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Our File: 5320

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To whom it may concern,

RE: Comments on the proposed *Lower Athabasca Regional Plan* (and related documents).

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. 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 proposed Lower Athabasca Regional Plan (LARP) including the LARP strategy and implementation plan, the draft regulation and the environmental management frameworks for the Lower Athabasca Regional Plan.¹

Introduction

The Government of Alberta has published numerous documents in relation to the Lower Athabasca Regional Plan including:

- *Draft Lower Athabasca Regional Plan 2011-2021: Strategic Plan and Implementation Plan;*²

¹These documents are available online from the Government of Alberta,
<http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/Default.aspx>.

² Government of Alberta, *Draft Lower Athabasca Regional Plan 2011-2021: Strategic Plan and Implementation Plan* (March 2011), online: Alberta Sustainable Resource Development

- *Proposed Lower Athabasca Integrated Regional Plan Regulations*;³
- *Draft Lower Athabasca Region Surface Water Quality Management Framework*;⁴
- *Draft Lower Athabasca Region Air Quality Management Framework*;⁵ and
- *Draft Lower Athabasca Region Groundwater Management Framework*.⁶

The ELC views these documents as a good start to regional management; however, there are significant gaps that must be filled to ensure the long term integrity and sustainability of the Lower Athabasca Region.

Cease granting statutory consents and expedite frameworks and policies for ecological function and biodiversity

There is a need to expedite work regarding several frameworks and policies that are not implemented under the draft documents. Until these frameworks are completed the *Proposed Lower Athabasca Integrated Regional Plan Regulations* should be amended to prohibit the granting of any additional statutory consents in the Lower Athabasca region. The frameworks, policies and plans that need to be completed include:

1. The biodiversity framework

The biodiversity framework must be expedited, with additional clarity regarding the management responses that will be pursued where limits and triggers for biodiversity are reached. Targets for the biodiversity indicators should be science based with economic and social tradeoffs in management decisions based on international and national

http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/DLARP%20Regional%20Plan_FINAL_March%2029%202011_1%2044%20pm.pdf.

³ Government of Alberta, *Proposed Lower Athabasca Integrated Regional Plan Regulations*, at section 15(1)(a)(i) and 15(1)(b)(i), online: Alberta Sustainable Resource Development.

http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/DLARP%20Regs_Document_FINAL_March_29_2011_1%2045pm.pdf.

⁴ Alberta Environment, *Lower Athabasca Region Surface Water Quality Management Framework for the Athabasca River Downstream of Grand Rapids to the Athabasca River Delta*, (March 31, 2011), online: Alberta Environment, http://environment.alberta.ca/documents/LAR_SWMF_Mar_31_Final_Draft.pdf> (draft).

⁵ Alberta Environment, *Draft Lower Athabasca Region Air Quality Management Framework for Nitrogen Dioxide (NO₂) and Sulphur Dioxide (SO₂)*, online: Alberta Environment, http://environment.alberta.ca/documents/LARP_AQMF_March_31_Final.pdf> (draft).

⁶ Alberta Environment, *Draft Lower Athabasca Region Groundwater Management Framework*, online: Alberta Environment http://environment.alberta.ca/documents/Groundwater_Management_Framework_April_1_Final.pdf> (draft).

biodiversity objectives.⁷ Specifically, land use plans and frameworks should include direct incorporation of critical habitat identified under the federal *Species At Risk Act*, to meet federal obligations and ensure that provincial laws are sufficient to protect and restore these species. The *Draft Regulation* should include prohibitions on the destruction of critical habitat, incorporating by reference the habitat identified federally through the recovery strategy process.

2. The Lower Athabasca Water Management Framework

The Lower Athabasca Water Management Framework should be included at the earliest point possible in the LARP. The Framework should include a science based ecological base flow at which point no further diversions (under current or future licences) will be permitted. If current licence conditions fail to allow for the enforcement of a binding framework, amendment to the *Water Act* should be pursued. In the absence of amended legislation, the *Draft Regulation* should include a provision mandating the Director to form an opinion under s. 55(2) of the *Water Act*.

3. The regional land disturbance plan

Land disturbance limits should be established on an expedited basis and should not be deferred to a multistakeholder process, as this is likely to cause further unjustifiable delay. Land disturbance limits should be based on scientifically defensible and precautionary measures to ensure biodiversity is maintained and that species at risk populations have a chance of being restored.

