

## Back to square one: summary judgement on an oil and gas lease validity issue set aside

By Nigel Bankes

### Draft commented on:

[Draft Lower Athabasca Regional Plan 2011 – 2021, Strategic Plan and Implementation Plan;](#)  
[Proposed Lower Athabasca Integrated Regional Plan Regulations](#)

On April 5, 2011 the Government of Alberta (GOA) moved a step further to implementing the *Alberta Land Stewardship Act*, SA 2009, c.A-26.8 (*ALSA*) when it released a draft version of the Lower Athabasca Regional Plan (LARP) for public consultation. *ALSA* has been much in the news in Alberta over the last few months and the legislation has been embroiled in debates over property rights leading the GOA to introduce a Bill (Bill 10) to amend *ALSA* to, inter alia, clarify the relationship between regional plans and property rights. I have commented on that debate (see [here](#)) and on Bill 10 (see [here](#)).

But whether you support this legislation as an essential step towards the effective management of cumulative impacts at the landscape level in order to maintain ecosystem health, or attack it as an unreasonable interference with the property rights of Albertans, all of the commentators agree that it is impossible to fully evaluate the impact of the legislation until we see the first plans. This is what is so important about the Draft LARP. True, it may be revised before ultimately being adopted by the Lieutenant Governor in Council, but I don't think that we should expect it to change that much; this version of the Plan is much more than a strawperson floated to measure the degree of political opposition or support that the Plan will attract.

This blog provides an outline of the documents that were released on April 5. I aim to provide subsequent blogs that will focus on some more specific legal issues such as: (1) what does the Draft Plan tell us about property rights and how does the Plan deal with existing property interests? and, (2) What is the legal effect of the Plan? How will the Plan be implemented? And what are the relative responsibilities of the line departments of government and the office of the Stewardship Commissioner and the Land Use Secretariat?

### The documents

The GOA has released two documents. The first is a document entitled “Draft Lower Athabasca Regional Plan 2011 – 2021”, and sub-titled “Strategic Plan and Implementation Plan”. The second document is entitled “Proposed Lower Athabasca Integrated Regional Plan Regulations”. The titles and the breakdown between the documents deliver the message that a regional plan will be comprised of a number of elements, a vision or a strategic plan (particularized to the region), an implementation plan (and perhaps other plans or “management frameworks” – see the discussion below), and a set of regulations. The first two elements of the Plan are written in the

style of a government policy and planning document, the second is drafted in the familiar style and language of a set of regulations.

The Strategic Plan covers some 17 pages of text. The first part of the Strategic Plan provides a description of the region today beginning with economic development and then, successively, ecosystems and the environment, and human development. The second part of the Strategic Plan turns to the future of the region describing both a regional vision and setting out how that vision is to be achieved, including a series of seven strategic directions (at 14):

- Improving the integration of industrial activities on the landscape;
- Encouraging timely and progressive reclamation of disturbed lands;
- Managing air, water and biodiversity through management frameworks that take proactive approaches and set limits and triggers, and minimizing land disturbance in the region;
- Designating new conservation areas that are large, interconnected and maintain intact habitat to support biodiversity;
- Strengthening infrastructure planning to support future growth of the region;
- Designating new recreation and tourism areas to provide diverse recreation opportunities to local residents and tourism products for visitors to the region; and
- Inclusion of aboriginal peoples in land-use planning.

Rather than comment on each of these strategic directions I will expand here on the third bullet which refers to air, water and biodiversity and minimizing land disturbance. Here the Strategic Plan contemplates that the GOA will manage cumulative effects at the regional level through regional management frameworks. The Draft suggests that such frameworks have already been developed for air quality, surface water quality and groundwater (although whether these “frameworks” are adequate may be open to question) and that these frameworks contain limits (clear boundaries in the system that cannot be exceeded) and triggers (which serve as warnings signaling the need for evaluation, adjustment or innovation). The Plan further contemplates that the GOA will complement these air and water quality management frameworks in the area of water quantity by updating (by 2012) the Instream Flow Needs Water Management System of the Lower Athabasca. This management framework deals with water quantity issues on the Athabasca. Further complementing these arrangements will be a new biodiversity management framework (to be developed by 2013) and a regional land disturbance plan (also by 2013).

