

**Environmental Law Centre
Response to Additional Public Consultation on the Proposed
Natural Heritage Act
October 1999**

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Introductory Comments

The Environmental Law Centre, a non-profit charitable organization, seeks to make the law work to protect the environment. Our comments on the proposed *Natural Heritage Act* are based on this objective. We hold that Alberta's public lands protected areas legislation work to protect public environmental values, including ecological and aesthetic, and compatible recreational uses.

ELC Response to Bill 15: The Natural Heritage Act incorporated in these Comments

On March 22, 1999 the Environmental Law Centre released its formal response to Bill 15. We attach a copy of this 61-page document. As well, the document may be accessed from our website <<http://www.elc.ab.ca>>. We incorporate these earlier comments as part of these comments.

Underlying Principles

We base our comments on the proposed *Natural Heritage Act* on the following principles:

1. The Province of Alberta as owner holds existing and potential protected areas on public lands in trust for the benefit of all Albertans, including our future generations. Government's decisions on protection and management of these lands must err of the side of protection.
2. The governing goal of protected areas legislation must be to protect the natural values of public land and to allow public uses consistent with protection, not to protect private economic interests in public lands.
3. New protected areas legislation must be remedial by enhancing protection and management of protected areas in the public interest, not diminishing it.

In being remedial:

- New protected areas legislation must not explicitly or implicitly authorize lands under existing designation to lose protection given by existing legislation.

- New protected areas legislation must not explicitly or implicitly authorize opening up lands under existing designations to uses or dispositions that are not currently allowed under those existing designations.
 - New protected areas legislation must not explicitly or implicitly authorize or allow a change of designation in a manner less stringent than authorized under existing legislation.
 - New protected areas legislation must not explicitly or implicitly authorize a change of designation without ensuring that the public, and not only those directly affected, has reasonable and effective opportunities to be involved in the decision.
4. Laws should be drafted so that they are clear and understandable.
 5. All information relied on by decision makers should be available to the public.
 6. Decision-making should be guided by statutory criteria that further and are relevant to the objective of environmental protection. Legislation should avoid irrelevant distinctions.
 7. Neither the Minister nor other statutory delegates should be given unqualified discretion to determine any matters, and in particular substantive matters.
 8. Regulatory powers for important matters should be exercised only by Cabinet, and not only by a Minister.
 9. Judicial review of decision making should not be precluded.
 10. The public, and not just those "directly affected", should have the legal right to:
 - Advance notice of decision-making that could substantially affect protected areas, such as, without limitation, exercising regulation making authority, generating management plans, proposing to allow dispositions, uses and activities potentially inconsistent with protection, proposing to add on or delete areas from protected areas, and proposing change of designation of a protected area.
 - Information upon which decision makers will base their decisions.
 - Reasonable and effective opportunities to be involved in decisions.

11. All mandatory requirements should be in the Act or regulations and not in guidelines or policy statements.
12. Intervenor costs should be available to ensure that public intervenors will not be at a disadvantage when participating in public review processes.
13. Hearing processes should be conducted in a fair and open manner recognizing the duty of fairness and the principles of natural justice.

Changes proposed by government

Maintaining current levels of protection

We are pleased that the Minister commits to continue the designation of wilderness areas under the proposed *Natural Heritage Act*, and continue the level of protection for those existing areas. However, the *Natural Heritage Act* should also commit to at least preserving existing levels of protection for all areas under current designation and not just wilderness areas.

Section 10 permits

It is encouraging to see Government statements indicating that the use of permits under section 10 of the proposed *Natural Heritage Act* will be limited and that permits will not be used to allow industrial activity in protected areas. We urge that the *Natural Heritage Act* be changed to specifically set out those instances in which permits will be allowed. If the government chooses to retain discretion in the Director with respect to the issuance of permits, that discretion should be subject to explicit limitations that are set out within the Act itself.

Dispositions

Current legislation and Natural Heritage Act

Currently, the *Wilderness Areas, Ecological Reserves and Natural Areas Act* requires the Minister to cancel, withdraw or terminate existing dispositions within wilderness areas and ecological reserves, with some limited exceptions applying to ecological reserves. New dispositions in wilderness areas and ecological reserves are prohibited.

Even more stringent are the protections found under the *Willmore Wilderness Park Act*. That Act prohibits the occurrence of any industrial activities and the granting of any dispositions within Willmore Wilderness Park, with exceptions for trail riding and similar outfitting and "to assist in trapping". While the *Provincial Parks Act* does not contain explicit prohibitions with respect to the activities or dispositions that may be permitted in provincial parks, natural areas or

recreational areas, activities and dispositions within those areas must be authorized in accordance with regulations made under that Act. Nothing with that Act authorizes activities that would be inconsistent with the purposes of the Act. Our participation in the stakeholder consultation meetings has led us to the obvious conclusion that the most contentious issue related to the proposed *Natural Heritage Act* is that of dispositions and the potential for industrial activity within protected areas. The Government must take action to ensure the proper protection of designated areas without industrial activity in those areas.

