ENVIRONMENTAL LAW CENTRE

NEWS BRIEF

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# WHERE DO OUR LAWS COME FROM? AN ALBERTA PRIMER

By Brenda Heelan Powell, *Staff Counsel*

When one thinks of "the law," images of courthouses, legislative buildings and dusty books spring to mind. Where exactly do our laws come from? In Alberta, there are two sources of law: the common law and government-made law (i.e. legislation).

Common law is the body of law that developed over time as individual cases were considered and decided by the courts. The principles of common law exist in past court decisions (as opposed to any particular body of legislation). As new cases are brought before the courts, past decisions act as "precedents" to guide the courts in decision-making.

Several common law principles that may be useful in environmental cases have evolved over time.[1] The common law principles of nuisance, trespass, negligence, strict liability, public authority liability and riparian rights have proven useful in protecting the environment. Essentially, these common law principles allow remedies for wrongs or injuries committed against a person, a person's property or both. The common law is flexible and can adapt to new issues that arise. However, the common law is reactive and does not achieve the long-term planning necessary for environmental protection.

Unlike the common law, the government can create laws that are proactive and that provide the long-term planning necessary for environmental protection. In Alberta, environmental laws may be created by both the Federal and Provincial governments.[2] The Canadian Constitution[3] dictates which subject matters may be regulated by each level of government. The provincial and federal processes for making laws are similar.[4]

In Alberta, a proposed law is introduced to the Legislative Assembly as a government bill, private members' public bill or as a private bill. The initial introduction is considered the "first reading" of the bill. The next step is "second reading." At this stage, the principles of the bill are debated by the members of the Legislative Assembly and a vote is held. If the bill passes the vote, it is sent for review by the Committee of the Whole. After this review, the bill (and any proposed amendments) undergoes "third reading." At this stage, members of the Legislative Assembly may comment on, criticize or ask questions about the bill. Another vote is held after the third reading. If the bill passes, then it is sent to the Lieutenant Governor for Royal Assent and becomes law.

The federal law-making process is very similar. Typically, a proposed law is introduced as a bill in the House of Commons; although, sometimes a bill is introduced in the Senate (an "s-bill"). The initial introduction of the bill constitutes the "first reading." The next step is "second reading." At this stage the bill is debated by the members of Parliament (or, if an s-bill, by the Senators) and a vote is held. If the bill passes the vote, it is sent for review by Committee. After Committee review, a report indicating proposed amendments is presented to the House of Commons (or, if an s-bill, to the Senate). The bill then undergoes "third reading." At this stage, the members of Parliament (or, if an s-bill, the Senators) debate the bill and a vote is held. If the bill passes the vote, then the bill is sent to the Senate (or, if an s-bill, to the House of Commons) where it undergoes a similar process. If the bill is passed by the Senate (or, if an s-bill, the House of Commons), it is sent to the Governor General for Royal Assent and becomes law.

Once a bill has received Royal Assent, it becomes law but does not necessarily come into effect at that time. A bill may indicate that it comes into effect upon proclamation or on a specified date. If there is no such indication in the bill, then it comes into effect upon Royal Assent. •

[1] For a detailed discussion of common law and environmental protection see Chapter 3 of E.L. Hughes, A.R. Lucas and W.A. Tilleman, *Environmental Law and Policy*, 3rd ed. (Toronto: Edmond Montgomery Publications, 2003).

[2] Municipal governments may also create laws that protect the environment. Municipalities are created by the province and the law making powers of municipalities is defined by the *Municipal Government Act*, R.S.A. 2000, c. M-26.

[3] *Constitution Act, 1867*(U.K.), 30831 Vict., c. 3, reprinted in R.S.C. 1986, App. II, No. 5.

[4] For Alberta's legislative process, see *The Citizen's Guide to the Alberta Legislature*, 7th ed. (2010), online: Legislative Assembly of Alberta <http://www.assembly.ab.ca/pub/gdbook/citizensguide.pdf> and for the Federal Government's process, see *How a Bill Becomes Law*, online: Parliament of Canada <http://www.parl.gc.ca/LEGISinfo/Faq.aspx?Language+E&Mode=1>.

**The ELC would like to welcome our newest staff member.**

**Brenda Heelan Powell**
*Staff Counsel*

Brenda Heelan Powell graduated from the University of Alberta with a B.Sc. in 1993 and a LL.B. in 1996. After practising law with a Calgary law firm, Brenda left private practice to pursue a LL.M. at the University of British Columbia. During her studies at the University of British Columbia, Brenda concentrated on environmental and natural resources law courses.

Upon completion of her LL.M. in 1999, Brenda joined the Environmental Law Centre as Staff Counsel in Edmonton. In 2002, Brenda returned to Calgary and continued to work in the areas of environmental and natural law with the Environmental Law Centre and, later, with the Alberta Energy and Utilities Board. Brenda has now re-joined the Environmental Law Centre as Staff Counsel based in Calgary.

