdictions, that while targeted at Ontario, captures many of the same issues around offsets in Alberta (Offset Issues paper).<sup>9</sup>
- A paper on opportunities for Conservation Offsets in Alberta that is not limited to *ALSA* (Offset Opportunities paper).<sup>10</sup>

Further recommendations on more specific issues around offset credits are mostly deferred to volume 4 of this report dealing with Stewardship Units and the Exchange. This report also makes multiple references to the work of the Alberta Association for Conservation Offsets, an initiative in which all of the above authors including the Government of Alberta have participated and which the ELC was able to attend informally.<sup>11</sup>

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5 Simon Dyer et al, *Catching up: Conservation and Biodiversity Offsets in Alberta's Boreal Forest*, (Canada: Canadian Boreal Initiative, 2008), online: Pembina Institute <<https://www.pembina.org/pub/1650>>.

6 Chad Croft, Todd Zimmerling and Karl Zimmer, *Conservation Offsets: A Working Framework for Alberta* (2011) Alberta Conservation Association.

7 Alberta Land Use Secretariat, *Experimental Economic Evaluation of Offset Options for Alberta: A Summary of Results and Policy Recommendations* by Marian Weber et al (2011), online: Alberta Environment and Parks <<https://www.landuse.alberta.ca/LandUse%20Documents/Experimental%20Evaluation%20of%20Offset%20Design%20Options%20Summary%20-%202011-11.pdf>> [AI Offset Options].

8 Offset Guide, *supra* note 1.

9 Ontario Nature, *Key Issues in Biodiversity Offset Law and Policy: A Comparison of Six Jurisdictions* by David Poulton (2015) online: Ontario Nature

<[https://www.ontarionature.org/protect/habitat/PDFs/Key\\_Issues\\_In\\_Biodiversity\\_Offset\\_Law\\_and\\_Policy\\_A\\_Comparison\\_of\\_Six\\_Jurisdictions\\_Final.pdf](https://www.ontarionature.org/protect/habitat/PDFs/Key_Issues_In_Biodiversity_Offset_Law_and_Policy_A_Comparison_of_Six_Jurisdictions_Final.pdf)> [Offset Issues].

10 Alberta Biodiversity Monitoring Institute, *Opportunities to Move Forward with Conservation Offsets in Alberta* by Morris Seiferling (2015), online: Ecosystem Services Assessment <[http://ecosystemservices.abmi.ca/wp-content/uploads/2014/10/Seiferling\\_2015\\_OpportunitiesToMoveForwardwithConservationOffsetsinAlberta.pdf](http://ecosystemservices.abmi.ca/wp-content/uploads/2014/10/Seiferling_2015_OpportunitiesToMoveForwardwithConservationOffsetsinAlberta.pdf)> [Offset Opportunities].

11 Alberta Association for Conservation Offsets, <<http://www.aaco.ca/>>.

While not official policy, the AI Offset Options paper captures where Alberta is or could be enroute to Conservation Offsets. It proposed:

- a short term phase from 2011-2016 in which there would be recommendations on offsets;
- a medium term phase from 2016 to 2021 during which pilots are evaluated to make decisions on moving forward with a regulated offset program; and
- a long term phase over 10-15 years in which the anticipated Exchange evolves and there is integration of Conservation Offsets with other markets for carbon, wetlands and water.

At the time of publication, this would put the Conservation Offset in Alberta movement near the start of the medium term phase which might be fairly accurate.

Some key government steps towards a regulated conservation offset system include:

- A 2014 Discussion paper on the potential offset framework (Discussion Paper).<sup>12</sup>
- A 2015 Draft Conservation Offset Framework that was approved internally close to the time of this publication so might be considered official policy (Conservation Offset Framework).<sup>13</sup>

This non-legislated policy groundwork establishes that Alberta wants to apply a single set of overarching offset principles and common system design elements and program characteristics to a diverse range of ecosystem components. This includes the wetlands offset system that is already operating plus potential for future habitat, water and air-based offsets. The stated purposes of providing an umbrella policy are to support consistent implementation and regulatory certainty while reducing duplication of common offset program requirements.

This provincial policy groundwork also establishes that the approach to Conservation Offsets is drawing on the provincial precedents of the carbon regime under the *Climate Change Emissions Management Act (CCEMA)* and the wetlands replacement regime under the *Wetlands Policy and Water Act*.

Debate over the merits of these precedents resembles one of principle versus mechanics. Concern with the carbon model begins with the difference between the fungible natures of carbon as compared to other ecosystem components. Concern with both carbon and wetland models are with the questionable adherence to the established principles of Conservation Offsets. Support for the carbon precedent usually focuses on design elements that enable a

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<sup>12</sup> Alberta Conservation Offset Policy Framework Discussion Paper (2014), unpublished [Discussion Paper].

<sup>13</sup> A Framework for Alberta Conservation Offsets (Draft May 25, 2015) unpublished [Conservation Offset Framework].



functioning market. Support for the wetlands system may be that it is implemented through regulatory approvals.

Potentially all government and non-government statements that Alberta is positioned for a regulated conservation offset system references the *LUF* as the high level policy driver and the existence of supportive legislation including *ALSA*. Likewise, threats to the advancement of Conservation Offsets in Alberta are said to include changes in government leadership resulting in loss of support for the *LUF* and *ALSA*.<sup>14</sup>

Overall, *ALSA* could be instrumental in advancing Conservation Offsets in multiple ways:

- Encoding the elements of the non-legislated offset policy into regulations made possible on Conservation Offsets, Stewardship Units and the Exchange; and
- Providing guidance through regional plans and the cumulative effects management frameworks under those plans, especially the “biodiversity frameworks”.

The offset policy groundwork also flags the continued importance of approvals of legislation including the *Environmental Protection and Enhancement Act (EPEA)*, the *Water Act* and the *Public Lands Act*.

Despite circulation of the draft Offset Framework, the potential lack of provincial government commitment to Conservation Offsets has still been called “the most significant barrier” to Conservation Offsets in Alberta.<sup>15</sup> The Offset Opportunities paper further recommended that this draft Offset Framework form the basis of the provincial offset system, subject to an additional requirement to achieve verifiable conservation outcomes.<sup>16</sup> The importance of measurable outcomes has been the subject of more recent developments discussed below.

Caution around hard commitment to the current policy direction and movement to a regulated offset system under *ALSA* is legitimate. There remain numerous unsettled law and policy issues around Conservation Offsets in Alberta, many of which could be considered systemic challenges flowing from the nature of the legal regime for public lands and natural resources.

Offsets on purely private land create a simpler context. The course of policy development might suggest reduced focus on the articulation of principles and removal of barriers to the most principled approach in favor of increased focus on design elements that enable markets. This report suggests caution around encoding the current policy direction into offset regulations of general application where issues might best be resolved through regional planning and non-*ALSA* tools.

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<sup>14</sup> *AI Offset Options*, *supra* note 7.

<sup>15</sup> *Offset Opportunities*, *supra* note 10.

<sup>16</sup> *Ibid.*

The following review indicates numerous unsettled issues with Conservation Offsets under every criterion for analysis: principles, property law and regulatory framework. The majority of these issues could be considered “systemic challenges” flowing from the nature of the legal regime for public lands and natural resources. Consequently these issues are highest concerning implementation of Conservation Offsets on public lands.

Several of these issues could be resolved by regulatory activity under *ALSA* or other legislation. An alternative is reform to natural resource tenure regimes and greater property rights in ecosystem services.

### Conservation Offsets use in Alberta

Use of Conservation Offsets in a formalized or regulated manner is spreading worldwide. This movement already includes some Canadian jurisdictions and there is a growing amount of offset-related activity in Alberta. This includes:

- the carbon compliance regime under *CCEMA*;
- wetlands offsets under the wetlands policy implemented through the *Water Act*;
- the acid deposition management framework is proposed as an example by the Offset Opportunities paper;
- federal *Fisheries Act* habitat replacement requirements and possibility for offsets under the *Federal Species at Risk Act*;
- federal regulators and joint review panels imposing or recommending offset conditions on large energy projects;
- voluntary project specific offsets and proactive reclamation activity by a number of energy companies;
- the Southeast Grassland pilot; and
- the Alberta Land Institute Wetlands Project.

Not all of these initiatives could be converted into a regulated conservation offset system under *ALSA*, especially the federal examples. However, all enable some observation of issues to development of offset policy and regulations in Alberta.

## Carbon regime

The *CCEMA* regime has been operational for several years. *CCEMA* and regulations thereunder make specified emitters subject to emissions intensity reduction targets. Emitters that exceed the targets have three options:

- purchasing emissions performance credits from another emitter that performed above its target and therefore acquired surplus reductions to sell;
- purchasing emission offsets produced by the actions of non-regulated sectors; or
- paying a penalty for excess emissions into a fund.

The option of paying into the fund is not a true offset as this does not directly generate environmental benefits. Design elements of the carbon model including use of protocols to establish offsets and the option of paying in-lieu fees to a fund have been recognized by the Offset Framework although are subject to future specific offset programs.

## Wetland Offsets

Wetland offsets are enabled by a combination of provincial legislation and policy. The Alberta *Water Act* vests all water in the province of Alberta. The province of Alberta also owns the beds and shores of all naturally occurring water bodies under the *Public Lands Act* and vests all natural watercourses in the province. These provisions collectively establish provincial ownership over many wetlands.

Regulations under the *Water Act* require anyone wishing to disturb a water body including a wetland to obtain an approval that may be granted on conditions. Alberta has an established practice of requiring as a condition that fees be paid into a wetland replacement fund. The Wetland Policy is a more recent non-legislated policy. It has several goals including minimizing loss and degradation of wetlands while allowing for continued development and “to conserve, restore, protect and manage wetlands”. Outcomes sought include wetland conservation and restoration in areas where losses have been high and replacing lost wetland value. The policy requires wetland replacement for impacts that cannot be avoided or minimized. Individual wetlands are to be assessed and assigned a value, and the residual impacts of development measured according to the prescribed metrics. The wetlands model follows similar structure to the carbon regime but applies it to a very different component of the environment.<sup>17</sup> Much like the carbon regime, developers have options including restorative replacement (restoration of wetlands) or payment into a fund that may be used for research, monitoring, and education and securing existing wetlands. While sufficient legal authority is established by the *Water Act* and regulations there may be a future wetland regulation to clarify the regime. As it is currently

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<sup>17</sup> Offset Guide, *supra* note 1.

expected that Conservation Offsets in Alberta will be consistent with the wetlands policy, “much depends on getting the wetlands system right.”<sup>18</sup>

### Acid Deposition Management Framework

Acid Deposition Management Framework is proposed by the Opportunities paper as a third example of an operational offset model under Alberta legislation.<sup>19</sup> The framework consists of defined, increasing levels of acid deposition from industrial emissions. These levels require increasing reduction of acid depositions. A “target load” under the framework becomes an environmental objective under *EPEA*. When a deposition load exceeds a “target load”, a management plan is required. In developing a management plan all options can be considered including emissions trading and the mandated implementation of offsets. This example is not cited in the government Discussion Paper or Offset Framework as a precedent of offsets in Alberta. However, it is notable for the concept of objectives adopted under legislation that could be pursued with offsets.

### Federal Fisheries Act and Species at Risk Act

The federal *Fisheries Act* is often cited for prohibitions on habitat destruction driving habitat compensation activities.<sup>20</sup> Non-legislated policy provides guidelines and principles for use of offsets for harm to habitat. Measures include funding projects. Habitat banking by activity proponents may also be authorized. Amendments to the habitat protection provisions of the legislation in 2013 may favor increased use of offsets.<sup>21</sup> This model shows the importance of regulatory drivers and the ability for more technical guidance to be left to policies.

The federal *Species at Risk Act* is cited as potentially favorable to offsets by multiple sources; however, there is no clear federal policy on its use in this way.<sup>22</sup>

### Federal or Joint Review Panels

The National Energy Board (NEB) and/or Joint Review Panels for major energy projects have imposed or recommended offset conditions on several energy projects. Without reviewing these decisions, the growing list is said to include:

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<sup>18</sup> *Ibid.*

<sup>19</sup> Offset Opportunities, *supra* note 10.

<sup>20</sup> *Fisheries Act*, RSC 1985, c F-14; Offset Opportunities, *supra* note 10; Offset Guide, *supra* note 1.

<sup>21</sup> Offset Opportunities, *supra* note 10.

<sup>22</sup> *Species at Risk Act*, SC 2002, c 29, see in particular s. 73; Offset Opportunities, *supra* note 10; Offset Guide, *supra* note 1.

- Between 2010 and 2012, the NEB three times made approval of pipeline development by Nova Gas Transmission in caribou habitat in the Horn River region contingent upon habitat compensation.
- The Federal Joint Review Panel for the Enbridge Northern Gateway pipeline recommended conditions for multiple types of offsets for fish, wildlife and habitat.
- The Federal-Provincial Joint Review Panel for the Shell Jackpine Oil sands mine in 2013 recommended that the federal and Alberta governments cooperatively consider the need for biodiversity offsets to address significant adverse project effects before other provincial or federal approvals are issued and that such considerations guide permit issue.
- The Joint Review Panel for the Total Joslyn Oil Sands Mine in 2011 examined the proponent's own offset plans and imposed a condition that habitat for species at risk be created or protected in locations need the project.
- The Kinder Morgan Trans Mountain Pipeline expansion received conditions from NEB offsets concerning habitat, wetlands, and greenhouse gases.

Offset conditions by the NEB and federal review panels are enabled by the provisions of *Canadian Environmental Assessment Act, 2012 (CEAA 2012)* that require consideration of "mitigation measures" which are defined to include restitution of environmental damage by "replacement, restoration, compensation".<sup>23</sup> However, the offset recommendations of federal reviews occur in an ad-hoc manner rather than as a routine matter of policy. The subject of federal reviews or joint reviews will typically be large projects on provincial public lands that are regulated by federal and provincial authorities. Federal conditions can put developers in a position of needing access to further provincially managed lands to establish appropriate offsets. This shows the need for clarity on federal as well as provincial offset policy and argument for policy alignment.

## Voluntary Conservation Offsets

A number of energy companies are already pursuing offsets on a voluntary basis. Examples include:

- A commitment by Kinder Morgan Trans Mountain Pipeline in an agreement with environmental groups to fund environmental improvements in national and BC parks.

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<sup>23</sup> *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, ss 52, 2.

<sup>24</sup> Offset Guide, *supra* note 1.

- The purchase by Shell of the “True North Forest” to establish a conservation area under joint management of Shell and ACA.
- Seismic line restoration by Conoco Philips / Suncor in relation to the Cabin Creek Pipeline 2005.
- Reclamation and restoration activities in caribou habitat unrelated to current development approvals including the Algar LEAP project and the Cenovus LiDea project.

These voluntary industry pilots are not reviewed in this report. However, some relevant points from the Algar LEAP project assessment include:<sup>25</sup>

- Efforts to distinguish “Conservation Offsets” focused on ecosystems from “biodiversity offsets” focused on specific species recognizing that either concept may get to the same subject of habitat.
- Discussion of the recognized principles of Conservation Offsets.
- Some support for a formalized offset system from an industry perspective.
- Reliance on *ALSA* as the legislative platform, which is mainly needed for a credit system.

It is also worth noting that exploring offsets is only one aspect of these industry reclamation pilots. These initiatives can also be viewed as very incomplete conservation offset pilots as they do not provide any securement for the outcomes of the conservation activities. Where there is some security, this has resulted from exceptional circumstances of unrelated offsets such as location on federal military lands.<sup>26</sup>

### The Southeast Grassland Pilot

The Southeast Grassland Pilot project was formed at the request of the Land Use Secretariat and the Agriculture Ministry.<sup>27</sup> Policy support for the pilot was found in the *ALSA* provisions for research and design, and by federal *Species at Risk Act* provisions for critical habitat protection.

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<sup>25</sup> Alberta Innovates, Silvacom Ltd and Green Analytics, “Assessing the Ecosystem Service Benefits of the Algar LEAP Project” (2014), online: Ecosystem Services + Biodiversity Network <[https://ecoservicesnetwork.ca/media/uploads/contributor-11/Assessing%20the%20Ecosystem%20Service%20Benefits%20of%20the%20Algar%20LEAP%20Projec\\_AHAaNI7.pdf](https://ecoservicesnetwork.ca/media/uploads/contributor-11/Assessing%20the%20Ecosystem%20Service%20Benefits%20of%20the%20Algar%20LEAP%20Projec_AHAaNI7.pdf)> [Algar Pilot].

<sup>26</sup> Offset Guide, *supra* note 1.

