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## Lower Athabasca Regional Plan 10-Year Review

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Matter Commented on: [Lower Athabasca Regional Plan](#)

The Land Use Secretariat (LUS) had commenced the 10-year review of the [Lower Athabasca Regional Plan](#) on August 26, 2022, according to the August 29, 2022 News Release, this review was intended to give advice to the Alberta government to “assess the ongoing relevancy and effectiveness of the existing plan in supporting the long-term vision for economic, social and environmental needs in the region.” This is required under section 6(1) of the *Alberta Land Stewardship Act*, [SA 2009, c A-26.8 \(ALSA\)](#), as previously written about by Professors Mascher, Banks, and Olszynski. The Lower Athabasca Regional Plan (LARP) was approved in August 22, 2012 with Order in Council [268/2012](#) as a cabinet level regulation with LARP becoming effective on September 1, 2012. As noted in the [LARP Review webpage](#), “[a] 10-year review does not amend, repeal or replace the regional plan. The 10-year review will result in a report from the Land Use Secretariat to the Stewardship Minister on the ongoing relevancy and effectiveness of the regional plan.”

The LUS, as noted in the “Quick Facts” section of the August 29, 2022 News Release,

... was created under the Alberta Land Stewardship Act to be separate from government departments to:

- Prepare or direct the preparation of regional plans for cabinet’s consideration.
- Facilitate and encourage cooperation among government departments and agencies.
- Periodically report on the process of a regional plan.
- Evaluate the objectives and audit the policies of a regional plan at least [once every five years](#).
- Conduct a review of a regional plan for ongoing relevancy and effectiveness at least once every 10 years. (emphasis added)

The 10-Year Review is underway, and the August 29, 2022 News Release notes that,

Public engagement will take place in the fall of 2022, commencing with the launch of a survey in mid-September hosted on the Government of Alberta [Public Engagement](#) website.

...

In addition, the Land Use Secretariat will be hosting engagement sessions in Fort McMurray, Cold Lake and Edmonton with representatives of key stakeholder groups and Indigenous communities. Invitations to participate will be sent in September 2022.

However, the current to October 10, 2022, [News Release](#) (Current News Release) as to the LARP 10 year Review provides,

Public engagement will take place in the fall, beginning with the launch of a survey in mid-September. Further details about the 10-year review engagement process and timelines will be available on the Land-use Framework website.

Notably there are no mentions that LUS “will be hosting engagement sessions in Fort McMurray, Cold Lake and Edmonton with representatives of key stakeholder groups and Indigenous communities. Invitations to participate will be sent in September 2022.” Alberta retroactively modifying its own New Release in this case is hardly a model of transparency.

The public survey is linked at the LARP Review webpage, in the Public Engagement website with a guide as to the survey in an attached PDF. There does not appear to be a deadline although that may change.

This survey does not appear to include questions about the results of the 5 year review which are summarized in the [Lower Athabasca Regional Plan 5-Year Evaluation Report \(2019\)](#) (LARP 5 Year Review), noting that all of the evaluation criteria, within the Purposes provision in section 1(2) of *ALSA*, were met, except for 1(2)(b) where,

...the Strategic Directions and their associated commitments are not in conflict with or provide opposing direction to the objectives and strategic, *they are not aligned with the regional outcomes and their objectives and strategies.*

....

... the Committee has determined that while LARP objectives and strategies do not fully meet the purpose statement under Section 1(2)(b) of the Act, the objectives and strategies *mostly* meet this purpose statement. (at 19 – 20)

It does include and optional 15 questions as to [The Review Panel Report](#) (2015), referenced in the original August 29, 2022 News Release and the Current News Release which is discussed below and in Part II. This is the first of three ABLawg posts, broken into 3 parts, as follows:

1. Part I: Background to Regional Planning in Alberta
2. Part II: Development of the Lower Athabasca Regional Plan (LARP)
3. Part III: Current Management Frameworks under LARP

