

## WRITTEN SUBMISSION ACCOMPANYING LAND USE FRAMEWORK WORKBOOK

June 15, 2007

Dean Watt  
Staff Counsel  
Environmental Law Centre

### I. Introduction

The Environmental Law Centre (the “ELC”) is a charitable organization, incorporated in 1982, to provide Albertans with an objective source of information on environmental law and natural resources law. The ELC provides services in legal education, assistance, research and law reform to achieve its mission to ensure that laws, policies and legal processes protect the environment. The ELC has provided assistance to the public and submissions to government on environmental and land use related issues since 1982.

The ELC has been an active participant in the development of the Land Use Framework to this point, having participated in stakeholder focus groups last fall as well as the cross sector forum held in Red Deer in December of 2006. The ELC expects to continue its participation in the development of the Land Use Framework as the stakeholder engagement continues in June of this year.

This submission has been prepared to accompany the workbook responses prepared by the ELC. This submission is based on the information and questions contained in the Land Use Framework Workbook and accompanying document entitled “Understanding *Land Use in Alberta*”. This submission provides the ELC’s vision for land use in Alberta, the ELC’s comments respecting issues and challenges identified in the Workbook, the ELC’s comments on the planning and decision-making process, and the ELC’s comments on the guiding principles and outcomes identified in the Land Use Framework Workbook materials.

### II. Vision for land use in Alberta

*Land use decisions are made in accordance with sound laws and policies that are protective of the environment and are implemented and effectively applied so to ensure the sustainability of Alberta’s natural capital.*

The ELC offers the above as its vision for land-use in Alberta. Key differences in this vision as compared to that provided for in the Workbook are the ELC’s references to laws and policies and the reference to the environment. Breaking down the ELC’s vision, sound laws and policies are those that are clear and enforceable and for which decision-makers are held accountable. Further, they allow for meaningful public engagement at all significant land use decision-making steps.

Recycled Paper

Sound environmental laws recognize the precautionary principle. In legal terms, the precautionary principle has been described as “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.”<sup>1</sup>

This principle must be kept in mind when determining appropriate limits and thresholds to address cumulative effects.

### **III. Issues and challenges**

The stated purpose of the Workbook is to provide the province of Alberta with broader input from Albertans on the input and feedback received through the Land-Use Framework process to date. In seeking this input, Part II of the Workbook identifies land-use issues and challenges identified by stakeholders during the initial consultations, and asks participants to rank them.

Page 5 of the *Understanding Land Use in Alberta* document refers to “land use challenges”. The realities of current growth and increased land-use pressure are referred to in a cursory way, as are the corresponding consequences of competing demands for land and cumulative effects. The desire for sustainability is generally expressed here as is the need for integration of land-use policies; however, what such “integration” means is not clear.

Unfortunately, the province has not provided, in either document, a clear description of what *it* sees as being the central problem to be solved by the Land-Use Framework. Steve Kennett, then of the Canadian Institute of Resources Law, identified points that should be reflected in an appropriate description of this particular problem. Kennett suggests the following points be included:

- Landscapes across Alberta are undergoing significant changes due to the increasing pace and intensity of industrial, commercial, residential and infrastructure development, along with growing pressure from recreational land use.
- Alberta’s legal, institutional and policy framework for land and resource management is structurally incapable of managing these cumulative environmental effects, primarily because landscape-scale change is the result of a multitude of individual, incremental decisions made within a fragmented regime for land and resource management.
- Albertans therefore lack the ability to set and achieve landscape-scale objectives over spatial and temporal scales that are meaningful for many important land-use values.
- To address this problem, the government will undertake a thorough and public review of existing legislation, institutional arrangements and policies and will then move decisively to implement integrated landscape management by filling gaps in the legal and regulatory regime, enhancing institutional capacity to manage cumulative effects, and ensuring accountability for land-use outcomes.<sup>2</sup>

For the purposes of this submission, the ELC considers this statement to appropriately describe the problem the Land-Use Framework must address.

Recycled Paper

#### IV. Planning and decision-making processes

Part II B of the Workbook focuses on Planning and Decision making processes and asks respondents for their views on the manner in which provincial and municipal responsibility for land use should be exercised. The ELC considers that different levels of government must work together to ensure effective land use planning.

