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GRASSLAND MANAGEMENT A DELICATE ISSUE

By Laura Bowman, *Staff Counsel*

Grasslands occupy much of Alberta's South Saskatchewan Region. Grasslands are areas where vegetation is dominated by grasses, forbs and other non-woody plants. The Canadian prairies are predominantly mixed grassland (tall and short grasses). Mixed grass prairie contains many special plants that are well-adapted to the varied moist and dry conditions in the Canadian prairies and a combination of fire and grazing. Without these forces, woody growth can begin to take over the prairie landscape. However, excessive grazing can adversely impact some native grassland species. Grassland management is therefore a delicate exercise.

An eco-region under pressure

Much of Alberta's native mixed grasslands have become seriously fragmented and newer agricultural practices have impacted the health and extent of grasslands. Grasslands are the most threatened ecosystem in North America¹ and have been reduced between 70 and 99% in Canada.

In January, the Alberta Prairie Conservation Forum released its 2011-2015 Action Plan for grasslands.² The report boldly asserts that threats to grasslands are continuing unabated in Alberta and that new threats are emerging, such as feedlot expansion, unconventional oil and gas and wind farm developments. This report rightly notes that maintaining large native grassland and parkland ecosystems is vital to biodiversity. It also notes that small areas of habitat can also play a very important role.

However, the report does not push the Alberta government to protect vital ecosystems in this region through robust regulation. In the action plan, only "stewardship" is highlighted as a protective mechanism. Stewardship is undoubtedly important on private lands; however, the law should also have a role in creating enforceable biodiversity protection, particularly on public lands.

Moreover, land use planning through the *Alberta Land Stewardship Act* is an important opportunity to protect grasslands on all land.

Most native grasslands in Southern Alberta are located on public lands. In Alberta, native grasslands cover approximately 42,000 km² of which 23,000 km² are owned by the Alberta Government and managed by Sustainable Resource Development. In addition to this, the Eastern Irrigation District is the largest private landowner in Southern Alberta and administers 2,400 km² of grassland, most of which (80%) is native grassland. Despite this, only 2% of native grassland is protected in Alberta, 1.29% of which is under provincial legislation.³

Protecting native prairie grasslands is extremely important for a variety of threatened and endangered species including the Sprague's Pipit, Swift Fox, Burrowing Owl, Loggerhead Shrike, Ferruginous Hawk, Long-billed Curlew, McCowan's Longspur and others. None of these species currently benefits from a federal recovery strategy that identifies and protects critical habitat: the habitat that is necessary for the survival and recovery of the species. Grassland bird populations currently face a startling decline throughout North America.

In Canada, there has been an overall loss of 44% of grassland species populations since the 1970s, with individual species showing significant declines of up to 87%.⁴ Grasslands are also vital for soil and water conservation, nutrient recycling, pollination, habitat for livestock grazing, genetic material for crops, recreation, climate regulation and carbon storage.⁵

Suffice it to say grassland health and biodiversity are under pressure on numerous fronts. Remaining grasslands in Alberta are threatened by conversion of land use, including cultivation and urbanization; overgrazing; and energy development including oil, gas and wind on large areas of native grasslands

in Alberta.⁶ Land used by oil and gas industries overlap with 60% of Alberta's remaining grassland.⁷ Environmental groups in Alberta continue to push for public lands conservation legislation.

The Alberta government is currently planning to sell 84,000 acres of Crown land, much of which is grassland to counties and municipal districts for one dollar per quarter section.⁸ Currently public lands legislation in Alberta does not adequately address sale, access management or species habitat protection on any public land.

On private lands, grassland preservation relies on the management intent of the landowner. Some conservation easements have been granted and land purchases have occurred in Southern Alberta.

The plan for the future of grasslands

The Regional Advisory Council for the South Saskatchewan Regional Plan (SSRP) under the *Alberta Land Stewardship Act* recently released recommendations for the region's land use plan.⁹ It identified grassland areas in that region and proposed nine conservation management regions for public lands both on and off grasslands. These

Laura Bowman
Staff Counsel



Laura Bowman holds a B.A. in Canadian studies from McGill University and a J.D. from the University of Toronto. She has worked with a variety of not-for-profit environmental groups across Canada on nuclear regulatory issues, water law, mining law, species at risk law, aboriginal law and land use planning issues.

Laura is leaving the ELC to return to Ontario to practise there. She will be missed.

constitute 11.4% of lands in the region (9,381 km²) and are spread across all the habitat types in the South Saskatchewan Region. The portions covering grassland regions are fragmented, with large areas of remaining grasslands being proposed for use by agriculture.¹⁰ The land use plan therefore has the potential to promote further encroachment on native grassland vegetation. At the same time, the report recommends that the government “minimize” the conversion of native landscapes.¹¹ It also recommends the identification of an integrated network of lands for biodiversity conservation and restoration, including critical habitat conservation. The advice includes a map of proposed conservation and management areas on public lands. If adopted, this map would propose protection for some grassland areas in Alberta. However, the extent of protection recommended for those lands is not explained by the regional advisory council. Ultimately, the limited extent of proposed conservation management area protection could result in substantial degradation and fragmentation of the remaining grassland areas on public land in Alberta.