To the greatest degree possible, without jeopardizing designation, all existing dispositions should be removed prior to designation of a new protected area in accordance with its category. No new industrial dispositions should be granted in protected areas.

Dealing with dispositions – Treating both public and private interest fairly

Much confusion has arisen over the course of this consultation with respect to Government's obligations relating to dispositions and disposition holder's alleged rights. One cannot help getting the impression that Government feels that it is not in the position to protect and improve public values of public land (such as ecological values such as for wildlife habitat, biodiversity and aesthetics, and compatible recreational values) just because industry and others claim private, for profit, interests in these lands.

Provisions of statutes, regulations and the dispositions themselves govern the government's legal rights and obligations relating to dispositions, including regarding cancellation, withdrawal and renewal. The Government must clarify what its legal rights and obligations are relating to the dispositions affected by the *Natural Heritage Act*. In some cases it may simply have the right to cancel, withdraw from or not renew a disposition without any further obligation on its part. Disposition holders obtain their dispositions subject to such limitations. They should not expect anything more than they are entitled to by virtue of the rules governing the disposition.

Subject to concerns over the public purse, we wish to make it clear that we have no objection to Government developing policy to compensate holders, even where law and the terms of a disposition would not require it. However, Government must determine what it legally is required to do. Only then will it be in a position to develop a policy on whether to do anything beyond what it is obliged to, such as pay compensation or offer other areas for development.

Following the last point, we are somewhat taken aback by some of the questions in the Workbook. In the Workbook Government asks the public to give its views

on policy decisions regarding Government's dealing with ("honouring") dispositions (and "commitments" (whatever they might be)) including by paying compensation. However, the Workbook gives no background into Government's legal rights and obligations regarding any of the dispositions (or "commitments") in question. Answers might be different if the Workbook said, (for example) "Under current law and the terms of (such and such) a disposition, Government may decline to renew the disposition without paying any compensation and without any further recourse by the disposition holder. Law would deem the disposition holder to be aware of these limitations at the time the disposition was issued. Nevertheless, the disposition holder has committed capital towards development of its interest. In these circumstances, do you think that the Government should buy out or otherwise compensate the holder?"

Finally, we note that The Canadian Association of Petroleum Producers, which represents most of the province's oil and gas industry, signed an agreement (CAPP-ENGO agreement) dated February 12 1998 with the Federation of Alberta Naturalists, the Canadian Parks and Wilderness Association and World Wildlife Fund Canada. That agreement states, in part, "industrial activities are not compatible" in protected areas and that "a process needs to be in place which will facilitate the transition of those Special Places sites designated for protection from having existing activities or existing but undeveloped tenures, to sites having no industrial activity." The agreement outlines to deal with outstanding interests. We urge that Government consult this document and in developing a policy on dealing with outstanding interests consider the wide range of tools agreed to in that document to remove dispositions from protected areas.

In Workbook Responses, the above section is called "Dealing with Dispositions -- Treating both public and private interests fairly".

Public notice

As set out in our previous submissions on the *Natural Heritage Act* and its proposed policy foundation, public notice and participation should exist in relation to the following matters:

- site designation, alteration and de-designation;
- development, review and amendment of management plans for designated sites;
- granting, modification and withdrawal of dispositions.

While the current version of the *Natural Heritage Act* provides for public consultation in relation to management plans, we are concerned that no public

notice or consultation requirements are imposed in relation to dispositions or designation matters. Protected areas legislation should include a full and meaningful public consultation process for all significant decisions that may be made affecting these areas.

Transitional provisions

We are dismayed to find that there are no transitional provisions in the *Natural Heritage Act* indicating the new designations for existing protected areas. This gap prevents the public and affected parties from assessing the true implications of this Act. The Act should include such transitional provisions.

Regulations

In a similar vein, Alberta Environment should release copies of the planned regulations and policies under the *Natural Heritage Act* at the time that it is reintroduced in the Legislature. This is not an unprecedented step, as this same department undertook an extensive public consultation, including the release of draft regulations, in relation to the enactment of the *Environmental Protection and Enhancement Act*. Release of draft regulations and policies would assist all parties interested in protected areas and the general public in assessing the full impacts of the proposed legislation.

Workbook Responses

Below please find our responses to the Workbook Questions:

1.1 The Natural Heritage Act proposes to continue meeting the province's legal obligations and honouring existing oil and gas commitments. A "no surface access" restriction on new resource commitments prevents development of any new commitments inside a protected area boundary. To access the resource, a company first must receive regulatory approval from the Alberta Energy and Utilities Board, and Alberta Environment, and operate to stringent environmental standards. What is your response to this proposal?

