

October 17, 2007

Our File: 33

IMI Strategies  
Suite 326, 10909 Jasper Avenue  
Edmonton, AB  
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To whom it may concern,

**RE: Alberta's proposed wetland policy and implementation plan**

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. As part of the Centre's law and policy activities, the ELC monitors and recommends law reform pertaining to several water related issues, including preservation and management of wetlands, fisheries and aquatic habitat, and water and watershed planning. The ELC is pleased to provide comments to the Alberta Water Council in relation to a new provincial wetland policy, as described in *Talking with Albertans About a New Wetland Policy and Implementation Plan*<sup>1</sup> (the "Workbook").

The ELC's comments deal with the following issues:

1. The application of the wetland policy to both the Green and White Areas of the province;
2. The application of the wetland policy to ephemeral wetlands;
3. Setting wetland objectives;
4. The Wetland Mitigation Approach proposed for the wetland policy;
5. The restoration approach to mitigation;
6. The goal of maintaining or increasing wetlands in Alberta; and
7. The need for a comprehensive implementation plan.

A summary table of the ELC's response to the Workbook questions is appended to this letter.

**1. The application of the wetland policy to both the Green and White areas of the province**

The ELC recommends that the wetland policy apply to both Green (forested) and White (settled) Areas of the province. The previous attempt to have a formalized wetland policy across the province resulted in the production of *Wetland Management in the Settled Area of Alberta: an Interim Policy*<sup>2</sup> (the *White Area Policy*) and *Beyond Prairie Potholes: A Draft Policy for*

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<sup>1</sup> Alberta Water Council, Wetland Consultation Workbook, undated, published online:  
<[http://www.waterforlife.gov.ab.ca/awc/wetland\\_policy/pubs/Workbook.pdf](http://www.waterforlife.gov.ab.ca/awc/wetland_policy/pubs/Workbook.pdf)>

<sup>2</sup> Alberta Water Resources Commission, (Edmonton: Alberta Water Resource Commission, May 1993).

*Managing Alberta's Peatlands and Non-settled Area Wetlands - for discussion purposes*<sup>3</sup>. The interim *White Area Policy* was implemented but it appears little was done to monitor and evaluate its effectiveness over the past 14 years. In that period wetland losses continued to occur.<sup>4</sup> A Green Area policy was never implemented and it appears that historical and current wetland impacts in this area are largely unknown. This vacuum of knowledge of Green Area wetlands alone justifies a wetland policy that is province wide.

A province wide wetland policy can also provide administrative continuity and efficiency. Under the current system it appears that Alberta Environment is not overly active in asserting its jurisdiction over water resources on public lands. Reliance on industry and Alberta Sustainable Resource Development to manage water resources may result in disparate objectives being developed for water quality and quantity in the Green Area of the province. A province wide policy will focus policy administration in one department resulting in greater efficiency, greater accountability and oversight and greater consistency in policy application. Also, greater certainty is created, as operators in the white and green areas will know that the same system applies notwithstanding the location of the activity.

## **2. The application of the wetland policy to ephemeral wetlands**

The nature of ephemeral wetlands makes them difficult to regulate, with surface water being present for relatively short periods of time and large variations in wetland area.<sup>5</sup> However, the fact that ephemeral wetland management and regulation is difficult does not justify excluding these wetlands from the policy. If the policy goal is to be based on maintaining wetland function, including groundwater recharge and biodiversity, then ephemeral wetlands must be considered in the policy.

It is clear that, under the *Water Act*, Alberta Environment has jurisdictional responsibility for ephemeral wetlands and can regulate activities that might impact them when surface water is present. Maintaining these wetlands areas when they have dried out becomes more problematic because regulatory jurisdiction is altered. Nevertheless, the policy directions for ephemeral wetlands will provide an important impetus to begin the work that is needed to classify, assess, educate and protect ephemeral wetlands in the province.<sup>6</sup>

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<sup>3</sup> Alberta Water Resources Commission, (Edmonton: Alberta Water Resource Commission, May 1993).

<sup>4</sup> *Supra* note 1 at 7.