For the purposes of the Implementation Plan (15 pages plus appendices) the seven strategic directions are reframed as *outcomes* with accompanying *objectives*, *strategies* and *indicators*. The *outcomes* do not match directly or map on precisely to the strategic directions. The regional outcomes (there are also more general provincial outcomes) are framed as follows (at 24):

1. The economic potential of the oil sands resource is optimized;
2. The region's economy is diversified;
3. Landscapes are managed to maintain ecosystem function and biodiversity;
4. Air and water are managed to support human and ecosystem needs;
5. Infrastructure development supports economic and population growth;
6. The quality of life of residents is enhanced through increased opportunities for recreation and active living; and
7. Aboriginal peoples are included in land-use planning.

Thus (to stay with the same example, bullet 3), the strategic direction discussed above is achieved in part through outcome 3 and in part through outcome 4. To focus on outcome 3, the Draft Plan identifies the following as the objectives (at 28):

- Enhance the regional network of conservation areas to support biodiversity and ecosystem function.
- Regional biodiversity objectives are developed for various indicators of terrestrial and aquatic biodiversity in the region.
- Land disturbance impacts to biodiversity should be avoided or mitigated.
- Enhance the rate of reclamation and reduction of tailing ponds.

The five Strategies for achieving the objectives are listed as (at 28 – 29):

- a) Increase the amount of provincial Crown land under a conservation designation.
- b) Develop a biodiversity management framework for green area public land and provincial parks in the region by 2013 ...
- c) Develop a land disturbance plan for public land in the Green Area for the Lower Athabasca Region by 2013. ....
- d) Complete a tailings management framework to support effective management of tailings. This strategy will complement the existing Energy Resources Conservation Board Directive 074 to reduce the volume of mature fine tails present on oil sands facility sites.
- e) Implement the progressive reclamation strategy enhancing the suite of policies, strategies and reporting mechanisms used to drive progressive on-going reclamation of mining operations....

The Draft Plan provides further details as to what is contemplated for each of the new biodiversity management framework and the new land disturbance plan. (And by the way, what is the difference between a plan and a management framework? And is a framework an “issue-specific plan within the meaning of s.10 of *ALSA*?).

The indicators that are to be used to assess progress in achieving the listed objectives are (at 30):

- Status of Alberta species, including species at risk.
- Area of land disturbance (by type) on public land in the region.
- Status of biodiversity indicator.
- Area of land retained in native vegetation.
- Area of oil sands reclamation.
- Volume of fluid tailings

The final element of the package is the Draft Regulations. The Regulations are divided into six parts: Part 1, Interpretation; Part 2, Conservation of Ecosystems (with Divisions for Conserved Land, Conservation Areas and Biodiversity); Part 3, Effects Management (with Divisions for Air Quality, Surface Water Quality and Groundwater); Part 4, Recreation and Tourism; and Part 5, Entry into Force and related amendments.

Included in the Interpretation Part are some crucial statements as to the legal effect of the LARP Strategic Plan and the LARP Implementation Plan (and see also s.13 of *ALSA*). Thus the provisions of the Strategic Plan are (s.4) to be interpreted as “statements of provincial policy *to inform* the Crown, decision makers, local government bodies and all persons ...” which decision makers and local governments must “*consider*” in making decisions following adoption of the Plan. By the same token, the Implementation Plan is to “guide and direct” (s.5) the Crown, decision makers, and local government bodies in their activities and decision-making and these entities must similarly consider the terms of the Implementation Plan. The Draft proposes to set 2 years as the period within which compliance must be established by decision-making bodies and 5 years for municipalities (see *ALSA* ss. 20 – 21). This is a reference to the very onerous responsibility that the statute imposes on municipalities and decision-making bodies to review their regulatory instruments, to determine if new instruments are required to ensure compliance with a regional plan and to file a declaration with the secretariat certifying compliance with the plan.

