

Comments on the *Draft Land-use Framework*: “The Devil is in the Details”

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Introduction

The Environmental Law Centre (ELC) is a charitable organization, incorporated in 1982 to provide an objective source of information on environmental law and policy in Alberta and Canada. Our mission is to ensure that laws, policies and legal processes protect the environment. Our work is guided by twin goals of ensuring that sound environmental laws are enacted and enforced, and ensuring effective and informed public participation in decision-making processes.

The ELC has been an active participant in the development of the Land-use Framework (LUF), acting as a reviewer for the Planning and Decision-making Working Group in 2007; providing comments on the LUF workbook in June 2007;¹ and participating in the cross sector forum and focus group sessions in 2006.

Given our mission, goals and continued interest in the LUF process, the ELC is pleased to provide comments on the Government of Alberta’s *Draft Land-use Framework (Draft LUF)*.²

Support for the Draft LUF

The ELC commends the Government of Alberta for acknowledging the deficiencies of Alberta’s current system for managing land and resources, and for beginning to reform this system through the LUF process. We found the language and many of the commitments in

¹ Environmental Law Centre, *Written Submission Accompanying Land-use Framework Workbook* (Edmonton: Environmental Law Centre, 2007), online: Environmental Law Centre <<http://www.elc.ab.ca/ims/client/upload/Land%20Use%20Framework%20Submission.pdf>>. Our submission includes the ELC’s vision for land-use in Alberta and key elements that must be included in an effective planning system.

² Government of Alberta, *Draft Land-use Framework*, May 2008, online: Alberta Land-use Framework <<http://www.landuse.alberta.ca/>> [*Draft LUF*].

the *Draft LUF* encouraging. The ELC supports the following concepts and commitments outlined in the *Draft LUF*:

- using integrated regional planning to set objectives for Alberta's landscapes;
- creating a new governance structure to implement and backstop planning decisions;
- developing and using mechanisms for managing cumulative effects on a regional scale;
- setting binding, science-based thresholds for the environment (air, land, water and biodiversity) at regional levels;
- identifying that new policy tools are needed to enhance stewardship on private and public lands; and
- recognizing that provincial leadership is critical to provide clear direction for planning decisions.

General comments

While the overall language and policy direction is positive, the *Draft LUF* lacks critical details with respect to its legal foundation and implementation. The ELC has identified five key elements where further details must be provided:

- (1) governance;
- (2) mechanisms for public participation;
- (3) compliance and enforcement;
- (4) integration of plans and planning; and
- (5) timing and transitional provisions.

These details are critical to ensuring that the LUF improves our system for managing land and resources rather than providing mere window dressing on an already broken system that is incapable of coping with the current pressures facing our land and resources.

The remaining parts of this submission identify gaps and/or missing details in the *Draft LUF* in relation to the five elements above, and provide recommendations for how these gaps and details should be addressed in the final LUF.

(1) Governance

The *Draft LUF* gives a high level glimpse of the overall governance structure that will be put in place. However, many important details have yet to be developed regarding the roles and responsibilities of both provincial and local decision-makers,³ as well as the processes necessary to translate the LUF from policy into reality.

(a) Clear governance structure

The governance structure described in the *Draft LUF* includes the creation of a Cabinet Committee, Land-use Secretariat and a number of Regional Advisory Councils (RACs). These bodies will implement the LUF and carry out planning functions. In addition to the roles stated in the *Draft LUF*, the ELC recommends the following expansions or clarifications.

As the provincial government is ultimately accountable for the LUF's success, the Cabinet Committee must assume responsibility for creating specific performance metrics relating to provincial outcomes and must be directly accountable for ensuring that regional plans are implemented to achieve those outcomes.

The *Draft LUF* states that the Land-use Secretariat will clarify and interpret regional plans for local planning bodies.⁴ This role must expand to include assisting provincial departments and municipalities in reconciling their respective policies to the LUF and providing administrative support to the RACs, without acting as a filter between the RACs and the Cabinet Committee.