<sup>5</sup> It has been noted that there are several regulatory limitations in dealing with ephemeral wetlands, including "1) incomplete data on the locations, extent and functional integrity of vernal pool habitats...; 2) lack of a methodology for assessing the functions of vernal pool complexes; 3) a poor understanding of basic ecological processes in vernal pools, especially critical ecological linkages between vernal pools and adjacent upland landscapes; and 4) a piecemeal regulatory approach that fails to protect vernal pools ecosystems, resulting in administrative inconsistencies and causing uncertainties for the regulated community". Robert A. Leidy and Elizabeth G. White "Toward an Ecosystem Approach to Vernal Pool Compensation and Conservation" in C.W. Witham, E.T. Bauder, D. Belk, W.R. Ferren Jr. and R. Ornduff (editors). *Ecology, Conservation, and Management of Vernal Pools Ecosystems – Proceedings from a 1996 Conference*. California Native Plant Society, Sacramento, CA, at 264, available online: Vernal Pools <<http://www.vernalpools.org/proceedings/leidy.pdf>>.

<sup>6</sup> Alberta can look to other jurisdictions for policy and regulatory governance models that have been pursued for ephemeral wetlands (and more specifically vernal pools or ponds). Several jurisdictions in the United States have pursued policies regarding the protection of vernal pools or ponds, including California, Massachusetts, and Connecticut. See, for example, U.S. Fish & Wildlife Service, *Draft Recovery Plan for Vernal Pool Ecosystems of California and Southern Oregon*, (October 2004), online: U.S. Fish & Wildlife Service <[http://www.fws.gov/pacific/ecoservices/endangered/recovery/vernal\\_pool/index.html](http://www.fws.gov/pacific/ecoservices/endangered/recovery/vernal_pool/index.html)>. Also see the Massachusetts Division of

The Workbook also raises the question of whether the Wetland Mitigation Approach should apply to ephemeral wetlands.<sup>7</sup> The use of the Wetland Mitigation Approach to ephemeral wetlands needs to be further evaluated and debated. Ephemeral wetlands may require an additional set of mitigation techniques.

### **3. Setting wetland objectives**

The ELC supports the setting of objectives for wetland protection, conservation, and restoration. These objectives must be measured against the overriding goal of maintaining or increasing wetland area in the province. The Workbook proposes a multi-stakeholder process to produce these objectives but it must be clear from the outset that the goal of the policy are binding on such a process (i.e. multi-stakeholder derived wetland objectives that fail to meet the overarching goal of the wetland policy will be unacceptable).

As part of meeting the objectives, the Workbook outlines a suite of tools that may be used to protect wetlands. Significantly, the ability of the government to refuse to allow diversions from permanent wetlands is not mentioned. The perception of a “right to divert” water from wetlands among landowners must be addressed and the Crown’s discretion to refuse to allow diversions from significant or rare wetlands must be exercised.

### **4. The Wetland Mitigation Approach proposed for the wetland policy**

The ELC supports the pursuit of the Wetland Mitigation Approach because it places avoidance of wetlands as the primary method to protect wetlands and recognizes that wetland drainage and degradation is a direct environmental and economic cost to a public resource.<sup>8</sup>

The Workbook states that the mitigation approach will be administered through the *Water Act* approval process.<sup>9</sup> The ELC recommends clarifying this statement to ensure that other activities that impact wetlands, and not just *Water Act* approvals, are covered by this approach. This would include licence activities and activities that are exempted from approvals under the *Water Act*.

There is also a need to build some criteria around the determination of whether the “avoidance” step of the approach has received adequate consideration. Often the “avoidance” step of planning will be marginalized and a proponent will simply accept the need to compensate as a cost of doing business and getting the project approved. In this way compensation becomes the

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Fisheries & Wildlife website regarding vernal pools at  
<[http://www.mass.gov/dfwele/dfw/nhesp\\_temp/vernal\\_pools/vernal\\_pools.htm](http://www.mass.gov/dfwele/dfw/nhesp_temp/vernal_pools/vernal_pools.htm)>.

<sup>7</sup> *Supra* note 1 at 24.

