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Institut canadien du droit des ressources

Institutional Relationships and Alberta's *Water for Life* Strategy

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Table of Contents

<i>Acknowledgements</i>	vii
<i>Table of Abbreviations</i>	ix
1.0. Introduction and Background	1
2.0. <i>Water for Life: An Overview</i>	2
3.0. Water Management Institutions in Alberta: An Overview	7
4.0. <i>Water for Life</i> and Land-use Planning: Alberta’s New Regime for Land-use Management	10
4.1. Land-use Planning in Alberta: The <i>Land-use Framework</i> and <i>ALSA</i>	10
4.2. Land-use Plans and Water Management	14
4.2.1. The Lower Athabasca Region	15
4.2.1.1. Template for Regional Plans	15
4.2.1.2. Issues Specific to the Lower Athabasca	18
4.2.2. The South Saskatchewan Region	19
4.3. <i>Water for Life</i> and <i>LUF/ALSA</i>	23
5.0. Sectoral Planning Exercises	24
5.1. Introduction	24
5.2. Cumulative Environmental Management Association (CEMA)	24
5.3. The Lower Athabasca Water Management Framework	26
6.0. Conclusions	30
<i>CIRL Publications</i>	33

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Table of Abbreviations

<i>ALSA</i>	<i>Alberta Land Stewardship Act</i>
CEMA	Cumulative Environmental Management Association
DFO	Fisheries and Oceans Canada
<i>EPEA</i>	<i>Environmental Protection and Enhancement Act</i>
ERCB	Energy Resources Conservation Board
EUB	Energy and Utilities Board
IFNs	instream flow needs
LAWM Framework	Lower Athabasca Water Management Framework
<i>LUF</i>	<i>Land-use Framework</i>
NRCB	Natural Resources Conservation Board
RACs	Regional Advisory Councils
RSDS	<i>Regional Sustainable Development Strategy for the Oil Sands Area</i>
WPACs	Watershed Planning and Advisory Councils

1.0. Introduction and Background

When it was introduced by the provincial government in November 2003, the *Water for Life* strategy¹ represented a potentially bold attempt to mark Alberta as the Canadian leader in modern approaches to water management. Indeed, at the time, the government described the strategy as the “most comprehensive of its kind in Canada.”² The strategy came against the backdrop of increasing stresses on the province’s water resources and a recently-completed overhaul of the cornerstone of water management legislation with the introduction in 1996 of a new *Water Act*.³ The Act has been the subject of extensive comment elsewhere,⁴ but, in summary, it attempted to both preserve the essential core of the province’s existing water management regime — which was built on the twin principles of prior allocation and “first-in-time, first-in-right” — and to incorporate modern concepts and tools of water management, as reflected in the foundational concept of ecosystem integrity and protection.

While the *Water Act* in theory recognized the significance of an ecosystem approach to water resource management, it was by no means clear that by itself the Act would generate the necessary changes to implement fully such a concept. This was effectively recognized by the government when it began the long period of extensive consultation beginning in 2001 that eventually gave rise to *Water for Life*. But the strategy is more of a broad vision statement than a detailed management blueprint, and its success will rest on the specific choices that are made in implementing its vision and goals. These choices must inevitably be based on a significant information-gathering effort, as well as substantial additional public consultations that the strategy committed the province to undertake.

Water for Life was not adopted in a vacuum, and its successful implementation will depend to an important degree on the rest of the regulatory environment in which it operates. This paper looks at one important set of factors that will colour the success of the strategy: the institutional setting in which *Water for Life* is situated. While this setting includes the broader regulatory regime that governs water management in Alberta, as well as natural resources management more generally, the primary focus of this paper is on the interrelationship between *Water for Life* and other planning exercises that the province has entered into more or less contemporaneously with that anticipated in the

¹ Government of Alberta, *Water for Life — Alberta’s Strategy for Sustainability* (November 2003).

² Government of Alberta, News Release, “Conservation vital to preserve Alberta’s water supply — Province releases provincial water strategy” (27 November 2003).

³ R.S.A. 2000, c. W-3.

⁴ For a brief overview of the Act, see Michael M. Wenig, *Understanding Local Albertans’ Roles in Watershed Planning — Will the Real Blueprint Please Step Forward?*, Occasional Paper # 28 (Calgary: Canadian Institute of Resources Law, 2010) at 3 *et seq.*

strategy. In particular the paper asks whether these planning exercises, taken together with *Water for Life*, reflect a coherent and integrated approach to implementing a modern approach to water management in Alberta.

