

## Giving legal effect to the designation of the Grizzly Bear as an endangered species under the Wildlife Act (Alberta)

By Shaun Fluker

### Decision Considered:

*Shell Canada – Application for licenses in the Waterton Field*, [2011 ABERCB 007](#)

In March 2008 the Alberta department of Sustainable Resource Development (“SRD”) issued the Alberta Grizzly Bear Recovery Plan 2008-2013 (“*SRD Grizzly Bear Recovery Plan*”) under section 6 of the *Wildlife Act*, RSA 2000, c. W-10. The goal of the SRD Grizzly Bear Recovery Plan is to restore and ensure the long-term viability of a self-sustaining grizzly bear population in Alberta (*SRD Grizzly Bear Recovery Plan* at page 20). On June 9, 2010 the Minister of Sustainable Resource Development enacted the *Wildlife (Endangered Animal, 2010) Amendment Regulation*, Alta Reg 86/2010 which designates the grizzly bear as an endangered species under the *Wildlife Act*. In this comment, I set out how this designation in law implicates the decision-making powers of the Energy Resources Conservation Board (“ERCB” or “Board”).

Over the last decade the Government of Alberta has expressed significant concern for the viability of the grizzly bear population in Alberta. SRD issued 2 status reports (2002 and 2010) on the species ([2010 Grizzly Bear Status Report](#)), and the overall message is that grizzly bear numbers are in decline because of increasing human activities in what is left of grizzly bear habitat in Alberta. The 2010 Status Report states “[r]ecent population estimates clearly point out that grizzly bear density in Alberta is negatively correlated with the level of human access” (at para 22) and “[h]uman-caused mortality, especially of adult females, is the primary factor limiting grizzly bear populations” (at para 27). The June 2010 legal designation of the grizzly bear as an endangered species together with the *SRD Grizzly Bear Recovery Plan* are important steps by the Alberta government towards fulfilling its commitment to provide legal protection for an endangered species under the 1996 *Federal-Provincial Accord for the Protection of Species at Risk* and the 1992 *UN Convention on Biological Diversity*.

There are many reasons besides the rule of law for why the Alberta government would take steps to restore and ensure the long-term viability of grizzly bears in Alberta. I will set out two here. First, ecologists believe the grizzly bear is a ‘keystone’ or ‘umbrella’ species – which means a viable population of grizzly bears on the landscape is a reliable indicator of ecological integrity for the landscape as a whole. In other words, the government achieves its mandate of sustainable resource development by ensuring such development does not adversely affect the grizzly bear population and its habitat. Second, the grizzly bear is perhaps one of the last vestiges of the disappearing Canadian wilderness and the enrichment it provides. In his 2010 book *The Grizzly Manifesto: In Defence of the Great Bear* author Jeff Gailus recounts the value in sighting a grizzly bear in the wild: “Like having a child, encountering a grizzly bear in the wild is something you can anticipate with the common sense of the conscious mind, but when it finally

arrives, you discover one of the few experiences that actually surpass what you had imagined.” (*The Grizzly Manifesto* (Rocky Mountain Books 2010) at 22 – *The Grizzly Manifesto* is a finalist in the 2011 [Alberta Reader’s Choice Awards](#)). In short, Alberta is a lesser place without a self-sustaining population of grizzly bears on the land.

So how does this affect the ERCB? To answer this question, I will use the Board’s recent decision to license an exploratory sour gas well (WT68 well or Project) in the Castle region west of Pincher Creek (*Shell Canada – Application for licenses in the Waterton Field*, 2011 ABERCB 007). Expert evidence tendered at the hearing, including written correspondence from a senior wildlife biologist for SRD, confirmed the WT68 well site is located on lands which are important grizzly bear habitat. In its Decision, the ERCB determined that the Project will have surface impacts that result in a loss of grizzly bear habitat (Decision at paras 63, 64 and 74), and that the Project will increase human activity on existing access routes into grizzly bear habitat (Decision at para 84). The Board’s findings concerning Project impacts on grizzly bears are set out in two paragraphs of its Decision (paras 63 and 64):

The Board notes that Dr. Gilbert stated that grizzly bear denning locations are not limiting and the email from the SRD regional biologist indicated that the area is highly productive for grizzly bears. Thus, although there may be some incremental loss of grizzly bear habitat, it is likely that foraging habitat is extensive, and the Board expects that loss of habitat due to this project will not be significant.

The Board notes that Shell indicated that its mitigations were focused on reducing new access and that it was contributing to maintaining grizzly bear habitat on a regional basis by reclaiming older sites at Waterton 6 and Waterton 12. The Board finds this is an acceptable approach.

One of the legal questions here is whether the ERCB has met its statutory obligation under section 3 of the *Energy Resources Conservation Act*, RSA 2000, c. E-10 to have regard for the effect of its Decision on the grizzly bear species and its habitat. In my opinion the Board erred in law with this finding by: (1) failing to reference or give effect to the legal status of the grizzly bear as an endangered species under the *Wildlife Act*; (2) accepting any loss of important habitat for a listed endangered species as a reasonable and acceptable outcome; (3) failing to have adequate regard for the objectives and guidelines of the *SRD Grizzly Bear Recovery Plan*.

Those readers interested in species protection law in Alberta and its implications generally in law and policy may wish to participate in a one-day CLE seminar that will take place at the Faculty of Law on May 19, 2011 (For more information and details on registration see [here](#)). The keynote speaker will be Dr. Stephen Herrero who will speak on the science and law of protecting grizzly bears in Canada and the United States. Seminar presentations will include an overview of species at risk legislation in Alberta and Canada and the application of species at risk laws on project planning, property rights, aboriginal rights, and provincial water management.