ENVIRONMENTAL LAW CENTRE

September 2, 2010 Our File: 5320

Honourable Mel Knight
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Sustainable Resource Development
Legislative Services
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Dear Minister Knight,

RE: Comments on the proposed *Public Lands Administration Regulation*.

The Environmental Law Centre (ELC) is a charitable organization incorporated in 1982 as a public source of information on environmental law and policy in Alberta and Canada. The ELC's mission is to ensure that laws, policies and legal processes protect the environment. The ELC is pleased to provide comments on the proposed *Public Lands Administration Regulation* (*Draft Regulation*).[1]

Introduction

Alberta has a significant amount of Crown owned, i.e., public land, which should be governed as a public trust. Management and dispositions of Crown land must recognize specific Crown duties toward the broader public and exercise their discretion in the public interest, to see that the environmental, social, and economic benefits of the land are not degraded for future generations.

The *Draft Regulation* has various provisions that support the public interest mandate, including providing increased transparency, empowering the establishment of disturbance standards on public land, and establishing reclamation processes which are not currently covered in other legislation.

The ELC commends the steps taken in the *Draft Regulation* but would recommend amendments to include a variety of environmental conditions that are relevant to public land management. These recommendations are set out below.

[1] Sample *Public Lands Administration Regulation*, AR_/2010, online: Alberta Sustainable Resource Development, <http://www.srd.alberta.ca/Newsroom/SRDSurveys/documents/SRDSurvey-PublicLandsActRegs-SAMPLE-Aug2010.pdf>. (*Draft Regulation*)

Public land restoration and reclamation

The *Draft Regulation* provides for reclamation approvals on Crown land in addition to conservation and reclamation requirements pursuant to the *Environmental Protection and Enhancement Act* for "specified land" and any requirements set out in a regional plan under the *Alberta Land Stewardship Act*.[2] The ELC supports the public land reclamation framework set up by the regulation; however, the general discretion found in s. 18 to waive reclamation requirements in the *Draft Regulation* should be narrowed. Waiver of reclamation requirements on public land should not be permitted except in instances where the reclamation would be deemed counterproductive due to planned and approved land uses (for example, a logging road that will be used for hydrocarbon exploration or production).

The *Draft Regulation* also sets the reclamation standard that would see the public land return to the condition it was in "before the disposition was issued".[3] While this is laudable, efforts should be made to integrate reclamation standards across departments. *EPEA* and the *Conservation and Reclamation Regulation* dictates a standard of having land meet the "equivalent land capability" for "specified land".[4]

In addition, there is a need to ensure that there is sufficient information gathered by the department and available to the public about the site of the disposition prior to an activity proceeding. In this regard s. 9 of the *Draft Regulation* should include a requirement to submit, during an application for disposition, a reclamation plan of public lands. Guideline documents for certain types of formal dispositions could be prepared for this purpose to address any concerns on the part of disposition holders.

The *Draft Regulation* should also enable the Director to assist, financially or actively, in reclamation of public lands to a higher standard where historical reclamation has been deemed to be inadequate. This would allow the Director to require a higher standard of approval but would require the government to cover the cost above the condition of the land prior to the disposition.

In addition, a transition provision should be included to prescribe the preparation of reclamation plans for existing disposition holders by a certain date.

Priority public lands

The *Draft Regulation* presents an opportunity to create a process to formalize timely reclamation of lands that are a priority for environmental reasons. In this regard, the *Draft Regulation* should oblige the Director to pursue a system to identify public lands (i.e. "priority reclamation zones") of high environmental and watershed value for targeted and timely restoration and reclamation. This framework would directly address closure and remediation of access roads and other linear disturbances that have caused ongoing problems for sustainable public land management. This

[2] *Ibid.* at s.16 (1)(f) and s.18(5).
[3] *Ibid*. at s. 18(2)(a).
[4] See the *Conservation and Reclamation Regulation*, Alta Reg. , 115/1993, at s.2 and definitions.