The *Draft LUF* contemplates a limited role for the RACs. More information is required about how these Councils will contribute to the planning process. The final LUF must provide a transparent process for appointing members to RACs and provide mechanisms for continuous regional input beyond the scope of the RACs' mandate. These could include an ongoing policy advisory group to assist the Cabinet Committee with continuing LUF implementation, or even the reconstitution of the RACs to regularly review regional plans or provide advice when it appears that regional plans are not achieving targets, or if thresholds and limits are being exceeded. The final LUF must also require the Cabinet Committee to consider a RAC's advice prior to recommending a regional plan for Cabinet approval and provide written reasons if the RAC's advice is not incorporated into a regional plan.

³ In this submission, the term "local decision-makers" refers to the full range of land use decision-makers that will be subject to the LUF. This includes all relevant provincial departments, municipalities and regulatory bodies such as the Energy Resources Conservation Board, Natural Resources Conservation Board, Alberta Utilities Commission and Environmental Appeals Board.

⁴ *Supra* note 2 at 17. Further discussion about the short-term status of RACs is addressed under heading (2) mechanisms for public participation.

(b) Legally binding

Previous land-use management policy tools have lacked “teeth” to enforce them, as they often contained recommendations and guidelines instead of mandatory language. The ELC recommends the creation of a single, dedicated piece of legislation, a *Land-use Planning Act* to establish and support the LUF. Existing pieces of legislation like the *Public Lands Act*, *Municipal Government Act* and *Mines and Minerals Act* must be amended so that the powers, accountabilities and processes described in those Acts are consistent with the new, overarching planning legislation.

The new *Land-use Planning Act* must include:

- **a strong purpose clause** to enforce the position of the LUF as the primary, overarching management tool to which local land-use decision-making is subject. This purpose section must also explicitly state that provincial outcomes are based on environmental and social performance measures and not simply economic ones.
- **the “rules of the game” outlining processes for how planning decisions are made.** This includes processes for delineating planning regions, for identifying provincial environmental, economic and social priorities and for setting corresponding thresholds and limits in regional plans. The *Act* must also set out the mandates and powers of the Cabinet Committee, Land-use Secretariat and the RACs, with clear lines of accountability between these bodies and local decision-makers.
- **a “road map” for the creation of regional plans.** These plans must apply mandatory language, with clear thresholds and firm limits that allow all stakeholders to easily determine whether local decisions are in compliance with the regional plan.

As described further below, the *Land-use Planning Act* must also include mechanisms for meaningful public input into planning processes and land-use decisions, a compliance and enforcement scheme and transitional provisions.

(c) Integrity of the governance structure

The LUF’s integrity depends on a transparent planning process that delivers provincial outcomes by imposing planning discipline on local decision-makers. This requires that the LUF apply to municipalities and all provincial departments, including Alberta Energy. The planning process must be sound enough to prevent any provincial department or local authority from approving projects that are inconsistent with the regional plan.

(2) Mechanisms for public participation

The *Draft LUF* endorses transparency and public participation by stating that decision-making processes will be open and inclusive.⁵ This language is encouraging; however, the LUF must ensure that public participation is meaningful.

The *Draft LUF* contemplates a wide range of decision-making functions. Some decisions, such as setting priorities for regional planning, are made on a regional scale, while others, such as whether to issue an oil and gas lease, approve an energy project or approve the subdivision of land are made on local scales. The public participation opportunities established under the LUF must be appropriate to the level of decision-making or planning at each stage and may narrow as decisions move down to the local level. A key component of providing meaningful participation is ensuring that broad participation occurs at the regional planning stage and that broad public interest issues have been properly dealt with at this stage of the decision-making chain.⁶

In the *Draft LUF*, RACs will consist of provincial government appointees representing the range of interests within a region.⁷ These Councils must be equally representative of many sectors, and all appointees and their constituent interest groups must have equal access to information and processes. With the assistance of the Secretariat, RACs must have a responsibility to engage in public consultation as a part of the planning process. Given that the RACs appear to be temporary bodies, the LUF must include opportunities for public input to monitor and evaluate processes and to be involved in subsequent reviews and changes to regional plans. These are crucial checks and balances needed to ensure that planning does not become a top-down process that is unresponsive to local issues.

The Land-use Secretariat will develop Terms of Reference prior to beginning regional planning processes. The Terms of Reference are pivotal documents that must set out government policy on critical elements like stakeholder support for the planning process. The *Draft LUF* indicates that non-government groups will have a role on the RACs.⁸ As the capacity of non-government organizations to effectively participate in these processes is limited, the province should commit to adequate funding of this participation in advance.

