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Alberta's New Land Use Planning Process Begins with First Regions

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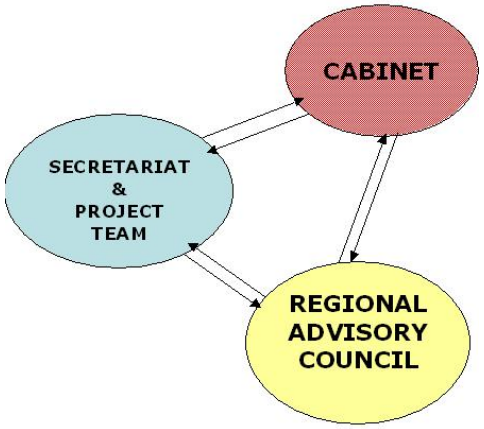
Alberta's new land use planning and management system continues on the road to implementation with work on the plans for the Lower Athabasca and South Saskatchewan land use regions. These regions were identified as priority areas in the *Land-Use Framework* policy[1] and the plans, scheduled to be completed in 2010, will be the first put into effect under the new system.

The planning process

The *Alberta Land Stewardship Act* authorizes Cabinet to initiate and provide direction to the regional planning process.[2] Structure for the process thus far has been broadly set out in the terms of reference for the Lower Athabasca and South Saskatchewan regional plans,[3] rather than in a regulation. There are three key participants in the process: the provincial Cabinet, the Regional Advisory Council (RAC) and the Land Use Secretariat.



Cabinet sets the economic, environmental and social expectations to be met in development of the regional plan and has final authority to review, approve and amend the plan. The RAC's role is to provide local input and advice on the plan's development, addressing the various expectations laid out by Cabinet in the terms of reference for the regional plan. The Land Use Secretariat is the steward of plan development, carrying out research and policy analysis and providing administrative support for the RAC. A project team, made up of staff from various provincial ministries and agencies, is responsible for drafting the regional plan, working through the Secretariat.

Each regional plan is intended to have the same basic elements:[4]

- A profile of the region, highlighting the region's current state, key considerations and major existing and future issues;

- An explanation of the policy context, setting out Cabinet's policy directions and instructions for the plan;
- The regional vision statement, expressing the region's desired future;
- A description of regional outcomes;
- The objectives and goals, including targets and thresholds, to achieve the regional vision and outcomes;
- A description of strategies, actions and approaches that could be taken to achieve the objectives and goals; and
- A description of how the provincial government will monitor and report on progress under the plan.

The details of any of these elements may vary from region to region.

Although the RAC will be one means of gathering local perspectives on the regional plan, some opportunities for public input have already been provided. The terms of reference indicate plans for further consultations in the Lower Athabasca and South Saskatchewan regions.

In both of these regions, the Land Use Secretariat carried out an initial round of consultations, holding information sessions in several communities. In the Lower Athabasca, these were framed as "information and awareness" meetings to provide basic background to the public on the Land Use Framework and the planning process.[5] By contrast, the initial consultations in the South Saskatchewan have included information from government, but also specifically sought public input on development challenges, lands that should be conserved, and high-value tourism and recreation areas. Albertans could provide that input at the meetings or through an online process.[6]

Additionally, the terms of reference for both regional plans indicate the intent to hold "public, stakeholder and Aboriginal consultations…using the Alberta government's consultation processes", in two separate steps. One step will consult on the draft vision, outcomes and objectives for each regional plan, and a second will consult on the draft regional plan itself.[7] It is unclear what is meant by the government's consultation processes, although for aboriginal consultation, it likely refers to the province's policy for such consultation on land management and natural resources issues.[8]

The regional plan terms of reference

The terms of reference documents for the Lower Athabasca and South Saskatchewan regions are effectively two documents in one. With minor wording variations, the first part of the document for each region sets out the regional planning process, addressing the parties involved and their roles, the broad steps to be taken and the general content and purpose of the regional plan.[9] The remainder of each document provides some basic background on the region, guidance from Cabinet to the RAC on the more specific matters to be dealt with, and the proposed timelines for completion of the regional plan.