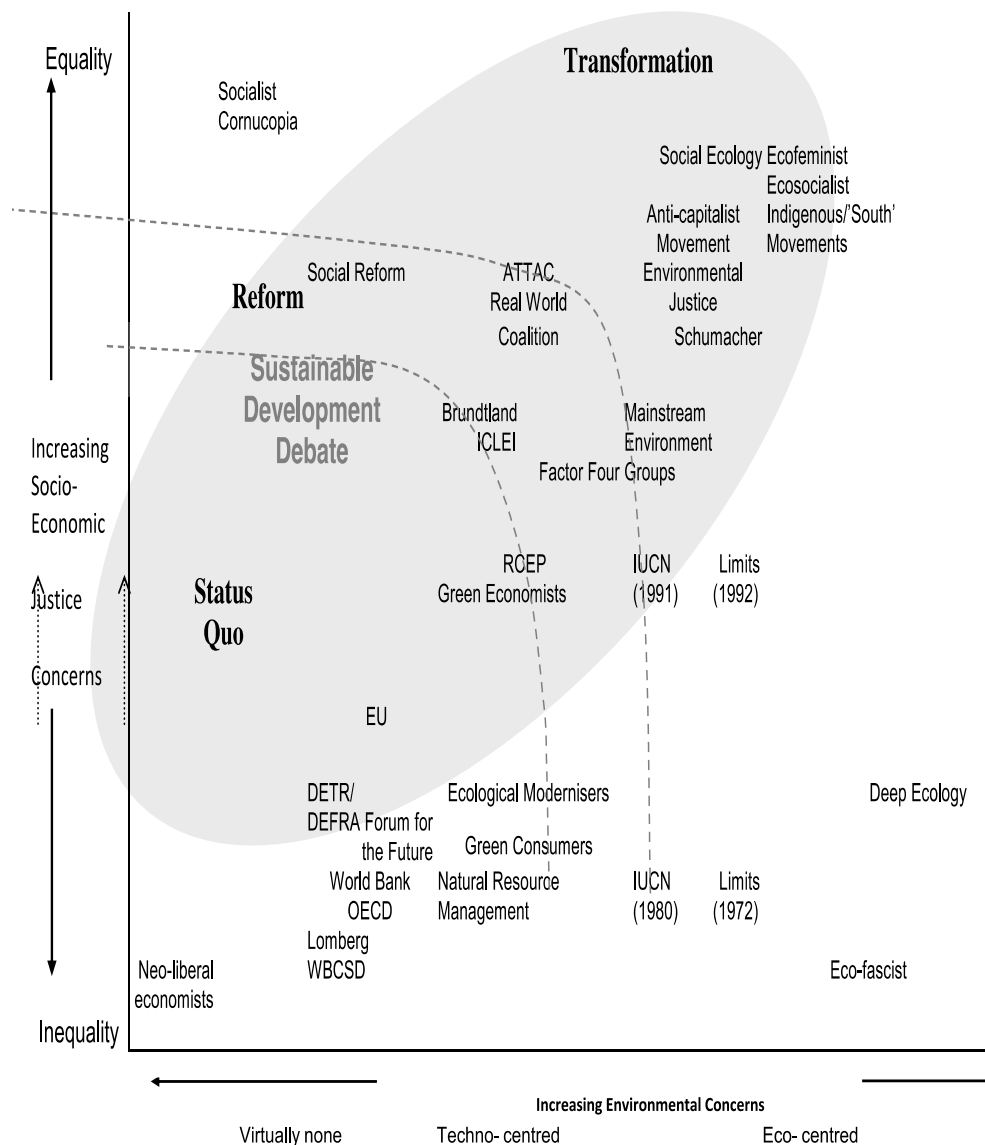
Part III will also assess the importance of this 10-year Review and provide some recommendations.

### **Definitions of Relevant Concepts – Regional Planning**

Most industrial developments are economically beneficial in that they support our modern lifestyle. Historically, Alberta’s economy has rested on [primary industries](#): agriculture, forestry, fishing and hunting, mining, quarrying, and, since 1949, oil and gas extraction and support services. Despite the transition to a services-based economy, these primary industries constitute a substantial component of Alberta’s economic activity (with at least 40% of GDP), employment,

direct and indirect government revenue to fund government's social, health and other policies. The importance of primary industries in Alberta has and continues to have an effect on policy, decisions, and law (see, Laurie E Adkin, ed, *First World Petro-Politics: The Political Ecology and Governance of Alberta* (Toronto: University of Toronto Press, 2016)).

There is, however, an upper limit to economic development, as unrestrained development can exhaust limited resources. This limit is usually phrased as *sustainable development* with the most common definition being from the World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987) (Brundtland Report) as: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”. The ambiguity inherent in this formulation is evident. For example, what are “needs” of both the present and future generation, engendering significant academic controversy over that definition – let alone policy makers who are expected to aim for this. There are also other definitions; an interesting typology is contained in Bill Hopwood, Mary Mellor, & Geoff O'Brien's 2005 article “[Sustainable Development: Mapping Different Approaches](#)”, (2005) 13:1 *Sust Dev* 38 at 42.