<sup>8</sup> The Wetland Mitigation Approach is based on a hierarchy of goals including, avoiding the loss or degradation of wetlands, minimizing wetland loss and degradation and compensate for losses to wetlands that occur. This approach garnered the support of the North American Wetlands Conservation Council (Canada) in *Wetland Mitigation in Canada: A Framework for Application*, Kenneth W. Cox, Allison Grose, ed., Issues Paper, No. 2000-1, (Ottawa, North American Wetlands Conservation Council (Canada), 2000) at 57. Available online: North American Wetlands Conservation Council (Canada) <<http://www.wetlandscanada.org/pubs.html>>.

<sup>9</sup> *Supra* note 1 at 20.

*de facto* approach to wetland management.<sup>10</sup> Criteria should be developed to determine whether avoidance has been adequately considered. If avoidance has not been adequately considered then the activity should not be approved under minimization or compensation methods.

Another issue regarding compensation is whether constructed wetlands must mimic the wetland function of the wetland being impacted. The wetland policy goal should be to preserve both wetland area and function. Maintaining areas of wetland alone is insufficient. The difficulty is that wetland function may not easily be recreated in a constructed wetland. The ELC recommends a formula be incorporated into the compensation guide that outlines increasing compensation as the functions of the constructed wetland decrease relative to the pre-impact functions displayed by the wetland that triggered the compensation. In other words, compensation should increase as wetland functionality decreases.

## **5. The restoration approach to mitigation**

The restoration of wetlands can be an effective method of increasing wetland area and function. Restoration is a valuable part of the wetland mitigation and compensation approach to maintaining or increasing wetlands in Alberta. Restoration may not always be an option where potential restoration sites are unavailable.

A difficulty arises in relation to restoration where the initial degradation of the wetland was illegally conducted. It is the position of the ELC that restoration of wetlands that were illegally drained or impacted should be restored by the party responsible for the impact and not by a third party who is impacting a wetland elsewhere. For this reason there should be criteria around allowable restoration sites such that accountability for illegal activities is maintained. This, in turn, is tied to an implementation plan of the policy that includes enforcement of current legislation to stop illegal wetland drainage, degradation and destruction.

## **6. The goal of maintaining or increasing wetland area in Alberta**

The goal of “maintaining or increasing wetland area (and hence wetland functions) in Alberta to maintain the ecological, social and economic benefits that wetlands provide” is a laudable goal. However, further clarity around wetland function would be helpful. A province full of storm water retention ponds that provide few wetland functions but are of equal area should not be the end result of the policy. Direct reference to the maintenance of wetland function in the policy goal is appropriate.

## **7. The need for a comprehensive implementation plan**

The Workbook refers to an “implementation plan” but there are few actions described in the document directly related to implementation. An effective implementation plan must contain criteria that will ensure accountability and transparency in applying the wetland policy. An implementation plan should include timelines for actions related to the various objectives of the policy and must have ongoing monitoring and periodic reporting to ensure that policy

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<sup>10</sup> A similar failure of process is seen in the typical environmental assessment process where mitigation of impacts, rather than avoidance, is par for the course.

implementation is on track. Information of wetland policy implementation must be readily available to the Alberta public.

A central part of implementation is enforcement of existing laws. Continued illegal diversions from wetlands will likely continue unless government enforcement of the *Water Act* is stringently applied as the wetland policy moves forward.

### **Conclusion**

A wetland policy for all of Alberta is a crucial step to stop the trend of destruction and degradation of the province's wetlands. To be effective, this policy must be comprehensive in both its geographic scope and in relation to the wetlands types that it governs. Mitigation of wetland impacts is possible if the policy provides a robust framework in which avoidance, minimization and compensation decisions are to be made. Finally, there is a need to curtail illegal diversions from wetlands through enforcement and education.