The Lower Athabasca terms of reference clearly identify the primary focus of the regional plan to be economic development, keying on oil sands and timber.[10] The RAC is directed to carry out its work taking into consideration development scenarios that project production levels from the oil sands in the region at 1.5-2 million barrels per day, 4-4.5 million barrels per day, and 6 million barrels per day or more.[11] Other direction provided includes consideration of a scenario

of conservation of 20 percent of the boreal forest within the region,[12] water and air (oxides of nitrogen and sulphur dioxide) thresholds,[13] and accomodating aboriginal traditional uses of land.[14]

The South Saskatchewan terms of reference give direction on a broader range of matters. The key areas of concern are the inter-related elements of population growth and water supply and demand,[15] and the RAC's work is expected to take into consideration anticipated regional population growth of 2 million people over the next 70 years and improvements in water use conservation and efficiency of at least 30 percent.[16] Conservation of landscapes and biodiversity are also addressed,[17] but unlike the Lower Athabasca, no specific targets or scenarios are identified. More economic sectors are identified as relevant in the South Saskatchewan, including agriculture, energy development, forestry, and recreation and tourism, and the RAC is directed to develop advice that should "aim for all industries to be successful".[18] Other considerations include existing thresholds for surface water quantity and quality and air quality,[19] accomodating aboriginal traditional uses of land,[20] and providing for major multi-use corridors for transportation and utilities.[21]

Commentary

While the terms of reference for the Lower Athabasca and South Saskatchewan regions give Albertans some direction on what regional land use plans may address and regulate, it is disappointing to see the province take an approach that echoes ineffective land use planning and management from the past. The guidance provided for both regions strongly focuses on a "balancing" between the economy and environmental and social matters, rather than a perspective that would seek to integrate these three elements for mutually beneficial ends where possible.

Given the unique nature of the Lower Athabasca region due to the dominance of oil sands activity and its economic significance, it is more likely that plan development for the South Saskatchewan region will serve as the model for the remaining five land use regions in Alberta. If this is the case, it appears Alberta is in for more of the same in terms of the "everything, everywhere" approach. The South Saskatchewan terms of reference direct the RAC to evaluate development scenarios for the region which aim for all industries in the agriculture, energy, forestry, recreation and tourism sectors to be successful.[22] Unlike the Lower Athabasca, no specific targets are set for land conservation, and there is little to indicate that the RAC has the scope to recommend limits on development or prohibitions on certain types of development in certain areas of the region.

In this vein, it is illuminating to look at the list of matters that are explicitly listed as off-limits for RAC consideration:[23]

- Municipal governance;
- Aboriginal consultation;
- Population limits;
- Taxation;
- Provincial royalties;
- Government expenditures;
- Existing laws and regulations; and

- Water allocation (for the South Saskatchewan region only).

If Alberta's new land use system is intended to be innovative, sustainable and produce a high quality of life for future generations, why should the RACs' creativity and their members' expertise be curtailed by such limitations? This is particularly puzzling given the purely advisory nature of the RACs and the province's power to create regional land use plans heedless of the RAC's advice and even without creating an RAC for a region.[24]

Admittedly, Albertans have not yet seen draft visions, outcomes or regional plans for either the Lower Athabasca or South Saskatchewan regions. These products will give an even clearer picture of the government's intent on practical implementation of the new land use planning and management system. However, the terms of reference thus far hint at a large dose of status quo in a system that effectively puts all of the power in the hands of the provincial cabinet with little opportunity for review or challenge.