(Hopwood at 42)

It is notable that the Brundtland Report’s version of sustainable development expresses equal concerns and qualifies as a Reform approach rather than the *Status Quo* espoused by neo-liberal economists or the Transformational approach – which are summarized in the paper as follows:

- *Status Quo* - Supporters of the *status quo* recognize the need for change but see neither the environment nor society as facing insuperable problems. Adjustments can be made without any fundamental changes to society, means of decision making, or power relations. (at 42 to 43)
- Reform - Those who take a reform approach accept that there are mounting problems, being critical of current policies of most businesses and governments and trends within society, but do not consider that a collapse in ecological or social systems is likely or that fundamental change is necessary. They generally do not locate the root of the problem in the nature of present society, but in imbalances and a lack of knowledge and information,

and they remain confident that things can and will change to address these challenges. (at 43 to 45); and

- Transformation - Transformationists see mounting problems in the environment and/or society as rooted in fundamental features of society today and how humans interrelate and relate with the environment. They argue that a transformation of society and/or human relations with the environment is necessary to avoid a mounting crisis and even a possible future collapse. (at 45 to 47).

Any development will involve the use of land; *land use* has been regulated in Alberta since the [early 1900's](#). All development will affect the environment, whether it be the air, water, wildlife, vegetation, or natural processes. For example, clearing land for a transmission line will have cascading and complex effects on the environment – not only by the removal of vegetation, but the interruption of migratory patterns of wildlife, increased access by predators (including human hunters), potential for invasive species, additional run-off affecting waters, maintenance activities that generate air and sound pollution, and additional sunlight to change the vegetation composition. These impacts could vary by timing of construction and methods used – the direct effects may be temporary or take a long time to recover. Recognition of such cascading and complex unknown effects on the environment has given rise to the *precautionary principle*, as a way of thinking developed in the 1970's by German academics. This is described in David Kriebel et al.'s 2001 article "[The Precautionary Principle in Environmental Science](#)" (2001), 109:9 *Env'tl Health Persp* 871:

...when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically [with] four central components of the principle: taking preventive action in the face of uncertainty; shifting the burden of proof to the proponents of an activity; exploring a wide range of alternatives to possibly harmful actions; and increasing public participation in decision making (at 871, citations omitted)

There is a complex web of federal and provincial legislation, regulations, and codes governing project development approval, in part because the environment is not an enumerated head of power in the *Constitution Act, 1867* and jurisdiction is shared between the federal and provincial governments depending upon nature of the concern see: *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, [1992 CanLII 110 \(SCC\)](#). These can incorporate components of the *precautionary principle*, such as requiring project proponent to identify environmental impacts, present alternatives, mitigative measures, monitoring programs – generally in an informational capacity for future developments and accepting public input. Informed public consultation has been identified as a good mechanism to develop and implement environmentally responsible sustainable development, and Alberta has its own version, (see, Sherry R Arnstein, “A Ladder of Citizen Participation” (1969) 35:4 *JAPA* 216, and generally Stepan Wood, Georgia Tanner, & Benjamin J. Richardson, “[What Ever Happened to Canadian Environmental Law?](#)” (2010), 37 *Ecology LQ* 981.

Environmental protection legislation, regardless of the name (e.g. *Fisheries Act*, [RSC 1985, c F-14](#)), regulates emissions into components of the environment (such as oceans or inland waters for the *Fisheries Act*) on a *project basis* with licences and permits authorized by government departments (Department of Fisheries and Oceans) with investigative powers. Unauthorized

emission bringing sanctions – for the offending project based on the *polluter pays principle*. Even authorized emissions have environmental effects that can be additive, negative, or combinatory with natural processes *or* other projects’ emissions – these are described as *cumulative environmental effects*. Combined with natural variability and climate change, particularly where the environmental effects are on a *regional scale*, such effects represent what planning literature describes as a “wicked problem” in ascribing fault to a particular development or developer sufficient to engage sanctions under environmental protection legislation. The pace of development approvals in a region exacerbates the cumulative environmental impacts within the region and has long been a concern of First Nations, Métis communities, and environmental groups.

There is a need to preserve the environment while allowing sustainable development. This is a political question as to the balancing required, that should be undertaken with the precautionary principle and informed by science, and we would suggest, Indigenous knowledge systems.