Brenda has published articles and briefs on a variety of environmental law topics. She is also the author of Demystifying Forestry Law, An Alberta Analysis, 2nd. ed.

# FROM THE EDITOR

When I first started at the Environmental Law Centre three years ago I had no background in environmental law. I knew I had a learning curve ahead when I accepted my position. What a curve it turned out to be! Sometimes I felt a lot like this guy:

It took me about 3 months to learn enough about the ELC to feel confident enough to put together a communications plan and get to work promoting the Centre in what I perceived to be the best way possible. But, the learning didn't stop there. If I was going to effectively communicate the ELC's work, I was going to have to come around to understanding just what in the heck these people talk about around the boardroom table.

The language of environmental law is complex, but it's not impossible to learn. In the beginning I spent a lot of time online, in the ELC Library and consulting my trusty Oxford when I didn't understand a word, phrase or concept. In the end, though, I found that the best way to find out what something meant was also the easiest: wander down the hall and ask the experts (a.k.a. my coworkers). Most of you, however, don't have easy access to the resources I do. Hence, this issue of *News Brief*.

This *News Brief* is intended for people like me. Its mission is to explain basic legal concepts in ways the "average" reader (and I don't mean average as in not special, you're all special, right?) can comprehend. I hope you'll take the time to let me know how successful we've been.

Thanks for reading.
Leah

The ELC publishes *News Brief* four times a year, but this definitely isn't all the research and commentary ELC staff members produce. To keep up on the latest happenings around the ELC, sign up for our email updates on our website at www.elc.ab.ca.

Our blog is also a great resource for timely, easy-to-read information on emerging and ongoing issues. You can find it at www.environmentallawcentre.wordpress.com.

We're also on Facebook (www.facebook.com/environmentallawcentre) and Twitter (www.twitter.com/ELC_Alberta).

Feel free to send us your thoughts, comments or questions via any of those sites, or contact me directly at lorr@elc.ab.ca

Image: renjith krishnan / FreeDigitalPhotos.net

# IS THIS A LAW? THE FIELD GUIDE TO GOVERNMENT-MADE REQUIREMENTS

By Cindy Chiasson, *Executive Director*

When it comes to rules and documents made by government, a law is a law is a law, right? Actually, it's not that simple. When it comes to government-made requirements, there are differences between them based on how they are made, their content and whether they are legally enforceable. In environmental regulation, what looks like a law may not necessarily be a law.

This article will cover three types of government-made requirements:

- Statutes (also known as acts), but not to be confused with *statues*, like the one of Wayne Gretzky hefting the Stanley Cup outside of Rexall Place in Edmonton;
- Regulations; and
- Policies.

## Statutes

Statutes, or acts, are laws made by elected representatives in federal Parliament or a provincial legislature. Another article in this issue, *Where Do Our Laws Come From*, explains how statutes are made. Statutes generally set up the framework to regulate a subject area. They set out the basic rules and requirements, as well as the powers of government and its officials in that subject area. For example, the *Environmental Protection and Enhancement Act* creates the framework for regulating activities that might affect Alberta's environment, and the *Alberta Land Stewardship Act* provides the broad structure for land use planning in Alberta. Statutes also set out the power to make regulations, which will be discussed in more detail below, and the permitted scope of any regulations.

## Regulations

Regulations are a subset of statute law. They provide the details of a legislative plan and flesh out the framework provided by the statute. For example, the *Release Reporting Regulation* sets out the requirements for how substance releases must be reported under the *Environmental Protection and Enhancement Act*. The statute will list the powers to make regulations, the person or body that may make the regulations and the subject areas or topics that can be covered by regulations. Regulations that do not comply with the statute enabling their creation are illegal.

Regulations are called subordinate legislation because they are made by a person or body other than the federal Parliament or provincial legislature; for example, Cabinet or a cabinet minister. Cabinet is the group of elected representatives selected to oversee government departments. Individual members of Cabinet are referred to as cabinet ministers, such as the Minister of Environment or Minister of Energy. Statutes may also give powers to certain regulatory bodies or agencies (for example, the Alberta Utilities Commission) to make regulations.

When they are made, regulations are not subject to the same process of public review in either the Legislative Assembly or Parliament that statutes follow, and are usually not released publicly until after they are in legal effect. Some government departments have begun to seek public input as part of the regulation-making process, but this is not mandatory unless required by the statute giving the power to make the regulation.

## Policies

There are also documents that may look like statutes or regulations, but do not have the same legal effect. These are often referred to as guidelines or policy; other terms that may also be used include "standards," "objectives" or "criteria." Policies are usually written documents that give further detail beyond that found in a regulation. A policy may set standards, levels or procedures or deal with other technical matters. For example, the *Alberta Tier 1 Soil and Groundwater Remediation Guidelines* set out Alberta Environment's expectations for clean-up of contaminated sites.