The paper begins with an overview of the *Water for Life* strategy, as reflected both in its original version and in subsequent refinements in later years. It then describes briefly the institutional context for water management in Alberta, focusing on the provincial agencies that have the primary ongoing responsibilities for water management in the province. The paper then turns to the description of some key planning initiatives undertaken by the province that are relevant to *Water for Life*, including both broader land-use planning exercises and planning efforts directed at water management more narrowly, together with a discussion of the interrelationship between these exercises and the *Water for Life* strategy. The final section provides some brief conclusions.

2.0. *Water for Life*: An Overview

As noted above, the *Water for Life* strategy was developed in recognition of the growing pressures on Alberta's water resources and the need to plan in a sustainable way for their future development. The issuance of the strategy was preceded by an extensive consultation process beginning in November 2001 and culminating in June 2002 with a Minister's Forum on Water.⁵ A governmental working group then took the results of the consultation process and developed a draft strategy in March 2003. Following consultation on the draft strategy, the final strategy was issued in November 2003.

The strategy is predicated on three major goals and reflects a number of guiding principles developed in the course of the consultation strategy. Both the goals and the principles represent an attempt to balance environmental and economic concerns. Thus the first two fundamental goals — the assurance of a safe and secure supply of drinking water and of healthy aquatic ecosystems — are balanced by the third goal, the recognition of a need for “[r]eliable quality water supplies for a sustainable economy.”⁶ The list of underlying guiding principles for water planning similarly includes, *inter alia*, such environmental elements as the need for healthy ecosystems and the need for management on a watershed basis. There is also an emphasis, however, on maintaining

⁵ The consultation process had three pillars: “ideas generation” by a small group tasked with identifying the major challenges to water management and some potential ways of improving that management; a broader outreach to and consultation with the public, involving both reactions to the ideas put forward in the first phase and other advice and ideas; and finally the Minister's Forum, which was composed of a diverse group of invitees who were asked to review the input from the previous phase and to discuss future steps.

⁶ *Water for Life*, at 7.

the underlying administrative structure upon which Alberta's water management regime has historically been built:

Albertans must preserve the "first-in-time, first-in-right" principle for granting and administering water allocations, but water allocations will be transferable to ensure societal demands and needs can be met.⁷

Taking the three goals identified above, the strategy then sets out for each a series of specific outcomes for the short term (2004/05 to 2006/07), medium term (2007/08 to 2009/10) and long term (2010/11 to 2013/14).

One of the *Strategy's* broad visions is to re-model the province's water management framework on a watershed-by-watershed basis or, in other words, to adopt a watershed management approach. A variant of the "ecosystem-based management" approach, watershed management generally strives for a comprehensive or holistic planning effort that links management decisions with respect to both water quality and quantity. As to quality, watershed management seeks to address pollution from both "point sources" (e.g. industrial discharge pipes) and runoff. Watershed management decisions also aim to consider all three hydrological linkages in watershed ecosystems: up-stream/downstream; in-stream/upland; and surface water/groundwater. From an organizational standpoint, watershed management seeks to promote multi-level governance, and especially local initiative, input, and decision-making. This organizational aspect of the strategy is of particular significance for institutional relationships.

The institutional arrangements that flow from the strategy reflect a balancing between a desire to reflect the local, place-based management that is inherent in watershed management and a desire for some uniformity of approach as reflected in a body with a province-wide perspective. The latter is represented by the creation of a provincial multi-stakeholder water advisory council (now called the Alberta Water Council) which is entrusted with guiding the "overall implementation" of the strategy and with providing advice to the provincial government on water policy issues.⁸ The Council also has a mandate to conduct investigations itself into current and emerging water policy issues, as well as to engage Albertans in consultations on water issues on a continuing basis.⁹

⁷ *Ibid.* at 6. The reference to the first-in-time, first-in-right regime as a foundational principle stands in contrast to most of the other principles, which are largely of the motherhood variety — for example, a recognition of the limits to water supplies, the need for different stakeholders to work collectively, and the need to use water wisely and responsibly. The reference to the particular priority of entitlements enshrined in the allocation regime as in itself a principle for water management — rather than as a tool for implementing other principles and goals — is at the least somewhat odd in that it is not a necessary element for sound water management more generally.