<sup>27</sup> Kimberly Good and Rachelle Haddock, Southeast Alberta Conservation Offset Pilot: Linking Decisions and Assumptions with Generally Accepted Offset Principles (Calgary: Miistakis Institute, 2014) [Grasslands Pilot].

The pilot involves payment to private landowners to reseed cropland to native grass to offset industrial disturbance on public lands. Participation was voluntary for the industry and landowners. The original focus was on areas designated as critical habitat for sage grouse recovery. However, the pilot was modified in favor of a broader habitat-focused offset. The initial target buyers were oil and gas industry; however, later identified targets included utilities, wind energy and aggregate industries.

Some key findings for the purpose of this report include [paraphrased]:

- The pilot reflected many but not all established principles and practices of Conservation Offsets.
- Principles that the pilot did not address resulted from no government policy or direction on the topic.
- Demand for offsets is essential and may come from regulations requiring offsets.
- Need for scientifically valid and understood metrics [discussed concerning Stewardship Units].
- Need for sustainable funding [discussed concerning Stewardship Units].

This Grasslands Pilot was recognized in the SSRP in provisions anticipating a “linear footprint management plan” for the White Area public lands discussed below.<sup>28</sup> However, the future Conservation Offset system it anticipates would be to protect existing grasslands on private lands rather than to conduct restorations.

### **Alberta Land Institute Wetlands Project**

The Wetlands Project is proposing payments to private landowners in Rocky View County to restore former natural wetlands that have been drained. Some potential restoration sites are existing wetlands that could be restored to a larger size. Funding would be provided through a “reverse auction” where multiple sellers (the landowners) would bid to a single buyer (the University of Alberta which houses the Alberta Land Institute).

The “offset” element to the Wetlands Project is that the restorations would compensate for wetland damage by development in the City of Calgary and funds would come through the provincial wetlands fund. In this case, the payers are land developers in the City of Calgary who need *Water Act* approvals in association with municipal developments. Wetland replacement is

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<sup>28</sup> Government of Alberta, *An Alberta Land-Use Framework Integrated: Plan South Saskatchewan Regional Plan 2014 – 2024* (Edmonton: Alberta Government, 2014) at 74 (strategy 3.16), online: Alberta Environment and Parks <[https://www.landuse.alberta.ca/LandUse%20Documents/South%20Saskatchewan%20Regional%20Plan\\_2014-07.pdf](https://www.landuse.alberta.ca/LandUse%20Documents/South%20Saskatchewan%20Regional%20Plan_2014-07.pdf)> [South Saskatchewan Regional Plan 2014 – 2024].



mandated by a City of Calgary policy that predates the provincial Wetlands Policy as well as by the provincial policy. The City policy might be considered a form of mitigation hierarchy with the trigger for moving to offsets being the non-availability of regulatory tools. The policy promotes direct protection of wetlands by taking Environmental Reserves under the *Municipal Government Act (MGA)*, however when this is not possible it promotes wetland restorations. The City issues the development permits under the *MGA* however the province issues the wetland alteration permits under the *Water Act*. The *Water Act* permit requires payments into the provincial wetland replacement fund. For those *Water Act* permits inside the City, the City is the provincially-recognized restoration agent and responsible for creating compensation wetlands using the provincially enabled funds. Urban growth, land availability and economic factors limit availability of restoration sites inside city boundaries. This caused the City to take interest in Rocky View County and the Wetlands Project.

Issues encountered through this project include:

- approvals for restoration projects;
- adequate securement of conservation sites;
- need for regulatory enforcement to uphold principles of offsets;
- overlapping policy and regulatory regimes requiring offsets;
- uncertainty over property ownership and management of conservation sites; and
- availability of restoration service providers including municipalities.

The Wetlands Project is not a government-sponsored pilot project. This makes it all the more important for highlighting legal and policy issues with Conservation Offsets from a ground-up perspective.

### **Missing Pilot Projects**

There are potentially some additional pilot projects in Alberta aside from those discussed above. The AI Offset Options paper suggested pilots around offset administration and enforcement. These issues have received relatively less attention in the development of a provincial offset system discussed below. To the ELC's knowledge, there have been no government-endorsed offset pilot projects where private conservation activities are delivered on public grasslands.

## Principles of Conservation Offsets

The principles of Conservation Offsets are quite specialized to this discipline as compared to the more general established principles of environmental law. The alignment of development and environmental protection implied by Conservation Offsets could be considered a manifestation of sustainable development. If the principles of Conservation Offsets are strongly articulated and applied then they could align with more specific environmental principles including pollution prevention, polluter pay, the precautionary principle and public participation.

Unlike the core environmental principles, conservation offset principles are not directly encoded in the international law regime in a manner that creates expectations of domestic implementation and attracts the interest of the courts. As such, if principles of Conservation Offsets are not adopted into policy, statutes and regulations, then they likely do not apply.

Also, with conservation offset principles no single prescription fits all jurisdictions and the application of principles must consider the social, economic, political and ecological context.<sup>29</sup> Much of the following discussion relies on the Offset Issues paper for a review of how these principles are treated in the legislation and policy of multiple jurisdictions. However, it is worth noting that multiple pilot projects identify most of the same principles and reach similar conclusions concerning the settled and unsettled issues:<sup>30</sup>

- definition of a conservation offset;
- the mitigation hierarchy;
- goals and objectives;
- limits to what can be offset;
- additionality;
- equivalency;
- proximity;
- duration of offsets;
- fees in lieu of offsets (in-lieu fees); and
- participation in Conservation Offsets.

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<sup>29</sup> Offset Issues, *supra* note 9.

<sup>30</sup> Algar Pilot, *supra* note 25; Grasslands Pilot, *supra* note 27.

Several principles of Conservation Offsets are the proper topic of regulations and technical guidance documents rather than simply high level statements. This warrants attention to unsettled issues of principles before proceeding to regulations under *ALSA*.

The practical applicability of established conservation offset principles in Alberta is a live issue, especially with offsets on public lands. Issues of principle are where the carbon and wetlands precedents cause most concern for Conservation Offsets as both models can be challenged for non-adherence to several of the above principles. The Alberta conservation offset policy framework appears to lean towards broad interpretation of principles or deferral of prescriptions to specific offset programs. This is justifiable for some principles where flexibility is warranted. However, it also reflects unresolved legal issues that may create barriers to offsets if strongly articulated principles were prescribed.

### What is a conservation offset?

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*A conservation offset: Measurable conservation outcomes of actions designed to compensate for significant residual adverse biodiversity impacts arising from project development after appropriate prevention and mitigation measures have been taken.*

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Need to define the concept of a conservation offset is a persistent issue that might not have one right answer. However, there is need for some clarification if there are to be regulations under *ALSA* as the range of possible definitions of “counterbalance” under *ALSA* is incredibly broad.

In the biodiversity context, the most cited source of offset definitions and principles is the Business and Biodiversity Offset Programme (BBOP).<sup>31</sup> This is an association of civil society, private sector, government and individual representatives from various jurisdictions, not a source of law as with the international environmental principles. BBOP defines an offset as:<sup>32</sup>

Measurable conservation outcomes of actions designed to compensate for significant residual adverse biodiversity impacts arising from project development after appropriate prevention and mitigation measures have been taken.

By the BBOP definition, an offset:

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<sup>31</sup> Business and Biodiversity Offsets Programme, online: <<http://bbop.forest-trends.org/>>.

<sup>32</sup> Business and Biodiversity Offsets Programme, “BBOP Principles on Biodiversity Offsets”, online: Business and Biodiversity Offsets Programme <[http://bbop.forest-trends.org/documents/files/bbop\\_principles.pdf](http://bbop.forest-trends.org/documents/files/bbop_principles.pdf)>.

- requires measurable results not just activity;
- occurs after the prevention and mitigation of impacts (the “mitigation hierarchy” which is a principle discussed below); and.
- is for “significant” impacts.

This definition qualifies a conservation offset based on procedure and performance rather than by the environmental subject matter of the offset.

The Alberta policy groundwork implies a similar approach. It could allow a broad range of environmental subject matters but is imposing some technical qualifications. The Discussion Paper refers to offsets more generally as actions to balance negative impacts after efforts to avoid and minimize. The Conservation Offset Framework defines Conservation Offsets as:<sup>33</sup>

A measurable conservation outcome, resulting from actions designed to counteract significant impacts arising from project development after appropriate prevention measures consistent with the mitigation hierarchy have been taken.

This provincial policy definition is conceptually similar to the BBOP definition in containing the same two qualifiers of measurability and adherence to a mitigation hierarchy.

*ALSA* provides huge leeway to define “counterbalance” in regulations.<sup>34</sup> Counterbalance could include [paraphrased]:

avoiding, limiting, mitigating, minimizing, rectifying “by repairing, rehabilitating, restoring or reclaiming”, reducing or eliminating “by conservation and maintenance”, compensating through Stewardship Units, requiring that counterbalancing be increased by a ratio, encouraging voluntary restoration, reclamation, mitigation, land acquisition, conservation easement, in-kind donation, and requiring action before or after an activity starts or ends.

These provisions of *ALSA*:

- Do not distinguish the definition of a Conservation Offset from the mechanism for delivery of an offset (voluntary, ad-hoc requirement, routine requirement or one of multiple compliance options).
- Does not distinguish the definition of Conservation Offsets from other regulatory design considerations like the timing of offsets relative to development or use of multiplier ratios (requiring offsets at a higher than 1:1 ratio to development impacts).

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<sup>33</sup> *Ibid.*

<sup>34</sup> *ALSA*, *supra* note 2 at ss 47(1) (2).

- Does not require adherence to the principles of Conservation Offsets discussed below (in particular the mitigation hierarchy and additionality) and goals that would amount to “counterbalance”.

Overall, *ALSA* could authorize Conservation Offsets that would not qualify as offsets by any recognized definition.

A second foreseeable issue is recognition of need for significant impacts. The conservation offset framework foresees this issue by offering some guidance. Consideration of significant impacts may include the geographic extent, duration of impact, and time lag between impact and restorative action.

Establishing significant effects in environmental regulatory process can be challenging. Many environmental assessments of major projects have found no significant effects considering proposed mitigation measures. Similar findings going forward would not support offset conditions. As environmental assessments are mostly for larger projects this raises a question of how significant impacts will be determined on more routine applications. Other challenges to finding significant effects in Alberta include absence of the precautionary principle, restrictive standing to intervene in regulatory process, and potential onus on interveners to show effects rather than on proponents to show no effects.

There are multiple options on significant effects where projects do not require environmental assessments. These could be roughly divided into approaches where regulations prescribe that offsets are required and approaches that make use of real site characteristics to determine offsets.

- *ALSA* Conservation Offset regulations may prescribe limits on the impact of activities for which counterbalancing is required and the Stewardship Units that must be spent to counterbalance these impacts.
- Regional plans and management frameworks could set levels of cumulative effects that create offsetting requirements for all projects.
- Disturbance standards, a relatively new tool created by *the Public Lands Administration Regulation*, might be an option for setting levels of disturbance beyond which offsets are required. The regulation allows setting a maximum allowable footprint for a class of activities or combination of activities on public land.<sup>35</sup> Authorities issuing dispositions may consider the disturbance standards, disposition holders are required to comply with the standards, and disposition holders can enter agreements with each other about matters in the disturbance standards.
- As previously proposed, use ABMI or other third party biodiversity inventories.

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<sup>35</sup> *Public Lands Administration Regulation*, AR 187/2011, ss 1, 3, 4, 16, 21.

- As previously proposed, use ecosites as a proxy for biodiversity value.

The regulatory prescription options, while simpler, largely bypass the mitigation hierarchy which is the next principle and the most established principle of offsetting.

## Mitigation Hierarchy

The mitigation hierarchy provides an order in which to address impacts before proceeding to offsets. This order is generally avoidance, on-site minimization or mitigation, rehabilitation or restoration, and finally offsetting. Some expression of the mitigation hierarchy is near universal in conservation offset policies or legislation. Of the six jurisdictions reviewed in the Offset Issues paper only one “outlier” allowed development proponents to proceed straight to offsetting for low risk developments.<sup>36</sup> The mitigation hierarchy impliedly embodies the pollution prevention principle as it prevents use of offsets as the mere purchase of a license to damage the environment.

Application of the mitigation hierarchy can be challenging as legislation and policy may provide variable levels of direction to decisions makers on how avoidance is to be enforced and what thresholds or considerations apply when moving from one level of the hierarchy to the next.<sup>37</sup> This is significant as avoidance may be interpreted in different ways. Some regulators may not feel empowered to review the location or purpose of a project, the implication being that avoidance alternatives are ruled out from the moment a development application is drafted.<sup>38</sup> Even where the mitigation hierarchy is prescribed by regulations, there may be scant records documenting avoidance and minimization prior to offsetting.

The Offset Issues paper recommended that [paraphrased]:

- the mitigation hierarchy and factors to consider in applying the hierarchy be clearly stated;
- developers should be required to document avoidance and minimization, and regulators should conduct their own analysis; and
- permits should be denied or applications remitted for redesign where avoidance and minimization are insufficient.

Multiple assessments of the pilot projects discussed above have articulated value to encoding mitigation hierarchy in policy in Alberta.<sup>39</sup> This was the case even if the mitigation hierarchy occurs somewhat impliedly through the practices of industry and regulators. The Offset Guide

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<sup>36</sup> Offset Issues, *supra* note 9.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Algar Pilot, *supra* note 25; Grasslands pilot, *supra* note 27.

notes that the Wetlands Policy reflects the mitigation hierarchy and is not overly dependent on offsets.<sup>40</sup> This would provide some favorable precedent.

The Conservation Offset Framework references adherence to the mitigation hierarchy in the definition of Conservation Offset but does not prescribe the mitigation hierarchy or factors around moving up the levels.

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*The mitigation hierarchy should be prescribed in any provincial offset policy, regulations or regional plans providing for use of offsets.*

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## Goals and Objectives

The need for goals or objectives to be pursued by offsetting is a broad point of consensus and one of the ELC's own criteria for a strong regulatory framework. The BBOP principle is that only conservation measures designed to achieve no net loss or better should qualify as Conservation Offsets. The Offset Issues paper found that four of six jurisdictions reviewed explicitly or implicitly suggested goals of "no net loss" or implied goals of at least net neutral through terms like "counterbalance".<sup>41</sup> The only two jurisdictions that did not prescribe any objectives were those that did not have firm Conservation Offset policies but only guidelines that could be applied at the discretion of regulators and private industry. None of the six jurisdictions had a general goal of true net gain for biodiversity although some left the door open to this prospect.

The Offset Issues paper recommended that [paraphrased]:

- any offset system should have clear goals that can be objectively measured;
- no net loss or a net gain should be the goal absent other compelling policy objectives; and
- departure from no net loss should follow clear policy objectives.

The need for measurable objectives is fairly well understood. However, it is clear that some people see no net loss as unfeasible in Alberta and that view has carried into the Wetland Policy. The Wetlands Policy goals as noted above include: "minimizing loss and degradation of wetlands" while allowing for continued development and "to conserve, restore, protect and

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<sup>40</sup> Offset Guide, *supra* note 1.

<sup>41</sup> Offset Issues, *supra* note 9.



manage wetlands". These are arguably vague goals and certainly not measurable objectives. The Offset Guide suggests that these vague goals of the Wetlands Policy contribute to "an unconventional foundation for offsetting".<sup>42</sup>

The Conservation Offset Framework does not prescribe an overarching goal, leaving that matter to specific offset programs. The *LUF*, *ALSA*, and regional plans to date are all similar regarding environmental objectives being vague or deferred to further plans, policies and programs. *ALSA*'s use of "counterbalance" could be implied to mean "net neutral"; however, the provisions on making regulations do not clearly contemplate setting goals or objectives through these regulations other than setting the impacts requiring offsetting.

Regional plans, sub-regional plans and management frameworks remain the better vehicle to set goals and objectives under *ALSA*. The biodiversity frameworks are a work in progress at time of publication and the LARP in particular is showing some more clarity in indicators and levels of cumulative effect. However, these frameworks still resemble other Alberta policies that seek to minimize assumed loss rather than setting a measurable objective like no net loss.

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*All offsets regulated under ALSA should have goals of no net loss or better, and powers to define "counterbalance" in ALSA regulations should be qualified as requiring as least net neutral outcomes.*

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Another issue of goals discussed below under "link to regulatory approvals" is the use of offsets as a goal in itself.