The *Alberta Land Stewardship Act* also provides legal authority to protect Alberta’s remaining grasslands: those owned by the Eastern Irrigation District,

other private landowners and public lands. This includes conservation directives, the use of conservation offsets and conservation easements.

SSRP recommendations fail to articulate how increasing agricultural activities, particularly cropping, will not undermine grasslands conservation and biodiversity. The recommendations also do not describe what protection on conservation and management areas will look like on public lands.

The *Public Lands Act* and the *Wildlife Act* in their current form are inadequate when it comes to protecting species at risk and habitat. Therefore, Alberta needs a strong new direction on managing public lands with native grasslands. This may involve designation of new protected areas as ecological reserves or wilderness areas, comprehensive legislative amendments to protect species at risk, and a regional plan that articulates clear thresholds and terms and conditions on all public land dispositions. It also needs to make more complete use of its land use planning powers to address destruction of grasslands on private lands using the full suite of legal tools it has available, ranging from promoting the voluntary granting of conservation easements to more mandatory measures accompanied with compensation when appropriate. •

¹ Todd A. Grant, Elizabeth Madden et. al. “Tree and shrub invasion in northern mixed-grass prairie: implications for breeding grassland birds” (2004) 32(3) *Wildlife Society Bulletin* 807.
² Prairie Conservation Forum *Alberta Prairie Conservation Action Plan: 2011-2015*. (Lethbridge: Prairie Conservation Forum, January 2011).
³ COSEWIC, *Assessment and Status Report on the Sprague’s Pipit in Canada* (Ottawa: Environment Canada, 2010) at 18, 23-24 Online: <http://www.sararegistry.gc.ca/virtual_sara/files/cosewic/sr_Sprague%27s%20Pipit_0810_e.pdf> and Canadian Parks and Wilderness Association, *Conserving the Grasslands of Southern Alberta: Three Candidate Areas for Protection* (Calgary: CPAWS, 2011) online: <http://www.cpaws-southernalberta.org/campaigns_grasslands/pics/Conserving%20the%20Grasslands%20of%20Southern%20Alberta_Report_FINAL_June11.pdf>.
⁴ Federal, Provincial and Territorial Governments of Canada. *Canadian Biodiversity Ecosystem Status and Trends* (Canadian Council of Resources Ministers: Ottawa, 2010) at 19.
⁵ *Ibid.*, at 18.
⁶ COSEWIC, *supra* note 3 at 11.
⁷ *Ibid.*
⁸ Government of Alberta “Government to transfer land to municipalities for local use” (News Release, February 3, 2011) online: <<http://alberta.ca/home/NewsFrame.cfm?ReleaseID=/acn/201102/29851ED214D54-A0FE-3226-9D12B0AE2624CF13.html>>.
⁹ *Alberta Land Stewardship Act*, S.A. 2009, c A-26.8; South Saskatchewan Regional Advisory Council *Advice to the Government of Alberta for the South Saskatchewan Regional Plan* (March 2011) online: <http://www.landuse.alberta.ca/AboutLanduseFramework/LUFProgress/documents/SSRP%20RAC%20Document_FINAL_2011.pdf>
¹⁰ *Ibid.*, at 60.
¹¹ *Ibid.*, 5.3.6 at 29.