### **Regional Land Use Planning**

One solution is to control land uses on a regional scale, with the region, ideally, based on a similar ecosystem. Regional land use planning is similar to municipal planning writ large, in that the regional plan would divide the region into areas where development can occur (subject to development approval), areas that can host limited human activities, and areas where land uses are directed at conservation of the environment. Choosing areas suitable for development should include areas that have previously been disturbed – unless those areas have particular environmental sensitivity, for example: endangered wildlife habitat *or* connectivity with conservation areas necessary to support environmental diversity. Unlike municipal plans, however, a common part of regional planning is to establish baseline environmental standards as to air, water, and bio-diversity measures, with monitoring to assess the changes in them. Any changes to these environmental measures would be coupled with regulatory action to ascertain the persons responsible for those changes to enable enforcement, either under existing legislation or the regional plan itself.

### **Alberta’s Regional Land Use Plans**

The current legislation is *ALSA* passed in 2009. *ALSA* was derived from the [Alberta Land Use Framework \(2008\)](#) (LUF), dividing Alberta’s territory into seven regions, generally corresponding with drainage basins of Alberta’s major rivers, adjusted by municipal boundaries.





(LUF at 24)

ALSA provides a mechanism to plan for the direction of desired economic, environmental, and social objectives on a long-term basis in a manner that recognizes the cumulative impacts of human activities for any of the seven regions in the LUF, and to reflect the different conditions in those various regions. Regional plans must convey a vision as to future direction of the region and one

or more objectives to attain that vision (*ALSA* at section 8(1)(a), 8(1)(b)). *ALSA* does not contain definitions as to the concepts of “sustainability” or “cumulative effects”.

Regional plans may, and the two existing ones do (the [Lower Athabasca Regional Plan](#) and the [South Saskatchewan Regional Plan](#)), contain an Introduction, a Strategic Plan with the necessary vision and objectives and with strategies to accomplish them, an Implementation Plan with details as to intended outcomes and measurement of indicators to gauge the progress of the plan, and a Regulatory Details Plan that implements the strategies and ascribes responsibility for implementation. Implementation is directed by the Regulatory Details Plan, which may incorporate management frameworks to be developed. The implementation of regional plans is done through existing legislation and the regional plans themselves which are a *source* of regulatory instruments i.e., the binding Regulatory Details Plans, which amend other regulations or the administration of an enactment within the planning region (*ALSA* section 9). There may be additional sub-regional plans as well.

Regional plans may, in section 13(2.1), “provide rules of application and interpretation, including specifying which parts of the regional plan are enforceable as law and which parts of the regional plan are statements of public policy or a direction of the Government that is not intended to have binding legal effect.” The parts of the regional plan that are enforceable as law will be considered for the purpose of other acts as regulations, but section 14(1) exempts regional plans from the *Regulations Act*, [RSA 2000, c R-14](#) aside from resulting changes in regulation that require notice in section 14(2). Regional plans apply to Crown and private lands in the planning region.

*ALSA* has a broad jurisdiction in section 2 and may be described as a *superordinate* legislation that overlays existing legislation; 27 statutes were amended with the passage of *ALSA* to incorporate directions to comply with a regional plan (where one exists). Regional plans apply to *any activity or proposed activity on private or public lands* that requires a statutory consent defined in section 2(2), with excepted statutes including (a) *Land Titles Act*, [RSA 2000, c L-4](#) (i.e. Certificates of Title), (b) *Personal Property Security Act*, [RSA 2000, c P-7](#), (c) *Vital Statistics Act*, [SA 2007, c V-4.1](#), (d) *Wills and Succession Act*, [SA 2010, c W-12.2](#), (e) *Cemeteries Act*, [RSA 2000, c C-3](#), (f) *Marriage Act*, [RSA 2000, c M-5](#), (g) *Traffic Safety Act*, [RSA 2000, c T-6](#), or (h) any enactment prescribed by the regulations (there are currently no enactments in the regulations); and anything under an enactment that must comply with a rule, code of practice, guideline, directive or instrument.

The government has extraordinary discretion in *ALSA*, for example to: designate or exempt a person or entity as a local government body, exempt an entity from the definition of a decision-making body, and designate or exempt an instrument from the definition of a regulatory instrument (at section 66). Provincial decision-making bodies, including for example the Alberta Energy Regulator (AER), relevant municipalities, environmental assessment tribunals etc. were required, under sections 20 to 22, to make any necessary changes to their procedures and decision making to comply with regional plans if they are located within the planning region.