### **Limits to what can be Offset**

There is good argument that Conservation Offsets should not be allowed where success is too uncertain or the risks of failure are too severe because the credibility of offsets as a tool depends on the ability to replicate what was lost.<sup>43</sup> Limits on what can be offset would reflect the precautionary principle, subject to debate over the inclusion of cost considerations in this principle.

Offset Issues found that none of six jurisdictions reviewed provided explicit criteria for a category of impact beyond which offsets may not be used.<sup>44</sup> Some of the more established regulated offset systems are also some of the weakest with respect to limits on what can be

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<sup>42</sup> Offset Guide, *supra* note 1.

<sup>43</sup> Offset Issues, *supra* note 9.

<sup>44</sup> *Ibid.*

offset, and even the fullest discussions in this principle are in non-mandatory policy.<sup>45</sup> Some proxies for limits on offsets include:

- Policies that prefer high offset standards in high-risk situations.
- Allowing broad “public interest” assessments to favor decisions not to issue permits instead of applying the mitigation hierarchy to permitting.

The Offset Issues paper recommended to [paraphrased]:

- Identify where offsets are unlikely to produce desired outcomes due to irreplaceable loss or unacceptable consequences of failure. Under these circumstances, policy-makers should be forthright about choosing between environmental value and development value and not hide behind offsets if environmental values are to be sacrificed.

The carbon precedent is of little use concerning limits on what can be offset as the fungible nature of atmospheric carbon is largely makes emissions so amenable to offsets. The wetlands system provides no clear limits on what can be offset. The Conservation Offset Framework also sets no limits on what can be offset.

ALSA provisions for regulations to “counterbalance” activities are silent regarding limits on what can be offset. The clearest regulatory power is to set limits on impacts of activities beyond which offsets are required. Recommendations on ALSA regional plans by the ELC and other organizations have included limits on what can be offset.<sup>46</sup> This concern has been most strongly directed at native grasslands in the South Saskatchewan.

## Additionality

A Conservation Offset requires outcomes beyond those produced through baseline behaviour. This beyond baseline outcome is additionality. The basic types of additionality are fairly settled; however, recognizing additionality in practice can be challenging. Need for policy to define additionality or clarify what will be recognized as additionality is an ongoing issue in Alberta.

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<sup>45</sup> *Ibid.*

<sup>46</sup> Southern Alberta Land Trust Society, Comments on the Draft South Saskatchewan Regional Plan, (2014), online: Southern Alberta Land Trust Society <[http://www.salts-landtrust.org/docs/SSRP\\_SALTS\\_SFS\\_submission.pdf](http://www.salts-landtrust.org/docs/SSRP_SALTS_SFS_submission.pdf)>. Also see Adam Driedzic, “ELC Comments on the Draft South Saskatchewan Regional Plan”, online: Environmental Law Centre <<http://elc.ab.ca/media/86833/ELC-feedback-on-Draft-SSRP.pdf>> and/or Adam Driedzic, “South Saskatchewan Regional Plan: Feedback on the Advice of the Regional Advisory Council”, Comments, (2013), online: Environmental Law Centre <[http://www.elc.ab.ca/Content\\_Files/Files/ELC\\_comments\\_SSRP\\_Jan\\_8\\_2013.pdf](http://www.elc.ab.ca/Content_Files/Files/ELC_comments_SSRP_Jan_8_2013.pdf)>; Jason Unger, “Comments on South Saskatchewan Regional Advisory Council Advice to the Government of Alberta for the South Saskatchewan Regional Plan”, Comments (2012), online: Environmental Law Centre <[http://www.elc.ab.ca/Content\\_Files/Files/CommentsSSRPApril302012.pdf](http://www.elc.ab.ca/Content_Files/Files/CommentsSSRPApril302012.pdf)>.

The two recognized types of additionality are “positive management actions” and “averted loss”.<sup>47</sup> Positive management actions are direct physical interventions to enhance ecosystem function. Averted losses are actions to protect existing ecosystems. This usually involves legal protection such as Conservation Easements or similar tools on private land or designation of protected areas on public land. Positive management actions are more clearly additionality; however, create more risks of offset failure and issues around liability for outcomes. Averted losses provide more certainty of outcome but do not produce gains against lost ecological values.

A third category of activities such as research, education and support for community initiatives are typically not considered true offsets as they produce no measurable improvements in ecosystem function or security.<sup>48</sup> Fees paid into funds may or may not be used for offsets and are discussed below.

Recognizing additionality is complicated by multiple aspects of the Canadian legal tradition. One is the lack of clear environmental responsibilities attached to the ownership of land and natural resources.<sup>49</sup> Neither governments, private landowners, nor the holders of natural resource rights are likely to face positive conservation duties unless such duties are provided under legislation, contracts, or other legal instruments. A related complication is that the broad powers of public authorities to regulate property rights, land, and natural resources are usually subject to equally broad discretion. Thus, views on the existence of additionality may diverge based on the weight provided to legal rules versus the actual regulatory environment and its practical effect on land use.

The precedents of the carbon regime and wetlands regime do not address additionality as it allows a compliance option of paying into a fund that is not used for offsets and at less than the cost of many offsets. The Wetlands Policy also allows developers options of reducing their own impact, obtaining offsets credits, or paying into a fund available for activities that are not true offsets.<sup>50</sup>

Almost all recommendations reviewed in this report favor recognizing positive management actions and averted losses; however, they diverge on what should be recognized. The Conservation Offset Framework considers additionality “eligible actions beyond a baseline”. It states that these baselines will be defined in protocols for eligible actions including “restorations” and averted losses.

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<sup>47</sup> Offset Issues, *supra* note 9.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> Offset Guide, *supra* note 1.

## Positive Management Actions (including Reclamation and Restoration)

Most issues with positive management actions in Alberta concern public lands. Some ideas that have been floated and raise questions of additionality include: industry plans or practices approved by regulators, voluntary adherence to “beyond compliance” standards provided by government, and private restoration inside public protected areas (which is driven partly by the need to provide securement).

The key test case for positive management actions in Alberta is land reclamation. Reclamation is a standard requirement on many industrial development permits and in some sense it attempts to achieve no net loss while accepting temporary disturbance.<sup>51</sup> Reclamation has been the subject of multiple pilot projects, recommendations for reclamation offsets, and further recommendations to clarify the relationship between reclamation offsets and reclamation as a regulatory requirement.<sup>52</sup>

Both the Boreal Offsets and AI Offset Options papers propose that offsets could help fill gaps in existing reclamation policy.<sup>53</sup> Some of these gaps include:

- Reclamation requirements under *EPEA* are set on a project-by-project basis and there is no mechanism to ensure that reclamation will maintain regional or landscape characteristics.
- Linear features and especially seismic lines represent a large percentage of the surface footprint of the energy industry that is not subject to environmental assessments or specific reclamation requirements.
- Reclamation requirements are often paired with the taking of financial securities that have been found inadequate, at least in the case of oil sand mines.<sup>54</sup>
- The regulatory requirements for reclamation baselines do not provide for true ecological restoration or timelines for reclamation.

All of these factors contribute to a legacy of un-reclaimed industrial footprint, underfunded liabilities and difficulty in achieving biodiversity or ecosystem outcomes from baseline reclamation.

The AI Offset Options paper proposes that advantages of reclamation offsets would include [paraphrased]:

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Boreal Offsets; *supra* note 5 and AI Offset Options, *supra* note 7.

<sup>54</sup> Auditor General of Alberta, Report of the Auditor General of Alberta 2015, online: Auditor General of Alberta <<https://www.oag.ab.ca/webfiles/reports/OAG%20Report%20July%202015.pdf>> [Report of the Auditor General of Alberta]; Dean Watt, “Seeking the Right Balance: Financial security for conservation and reclamation of Alberta’s oil sands mines” (Canada: Environmental Law Centre, 2010), online: Environmental Law Centre <<http://elc.ab.ca/media/8936/Seekingtherightbalancewebcopydfinal.pdf>>.

- Prevention of companies free riding on the conservation actions of industry leaders.
- A system and capacity for reclamation and certification is already in place and provides opportunity to expand these systems for certifying offset credits.
- A company role in addressing cumulative effects.
- Additional security along with the financial securities that would still be required.

The AI Offset Options paper provides one of the more fulsome suites of recommendations for reclamation offsets in the oil sands. Some details of this proposal were:

- To implement the biodiversity strategy and disturbance management plan for the LARP.
- Credit of either temporary or permanent offsets.
- Tradeable credits for reclamation on public lands and for avoided disturbance on private lands.
- Credits should be counted as security against future reclamation.

Concerning additionality in reclamation there are at least three options:

- reclamation beyond the baseline standard;
- accelerated reclamation; or
- reclamation to which no regulatory liability attaches to the party doing the reclamation.

**Reclamation Beyond the Baseline Standard:** The baseline reclamation standard provided by *EPEA* is to return the land to an “equivalent land capability”. Equivalent land capability is defined by regulations under *EPEA* as: <sup>55</sup>

The ability to use the land to support various land uses after conservation and reclamation is similar to the ability that existed prior to an activity being conducted on the land, but that individual land uses will not necessarily be identical.

This baseline regulatory standard does require ecological restoration, subject to more specific guidelines, of which there are several. As of 2011, it is also possible to establish reclamation standards under the *Public Lands Administration Regulation*. These provisions could potentially be used to establish standards higher than *EPEA*, or to reduce reclamation requirements. The ELC is not aware of specific guidance documents on use of these provisions. The potential for

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<sup>55</sup> *Conservation and Reclamation Regulation*, AR 115/1993, s 1(e).

multiple reclamation standards suggests the possibility of voluntary reclamation to a beyond-compliance standard closer to ecological restoration. The concern is that such additionality seems to depend on a weak baseline and further government approval.

**Accelerated Reclamation:** The AI Offset Options paper proposes accelerated reclamation as additionality as conservation benefits would be shifted from an uncertain future to the present.<sup>56</sup> It also recognizes a barrier to this option is the absence of clear regulatory baseline timing for reclamation. None of the existing policy documents on reclamation put timelines on the initiation or completion of reclamation either.<sup>57</sup> ELC has recommended reforms to provide for more timely reclamation beyond any concern with enabling Conservation Offsets.<sup>58</sup>

**Reclamation in the Absence of Liability:** The AI Offset Options paper proposes recognition of additionality from reclaiming abandoned footprint to which no regulatory liability attaches.<sup>59</sup>

Allowing reclamation offsets where reclamation obligations exist will increase need to clarify the relationship of the offset to the obligation. Some options are to:

- Not impose offset conditions where reclamation is required.
- Allow developer choice between reclamation and offsetting.
- Allow developers who conducted offsets to apply for relief from reclamation when the time comes.<sup>60</sup>

The ELC understands that one option under the wetlands system is that offsets conditions will not be imposed where reclamation is required.

From an industry perspective, it is generally necessary to show how offsets fit into a range of already existing requirements for reclamation so as to ensure no cost duplication.<sup>61</sup> These are important questions of regulatory harmonization or alignment that are mostly beyond the focus of this report.

ALSA considers reclamation in two provisions on what could amount to “counterbalance”:

- Rectifying or reducing an adverse effect by repairing, rehabilitating, restoring or reclaiming.

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<sup>56</sup> AI Offset Options, *supra* note 7.

<sup>57</sup> Jason Unger, “Reclaiming Tomorrow Today: Regulatory Timing for Abandonment and Reclamation of Well Sites in Alberta” (Canada: Environmental Law Centre, 2013), online: Environmental Law Centre <[http://elc.ab.ca/media/98837/Reclaiming\\_Tomorrow\\_TodayFINAL.pdf](http://elc.ab.ca/media/98837/Reclaiming_Tomorrow_TodayFINAL.pdf)>.

<sup>58</sup> *Ibid.*

<sup>59</sup> AI Offset Options, *supra* note 7.

<sup>60</sup> *Ibid.*

<sup>61</sup> Offset Opportunities, *supra* note 10.

- Encouraging voluntary measures to offset by committing to additional restoration or reclamation.

These provisions of *ALSA* allow any reclamation to potentially count as an offset including reclamation required by the baseline. However, they most clearly contemplate reclamation beyond the regulatory baseline and reclamation to which no liability attaches. They are silent regarding issues of timing of reclamation, choice of compliance options or relief from baseline obligations.

The conservation offset paper accepts “restorations” that may include habitat creation or reclamation of legacy disturbance which do not have reclamation requirements. This is fairly sound application of the additionality principle that may also avoid around relationship between offsets and reclamation obligations. Restorations of this nature are also the action most likely to go beyond regulatory baselines on private lands as well as public lands.

### Averted Loss

Some skepticism about averted loss as offsets was a feature of every jurisdiction reviewed in the Offset Issues paper.<sup>62</sup> Among the examples of regulated offset systems, averted loss was either the least preferred option, required a combination with additional management actions, or was not clearly considered. The unique case where averted loss was an equal option was the program in Victoria, Australia seeking conservation of native vegetation, and even then an original assumption that “nature is best” has been subject to policy review.

The Offset Issues paper recommended that:

- Averted loss should only be allowed where there is clear evidence of imminent threat and long term legal protection is arranged.
- Caution should be taken that protective action on the offset site does not simply displace the threat to other sites.<sup>63</sup>

For averted loss of private lands in Alberta, the ACA Offset Proposal and the AI Offset Options paper both rely on the historical rate of conversion of private land as indication that private land is at legitimate risk of being disturbed without protection.<sup>64</sup> This averted loss would be allowable to offset impacts on public lands. In contrast, multiple comments on *ALSA* - including the Offset Guide and the Alberta Land Institute Guide to Property Rights - all note

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<sup>62</sup> Offset issues, *supra* note 9.

<sup>63</sup> *Ibid.*

<sup>64</sup> AI Offset Options, *supra* note 7 and ACA Offset proposal, *supra* note 6.

that it is settled law that governments acting within their jurisdiction can restrict use of private land.<sup>65</sup>

For averted loss of public lands in Alberta, the AI Offset Options paper proposes that delay of industry projects might serve as averted loss. It is important to note that this was within a modelled scenario where all offsets and impacts were considered temporary. The AI Offset Options paper also suggests that relinquishment of industry rights might be recognized as an offset in certain situations where this would serve the outcomes of land use plans.

Delay or deferral of industry projects may be a very broad view of averted loss. Where the regulatory system provides for two steps such as with mineral leasing and surface development applications there is no right to the development, even if such approvals are granted routinely.

There is debate in Alberta around creation of protected areas or other forms of regulatory zoning as averted loss. At one extreme, mere government creation of a park in one location while approving development in other locations is not a conservation offset. On the other hand, one of the largest challenges for Conservation Offsets in Alberta is that some form of provincial regulatory decision is necessary to implement any offset on public lands in Alberta. This is discussed at length below. Concerns with no additionality from protected areas could be alleviated by some form of private sponsorship which is also discussed below.

Averted loss of wetlands is a very challenging issue due to overlapping public and private property interests. The wetland replacement fund can be used to secure existing wetlands. However, the legal ownership of wetlands creates questions around recognizing averted loss. The issue is that the province already owns the beds and shores of all permanent and naturally occurring wetlands under the *Public Lands Act* and makes wetland alteration illegal without a permit under the *Water Act*. These leaves question of what additional value is provided by securement of wetlands through the fund. It is possible that Conservation Easements might provide more explicit obligations than the *Water Act* and enable third party enforcement.<sup>66</sup> However, if the *Water Act* were rigorously enforced then little additionality would be provided by a conservation easement.<sup>67</sup> One notable finding from the Alberta Land Institute wetlands project noted that the vast majority of the currently drained wetlands in the South Saskatchewan region were drained illegally. Much of this drainage occurs on agricultural lands of the type targeted for wetland restoration activities. Thus even the positive management action of wetland restoration could raise additionality concerns.

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<sup>65</sup> Offset Guide, *supra* note 1; Eran Kaplinsky and David Percy, *A Guide to Property Rights in Alberta* (Edmonton: Alberta Land Institute, 2014), online: Alberta Land Institute <<http://www.albertalandinstitute.ca/public/download/documents/10432>>. See also Jason Unger, "Property Rights and the Regulatory and Planning Powers of Government", Comments to the Property Rights Task Force, (2012), online: Environmental Law Centre <[http://elc.ab.ca/Content\\_Files/Files/PropertyRightsTskForceComment.pdf](http://elc.ab.ca/Content_Files/Files/PropertyRightsTskForceComment.pdf)>.

<sup>66</sup> Offset Guide, *supra* note 1.

<sup>67</sup> *Ibid.*



The Conservation Offset Framework states that averted losses include: avoided releases to the environment and deferred projects where resource rights are allocated. Apart from expressing a potentially broad view of additionality, it defers recognition of the same to program-specific protocols.