Policies are often developed by government (usually civil servants), but can also be developed by other bodies such as technical or scientific groups (for example, the Canadian Association of Petroleum Producers created the *Guide for Effective Public Involvement* dealing with public involvement in energy development) or policy development groups (for example, the Canadian Council of Ministers of the Environment maintains the *Canadian Environmental Quality Guidelines*, which provide guidance on amounts of toxic substances in air, water and soil). Policy that is directly related to statutes and regulations is usually developed by government, and may or may not be written or documented in some way. This form of policy generally sets out the details of how government will interpret, administer and enforce statutes and regulations.

## So what is a law?

A key difference of statutes and regulations as compared to policy is that statutes and regulations are legally enforceable when properly made. They are enacted and made publicly available in a specified way, to ensure that the requirements they create can be determined by those who are regulated by the statutes or regulations. Policy generally is not legally enforceable due to the informal way it is created and the lack of consistency regarding public availability and accessibility. Policies can be made legally enforceable by specifically incorporating them as part of a statute or regulation. •

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## Reading statutes and regulations*

### 1. Helpful tools

Be sure to use the tools that may be included for assistance, such as tables of contents, headings and marginal notes. Tables of contents are not included in all statutes and regulations. However, where they are included, they may be of assistance in finding a particular section or subject area. Headings will often be used to indicate the subject matter of different parts of a statute or regulation. Marginal notes are found in small print in the margin next to the start of a section, and indicate the subject matter of that section. Keep in mind that schedules to statutes and regulations are part of that legislation, and may be relevant to your interests and research.

### 2. Definitions

Definitions are an important part of any statute or regulation. Words or phrases that have a commonly understood meaning in everyday language may be given a totally different meaning in a statute or regulation. Generally, definitions of terms that are used throughout a statute or regulation are found in the early sections of the legislation, often in section 1 or 2. However, definitions that apply to a particular part or sections of a statute or regulation may be found in the early sections of that part or group of sections instead.

### 3. Enabling powers

The powers given in a statute to make regulations are referred to as enabling powers. These may be found in sections near the end of the statute or at the end of particular parts of a statute. Sections setting out enabling powers are generally worded: "The Minister/Governor in Council/Lieutenant Governor in Council may make regulations prescribing/related to...."

### 4. Offences

Statutes and regulations may also contain sections creating offences under the legislation. Often these sections are located near the end of the statute or regulation, or at the end of a particular part of a statute or regulation. Offence provisions usually are worded to indicate who might commit the offence ("a person who…" or "any person who…"), and what action (or inaction) would constitute the offence ("does/fails to do something is guilty of an offence"). Often offence provisions will also indicate the penalty attached to the offence. Penalty provisions may also follow the offences in a separate section, particularly if the offence section contains a lengthy list of offences. Offences and penalties related to a statute may alternatively be set out in a regulation made under that statute. •

## Interpreting statutes and regulations*

Statutes often use broad terms that can sometimes be subject to different interpretations. For example, a person might be charged with an offence that could be interpreted in two or more ways, and that person might challenge the charge on that basis. When this happens, it is up to a court to decide the correct meaning of the statute or to hold it invalid if it is too vague. Courts are often guided in this task by an Interpretation Act, as well as by certain long-standing legal rules. Judges can also consider the debates in Parliament or the provincial legislature to get an idea of what the drafters of the statute were trying to achieve. These combined factors can lead to statutes being given a meaning that is not always the most obvious, so it is important to look up how the statute has been interpreted.

Regulations are not usually subject to the same kind of review by courts, but they are often accompanied by interpretive aids such as guidelines or policy manuals. A good tactic in trying to determine the interpretation of a regulation is to contact the relevant government department, which will have any interpretive aids that exist or may be able to give an idea of the likely interpretation. Keep in mind, however, that government may not be willing to publicly release or share these policy documents. •

*Note: this information was excerpted and modified from Community Action on Air Quality: Background Materials for Community Involvement in Air Quality Monitoring and Enforcement (Environmental Law Centre, 1999).

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# WHAT ARE MY RIGHTS TO PARTICIPATE IN MUNICIPAL PLANNING?

By Adam Driedzic, *Staff Counsel*

It is important to distinguish participation rights from opportunities. The preparation of a municipal plan provides an example. The *Municipal Government Act* (*MGA*) provides that a municipality has those duties imposed by statutes and any duties that the municipality "imposes on itself as a matter of policy."[1] During the plan preparation stage, the *MGA* requires a municipality to:[2]

- notify the public of the plan preparation process and the means to participate; and
- provide persons who are affected by the plan with an opportunity to participate.

Provincial Land Use Policies established under the *MGA* promote broader participation by encouraging municipalities to:[3]

- inform both interested and potentially affected parties of planning activities; and
- provide appropriate opportunities and sufficient information to allow meaningful participation by residents, landowners, community groups, interest groups, municipal service providers and other stakeholders.

A municipality might interpret the provincial policy as imposing a duty on itself beyond the basic requirements of the *MGA*. It could also impose duties on itself by providing for participation in a statutory plan or its own policy. The chart on page 5 shows that not all duties are equally binding.