[1] Government of Alberta, *Land-Use Framework* (Edmonton: Government of Alberta, 2008) at 44-45, online: Government of Alberta Land-use Framework <http://www.landuse.alberta.ca/AboutLanduseFramework/LanduseFrameworkProgress/documents/LanduseFramework-FINAL-Dec3-2008.pdf>.
[2] S.A. 2009, c. A-26.8, s. 50, online: Alberta Queen's Printer <http://www.qp.alberta.ca/574.cfm?page=A26P8.cfm&leg_type=Acts&isbncln=9780779745050>.
[3] Government of Alberta, *Terms of Reference for Developing the Lower Athabasca Regional Plan* (Edmonton: Government of Alberta, 2009), online: Land-use Framework <http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/TermsOfRefDevLowerAthabascaRegionalPlan-Jul2009.pdf> [*Lower Athabasca TOR*]; Government of Alberta, *Terms of Reference for Developing the South Saskatchewan Region* (Edmonton: Government of Alberta, 2009), online: Land-use Framework <http://www.landuse.alberta.ca/RegionalPlans/SouthSaskatchewan/documents/TermsofRefDev-SouthSaskatchewanRegion-Nov26-2009.pdf> [*South Saskatchewan TOR*].
[4] *Ibid.*, *Lower Athabasca TOR* at 4-5; *South Saskatchewan TOR* at 4-5.
[5] Information on development of the Lower Athabasca regional plan and the consultation process thus far is available online: Land-use Framework <http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/Default.aspx>.
[6] Information on the public input and consultation process for the South Saskatchewan region is available online: Land-use Framework <http://www.landuse.alberta.ca/RegionalPlans/SouthSaskatchewan/PublicInformationInputSessions.aspx>. This includes a number of region-specific government fact sheets on various topic areas.
[7] *Supra* note 3, *Lower Athabasca TOR* at 20; *SouthSaskatchewan TOR* at 28.
[8] Government of Alberta, *Alberta's First Nations Consultation Guidelines on Land Management and Resource Development* (Edmonton: Government of Alberta, 2007), online: Alberta Aboriginal Relations <http://www.aboriginal.alberta.ca/documents/First_Nations_and_Metis_Relations/First_Nations_Consultation_Guidelines_LM_RD.pdf>.
[9] *Supra* note 3, *Lower Athabasca TOR* at 1-8; *South Saskatchewan TOR* at 1-8.
[10] *Ibid.*, *Lower Athabasca TOR* at 10-13; see specifically guidelines set out at 13.
[11] *Ibid.* at 12.
[12] *Ibid.* at 14.
[13] *Ibid.* at 15-17.
[14] *Ibid.* at 17-18.
[15] *Supra* note 3, *South Saskatchewan TOR* at 10-14.
[16] *Ibid.* at 21.
[17] *Ibid.* at 14-16.
[18] *Ibid.* at 16-22.
[19] *Ibid.* at 22-26.
[20] *Ibid.* at 26.
[21] *Ibid.* at 27.
[22] *Ibid.* at 22.
[23] *Supra* note 3, *Lower Athabasca TOR* at 8; *South Saskatchewan TOR* at 8.
[24] *Supra* note 2, s. 5.

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Who's it "FIT FIR"?

Provincial allocation review looms large for water users and the environment

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The "first in time, first in right" (FIT FIR) system of water allocation is a system whereby the first at the table gets first access to the water.[1] While such a system deals directly with issues of water scarcity, i.e., the earliest arrivals get it all; it does not do well at providing equitable access to water nor to managing degradation to the environment. The FIT FIR system, in isolation, is a system that produces winners and losers.

Allocation of water under FIT FIR – also referred to as prior allocation – poses significant challenges in over-allocated major basins, such as the South Saskatchewan River Basin (SSRB), for both economic development and environmental protection. In response to these pressures, the Alberta Government announced a review of the water allocation system in 2009. This review is ongoing and public consultation is expected in Spring of 2010.

As part of the review, the province received advice from three bodies: the Alberta Water Council, regarding the water transfer system specifically (an overhaul of the FIT FIR system was not considered, as this group had already begun meeting prior to the announced review)[2]; a Minister's Advisory Group (MAG)[3]; and the Alberta Water Research Institute (AWRI)[4].

The three reports make similar recommendations regarding how water allocation could be changed to deal with various issues.[5] Common themes include:

- Establishing protected water and/or the setting of water conservation objectives,
- Facilitating water transfers of licenced allocations, and
- Not touching FIT FIR.

