

December 3, 2007

Our File: 33

Towards Environmental Sustainability
Alberta Environment
9th Floor, South Petroleum Plaza
9915 – 108 Street
Edmonton, Alberta
T5K 2G8

Dear Sir/Madam:

RE: *Towards Environmental Sustainability: Proposed Regulatory Framework for Managing Environmental Cumulative Effects*

The Environmental Law Centre (ELC) is a charitable organization incorporated in 1982 as a public source of information on environmental law and policy in Alberta and Canada. The ELC's mission is to ensure that laws, policies and legal processes protect the environment. The ELC is pleased to provide comments regarding the proposed regulatory framework to manage cumulative effects as described in *Towards Environmental Sustainability: Proposed Regulatory Framework for Managing Environmental Cumulative Effects*¹ (the "Discussion Paper").

The ELC commends the Government of Alberta for beginning this initiative to address the cumulative effects of development. We recognize that the Discussion Paper is the initial step, and that a significant amount of effort and cooperation will be required to develop a strong, effective system. In that vein, there are basic elements that the ELC suggests are necessary for a successful system for dealing with cumulative effects, as follows:

- There must be integration throughout this system, including integration across government initiatives (such as the Land Use Framework and *Water For Life*), integration across provincial government departments and agencies, and integration with other levels of government (federal and municipal).
- The system must be legislatively based, and the Environmental Sustainability Objectives must be legally binding on decision-makers and those pursuing activities that contribute to cumulative effects. Dealing with cumulative effects and the multiple government

¹ Alberta Environment, October, 2007, available online: Alberta Government <http://environment.gov.ab.ca/cem/pubs/CEM_Framework.pdf>.

agencies that regulate project-based activities that add to these impacts requires a legislatively backed tool. The Discussion Paper proposes a general framework to deal with cumulative effects but a more substantive piece of legislation is required if cumulative effects are to be managed effectively.

- The provincial government must have a strong role in this system, and must hold ultimate accountability and responsibility for achievement of the Environmental Sustainability Objectives.
- There must be strong integrity of the information upon which the system will be based. This must include transparency and broad access to information, and resort to the precautionary principle in instances where there are knowledge or data gaps.

While there is apparent promise in this initiative, the ELC has several concerns with the proposed regulatory framework as described in the Discussion Paper. These concerns and recommendations dealing with these concerns are outlined below.

Roles

The Discussion Paper indicates that the regulatory framework will depend on government, industry, non-government organizations, municipalities, the federal government and First Nations to collaborate if success is to be achieved.² It also states that “departmental mandates [will be] respected”.³

To be effective, a regulatory framework for managing cumulative effects will undoubtedly impact departmental mandates beyond that of Alberta Environment. Managing cumulative effects requires leadership and significant changes in how project based approvals are made. If what is contemplated is a maintenance of departmental mandates as they currently stand, it is submitted that the regulatory framework to manage cumulative effects is doomed for failure. If the discretion of decision-makers is not substantively altered by this regulatory framework, it seems that the *status quo*, of individual incremental decision-making, will be perpetuated.

The ELC recommends that the Government of Alberta truly integrate environmental decision-making across the various agencies and departments that authorize activities that impact on the environment. This will require amendments to the enabling statutes of various agencies to ensure that duties and decisions in these departments adhere to environmental outcomes, as they are established. This includes the mandates of departments that to date have had minimal environmental considerations in their decision-making processes, including Alberta Energy, Alberta Infrastructure and Transportation, and Alberta Municipal Affairs and Housing

² *Ibid.* at 10.