4. The wetland policy establishment and implementation

The Lower Athabasca watershed contains numerous wetlands of functional significance that must be protected or be subjected to a compensation and restoration regime using wetland restoration ratios as a proxy for loss of wetland function. The regional plan fails to deal with this significant issue notwithstanding the Regional Advisory Council's advice in this regard. Interim objectives for wetland avoidance and mitigation must be put in place if a final provincial wetland policy is not immediately implemented.

Further, in line with a “balanced” approach to development, the decisions of all departments of the Government of Alberta should include mandatory consideration of the impacts on

⁷ The implementation plan currently focuses on provincial policy direction for caribou habitat alone, largely ignoring federal obligations. *Supra* note 2 at 29. This must be expanded to specifically consider the habitat provisions and policy direction of the federal *Species At Risk Act*, S.C. 2002, c. 29 and international obligations under the United Nations *Convention for Biological Diversity*.

biodiversity. Specifically, the mineral tenure process should be directed by both the designation of conservation areas and areas where significant biodiversity concerns arise. This would include areas where woodland caribou habitat is under threat. This approach must be established now to ensure it is carried over to other regions of the province to facilitate proactive protection of species at risk and related habitat.⁸

Comments regarding the draft regulation

The proposed *Lower Athabasca Integrated Regional Plan Regulations* provide the regulatory framework under which the regional plan and environmental management frameworks will be implemented (hereinafter referred to as the “*Draft Regulations*”).⁹ The ELC recommends amending the *Draft Regulations* and implementation plan to foster land uses that contribute to the maintenance of the ecological integrity of the area.

1. Conservation Areas are for conservation, not forestry

Conservation areas should not have commercial timber allocations within them. The *Draft Regulations* outline the paramount objective as “conserving the environment, biological diversity, wildlife corridors and wildlife habitat in the conservation area”.¹⁰ For the Birch River Conservation Area Public Land Use Zone and the Dillon River Conservation Area Public Land Use Zone the secondary objective is stated as “managing and harvesting timber consistent” with the implementation plan objectives.¹¹ These two Conservation Areas constitute a major proportion of the areas designated for conservation and must be managed for the objective of conservation of biological diversity and ecological function. The current implementation plan may undermine these objectives. The implementation plan refers to “ecosystem forestry” as a permitted use in these areas.¹² The term “ecosystem forestry” is described in the implementation

⁸ Currently, the implementation plan for the region indicates that biodiversity targets will be developed in light of social and economic considerations. Mechanisms mandating consideration of biodiversity impacts of economic development across the region are also needed.

⁹ Government of Alberta, (March 2011)

http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/DLARP%20Regs_Document_FINAL_March_29_2011_1%2045pm.pdf.

¹⁰ Government of Alberta, *Proposed Lower Athabasca Integrated Regional Plan Regulations*, at section 15(1)(a)(i) and 15(1)(b)(i), online: Alberta Sustainable Resource Development http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/DLARP%20Regs_Document_FINAL_March_29_2011_1%2045pm.pdf.

¹¹ *Ibid.* at s.15(1)(b)(ii).

¹² Government of Alberta, *Draft Lower Athabasca Regional Plan 2011-2021: Strategic Plan and Implementation Plan* (March 2011), online: Alberta Sustainable Resource Development http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/DLARP%20Regional%20Plan_FINAL_March%2029%202011_1%2044%20pm.pdf.

plan but has no legal bearing on management in these areas. Reference is made to international guidelines without specific adoption and integration of these guidelines.¹³ In the absence of a substantive and enforceable mechanism to ensure that low impact forestry is not harming biodiversity and ecological integrity of these areas, the ELC recommends deferring any contemplation of forestry in these areas until such binding forestry standards are created. Further, the use of the International Union for Conservation of Nature criteria may not be appropriate in areas where at risk or sensitive species are located.

2. Clarify when statutory consents will be renewed in conservation areas, if at all

Section 15 (2) of the *Draft Regulations* states that statutory consents in the conservation areas must not be issued or renewed “unless, in the opinion of the Designated Minister” the conservative objective “will be protected or enhanced under the terms of the statutory consent”. The ELC recommends specifying what will constitute “protection” and “enhancement” of the conservation objectives. This in turn will provide added clarity as to when a statutory consent may be issued in these areas and provide certainty to those currently holding consents. The definition will also ensure that the Designated Minister is forming opinions in line with the regulatory intent. For example the phrase “protect and enhance” could be defined to include maintenance or restoration of functional habitat for species at risk as defined provincially and federally as well as maintenance and restoration of other indicators of ecosystem function.