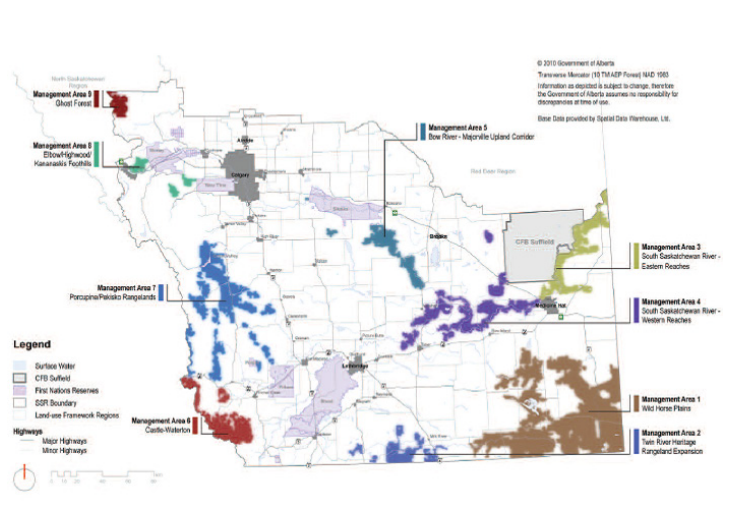
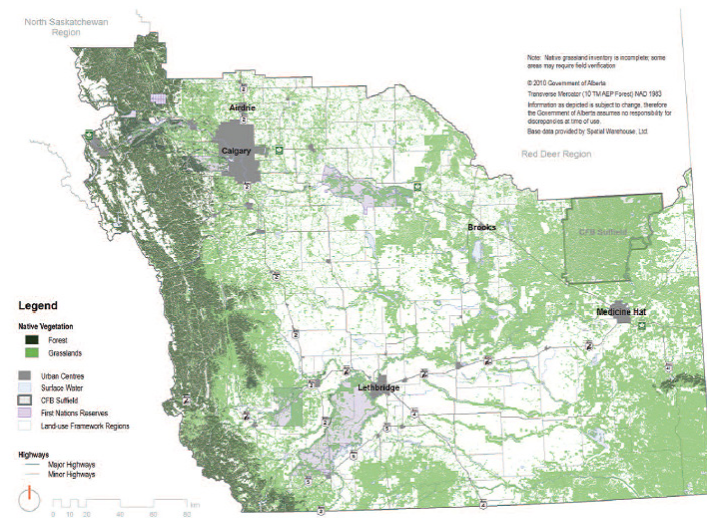


Figure 1: Native grasslands and forests in Southern Alberta (South Saskatchewan Regional Advisory Council *Advice to the Government of Alberta for the South Saskatchewan Regional Plan* at 34)

Figure 2: Proposed Conservation areas on public lands (South Saskatchewan Regional Advisory Council *Advice to the Government of Alberta for the South Saskatchewan Regional Plan* at 37)

CAN RECREATION SAVE YOUR WATER SOURCE?

By Adam Driedzic, Staff Counsel

Summer has arrived, and with it a clear reminder of land use planning issues in Southern Alberta. First, the key challenge in the South Saskatchewan Region is water, three quarters of which comes from the Rocky Mountains.¹ The social and economic development of the region depends on the health of this natural water tower. Second, the mountains are flooded with recreation tourists, eighty percent of whom are provincial residents.² Basically, Albertans are playing (among other things) in their own water source.

The terms of reference for the South Saskatchewan Regional Plan provide that the priority use of the Eastern Slopes be watershed protection followed by appropriate recreation and tourism.³ Are these two priorities compatible?

Recreation definitely provides an incentive to preserve the natural characteristics of the Eastern Slopes. First, studies in the region find that recreationalists seek out natural landscapes and avoid industrial ones.⁴ Second, there is an insufficiency of recreational venues to meet growing demand.⁵ Third, the economic value of the nature-based tourism industry in the South Saskatchewan competes with extractive industries. According to the regional profile, the recreation sector creates 36,400 jobs, generates 1.6 billion dollars for the region, and is crucial to the entire province.⁶

The problem is that recreation contributes to the cumulative effect of human activity on the Eastern Slopes. Prioritizing recreation over extractive industries is a good start to watershed protection, but nature can also be loved to death. This is the current state of important recreation lands identified in the first stage of public consultation, including the Castle Area and Kananaskis Country.⁷ Both areas are weakly protected compared to neighboring national parks and even some private lands. This discrepancy must be improved if the Regional Plan is to uphold the top two priorities for the Eastern Slopes.

The advice of the South Saskatchewan Regional Advisory Council (RAC) is not clear on how improvements will be made. The RAC advice proposes several public land designations including “Conservation Areas,” “Mixed Use Forest,” and “Recreation and Tourism areas.”⁸ These designations have different management priorities but none prohibit any activity outright. There is still potential for anything anywhere, but in varying amounts.

Some RAC recommendations on recreation management would serve watershed protection if made into law, especially the attention to motorized recreation. Examples include designating areas for motorized recreation, keeping it out of riparian areas and wetlands, and prohibiting mud bogging on public land.⁹ Other recommendations on recreation are less clearly water-protective, such as enhancing infrastructure and access to water bodies.¹⁰

Further advice for the Eastern Slopes is to develop “iconic nature-based tourism destinations” in the Castle and Kananaskis Country. “Iconic” aptly describes the landscape but it does not relate to the proposed designations. Kananaskis Country would be an iconic destination and a mixed-use forest. The Castle would be an iconic destination with conservation areas and recreation areas. The advice for the latter is to “effectively manage the Castle without necessarily designating it as a park.”¹¹ This advice is contrary to a citizens’ proposal that was held by Alberta Parks and Recreation to be a good fit for the Land Use Framework.¹²