## Equivalency

Equivalency is basically a requirement for offsets to match the impacts. Establishing equivalency can be a difficult, context-dependent and case specific exercise that is not always amenable to general policy prescriptions.<sup>68</sup> It is common to prefer “like for like” offsets because “out of kind” offsets involving different ecosystem features complicate the assessment.<sup>69</sup> The Offset Issues paper found that none out of six jurisdictions categorically required “like for like” or prohibited “out of kind” offsets.<sup>70</sup>

Almost all examples required or allowed the use of “multiplier” ratios to counteract the uncertainties of offsetting. This basically involves offsets at a higher than 1:1 ratio to impacts. Use of multipliers might be implied as reflecting the precautionary principle.

In Alberta, the context of oil sands impacts on the boreal ecosystem and especially caribou have raised concern about a rigid approach to equivalency. There is interest in linear reclamations to offset area disturbances, and in dedicating resources to other sub-regions or caribou conservation activities rather than trying to replicate ecological conditions lost at mine sites.

The carbon precedent is fairly unhelpful with equivalency. The key difference between Conservation Offsets and carbon offsets may be that atmospheric carbon can be treated like a uniform or fungible commodity.

The Wetlands Policy provides an approach to equivalency that distinguishes different grades of wetland value but not differences in kind. This seems to assume that all wetlands are interchangeable provided that the right multiplier applies.<sup>71</sup> The discretion of permitting authorities to allow replacement of high value wetlands with low value wetlands by using the right multipliers is affirmed in a design protocol for wetland offsets that is under development at the time of this writing. Over time, this might cause a transition in the wetland base from high value to low value wetlands, even though any given offset is deemed equivalent.

Recommendations on equivalency vary based on being general in nature or directed at Alberta. The Offset Issues paper generally proposed that policy should provide principles for

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68 Offset Issues, *supra* note 9.

69 *Ibid.*

70 *Ibid.*

71 Offset Guide, *supra* note 1.

drawing equivalency that could be applied flexibly. The onus to establish equivalency might be placed on development proponents; however, subject to rigorous review by public servants.

The ACA proposal for Alberta was to establish equivalency based on ecosites – a unit of ecological classification already used in regulatory process. The preference would be for “like for like” offsets featuring the same ecosite type in the same sub region. However, multiplier ratios could be applied to allow offsets by the same ecosite outside of the sub region or a different ecosite outside the sub region. This proposal recognizes the debates around equivalency and that it could be challenged accordingly. However, it proposes a simple model to reduce time, costs and complexity.

## Proximity

Proximity between the impact site and the offset site might be considered a factor in equivalency and the issues are similar. The Offset Issues paper notes that five out of six jurisdictions had a somewhat softly worded preference for proximity based on the presumption that it contributes to equivalence. The recommendations were for a flexible approach to proximity provided by guidelines, with factors to consider including program objectives, ecological site characteristics and the distribution of social costs and benefits.

Again, in Alberta the expressed concerns with rigid proximity requirements are in the oil sands region as caribou are considered to be wide ranging species and there may be better conservation opportunities away from the development sites.

The policy groundwork in Alberta does not have strong precedents or prescriptive requirements for proximity. As above, the ACA Proposal was to preference offsets within the same sub region.

## Duration of Offsets

The general expectation is that offsets should last as long as the impacts of development. Issues of duration are linked to goals as offsets of shorter duration than the impacts enable net loss. Duration may be determined by the securement tool; however, securement is a broader topic as it also considers allowable uses during the offset term. Conservation Offsets of shorter duration than the duration of impacts likely violate the environmental principle of intergenerational equity and the precautionary principle. The Offset Issues paper found that all six jurisdictions expressed an expectation that offsets be at least this same duration or at least for the long term. Some jurisdictions more clearly preferred or required perpetual duration.<sup>72</sup>

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<sup>72</sup> Offset Issues, *supra* note 9.

Long duration warrants long term planning, management, financing, monitoring and legal protections against conflicting uses.<sup>73</sup> Often the best means for providing long term management of offset sites is a well-established community of land stewardship organizations.<sup>74</sup> The ACA proposal is that land trusts would hold all private land Conservation Easements associated with Conservation Offsets and be responsible for long term management.<sup>75</sup>

Alternative conservation agreements of limited duration and more flexible payment options have already arisen organically and used for wetland restorations. Consequently there is little need for reforms to enable alternative tools as compared to need for regulations to require sufficient duration or permanence. While some wetland impacts may be temporary, use of payments from the replacement fund in lieu of creating true offsets complicates adherence to the principle of duration.

Proposals for offset policy in Alberta diverge on demand for permanence. The ACA proposal is that all offsets must be permanent as temporary offsets add unnecessary complexity without foreseeable conservation benefit. In contrast, the AI Offset Options asserts the need to allow temporary offsets on public lands.<sup>76</sup> The Conservation Offset Framework accepts temporary and permanent offsets and largely defers issues of duration to specific offset programs.

ALSA is unclear on the intention for regulations to dictate duration of offsets. Provisions for setting limits on activities beyond which offsets will be required provide that these limits would be “within a period of time” specified in regulations. This impliedly recognizes temporary impacts and offsets. Other provisions allow for recognition of Stewardship Units where Conservation Easements exist which might imply permanent offsets.

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*Any offset policy or regulations should require that duration of offsets be at least as long as duration of impacts or longer.*

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Longer duration increases need for ongoing management and funding. The Offset Issues paper proposes that often the best means of providing long term management of offset sites is a well-established community of land stewardship organizations.<sup>77</sup> The ACA proposal is that land trusts would hold all Conservation Easements on private land associated with Conservation Offsets and would be responsible for long term management.<sup>78</sup> There is merit to policy supporting a more fulsome role for land trusts and other qualified organizations under

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> ACA Offset Proposal, *supra* note 6.

<sup>76</sup> AI Offset Options, *supra* note 7.

<sup>77</sup> Offset Issues, *supra* note 9.

<sup>78</sup> ACA Offset Proposal, *supra* note 6.

ALSA beyond a mere legislated right to hold Conservation Easements. Concerning funding, as noted above, tools like local conservation taxes are beyond the scope of the report; however, success may be greatest where multiple tools work together.

### Fees in Lieu of Offsets (“in-lieu fees”)

Payments of fees into a fund (in-lieu fees) are not typically considered true offsets. Funds may be paid to conservation actors for relevant work however conservation gains from use of the funds are independent from particular developments.<sup>79</sup> Fund models may also support activities such as education or research that do not directly produce ecosystem benefits.

Multiple sources weight the benefits and drawbacks of in-lieu fees.<sup>80</sup> The trend in the commentary is not to categorically reject in-lieu fees but to propose caution. Proposed benefits of in-lieu fees include:

- For development proponents, the ability to resolve offset requirements quickly and with certainty.
- Fees allow some conservation action to happen, especially if offsets are not readily available or the details of offset programs are still being worked out.
- Fees may be favored by conservation actors such as NGOs for whom it fits their business model (and who legitimately want to get on with conservation work).
- Where government decides that economic risks are more important than ecological risks at a specific cost threshold.<sup>81</sup>
- Where funds are needed for management actions that do not involve habitat improvement such as predator control and access management.

Proposed drawbacks of in-lieu fees include:

- No price discovery mechanism linking development decisions with the costs of impacts.
- Transfer of ecological risks from the developer to a third party or the government that does not have full information about the actual costs of offsets (since only offset sellers know this).

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<sup>79</sup> Offset Issues, *supra* note 9.

<sup>80</sup> AI Offset Options, *supra* note 7 and Offset issues, *supra* note 9, See also: “Public Lands, Private Conservation: Bridging the Gap: A Workshop Summary Report on the Workshop Held October 20, 2015, Edmonton, Alberta” (Alberta Association for Conservation Offsets, 2015), online: Alberta Association for Conservation Offsets) <<http://www.aaco.ca/events-publications.html>> [AACO Public Lands Summary].

<sup>81</sup> AI Offset Options, *supra* note 7.

- Compromised ecological objectives and potential taxpayer liabilities if the real costs of offsets are higher than the fee.

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## Fees in lieu of Offsets:

- in-lieu fees should match costs of offsets to the best available knowledge;
- uses for positive management actions or averted losses before activities with no direct ecosystem benefits; and
- do not allow fees in absence of sufficient restoration services able to meet securement standards.

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The risk of in-lieu fees being inadequate bears analogy to past findings of oil sands reclamation securities being inadequate. Thus in-lieu fees can violate the polluter pays principle.

AI Offset Options paper recommended that if a fund is used, then the objectives of the fund must be transparent and clearly stated and the fund must be adequate to meet the stated objectives.<sup>82</sup> Further, the AI Offset Options paper recommended exploration of an in-lieu fee option to address caribou management [if species specific targets for the offset program are established].<sup>83</sup> The Conservation Offset Framework also accepts in-lieu fees, recognizing that these are not offsets but may help in offset programs.

The historical approach to in-lieu fees in the provincial carbon regime clearly violates the polluter pay principle as fees have been less than the costs of many real offsets and the purposes of the fund do not directly offset emissions. On the other hand, the AI Offset Options paper suggested the carbon in-lieu fee as an example of where fees can be appropriate based on a decision that economic risks outweigh ecological risks at a given cost threshold.

The wetlands offset system suggests further caution around barriers to use of in-lieu fees for activities resembling true offsets. Currently, the fees collected into the wetland replacement fund as a condition on *Water Act* approvals exceed fees spent on wetland restorations and further “non-restorative” replacement activities. This is due partly to lack of funding process, eligible recipients or guidance on such matters. Prior to the wetland policy, wetland restorations have historically been done through a small number of recognized “restoration

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<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

agents” following a Memorandum of Understanding between the province and the agent. The current government intention is to move away from the restoration agent system to a broader grant and/or contract process that would engage a larger suite of service providers including NGOs, the private sector and municipalities.

The Alberta Land Institute Wetlands Project highlights further issues if municipalities are to be the fund recipients in regional offset programs and if appropriate securement is to be achieved through use of funds. The background is that the City of Calgary is the provincially recognized restoration agent in relation to provincial *Water Act* approvals of impacts caused by City-approved municipal developments, and the City holds the funds for this purpose. Access to lands for wetland restoration inside City limits is limited which provides basis for City interest in the Wetlands Project conducted in Rocky View Country. However, the *MGA* creates barriers to municipalities holding land interests in other municipalities of the type typically needed to secure wetland restorations. The *MGA* only expressly contemplates municipalities holding land interests inside other municipalities following proceedings under the *Expropriation Act*, the written consent of the other municipality, and approval by council of the municipality taking the land interest.<sup>84</sup> There is no clear authority for municipalities to simply become holders of a Conservation Easement or similar registered conservation agreements outside their boundaries.

## Participation in Conservation Offsets

As discussed multiple times above, despite much overlap, there are real tensions between the environmental principle of public participation and the MBI principle of stakeholder involvement. Several sources on Conservation Offsets highlight this tension in multiple situations. Examples covered here include policy and plan development, regulatory approvals, and monitoring and enforcement. Stakeholder involvement in the administration and oversight of offset systems is discussed further below.

## Policy and Planning

Beginning with offset policy development, the Boreal offsets paper issues a major caution that offsets may not be supported due to public perception of a license to destroy. This reflects a need for the pollution prevention principle as embodied by the mitigation hierarchy. It also shows the need for public consultation that has not occurred in Alberta. As above, regional planning consultations have barely touched on MBIs and *ALSA* provides little guidance for participation in development of other policies and regulations. Development of the conservation offset framework has been fairly quiet. The most obvious input is from the type of stakeholders that participate in the Alberta Association for Conservation Offsets such as the targeted industries, conservation organizations seeking to be market players, technical subject

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<sup>84</sup> *Municipal Government Act*, RSA 2000, c M-26, ss 72, 14.

matter experts, and government staff. Overall, it is hard to gauge public support for Conservation Offsets.

Even if there is public support for offset policy, *ALSA* creates barriers to public participation in the implementation of regional plans and regulations that would require offsets. If regional plans or biodiversity frameworks require Conservation Offsets, the only persons that may challenge these plans are title holders (who may seek a variance) and directly affected persons (who may seek review). One scenario is that developers that are required to create offsets as conditions on approvals would seek review of the plan. Another foreseeable scenario is that a review will be sought by third parties whose resource interests may be affected by the securement of conservation sites.

As previously discussed in this report, *ALSA* attempts to prohibit court action for non-compliance with *ALSA*, regional plans, and regulations. The implication is that it will not be possible for anyone other than the Stewardship Commissioner to enforce compliance with any conservation offset policy encoded into *ALSA* regulations. Other persons will have to resort to complaints to the Stewardship Commissioner.

### Regulatory Intervention

The effect of public participation in the regulatory approvals process for Conservation Offsets deserves more study. Public participation might create costs, delay and questions about the merits of proposed mitigation measures. However, this is no different than any regulatory system. The case studies above suggest that public participation is an important requirement. For example:

- Conditions on development approvals result from the influence of interveners on decisions.
- Public interest organizations have leveraged voluntary offset commitments from companies seeking regulatory approvals even though these organizations do not create the offsets.
- Conservation organizations that create offsets do not typically intervene in the regulatory system so as to help require offsets.
- The holders of private conservation interests such as land trusts and landowners may not be inclined to intervene in the regulatory approval of activities that would damage offset sites.

The Offset Issues paper recommended that participation in a decision to create an offset should include more than developers and scientists and might include, for example, local residents with knowledge of development and offset sites.<sup>85</sup> This is sound advice for Alberta.

As discussed above, Alberta legislation consistently restricts standing in regulatory proceedings to directly affected persons and this approach already warrants reform. The federal environmental assessment regime provides broader participation but it only applies to large projects. Less public participation may create increased need for regulations to require offsets.

### Monitoring and Enforcement

Monitoring and enforcement needs will increase with a regulated conservation offset system. This includes enforcement of private agreements, enforcement of baseline regulations so as to establish additionality, and enforcement of conservation sites requiring regulatory protection due to insufficiently strong property rights. Enforcement of private agreements is an easier case as the parties producing the offsets and needing the offsets will have vested interests in offset success. Regulatory enforcement is already a significant capacity challenge and involving non-government parties requires government consent as discussed above.

### Property law issues with Conservation Offsets

The nature of legal interests in public lands and natural resources is one of the largest challenges for Conservation Offsets in Alberta. Issues discussed above include recognizing the additionality warranted to recognize a Conservation Offset. Those discussed below concern the ability to implement Conservation Offsets.

The *LUF* and *ALSA* allow Conservation Offsets on public lands or private lands; however, neither of these instruments distinguishes between these contexts. This distinction is very important due to the different property law regimes. Perhaps the most universal issue for offsets on public and private lands is the impact of minerals activity on offsets.

Private lands provide a relatively easier context to implement offsets. The landowner can grant access with less formality and has direct access to voluntary tools to secure offsets against surface use. This includes Conservation Easements, other forms of conservation agreements, common law restrictive covenants and transfers of fee simple title. Issues with offsets on private land from a legal perspective include:

- The form of securement required (discussed below under Regulatory Framework).

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<sup>85</sup> Offset Issues, *supra* note 9.



- The timing of securement relative to offset credit recognition (discussed in Volume under Stewardship Units).

Public lands create a very challenging context for implementing conservation offsets and for upholding the recognized principles of offsets. Need for access to public lands and securement of offsets against incompatible uses is discussed at length below.

Wetlands offsets create special property law challenges due to the location of public property on private lands. This report does not review the wetlands system in one comprehensive section but rather flags issues with this precedent that are relevant to Conservation Offsets under *ALSA*.

Property law issues related to offset credit systems are discussed in Volume 4 of this report dealing with Stewardship Units and the Exchange.

### **Impact of minerals activity on conservation offset sites**

The *LUF* specifically identified coordination of subsurface minerals activity and surface concerns as an area of provincial interest where policy is lacking. This gap has not been filled to a level needed by Conservation Offsets. Potential for Conservation Offsets to be damaged by minerals activity applies to both public land and private land. It is probably a universal legal rule in Alberta that all surface interests must yield to provincially-approved minerals activity. On private land, no tools directly available to landowners can prevent minerals development, nor can municipal zoning. On public lands, no other disposition holders have rights to exclude the “primary industry”. Existing compensation regimes are based on lost value of land user rights rather than on lost conservation value.