A plan could be made in compliance with all relevant statutes and policies and still be invalid for a breach of common law duties. Decisionmakers owe a duty of fairness to persons affected by their decisions. The duty of fairness is strongest on a municipal council when it is acting in a 'quasi-judicial' role rather than a legislative role. Therefore, participation rights become increasingly enforceable as a planning process moves from early consultations, through the presentation of proposed plans, to bylaw hearings and eventually to development permit applications. The best opportunities to influence plans, however, often come early in the process. Early involvement is especially important for parties who might struggle to show that they are directly affected. •

1 *Municipal Government Act*, RSA 2000 c. M-26, s. 5.
2 See *Municipal Government Act*, *ibid.*, s. 636
3 Government of Alberta, *Land Use Policies*, at 2(1). (Edmonton, Government of Alberta, Municipal Affairs, 1996) online: Government of Alberta, Municipal Affairs < http://www.municipalaffairs.alberta.ca/documents/ms/landusepoliciesmga.pdf>. [Land Use Policies].

# FUTURE OF EDMONTON FARMLAND: A CASE STUDY IN MUNICIPAL PLANNING, ISSUES INCLUDED

By Adam Driedzic, *Staff Counsel*

The process is underway to develop an Area Structure Plan (ASP) for Northeast Edmonton. This area contains some of the best class farmland in the North Saskatchewan Region and is currently zoned agricultural. Much of this farmland was purchased on speculation of residential development and the area has been designated as an Urban Growth Area under the 2010 Municipal Development Plan (MDP).[1]

The MDP and the ASP are statutory plans under the Planning and Development part of the *Municipal Government Act* (*MGA*).[2] The purpose of this part is:[3]

> To provide means whereby plans and related matters may be prepared and adopted
>
> (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
>
> (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,
>
> without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

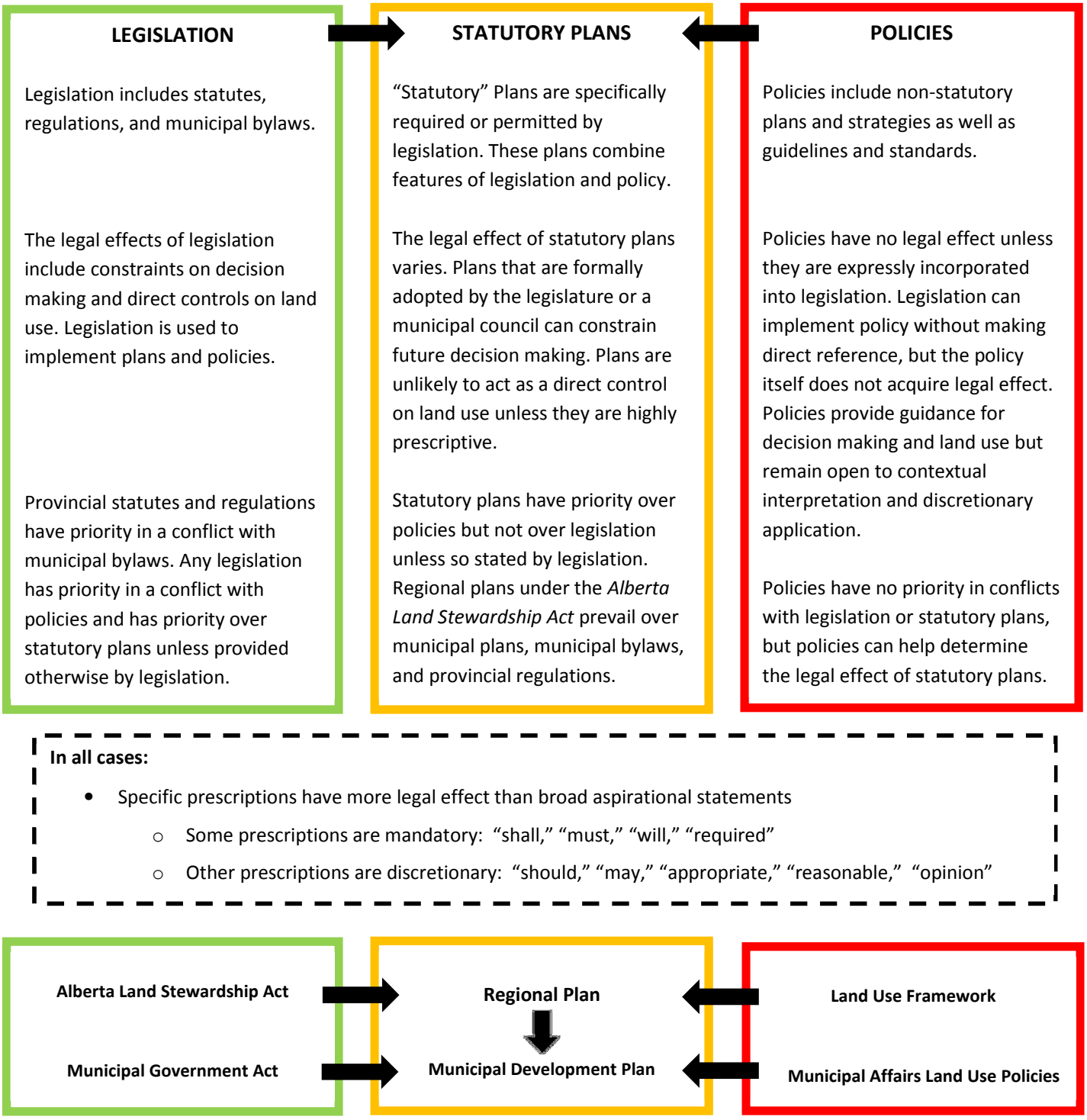
The adoption of a statutory plan does not require the municipality to undertake any of the projects referred to in it.[4]