³ *Ibid.*

Planning areas

The Discussion Paper states that the planning areas in which cumulative effects will be managed will be dynamic, “nested” and pursued at the discretion of government.⁴ The planning area may be based on natural sub-regions, airsheds, watersheds, or other pre-existing planning areas.⁵ It is suggested that, in the long term, the planning areas would be contiguous and cover the province.⁶

A flexible approach to planning areas may be necessary to accommodate different ecological goals, but the nesting approach gives rise to the possibility of conflicting management plans and strategies for overlapping areas. This, in turn, may create uncertainty as to which plan will be paramount and create administrative difficulties for government and proponents in a given area. Proponents will need to be aware of what plans or objectives may be involved in each region, and for those operating in various areas, they will need to understand and comply with potentially varying standards. This may become particularly confusing for large projects that span more than one planning region. This speaks to the need to establish a hierarchy of plans in the legislation or a centralized planning body that will determine the relative weight to be given to the competing plans and objectives.

The ELC recommends that the framework for managing cumulative environmental effects articulate how competing plans will be integrated or how a hierarchy of plans and policies will be established. This must be clarified and articulated before plans are put in place. Also, Alberta Environment should pursue a consistent method for establishing these planning areas. This hierarchy of plans and policies should be reflected in the enabling legislation of agencies that authorize decisions that contribute to cumulative effects on the environment.

Alternatively, the ELC recommends the formation of a central planning agency that would consider relevant plans and decide on whether and how an activity might proceed in a given planning area.

The Discussion Paper references other government initiatives such as *Water for Life* and the Land-Use Framework. It is imperative that the government start communicating more effectively how all of these initiatives fit together. Silence on this point suggests that government itself does not know how all its initiatives fit together. This is a fundamental problem.

Environmental Sustainability Objectives and Strategies

The Discussion Paper indicates that Environmental Sustainability Objectives (“ESOs”) and Environmental Sustainability Strategies (“ESSs”) would be produced in the planning areas and then be used to guide decision-making.⁷ The ESOs would be measurable ambient environmental quality objectives and would be developed considering economic, social and environmental

⁴ *Ibid.* at 11.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.* at 12-13.

factors.⁸ The Discussion Paper further contemplates that these objectives would enable all regulated and unregulated activities to be carried out within the environmental limits.⁹

Several questions arise in relation to ESOs. First, if ambient environmental quality is going to be the governing objective, how will exceedances of the ESO be dealt with? Determining the cause of the exceedance will be of central importance, as will taking actions to decrease the environmental impact. It seems likely that everyone in the planning area will wish to absolve themselves of any responsibility for the exceedance. This is particularly the case if monitoring shifts toward more ambient monitoring at the expense of point source monitoring as is contemplated by the Discussion Paper.¹⁰ Attempts to reduce environmental impacts would be undermined by a need to prove causation and a lack of a robust compliance and enforcement policy.

Second, how will ESOs be relevant to unregulated activities? The Discussion Paper clearly contemplates the consideration of ESOs in decision-making by government approvals and yet it ignores the many activities that may contribute to ESO exceedances. Examples of this includes nutrient loading of water bodies from non-point sources or impacts from motor vehicle emissions.

Third, who will be determining the relative weight of social, economic and environmental factors? To date regulatory bodies in Alberta have claimed to be balancing these factors and yet, the ELC would argue, there is a presumption or predisposition towards favouring economic factors, notwithstanding environmental impacts that cannot be mitigated. Where these factors are being balanced there is a need to clearly discern how the balancing is to take place.

The ELC recommends clarifying how ESOs will impact activities that are currently unregulated. This may include how ESOs will impact planning on the municipal level. The ELC also recommends that the regulatory framework outline actions that can be taken to address exceedances of ESOs. These enabling provisions should consist of a variety of soft and hard tools to respond to an ESO exceedance. The enabling provisions must also ensure that compliance and enforcement activities are possible across government departments.

Development and implementation of objectives and strategies

The development of ESOs and ESSs will undoubtedly be a source of significant controversy. The Discussion Paper indicates that they will be based on “sound, shared information and knowledge”.¹¹ The setting of ESOs and ESSs would rely on Ministerial initiative.¹² The Minister of Environment would create the terms of reference and a timeline for completion.¹³ The Minister would then make a recommendation to Cabinet, which would adopt, amend or reject the recommendations. Revoking an established and approved ESO would also be within

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.* at 16.