⁸ *Ibid.* at 15.

⁹ For more basic research on water issues, the Alberta Water Research Institute was created in the spring of 2007, pursuant to a \$30 million grant from the Alberta Ingenuity Fund.

The local perspective in watershed management is reflected in the strategy in two other institutional mechanisms — Watershed Planning and Advisory Councils (WPACs) and Watershed Stewardship Groups. The Councils are the local multi-stakeholder bodies — with one formed for each identified watershed — that will actually take the lead in watershed planning and associated activities.¹⁰ Their relationship to the Alberta Water Council is somewhat ambiguous. The strategy notes that while the Watershed Councils “will not have a direct reporting relationship to the [Alberta Water Council], they will benefit from their guidance and mentoring.”¹¹ As to the relationship with the provincial government, while the Watershed Councils will indeed take the lead in watershed planning, the approval of these plans ultimately rests with the provincial government. Unfortunately, *Water for Life* is less than forthcoming as to the actual structure of those plans and the required components. Some assistance may be found in an earlier document, the *Framework for Water Management Planning*¹² which pre-dates the *Water for Life* strategy and which finds its origins in the 2000 *Water Act*, and also in the 2008 recommendations of the Alberta Water Council with respect to a framework for watershed management planning¹³ (both discussed *infra*).

The final institutions noted in *Water for Life* — the Watershed Stewardship Groups — are really a catch-all to describe a range of community-based groups that already existed prior to the strategy (but which of course may be added to) and which were formed on a volunteer basis by citizens concerned about the health of local water bodies. Again, the specific roles of these groups and their precise relationships with the two other institutions in the strategy are not entirely clear beyond a motherhood comment that they “will be encouraged to participate at the Watershed Planning and Advisory Council level, for guidance, technical advice, and mentoring.”¹⁴ It is not even clear, for example, whether they will enjoy any special status (or funding) in the planning process, although there is a reference to roles such as taking “on-the-ground” actions and engaging in “collaboration with land use managers”.¹⁵ In the absence of any specific legal authority, however, it is not clear how much leverage such groups can actually exercise.

¹⁰ Their mandates also include the responsibility to “develop best management practices, foster stewardship activities within the watershed, report on the state of the watershed, and educate users of the water resource.” *Ibid.* at 16. For a detailed discussion and critique of the Watershed Planning and Advisory Councils, see Wenig, *supra* note 4.

¹¹ *Ibid.* at 15-16.

¹² Alberta Environment, *Framework for Water Management Planning* (2001)

¹³ Alberta Water Council, *Recommendations for a Watershed Management Planning Framework* (December 2008).

¹⁴ *Water for Life*, at 16.

¹⁵ *Ibid.* at 17.

Since its initiation *Water for Life* has been subject to review. Most notably, in June 2007 the Alberta Water Council was asked by the government to review the strategy and to provide recommendations for its renewal in light of changing circumstances within the province. Those recommendations were delivered to the government in January 2008 and were reflected in two subsequent documents. The first of these was a “renewal” of the strategy five years on, based on a report and recommendations by the Alberta Water Council.¹⁶ The 2008 renewal amounts to little more than a tweaking and updating of the original strategy, with the exception that it notes the need — through the addition of a new water management principle to this effect — to integrate *Water for Life* into other planning processes such as the recently developed *Land-use Framework* (discussed *infra*). There are however no specifics as to how the latter will be accomplished.

The second document that emerged in response to the Water Council’s recommendations was the November 2009 action plan, which is somewhat more substantive.¹⁷ The action plan accepts the Council’s recommendation that the renewed strategy be focused on two themes: the safeguarding of water resources and the acceleration of the required actions.¹⁸ The actions necessary to address these two themes are set out in tables grouped under six headings comprising three goals and three directions. The three goals reflect a balance of human and ecological needs: the assurance of a safe and secure supply of drinking water; the protection and maintenance of healthy aquatic ecosystems; and the effective management of water resource too support a sustainable economy. These three goals are complemented by the three directions: ensuring access to the knowledge and research necessary to meet the three goals; ensuring the engagement and empowerment of the partnerships necessary to effective shared stewardship of the province’s water resources; and the adoption of a water conservation ethic by all sectors.