Agree: ____

Agree with the following conditions: ____

Disagree for the following reasons: X

Current law requires that most dispositions be withdrawn or cancelled as soon as practicable in wilderness and ecological areas. Government has committed to retaining current levels of protection to protected areas and 1.1's statement of policy is inconsistent with this commitment.

1.2 If you do not agree with the current practice of honouring existing oil and gas commitments, do you agree with the idea of buying out or otherwise compensating companies for their existing rights?

Agree: ____

Agree with the following conditions:

Disagree for the following reasons: X

We do not believe that this question can be answered without giving information on both Government's and holders' rights and obligations relating to particular "commitments". See Dealing with dispositions: Treating public and private interests fairly

2.1 The Natural Heritage Act proposes to continue meeting the province's legal obligations and honouring existing mining commitments. New sub-surface agreements for mining in parks and protected areas will not be issued. Where commitments exist, the Natural Heritage Act will require that any approved mine site be deleted from a Provincial Park, Wildland Park, or Heritage Rangeland and replaced with lands of equivalent quality, size and class. What is your response to this proposal?

Agree: ____

Agree with following conditions: __
Disagree for the following reasons:

This question asking for legislative advice cannot be informedly answered unless the reader is advised on whether Government has any legal obligation to replace lands or otherwise compensate. For example, what is an “approved mine site?” Does it give the holder an absolute right to mine? Are other approvals or processes required? See Dealing with dispositions: Treating public and private interests fairly.

We agree with the statement insofar as it states that no new sites will be approved.

If you do not agree with the current practice of honouring existing mining commitments, do you agree with the idea of buying out or otherwise compensating companies for their existing rights?

Agree:

Agree with the following conditions:

Disagree for the following reasons: X

See Dealing with dispositions: Treating public and private interests fairly.

3.1 Under the Natural Heritage Act, existing and candidate Natural Areas would be placed into the class that provides the highest level of protection based on ecological significance, and existing and potential use.

Agree:

Agree with the following conditions:

Disagree for the following reasons: X

This statement could mean so many things that we cannot simply agree with it, or disagree with it. We agree that ecological significance should be a criterion. Indeed, it should be the driving criterion. But “existing and potential uses” could mean almost anything from casual recreational to strip mining or intensive livestock operations. We do not agree that such use criteria ought to determine protection levels.

4.1 The Natural Heritage Act proposes to continue to prohibit recreational hunting in Ecological Reserves, Wilderness Reserves and provincial Parks, but allow hunting in Wildland Parks, Heritage Rangelands

and large Recreation Areas subject to approval in each in each area's management plan. What is your response to this proposal?

Agree:

Agree with the following conditions:

Disagree for the following reasons:

No comment except that any rules developed must (a) advance public safety (b) respect and accommodate non-hunting uses (c) be based on scientifically credible, ecologically based wildlife management plans and (d) not create private hunting grounds.

4.2 The Natural Heritage Act proposes to continue to use management hunting in Ecological Reserves and Provincial Parks to restore population balance of specific species when necessary. What is your response to this proposal?

Agree:

Agree with the following conditions:

Disagree for the following reasons:

No comment except to repeat (a) , (b) and (c) above.

5.1 The Natural Heritage Act will restrict off-highway vehicle use to Wildland Parks, Heritage Rangelands and Recreation Areas. Use will be restricted to existing trails, if approved in each area's management plan with public input. What is your response to this proposal?

Agree:

Agree with the following conditions:

Disagree for the following reasons:

No comment except that protection of ecological values must not be compromised. If Government wishes to provide public lands for the purpose of off-highway vehicle recreational use, then it should choose places where that use is not incompatible with protection of natural values.

5.2 The Natural Heritage Act proposes to restrict recreational snowmobile use to Wildland Parks, Heritage Rangelands and Recreation Area. Use will be restricted to existing trails, if approved in each area's management plan with public input. What is your response to this proposal?

Agree:

Agree with the following conditions:

Disagree for the following reasons:

No comment except to repeat last statement.

Page 20: Base on the explanations in this workbook and the proposed policy foundation, do you feel you have a clear understanding of the purpose of this legislation:

Yes:

No:

We hope to see an Act where the purposes clearly are to protect designated areas.

In your opinion, is the proposed legislation valuable to Albertans:

Yes:

Yes, if changes are made: X

No:

No opinion:

Your gender?

Male:

Female:

We do not find this relevant.

Your age range?

Under 20:

20-40:

41-65:

over 65:

We do not find this relevant.

Where do you live?

City:

Town/Village:

Farm:

Acreage:

Other:

We do not find this relevant.

Which of the following best describes your interests in the Natural Heritage Act?

Agriculture:

Environment/Health:

First Nation:
Metis:
Mining:
Oil and Gas:
Recreation:
Tourism:
Other:

No comment

I would like to stay informed about the Natural Heritage Act review.
Name: Environmental Law Centre attention Arlene Kwasniak
Address: 204, 10709 Jasper Avenue, Edmonton
Postal Code: T5J 3N3

Yes