Interestingly, the two reports (MAG and AWRI) that could have analyzed FIT FIR in greater detail did not walk down that road to any significant degree. The MAG report simply concluded in its it forwarding letter that "overall, the advisory group believes that the current system as outlined in the Water Act, including the system of prior allocation (commonly called first-in-time, first-in-right or FIT FIR), continues to be a reasonable basis for allocating and reallocating water in Alberta at this time".[6] The AWRI report, on the other hand, observes that "there is still much debate about whether [the FIT FIR] approach is still relevant and appropriate for addressing the full range of water management issues facing Alberta".[7]

Tackling FIT FIR, (the use of an aggressive sports metaphor is intended), is certainly no easy task. Altering the fundamentals of Alberta's water allocation system will not be without strong opponents. Perhaps the authors of the reports realized that the vast majority of Albertans, who have limited knowledge of FIT FIR, may be ill prepared to force change, even if they felt it was worthwhile.

And yet, we would argue, if the government aims to "address the full range of water management issues", it is imperative that FIT FIR become part of public discourse around water. The public needs to ask "who's it FIT FIR?".

Among the issues that justify a serious debate about FIT FIR are Crown ownership and equity and environmental risks during drought.

As a precursor to the equity issue it must be remembered that the water itself is owned by the Crown. The equity issue is a result of the how the FIT FIR system operates where a cap is placed on the issuance of further water licences and transfers are enabled, i.e., a water market is allowed to develop. Now that the SSRB is closed, new industries and developments are struggling to find water. With tradable licences, the FIT FIR system ensures that newcomers will pay a handsome price: a price not paid by original licencees. In the case of original licences, the primary expense to a licence holder was infrastructure to move the water. The water itself was basically given away. In some instances, the infrastructure may have garnered further public investment. One could say that the Crown (public) was subsidizing licence holders' ventures by not charging for the water itself. This was viewed as reasonable, as it was a means of encouraging settlement and development in the West.

Licence holders used the water for private gain and some return for use of the public resource resulted by way of taxes. The more recent capping of licences, however, has enriched these licence holders immensely – some more than others – as they can now seek to transfer a licence for Crown owned water for significant amounts of money. Further, the cost of environmental harms in an over-allocated system is also borne by the public. The FIT FIR system (and licence transfers), like markets generally, treats the environment as an externality. This inequity is the result of having a regulatory system evolve into a market system (and is not unique to Alberta).[8] Whether this approach is acceptable to the broader Alberta public, as ultimate owners of this resource, needs to be addressed.

A second issue of significant relevance to a review of water allocation is the risks to the environment in an over-allocated basin, particularly in drought years.[9] The FIT FIR system is largely based on volumes and blind to seasonal supply. While some conditions on licences exist

for maintaining environmental flows, only a few appear to be regularly used (primarily dams). For this reason, the primary holder of risk is the environment in an over-allocated basin. During extremely low flow periods, the FIT FIR system (barring a senior licence held for instream flows being in place) is not overly efficient or flexible in how it maintains environmental flows.

Allowing for a licence transfer system may foster conservation, but not for conservation purposes. Rather, it fosters the sale of water to other users. Environmental gains, if they are obtained through the transfer, are largely collateral to the transfer's main purpose. Currently, the ability to hold private instream licences (as reflected in a water conservation objective) is limited.[10] All three reports recommend allowing issuance of private licences for environmental goals but some argue that this power should have limits.[11] In this regard, flow conservation largely relies on the Crown taking 10% holdbacks under the *Water Act* during a transfer, something which is not likely to bring significant environmental gains.

In short, FIT FIR is a blunt but relatively easily administered water allocation tool. It provides a level of certainty to licenced water users. In over-allocated basins, it provides a high level of uncertainty to the environment and new users. Further, it appears to be perpetuated in a social and political vacuum. In times of short supply, is it truly expected that senior licence holders will be able to cut off diversions for human health and environmental disasters? Certainly the *Water Act* foresees such situations where the priority system will need to be overridden.[12] Where environmental harms are likely, a level of compensation is required.[13] But these "backstop" provisions of the *Water Act* merely perpetuate the idea that private entities own the water itself. This is a dangerous view, and one that minimizes the likelihood of fostering a water management system that provides for environmental flows.