The MDP is a high level statement of direction that is legally required of any municipality with a population over 3,500. It must broadly address future land use, development, and coordination with adjacent municipalities.[5] Statements on the environment or development constraints are optional.

ASPs are used to provide more detailed subdivision and development plans for large parcels of raw land. They are not required by law, but if created must describe the proposed sequence of development, land uses, population density, and the general location of major transportation and public utilities.[6] Other matters are again optional. Any further guidance on the planning process or plan content is left to other plans and policies. The preparation of an ASP is

continued on page 6

# Are Plans 'Law'? Yes and No



often instigated and funded by large real estate developers, with the municipality providing input as it sees fit.

The City of Edmonton's Terms of Reference for Residential Area Structure Plans affirm that the largest property owner in the area will lead the process. The MDP creates an un-legislated requirement that the ASP include a vision for the area created with area landowners and other city stakeholder groups.[7] This visioning requirement was to have been addressed through a 'design charette' with a Stakeholder Advisory Group held in September, 2011. The Terms of Reference for this group affirmed that it was engaged in ASP preparation, but the group was convened by invitation and its activities were not open to the public. Further participation opportunities will be necessary to meet the requirements of the *Municipal Government Act* and the standards proposed by the provincial Land Use Policies.[8] (see page 4 for participation rights).

There is no legislated requirement that municipalities preserve farmland, but this consideration factors prominently in the statutory plans and policies applicable to Northeast Edmonton. The Capital Region Growth Plan loosely aspires to the preservation of agricultural land. The MDP echoes the provincial Land Use Policies in the need to identify prime agricultural lands and limit their fragmentation.[9] It expressly requires all ASPs to include an agricultural section in support of a municipal Food and Agriculture Strategy.[10] Any ASP for Northeast Edmonton is further required to recognize the value of the area's agricultural characteristics, including specific biophysical attributes.[11]

For the Stakeholder Advisory Group, however, the legal requirements of plans and legislation are off the table. ASP content is to be developed according to the Terms of Reference for Residential Area Structure Plans, which do not require any agricultural considerations in public consultation. When the ASP developer consults with city administration, then considerations will include "protected farmland (if applicable)."[12]

The crux of the issue is timing. The MDP authorizes preparation of the Northeast Edmonton ASP, but only allows it to be approved following the completion of the Food and Agriculture Strategy.[13] As the later initiative is barely underway, ASP preparation is proceeding before the strategic identification of agricultural land. One plan requires another plan to follow a strategy that doesn't exist.

One dispute over the timing of ASP preparation has already come to a head in 2011. In *Re: Okotoks* (*Town of*), the Municipal Government Board considered whether it was premature to adopt an ASP in advance of a provincial water license for the proposed developments.[14] The appellant argued the absence of a license created uncertainty when an ASP is supposed to promote certainty. The Board also considered that the ASP was approved with a wastewater treatment facility closer to residential development than allowed by the *Subdivision and Development Regulation*.[15] Even though water licensing and wastewater authorization are provincial matters, the Board found that it had sufficient jurisdiction over environmental and public health impacts to hear the appeal. The arguments and evidence in this case are pending.

The purpose of planning as provided by the *MGA* might suggest that plans be informed by objective analysis, which in this case might include the prescribed study of agricultural land values. But, as one can see from the chart on page 5, planning is also a political exercise. Perhaps the MDP is sufficiently prescriptive respecting ASP process and content that these are legal duties imposed on the municipality by itself rather than simply aspirational undertakings that it is not required to pursue. Even if the planning exercise is legally permissible, ignoring one plan does little to assure certainty under another. •

**"The policy area in greatest need of reform from the urban perspective is in the preparation of area structure plans."**

Read recommendations on

- Council involvement and leadership in planning;
- Identification and conservation of agricultural land;
- Community-based planning and attunement to local views.