3. Provide sufficient regulatory powers for triggers and limits

The *Draft Regulations* prescribe prohibitions on the issuance of new statutory consents where an environmental limit is exceeded.¹⁴ The *Draft Regulations* further direct the Minister to pursue management responses where triggers or limits are reached.¹⁵ Provisions outlining specific powers for government responses are currently restricted to “limits” and fail to clearly articulate government powers in relation to “triggers” (as described in the environmental management frameworks). Further enabling provisions around triggers should be included in the *Draft Regulations*.

Further, the management responses under the *Draft Regulations* are constrained to “lawful directions of an official”. This approach to managing cumulative effects is reflective of the reliance on regional plans and the *Alberta Land Stewardship Act* to implement management responses to cumulative impacts. In light of this, the ELC foresees several areas where a

¹³ *Ibid.* at 50.

¹⁴ *Draft Regulation* at ss. 22, 29, 34, 39.

¹⁵ *Ibid.* at 23, 30, 35, 40.

management response is not currently enabled or where the response could be in direct conflict with existing legislative provisions or authorization/disposition conditions. These areas include:

- *Water Act* licences and approvals,
- Dispositions on public land, and
- Management responses related to activities that contribute to cumulative effects which are not regulated; for example, non-point source contributions to the degradation of surface water quality.

The complexity of the issue is heightened by the fact that individual authorizations may include conditions allowing the implementation of the management response; however, this is not easily assessed, nor does it have sufficient transparency to enable an evaluation of whether a specific management response will be thwarted by the current legal reality.

In this regard, the ELC recommends that the *Draft Regulations* be amended to include a mandatory assessment and public reporting of legal barriers to effective cumulative effects management. This assessment and reporting would identify specific legal provisions that may create barriers to cumulative effects management, the government's management and policy response in light of identified legal barriers, and an assessment of how these barriers undermine reaching a stated objective, trigger or threshold.

Environmental Management Frameworks

The general approach of the environmental management frameworks are laudable; however, significant concerns about their substantive content and implementation remain. These concerns include the ability of current systems to adequately assess regional environmental quality, disparate levels of regulatory oversight covering the host of activities that contribute to cumulative effects and the potential for conflicting legislative mandates and objectives that may hinder effective implementation.

1. Lack of clarity around evaluation procedure and implementation of management response.

The regional management response process included in the frameworks outlines how the process of cumulative effects management will occur including aspects of preliminary assessment, investigation and mitigation. There is a significant lack of clarity in how these items are

presented. For example, page 24 of the *Surface Water Quality Framework* outlines the management framework process and has the following language of concern:¹⁶

- Under “Preliminary investigation”: “Determine if an investigation is required” in the event a trigger or limit is reached. There are no criteria guiding this determination nor is there transparency in how the decision is made.
- Under “Investigation”: “Identify the natural and anthropogenic sources that are responsible.” How is this relevant to the response, if at all? Even if natural sources contribute to reaching a trigger or limit a management response is still required in relation to anthropogenic sources, if the goal is cumulative effects management.
- Under “Investigation” – “Investigate whether existing initiatives and plans are sufficient to address the conditions.” How will the sufficiency of existing initiatives and plans be assessed? In light of the reaching of a limit or trigger it appears unlikely that existing initiatives are sufficient.
- Under “Mitigative Management Actions”: – “Determine need for action and who needs to act”. How is “need” determined? How will those who need to act be identified?

Similar language is used in the other two frameworks. The Government of Alberta should establish a specific investigation, mitigation and management regulation, setting out the ladder of specific decisions, criteria that will be considered and the host of regulatory tools that may be used to manage impacts. This is needed to ensure a level of accountability and transparency around outcomes as well as to provide all interested parties with a level of certainty about how the frameworks will be applied.

2. Resource and technical capacity

The capacity and resources needed to continuously monitor and assess cumulative effects and to translate this information into management actions are significant. The holders of statutory consents who may have to adjust operations to comply with management response will undoubtedly expect that these actions will only be pursued where a causal connection between their activity (i.e., input or contribution) and the reaching of a trigger or limit has been established. This in turn requires a monitoring system of sufficient scope and depth to isolate specific contributions on an ongoing basis.

¹⁶ Supra note 4 at 24.