For each of the six goals and directions there is a corresponding table of key actions to be taken in the short (by 2012), medium (by 2015) and long (by 2019) term. These actions vary in specificity, but most of them are of a general nature, and involve, for example, commitments to develop and implement systems or solutions to identified problems.¹⁹ In sum, the action plan represents a very ambitious programme for a panoply

¹⁶ Government of Alberta, *Water for Life, A Renewal* (November 2008). See also *Report on Implementation Progress of Water for Life* (October 2005), which, *inter alia*, refined the measures for assessing the strategy’s effectiveness.

¹⁷ Government of Alberta, *Water for Life Action Plan* (November 2009).

¹⁸ *Ibid.* at 5.

¹⁹ For example, with respect to the goal of providing safe and secure drinking water, the action plan includes as key actions commitments to, *inter alia*: “[p]rovide and maintain the availability and accessibility to Albertans on private water systems ... [r]eview and improve the management of small public drinking water systems ... [w]ork co-operatively with First Nations, Métis communities, and the federal government to ensure safe drinking water in Aboriginal communities ... [d]evelop a waterborne

of measures across a broad spectrum of water management issues. Less clear is how, as a matter of institutional rationalization, the action plan will be integrated with other resource management initiatives on the part of the province — including both those directed at water management and those directed at resource management more generally. In this respect, there is only a general statement in the action plan that its “implementation will be aligned with other [provincial] strategic policies (e.g. Land-use Framework, cumulative effects management system, Provincial Energy Strategy, etc.) to support better consistency and certainty towards the environment, economy and quality of life for Albertans.”²⁰ There is no indication in the action plan, however, as to how this alignment will be managed.

As noted, while *Water for Life* provides a general road map for water management in Alberta through the articulation of general principles and objectives, together with an indication of institutional reform, it does not provide the nuts and bolts of how watershed planning will proceed. These details are supposedly found in two documents — the 2001 *Framework for Water Management Planning* and the 2008 *Recommendations for a Watershed Management Planning Framework* for Alberta. The first of these pre-dates the strategy and was generated in direct response to the requirement for such a framework in the *Water Act*.²¹ While the *Framework* provides a template for planning, it recognizes the breadth of variation that may exist between different plans, reflecting the degree to which issues may vary regionally. A water management plan then is a broad concept, and the guidance provided by the *Framework* is similarly and necessarily general in nature: “A Water Management Plan can be developed by anyone. It can be a single issue such as a lake cleanup or involve multiple issues in a major river basin. However any person developing a water management plan must follow the *Framework*”²² The 2001 *Framework* has been criticized as falling short of its objective of formalizing water management planning in that “it provided only broad, general principles and lacked sufficient detail to “formalize” anything.”²³ However, in at least including watershed management in its list of water management principles, it sets the stage for later initiatives such as *Water for Life*. The Alberta Water Council’s 2008 *Recommendations*,

disease surveillance system ... [d]esign and implement regional drinking water and wastewater solutions ... [d]evelop innovative approaches to build and ensure long-term operational capacity in smaller Alberta communities.” *Ibid.* at 11.

²⁰ *Ibid.* at 23.

²¹ Pursuant to s. 7(1) of the *Water Act*, R.S.A. 2000, c. W-3, the responsible Minister was required to establish a framework for water management planning by 31 December 2001. While the 2001 document refers to water management rather than watershed management, it is clear in the water management principles that are set out therein that it accepts that “water management is based on a watershed approach.” Alberta Environment, *Framework for Water Management Planning* (2001) at 6.

²² *Ibid.* at 1. The *Framework* is also broad in terms of the ambit of its coverage; it applies to “all types of waterbodies, including streams, rivers, lakes, aquifers and wetlands, and takes a holistic approach.” *Ibid.*

²³ Wenig, *supra* note 4 at 9.

which constituted a report under its Shared Governance Project,²⁴ were intended to strengthen the framework for watershed planning by building on the foundations in the *Water Act* and the 2001 *Framework*, as further envisioned under *Water for Life*. The *Recommendations* were intended to advance “the development of a framework that will integrate shared governance and a watershed approach into the existing policy and legislation to improve watershed management in Alberta.”²⁵ However, as with the 2001 *Framework*, the *Recommendations* have been criticized for their use of generalities and lack of specific details as to what plans should contain and how they should be implemented.²⁶