Currently, many people are frustrated with the application of the narrow “directly and adversely affected” test for standing that is applied by the Energy Resources Conservation Board and other agencies. This test tends to focus on economic interests of the individual, rather than on broader environmental or social interests. The province must discard the directly and adversely affected test when creating opportunities for public input in LUF

⁵ *Ibid.* at 10.

⁶ See Environmental Law Centre, *Roadmap for Reforming ‘The Public Interest’ for the ERCB and NRCB* (Edmonton: Environmental Law Centre, 2008), online: Environmental Law Centre <<http://www.elc.ab.ca/ims/client/upload/Roadmap%20for%20Reforming%20The%20Public%20Interest.pdf>> [*Public Interest Roadmap*].

⁷ *Draft LUF*, *supra* note 2 at 17.

⁸ *Ibid.*

processes. Specifically, this test should not apply to determine a person's ability to appeal or challenge decisions on the basis that the decision is inconsistent with the regional plan. Failure to adhere to regional plans has a broader impact than an immediate locality and affects a wide range of interests beyond the economic.

Finally, given the significance of the proposed LUF for Alberta's future, the province should undertake timely public consultation on the *Land-use Planning Act* and its supporting regulations prior to its passage.⁹ The Alberta government undertook a similar consultation initiative in the early 1990s, as part of the development of the *Environmental Protection and Enhancement Act* and its regulations, and should do the same now to ensure that the important job of creating a new land-use planning and decision-making system for Alberta is done well.

(3) Compliance and enforcement

The *Draft LUF* provides that all local decision-makers will be required to conform to the regional plans. There is little discussion, however, of how compliance will be monitored and enforced. The ultimate responsibility for the success of the LUF lies with the provincial government; accordingly, it is the province's responsibility to ensure compliance. The ELC recommends that the Secretariat have a specific compliance and enforcement function and be answerable to the Cabinet Committee for its performance.

The *Draft LUF* promises to create appeal processes to allow for the appeal of decisions that are inconsistent with the regional plans, and notes that existing appeal processes will be reviewed and updated.¹⁰ This must be expanded to address land-use decisions that cannot currently be appealed, such as the lease of Crown oil and gas assets.¹¹ Albertans must have the legal means to challenge development decisions, such as the issuance of an oil and gas lease, that are not consistent with the regional plan.

Further, it is important that a wide range of stakeholders have the ability to appeal local land-use decisions on the basis of non-compliance with regional plans. Albertans must be properly resourced, in terms of finances and information to participate in appeals. Funding must be made available for individuals or groups to bring an appeal.

Finally, the *Land-use Planning Act* must set out a compliance and enforcement scheme that includes regular monitoring and analysis. This monitoring and analysis information must be made publicly available on a routine basis.

⁹ Note that review of the statute itself, without the related regulations, will provide only a partial understanding of the ultimate structure and implementation of the LUF.

¹⁰ *Supra* note 2 at 16, 27.

¹¹ For instance, while the *Mines and Minerals Act* allows the Minister to expropriate a mineral interest where development is not, in the Minister's opinion, in the public interest, no appeal lies with respect to the lease of Crown oil and gas assets.

(4) Integration of plans and planning

The final LUF must integrate planning both within provincial departments and across federal, provincial and municipal jurisdictions. Failure to integrate planning and resulting objectives will undermine the LUF's ability to manage cumulative effects and achieve environmental outcomes.

The *Draft LUF* acknowledges the need to integrate broader regional planning objectives in municipal planning processes and indicates that regional plans "will align provincial strategies and policies at the regional level".¹² Despite acknowledging the importance of integration, the *Draft LUF* lacks sufficient detail in relation to the scope of integration that is being pursued and the process by which integration will be realized.

The final LUF must explicitly address how integration with other planning and policy initiatives will occur. Current policies and planning processes within Alberta that must be integrated into the LUF process include:

- water and watershed management planning policies, as found in the *Water Act* and in *Water for Life: Alberta's Strategy for Sustainability*;
- Alberta Energy's policy regarding mineral tenure and energy development in the province;
- Alberta's Clean Air Strategy;
- Alberta's strategy for parks and protected areas;
- Alberta Agriculture and Food's plans and policies;
- statutory plans under the *Municipal Government Act*; and
- plans and policies related to cumulative effects management.