¹¹ *Ibid.* at 13.

¹² *Ibid.*

¹³ *Ibid.*

Cabinet's discretion.¹⁴ The Discussion Paper further states "only those parts of strategies that are within the mandates of government departments or require provincial government action would be formally adopted by cabinet, other actions would be voluntary by stakeholders".¹⁵

The development of ESOs and ESSs, as outlined in the Discussion Paper, is rife with political and bureaucratic discretion. There is no guidance given to the Minister or Cabinet to ensure that ESOs and ESSs will be established for any part of the province. This creates significant uncertainty as to if or when an ESO will be established or revoked. This discretion also undermines the efficacy of developing ESOs and ESSs through multi-stakeholder processes. If the decisions at the end of the day are purely political, these standards and strategies can then be created within government, without costly multistakeholder processes.

The ELC recommends focusing the legislation on substantively dealing with cumulative effects management. This will likely entail placing discretion, where it is necessary, in a central planning body that is less likely to be governed by political forces. Further, the ELC recommends creating guiding criteria that would govern decision-making and ensuring that these criteria are set out in legislation. Accountability in decision-making can only be maintained through a legal right to appeal decisions that undermine the substantive intent of legislation.

The Discussion Paper also indicates that the ESOs and ESSs would need to be in compliance with overarching provincial objectives.¹⁶ The creation of these provincial objectives are not addressed in the Discussion Paper. Details regarding how these provincial standards are formulated and applied must be provided to assess whether ESSs and ESOs should comply with provincial objectives. Certain questions must be clarified, such as, whether an ESO or ESS that is more protective of the environment will be considered to be in compliance with provincial standards?

Options for developing objectives and strategies

The Discussion Paper outlines two options for development of the objectives, namely, a multi-stakeholder organization or a government appointed advisory committee.¹⁷ Both options have their drawbacks. First, a government appointed advisory committee could appear to be too partisan in nature, thereby undermining the credibility of its work with the public. This need not be the case where the mandate and selection criteria for the advisory committee provide a degree of fairness and transparency in the decisions to appoint. Plus, there is generally no requirement for the government to follow the recommendations of "advisory committees". This leaves open the possibility of the government cherry picking recommendations or only dealing with the "low hanging fruit".

Second, multi-stakeholder organizations can simply cause delays in setting standards, with participants focusing on defending positions and not on proactive solutions to environmental impacts. An example of this delay is the Cumulative Environmental Management Association

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.* at 14-15.

(CEMA), which has failed to arrive at substantive decisions to ensure mitigation of environmental impacts. In this latter instance, the Government of Alberta must be clear in its intent to develop and implement ESOs and ESSs from the outset, must provide the planning body with sufficient funds to make informed decisions and set out timelines by which decisions must be made. In the absence of a decision, the government would then provide the backstop decision.

A more autonomous and independent decision-making authority is required so that politicization of decision-making is avoided. This may take the form of a multi-stakeholder group that has some legislatively enabled authority or an environmental assessment and planning authority that would make decisions in relation to proposed and existing activities.

Monitoring, assessment and reporting

The Discussion Paper indicates that the monitoring function would remain with industry, government and on occasion with multi-stakeholder organizations and that there would be an increased shift toward ambient monitoring.¹⁸ Assessment of the status of ESOs will be done through the use of indicators.¹⁹ Reporting would occur annually and would include reporting on the status of achieving objectives and the effectiveness of strategies.²⁰ Cumulative effects management requires an effective way of responding to threats to the environment. This entails a system of monitoring and assessment that is effective at providing timely responses where the environmental quality does not meet the ESOs.

