

March 18, 2009

Our File: 2200

Energy Resources Conservation Board
640-5 Avenue SW
Calgary, Alberta
T2P 3G4

Via facsimile: 403-297-7336

RE: Comments on Draft Directive [XXX] - Oil and Gas Development Within or Proximal to Water Bodies

The Environmental Law Centre (ELC) is a charitable organization incorporated in 1982 as a public source of information on environmental law and policy. The ELC's mission is to ensure that laws, policies and legal processes protect the environment. The ELC is pleased to provide comments on the *Directive [XXX] – Draft, Oil and Gas Development Within or Proximal to Water Bodies*, dated February 10, 2009 (*Draft Directive*).

General Comment

The ELC commends the ERCB for pursuing this directive and offers its strong support for pursuing a more systematic approach to managing oil and gas activities within or close to water bodies.

Specifically, the ELC supports:

- (1) the use of the site assessments and planning to ameliorate impacts of oil and gas development on water bodies, and
- (2) the approach to measuring distances to water bodies in reference to the “Ecological Boundary” as described on page 6 of the *Draft Directive*.

The ELC has identified a few concerns with in the *Draft Directive*.

Compliance with plans set out in s. 5(5)

The ELC supports the creation of the various plans outlined in s. 5(5) of the *Draft Directive*. However, the creation of these plans must be accompanied by an ability to enforce compliance with the plans in a timely and efficient manner.

The ELC recommends that these plans be incorporated by reference into any permits that are issued by the ERCB in relation to the wellsites and facilities (whether they relate to a

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routine or non-routine application). The plans should be publicly available to allow landowners and other interested parties to monitor compliance.

Potential knowledge gaps the in desktop review in s.6 of the Draft Directive

Section 5(4) sets out appropriate criteria to assess an area for specific site sensitivities including drainage, hydrologic conditions, soil characteristics (relevant to infiltration and transport), the presence of native and rare plant communities and use of areas by wildlife and more specifically species at risk. Section 6 indicates that this assessment is done by a desktop review while the planning, required under s. 5(5), is done by site visit.

The ELC recommends amending the review to adequately deal with knowledge gaps in a desktop review. More specifically where hydrologic, soil characteristic, and species composition or habitat information is not available through the desktop review a site visit and scientifically rigorous site assessment must be conducted. This in turn would also act as an incentive to avoid carrying out activities within the 100 metre buffer.

Clarity around *Water Act* approvals and 30 metre non-routine applications (s. 5(5))

The *Water Act* prescribes the need to obtain an approval for any works or activities that result in disturbing ground that may cause or may become capable of causing siltation of water or causing an effect on the aquatic environment. In this regard an approval from Alberta Environment may be required for activities on uplands surrounding water bodies. In its current form the *Draft Directive* may lead to confusion about this requirement.

Specifically, the *Draft Directive* may create confusion at Figure 1 where it states that an Alberta Environment approval must be applied for if the “activity is within a water body”. Moreover, the setting of the non-routine application of 30 metres may foster the perception that only activities directly in a water body are covered by the *Water Act*.

The ELC submits that activities that occur within 30 metres of a water body have a significant probability of incurring impacts on water bodies for which approvals may be required from Alberta Environment. This is particularly the case where disturbance of land (and not simply the well centre) is within the 30 metre distance.

While s.5(3) of the *Draft Directive* recognizes that a site assessment may identify that a *Water Act* approval must be obtained this may be misconstrued in light of allowances for activities within 30 metres (as a non-routine application).

It is recognized that the ERCB does not regulate compliance with the *Water Act* but the *Draft Directive* should be clear regarding these potential regulatory requirements. A provincial regulatory framework for riparian area setbacks would be of assistance in this regard.

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Disturbance footprint versus well centre

The *Draft Directive* states that the “well centre” or other facility equipment is to be used as the reference point for measuring the distance from a water body (s.5(4)). While this approach may be appropriate to deal with point source concerns there is a need to recognize that impacts on water bodies will also occur due to the broader disturbance of land which may occur beyond the well centre or facility location.

The ELC recommends amending the *Draft Directive* to measure the distance between the area of disturbed land related to oil and gas activities or, at least, an adequate proxy for this disturbance area (for example an average of the well pad and disturbance). This approach will promote best practices in relation to minimizing land disturbance and will ensure non-point source impacts on water bodies are considered in the *Draft Directive*.

The need to promote avoidance of incursions within 100 metres of a water body

The ELC recommends that the *Draft Directive* be amended to provide an incentive to avoid development within 100 metres of a water body. While the “assessing and addressing of site sensitivities” for development proximal to a water body is lauded there is a need to promote avoidance of water bodies as an initial step.

The ELC recommends that the *Draft Directive* require proponents provide an analysis of alternative well or facility placement to avoid activities or disturbance of land within 100 metres of a water body. In addition, the ELC recommends outlining specific, heightened enforcement responses or significantly increased fines where activities are undertaken within 100 m of a water body. This may require regulatory amendments but is an important approach to incenting avoidance of water bodies. Carrying out activities near a water body should not be merely considered a cost of doing business by way through the creation of boilerplate plans established under s.5 of the *Draft Directive*.

Related facility impacts

There is a need to expand the *Draft Directive* to infrastructure including roads and pipelines. The ELC recommends applying a similar approach to the placement and management of roads and pipelines to minimize impacts on water bodies, important upland habitats or water recharge areas. This approach would be complimentary to current requirements in the *Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body*.

Should you have any questions or concerns regarding any of the foregoing please don't hesitate to contact me.

Yours truly,

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