3.0. Water Management Institutions in Alberta: An Overview

There are a number of governmental bodies that have an impact on water management in Alberta. Foremost amongst these is Alberta Environment, which currently has direct, primary responsibility for water management under the *Water Act*. However, several other provincial agencies make project approval decisions that affect water demand and use in important ways. For example, the province’s Energy Resources Conservation Board (ERCB) regulates water-consuming oil and gas operations under a broad “public interest” mandate that reflects provincial objectives for energy and economic development, but that also includes environmental considerations.²⁷ Meanwhile, Alberta Environment grants water licences and approvals with a particular focus on applicable water management plans and environmental objectives.²⁸ But Alberta Environment’s decisions are arguably also based on an implied public interest mandate that reflects energy and economic, as well as environmental, considerations. Otherwise there would be no reason to issue a *Water Act* approval for any activity that reduces water supplies or other environmental values to any degree whatsoever. There is thus considerable overlap between these agencies’ decision-making functions.

This overlap raises uncertainties regarding the distribution of legislative powers for water management. From a procedural standpoint, which agency should decide first and how should its decision reflect the considerations of the other? From a substantive standpoint, how do the two agencies’ decision-making ‘formulas’ relate to each other?

²⁴ Discussed in *ibid.* at 17 *et seq.*

²⁵ Alberta Water Council, *supra* note 13 at 1.

²⁶ Wenig, *supra* note 4 at 23.

²⁷ See *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 3.

²⁸ See *Water Act*, ss. 38 and 51.

Are they consistent? Does or should the decision of one agency trump or greatly affect the decision of the other?

Of course, the ERCB's approval of water-consuming oil and gas operations is not the only constraint on Alberta Environment's water management functions with respect to those same operations. Oil and gas tenures precede and are a key factor in, or driver of, the ERCB's "public interest" project approval calculations (at least, for the roughly 80 percent of the province's oil and gas that is provincially owned).²⁹ Tenures are basic access and extraction rights granted by Alberta Energy under broad discretionary decision-making powers that arguably reflect an implied, even if not express, public interest mandate.³⁰ Because of their influence in ERCB decisions, Alberta Energy's issuance of oil and gas tenures has significant — albeit indirect — implications for water demand and use and, thus, provides another uncertain institutional overlap with Alberta Environment's water management decisions under the *Water Act*.

In addition to the ERCB's regulation of oil and gas production, Alberta's Natural Resources Conservation Board (NRCB) is responsible for issuing regulatory approvals — under a broad, public interest approval criterion like that used by the ERCB — for certain, generally large-scale, natural resource, recreation, and tourism development projects, all of which can substantially affect water demand and use.³¹ The NRCB's "public interest" mandate thus creates still another uncertain institutional constraint on Alberta Environment's water management functions.

Under current legislation the NRCB is given regulatory approval authority over still another category of activities that can greatly affect water demand and use — intensive livestock operations and manure handling and storage facilities. Although not expressly tied to a broad public interest decision-making mandate like that of the ERCB, the NRCB's approval authority with respect to these activities is likely governed by an implied public interest test. The NRCB is also charged with ensuring the consistency of those operations with "the land use provisions" of applicable municipal development plans.³² Both of these decision-making mandates, and those of the municipal agencies that adopt the land use plans in the first instance, overlap with those of Alberta Environment and thus create still more sources of uncertain institutional constraints on Alberta Environment's water management roles.

There are institutional uncertainties even within Alberta Environment's own decision-making sphere, arising from that agency's occasional need to consider issuing water

²⁹ See, e.g., Steven A. Kennett & Michael M. Wenig, "Alberta's Oil and Gas Boom Fuels Land-use Conflicts — But Should the EUB be Taking the Heat?" (Summer 2005) 91 Resources 1.

³⁰ See *Mines and Minerals Act*, R.S.A. 2000, c. M-17, ss. 16-18.

³¹ See *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 2.

³² See *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, s. 20.

licences under the *Water Act* and to conduct environmental assessments and issue environmental approvals under the *Environmental Protection and Enhancement Act (EPEA)*,³³ for the same projects. Both statutes have implied public interest mandates and, while their regulatory approval provisions focus on somewhat distinct aspects of specific developments, those aspects may overlap. Even where the aspects of a single development being considered under both *EPEA* and the *Water Act* are distinct, it is uncertain as to whether Alberta Environment can logically piecemeal distinct aspects of a single overall development under a “public interest” decision-making formula. There are also issues about coordinating approvals under both statutes to ensure that conditions imposed in one approval are consistent with objectives sought for the other.