Practically every source considered in this report recognizes the potential damage to offsets by minerals activity. Prior to the *LUF* and *ALSA*, the Boreal Offsets report identified the lack of legal mechanisms to restrict surface access to subsurface resources as “the largest threat to the success of an offset program or any other conservation strategy in Alberta.”<sup>86</sup> This critical issue remains and multiple recent proposals suggest means to address it. These include:

- Avoiding surface disturbance of Conservation Offsets (which should be done under the mitigation hierarchy anyway).
- Impose operational requirements such as direction drilling, which would also fit with the mitigation hierarchy.

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<sup>86</sup> Boreal Offsets, *supra* note 5.

- Requiring the minerals developer to “offset the offset” at higher than the normal offset ratio as a condition on the development approval.<sup>87</sup>
- Have the Surface Rights Board require the mineral developer to compensate the offset holder for the negative impacts of the development based on the value of the offset and/or the investment needed to recreate it.<sup>88</sup>

Notably, none of these suggestions could be considered a “securement” of the offset site against minerals activity. All are fairly pragmatic about mineral development proceeding and none suggests that private parties should be able to unilaterally restrict that activity.

However, such ideas do not incent creation of Conservation Easements if the motivation is anything other than profit from offset sales. These proposals also do not remedy irreparable harms to the environment. Irreparable harm is highly foreseeable as “averted loss” secured by a conservation easement will often be an ecosystem like native grasslands that is rare or hard to restore.

*ALSA* does not speak directly to coordinating surface and subsurface activity. Regional plans to date have not provided any clear constraints on energy development outside of existing parks and protected areas. The SSRP provisions on future grasslands offsets anticipate offsetting industry impacts on public lands with the protection of private lands. Yet if Conservation Easements cannot prevent minerals activity, then it is foreseeable that the private lands used for the offset will be impacted as well. It is notable that the grassland offset pilot involved the positive management action of re-seeding private cropland to native grassland. This would appear to be more in keeping with the nature of the impacts.

*ALSA* can definitely assist with providing protection from minerals and regional plans might be the best vehicle. This could be done by:

- Indicating where future mineral leases should not be offered.
- Directives to regulators not to approve damage to Conservation Offsets.
- Alteration of statutory consents to delay or avoid development or alter operating conditions.
- Conservation Directives.
- Zoning where conservation activities and development activities should occur.

There are competing views on whether or not regional planning should be identifying potential conservation offset areas. This ties back to the previous discussions on additionality. The

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<sup>87</sup> ACA Offset Proposal, *supra* note 6.

<sup>88</sup> Offset Opportunities, *supra* note 10.

Opportunities Paper proposes proactively identifying the location of potential offsets.<sup>89</sup> This would identify where offset banking will be recognized, where offsets will receive regulatory protection or trigger requirements on incompatible uses to “offset the offset”. A competing view captured in the Public Lands Workshop Summary is that if the province is going to identify conservation worthy areas, then why not just create a protected area?<sup>90</sup>

Another option in recommendations for regional plans from the land trust community is a form of “dominant land use” zoning under which activities are not categorically excluded but are assessed for their impact on the priority objectives or uses for that zone.<sup>91</sup> This could be a tool for zoning areas of offset production or areas where the protection would apply on public or private land.

Directives to regulators and industry could be provided outside of *ALSA* as well. There are numerous examples of Information Letters and Bulletins in use, some produced by the Alberta Energy Regulator and others by the Environment and Parks Ministry. As done to date, a Directive restricting surface disturbance need not prevent mineral leasing or project approval.

Directives under regional plans or other legislation applicable to the regulator are a key option for private land because the majority of other regulatory tools are not available or very difficult to apply to private land. It is important to emphasise the need for restrictions on surface access to apply to private land. If Conservation Easements are created in pursuit of provincial policy objectives then surface disturbance should be prohibited without consent of the qualified organization and the landowner. This goes beyond interest in enabling MBIs.

### Conservation Offsets on public lands

Public lands in Alberta provide a very challenging context to implement Conservation Offsets. Crown ownership of land and all surface and sub-surface resources makes government the management authority or determiner of management authority. All legal interests of other land users are limited.

As in many places, Alberta’s public lands regime developed with an emphasis on making lands available for resource extraction and development. Most dispositions of public lands and resources to private parties are for development purposes. Similar tools for conservation purposes have not been developed and the legislation under which dispositions are granted provides little direction to do so.

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<sup>89</sup> Offset Opportunities, *supra* note 10.

<sup>90</sup> AACO Public Lands Summary, *supra* note 80.

<sup>91</sup> Southern Alberta Land Trust Society, Dominant Land Use Planning Model for the Southern Foothills of Alberta (2010), online: Southern Alberta Land Trust Society <[http://www.salts-landtrust.org/docs/D\\_100407\\_dlu\\_paper.pdf](http://www.salts-landtrust.org/docs/D_100407_dlu_paper.pdf)>; See also Submissions on the South Saskatchewan Regional Plan, available online: Southern Alberta Land Trust Society <[http://www.salts-landtrust.org/st\\_landuse.html](http://www.salts-landtrust.org/st_landuse.html)>.

Almost every source reviewed in this report concerning Conservation Offsets notes the limited capacity of private parties to implement offsets on public lands without involvement by government. The question is about the type or degree of regulatory support, action or reforms that are required. There are options to consider under multiple statutes including *ALSA* as well as the merit of legislative reform to the resource tenure regimes.

The offset framework recognizes these challenges by identifying “considerations for Conservation Offsets in public land and private lands”. Examples include:

- Offsets may be allowed on land where resource rights exist.
- Resource rights holder may exercise its rights if the holder provides a suitable offset for disturbing the offset [i.e., offsets the offset].
- Suitable offsets could include development project deferral by the rights holder.
- Offset securement may take the form of contracts, Conservation Easements or statutory tools.
- The offset provider must specify legal conditions associated with the offset.

However, the offset framework does not propose specific solutions to these challenges and largely works around them in the way that it articulates principles and concepts of offsetting. In fairness to the offset framework, it does not have the direct ability to solve these systemic challenges and it will also apply to situations where these challenges do not exist.

Issues discussed below include:

- access to public lands for conservation activities;
- securement of offsets against other uses;
- process for regulatory protection as a form of securement; and
- resource rights within a secured area.

“Access” to public lands and “securment” of public lands are separate questions, although some tools might serve both purposes. The need for “process” for private conservation of public lands may apply to both access and securement.

### **Access to public lands for Conservation Offsets**

Access is a threshold question of “when” and “how” conservation activities occur. Securement is about protecting the offset site from other uses.

Access to public lands for conservation involves at least two questions:

- When, as a question of policy, should access to public lands be granted for conservation?
- What legal tool to access public lands for conservation projects?

As a question of policy, some suggestions captured in the summary of the AACO Public Lands Workshop included situations in which:<sup>92</sup>

- activity operators are required to create offsets as a result of provincial or federal authority;
- offsets would pursue public policy objectives;
- offsets are in the public interest;
- where an offset is not counter to public policy;
- where existing conservation tools such as regulation by government are not working or will not work; or
- where an offset has demonstrated adherence to the mitigation hierarchy.

Other suggestions point to need for procedural considerations. These include:<sup>93</sup>

- Grant access where competing interests have been addressed.
- Have a process for prioritizing requests.
- Establish the accountability /credibility of the private party.

The answer that would pass the most consistently stated of above criteria is: where the conservation offset would pursue a provincial policy objective, the principles of offsetting are upheld and the application passes a screening test that assesses that applicant and other land uses. Whether or not access should be granted where activities are simply not counter to policies, pursuing federal regulatory requirements or should only be allowed when nothing but offsets would serve conservation outcomes are harder questions.

ALSA is silent on the issue of access to land for offsets and would assist most with providing objectives through regional plans. A screening process is probably within the administrative functions of government to develop (subject to policy direction).

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<sup>92</sup> AACO Public Lands Summary, *supra* note 80.

<sup>93</sup> *Ibid.*

What tool should be used to access public lands refers to the statutory consent. The main options are likely:

- temporary field authorizations;
- existing natural resource dispositions; or
- new disposition types.

Discussion of access consents merges into discussion of how to secure conservation sites where a disposition has weight against other uses.

### **Temporary field authorizations**

Temporary field authorizations are already issued for restoration work and similar activities like recreational trail work by non-governmental organizations (NGOs). The main advantage is availability to restoration service providers that do not already have land access by virtue of resource rights. The disadvantage is that it cannot double as a securement tool as it is temporary, will not appear in the land registry, or exclude other users.

### **Use existing natural resource dispositions**

There is some belief that existing natural resource dispositions may provide sufficient flexibility to produce offsets despite being created mostly for development purposes. This might be called the “already out there” option. Examples include:

- Allowing sale or transfer of dispositions to persons with no development intention.
- Allow forest companies to sell portions of their annual allowable cut or tenure.
- Allowing mineral lease holders to delay, cancel or alter development projects.
- Save parts of the disposition area from development through operating plans and practices.
- Conduct reclamation, restoration, reforestation or forest stand retention beyond baseline requirements on disposition holders.
- Conduct restoration or reclamation activities where no regulatory liability exists.

However, the Boreal Offsets paper states that “significant changes to current land management policy in Alberta would be required to enable the creation of offsets by lease or

tenure holders on public lands”.<sup>94</sup> Again the issue is with dispositions only providing rights to use resources rather than not use them, and restriction on transferring the disposition or selling rights in the resource to non-developers.

Whether or not the current types of disposition granted for natural resource use also include a right to non-use or to non-development may depend on the disposition type. Mineral leases are typically granted with five year “use it or lose it” term. However, this term is not a legal necessity and the Minister of Energy could extend the lease if this is in the public interest and thereby temporarily defer development.<sup>95</sup>

Forest Management Agreements (FMAs) are the disposition most often cited for potential to provide offsets. There are many factors in favor. FMAs are the only forestry disposition that have a legislated purpose of “sustainable forest management”, provide property interests in living trees, and provide the disposition holder with forestry planning responsibility. FMAs are also a hybrid of statutory consent and negotiated agreement whose terms could be more flexible than currently done, and they come with expectations of renewal that can assist with long term horizons. Some concerns are that FMAs do not really have a conservation purpose, forest stewardship is a regulatory obligation tied to rights to harvest the resource, harvesting is a required term of the disposition, and forestry plans and operating practices are subject to government approval.

Grazing leases under the *Public Lands Act* of the type used for the White Area of the province might be the form of natural resource disposition with most resemblance to a conservation tool. The range management regime is the area where the *Public Lands Act* provides the strongest conservation mandate. The Act provides the Ministry with authority to “require proper range management efforts and grazing practices by disposition holders for conservation purposes”.<sup>96</sup> The *Public Lands Administration Regulation* further provides that the holder of a grazing disposition “must use the land . . . in accordance with proper range management and conservation practices”.<sup>97</sup> Range management plans are defined by the *Public Lands Administration Regulation* as instruments that define outcomes to be achieved by grazing disposition holders.<sup>98</sup> Range management planning authority is with the Ministry but the disposition holders have input.

There is a Stewardship Code of Practice for grazing lease holders which requires compliance with range management plans, states a principle of wildlife habitat protection, and lists baseline practices towards that end.<sup>99</sup> The Code also notes a “future consideration” that

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<sup>94</sup> Boreal Offsets, *supra* note 5.

<sup>95</sup> David Poulton, “Public Lands, Private Conservation: Bridging the Gap: A Background Paper For the Workshop (2015), online: Alberta Association for Conservation Offsets <[http://www.aaco.ca/uploads/4/8/2/4/48245677/plpc\\_-\\_background\\_paper\\_-\\_final.pdf](http://www.aaco.ca/uploads/4/8/2/4/48245677/plpc_-_background_paper_-_final.pdf)> [Public Lands Backgrounder].

<sup>96</sup> *Public Lands Act*, RSA 2000, c P-40, s 18(d).

<sup>97</sup> *Ibid* at s 53(1)(a).

<sup>98</sup> *Public Land Administration Regulation*, AR 187/2011, s 1(1)(z).

<sup>99</sup> Grazing Lease Stewardship Code of Practice, online: Alberta Environment and Parks <<http://aep.alberta.ca/lands-forests/grazing-range-management/documents/GrazingLeaseStewardshipCodePractice-2007.pdf>>.

leaseholders who perform above the baseline provided by the code could be considered for longer tenures. The SSRP repeats this proposal of longer tenures for beyond-compliance performance. There is a precedent of heritage rangelands on public lands providing the leaseholders with stronger leases in exchange for stewardship functions.<sup>100</sup> Furthermore, the White Area leases provide some legal weight against other uses. One is that recreational users must ask the leaseholder for access and the leaseholders can require that recreational access be by foot.<sup>101</sup> The other is that leaseholders are entitled to compensation for surface access by oil and gas under the surface rights regime.<sup>102</sup> The surface rights regime was considered in the 2015 Auditor General's report which accurately identifies some tensions. Albertans in general benefit by having individual leaseholders who help ensure sustainability of the land and who protect species at risk when needed. The report found the public range resource to be overall in good health and its main concern was with risk of private parties deriving financial benefits beyond those which the disposition was intended to provide.<sup>103</sup> The Auditor General and the government review of the leasing regime that followed largely focused on who gets the money and underemphasized the conservation and stewardship issues. Payments for surface disturbance are not required to go towards range conservation and stewardship despite the facts that the payments can exceed the value of the disposition for grazing use and the government is already reliant on private stewardship.

Overall, the White Area grazing regime provides a conservation purpose, a regulatory baseline, possible incentives for beyond-compliance activities and a disposition with some legal weight against the activities targeted for the funding of offsets in addition as well as against activities that would impact an offset site. A well-conceived pilot featuring conservation of public grasslands could help cut to the core of several issues around Conservation Offsets and private stewardship of public resources.

Almost all ideas on use of existing natural resource dispositions raise questions of sufficient "additionality" as previously discussed. Activities that require government approval may become the regulatory baseline even if these are above standard industry practices. Even if additionality is found, this might only be acceptable for existing dispositions. Going forward, the conservation objectives could be met by imposing stricter terms or by not granting dispositions.

The activity most likely to qualify as Conservation Offset is restoration or reclamation where no regulatory liability exists, and this could be done by a party that does not hold a natural resource disposition. If the activity is ecological restoration rather than industrial reclamation or resource stewardship, then NGOs or private service providers may be better placed for this task than are natural resource operators.

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<sup>100</sup> Alberta Environment and Parks (2015), *Heritage Rangelands Operational Management Directive, AEP, Public Land Management, 2015, No. 1* available online <<http://aep.alberta.ca/forms-maps-services/directives/documents/HeritageRangelands-Jun-15-2015.pdf>>.

<sup>101</sup> *Recreational Access Regulation, AR 228/2003*, ss. 5 and 6.

<sup>102</sup> *Surface Rights Act, RSA 2000*, c. S-24.

<sup>103</sup> Report of the Auditor General of Alberta, *supra* note 53.



## New Disposition Types

The *Public Lands Administration Regulation* allows for the creation of new forms of dispositions however provides little guidance for doing so. There is no clear legal barrier to creating conservation dispositions and guidance to do so could be provided by regional plans or Ministry policies. An advantage of conservation dispositions is that they could be granted directly to NGOs or restoration service providers. This would also enable a greater number of offset producers and especially those organizations best suited to the task. Dispositions also have more chance to help with securement.

## Securement of Conservation Offsets against other uses of public land

Conservation Offsets on public lands in Alberta face potential for damage due to the extent of overlapping interest that have resulted from Alberta's historical approach to multiple use. The focus issue has been minerals activity; however, this is far from the only threat to offset sites. Surface interests that might be incompatible with an offset include agriculture, forestry, recreation, hunting and trapping, and surface material extraction (gravel, sand and aggregates).

On public lands, there is no tool equivalent to a Conservation Easement to provide private parties with a direct means to secure conservation activities against other uses. Again, this goes beyond need to protect offsets from minerals activity and speaks to the general need for market players to have access to protective tools. Filling this gap may be the most important step towards Conservation Offsets on public land.

Several of the options below were discussed in a Background Paper for "Public Lands, Private Conservation", a workshop hosted by the Alberta Association for Conservation Offsets (the "Public Lands Backgrounder").<sup>104</sup> However, there are several potential additions to this list made available through *ALSA* and other legislation. The summary of workshop proceedings also includes a recommendation to classify these many options.<sup>105</sup>

Securement options could be classified as those that rely on property interests versus those that rely on regulatory protections. Options of regulatory protections create the most concerns about additionality; however, they typically have longer duration and more weight against other land uses.

Securement options can also be classified based on whether the decision maker is a departmental staff person, a minister, Cabinet or the legislature. Tools available lower down the chain of government authority have advantages of being deployed with more efficiency and certainty as they are less vulnerable to broad political considerations and deliberations.