While ambient monitoring can be conducted there is a need to maintain site-specific monitoring to allow for the identification of activities that are contributing excessively to environmental impacts in a planning area. To do otherwise invites “free riders” that will ignore the objectives, knowing full well that they cannot be individually targeted to address their environmental impacts.

There is also a need to further define the type of indicators that will be used to assess progress. There is a need to provide clarity as to who will determine the indicators and validate their measurement. Reporting must include substantive analysis of current and future trends in the planning area to allow those reading the reports to assess whether the system is working, and if not, what are the activities or issues leading to the inadequate performance.

The ELC recommends that a focus be placed on ensuring that compliance and enforcement options under the framework provide clarity and accountability for individual activities within the planning area. Ambient monitoring and reporting alone may merely become a system of recording failures in dealing with cumulative environmental effects. Free riders must be held to account in the regulatory system. Pursuing environmental outcomes through collaboration and voluntary compliance will not, of itself, result in effective cumulative effects management.

¹⁸ *Ibid.* at 16.

¹⁹ *Ibid.*

²⁰ *Ibid.*

Framework for ESO development

The Discussion Paper indicates that the framework for guiding development of ESOs and ESSs will be created within one year of the legislation coming into force.²¹ A framework for developing objectives and strategies is required but certain issues should be dealt with in the legislation or regulations. More specifically, the integration of ESOs and ESSs with other government policy must be addressed in legislation. Similarly, the development, analysis and assessment of ESOs and ESSs should be set out in regulation and should be reviewable, that is to say public participation in the process should be legislated. This should include some form of appeal or review that would be available in instances where ESOs are not substantiated scientifically.

System based approach

The Discussion Paper indicates that a systems based approach will be taken whereby the legislation provides the enabling structure for a results-based management system of cumulative effects. The Discussion Paper proclaims certain benefits arising from the system based approach, yet it is unclear if these benefits will be realized.²² The significant discretion maintained both by the Minister and Cabinet may effectively undermine any benefit accrued through the planning process. Further, without objectives and standards that bind decision-makers it is unclear whether any benefit will accrue in a given decision. It appears likely that a successful challenge of discretionary decision would require showing that the decision maker was patently unreasonable in coming to their decision. This standard of review effectively means that a decision maker's choice to ignore the objectives and plans is largely shielded from challenge or review.

What fails to be acknowledged is that the benefits attributed to the systems approach will only be realized if the "united approach to protecting and restoring the health and diversity of Alberta's ecosystems" is integrated into all government mandates. If mandates and enabling statutes remained unchanged it appears doubtful that Alberta's ecosystem will be protected.

The result-based systems approach also appears to be targeted at efficiency rather than effectiveness. The systems approach must not be used to justify resource and capacity constraints within the department as this ensures the system will perpetuate under-funding of environmental initiatives within government.

Integration

Integration of the various existing government policy initiatives dealing with the environment is laudable but without significant changes to other departments' mandates or the creation of regulatory tools to counteract currently unregulated actions that contribute to environmental health, the expectation of successfully managing cumulative effects remains low. Successful design and implementation of a cumulative effects management system also demands integration

²¹ *Ibid.* at 17.

²² *Ibid.* at 18.

between the different levels of government, namely the municipal, provincial and federal governments. We note that the Discussion Paper is conspicuously silent in relation to the role the federal government, which shares constitutional responsibility for environmental regulation with the provinces, will play in the proposed cumulative effects management system. The federal government must have a visible and active role in any system created to address cumulative effects within Alberta.

Conclusion

As mentioned at the outset of these comments, the ELC commends the province for pursuing this initiative to manage cumulative effects of development in Alberta. Recognizing that the initiative is in its infancy, we suggest that the following key elements be incorporated in the system to be developed: integration; a legislatively based system with legally binding objectives; a strong role and ultimate accountability for the provincial government; and strong integrity of information. We appreciate the opportunity to provide our comments on the Discussion Paper, and look forward to active involvement in the ongoing development of the cumulative effects management system.

Yours truly,

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