Regional plans, under *ALSA* section 15(1), bind (a) the Crown, (b) local government bodies, (c) decision-makers, and (d) subject to a variance to the regional plan under section 15.1 all other



persons. However, sections 15(3) and 15(4) may be seen as a *privative clause* that oust the Courts supervisory jurisdiction. Section 15(3) says a regional plan does not:

- (a) create or provide any person with a cause of action or a right or ability to bring an application or proceeding in or before any court or in or before a decision-maker
- (b) create any claim exercisable by any person, or
- (c) confer jurisdiction on any court or decision-maker to grant relief in respect of any claim.

Section 15(4) says a *claim*:

- includes any right, application, proceeding or request to a court for relief of any nature whatsoever and includes, without limitation,
- (a) any cause of action in law or equity,
  - (b) any proceeding in the nature of certiorari, prohibition or mandamus, and
  - (c) any application for a stay, injunctive relief or declaratory relief.

This is a comprehensive list.

There is an exception for the Stewardship Commissioner, a member of the Land Use Secretariat, who may bring proceedings in the Kings Bench in section 18.1 if they are of the opinion that non-compliance with *ALSA* cannot be remedied (see, *Keller v Municipal District of Bighorn No. 8*, [2010 ABQB 362 \(CanLII\)](#) wherein the private remedy was limited to filing a complaint with Stewardship Commissioner as to non-compliance with a regional plan. Theoretically the decision of the Stewardship Commissioner could be subject to judicial review.

Regional plans are expressions of provincial policy and may only be approved by the Lieutenant-Governor in Council (*ALSA* section 13(1)) and those deliberations would engage the common law doctrine of cabinet secrecy (a recent formulation of cabinet secrecy is found in *Babcock v Canada (Attorney General)*, [2002 SCC 57 \(CanLII\)](#)). The doctrine of cabinet secrecy is a long-standing exception in Alberta's *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#) (FOIPP), (at sections 4(1)(q), 6(4), 24(1)).

*ALSA* allows the government to prepare or amend regional plans with ‘appropriate public consultation’ (sections 3 – 5), and while regional plans or any changes must be tabled in the Legislative Assembly – the elected Legislative Assembly cannot comment on or change regional plans.

## **Land Use Secretariat**

*ALSA* established Land Use Secretariat (LUS), as part of the Public Service headed by a Stewardship Commissioner directed by the Stewardship Minister, currently the Minister of Environment and Parks (AEP). The Land Use Secretariat is to direct and prepare regional plans and sub-regional plans, ensure compliance with regional plans, monitor the implementation, and suggest to Cabinet any necessary changes (at sections 58 – 61). The LUS can accept complaints, which it will review and if it deems justified issue directions or sue in court (at sections 18, 62). It may issue a variance to the regional plan on application by a title holder if the proposed variance

is “consistent with the purposes of ALSA; the proposed variance is not likely to diminish the spirit and intent of the regional plan, and refusal to grant the proposed variance would result in unreasonable hardship to the applicant without an offsetting benefit to the overall public interest” (at section 15.1). There have been 3 [successful applications](#) for a variance by oil sands developed under LARP.

LUS can receive a request to review a regional plan from a person who is “directly and adversely affected by a regional plan” within one year after that regional plan becomes effective and it must establish a panel to investigate and report to the Stewardship Minister with any recommendations, who then reports that *advice* to Cabinet (at section 19.2).

There has been one instance of such a review: [The Review Panel Report](#) (2015), referenced in the News Release above and further discussed below.

All of these processes are governed in accordance with the *Alberta Land Stewardship Regulation, Alta Reg 179/2011*, but notably this does not apply to the mandated 5-year Review and 10-year Review under *ALSA*.

Initially, *ALSA* and the Land Use Framework (2008) were hailed as being unique in the common law world and were promoted as a way to address cumulative effects by protecting the regional environment, subject to the details of a Regional Plan (see, Bernard J Roth and Rachel A Howie, “Land-Use Planning and Natural Resource Rights: The Alberta Land Stewardship Act” (2011), 29 *J Energy & Nat Resources* L 471 at 473-476, and Alan Harvie and Trent Mercier, “The *Alberta Land Stewardship Act* and its Impact on Alberta's Oil and Gas Industry” (2010-2011), 48 *Alta L Rev* 295).

However, the devil was in the details of implementation.

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