Alberta Environment’s institutional overlap with its own regulatory functions under *EPEA* and the *Water Act*, and with the ERCB and other agencies with respect to water management, pre-dated the *Water for Life* strategy. However, the strategy creates new, additional institutional relationships by promoting the establishment and use of provincial, basin and local watershed councils in watershed management decisions. While these councils are generally consistent with contemporary watershed management principles, their creation gives rise to questions regarding their appropriate and actual decision-making authority and capability in relation to provincial decision-making under a watershed management approach. These questions include: whether and how local watershed councils can account for biological diversity and other public values that arguably transcend local interests; what leadership, in the sense of ecological bottom lines or other decision-making principles, the province should provide for local decision-making; whether the province is allowing local councils to consider a sufficiently broad set of tools to enable them to conduct the kind of cooperative, consensus-based decision-making that the province is encouraging; and, what if any explanation the province should provide if and when it reaches a decision that is inconsistent with that of a local council. All these questions, while important, have been overtaken since the initiation of *Water for Life* by the development of an overarching scheme for land-use planning in the province which has the legal teeth that are largely absent in *Water for Life*. This is the province’s *Land-use Framework* and its implementing statute, which are discussed in the following section.

³³ R.S.A. 2000, c. E-12.

4.0. ***Water for Life* and Land-use Planning: Alberta's New Regime for Land-use Management**

4.1. Land-use Planning in Alberta: The *Land-use Framework* and *ALSA*

One of the most important issues with respect to the integration of the *Water for Life* strategy into the broader context of resource management planning in Alberta is how the strategy and its associated institutions will be accommodated within the framework of land-use planning in the province. In particular it is not clear how the strategy will interact with the new *Land-use Framework (LUF)*³⁴ introduced by the province in December 2008, and implemented legislatively in 2009 by the *Alberta Land Stewardship Act (ALSA)*.³⁵ While the *LUF* is not the first exercise in land and resource planning on the part of the provincial government, it is certainly the most ambitious to date and, moreover, provides significantly more legal enforcement mechanisms than has been true for past initiatives.

Attempts to engage in some form of province-wide planning in Alberta date back over sixty years to the introduction in 1948 of a policy framework that divided the province into two broad areas for purposes of classifying how the government saw their potential for development: a white, “settled” area comprising about 39 percent of the province, largely under private ownership, and primarily in the south and central portions of the province, but also including the Peace River belt; and the remainder a green area, largely Crown owned and primarily in the north of the province, but also including the foothills and mountain areas. The white area was foreseen as the appropriate venue for urban and industrial development and agriculture, while the expectation for the white area was for a much lower threshold of development — primarily forestry and grazing. Obviously the vintage of this framework is such that it did not foresee the full impact of subsequent energy development in the province.

Subsequent to 1948 there were a number of resource and land-use planning initiatives in the province. However, these tended to be limited either by region or by sector. Perhaps the most well-known example of the former is the Lougheed government's policy initiative with respect to resource development in the Eastern Slopes.³⁶ As to sectoral planning exercises, in addition to *Water for Life* itself, the province has also, for example, introduced strategies with respect to both air quality and climate change.³⁷

³⁴ Government of Alberta, *Land-use Framework* (December 2008).

³⁵ *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8, received Royal Assent 4 June 2009, proclaimed in force 1 October 2009.

³⁶ Government of Alberta, *Policy for Resource Management of the Eastern Slopes* (1977).

³⁷ Government of Alberta, *Clean Air Strategy for Alberta* (1991); Government of Alberta, *Climate Change Strategy* (2008).

Quite apart from the limited scope of previous planning initiatives, the major drawback from the perspective of legal enforcement in planning exercises to date has been the lack of legal teeth; it is in this regard that the new *LUF* promised to break new ground.

The *LUF* as introduced in December 2008 sets its overall objective broadly: “to sustain [Alberta’s] growing economy, but balance this with Albertans’ social and environmental goals.”³⁸ In particular, it sets three “desired outcomes” that are to guide land-use planning decisions:

- healthy economy supported by our land and natural resources;
- healthy ecosystems and environment; and
- people-friendly communities with ample recreational and cultural opportunities.³⁹

The strategic blueprint that is intended to move the province towards these outcomes consists of what are effectively seven sub-strategies:

- the development of regional land use plans based on the seven land-use regions identified in the *LUF*;
- the creation of a Land-use Secretariat for the province and seven Regional Advisory Councils for the respective land-use regions;
- the use of cumulative effects management to measure impacts on land, water and air at the regional level;
- the development of a conservation and stewardship strategy and collateral policy instruments for both public and private lands;
- the promotion of efficient use of land so as to reduce the human footprint on the landscape;
- the establishment of an information, monitoring and knowledge system so as to allow for continuing improvement of planning and decision-making; and
- provision for including Aboriginal peoples in land-use planning.⁴⁰

By any measure the agenda set out in the *LUF* is an ambitious one, and it remains to be seen what advances in practice it will yield compared to past efforts. By itself the *Land-use Framework* is just that — a framework, analogous to the general template set

³⁸ *LUF*, at 6.