The ELC considers that the provincial government should take a more direct role in working with regional and local governments and stakeholders to achieve province wide objectives. Municipalities are subordinate to the province. Ultimately, it is the province, not the municipality, that has the power and responsibility to ensure that land-use planning addresses the problem of cumulative effects. Kennett notes that when local or regional land-use decisions impact provincial or national interests, such as maintaining biodiversity, or pursuing overarching economic or social priorities, higher-level policy direction should be incorporated into the planning process.<sup>3</sup> Municipalities cannot develop this higher-level policy individually.

For this reason, the ELC strongly disagrees that local governments should have sole responsibility for making planning decisions within their boundaries and scope of responsibilities, to meet local needs. While development within a municipality may result in economic benefits for the municipality, cumulative effects of development are not necessarily restricted by municipal boundaries. Entire watersheds and airsheds may be negatively impacted by development in a given municipality. If municipalities have sole responsibility for land use planning within municipal boundaries, there is potential for planning decisions to be continually made in an incremental fashion. Municipalities are creatures of statute and their powers are confined to those identified in the *Municipal Government Act*. The province has the authority to require the municipalities to conduct land-use planning on a scale that addresses regional impacts.

The ELC agrees that the provincial government should create mechanisms for resolving land-use conflicts at the provincial, regional and local level. Because land use decisions affect economic and non-economic values of land and the environment, an arbitrator of land-use conflicts must allow for meaningful participation by all interested persons, rather than extending participation rights, or standing, only to those with economic interests. The ability of Albertans to ensure sustainable land use planning requires the engagement of individuals and groups with a long-term view rather than solely involving those with short-term economic interests. The ELC considers that it is appropriate to grant participation rights to any person or group who has a legitimate interest that ought to be represented in the proceeding or process, or has an established record of legitimate concern for the interest they seek to represent. This position is consistent with the test for public interest standing developed by the Supreme Court of Canada. The ELC has previously recommended that this test be applied by Alberta Environment, by the Environmental Appeals Board and by the Energy and Utilities Board.<sup>4</sup>

Where land use planning is bound by scientific limits and thresholds to ensure ecosystem sustainability, as recommended below, stakeholders must be able to require project proponents to demonstrate that thresholds and limits are respected prior to development being approved. Meaningful consequences must lie for decision-making that does not respect established limits and thresholds. This will require that thresholds and limits be incorporated in binding law and regulation and that decisions be in writing and be appealable.

The ELC is concerned that while the Workbook identifies integration between provincial and municipal decision makers, it is silent with respect to other types of integration that are necessary. Kennett has identified the following three required components to manage cumulative environmental effects:

Recycled Paper

- Integration across resource sectors and other activities on the land base (i.e. breaking down the sectoral silos that characterize agencies responsible for land and resource management);
- Integration among the five principal stages of decision-making –
  - strategic policy direction on land and resource use,
  - land-use planning;
  - the issuance of private rights to public land and resources,
  - project review and environmental assessment, and
  - regulatory and permitting processes; and
- Integration over spatial and temporal scales that are appropriate for accommodating important land-use values.<sup>5</sup>

Respecting integration across sectors, when land-use decisions are made sector by sector, such as is the case when mineral rights are issued by Alberta Energy or timber rights are issued by Alberta Sustainable Resources, each of those land use decisions has an impact that extends beyond the land in question; the cumulative effects are externalized from the specific decision maker in each case. The Land-Use Framework must govern and place enforceable limits on individual land use decisions within a region to ensure that those decisions are consistent with broader, landscape-scale objectives and values.

Respecting integration of decision-making processes, broad, landscape-scale objectives should be established through a public process that allows for meaningful stakeholder engagement. These objectives can be used to provide strategic direction to land and resource management decision makers. This strategic direction, if it is given legal effect, can serve to place constraints on the land-use planning. This requires government-wide commitment to integrated land management and the required political, bureaucratic and financial resources to implement integration.<sup>6</sup>

In order to achieve landscape-scale objectives, land-use planning must be made on a regional basis, and consider cumulative effects on the broader region, rather than simply the area proposed for development. Regions should be rationally derived and should align with ecosystem elements. Municipal boundaries do not necessarily conform to ecosystem boundaries and, thus, municipalities make for poor planning regions. A better example of a rationally derived planning region is a watershed. Because all land-uses within a watershed have potential to impact the quantity and quality of water within the watershed, cumulative effects of land-use decisions must consider impacts throughout the entire watershed.