3. Management Framework specific concerns

Surface water quality			
Framework/section	Concern	Assessment/comments	Recommendation
Basis for triggers and limits	Triggers are based on movement away from “historical” but this baseline is defined too narrowly.	<p>Historical impacts are being accepted in the management framework as the data used is limited in scope (1988-2009) and (1999-2009). This in turn ignores cumulative impacts from previous generations of development in the region.</p> <p>Management actions are triggered by derivation away from “historic means and peaks”. The establishment of the “historic mean” as baseline is therefore highly relevant.</p>	Available data and modeling should be used to establish true historic record of water quality in region.
	Trigger 2 lacks clarity.	The Level 2 management response is set out as being based on the “urgency” and potential risk to the environment. There are no criteria or standards by which these risks are to be assessed.	Establish specific criteria for assessing risk and urgency and require public reporting around these decisions.
Regional management of cumulative effects	System is not regional in nature.	Using one station for cumulative impacts does not ensure regional water quality is met.	A network of surface water quality monitoring stations are required to guarantee surface water quality

		Picking one station downstream gains the benefit of the dilutive effects from other surface water contributions to the Athabasca mainstem.	upstream and in tributaries.
Use of annual values for determining water quality	The use of a 12 month rolling average for water quality is not likely to minimize cumulative effects.	<p>The coarse scale of water quality assessment ignores the cumulative impacts of quality issues during times of lower flows and the cumulative impact of numerous acute incidents throughout the year.</p> <p>For example, if air deposition of contaminants is occurring in winter (as suggested by recent research) then specific consideration of runoff events is needed to inform the cumulative impact on environmental factors.</p>	Scale of assessment, triggers and limits should be seasonal and should integrate a mechanism to account for acute impacts (possibly by incorporating a multiplying factor to reflect acute impacts).
Substance inclusion	Several substances of high relevance are not included.	<p>Napthenic acids and Poly Aromatic Hydrocarbons need to be included at the earliest stages possible.</p> <p>Similarly, areas of the province may require inclusion of pesticides, endocrine disruptors and other hormones or hormone mimics as some reaches are</p>	The <i>Draft Regulations</i> should prescribe the process and timeline for inclusion of all relevant substances.

		currently seeing impacts. ¹⁷	
Current limit exceeded	Lack of clarity around management responses where current water quality guideline limits have already been reached.	11 substances already exceed guideline amounts in the region. Mitigation responses for these substances should be clearly articulated.	Articulate management actions that would be undertaken as part of escalating implementation/compliance ladder (with particular reference to present limits that have been exceeded).
Groundwater			
Framework/section	Concern	Assessment/comments	Recommendation
Risk based limit characterization	Triggers and limits lack clarity as are reliant on undefined risk assessment process.	Risk Assessment criteria and process must be defined. Reliance on <i>Tier 1</i> and <i>Tier 2</i> guidelines discounts potential environmental and ecological impacts.	A risk assessment matrix should be published in relation to the risk assessment process.
Management response when limits and triggers are reached	Currently management responses when limits and triggers are reached are not defined.		Articulate management actions that would be undertaken as part of escalating implementation/compliance ladder.
Quantity regulation	Reliance on Water Conservation and Allocation Guidelines for managing quantity issues is not appropriate.	Cumulative effects of withdrawals from groundwater prior to the Guideline publication (particularly in regions where extension enhanced recovery licences predated the Guideline)	Identify other management and mitigation measures to be used where cumulative impacts of groundwater withdrawals are identified. Articulate management actions that

¹⁷ Jeffries et al. Presence of natural and anthropogenic organic contaminants and potential fish health impacts along two river gradients in Alberta, Canada. *Environmental Toxicology and Chemistry*, 2010; DOI: [10.1002/etc.265](https://doi.org/10.1002/etc.265)

		<p>are not addressed.</p> <p>Previous licence conditions appear to be primarily based on volumes not drawdown criteria.</p> <p>Impacts to surface water hydrology with Guideline rates may still occur.</p>	<p>would be undertaken as part of escalating implementation/compliance ladder.</p>
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Highly discretionary assessments of “risk” to the environment and “need” to respond are likely to undermine public confidence that the system is accountable and transparent in dealing with cumulative effects. This discretion must be narrowed by clearly defining how decisions will be made and what regulatory tools will be used in relation to triggers and limits established in the framework documents.

The ELC welcomes the opportunity to provide these comments on the draft documents and would invite you to contact the Centre should you have any questions or wish to discuss the ELC’s comments or recommendations in greater detail.

Yours truly,

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cc: Kate Rich, Director, Land Use Framework

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