³⁹ *Ibid.* at 23.

⁴⁰ *Ibid.* at 20-21.

out in *Water for Life*. Much will depend upon the degree of commitment that the province shows to implementing it. The most important signal of the province's determination in this respect — albeit not a conclusive indicator — is the legislative implementation of the *LUF* in 2009 in the form of *ALSA*, which essentially adopts the *LUF*'s structure with no significant changes. The purpose of this paper, however, is not to assess the success of the *LUF* and *ALSA*, but to suggest how they fit with the *Water for Life* strategy, and in particular their institutional implications. In this regard, the first two *LUF* strategies noted above — the development of regional plans and the creation of new planning institutions — are of special interest.

The institutions set up under the *ALSA* bear some analogies to those provided for in *Water for Life*. There is provision, first, for a single provincial Land Use Secretariat which will support Cabinet decision-making and take the lead in setting the terms of reference under which regional planning exercises are conducted (analogous to the role taken on by the Alberta Water Council pursuant to the *Water for Life* strategy) as well as lead the development of the regional plans “in conjunction with [relevant provincial government] departments and in conjunction with the Regional Advisory Councils.”⁴¹ The Secretariat will also have other overarching duties such as ensuring “effective management of cross-regional infrastructure and policy matters”,⁴² overseeing the implementation of models for cumulative effects management, and generally providing supervision and advice to regional planning bodies from a provincial perspective. In sum, it is the key agency at the heart of the actual planning exercise and, in this respect, would appear to have a much more active role than that accorded the Alberta Water Council under *Water for Life*. Most significantly, of course, the Secretariat operates under a very broad legislative mandate pursuant to *ALSA*⁴³ — albeit one that is subject to potentially close supervision by Cabinet, which ultimately must approve the plans.⁴⁴

The second major institution created pursuant to the *LUF* and implemented by *ALSA* is the Regional Advisory Council (RAC), of which there are seven — one for each of the designated planning regions.⁴⁵ The Councils are intended to include representation from a wide range of stakeholders, and their members — appointed by Cabinet — are to include broadly “provincial and municipal government interests, industry, nongovernment groups, aboriginal community representatives, and other relevant planning bodies (e.g.

⁴¹ *Ibid.* at 29.

⁴² *Ibid.*

⁴³ The key provisions relating to the Secretariat are found in ss. 57-63 of *ALSA*.

⁴⁴ An indication of the government's intention to retain firm control of the process through Cabinet is reflected in s. 63(1), which provides: “In addition to its mandate under this Act and any other enactment, the secretariat must perform the duties imposed or conferred on it by a regional plan or by the Lieutenant Governor in Council.”

⁴⁵ The legislative implementation of these Councils is found in *ALSA*, ss. 52-56.

Watershed Planning and Advisory Councils) within the region.”⁴⁶ The role of these RACs is entirely advisory: to advise on the plans as they are developed, to advise on “trade-off decisions” with respect to competing land uses (including the associated question of setting cumulative effects thresholds), and to advise on (and participate in) the consultation process for the planning exercise.⁴⁷

In the result, while the planning process that is envisaged by the *LUF* and *ALSA* is characterized as a *regional* planning exercise, it is nevertheless one that is highly controlled by the central Secretariat (and ultimately by Cabinet). Moreover, the approach represents an important departure from most of the past planning exercises in the province insofar as the implementing legislation provides real teeth both in the planning process and in the implementation of the plans that are adopted. The process will yield seven regional land-use plans, each of which will “define regional outcomes (economic, environmental and social) and a broad plan for land and natural resource use for public *and private* lands within the region”⁴⁸ — and each of which must eventually be approved by Cabinet. Once approved, the regional plans will represent government policy and are not subject to appeal. Both municipal and provincial decision-makers affected will be bound by the plans and required to comply with them,⁴⁹ moreover, they will be required to file a statutory declaration of compliance to this effect with the Secretariat.⁵⁰

With regard to the issue of particular interest for this paper — the nature of the interaction between the *LUF/ALSA* and *Water for Life* — the implications of the former for the latter are not entirely clear. In one very important respect — the choice of the planning horizon (or, put differently, the relevant landscape) — there is a very clear linkage between the two initiatives. The *LUF* explicitly opts for using the seven major watersheds as defined in *Water for Life* as the basis for its regional planning. While this

⁴⁶ *LUF*, at 26.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* at 26 [emphasis added].