To a large degree the RAC advice resembles the status quo. Water supply is already a purpose for public land under the *Forest Reserves Act* and a management priority under the Eastern Slopes Policy.¹³ Honoring this priority is already frustrated by the absence of supportive legislation. If the Regional Plan and the *Alberta Land Stewardship Act* cannot close this gap, the public may rightly conclude that protecting watersheds and

enhancing recreation simultaneously requires parks. “Iconic destinations” are particularly vulnerable to recreational overuse and warrant clear protection, not just for tourist dollars, but also for the water they produce. Anything less is a questionable approach to sustainable development in the South Saskatchewan Region. •



¹ Government of Alberta, *Profile of the South Saskatchewan Region* (Edmonton: Government of Alberta, 2009), online: Government of Alberta, Land Use Framework <<https://www.landuse.alberta.ca/Documents/SSRP%20Profile%20of%20the%20South%20Saskatchewan%20Region%20Report-P1-2009-11.pdf>>.

² *Ibid.*, at 21 and 58.

³ Government of Alberta, *Terms of Reference for Development in the South Saskatchewan Region*, (Edmonton: Government of Alberta, 2009), online: Government of Alberta. <<https://www.landuse.alberta.ca/Documents/SSRP%20Terms%20of%20Reference%20for%20Developing%20the%20South%20Saskatchewan%20Region%20Report-P1-2009-11.pdf>>.

⁴ Cornel Yarmoly, *Cumulative Effects in the Ghost River Watershed*, online: ALCES Landscape and Land-Use Ltd.

<http://www.alces.ca/home/Presentations/Videos/2011_Cumulative_Effects_in_the_Ghost_River_Watershed>.

⁵ *Supra* note 1 at 21-22.

⁶ *Ibid.*, at 58.

⁷ Government of Alberta, *South Saskatchewan Regional Plan Workbook Results* (Edmonton: Government of Alberta, 2010), online: Government of Alberta, Land Use Framework <<https://landuse.alberta.ca/Documents/SSRP%20South%20Saskatchewan%20Regional%20Workbook%20Results%20Summary-P1-2010-07.pdf>>.

⁸ South Saskatchewan Regional Advisory Council, *Advice to the Government of Alberta for the South Saskatchewan Regional Plan*, online: Government of Alberta, Land Use Framework, <<https://landuse.alberta.ca/RegionalPlans/SouthSaskatchewanRegion/PlanningProcess/RACAdvice/Pages/default.aspx>>.

⁹ *Ibid.*, at p.44.

¹⁰ *Ibid.*, at p.44-45.

¹¹ *Ibid.*, at p. 17.

¹² Castle Special Place Citizens’ Initiative, *Castle Special Place Conceptual Proposal for Legislated Protected Areas* (October, 2009), online: Castle Special Place Citizens’ Initiative <<http://www.castlespecialplace.ca/index.html#tips>>.

¹³ *Forest Reserves Act*, RSA 2000, c. F-20; Government of Alberta, *A Policy for Resource Management of the Eastern Slopes* (Revised 1984) (Edmonton: Government of Alberta, 1984).



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EDITORS

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ASSISTANT EDITORS

Jason Unger

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#800, 10025 - 106 Street
Edmonton, AB T5J 1G4
Tel: (780) 424-5099
Fax: (780) 424-5133
Toll Free: 1-800-661-4238
elc@elc.ab.ca
www.elc.ab.ca
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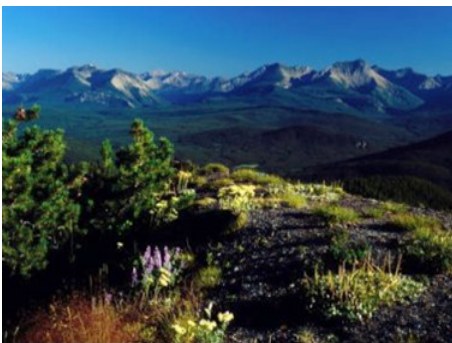


Photo by Gordon Petersen,
Castle Crown Wilderness Coalition

SAGE GROUSE

The Greater Sage Grouse is an endangered bird that lives in Southern Alberta and Saskatchewan. The Sage Grouse was designated endangered in April 1998 and this was confirmed in May 2000 and April 2008. The Sage-Grouse is listed as endangered on Schedule I of the federal *Species at Risk Act*.¹ It is also listed as endangered in both Alberta² and Saskatchewan.³ Sage Grouse are found in mixed grasslands containing sagebrush habitat.