See: *Municipal Powers, Land Use Planning, and the Environment: Understanding the Public's Role* (Environmental Law Centre, 2005)

http://www.elc.ab.ca/Content_Files/Files/MunicipalPowersLandUsePlanning.pdf

Image: Gord McKenna / http://www.flickr.com/people/gord99/

[1] The Way We Grow Municipal Development Plan Bylaw 15100, (City of Edmonton, 2010) online: City of Edmonton <http://www.edmonton.ca/city_government/documents/MDP_Bylaw_15100.pdf>. [MDP].
[2] *Municipal Government Act*, RSA 2000, c. M-26, ss. 632 - 633.
[3] *Ibid.* at s. 617.
[4] *Ibid.* at s. 737.
[5] *Ibid.* at s. 623.
[6] *Ibid.* at s. 633.
[7] MDP, *supra* note 1 at 3.2.1.8.
[8] Government of Alberta, *Land Use Policies*, at 2(1). (Edmonton, Government of Alberta, Municipal Affairs, 1996) online: Government of Alberta, Municipal Affairs < http://www.municipalaffairs.alberta.ca/documents/ms/landusepoliciesmga.pdf>. [Land Use Policies].
[9] MDP, *supra* note 1 , sample provisions include 3.1, 3.2.1.6, 7.1.1.7, and 7.1.1.13; and Land Use Policies, *supra* note 8 at 6.1.
[10] MDP, *supra* note 1 at 3.2.1.8.
[11] *Ibid.* at 3.2.1.9.
[12] City of Edmonton, Terms of Reference for the Preparation and Amendment of Residential Area Structure Plans, Version 5, (City of Edmonton, 2010) online: City of Edmonton < http://www.edmonton.ca/city_government/documents/Area_Structure_Plan_TOR_2010.pdf#xml=http://search1.edmonton.ca/texis/ThunderstoneSearchService/pdfhi.txt?query=%22terms+of+reference%22&pr=www.edmonton.ca&prox=page&rorder=750&rprox=250&rdfreq=0&rwfreq=0&rlead=750&rdepth=0&sufs=1&order=r&cq=&id=4d9af1447. >
[13] MDP, *supra* note 1 at 3.2.1.7.
[14] *Re: Okotoks (Town of)* (January 26, 2011), MGB decision 005/11 online: MGB < http://www.municipalaffairs.alberta.ca/abc_MGB_board_order_search.cfm?fuseaction=SearchDetails&bonum=MGB%20005%2F11 >
[15] *Subdivision and Development Regulation*, Alta. Reg. 43/2002.

# INTEGRATED ENVIRONMENTAL MANAGEMENT: THE ELUSIVE PRIZE

By Jason Unger, *Staff Counsel*

The goal of environmental management is to mitigate human impacts on a complex living system through operational decisions, laws and policies. Managing the environment in an integrated fashion assumes two things: we know how to manage the environment, and we can integrate management across institutional, jurisdictional and legal boundaries. Integration is no easy task and the traditional and current state of affairs is like Swiss cheese, with different governments and different departments each making their own hole.
The size and nature of the holes in the cheese are determined by the Constitution, legislation and the exercise of government discretion under that legislation. Connecting the dots is no easy task.

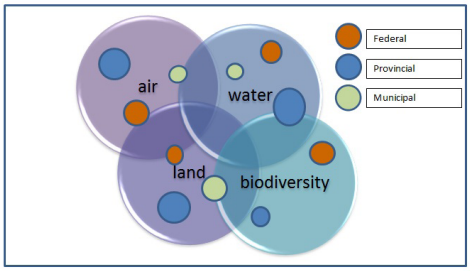



Figure 1: the Swiss Cheese of environmental management

## Integration between governments

Inter-governmental level integration requires recognition of specific realities embodied in section 91 and 92 of the Constitution, which set out federal and provincial jurisdiction.[1] For the "environment" this is not an easy matter as there is no single head of power that gives environmental management and governance to either level of government. Similarly, municipalities, as more regional based decision makers, are limited in their power by their enabling provincial statute. Admittedly, integration between the province and the municipality is far easier to tackle than are Constitutional issues, as the province has near absolute control to limit municipal powers. In practice, however, municipalities maintain significant powers over environmental issues.

Where governments diverge in approaches to a specific environmental issue, conflicts

continued on page 8

## Typical jurisdictional integration issues

**Example #1 Municipal waste water**
The bulk of municipal waste water streams are regulated by the province. Approvals exist for the effluent, and will generally dictate certain standards for waste water releases into surface water. On the federal side there is a protective provision in the *Fisheries Act* that prohibits deleterious substance releases into water frequented by fish. Provincial standards may not cover all deleterious substances, may allow substance releases in deleterious amounts and may rely on the ability of the receiving water to dilute a substance. Federal law is far more protective insofar as the substances covered are broad and the limitation looks at the effluent as opposed to allowing "pollution by dilution." The result has been charges against municipalities under federal legislation for releasing waste water that was deleterious but within provincially approved standards.[1]

It is also apparent that divergent approaches to managing waste water create a level of confusion of what is allowable. Past cases have illustrated how consultants and advisors to municipalities may not appreciate the nature of federal laws. Also, divergent approaches of the law may result in pressures to not enforce the federal *Fisheries Act*.[2]