## **V. Inadequate information for decision makers**

Part III D of the Workbook asks respondents to comment on the adequacy of information available to decision makers to make effective land-use decisions. This section unhelpfully defines “decision makers” broadly to include the provincial government, municipalities, industry and landowners without acknowledging the obvious distinctions between them. These different parties are obviously different in terms of the land-use decision-making authority that they have and consequently, the types of information each requires is different. Decisions made by the provincial government and municipalities are, in the majority, made as either land-use planners or regulators of particular industries or activities, whereas industry or landowners make their land-use decisions, generally speaking, as proponents of certain activities.

The ELC advocates the use of integrated landscape management principles when making all significant land-use decisions. When decisions are made by the provincial government or a regional land use planning body to

Recycled Paper

establish a regional, landscape scale objective for a particular region, that decision maker requires sufficient information to satisfy itself that it can establish an effective and enforceable landscape-scale objective that will be adhered to by all decision-makers approving particular land-uses within that region.

As described further below, integrated landscape management requires the establishment and enforcement of limits on activities and impacts if it is to be successful in achieving landscape-scale objectives. Accordingly, a necessary first step in establishing limits on impacts is the development of an accurate inventory of environmental values intended to be protected within each region. For instance, the establishment of a limit on the amount of caribou habitat impacted in a given region cannot be properly established without first quantifying the existing caribou habitat in that region.

Once landscape-scale objectives have been established, decision makers responsible for approving land-uses require, in each case, sufficient information to enable them to satisfy themselves that the proposed land use is consistent with established landscape-scale objectives for the particular region. At this level, decision makers such as municipalities or the provincial government departments issuing timber rights or mineral rights must understand the landscape-scale objectives established for the region and the manner in which those objectives limit their discretion to approve proposed land-uses. Decision makers must have clear information about the limits established as a component of the landscape-scale objectives and have a clear understanding of the consequences of land-use planning that is not consistent with those objectives.

Armed with the above information, land-use decision makers must also have sufficient information about the nature of the proposed land-use and the nature and extent of the impacts that the proposed land use will bring about. The impacts must be considered over the appropriate spatial and temporal scale and must be considered in conjunction with other existing and proposed land uses in the region.

It is important that land use decision-makers are appropriately inclusive in the manner in which they receive the above-noted information. At the level of setting landscape-scale objectives, decision-makers should allow the broadest public participation. At the level of approving specific land uses, the process must allow for proponent information respecting impacts of a proposed activity on a region to be publicly tested. Decision-makers at this level should allow for broad participation in accordance with the recommendations made above at page three of this submission. The nature of participation rights extended in a given case is necessarily linked to the objectives and limits established for a region. For example, where a limit is placed on the amount of caribou habitat to be impacted within a region, no land-use decisions that may impact caribou habitat should be made without first obtaining information respecting the impacts on caribou habitat from the appropriate environmental non-governmental organization.

Provincial and regional land-use objectives should be monitored and publicly reported on. Land-use decision makers must be able to see the positive and negative consequences of their decisions. Without monitoring and reporting information on the various elements reflected in the landscape-scale objectives and limits, decision-makers cannot know if they are headed in the right direction.

Monitoring and reporting data must be made publicly available. All Albertans have an interest in the achievement of provincial land-use objectives and to the extent that regional objectives feed into the provincial objectives, have an interest in regional objectives as well. If this information is not made public, it becomes more difficult to ensure enforcement and accountability.