In Canada, the current range of Sage Grouse has been reduced to approximately 6% of the historic range, due primarily to the loss and degradation of native sagebrush habitat.⁴ Population declines are driven by reductions in habitat quality during the three critical life stages: nesting, brood rearing and wintering.⁵

Oil and gas development contributes to fragmentation of Sage Grouse habitat in Alberta and increases the potential for mortality and disturbance to grouse.⁶ To date, at least 1500 wells have been drilled within the current range of Sage Grouse in Alberta. It is estimated that 575 wells are still producing. Thus there are approximately eight well sites per square mile of Sage Grouse habitat connected by roads, trails, pipelines and power-lines and interlaced with compressor stations and gas camps. These structures and linear features result in direct habitat loss, and fragment remaining suitable habitat. Over the last three decades, the Alberta Sage Grouse population has declined by 66-92%. Oil and gas development, particularly dense development, destroys wintering habitat and results in reduced survival.⁷ Currently less than 5% of Sage Grouse nesting and brood-rearing habitat is potentially protected in Alberta by the setback recommendations on public lands. Both development and development density increases represent an imminent threat to Sage Grouse habitat. Despite this, the Energy Resources Conservation Board has recently proposed removing all well-spacing controls in Sage Grouse habitat areas.⁸ •

¹ *Species at Risk Act*, S.C. 2002, c. 29.

² Lungle, K. and S. Pruss. *Recovery Strategy for the Greater Sage-grouse (Centrocercus urophasianus urophasianus) in Canada*. In *Species at Risk Act Recovery Strategy Series*. (Ottawa: Parks Canada Agency, 2008) at 4.

³ *Ibid.*, at vii. viii, 3.

⁴ *Ibid.*, replacement of s.2.6.

⁵ Connelly, J.W. et al. "Guidelines to manage Sage-grouse populations and their habitats" (2000) *Wildlife Society Bulletin* 28: 967-985.

⁶ Dale Eslinger et. al, *Alberta Greater Sage-Grouse Recovery Plan 2005-2010* (Alberta Sustainable Resource Development, December 2005) at 9.

⁷ Beck, T.D.I., "Sage-grouse flock characteristics and habitat in winter" (2007) *Journal of Wildlife Management* 41: 18-26.

⁸ Energy Resources Conservation Board, *Bulletin 2010-39*, online: <<http://www.ercb.ca/docs/documents/bulletins/bulletin-2010-39.pdf>>.

"As a potentially limiting factor in the economic and social development of southern Alberta, it may be important to re-assess the value of upland areas in the context of water supply and the ecological services they provide. It may be wise to consider special upland designation for no other reason than watershed protection. In examining upland watershed protection options, it should be noted that while our mountain national parks are now considered valuable tourism resources, the original purpose protected as much in water resource protection as in tourism promotion."

Rosenberg International Forum on
Water Policy
Forum V
"Upland Watershed Management in an
Era of Global Climate Change."

Banff, Canada
September 6-11, 2006
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THE “INSIGNIFICANCE” OF WATER TRANSFERS

By Jason Unger, *Staff Counsel*



In law, most things are about interpretation. This is particularly the case in much of Alberta law due to the high level of discretion it offers decision makers. The *Water Act* and the interpretation of what is “significant” is a case in point.

Since the closure of the South Saskatchewan River Basin (SSRB) to new water licences there has been *significant* reliance on licence transfers to get water to new users.¹ There are some legislative constraints associated with the transfer process. Notably, the *Water Act* prescribes the need to conduct a “public review” of transfers and limits transfers to instances where the transfer, “in the opinion of the Director, will not cause a significant adverse effect on the aquatic environment.”²

Questions flowing from the “significant adverse effect” provision include: when will a “significant adverse effect” arise? How is the Director’s opinion formed? What has the Director’s opinion in recent transfers been? Tackling the last question first we know that transfers are being made so the Director is not finding a significant adverse effect. Beyond that we don’t know much.

At a coarse level of assessment it would appear that any actual increase in water diversions or even a change in the location of a diversion is likely to incur a significant adverse effect in a basin that is considerably over-allocated. Many portions of the SSRB are being degraded during some times of year; therefore, it is reasonable to conclude that a significant adverse effect would occur in many of licence transfers.³

So, why are transfers occurring and what would we expect the Director to consider in forming his or her opinion? In the absence of substantive public reasons about how the opinion is being formed we are largely left in the dark. We don’t know the scale or approach to the determination of “significance,” including the gravity and type of harm that is deemed to be significant. There are nevertheless a few factors we can observe from the legislative context.

First, an assessment of a “significant adverse effect” cannot rely on licenced volumes, but rather must deal with actual flows. That is to say, the consequences of the transfer on the aquatic environment are what give rise to a potential significant effect. The result in actual flow is what matters. This conclusion is supported by the fact that legislation already has a provision that limits the amount transferred to the amount in the original licence, i.e. the volume can’t increase. The legislation nevertheless identifies the need to assess the transfer for its effects, indicating a legislative intent that the licenced volume does not dictate the effect, rather the consequences of a specific transfer and whether it sees more water exiting the stream or changes to stream condition.