Yours truly,

Jason Unger  
Staff Counsel

## Appendix Workbook Responses

<b>Workbook Statement</b>	<b>Level of Agreement</b>	<b>ELC Comments</b>
<b>Wetland conservation is important to me, even if it means foregoing other land use activities in a particular area</b>	<b>Strongly Agree</b>	<b>If Alberta is to sustain its ecological integrity, planning priorities must be made, meaning that some activities will not be allowed.</b>
<b>Like other land uses and values, the costs and benefits of wetland conservation should be a consideration in land-use planning and decision-making</b>	<b>Somewhat Disagree</b>	<b>Current analysis of costs and benefits in relation to environmental impacts is inadequate to assure environmental integrity in the long term.</b>
<b>A new Wetland Policy should apply to all areas of Alberta including both the Green and White Areas</b>	<b>Strongly Agree</b>	<b>See comments at section 1 above.</b>
<b>Please indicate your level of agreement with the new proposed policy goal</b>	<b>Somewhat Agree.</b>	<b>See comments at section 6 above.</b>
<b>Albertans are aware of, and value, the functions and benefits that wetlands and wetland riparian areas provide</b>	<b>Somewhat Agree</b>	<b>“Valuing” wetlands requires that the province lead the way in relation to progressive and protective wetland law and policy.</b>
<b>Albertans have the knowledge to effectively protect, conserve, and restore wetlands.</b>	<b>Somewhat Agree</b>	<b>The regulator (the Government of Alberta) requires this knowledge on which to base decisions.</b>
<b>Recommendations for wetland protection, conservation, and restoration are made for watersheds across Alberta.</b>	<b>Somewhat Agree</b>	<b>See comments at section 3 above.</b>
<b>Where appropriate, incentives to promote wetland protection, conservation, and restoration are available, while disincentives to these activities are removed</b>	<b>Somewhat Agree</b>	<b>Incentives for wetland conservation should be seen as one tool of many and should not be used to perpetuate perceptions of “rights to divert” water from wetlands.</b>
<b>The Wetland Policy and Implementation Plan is successfully integrated into the legislation, policies, and programs of the Government of Alberta and its partners.</b>	<b>Somewhat Agree</b>	<b>The wetland policy must be integrated into decision-making across all departments of the Alberta Government. Legislative and policy changes should be made to facilitate this, as required.</b>
<b>The proposed Wetland Mitigation Approach will effectively contribute to wetland</b>	<b>Somewhat Agree</b>	<b>See comments at section 4 above.</b>

<b>conservation in Alberta</b>		
<b>The proposed Wetland Mitigation Approach should be applied through the province</b>	<b>Somewhat Agree</b>	<b>See comments at section 4 above.</b>
<b>The proposed Wetland Mitigation Approach should be applied to all proponents.</b>	<b>Somewhat Agree</b>	<b>See comments at section 4 above.</b>
<b>Until we know how to measure and restore wetland function, using as science-based ratio of wetland are restored to wetland area lost is appropriate</b>	<b>Somewhat Agree</b>	<b>While a ratio of compensation is acceptable in many instances, impairment or degradation of rare or significant wetlands should not be allowed unless restoration of function of these wetlands is possible.</b>
<b>Water bodies constructed primarily for stormwater management and wastewater treatment should be considered as one option for compensation for wetland loss if they can mimic at least some natural wetland function.</b>	<b>Somewhat Disagree</b>	<b>Avoidance, restoration and other compensation mechanisms that maintain wetland function must receive priority in the planning process. Where created wetlands lack certain wetland functions there should be a requirement to restore function elsewhere or to pursue research on restoring specific wetland functions.</b>
<b>Ephemeral waterbodies should be recognized as wetlands in Alberta</b>	<b>Strongly Agree</b>	<b>See comments at section 2 above.</b>
<b>Ephemeral waterbodies should be included in the Wetland Mitigation Approach proposed in the new Wetland policy for Alberta</b>	<b>Somewhat Agree</b>	<b>See comments at section 2 above.</b>
<b>Education and awareness programs and initiatives should be developed to encourage the conservation of ephemeral waterbodies</b>	<b>Strongly Agree</b>	<b>See comments at section 2 above.</b>
<b>Wetland restoration is an important and effective tool for ensuring the new Wetland Policy Goal is achieved</b>	<b>Somewhat Agree</b>	<b>See comments at section 5 above.</b>