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<sup>104</sup> Public Lands Backgrounder, *supra* note 95.

<sup>105</sup> AACO Public Lands Summary, *supra* note 80.

However, tools available to higher officials tend to be more permanent and stronger against other uses.

Overall, some options include:

- dispositions;
- Conservation Easements on public lands following conversion of land to fee simple title;
- Protective Notations under the *Public Lands Act*;
- Directives and Information Letters issued by agencies, departments or ministries (could apply to private lands as well as public lands);
- parks and protected areas;
- Public Land Use Zones under the *Public Lands Act*;
- habitat conservation areas under the *Wildlife Act*; and
- regional plans and Conservation Directives under *ALSA*.

Most of these options are outside of *ALSA*. However, *ALSA* regulations or regional plans could provide direction on the appropriate securement tool. This may have added value where the statute under which the tool is housed does not provide a strong conservation mandate. Industry plans, species recovery plans, range plans and integrated land management are not included in a discussion of securement tools as they provide no legal protection from other uses. The exception is regional plans under *ALSA*.

### Dispositions

Dispositions are an obvious option as the same disposition might be used to grant access and produce the offset as to secure the site. An appeal of dispositions is that they are private property interests that appear in the public land records and may provide enforceable rights against other uses depending on the disposition type. This loosely resembles the concept of an easement. The disadvantages of dispositions are that:

- No existing disposition types provide conservation purposes or sufficient rights to exclude other users.
- Any compensation payable by other land users is for lost resource value not conservation value.
- The Crown is not liable for approving the incompatible use.

- Government is usually not required to grant dispositions, so there would need to be some certainty that dispositions would be issued or renewed.

New forms of conservation dispositions under the Public Lands Administration Regulation would be preferable. The best options among existing dispositions are likely Forest Management Agreements and White Area grazing leases. Both forms provide some stewardship functions, are of relatively stronger weight and longer duration, and carry some expectations of renewal. Use of industry dispositions to secure offsets would warrant legislative reforms to provide longer, stronger and more conservation-focused disposition types.

### Conservation Easements

Conservation Easements can be made possible on public lands. This would require converting specific public lands to fee simple land titles with a registered owner under the *Land Titles Act*.<sup>106</sup> The Crown could remain the registered owner if desired, and whoever was the registered owner would grant the Conservation Easement. One advantage to this option is flexibility in who becomes the landowner and the easement holder as between the Crown, land trusts, and private industry seeking the offset.

Possible disadvantages include multi-stage process, the relinquishment of Crown authority, the fettering of Crown discretion to alter Conservation Easements and an outcome of patchwork land ownership.

### Protective Notations

Protective Notations are a form of “reservation” placed on a piece of public land by the Ministry responsible for the *Public Lands Act*.<sup>107</sup> Protective Notations are not expressly referenced in the *Act*; however, authority to create and use this tool is well established and can be implied through broad authority to put “reservations” on dispositions. Protective Notations are created where a government agency applies for the notation, and if successful becomes the “holder” of the notation.<sup>108</sup> Some advantages are that Protective Notations:

- are registered in the searchable public land records;

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<sup>106</sup> Public Lands Backgrounder, *supra* note 95 and *Land Titles Act*, RSA 2000, c L-4, s 29.

<sup>107</sup> *Public Lands Act*, *supra* note 96; Information Guide, *supra* note 14; Government of Alberta, *Handbook of Instruments pursuant to the Public Lands Act and Public Lands Administration Regulation* (Alberta Environment and Parks, 2014), online: Alberta Environment and Parks <<http://aep.alberta.ca/lands-forests/public-lands-administration-regulation/documents/PLARHandbookInstruments-Feb19-2014A.pdf>> [Notation Guide]; Government of Alberta, “Content Requirements for Reservation/Notation Sketch Plans PNT/CNT” (Sustainable Resource Development, 2012), online: Alberta Environment and Parks <<http://aep.alberta.ca/lands-forests/land-management/documents/RequirementsReservationSketchPNTCNT-2012.pdf>>.

<sup>108</sup> Notation Guide, *supra* note 107.

- somewhat resemble a hybrid of regulatory protection and an interest in land;
- can be used for wildlife habitat and there are numerous specific types for this purpose;
- are created by Ministry staff rather than elected officials; and
- can be used anywhere on public land.

Potential disadvantages of Protective Notations include variable duration and limited legal weight directly against land users. The duration of Protective Notation for wildlife purposes is five years unless otherwise stated. Many such notations last for ten years and the endangered species notation appears to have a near perpetual term. This may serve temporary offsets; however, it ties duration to the function of the notation or to species status rather than to duration of impacts.

Protective Notations can restrict land uses for conservation objectives. However, the manner of doing so is more to restrict future government decisions and to act as a “buyer beware” for the industries than to directly regulate land use. A typical Protective Notation may restrict the granting of dispositions, put conditions on surface activities where dispositions are granted, and provide notice to disposition seekers that surface activities may face conditions or be denied. However, the holder of the Protective Notation cannot veto disposition applications. It is on the disposition authority to apply the notation to their decision and to convert the terms of the notation into conditions on the disposition. If dispositions are granted before the Protective Notation is created, then it may have little effect.

Protective Notations will likely be strongest against activities like gravel where dispositions are issued by the Public Lands Ministry. This would be a case of the Ministry upholding its own decision to create the notation. Energy, utilities and forestry create situations where the regulators neither hold nor created the disposition. Multiple Information Letters, notices, public lands appeals and the terms of the notations themselves support this theory.

Multiple Information Letters on industrial disturbance of grasslands state that: “the purpose of the Protective Notation is not to restrict development but to alert industry to environmental and economic risk”.<sup>109</sup> These letters endorse development standard and principles rather than excluding use.<sup>110</sup> This approach might be more appropriate for identifying where offsets are required than for protecting offset sites. The SSRP may imply this by proposing that an offsets program for public grasslands build on the AER Information Letter.

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109 Government of Alberta Information Letter, Industrial Activity in Foothills Fescue Grasslands – Guidelines for Minimizing Surface Disturbance (Sustainable Resource Development March, 2010) [accompanies the earlier Government of Alberta Information Letter, Fescue Grassland Protective Notation Information Letter– Principles for Minimizing Surface Disturbance (IL2010-02), online: <<http://aep.alberta.ca/lands-forests/grazing-range-management/documents/Grassland-MinimizingSurfaceDisturbance.pdf>> .

110 Alberta Energy Regulator, Information letter IL2002-1, Principles for Minimizing Surface Disturbance in Native Prairie and Parkland Areas (Alberta Energy and Utilities Board, January 18, 2002), online: Alberta Energy Regulator <<http://www.aer.ca/documents/iils/pdf/il2002-01.pdf>>.

In contrast, Protective Notations implementing a “Key Wildlife and Biodiversity Zone” in the Lower Athabasca Region have resulted in denial of gravel dispositions and these decisions have been upheld by the Public Lands Appeals Board.<sup>111</sup> The notation had a “no surface disposition” restriction (except for timber, recreation and oil and gas) and was put in place after previous applications by the same developers had been denied. In another case, the denial of a disposition following a Protective Notation led to an appeal (however, the appeal was discontinued).<sup>112</sup> The overall pattern is that Protective Notations can produce and uphold decisions to deny dispositions.<sup>113</sup>

The ability of Protective Notations to secure offsets against forestry is uncertain. Protective Notations have been cited in FMAs as factors in determining the annual allowable cut and they have been applied in forestry decisions. However, Protective Notations have a lower chance of “catching” forestry prior to dispositions given the relative length of dispositions.

“Consultation Notations” have also been mentioned in relation to Conservation Offsets.<sup>114</sup> A Consultation Notation alerts applicants to the concerns of the holding agency, requires that applications be referred to the holding agency and allows the holding agency to request conditions on dispositions. However, Consultation Notations do not restrict land use and, as such, are not securement tools. If Consultation Notations help government agencies and industries work together to avoid impacts, then this is good and a Consultation Notation could be layered with a Protective Notation.

### Directives and Information Letters

Directives and Information Letters are issued by Ministries or regulatory boards and intended to be applied by decision makers (usually the same agency) when engaging in planning or issuing dispositions and approvals. Information Letters may be used to communicate the implications of Protective Notations for regulators and industry.

An advantage of Directives and Information Letters is that they can be made by staff and potentially approved by the Minister or adopted into regulations depending on the specific legislation under which they are made. This combines relative ease of creation with potential legal weight. As with Protective Notations, a disadvantage is that the Directives need to be applied to refuse dispositions or the standards provided by the Directive need to be made into

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<sup>111</sup> *Sigga Oilfield Services Ltd. and 1447537 Alberta Ltd. v. Alberta Environment and Sustainable Resources Development*, PLAB 12-0020/21 (Public Lands Appeals Board), online: Alberta Environment and Parks <<https://ext.esrd.alberta.ca/lands/alberta-public-lands-appeal-board/Scheduled%20Appeals/PLAB%2016-0030A.pdf>>.

<sup>112</sup> *Dunphy v. Alberta Environment and Sustainable Resource Development*, PLAB 14-0025 (Public Lands Appeals Board), online: <https://cases.legal/en/act-ca1-669697.html>.

<sup>113</sup> For commitment to upholding Protective Notations, See also: Government of Alberta, Gull Lake Restricted Development/Activity (RDA) Areas (2011), online: Alberta Environment and Parks <<http://aep.alberta.ca/lands-forests/shorelands/lakeshores/documents/GullLakeRDAIndexAerialMapAreas-2007.pdf>>; Government of Alberta, Sylvan Lake Restricted Development/Activity (RDA) Areas Index Aerial Map (2011), online: Alberta Environment and Parks <<http://aep.alberta.ca/lands-forests/shorelands/lakeshores/documents/SylvanLakeRDAIndexAerialMapAreas-2007.pdf>>.

<sup>114</sup> Public Lands Backgrounder, *supra* note 95.

conditions on dispositions in order to directly restrict land use. Planning Directives have a further disadvantage in that they apply to protracted process rather than to specific lands and decisions like Protective Notations and Information Letters.

An example Directive is the Caribou Range Planning Directive which sets standards for seismic operations until a range plan is finalized, with these conditions to be applied as conditions on dispositions.<sup>115</sup> In this example, the resulting plan would not be considered a securement tool so it is difficult to see how a Directive on planning could be any more adequate. Even in the Information Letter example, it is the Protective Notation and not the letter that provides more securement (if any).

### Parks and protected areas

The Public Lands Backgrounder provides a fulsome discussion on the potential use of parks and protected areas to secure offsets.<sup>116</sup> The advantages from a conservation perspective include the level of permanence and the weight and breadth of protection against other uses. Protected areas can also serve as an “averted loss” or as protection for “positive management actions” like restorations. The disadvantage is that these designations are created by Cabinet or, in some cases, by new legislation. The process is likely to involve lengthy deliberations, broad political considerations and uncertain outcomes.

### Public land use zones

Public land use zones are a regulatory designation under the *Public Lands Act*. They are made by Cabinet and listed in the *Public Lands Administration Regulation*.<sup>117</sup> Public Land Use Zones (PLUZs) are apt to be considered as softer alternatives to parks and protected areas and may be a tool of preference to administrative staff. The advantages of PLUZs are mostly in managing public use including restriction of motorized use to designated trails and areas. PLUZs might provide a favorable context for restoration activities and it is fair to say that their potential to manage public use may depend on the state of the industrial footprint. The disadvantages of PLUZs are that they have no expressed conservation purpose, no enforceable weight against the issuance of industrial dispositions, and require Cabinet decisions in the manner of parks and protected areas.

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<sup>115</sup> *Directive on Caribou Range Planning, ESRD Fish and Wildlife Habitat*, 2014, No.2 (September 23, 2014).

<sup>116</sup> Public Lands Backgrounder, *supra* note 95.

<sup>117</sup> *Public Lands Act*, *supra* note 96 at s 71.1; and *Public Lands Administration Regulation*, *supra* note 3 at s 178 and Schedule 4.

## Habitat Conservation Areas

Habitat Conservation Areas are regulatory zoning designations under the *Wildlife Act*. The areas are created by the Minister and listed in the *Wildlife Regulation*.<sup>118</sup> Authority to set aside land for the Habitat Conservation Area is with Cabinet under the *Public Lands Act*, not just with the Minister. This resembles PLUZs with key differences.

The advantage of a Habitat Conservation Area is that the *Wildlife Act* itself provides the designation with a broad expressed conservation purpose of “regulating human use and for habitat protection and enhancement.”<sup>119</sup> The most current use of the tool through the *Wildlife Regulation* is in the White Area to restrict public use such as hunting and overnight camping. However, the tool as provided by the *Wildlife Act* is very flexible concerning permitted uses, and habitat protection and enhancement activities which suggests that it could apply to industry.

Another important feature is that the *Wildlife Act* provides the Minister (not Cabinet) with authority to make regulations on management activities and further allows delegation of authority for Habitat Conservation Areas. This could enable “positive management actions” by third parties, or provide for ongoing management if the area is used to secure an “averted loss”. There is a precedent of the *Wildlife Act* being used to delegate authority to conservation organizations, most notably to the ACA. There is also a precedent of using the Habitat Conservation Area designation in conjunction with conservation partnerships and land donations. Namely, the Ann and Sandy Cross Conservation Area which resulted from a donation of private land to the province and is administered by a non-profit organization.

The main disadvantage of a Habitat Conservation Area is need for Cabinet to provide the land; however, this is no different than PLUZs, parks and protected areas or regional planning. A further disadvantage may be administrative unfamiliarity with use of the tool in the Green Area and governmental interpretations that this tool is not for use in regulating industry.

Overall, the Habitat Conservation Area is one of the few regulatory zoning tools in Alberta that combines a conservation purpose with flexible details and management authority. The *Wildlife Act* in general may be under-explored as a means to enable Conservation Offsets, given that it is the provincial platform for establishing ownership of wildlife, endangered species designation, species recovery planning, and the regulation of wildlife-related activities.

## Regional Plans under ALSA

Regional plans under *ALSA* can do everything necessary to secure Conservation Offsets on public lands without use of any further tools. They can act like regulations, require all decision makers to comply, alter all statutory consents, and prevail in conflicts with other

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<sup>118</sup> *Wildlife Act*, RSA 2000, c W-10 at s 103(1); *Wildlife Regulation*, AR 143/1997 at s 3 and Part 1 of Schedule 12; *Public Lands Act*, *supra* note 96 at s 7.

<sup>119</sup> *Wildlife Act*, *supra* note 117.

regulations. Regional plans can also create Conservation Directives (discussed in Volume 1) which may provide permanent protection and/or flexibility in allowable uses. Use of *ALSA* may be the only option other than parks that can definitely restrict minerals activity. As with the other regulatory zoning tools, the disadvantage of using *ALSA* for regulatory protection is the inefficiency and uncertainty that results from Cabinet being the authority. A further disadvantage is connection to regional planning timelines which may constrain private conservation action.

### Procedure for regulatory protection as a form of securement

Most, if not all, of the above options for securement by regulatory protection warrant a formal process to establish the secured area. The Public Lands Backgrounder provides the rationales with respect to parks and protected areas.<sup>120</sup> These same rationales could apply to the other regulatory designations as well. One is that a form of private sponsorship of new protected areas could help overcome questions of additionality about the use of protected areas as Conservation Offsets. Another is that the current process of protected area creation is characterized by lengthy deliberations and politicized public campaigns. The closest examples to a formal process in Alberta are requirements for notice and public meetings concerning potential heritage. An example from the past was the Special Places program whereby civil society and government could nominate protected areas to be screened by government staff and submitted to a stakeholder committee for the making or recommendations. However, even this initiative “did not provide a sufficiently principled and consistent process of review to stem political considerations and backroom lobbying”.<sup>121</sup> In all cases in Alberta, the decision to create protected areas is entirely with government and subject to discretion.

Some features of this missing process might include:

- opportunity for private parties to nominate new protected areas;
- a means to address the costs of any required compensation or the voluntary buy out of dispositions;
- potential private sponsorship of the ongoing maintenance and enforcement costs;
- further input by the public and vetting by conservation stakeholders;
- fairly certain outcomes of the government decision based on eligibility criteria; and
- such process could be a benefit to Alberta irrespective of Conservation Offsets.

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<sup>120</sup> Public Lands Backgrounder, *supra* note 95.

<sup>121</sup> *Ibid.*



## Resource rights in secured areas

At least three issues around resource rights in secured areas:

- transfer, sale or alteration;
- priority of rights; and
- compensation.