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framework can also be used to determine which lands should be reclaimed to a higher standard (with government assistance, as set out above).

The *Draft Regulation* should be amended to enable the establishment of priority reclamation zones. These zones should have prescribed conditions and timelines regarding abandonment, remediation and reclamation.

Access management

There is a need to be proactive in management of access on public lands. Access to public lands should be managed based on maintaining the ecological integrity and watershed function of those lands. This necessitates limiting access where it would cause degradation to rare, unique or otherwise valued ecosystems and ecosystem components.

Road closure powers

Section 88 of the *Draft Regulation* should be amended to empower the Director to close a road to users unrelated to the licence. The Director should be able to control road access by non-licencees at his/her own discretion. There is no reason that the consent of the licencee is required for this purpose, as the licenced purpose remains in place.

Further, s.86 of the *Draft Regulation* should be amended to allow the Director and/or Minister to place conditions or establish any standards for road construction the government deems appropriate. If such conditions or standards are viewed as inhibiting the primary purpose of the licence, this could be appealed to a panel (under Part 9 of the *Draft Regulation*).

Trespass

The *Public Lands Act Regulation Survey* (at s.4) indicates, by way of example, that s. 25 of the *Draft Regulation* can be used to protect fragile ecosystems.[5] As s. 25 currently is limited to orders related to property and public health and safety there is a need to add language specific to orders made to protect "fragile ecosystems".

Range development and improvement plans

Part of sustainable range management is ensuring watershed protection and ecological integrity is preserved. Measures aimed at these goals should be expressly included in the planning for range management as defined in the *Draft Regulation*. In this regard sections 1(1)(jj) – (mm) should be amended to include range standards for watershed protection and ecological integrity. Guidelines and information documents should then be compiled to facilitate the creation and implementation of sustainable range management plans.

[5] Alberta Sustainable Resources Development <http://www.srd.alberta.ca/Newsroom/SRDSurveys/documents/PublicLandsActRegulationSurvey-P-FINAL-Aug2010.pdf>.

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Disposition constraints related to species at risk

The *Draft Regulation* should integrate important linkages between public land management and preservation of wildlife species at risk. Where the proposed activity is to take place where a species that is listed as threatened or endangered pursuant to the *Wildlife Act* (and Schedule 6 of the *Wildlife Regulation*) is located the Minister or Director should be prohibited from issuing dispositions, approvals, or authorizations. This should include the species itself, its residence or nest and its habitat more broadly.

The Director and Minister should similarly be constrained where there are potential impacts on listed species where an application relates to:

1. Issuance of access permits under s. 30(1) of the *Draft Regulation*; and

2. Issuance of a mineral surface lease that is governed by s. 9(5) of the *Draft Regulation*.

The Minister and Director should also be expressly empowered to limit access or activities that are likely to impact a listed species.

Disturbance standards

The general principle of having disturbance standards is supported by the ELC. The ELC recommends adding a procedural aspect to the creation of standards to facilitate public input in the process. Draft standards should be made available for comment through a public registry system.

The *Draft Regulation* also empowers the Minister to enter into agreements for specific disturbance standards that would result in reduced rentals and other fees payable.[6] This is potentially at odds with other stewardship initiatives that are found in the *Alberta Land Stewardship Act* (*ALSA*), namely, the concept of offsets. A system of requiring offsets for a disturbance on public land will effectively incentivize minimizing and avoiding disturbance wherever possible. There is a need for policy clarity around when benefits would accrue to proponents to meet disturbance standards and when offsets will be required for specific disturbances as contemplated by *ALSA*.

In this regard, the ELC recommends a hierarchical approach to managing impacts on public land. First, the regulatory framework should include substantive provisions mandating avoidance of areas of environmental significance, based on such issues of concern as the presence of rare or unique species and habitats, watershed function, or general aspects of habitat integrity to support sustainable populations of wildlife. Second, where avoidance is deemed impossible or where areas are deemed suitable for development, mitigation and compensation will be the focus of a regulatory framework. The *ALSA* contemplates a system whereby development in one area facilitates greater environmental gains in another. The ELC has concerns regarding the *ALSA* approach insofar as it allows for significant tradeoffs to be made in a manner that may not result in overall ecological integrity and sustainability. However, the ELC also recognizes that

[6] *Ibid*. at s. 3(6).