Integration with federal plans, policies and regulations is also essential; this is not addressed in the *Draft LUF*. The Government of Canada has significant regulatory roles in relation to toxic substances, fisheries, migratory birds, species at risk, and greenhouse gases. The federal government also has responsibility to ensure plans are integrated with First Nation and Métis land-use objectives.

The mechanisms for integrating policies must be set out early in the LUF process. This is particularly the case where different planning processes may result in disparate planning outcomes. For example, Watershed Planning and Advisory Councils (WPACs) may arrive at specific environmental objectives through the watershed management planning process that are at odds with the LUF's outcomes. This possibility is heightened by the fact that RACs

¹² *Supra* note 2 at 15-16.

under the LUF are temporary planning councils while WPACs have an ongoing ability to evaluate and refine planning objectives.

Effective integration requires legislative backing in the new *Land-use Planning Act*. In the absence of legislative changes, the day-to-day decisions of local decision-makers are unlikely to change. The legislative mandates that guide the discretion of decision-makers must be revised and informed by a planning hierarchy.¹³ Maintaining the current, piecemeal approach to decision-making will result in continued failures to manage cumulative environmental effects.

Effective planning integration also requires integrating and harmonizing key principles and operating practices across provincial departments. These include:

- public access to information and transparency in all aspects of governance;
- thorough monitoring and data collection for environmental indicators;
- opportunities for public interest participation in all relevant decision-making processes; and
- clear compliance and enforcement policies and plans to foster accountability for reaching environmental objectives.

Finally, there is a need to build sufficient technical, financial, and enforcement capacity within all levels of government to ensure that a robust planning system is created in Alberta. Alberta Finance and Enterprise and the Treasury Board must therefore integrate their planned spending and budgeting to achieve the *Draft LUF* goals.

(5) Timing and transitions

To be effective, the final LUF requires further detail and clarification on timelines for implementation and transition measures.

The *Draft LUF* mentions repeatedly that it represents a significant change in Alberta's land-use decision-making, and that implementing these changes will take time.¹⁴ However, the timelines proposed for key elements of the LUF such as developing regional plans and creating the RACs are overly long, stretching out to 2010 or 2012 but not assigning specific milestones within these timelines.

The *Draft LUF* gives no apparent rationale for these long timelines. While the *Draft LUF* identifies priority areas, it is unclear why RACs and regional plans for the other areas of Alberta could not also be developed by 2010 as well.¹⁵ Staggering these steps runs the risk of creating

¹³ See *Public Interest Roadmap*, *supra* note 6.

¹⁴ *Supra* note 2 at 12, 24, 27.

¹⁵ Identified priority areas are the Edmonton and Calgary regions, southern Alberta and northeastern Alberta. *Ibid.* at 24-25.

“free development” zones within the province that are subject to the current dysfunctional land-use planning system, rather than the new approach proposed by the *Draft LUF*. At the very least, this would create an uneven playing field between land users in different areas of the province. It also raises the very real possibility of facilitating rushes to develop land under the current system. The final LUF should impose the same timeline of 2010 for establishing RACs and regional plans for all six regions created by the LUF.

To avoid land and development rushes, the final LUF must set out immediate transitional measures, including imposing interim thresholds on a precautionary basis, and temporary holds on development in high priority areas as regional plans and long-term limits are developed. The *Land-use Planning Act* must include provisions to address issues such as the treatment of applications that are partway through the development process, timing concerns in relation to the applicability of thresholds and limits, potential grandfathering of land-use matters and time limits on such grandfathering. Finally, the completion of Alberta’s protected areas network must be given a higher priority, to ensure that high value representative areas are not lost before the planning regime can be put in place.

Conclusion

The *Draft LUF* signals an initial step away from “everything, anywhere, anytime” approach to land and resource management that has dominated in Alberta. For this paradigm shift to actually occur, more details are required so that all Albertans can be confident that the government will implement an effective planning process rather than paying lip service to planning ideals while maintaining the *status quo*.

Thank you for the opportunity to provide this submission. The ELC looks forward to participating further in finalizing and implementing the LUF.