Recycled Paper

## **VI. Need to establish regulatory limits**

Integrated landscape management amounts to more than simply coordinating activities in order to reduce industrial footprints on the landscape. It is about setting and prioritizing landscape-scale objectives and developing a planning strategy to achieve those objectives.<sup>7</sup>

In order to achieve landscape-scale objectives, the planning strategy must include the setting of limits on the total amount and intensity of activity in a given, rationally derived, region. While it is necessary to determine whether certain activities such as forestry or oil and gas development ought to be permitted in a given area, increased pressure on the land from all uses requires that more be done. By building into landscape-scale planning documents limits such as limits on linear disturbance density, the density of stream crossings or the total amount of forest cover that can be removed, planners help to ensure that incremental decision making does not put the landscape-scale objectives in jeopardy.<sup>8</sup>

While the setting of limits on activities and impacts may create incentives to develop improved technology or land-use practices, it will inevitably lead to trade-offs between competing land-uses.<sup>9</sup> However, the setting of limits is a necessary first step in developing an effective Land-Use Framework that respects the principles of integrated landscape management.

## **VII. Alberta Energy must be subject to broader landscape-scale objectives**

Once land-use planning is done on the regional basis, the results of this planning, if they are given legal effect, can and should limit the discretion of Alberta Energy to issue mineral leases. This is important because mineral rights in Alberta are currently issued without a thorough public review of environmental impacts of resource development.<sup>10</sup> Therefore, in order for the Land-Use Framework to be an effective tool to achieve landscape-scale objectives that are protective of the environment, it must apply to all land uses and, if necessary, limit Alberta Energy's ability to grant mineral tenure.

The footprint created by Alberta's energy industry is enormous. Alberta Energy sells mineral rights in response to market demand. Decisions to dispose of mineral rights are made without the benefit of public input and no hearings are held. Further, these decisions have been made in the absence of a planning framework. Once mineral rights have been issued, applicants seek regulatory approval from the Energy and Utilities Board (the "EUB"). Public Hearings and opportunities for stakeholder participation may exist at the EUB stage but the initial decision to issue the mineral rights is not re-examined. Rather, the very issuance of the mineral rights is seen by the EUB as justifying the need for the project. The EUB has been reluctant to deny project applications where Crown minerals in a particular area have already been issued.

Effective integrated land management cannot occur if Crown mineral rights dispositions take place in the absence of landscape-scale land use planning that is binding on those dispositions. If the proposed Land-Use Framework is to succeed, it must be applicable to all significant land uses, including energy development.

## **VIII. Guiding Principles**

The ELC agrees generally with most of the guiding principles set out in the Workbook but makes the following comments.

Recycled Paper

- Respecting accountability and responsibility – the ELC considers that while there is a shared responsibility between levels of government and also between governments and land users, given the subordinate nature of municipal governments, the ultimate responsibility for sustainable land use planning rests with the provincial government. The ELC also considers that accountability in the context of land-use planning must allow for land-use decisions made by municipalities, provincial departments or regulatory boards to be reviewed upon the application of an interested party. Having the Land-use Framework enshrined in legislation to make it legally binding can more effectively allow for stakeholders to hold decision-makers accountable for their decisions.
- Respecting collaboration – in addition to the specific comments made above in respect of a provincial mechanism to resolve disputes, the ELC considers that the development of the Land-Use Framework and its implementation must be transparent and open to public involvement that is supported by access to the relevant information necessary to allow meaningful participation.
- Respecting integration – in addition to the comments made above, the ELC considers that the taking into account of environmental, economic and social considerations under the banner of land use planning must be more rigorous than the exercise undertaken by the Energy and Utilities Board whose mandate requires the same considerations but whose decisions reflect an apparent tendency to favour economic considerations.
- Respecting the knowledge based approach – while the ELC agrees that any Land-Use Framework must be science-based, rather than opinion-based, there is potential for scientific uncertainty to lead to a delay or outright failure in establishing limits. In such a case, rather than failing to set limits, the precautionary principle should be applied and decisions about acceptable impacts should be conservative. Further, as articulated by Kennett, the matter is not purely scientific. Planning decisions should involve a consideration of social, cultural, economic and environmental factors.<sup>11</sup>
- Respecting the need for the adaptability and flexibility – The ELC refutes the underlying premise that there is an absolute need to meet formal commitments already made through current land-use decisions. The province is facing a cumulative effects crisis precisely because current land use decisions have been made in the absence of effective integrated land management considerations. To insist that the starting point for a Land-Use Framework is to require that there can be no revisiting existing dispositions indicates that there may be little point in continuing down this road. The government should be more creative in its approach and should consider options such as land swaps, or compensation rather than insisting that all existing commitments must be strictly adhered to.