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economic development and resource development in many instances can be done in a manner that minimizes impacts on the environment and may contribute to beneficial practices being pursued elsewhere. The ELC recommends that disturbance standards be based on the best management practices available for a specific sector and that agreements contemplated under s. 3(6) of the *Draft Regulation* defer to an offset approach as contemplated by the *ALSA*.

Violation of disturbance standards must also attract an enforcement response. This may include a monetary penalty and administrative orders mandating compliance with the standard. Monetary penalties must be over and above any monetary benefit attained by violating the standard.

Access to Information

Part 6 of the regulation provides increased transparency and information regarding dispositions, approvals and authorizations on public land. The ELC strongly supports the information disclosure provided in s. 174 of the *Draft Regulation*. The ELC would recommend expanding the enumerated list of items that must be disclosed to the public to include annual operating plans where they are required by regulation, operating ground rules, or codes of practice.

Further, in relation to the determination of confidentiality there should be a stated assumption of public disclosure placed in the regulation. While the current wording retains government discretion to determine the confidential nature of documents, the breadth of potential claims of confidentiality as being "harmful to business" must be ameliorated by a presumption of public knowledge pertaining to activities on public land.

Appeals

The appeal process for public lands should ensure that the best decisions are made regarding dispositions and authorizations on public land. Limiting standing to bring an appeal to holders of a disposition or authorization and adjoining landowners undermines this goal. The public interest can only be elucidated through effective public involvement in approval and appeal processes.

Standing to bring an appeal under s. 230 should be amended to allow for public interest input in the process to be brought by those with a genuine interest in the effective and sustainable management and preservation of public lands. This is particularly the case considering the nature of the ground of appeal being limited under s. 229.

It is antithetical to the public nature of Crown land and its long-term sustainable management to limit appeals to those parties who only have a direct interest in activities that have the greatest environmental impacts on the land. For example, under the current *Draft Regulation* a party seeking an access permit for an event can appeal the Director's decision, and yet a lower impact user of that same land has no say in the original decision or the appeal. In effect, the *Regulation* is vesting more rights for those who pursue more deleterious activities on public land and silencing those who would argue against such approvals and dispositions.

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In addition, the right to appeal to subletting and mortgage decisions should be removed (at s. 227 (xiv)(xv)).

In addition, the proposed regulation should include provisions to allow for third party interventions in appeal processes.

Grounds for appeal - substantive evidentiary contributions to application decisions

The *Draft Regulation* should be expanded to include a mechanism to allow interested parties to submit statements of concern regarding applications for dispositions, including land sales or exchanges, authorizations and approvals. This approach, used in the *Environmental Protection and Enhancement Act*, would require public notice and filing a statement of concern to the department within prescribed timelines. The Director should be required to consider the filed statements of concern of those parties who have illustrated a genuine interest in management of public lands, as reflected in past and current work on issues relevant to public land, wildlife and environmental management.

Panel members and natural justice

The *Draft Regulation* contemplates the use of department employees to determine appeals.[7] This is problematic from an administrative law perspective as the impartiality of the adjudicative panel is likely to be put in question due to arguments about an apprehension of bias. In describing the five types of bias in law Jones & De Villars note: [8]

> The third type of situation is when the decision-maker has acquired knowledge of or has been involved in the matter in some capacity other than his or her capacity as a decision-maker.

The *Draft Regulation* sets out that "managers" will be appointed for appeal purposes giving rise to arguments of institutional and structural bias. Institutional bias has been found where tribunal staff have overlapping functions, such as having roles on multiple tiers of decision-making processes.[9] In the present situation there appears the potential to have an appeal panel that would have input into the original decision, raising a real possibility of bias claims.