If one speaks of balancing environmental, social and economic outcomes, FIT FIR has already tipped the scales. Who's it FIT FIR? It's a valid question, and many who want effective environmental protection see it as a barrier rather than a solution.[14]

[1] The "first in time, first in right" system is codified in the *Water Act*, R.S.A. 2000, c. W-3, at Part 3.
[2] Alberta Water Council*, Recommendations for Improving Alberta's Water Allocation Transfer System* (Edmonton: Alberta Water Council, August 2009), online: Alberta Water Council <http://www.albertawatercouncil.ca/Portals/0/pdfs/WATSUP_web_FINAL.pdf>.
[3] Minister's Advisory Group, *Recommendation for Improving Alberta's Water Management and Allocation* (August 2009), online: Alberta Environment <http://environment.gov.ab.ca/info/library/8239.pdf>.
[4] Alberta Water Research Institute, *Towards Sustainability: Phase I, Ideas and Opportunities for Improving Water Allocation and Management in Alberta* (Edmonton: Alberta Water Research Institute, 2009), online: Alberta Water Research Institute <http://www.waterinstitute.ca/pdf/summary_report_future.pdf>.
[5] The Water Council report regarding licence transfers, the only report that was the result of a multistakeholder decision-making process, included several non-consensus items of environmental significance, *supra* note 2.
[6] *Ibid*. at iii.
[7] *Supra* note 4.
[8] See, for example, the approaches taken in Western United States and Spain.
[9] The questions about the levels of precipitation and impacts of seasonal flows from diminished glacial contributions in meltwater are of central relevance. See, for example, E.A. Bash, S.J. Marshall, and E.C. White, "*Glacial meltwater contributions to the Bow River, Alberta, Canada",* (Paper presented to the 2009 American Geophysical Union Fall Meeting, San Francisco, December 14-18, 2009), abstract online: Bibliography of Canadian Geomorphology <http://cgrg.geog.uvic.ca/abstracts/BashGlacialAssessment.html>.
[10] *Water Act*, *supra* note 1 at s. 51(2).
[11] See Alberta Water Council *supra* note 2 at 16.
[12] *Water Act*, *supra* note 1 at ss. 54-55.
[13] *Ibid.* at s.55 (2).
[14] See Water Matters Society of Alberta and EcoJustice, *Share the Water: Building a Secure Water Future for Alberta* (Vancouver: EcoJustice, 2009), online: Water Matters Society of Alberta <http://www.water-matters.org/docs/share-the-water.pdf>.

Public Interest in Private Members:
Environmental Bill of Rights Enters Parliament

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You live in town X. The town was once supported by an industrial project. Proponents of the project included the federal government, which provided local jobs in government agencies and on the site itself. Now the project is finished and town is quiet, too quiet. That silence is filled by many questions: What is in the water? Was it authorized? Who knew, and were they afraid to tell?

Under current law, being a citizen of X creates no rights to seek an investigation, review environmental laws, challenge government decisions, or sue polluters directly. Individuals who do qualify for an audience with the Court face the financial risks of failure. Success could depend on inaccessible information or stringent proof of harm.

Enter federal Bill C-469, the *Environmental Bill of Rights.*[1] The recent Private Member's bill affirms a general right to a healthy environment beside specific rights to access information, participate in lawmaking processes, review federal instruments, and investigate alleged offences. Expanded access to the courts is a major feature, with extensive provisions on both judicial review of administrative action and civil suits against environmental wrongdoers. In the judicial review context, standing would be guaranteed to anyone with a genuine interest in the matter rather than limited to those directly affected. Plaintiffs would be immunized against litigation costs and could even qualify for advance costs where the matter is one of public interest. Civil suits could be used pre-emptively where a person is likely to contravene a law with a result of significant environmental harm. A shifting burden of proof would require defendants to demonstrate that no environmental harm would result from their actions.