The Director’s assessment should consider the diversion’s consequences in relation to its amount and timing. The licence’s historical diversion is highly relevant to a determination. Where sleeper licences (licences that have gone unused for some time) are transferred, it will reflect an increase in total diversions. Similarly, where a licence is underused, a transfer of the unused portion will constitute an increase in total diversion. In an over-allocated and degraded basin it appears such a situation would, on its face, cause a significant adverse effect, if not in the reach of the transfer, then downstream by removing some flow for a specified time.

Second, the assessment of significance and the “water conservation objective” (WCO) set in the basin are mutually exclusive concepts. Even if the WCO is being met, it doesn’t determine the significance of the effect on the aquatic environment. This is evident in a plain reading of the legislation. The transfer provision doesn’t make reference to the WCO and the definitions of WCOs and the “aquatic environment” under the *Water Act* are starkly different. A WCO may be based on a variety of outcomes, including pollution abatement and recreation.⁴ This is clearly different from a “significant adverse effect” on “the components of the earth related to, living in or located in or on water or the beds or shores of a water body, including but not limited to all organic and inorganic matter, and living organisms and their

habitat, including fish habitat, and their interacting natural systems.”⁵

Third, a water transfer “holdback” is unlikely to be sufficiently ameliorative to take a transfer’s effects outside the realm of “significance”.⁶ Even where the holdback provision results in an actual return of water (as opposed to a paper return) to foster the aquatic environment, it will merely have a minor mitigating effect.

In light of these factors, how are transfers being justified? Unfortunately, the Director’s determination of “significance” is difficult to discern, let alone refute. One might assume that, in discerning some standard of measurement for “significance,” there is a scientifically based standard. If there is such a benchmark, it is not stated in law or policy. Alberta Environment policy regarding transfers and the approved water management plan for the SSRB provide no detail with regard to the determination of significance.⁷ There is a recently published document regarding in-stream flow needs, *A Desk-top Method for Establishing Environmental Flows in Alberta Rivers and Streams*, but if this were used it seems it would bolster arguments about significant adverse effects occurring rather than justify transfers.⁸

Cases that have considered the nature of “significance” are not overly helpful either. Much judicial consideration of “significance” has arisen in the context of the *Canadian Environmental Assessment Act*, with resulting decisions being highly deferential in terms of the determination of “significance.”⁹



Photo by RJ Pisko, with courtesy Lighthawk

So, is the Director conducting science and risk based assessments of whether a transfer will have a significant effect? If not, how is significance being determined? Without a factual benchmark and knowledge about how significance is determined, challenging the reasonableness of the Director's opinion is nearly impossible.¹⁰

What is the lesson in all this? A coarse assessment of how the Director exercises his or her discretion under the *Water Act* for transfer of water licences in the SSRB reveals fundamental concerns about how the determination of "significance" of effects is being interpreted and applied. This lack of clarity should be addressed through a clear policy about how "significance" is determined and public reporting of reasons for the determination. On a secondary level, the issues of interpreting what is "significant" should be fair warning against adopting similar discretionary phrases to guide government when determining whether activities can go ahead. Specifically, the advice given to the Government of Alberta in relation to water allocation transfers comes to mind. The Alberta Water Council's non-consensus report identifies mechanisms to "streamline" the process of transfers by implementing a "no significant harm" test. In light of the inability to truly define significance and the general appearance that not much is considered "significant" in relation to transfers, it appears any road to streamlining that includes such a definitional approach should be strongly resisted. •

¹ See the Alberta Environment, *Alberta River Flow Quantity Index*, online: Alberta Environment <<http://environment.alberta.ca/01713.html>> and various "State of the Basin" reports from the South Saskatchewan River Watershed, for examples, see the Bow River Basin, online Bow River Basin Council <http://wsow.brbc.ab.ca/index.php?option=com_content&view=article&id=82&Itemid=179%20and%20the%20Oldman%20Watershed%20Council%20http://www.oldmanbasin.org/State-of-the-Watershed-Report.html>. Currently the SSRB has a water conservation objective (WCO) which is not met in various reaches at different low flow times. This WCO is set at 45% of the natural Rule of Flow.

² *Supra* note 2 at s.(1)(i)(hhh).

³ *Ibid.*, at s.(1)(i)(h).

⁴ Section 83 of the *Water Act* allows the Director to retain up to 10% of the licence allocation being transferred, this amount being referred to as a holdback.

⁵ Alberta Environment and Alberta Sustainable Resource Development, (Edmonton: Government of Alberta, 2011), online: Alberta Environment <<http://www.environment.gov.ab.ca/info/library/8371.pdf>>.

⁶ Section 83 of the *Water Act* allows the Director to retain up to 10% of the licence allocation being transferred, this amount being referred to as a holdback.

⁷ See Alberta Environment, *Administrative Guideline for Transferring Water Allocations*, (Edmonton: Alberta Environment 2003), online: Alberta Environment, <http://environment.alberta.ca/documents/Administrative_Guideline_for_Transferring_Water_Allocations.pdf> and Alberta Environment, *Approved Water Management Plan for the South Saskatchewan River Basin* (Alberta), (August, 2006), online: Alberta Environment <http://environment.alberta.ca/documents/SSRB_Plan_Phase2.pdf>.