**Example #2 Municipal actions to protect the environment and citizen health**
Often municipalities may feel they have little say in environmental matters. In some cases this is true, but in others it is quite false. While the Alberta *Municipal Government Act* limits the ability of municipalities to govern aspects of energy and some agricultural developments (and other developments under the jurisdiction of the Energy Resources Conservation Board, the Alberta Utilities Commission and the Natural Resources Conservation Board), municipalities maintain broad bylaw making and planning powers around activities that impact the environment.[3] This includes the ability to regulate land use and the resulting implications for industrial, commercial and residential enterprises.[4] Certainly Alberta Environment has a central role to play, but the provincial agency may not be protective enough for some municipalities. Municipalities appear to generally feel that they cannot control environmental impacts if activities are approved by Alberta Environment. Yet, case law has supported municipal bylaws that are more protective of the environment (and human health) than provincial and federal regulations, as long as they don't directly conflict with the other jurisdictions' laws.[5]

[1] See, for example, the case of the Town of Beaverlodge which was fined under the *Fisheries Act*. See Environment Canada, Enforcement Notifications, August 27, 2008, online: Environment Canada <http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=CCAA8EDB-1>. This case involved the release of effluent with a pH which was deleterious to fish. A provincial approval was present; however, it did not cover pH. Also see *Siksika Nation Elders Committee and Siksika Nation v. Director, Southern Region, Regional Services, Alberta Environment , re: Town of Strathmore* (18 April 2007), Appeals Nos. 05-053-054-R (A.E.A.B.), online: Alberta Environmental Appeals Board, <http://www.eab.gov.ab.ca/dec/05-053-054-R-Erratum.pdf> for an example of misperceptions of the application of the *Fisheries Act* at 36.
[2] While there is limited evidence of pressure around enforcement one can read between the lines in the circumstances surrounding attempted private enforcement of the *Fisheries Act* against the Greater Vancouver Regional District (GVRD) for its waste water stream. A private prosecutor initiated a prosecution against the GVRD twice only for it to be stayed by the Provincial Attorney General. See Sierra Legal Defence Fund, *The National Sewage Report Card (Number Two)* (August, 1999), online: Ecojustice < http://www.ecojustice.ca/publications/reports/the-national-sewage-report-card-ii/attachment >.
[3] See *Municipal Government Act*, R.S.A. 2000, c. M-26 at ss. 618-619.
[4] This includes such things as aggregate extraction activities, subdivision, and the construction and operation of industrial facilities (not governed by the ERCB or NRCB).
[5] See the *Municipal Government Act, supra* note iv at ss. 3 & 7. See *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (town),* (2001) SCC 40. This led to a challenge under the North American Free Trade Agreement, however, the ban remains in effect. One difficulty municipalities face more than other levels of government is having sufficient resources and expertise to monitor and assess environmental impacts. The willingness (or lack thereof) of municipalities to take on the potential legal costs associated with restrictive land use decisions may also prove a barrier.

may arise. Generally, the federal government holds a trump card in relation to many environmental matters that are validly within its constitutional jurisdiction. The most contentious areas of overlap where the federal government may get involved include greenhouse gas management, species at risk and environmental assessment. Also, the federal government has significant jurisdiction and a role to play in managing fisheries, fish habitat, pollution that may harm fish and hazardous substances.

## Integration across departments

Similar to jurisdictional constraints, our laws and policies have evolved to isolate areas of the environment and decision-making in a manner that often ignores the environment as a whole. Often referred to as a "silo" effect, the legal and institutional frameworks that govern the bureaucracy are typically good at isolating the scope of decisions, notwithstanding the impacts on other areas of the environment. To take the Swiss cheese analogy further, departments know the circumference of their bubble and are constrained from expanding past that bubble, both by our laws and by self-imposed (or policy imposed) limitations on how a decision-maker exercises their discretion.

These interdepartmental constraints may thwart true integration of environmental management. Alberta Environment and Alberta Energy may make decisions seemingly indifferent to species at risk. Similarly, Alberta Sustainable Resource Development may pay limited attention to the impacts of public land activities on water resources.

This integration issue is exacerbated in instances where a decision-maker views their discretion as limited, notwithstanding the legislative mandates. The drivers for viewing one's discretion narrowly may be policy (and politically) driven or be based in some perception of risk ("Is my decision going to get the government sued?") associated with using broad discretion. For example, under the *Environmental Protection and Enhancement Act* (*EPEA*) the breadth of the definition of the "environment" and "adverse effect" would enable the Director designated under *EPEA* to undertake various actions related to species at risk, something more centrally under the jurisdiction of Alberta Sustainable Resource Development.[2]

Yet, one would be hard pressed to find an example of Alberta Environment exercising discretion in this manner.

In the end, failures to integrate environmental management and governance may reflect a real or perceived "passing of the buck" on holistic environmental management. This in turn may lead to failures to adequately consider environmental impacts of an activity.