Further features of the bill include:

- Examination of environmental legislation by the Auditor General;
- Employer reprisal (whistle blower) protection; and,
- Amendment of the *Canadian Bill of* Rights[2] to include the "right to a healthy and ecologically balanced environment".

Bill C-469 buttresses these rights with emerging principles of environmental law. First, it confirms that the Government of Canada has a public trust duty to protect the environment. It then requires that its own interpretation accord with principles of environmental law including: environmental justice, intergenerational equity, sustainable development, the precautionary principle, and polluter pays. Definitions of these principles are provided in the bill. In short, Bill C-469 combines substantive rights to the environment with procedural rights to public participation.

Being federal law, Bill C-469 would only apply to federal lands, waters, or airspace, federal departments or agencies, and federal works and undertakings. It would not provide any rights against provincial governments, but Ontario, Quebec, the Yukon and the Northwest Territories

already have similar legislation.[3] Environmental rights have even stronger purchase in the U.S. and internationally. On Parliament Hill, however, a stiff debate is likely.

Supporters must show that Bill C-469 goes beyond environmentalism to protect the health of a democratic society. Features of this society include government transparency and accountability. These features are protected through access to information, public participation in the lawmaking process, and court protection from the discretion of lawmakers. While crucial to justice for all, striking examples of these protections in action come from the environmental realm. In April 2009, the Federal Court ordered the federal government to report the content of mine tailings to the National Pollutant Release Inventory.[4] MiningWatch Canada called this decision "a victory that should be celebrated from Smithers to Voisey's Bay".[5] The requirement to report tailings had been in place since 2006 and was based on the recommendation of a multi-stakeholder committee. When the Federal Court, not environmental activists, states that the "the Canadian public is the loser"[6] on account of government "turning a blind eye"[7] to its own requirements, there is an argument for ending government monopoly on the public interest. By taking that step, Bill C-469 aims to enhance public confidence in the implementation of environmental law.

Environmental rights also push established rights discourse. Bill C-469 is clear that the rights it recognizes can be held collectively. This collective could even extend beyond legal persons if, as the preamble states, the environment itself has inherent value. Bill C-469 cites both sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*,[8] first stating that environmental harm could compromise "life, liberty, and security of the person" then defining "environmental justice" as a distribution of environmental benefits free from discrimination. Consider the "public trust", and the state could have a positive duty to provide Canadians with a healthy environment. Aside from Aboriginal rights, the Canadian rights framework is largely 'first generation': rights belong to individuals, and the state's duty is simply not to interfere. Environmental rights expand the sphere.

Bill C-469 has a long road ahead. The bill was introduced by Linda Duncan (NDP) and can expect opposition from government. Any bill must pass three readings in both the House of Commons and the Senate before it receives Royal Assent and becomes law. Bill C-469 received first reading on October 29, 2009. The second reading will see debates before a vote. If the bill survives then it will likely go to a committee for review. The third reading will not occur until the committee makes recommendations on whether the bill should rejected, amended, or advanced. For citizens with unanswered environmental questions, Bill C-469's advance would be a victory to celebrate, from Ottawa to Town X.

[1] Bill C-469, *An Act to Establish a Canadian Environmental Bill of Rights*, 2nd Sess., 40th Parl. 2009.
[2] *Canadian Bill of Rights*, S.C. 160, c.44.
[3] *Environmental Bill of Rights*, S.O. *1993*, c. 28; *Environment Quality Act*, R.S.Q., c. Q-2.; *Environment Act*, R.S.Y. 2002, c. 5; *Environmental Rights Act*, R.S.N.W.T. 1988, c. 83 (Supp.).
[4] *Great Lakes United v. Canada* (2009) FC 408.
[5] Ecojustice and Great Lakes United, News Release, "Court Victory Forces Canada to Report Pollution Data for Mines", (24 April 2009), online: MiningWatch <http://www.miningwatch.ca/en/court-victory-forces-canada-report-pollution-data-mines>.
[6] *Great Lakes United*, *supra* note 4 at para. 207.
[7] *Ibid*. at para. 145.
[8] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Nuclear in Alberta

Radioactive hazardous waste a race to the bottom?