The heart of the Regulations - at least so far as the planning process deals with the problem of cumulative impacts - is found in the different divisions of Parts 2 and 3. Each of these Divisions is structured along common lines and I will use the Biodiversity Division as a common example following (selectively) the headings used in the regulations: Designated Minister, Application of the Division, Definitions, Programs to Manage Effects, Tables (incorporated from the schedules), the Legal Effect of Limits, and Management Responses.

While it is in some respects problematic to use the Biodiversity Division as an example (since the province has yet to develop the promised biodiversity management framework and the land disturbance plan – see above), this is the concept that has the greatest potential to cut across the line responsibilities of different departments and decision-makers.

The Biodiversity Division is stated to apply (s.18, and acknowledging that we will not see the final version of the Biodiversity regulations until 2013) to the Crown, decision-makers, local government bodies, and (subject to the proposed s.15.1 of the *Act*, see Bill 10, this is the proposed new variance power) all other persons. Under the heading “Programs to manage effects”, s.20 contemplates that the Minister “shall establish and maintain” programs for a Biodiversity Management Framework as follows:

- (a) managing land disturbance limits and triggers that in the opinion of the Designated Minister are indicators of the biodiversity health for the planning region;
- (b) regulating the sources of land disturbance referred to in clause (a) to [*sic*] so as not to exceed an applicable limit referred to in clause (a);
- (c) regulating the sources of land disturbance referred to in clause (a) to [*sic*] so as to mitigate the effect of exceeding an applicable trigger referred to in clause (a);
- (d) monitoring and evaluating the land disturbance in respect of public land in the planning region as part of a provincial biodiversity monitoring program;
- (e) evaluating the effectiveness of the framework in meeting the biodiversity health objectives stated in the LARP Implementation Plan;
- (f) reporting on the monitoring and evaluation referred to in clauses (d) and (e), including reporting on adverse trends or effects; and
- (g) informing decision-makers about applicable limits for the purposes of section 22. (emphasis added)

The structure outlined here is common to the other divisions, i.e. each of the parallel sections begins by indicating that the Minister is to establish programs to implement the subject-specific framework (e.g. biodiversity, air quality, surface water quality, groundwater). The Minister is to do that by establishing limits and triggers that in the Minister's view represent useful indicators of (in this case) biological diversity. I will refer to this below as the "indicators decision". Once s/he has done this the Minister must regulate so as not to exceed applicable limits along with necessary reporting and evaluation.

The heading "Table" will incorporate a set of limits. This table has yet to be drafted for the biodiversity objectives of the Plan but the Schedules to the Implementation Plan do include tables of both triggers and limits for water quality for a series of indicators providing as well their derivation (e.g. CCME Guidelines or US EPA criteria).

Under the heading "Legal effect of limits", s.22 of the Draft Regulations (again in a formula common to each of the main divisions) provides as follows:

22(1) In respect of activities reasonably expected to have a direct or indirect effect on the biodiversity of the planning region, a decision-maker shall not issue a statutory consent if

- (a) the activity that is the subject of the statutory consent will, in the opinion of the Designated Minister, result in an applicable limit being exceeded, or
- (b) an applicable limit in respect of the activity referred to in clause (a) has, in the opinion of the Designated Minister, been exceeded. (emphasis added)

It should be noted that this section has two subjects: (1) the actual statutory decision maker, and (2) the Designated Minister. The statutory decision maker has a mandatory duty not to issue the statutory consent but only if a pre-condition is fulfilled; and in each case that pre-condition can only be fulfilled by a decision of the Designated Minister. I will refer to this below as the "limits exceedance" decision.