Timing of Day appeals

The *Draft Regulation* sets out a very short timeline to determine the validity of Stop Orders issued under the Act and Regulations. Specifically it requires the department to respond in a day, failing which the decision is set aside.[10] This tight timeline is problematic as there may be informational constraints to justify the replacement of the Stop Order with an Enforcement Order as contemplated by s. 183 of the *Draft Regulation*. There is the risk that the timeline will make

[7] *Ibid*. at s. 227 (k) defines panel as those appointed by the Appeals Coordinator from among management employees of the Department (or third parties by agreement).
[8] *Principles of Administrative Law,* 5th ed. (Toronto: Carswell, 2009) at 403-404.
[9] *Ibid.* at 429.
[10] *Ibid*. at ss. 247(1)(a) and 255

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dealing with the merits of the Stop Order on appeal difficult. Effectively, the timeline transfers the risk to public land in favour of proponent interests. The risks of this short timeline are compounded when one considers the difficulties that may arise in having an Enforcement Order in place of a Stop Order within a day. In this regard, the timeline for Stop Orders should be extended to 72 hours.

Reinstatement of dispositions

Dispositions may be cancelled for a variety of reasons including Crown indebtedness, violations of dispositions, and fraud or misrepresentation. When a disposition is cancelled there are questions about whether the disposition holder is able to operate on public lands in an appropriate manner. An appropriate level of public transparency and participation must accompany the reinstatement process. The *Draft Regulation* should be amended to allow for third party statements of concern to be presented to the Director in exercising this discretion and participation in appeals related to the reinstatement hearings pursuant to s. 165 of the *Draft Regulation.*

Limiting subletting and mortgaging of dispositions

The ELC recommends removing provisions in the *Draft Regulation* related to subletting. While the *Draft Regulation* limits the extent of subletting that is possible (at s. 168), public land should be managed as a public trust, by the department. Subletting of public land may result in unjust enrichment of the disposition holder for, in effect, managing public lands on behalf of the province. The use of assignment provisions found in Part 5 of the *Act* and *Regulations* is a preferred method of dealing with dispositions.

Subletting may give rise to difficulties in enforcement and compliance actions where disputes arise between the sublessor and sublessee.

Mortgaging of dispositions on public lands should also be limited. Should the mortgage be called it would give rise to uncertainty as to the management of public land. Those seeking dispositions on public land should have sufficient capital to operate in the absence of a mortgage. If disposition holders have insufficient capital to operate within the terms and intent of the disposition and cover any damages that may occur to the public land due to their operations, their disposition should be suspended or cancelled.

Administrative Penalties

The cap on administrative penalties in the *Draft Regulation* should be raised from $5000.[11] The objective of administrative penalties is efficiency in promoting compliance and the penalty must not merely reflect a cost of doing business. A maximum penalty of $5000 may result in fines that do not satsify this aim.

In this regard, the monetary benefit gained by the party who has violated s. 59.3 of the Act, the gravity of the harm, and the nature of the contravention should be considered in coming to a

[11] *Ibid*. at s. 187(4)

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suitable administrative penalty.[12] The ELC recommends raising the administrative penalty limit to $20,000 to ensure sufficient leeway to deal adequately with all scenarios that may attract administrative penalties.

Conclusion

The *Draft Regulation* provides a step forward in public land administration and management; however, to reflect the public interest in these lands there is a need to integrate and expand the regulation to adequately address public participation in decision-making and access management and to minimize environmental impacts of dispositions on public land.

Please do not hesitate to contact the ELC if you have any further questions in this regard.

Yours truly,

Jason Unger, Staff Counsel

cc: Kent Hehr, Liberal Critic Sustainable Resource Development
Brian Mason, NDP Leader
Rob Anderson, Wildrose Alliance

[12] For an example of this approach see the Ontario *Environmental Penalties Regulation*, O.R. 222/07, online: Government of Ontario <http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_070222_e.htm>.

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