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In December 2009 the Alberta government indicated that it would consider nuclear power on a case-by-case basis and that any proposal would have to meet federal and provincial standards. Alberta also has an active uranium exploration industry that is relatively new. Uranium mining and nuclear power do not yet have a track record in the province. In one Alberta consultation 72 per cent of respondents worried about the health impacts of nuclear. Another 77 per cent agreed that, "it's wrong to generate 40 or 50 years of electricity for our generation and then leave a nuclear waste problem that will go on for generations to come."[1] Accordingly, the health and waste regulation of nuclear material is an issue of public concern.

In Canada, the federal government has the authority and responsibility for approving and regulating all nuclear power facilities as federal works under the *Constitution Act, 1867*. At the federal level, the Canadian Nuclear Safety Commission (CNSC) licenses the disposal or storage of radioactive and hazardous waste from nuclear facilities. However, disposal, storage and management of nuclear waste is not itself a federal work under the CNSC's legislation unless it meets certain criteria: first it must be "high level" radioactive waste[2] and second it must be a facility used for the disposal of waste from another nuclear facility (a nuclear power plant, refinery, mine, or mill.)[3] Likewise, federal regulations define hazardous waste as waste that is used or produced in the course of carrying on a federally licensed nuclear activity.[4]

In Alberta, provincial waste management is governed primarily under part 9 of the *Environmental Protection and Enhancement Act* (*EPEA*), which requires approvals for waste disposal, and for the generation, collection, transportation or disposal of hazardous waste.[5] The *EPEA* also requires an environmental assessment for off-site hazardous waste landfills and approvals for hazardous waste and large landfills.[6] It may be surprising that any waste regulated under the federal *Nuclear Safety and Control Act* (*NSCA*) is not defined as "hazardous waste" in Alberta.[7] However, that waste still fits within the definition of non-hazardous "waste" in the *EPEA* and regulations.

The *Alberta User Guide for Waste Managers* under the *EPEA* does not include low-level radioactive waste as hazardous waste in Alberta,[8] even though the CNSC does not have exclusive licensing authority for that waste.[9] No reference is made to other hazardous waste included in the guide, but regulated in a CNSC license. This is strange, because *EPEA* regulations simply provide a complete exemption for any waste (even non-radioactive hazardous waste) regulated by the CNSC from all hazardous waste requirements.

This leaves a wide range of radioactive and hazardous waste that is potentially regulated only as ordinary waste under the Alberta *EPEA*. Meanwhile, any non-radioactive hazardous waste from a nuclear plant and low-level radioactive waste may ultimately be regulated by both levels of government.

It also leaves a gap where nuclear and hazardous materials may enter the provincial waste stream without full consideration of the potentially dangerous or hazardous nature of the material from a provincial perspective.

Alberta currently hosts two significant nuclear waste facilities handling waste generated by the SLOWPOKE research reactor at the University of Alberta. The University sends waste to the Hazardous Waste Management Facility at Ellerslie Research Station and the municipal Cloverbar waste facility in Edmonton. The Alberta Government and the CNSC license both of these facilities. The conditions of both federal and provincial licenses contain criteria for radioactive and hazardous waste. Therefore to date the different levels of government have recognized some overlap despite the difficulties in doing so under both federal and provincial legislation.

In an October 2009 ruling, the CNSC attempted to license a landfill in Port Hope, Ontario to contain historic low-level radioactive waste mixed with hazardous metals. Although the province purported to regulate hazardous waste and uranium effluent under its *Environmental Protection Act,* it reported to the CNSC that it did not know if the landfill met provincial requirements. When asked to rule on the issue, the CNSC ruled that it had "full authority to regulate the discharge of radioactive nuclear substances and hazardous substances associated with or arising from an activity that is licensable under the [federal legislation]." However, the CNSC also stated that "the issuance of the [federal] licence does not obviate the need for the licence applicant to seek any applicable provincial authorizations."[10]

In Alberta, *EPEA* regulations over hazardous waste leave less room for provincial participation, and would definitively exclude all hazardous and nuclear waste regulated by the CNSC from provincial authorizations for hazardous waste, even if the waste is dangerous high-level radioactive waste or ordinary hazardous waste.