⁸ Alberta Environment and Alberta Sustainable Resource Development, (Edmonton: Government of Alberta, 2011), online: Alberta Environment <<http://www.environment.gov.ab.ca/info/library/8371.pdf>>.

⁹ See *Pembina Institute for Appropriate Development v. Canada* (Attorney General) 2008 FC 302, online Federal Court of Canada, <<http://decisions.fct-cf.gc.ca/en/2008/2008fc302/2008fc302.pdf>>. While the Court in this case did find the reasons lacking in relation to the significance of greenhouse gas emissions, it failed to outline any criteria for determining whether

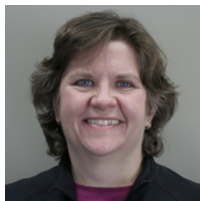
a decision maker's evaluation of significance is reasonable. In so doing, the Court stated, "I recognize that placing an administrative burden on the Panel to provide an in-depth explanation of the scientific data for all of its conclusions and recommendations would be disproportionately high. However, given that the Report is to serve as an objective basis for a final decision, the Panel must, in my opinion, explain in a general way why the potential environmental effects, either with or without the implementation of mitigation measures, will be insignificant". Contrasting this case with present consideration of the Director's discretion, it should be noted that there is no requirement to publicly report or provide reasons for the determination of significance, in even a summary fashion.

¹⁰ The scale of assessment of significance itself could range dramatically, from a demonstrated effect on a specific focal species population at regional level to adverse effects on invertebrate populations in a given reach or reductions in available spawning habitat in at a specific site.

SCRATCHING THE SURFACE: A DECADE OF CONTAMINATED LAND REGULATION IN ALBERTA

By Cindy Chiasson, *Executive Director*

Ten years ago, Alberta and national media were full of stories about Lynnview Ridge, the Calgary subdivision built on a reclaimed oil refinery site. Following a change in regulatory standards for soil contamination, Alberta Environment issued an order to Imperial Oil, owner of the original refinery, and Devon Estates, initial developer of the reclaimed property, to assess and deal with soil contamination within the subdivision. After several years of litigation at the Environmental Appeals



Board and the Alberta courts, Imperial Oil purchased most of the properties and removed the contaminated soil.¹ The remediated property currently stands undeveloped.² Much has happened and remains to happen at Lynnview Ridge; the bigger question is whether any significant legal change has occurred in Alberta?

What's changed?

In the past decade, judicial decisions and legislative changes have provided more clarity around the tools available to the Alberta government to deal with contaminated land. The courts upheld the Director's discretion to choose the form

of order that could be issued (substance release vs. contaminated site),³ which has resulted in the practical abandonment of the contaminated sites provisions of the *Environmental Protection and Enhancement Act* (EPEA).⁴ Amendments to EPEA's substance release provisions have explicitly extended duties to report releases and take remedial action, as well as the applicability of orders, to releases that occurred before EPEA's enactment in 1993.⁵ A new tool, the remediation certificate, was introduced to encourage site remediation and limit future regulatory liability when standards change.⁶ Application for the certificate

is voluntary once lands have been remediated to meet prescribed standards.

Alberta Environment has also taken steps to make information about the condition of land more accessible. Since 2005, information provided to the department in relation to substance releases or contaminated sites, including scientific and technical reports and studies, has been made publicly available.⁷ Environmental site assessment information held by Alberta Environment for land that has been assessed or reclaimed is available through the online Environmental Site Assessment Repository (ESAR) database.⁸ It should be noted, however, that a lack of results or information from Alberta Environment or ESAR does not mean that land may not be contaminated; it means that Alberta Environment does not possess any information related to the condition of that land.

Would these changes prevent another Lynnview Ridge?

On the surface, it would appear that significant progress has been made on improving regulation of contaminated land. However, it's important to look at these changes in context. While more information about the environmental condition of land is publicly available, the general approach in land transactions remains "buyer beware." The onus is on the prospective buyer of a property to inquire into and investigate the environmental condition of that property. It's not likely that the new home inspection regulation, coming into effect in the fall of 2011, will shift that responsibility away from residential buyers.⁹ That regulation focuses on the buildings and general site condition, rather than environmental conditions of the property.¹⁰ Additionally, the information available from Alberta

Environment is not exhaustive, as the government does not systematically carry out or require environmental assessments of all land in Alberta. The information held by the department has been provided to it, either voluntarily or as required by an order or other regulatory tool.