And finally, under the heading of "Management Response", s.23 of the Regulations contemplates that where the Designated Minister determines that a trigger or limit has been exceeded then:

- (1) .... the Designated Minister must direct the appropriate official in the Designated Minister's government department to initiate a management response consistent with the framework.
- (2) A person responsible shall comply with the lawful directions of an official in respect of a management response referred to in subsection (1).
- (3) An official responsible for initiating a management response under this section shall as soon as practicable report to the Designated Minister in writing the details and the effect of the management response.

In each case, the relevant "Management Response" section of the regulations contains a footnote with the following text (with different statutes listed depending upon the subject matter of the Division): "Authority for these lawful directions will flow from the home legislation under which the official is acting. The official responding must have authority under the *Public Lands Act, Wildlife Act, Fisheries (Alberta) Act,* and other applicable enactments."

In sum, the scheme outlined in each of the Divisions follows a fairly tight logical pattern. Thus for each “problem area” there is: (1) adoption of a framework, (2) establishment of programs to fix relevant limits and triggers, expressed numerically where appropriate in the form of a table, (3) establishment of a decision-making nexus between statutory decisions (consents) and limits, and (4) the issuance of “lawful directions” to ensure that limits continue to be achieved.

### **Some preliminary comments**

There is a lot here and it is complex stuff. As I noted above, I hope to provide some more detailed analysis of specific issues in subsequent blogs, but here are some preliminary observations.

First, notwithstanding the overall complexity of this package I applaud the GOA and the Secretariat for getting it all out as a package - by which I mean giving the public not only the Strategic Plan and Implementation Plan but also a draft of the regulations. This helps the reader to appreciate the methodology that is being proposed for taking us from visions and desired outcomes through to implementation.

Second, the title to this blog draws on the adage that the proof of the pudding is in the eating, meaning that the dish may look and smell good but we don’t really know until we dig in. The analogy here is that *ALSA* looks like an impressive statute for dealing with the challenges posed by cumulative effects in innovative ways but we don’t really know how good or bad it is until we see the whole picture. While the current package represents a crucial step forward it is apparent that the pudding is not yet ready to eat insofar as crucial elements are still missing. For example, in the context of the biodiversity diversity/ecosystem function outcome (outcome 3 above), we can’t gain a complete picture of how this will work until we see the new biodiversity management framework and the new land disturbance plan. The same is perhaps true of other problem areas where the Plan relies on frameworks that were developed for other and perhaps more limited purposes.

Third, I suggested above that logic of the regulations is quite tight but this is subject to the caveat that the logic is only as good as the premises on which it is based and it seems to me that there are two important caveats with respect to the premises. The first relates to my last comment i.e. we still need to see important component parts. The second relates to what I described above as the “indicators decision” and the “limits exceedance decision”. In both cases the trigger to the application of the section is a decision by the responsible Minister and in each case (see the underlined statutory text) the decision is framed in subjective terms. This affords the Minister considerable discretion and makes it very difficult to use the courts to discipline the Minister’s exercise of discretion or the Minister’s failure to act. It is not clear to me why these decisions should be treated as political decisions rather than decisions based upon expertise and clearly articulated values.

Fourth, I noted above that the management response provisions of the regulations all rely upon an authority that must be found in the home statute rather than *ALSA* itself in order for the GOA to take what might be thought of as actions to enforce the concretized concepts of triggers and limits. I confess that this came as a surprise to me. I had thought that the Regional Plans would themselves provide authority for this sort of enforcement order to issue and I had thought that this was the reason for the rather broad authority conferred on Plans by ss. 13 – 17 of *ALSA*. The approach enshrined in the current draft of the regulations is more deferential to the existing

authorities of line departments. But this approach also means that it will be necessary to scrutinize the provisions of those statutes to see if they confer the necessary authority on the relevant decision makers to issue the necessary “lawful directions”. I appreciate that the proclamation of *ALSA* was accompanied by massive consequential amendments to these other statutes, but whether those amendments will prove to be specific enough to serve the purposes contemplated by the “management response” sections of the regulations will require careful scrutiny.