One may wonder what the problem with allowing the federal regulator to exclusively license radioactive and hazardous waste would be. First, this may lead to inconsistent approaches to licensing, particularly in mixed-waste facilities containing other forms of hazardous and non-hazardous waste: for example, municipal landfills containing radioactive waste. Waste from a nuclear facility validly licensed by the CNSC would have one set of effluent criteria, while the remainder of the waste may have another.

The other more serious risk is that the CNSC uses much more relaxed hazardous and radioactive waste effluent standards than the provinces do. While most provincial water quality objectives and landfill effluent criteria are derived from the Canadian Council of Ministers of the Environment standards, the source of CNSC standards is much less clear. In the Ontario example, hazardous waste mean effluent standards in CNSC licenses allowed more pollution than provincial standards by between 20 and 100,000 times for a number of hazardous metals and other substances like nickel, arsenic and uranium.[11] The Alberta *River Water Quality Index Objectives* provide very similar criteria to Ontario's for these substances.[12] Accordingly, it remains to be seen how Alberta will be able to apply a consistent approach to hazardous and radioactive effluent from any waste facilities storing waste associated with nuclear facilities. This may leave communities with nuclear facilities with compromised water quality in comparison to the rest of Alberta.

Whether the federal and provincial government can collaborate and how Alberta environmental assessment, utilities commission, waste approval, and other processes will apply to nuclear generation remains to be seen. What will matter most is whether Alberta maintains provincial standards, or whether it walks away from any hazardous and radioactive waste and other basic regulatory standards and approaches when presented with waste that is radioactive or comes from a nuclear facility.

[1] Alberta Energy, *Alberta Nuclear Consultation Summary*. (Edmonton: Alberta Energy, 2009), online: Alberta Energy <http://www.energy.gov.ab.ca/Electricity/1781.asp>
[2] *General Nuclear Safety and Control Regulations*, SOR/2000-202, s. 19(a).
[3] *Class I Nuclear Facilities Regulations*, SOR/2000-204, s. 1(e).

[4] *Ibid.,* "hazardous waste".
[5] *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 176 & 188.
[6] *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/1993, sched. 1 (aa); *Activities Designation Regulation*, Alta. Reg. 276/2003, sched. 1, Div. 1, (i).
[7] *Nuclear Safety and Control Act*, S.C. 1997, c. 9; *Waste Control Regulation*, Alta. Reg. 192/1996, Sch. 2, s. 1(d).
[8] Alberta Government, *Alberta's User Guide for Waste Managers* (Edmonton: Alberta Environmental Protection, 1996), online: Alberta Environment <http://www.environment.alberta.ca/2452.html>.
[9] *General Nuclear Safety and Control Regulations, supra* note 2.
[10] Canadian Nuclear Safety Commission, *Record of Proceedings Including Reasons For Decision in the Matter of Atomic Energy of Canada Limited* (Ottawa: Canadian Nuclear Safety Commission, 16 October 2009), paras. 23-24.
[11] Lake Ontario Waterkeeper, *Request to intervene*, (Toronto: 27 July, 2009) at 4. Also see Natural Resources Canada, *Screening Report for the Port Hope Long-Term, Low-Level Radioactive Waste Management Project* (Ottawa: Natural Resources Canada, 2006), at 8 & 172, online: Town of Port Hope <http://www.porthope.ca/en/municipaldepartments/resources/Final_Port_Hope_Screening_Report.pdf>
[12] Alberta Environment, *Alberta River Quality Index Objectives* (Edmonton: Alberta Environment, 2005), online: Alberta Environment <*http*://environment.alberta.ca/documents/RWQI_Objectives.pdf>