In Alberta, remediation of contaminated land and reuse of remediated land is mainly market driven. Usually, the primary factor leading to remediation and reuse of property is that the value of the remediated property will be greater than the costs to assess and remediate that property. Government-initiated remediation tends to happen where there is significant risk to health or the environment. A major challenge for landowners affected by contamination caused by others is the lack of a regulatory trigger to compel assessment or remediation within a specified time period. This is particularly a problem for properties (commonly rural) affected by contamination from oil and gas development, where the surface owner had minimal control over the industrial activity and little leverage to have remediation proceed.

A remaining weakness in Alberta's regulatory system is the lack of a fund or other mechanism to deal with unfunded liability for historical contamination where the party that caused the contamination no longer exists or has no resources to carry out remediation. Without a specific regulatory mechanism, the default source to pay for such remediation would likely be public funds and the timelines for remediation and redevelopment could be very uncertain. The current status of Lynnview Ridge might have been significantly different

had the refinery owner been a defunct company, rather than Imperial Oil.

In relation to contaminated land, government doesn't have all the answers and, practically, may never have them. There is an important responsibility on the parts of those who deal with land, including landowners and prospective buyers, to be aware and make inquiries about the environmental condition and past uses of property. An area where government could take significant steps to prevent the likelihood of future Lynnview Ridges is in relation to prevention of land contamination in the first instance, through greater regulatory use of pollution prevention, monitoring, reporting and timely remediation requirements.

¹ See *Imperial Oil Ltd. and Devon Estates Ltd. v. Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.* (21 May 2002) Appeal No. 01-062-R (A.E.A.B.); there are eight written decisions of the Environmental Appeals Board on various aspects of this proceeding. See also *Imperial Oil Limited v. Alberta (Minister of Environment)* 2003 ABQB 388 and *Lynnview Ridge Residents' Action Committee v. Imperial Oil Limited* 2005 ABCA 375.

² Kelly Cryderman, "A decade later, questions still linger over Lynnview Ridge" *Calgary Herald* (16 May 2011), online: *Calgary Herald* <<http://www.calgaryherald.com/health/decade+later+questions+still+linger+over+Lynnview+Ridge/4788608/story.html>>.

³ *Imperial Oil Limited v. Alberta (Minister of Environment)*, supra note 1; *McColl-Frontenac Inc. v. Alberta (Minister of Environment)* 2003 ABQB 303.

⁴ R.S.A. 2000, c. E-12, Part 5, Division 2 (ss. 123-133).

⁵ *Ibid.*, ss. 110(1.1), 112(2) and 113(4)-(5).

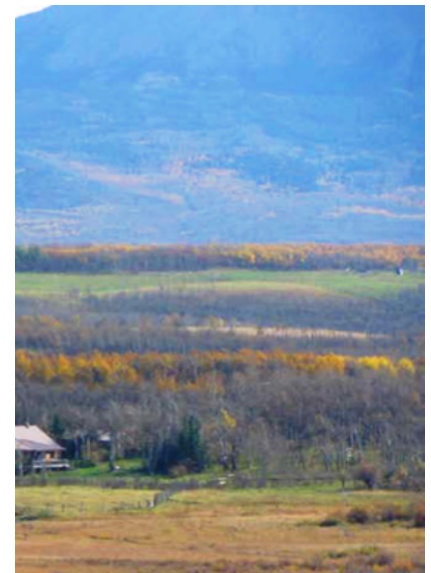
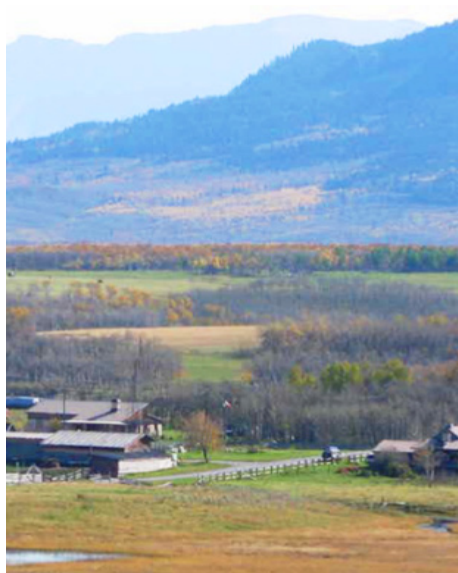
⁶ *Remediation Certificate Regulation*, Alta. Reg. 154/2009.

⁷ *Designation of Public Information Under the Environmental Protection and Enhancement Act*, Ministerial Order 02/2010, online: Alberta Environment <http://environment.alberta.ca/documents/Ministerial_Order_02-2010.pdf>.

⁸ Environmental Site Assessment Repository, online: Alberta Environment <<http://environment.alberta.ca/01520.HTML>>.

⁹ *Home Inspection Business Regulation*, Alta. Reg. 75/2011 (not yet in force).

¹⁰ *Ibid.*, see in particular ss. 1(b), 1(c) and 19(c)(xi).



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