## **IX. Conclusion**

Reflecting back on the ELC's vision for land-use in Alberta,

*Land use decisions are made in accordance with sound laws and policies that are protective of the environment and are implemented and effectively applied so to ensure the sustainability of Alberta's natural capital,*

the ELC considers that the development of a landscape-scale land use-planning framework is urgently required to address the problem of cumulative effects associated with increasing land-use in Alberta.

Recycled Paper

In order for the Land-Use Framework to address this problem, it must have cumulative effects as its central problem to be solved, rather than cumulative effects being ancillary to the problem of conflict between competing land uses. The Land-Use Framework, recognizing and applying integrated landscape management principles, should establish landscape-scale objectives and should allow for the creation of limits on activities and impacts in order to achieve those objectives. The Land-Use Framework, and the discipline it imposes on land-use decision-making must be applicable to all significant land uses in the province, including the development of oil and gas resources. Further, and most importantly, it must be enforceable. Enforceability should be ensured by making the Land-Use Framework legally binding. Enshrining it in legislation would have this desired effect.

The Land-Use Framework must be supported by a strong political commitment by the highest levels of the provincial government. The setting of priorities and limits will result in trade-offs. No longer can the mantra “everything, anywhere, anytime” be applicable if the problem of cumulative effects is to be addressed in a meaningful way. The setting of priorities and limits must be based on sound science and must allow for meaningful stakeholder engagement. Thus far, there is no evidence that these scientific foundations have been established by the province and the stakeholder engagement process has done little to inspire confidence.

Thank you for the opportunity to provide this submission. The ELC looks forward to further participation in the development of the Land-Use Framework.

---

<sup>1</sup> *Rio Declaration on Environment and Development*, 14 June 1992, 31 I.L.M. 874, Principle 15.

<sup>2</sup> Steven A. Kennett, “A Checklist for Evaluating Alberta’s New Land Use Initiatives”, *Resources* No. 95, Summer 2006, Canadian Institute of Resources Law [Kennett, *Resources*] at 3, online: <http://www.ucalgary.ca/~cirl/pdf/Resources95.pdf>.

<sup>3</sup> *Ibid* at 6.

<sup>4</sup> See Cindy Chiasson & Jodie Hierlmeier, *Public Access to Environmental Appeals: A Review and Assessment of Alberta’s Environmental Appeals Board* (Edmonton: Environmental Law Centre, 2006) for a discussion of standing in the context of the Environmental Appeals Board. See Cindy Chiasson, *Submissions to the Oil Sands Panel on Phase II Proposed Options and Strategies and Actions for Oil Sands Development in Alberta* (Edmonton, Environmental Law Centre, 2007), online: <http://www.elc.ab.ca/ims/client/upload/Submission%20as%20presented%20to%20the%20Oil%20Sands%20Panel%20in%20Calgary.pdf>.

<sup>5</sup> Kennett, *Resources*, *supra* note 2 at 5.

<sup>6</sup> Steven A. Kennett, *Integrated Landscape Management in Canada: Getting from Here to There*, Occasional paper #17 (Calgary: Canadian Institute of Resources Law, 2006) [Kennett, Paper #17] at 36-37.

<sup>7</sup> See Jodie Hierlmeier, *Submissions to the Oil Sands Panel on Phase II Proposed Options and Strategies and Actions for Oil Sands Development in Alberta* (Edmonton, Environmental Law Centre, 2007), online: <http://www.elc.ab.ca/ims/client/upload/Submission%20as%20presented%20to%20the%20Oil%20Sands%20Panel%20in%20Edmonton%20on%20April.pdf>.

<sup>8</sup> Kennett, *Resources*, *supra* note 2 at 6.

<sup>9</sup> *Ibid*.

Recycled Paper



---

<sup>10</sup> Kennett, Paper #17, *supra* note 6 at 15.

<sup>11</sup> Kennett, *Resources*, *supra* note 2 at 6.