## Conclusion

Integration of environmental decision making and governance may hold out some hope for better environmental management. Unfortunately it appears that the more one moves to holistic, outcome based environmental management the more one needs increased technical, scientific and financial capacity to reach those outcomes. This is to note that efficiency gains in integrated decision making may be vastly out weighted by costs associated with proper monitoring, oversight and compliance around environmental outcomes.

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### Recent efforts to integrate: a quick assessment

The Alberta Land Stewardship Act (ALSA) is aimed at creating regional plans that are binding on other decision-makers. If the plans that are produced are comprehensive in their approach, ALSA may resolve some frustrations over what land use should prevail and may, in some instances, lead to more holistic environmental management. Proposed regulations under ALSA also pursue a method of integration through the creation of a cumulative effects management (CEM) system.[1] The proposed CEM regulations set triggers for specific management actions and thresholds over which limitations on further authorizations are set. The environmental objectives are based on environmental indicators and this reflects an attempt to integrate all impacts on the environment.

The CEM system has significant law and policy hurdles to overcome. First among them are regulatory gaps in the current Alberta legislative framework. These gaps include allowing some activities that may contribute significantly to cumulative environmental impacts to escape regulatory oversight.[2] Second, there is limited accountability in the proposed CEM structure to ensure that environmental triggers and thresholds lead to effective changes in regulatory oversight. Finally, the resource intensity of monitoring cumulative effects, identifying relevant contributors and the extent of their contribution, and pursuing compliance is likely to be extremely high.

The other significant area of integration is the move towards an energy super board or single energy regulator.[3] This move would see the roles of several government departments rolled into one, all requiring legislative changes in relation to management of emissions, water use, use of public lands and reclamation. From an environmental perspective, this type of integration is worrisome primarily because the use of the ERCB model may not be in line with a true melding of mandates from different departments. Notwithstanding the ERCB's public interest mandate, one would be hard pressed to argue that the current legislative mandate, the Board's approach to public interest determinations and institutional structure, funding and history have favoured environmental outcomes. Further, the need to incorporate sufficient expertise and capacity is also a concern, as is transparency and participation in regulatory review processes. To be fair the intended aim of this integration process is not better environmental protection; nevertheless, the legislative changes that will be required offer an opportunity to fully address some long standing failures of integration of environmental matters in development, particularly in areas where lands of high environmental value (sensitive and rare species, high habitat values, watershed function) are the subject of potential energy projects.

[1] See Government of Alberta, Proposed Lower Athabasca Integrated Regional Plan Regulations, (Edmonton: Government of Alberta, 2011), online: Land Use Framework, <https://www.landuse.alberta.ca/Documents/LARP%20Proposed%20Lower%20Athabasca%20Integrated%20Regional%20Plan%20Regulations-P3-2011-03.pdf>.
[2] For example, there are no regulations relating to phosphorus loading of surface water from non-point sources.
[3] See Government of Alberta, Enhancing Assurance: Developing an integrated energy resource regulator, (Edmonton: Government of Alberta 2011), online: Alberta Energy <http://www.energy.alberta.ca/Org/pdfs/REPEnhancingAssuranceIntegratedRegulator.pdf>.

Due to the inherent limitations of human knowledge and the lack of a clear regulatory compliance ladder to reach environmental objectives covering all relevant activities, it appears that recent efforts to integrate governance in Alberta will not assure environmental outcomes. The rhetoric of environmental protection is front and centre, but in attempting to connect the dots of the Swiss cheese we just may make one big mess. Nevertheless, integration of environmental management remains necessary. Admittedly the Constitution is mildly constraining on this front; however, there are numerous opportunities to integrate holistic environmental management through environmental assessment and more ambitious implementation of cumulative effects management at national, provincial, regional and local scales. •

[1] *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3.
[2] See *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E – 12, at s. 70(3)(a)(i) for example, which allows the suspension or amendment of approvals where an "adverse effect" was not foreseen at the time of the approval. The definition of "environment" includes "all organic and inorganic matter and living organisms" and the phrase "adverse effect" means "impairment of or damage to the environment, human health or safety or property" at s. (1)(b) of EPEA.

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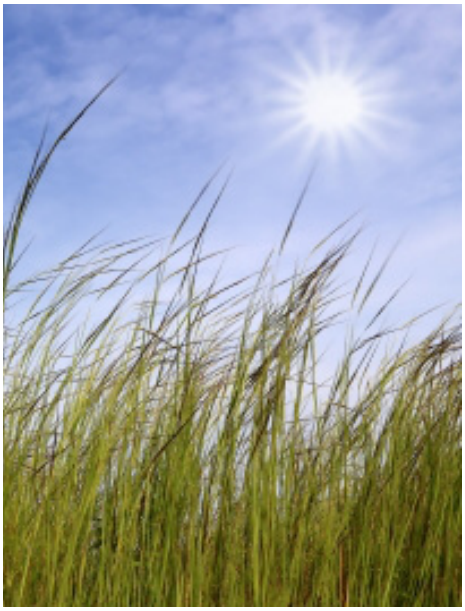
**The next issue, out by the end of 2011, will focus on the basics of administrative law.**



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