### Transfer, sale or alteration of resource rights

Limits on the ability of disposition holders to transfer, sell, or alter their dispositions has been recognized as a barrier to use of industry dispositions for Conservation Offsets since before *ALSA*.<sup>122</sup> *ALSA* allows regional plans to alter statutory consents; however, it does not itself alter the disposition regime. Even if the above ideas for production of offsets from existing natural resource dispositions met the test of “additionality”, all would require government consent and some might not be legally possible. Altering terms of existing dispositions would be the easiest option. Sale, trade or transfer of dispositions might require return of the disposition to government for re-disposition or at least consent to transfer. Reclamation activities pose a different challenge as there is no need to alter the disposition but there is no way to sell credits. That would be dealt with by regulations on Stewardship Units and the Exchange as discussed in Volume 4 of this report.

### Priority of rights

If conservation dispositions are to be coordinated with other dispositions and authorizations on or under the same land, then a set of criteria to determine priorities of rights on a particular piece of land is required.<sup>123</sup> First in time, first in right<sup>124</sup> would not work as conservation dispositions almost certainly would be second to older development rights.<sup>125</sup> Regional plans might assist; however, more attention to this area is warranted.

### Compensation for resource rights

There is uncertainty around the liabilities for compensation if natural resource rights are devalued by the securing of Conservation Offsets. Despite the general rules not recognizing “regulatory takings”, the compensation provisions of legislation and terms of

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<sup>122</sup> Boreal Offsets, *supra* note 5.

<sup>123</sup> Public Lands Backgrounder, *supra* note 95.

<sup>124</sup> First in time, first in right is a concept used in Alberta with respect to water rights whereby the first person to the table, gets first access to the water. See Jason Unger, “Who’s it ‘FIT FIR’? Provincial allocation review looms large for water users and the environment” (2009), 24(4) *Newsbrief* 5.

<sup>125</sup> *Supra* note 95.

specific dispositions can alter this baseline. Presumably, a company that voluntarily relinquished its rights would be compensated by having produced an offset to use against its other projects. The issue is more with third party companies impacted by securements, especially by the regulatory protections that are likely necessary. This is another area deserving of more research.

## Regulatory framework for Conservation Offsets

The foregoing discussion of the principles of Conservation Offsets and property law issues covers several matters that are amenable to resolution under *ALSA*. It also provides caution about moving to a regulated conservation offset system without better settlement of these issues in policy.

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*Gaps that ALSA regulations or regional plans could fill include definition of offsets, encoding the mitigation hierarchy, setting program goals and objectives, setting limits on what can be offset, and defining additionality for the purpose of specific programs. As above, questions of equivalency and proximity might best be left to flexible guidelines. Such regulations and guidelines would do double duty as they would recognize principles while also providing clear rules for regulators and market players.*

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Further matters that *ALSA* regulations or regional plans could help with and were not discussed fully above include:

- connection to regulatory approvals, including authority to use the tool, guidance to regulators, and approvals for Conservation Offset activities;
- required securement of Conservation Offset sites;
- alignment of plans, policies and regulatory requirements; and
- administration and oversight of conservation offset programs.

## Connection to regulatory approvals

The Conservation Offset Framework states that Alberta accepts Conservation Offsets in regulatory decision processes toward meeting resource management outcomes. The Framework also provides that broad authority to require offsets is enabled by [unspecified]

statutes, plans and policies. Furthermore, the absence of broad authority does not preclude a requirement to offset in specific authorization decisions.

These statements should not be taken for granted as no policy since the *LUF* so clearly asserts use of Conservation Offsets in this manner. Some considerations include authority to require offsets, guidance to regulators on requiring offsets, and approval of offset activities.

The common thread to these issues is that *ALSA* is unnecessary, although it might help.

### Authority to require Conservation Offsets

Authority to require Conservation Offsets as conditions on development approvals likely already exists under several provincial statutes. The *Water Act* is the leading precedent and equivalent potential may exist under *EPEA*, the *Public Lands Act* and the various natural resource statutes.

Conversely, *ALSA* is not a platform for issuing regulatory approvals for which Conservation Offsets could be required. *ALSA* mostly provides power to require and recognize Conservation Offsets. However, if authority to issue the regulatory approval subject to offset conditions does not exist under other legislation, then this condition may be legally invalid. The same may be said for approvals to conduct Conservation Offset activities.

The issue is with lack of guidance for the use of authority as the various approval statutes were not designed to enable offsets in the manner of *ALSA*. The wetlands precedent is already raising questions about whether to leave requirements for wetland restorations to the discretion of the approval director or to provide formal guidelines. Some further complications under the approvals legislation include:

- Different regulators issue the same type of approvals now that the AER has authority over water, environment and public lands approvals for hydrocarbon projects.
- Demand for packaged development approvals, for example on *Water Act* approval for alteration of multiple wetlands or one energy approval for multiple gas wells.
- Multiple types of approval for the same project that could all be used to implement offset policy.

Regulators charged with imposing offset conditions may understandably be concerned with potential for appealed approval decisions. It is unlikely that appeals would be purely legal questions of whether or not regulators have authority to impose conditions as they usually do. The substantive environmental merits of an offset may be more of an issue.

The type of appeal process is a relevant consideration. Appeals of *Water Act* and *EPEA* approvals to the Environmental Appeals Board allow for notable consideration of the

environmental merits of the decisions. Conversely, appeals of Alberta Utilities Commission, Natural Resources Conservation Board and Alberta Energy Regulator final decisions to the Court of Appeal require serious issues of law. There would be value to more research around the extent to which offset decisions could be considered by an array of tribunals including the Public Lands Appeals Board and self-review of decisions by the AUC and AER.

All of these issues point to the same need for guidance under *ALSA* or other policy on when, where, and why to put Conservation Offset conditions on development approvals.

### Guidance to regulators

The need for guidance, direction, standard rules or process around when offsets are required is a fairly consistent recommendation. So is recognition of the potential diversity of offset contexts. For example, the Offset Opportunities paper recommends that requirements for offsets be “clear but sufficiently flexible to allow site-specific situations”.<sup>126</sup>

The level of guidance required might be described as a “missing link” between high-level endorsement of Conservation Offsets such as the *LUF* and the regulatory decision level where offsets are implemented. This could also be described as need for a governance path of the type being established in the wetlands system.

The policy groundwork largely accepts policy-driven (i.e. routine) or approval-specific (i.e. ad-hoc) offsets. The Discussion Paper was potentially stronger in articulating a preference for guidance on offsetting coming from policies, regional plans or management frameworks rather than approval-specific offsets, while still admitting that the latter may be needed.<sup>127</sup>

Overall, the policy groundwork defers to future offset programs, policies, plans or regulations to identify what regulatory obligations can be met with offsets. One implication is that Conservation Offsets could be used in situations other than new development approvals. As an example, Conservation Offsets could be used as a compliance option similar to the carbon regime.

Multiple proposals suggest a function for environmental assessments in implementing Conservation Offsets.<sup>128</sup> Assessment could help identify what offsets are required without needing to use *ALSA*. As stated above, it is important to recognize the narrow range of activities that require environmental assessments under provincial or federal legislation. Reliance on environmental assessments could limit use of offsets to large industrial projects, which admittedly is the context for all of these proposals.

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<sup>126</sup> Offset Opportunities, *supra* note 10.

<sup>127</sup> *Supra* note 12.

<sup>128</sup> Boreal Offsets, *supra* note 5; AI Offset Options, *supra* note 7; and ACA Offset Proposal, *supra* note 6.

*ALSA* provides numerous options for guidance to regulators through regulations or regional plans. The first option is that *ALSA* regulations may: “require a decision maker to impose terms and conditions on an existing or proposed statutory consent to counterbalance the effect of an activity.” This option could simply have regulations dictate specific types of approvals requiring offsets.

A “decision maker” under *ALSA* includes any person with authority to grant statutory consents, including all provincial regulators and municipalities. A “statutory consent” under *ALSA* covers every form of disposition, permit, license, approval or agreement under provincial legislation including municipal regulatory approvals. It is possible that municipal development decisions could trigger municipal obligations to impose offsets under *ALSA*, although this is not a feature of the wetland policy or the conservation offset framework.

Offset conditions could also be imposed on existing approvals. However, the TDC case of *Bighorn v. Keller* discussed in Volume 2 provides a reminder that *ALSA* does not apply retroactively and that future regulations would have to clearly express that intention.

A second option is that *ALSA* regulations may set a limit or restriction on the maximum effect of an activity, prescribe the Stewardship Units (offset credits) required to counterbalance these effects, and prohibit the activity without extinguishing these Stewardship Units. This option would have *ALSA* set the impacts that require offsets, leave regulators to find the impacts, and freeze final approval until an offset is confirmed by evidence of credit extinguishment. This option appears tied to the existence of a stewardship unit scheme.

A third option is that *ALSA* regulations may adopt or prescribe guidelines or best practices respecting counterbalancing the effect of an activity. This option would involve provision of guidance documents on offsetting practice however leave decisions to apply the guidelines and/or to require offsets to the regulators.

Regional plans and biodiversity frameworks could provide most of the same guidance to regulators that general regulations could but in a more defined context respecting geography and environmental subject matter. However, regional plans to date have shown reticence to intervene into land use in the White Area of the province. The SSRP does provide some endorsement of grassland offsets. The SSRP anticipates voluntary offsets for footprint on native grasslands on public lands through agreements with private landowners for conservation of intact grasslands on private land.<sup>129</sup> The anticipated approach would build on the Alberta Energy Regulator Manual 007, Principles for Minimizing Surface Disturbance in Native Prairie and Parkland Areas. These provisions of the SSRP also anticipate “consideration” of the grassland offset pilot and further initiatives. The SSRP also includes general statements encouraging municipalities and qualified organizations to explore

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<sup>129</sup> *South Saskatchewan Regional Plan 2014 – 2024*, *supra* note 28.

Conservation Offsets (and TDCs). However, none of these statements go anywhere near telling regulators to impose a Conservation Offset condition.

The role of biodiversity frameworks under regional plans in providing guidance for use of offsets remains vague. The Conservation Offset Framework includes a schematic diagram that implies that biodiversity frameworks could: set limits on what can be offset, determine how the mitigation hierarchy is applied, impose conditions on activities, and determine whether such conditions will require real offsets or in-lieu fees. All of these functions are likely possible under *ALSA*.

None of these options for regulatory guidance are mutually exclusive. For example, *ALSA* regulations could prescribe types of activities requiring offsets and leave offsetting practice to guidelines. Biodiversity frameworks could set limits on impacts and leave the option of offsetting to regulators. Regulators and industry may further be concerned with application process and formal requirements where Conservation Offsets may be required. *ALSA* is silent on procedure and the normal rule is that administrative agencies are masters of their own procedure.

### Approvals for conservation offset activities

Approvals may be required for offset activities. Terrestrial offsets on private land create little need for such formalities as discussed above. Access to public lands for conservation definitely requires government consent as discussed at length above.

Wetlands offsets on private land are creating uncertainty around approval needs. These learnings may be applicable to other Conservation Offsets involving public resources on private land such as water or wildlife.

Crown ownership of natural wetlands and the water they contain can make *Water Act* approvals and water licenses necessary for wetland restorations. Approvals may be required where restorations alter existing wetlands or where restorations would create permanent natural wetlands. Water licenses are required for the diversion of surface water from permanent water bodies.<sup>130</sup> The *Water Act* defines a diversion of water to include the storage, impoundment or taking of water.

The experience of the Alberta Land Institute Wetlands Project suggests that application of the *Water Act* creates challenges for the approval of wetland restorations. Some of these challenges relate to the unique situation of the South Saskatchewan Basin providing a more stringent context for issuance of approvals and being “closed” to issuance of new water licenses.

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<sup>130</sup> *Water Act*, RSA 2000, c W-3, ss 49(1), 1(1)(m).

Concerning approvals, the Water Management Plan for the South Saskatchewan Basin provides factors that must be considered on approval decisions including net diversions and hydrological effects.<sup>131</sup> This could apply to wetland restoration approvals if the restoration would adversely impact surface water flows into the river. Potential for such impacts may trigger departmental requirements for restoration proponents to conduct scientific assessments for which official guidance documents are lacking and the review of which could take some time.

Concerning water licences, the South Saskatchewan Basin Allocation Order limits provides that licenses for water storage may be issued where the license is for protection of the aquatic environment and for improving availability of water for existing license holders.<sup>132</sup> It is notable that the requirements for *Water Act* approvals and licenses would not apply if artificial dugouts were used to meet compensation requirements.

There is also some recognition, not limited to any geographic region, that one-off restoration approvals are not ideal for restoring multiple wetlands on a property or for credit banking.

ALSA does not anticipate these approval issues. Regional plans could provide guidance on where restoration approvals are necessary or should be offered, and they could prevail over other plans and orders if that is the source of the barrier. However, some caution is warranted where the instruments creating the barrier have environmental protection functions.

### Required securement of Conservation Offsets

Securement has been previously discussed in this report as related to need for duration of offsets to match duration of impacts and frequent preference for permanent protection. It has also been discussed in relation to need for securement tools on public lands, several options of which fall outside of ALSA. The missing piece is policy or regulations clarifying the required securement.

The wetlands precedent offers policy guidance on securement. The offset design protocol currently under development recognizes the distinction between public and private lands. The protocols also imply that evidence of securement is necessary for offset verification. Whether or not the guidance on wetland securement upholds conservation offset principles is debatable.

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<sup>131</sup> Government of Alberta, Approved Water Management Plan for the South Saskatchewan River Basin (Alberta) (2006), online: Alberta Environment and Parks <<http://aep.alberta.ca/water/programs-and-services/river-management-frameworks/south-saskatchewan-river-basin-approved-water-management-plan/documents/SSRB-ApprovedWaterManagementPlan-2006.pdf>>.

<sup>132</sup> *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order*, AR 171/2007, online: Alberta Queen's Printer <[http://www.qp.alberta.ca/documents/Regs/2007\\_171.pdf](http://www.qp.alberta.ca/documents/Regs/2007_171.pdf)>.

For private lands, the design protocol endorses 10 year conservation agreements. This is shorter than historic practice for time-limited agreements and the protocol does not clearly indicate that the duration of offsets must meet the duration of impacts. Details of securement are mostly left to the agreements. This leaves some question about what agreements must include and what environmental outcomes must exist in order for offsets to be verifiable. For public lands, the design protocol mostly recognizes unresolved systemic challenges around non-exclusive occupancy and potential need for regulatory protection for offsets to be verifiable.

The Conservation Offset Framework is potentially less prescriptive securement than the Discussion Paper. For private lands, the Discussion Paper was more prescriptive on need for Conservation Easements or other restrictions on land title. For public lands, the Conservation Offset Framework again recognizes the systemic challenges to securement. The Discussion Paper provided some additional options that have not clearly carried forward. One was that offsets may be established where resource rights exist provided that those rights will not require a non-compatible disturbance for the duration of the offset. This would effectively screen out locations where challenges to securement would arise. It would also limit the availability of public lands for offsets, especially those of long duration. The clearest indication of what securement tools will be required or acceptable for public lands is a submission for “credit for early action” discussed in Volume 4 dealing with Stewardship Units.

*ALSA* could definitely help provide direction on securement. *ALSA* itself does not prescribe securement of Conservation Offsets. The closest two provisions are that:

- counterbalance may include voluntary establishment of Conservation Easements; and
- regulations could make Conservation Easements a pre-requisite for Stewardship Units.

This implies that *ALSA* contemplates Conservation Easements as a pre-requisite for Stewardship Units in at least some situations.

Either regional plans or regulations of general application could prescribe the securement or at least the allowable options. Regional plans would be more amenable to resolving the location and program specific challenges of securement on public lands.

### **Alignment, coordination and harmonization issues with Conservation Offsets**

This report has flagged numerous issues around themes of “alignment”, “coordination” or “harmonization”. Examples include:

- Lack of clarity on the role of offsets under federal, provincial, and municipal regulatory regimes.



- Federal regulators and joint review panels proposing offset conditions on approvals of large projects despite barriers to implementing offsets on provincial public lands.
- Need to align multiple overlapping plans with divergent objectives, temporal and spatial dimensions such as: industry development plans, species recovery and range plans, and recreational access management plans.
- Need to prioritize multiple overlapping rights and interests on public land including any new conservation dispositions.
- Under *ALSA* regional plans, numerous related sub-regional planning initiatives such as biodiversity frameworks, landscape management plans, linear footprint plans any of which could provide guidance on use of offsets.
- From an industry perspective, need to harmonize Conservation Offsets with other regulatory requirements such as reclamation, timber damage assessment, and integrated land management.

These issues may all flow from a fragmented legal regime; however, they are different in nature and affect different issues.

The key issue to deal with under *ALSA* is divergent plans, policies, regulations, decisions and statutory consents under the authority of multiple provincial decision-makers. This returns to the intentions of the *LUF* and the power of regional plans under *ALSA*. The general need for regional plans to set clear priorities, measurable objectives, limits on cumulative effects, to require all decision makers to comply and to be legally enforceable remains in the context of Conservation Offsets. Federal-provincial alignment is an issue beyond the reach of provincial legislation unless the province chooses to accommodate federal decisions through application of its own planning and regulatory tools.

### **Administration and oversight of conservation offset systems**

Conservation Offsets create notable need for administrative functions. Some examples discussed above illustrate the roles for non-government actors include monitoring and enforcement. Examples of credit-related functions are mostly discussed in Volume 4 with respect to the Exchange.

This current section reviews a general question of how functions should generally be consolidated or divided within the main government departments or delegated agencies involved in conservation offset system.

The Offset Issues paper states that Conservation Offsets create special challenges in administration. These challenges are linked to tension between the need for direct stakeholder

involvement and the uncertain applicability of public participation principles to Conservation Offsets. Development proponents, offset producers, and offset system administrators are apt to share interests in a smooth and efficient system.<sup>133</sup> In contrast, public interests in a healthy environment may best be served by looking skeptically at uncertainties which creates delay and costs.<sup>134</sup> The general public and civil society groups are unlikely to have direct opportunities to participate in the administration of offset systems and, consequently, there is a risk that the direct interests in an efficient system may dominate over public interests in environmental protection.<sup>135</sup> Conversely, departments responsible for substantive environmental policy development are not best suited to day-to-day administration of offsets. They should be free to focus on environmental protection in the public interest without pressure to make the system efficient.

The Offset Issues paper found that several jurisdictions divided responsibilities between different levels or agencies of government. The most formal example involved the environment department making legally enforceable policy guidance to an agency responsible for offset program administration. The most common model may be for the department responsible for offset policy development to provide non-binding guidance documents to industry regulators and development proponents. In these cases the regulators would be the offset program administrators. Few jurisdictions were found to have specialized oversight agencies, banks or exchanges. The US wetlands offset system is significant for offset credit banking and exchange which originally began on a foundation of mere policy not law.<sup>136</sup> The state of Victoria in Australia also has an exchange. None of these six jurisdictions used committees of external stakeholders and experts, or had external oversight mechanisms beyond those typical of all government operations such as an auditor general or government accountability office.

The Offsets Issues paper recommends that the agency responsible for day to day administration of the offset system be separate for that responsible for substantive environmental outcomes. Further, it recommends that a committee of stakeholders and experts should provide at least periodic oversight of the offset system.

The Offset Opportunities paper made a recommendation that may favor consolidation of functions or at least responsibility to establish diverse functions. This was to “establish a lead agency with responsibility, authority and resources to coordinate development of provincial offset program.”<sup>137</sup> Functions included establishing a banking system and market as well as being responsible for collaboration between provincial and federal regulators to help

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<sup>133</sup> Offset Issues, *supra* note 9.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> Offset Opportunities, *supra* note 10.

coordinate regulatory requirements.<sup>138</sup> As was previously discussed (as additionality), the wetlands experience is already showing issues with under-attention to enforcement.

The Conservation Offset Framework is very sparse concerning administration and oversight. For example, the Conservation Offset Framework:

- states that all offset programs should include monitoring of the success of offsets over time;
- contemplates a future exchange; and
- cites a principle of transparency and accountability.

There have also been comments that the industry regulators in Alberta are not set up to assume management of Conservation Offset systems.

*ALSA* creates some uncertainty around division of functions. On one hand, the mandate to develop the conservation tools is provided to Cabinet and may be delegated to the Land Use Secretariat. On the other hand, *ALSA* is not necessary for all Conservation Offsets, and policy is currently being developed by the Environment and Parks Ministry. However, *ALSA* assigns oversight of regional planning and implementation to the Land Use Secretariat. This would suggest a substantive policy function if offsets are used to implement regional plans. If regional plans are used, then *ALSA* further provides for delegation of functions related to pursuit of the regional plan objectives.

Having the Environment and Parks Ministry responsible for substantive offset policy development and oversight may warrant sufficient internal separation of function. This is because the Environment and Parks Ministry is also one of the regulators that requires Conservation Offsets and to which day-to-day administration of offset systems could fall by default.

*ALSA* regulations could relieve issues with multi-function ministries and administrative burdens on regulators by delegating credit-related functions to the Exchange. This is discussed in Volume 4.

## Synthesis of Findings and Conclusions

Using our three criteria for assessment, this section of the report synthesizes findings on *ALSA*'s general scheme, TDCs, Conservation Offsets, Stewardship Units and the Exchange. It considers:

- How *ALSA* has enabled or disabled MBIs.

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<sup>138</sup> *Ibid.*

- The extent to which *ALSA* is necessary or unnecessary for MBIs.
- The similarity or difference in issues between the types of MBIs provided by *ALSA*.
- Similarity or difference between multiple examples of the same type of MBI.

### General scheme of *ALSA*

*ALSA* offers high potential to subordinate markets to desired policy outcomes, and thus offers a key hallmark of MBIs as a form of regulation. The suite of Conservation and Stewardship Tools-- including the MBIs and the securement tools—are well aligned with the *LUF* and can foreseeably work together. The specific MBIs – TDCs, Conservation Offsets, Stewardship Units and the Exchange – are fairly sound choices to pursue from a market perspective or a conservation perspective. TDCs and Conservation Offsets foreseeably involve buying and selling rather than mere provision of incentives, while Stewardship Units and the Exchange could facilitate these markets. *ALSA* is especially important for mandating MBIs aimed at the conservation of land and biodiversity. *EPEA* and *CEMA* enable MBIs in the context of pollution and emissions management. However, the land and natural resource statutes lack MBI provisions, and mere authority to limit impacts and impose conditions is not driving MBIs without policy guidance.

On the other hand, *ALSA* is an unconventional and less ideal platform for MBIs than might be assumed. Looking at the broader legislative framework in which MBIs must exist, *ALSA* is not the most accessible legislation for decision makers nor can it implement MBIs by itself. *ALSA* is separate from the subject-specific statutes that impose regulatory limits on activities and which remain necessary for use as approvals platforms. Despite mandating pilot projects, *ALSA* does not favor the organic development of MBIs so much as the imposition of constructed MBIs.

Further, *ALSA* did not fully implement the *LUF*. *ALSA* does not expressly include all proposed strategies, most notably efficient use of land and footprint reduction. Nor does *ALSA* directly fill the policy gaps identified by the *LUF* around matters including coordination of surface and minerals activity, agricultural land fragmentation, and the under-representation of ecological regions in the protected area system. *ALSA*'s legal impact depends heavily on future regulations and regional plans for which there is broad discretion, few substantive criteria, and little accountability for outcomes. The *ALSA* model further depends on strong political leadership, a Land Use Commissioner and Secretariat with notable independence, and widespread capacity for implementation.

## i. Guiding environmental principles

The principles adopted by *ALSA* – sustainable development and cumulative effects – fill an important gap in provincial land and resource legislation. If developed according to best practices, the *ALSA* MBIs could reflect most of the more specific sub-principles such as pollution prevention, polluter pay and the precautionary principle. The principles articulated by the *LUF* and *ALSA* are already reflected in the plans of multiple municipalities with interest in TDCs and could be considered a driver of Conservation Offsets in Alberta.

However, sustainable development and cumulative effects management are both notably hard principles to operationalize. *ALSA* leaves need for the adoption of more specific sub-principles and grants of authority in regulations, regional plans or other legislation. There is acute need to recognize the precautionary principle and to resolve systemic issues of public participation in Alberta.

Issues of principle differ between TDCs and Conservation Offsets. The principles of TDCs are fairly settled and well aligned with established environmental principles. Municipal plans can further fill some gaps in principle in the provincial regime. Principles of Conservation Offsets are highly specialized, less established in the legal regime, and their workability in Alberta remains unsettled despite the recent development of conservation offset policy. There is a need to adopt principles into provincial regulations yet caution against encoding the current policy direction in regulations.

## ii. Sufficient Resolution of Property Law Issues

Property law issues are not the leading concern with MBIs under *ALSA*, although they exist. Conservation Easements are especially valuable as they answer need for voluntary conservation tools that provide a hybrid of a statutorily-enabled designation and a private land interest. Stewardship Units and municipally created development credits answer the need for transferable personal property separate from the land itself. The *ALSA* MBIs should not require creating new private property rights in ecosystem services except for perhaps the specific situation of using public lands as the site of Conservation Offsets. Concerning restrictions on property rights and compensation for restrictions, *ALSA* is at least neutral and probably generous towards property rights as compared to the general legal regime.

However, *ALSA* has not resolved systemic property law issues that create barriers to MBIs. Risk of damage to conservation value by minerals activity is a widespread concern. This concern applies wherever private conservation occurs with or without MBIs, although it is potentially strongest with Conservation Offsets. The options are basically to strengthen private property rights on private and public lands, or to provide regulatory protections. A government response is needed in any event where private conservation supports public policy objectives.

*ALSA* leaves multiple debates over need for more conservation tools. One is demands for alternatives to Conservation Easements on private lands. Concerning MBIs, this demand is mostly relevant to Conservation Offsets with limited goals or duration. Alternative agreements are already in use which suggests that legislative enablement of new tools may not be necessary, and there is disagreement on the merits of such tools.

Another demand is for tools to implement Conservation Offsets on public lands. This issue is widely recognized and should be resolved prior to any regulatory enablement or recognition of credit for offsets on public lands. The options canvassed above include those under *ALSA* and other legislation. The *ALSA* options are less efficient; however, among the strongest and most flexible.

*ALSA* leaves multiple questions around compensation that merit further exploration. Again these issues mostly concern Conservation Offsets rather than TDCs. One issue is remedies for harm to conservation sites. Neither the current proposals nor the current policy direction would deal with irreparable harm. The other issue is compensation for restrictions on resource rights resulting from regulatory protection of Conservation Offsets. *ALSA* may not change the baseline however the terms of dispositions and agreements can.

### iii. Strong regulatory framework

The regulatory framework for MBIs is where *ALSA* offers the most potential and creates the most issues. A combination of regional plans and regulations under *ALSA* can do possibly everything needed from the regulatory framework: clarify rules and applicability, set goals, set limits on impacts of activities, affirm authority to use the tools, provide guidance for regulatory approvals, require securement of conservation sites, align conflicting policies, and provide administrative structures.

Concerning administration, *ALSA* implies MBI-related functions for the Land Use Secretariat, the Exchange, qualified organizations, and further delegated authorities to pursue objectives of regional plans. *ALSA* creates no barriers to administrative responsibilities falling by default to municipalities in the case of TDCs or regulators in the case of offsets. While how to divide responsibilities remains an issue, *ALSA* definitely contemplates options as compared to other legislation. The larger issues around division of functions concern Conservation Offsets rather than TDCs.

TDCs and Conservation Offsets under *ALSA* share several high level challenges:

- *ALSA* was unnecessary for legal authority to use these MBIs. Municipalities likely had implied authority to establish simple TDCs under the *MGA*. Provincial regulators definitely have authority to impose offset conditions on activities and this already

occurs with wetlands. The main need for MBI legislation was, and still is, to provide guidance for use of existing authority.

- Anticipation of *ALSA* regulations or regional plans has had some cooling effect on the ground-up pursuit of MBIs. This is clearest with TDCs as *ALSA* has legally occupied the field and creates compliance concerns. Similar concerns exist with Conservation Offsets in the demand for “credit for early action” and legitimate reticence by government to offer certain credit before establishing what qualifies.
- Further regulations or regional plans under *ALSA* may not be necessary. *ALSA* allows TDCs to be established without any further provincial regulations, even though lack of regulations is a practical barrier to use of the tool by municipalities. Likewise, a regulated Conservation Offsets system under which offsets are required as a routine matter can be established with guidance from other policies.
- There is need to require securement for all TDCs and Conservation Offsets. *ALSA* provides more clarity around the appropriate securement tools for TDCs; however it does not clearly require their use. Potential non-securement or inadequate securement of Conservation Offsets should be considered a serious issue unless dealt with by regulations.

The main need for *ALSA* regulations is to provide for Stewardship Units and the Exchange. Even these tools speak mostly to market efficiency in a narrow range of contexts. The recognition of Stewardship Units and the functions of the Exchange are some of the more unsettled issues in this report.

No limits on the impact of land use activities in Alberta should be considered a pervasive barrier to the use of TDCs, Conservation Offsets, and other MBIs possible under *ALSA*. There is inadequate regulatory pressure on the development industries to purchase conservation. There are inadequate incentives for private parties to pursue conservation for profit because there are few buyers and because development opportunities of their own are foreseeable.

There is uncertainty regarding the link between the MBIs and regional planning. Regional plans and regulations could do many of the exact same things needed to enable these tools due to the regulatory status of regional plans. Neither TDCs nor Conservation Offsets need to be used to implement regional plans; however, either of them could and there is good argument for regional plans to guide use of these tools. Furthermore, only regional plans under *ALSA* can clearly respond to cumulative effects. If MBIs are to be used to respond to cumulative effects, then there is a tie to regional planning.

TDCs and Conservation Offsets also display different issues that warrant very different regulatory responses:

- TDCs show fair adherence to environmental principles and few issues of property law. The main issue with the regulatory framework for TDCs under *ALSA* is that *ALSA* is already highly prescriptive of substantive and procedural requirements. The need for regulations is to affirm municipal authority, clarify the substantive and procedural requirements of *ALSA*, and provide for local administration of credit systems outside of Stewardship Units and the Exchange. This is best done through regulations of general application rather than regional plans.
- Conservation Offsets show multiple unsettled questions of principle and property law concerning public land and resources. The main issue with the regulatory framework for Conservation Offsets under *ALSA* is that it could allow practically anything. The need for regulations is to restrict or settle the range of possibilities contemplated by *ALSA* and the non-legislated conservation offset framework. The pending instruments should provide program goals, geographic scope, and guidance for the application of offset principles that are not amenable to general prescriptions. This may best be done through regional plans that provide for specific conservation offset programs rather than through regulations of general application.

Pursuit of TDCs and Conservation Offsets has been mostly separate to date, with Stewardship Units and the Exchange being linked more closely to Conservation Offsets. This accurately reflects the general scheme of *ALSA* and should continue in the early rounds of regulation making.

### General recommendations

1. Adopt the precautionary principle in any new plans, policies or regulations concerning use of MBIs in Alberta. The biodiversity frameworks are an ideal candidate for this inclusion.
2. Formalize a public and stakeholder participation in the development and oversight of all MBIs.
3. Protect private conservation activities from minerals activity. Begin by protecting Conservation Easements that fit the objectives of provincial plans or policies.
4. Regulations should require securement of all conservation activities related to MBIs. Securement should include an instrument registered on land titles or Crown land records wherever possible.
5. Explore the direct use of regional plans and Conservation Directives to designate and protect conservation areas associated with the MBIs under *ALSA*.



## Conservation offset recommendations

1. Any policies, regulations or regional plans endorsing Conservation Offsets under *ALSA* should:
  - a. Prescribe the mitigation hierarchy, considerations for moving from avoidance and mitigation to offsets, and documentation of reasons for decisions.
  - b. Adopt a definition of “counterbalance” as meaning:
    - i. net neutral or no net loss with respect to the impact being offset, and
    - ii. a duration of offset at least equal to the duration of impacts or longer.
  - c. Set limits on what can be offset and limits beyond which offsets are required.
2. If in-lieu fees are allowed, match the price of fees to the cost of real offsets to the best available knowledge, and require the fund to prioritize activities that provide direct ecosystem benefits. Consider expanding the Alberta Land Stewardship Fund to accept in-lieu fees for impacts on public lands and moving the fund regulation under *ALSA*.
3. Resolve systemic barriers to the implementation of Conservation Offsets on public lands prior to encoding any policy allowing public lands offsets into regulations under *ALSA*. This should include:
  - a. Providing tools to access and secure public lands.
  - b. Exploring regional plans and Conservation Directives as securement tools.
  - c. Providing a process for nomination and sponsorship of regulatory zoning options.
4. Promote missing pilot projects including: conservation of public agricultural lands, administration of offset systems and enforcement of conservation sites.
5. Consider using regional plans and environmental management frameworks as enforceable regulations rather than making conservation offset regulations of general application.