⁴⁹ So, for example, municipal governments will be required to amend their own planning documents so as to align with the requirements of the respective regional plan and to demonstrate their compliance. In this respect, while the Framework notes (*ibid.*) that there is a “strong tradition of local government control” that recognizes the diversity of interests in the province, it also makes it clear that there are overriding provincial interests which will be increasingly important in the face of development and competing uses for provincial resources.

⁵⁰ *ALSA*, ss. 20-21. This also suggests — and indeed the *Framework* recognizes — that “changes in provincial policy or direction will need to be reflected through amendments to regional plans to ensure that provincial policy and regional plans remain aligned” (at 26). (The relevant legislative provision implementing this requirement is found in *ALSA*, s. 22.) This raises obvious questions (which are beyond the scope of inquiry for this paper) with respect to administrative efficiency and the degree to which a process that ensures alignment with seven regional plans on a continuing basis may prove overly cumbersome.

should enhance the potential for the two processes to complement one another, there are other fundamental questions that are left unanswered by the *LUF* as implemented by *ALSA*. The *LUF* suggests that it “complements” the *Water for Life* strategy, and in particular notes that uses that are permitted on land clearly have impacts on adjacent watersheds.⁵¹ Beyond this — and the provision noted earlier that anticipates the inclusion of representation from Watershed Planning and Advisory Councils on RACs — there is little in the way of specifics as to how these different bodies will interact in planning. The *LUF* is at pains to emphasize that land use planning is a different and more difficult exercise than agreeing on air and water policies (suggesting, perhaps somewhat optimistically, that “[i]t is relatively easy to reach broad consensus on the appropriate standards” for the latter two). While pointing out some of the difficult questions that are raised in respect to the scope of land-use planning,⁵² the *LUF* provides no concrete answers other than to note that it is a “difficult topic “and that it “will entail ongoing public discussion.”⁵³ Nor does *ALSA* provide these answers.

4.2. Land-use Plans and Water Management

While the full implications of the new land-use management regime for *Water for Life* are yet to unfold, as of this writing there are indications in this respect in the two land-use planning processes that are most advanced — those for the Lower Athabasca region⁵⁴ and the South Saskatchewan region.⁵⁵ Currently, detailed terms of reference have been developed for each region to guide the development of the regional plan. These terms of reference are useful in indicating how the government sees the interaction of land-use planning and water management — particularly because they suggest the differences in land-use planning and water management priorities that attach to two regions of the province that both face very significant, but also very different, water use challenges.

⁵¹ *LUF*, at 7.

⁵² As the *LUF* itself asks about the potential scope of a land-use framework:

Is it about extending water and sewers from towns into adjacent rural communities: Or the proximity of feedlots to populated areas? Or addressing cumulative effects of a development on the quality of our air, land and water on a region-by-region basis? *Ibid.*

⁵³ *Ibid.* See also on this point, Wenig, *supra* note 4 at 24.

⁵⁴ Government of Alberta, *Terms of Reference For Developing the Lower Athabasca Regional Plan* (July 2009) [*Lower Athabasca Terms of Reference*].

⁵⁵ Government of Alberta, *Terms of Reference For Developing the South Saskatchewan Region* (November 2009) [*South Saskatchewan Terms of Reference*].

4.2.1. *The Lower Athabasca Region*

The *Lower Athabasca Terms of Reference* were the first developed under the *LUF*, and indeed pre-date the actual legislative implementation of the *LUF* in *ALSA*. As such, they have a special significance insofar as they are indicative of the general approach that the government is likely to pursue in giving effect to the broad planning structure established by the *LUF* and *ALSA*. Of particular interest for this paper is the insight the terms of reference provide as to the balancing of institutional responsibilities that the government anticipates, especially as between the government (in particular, Cabinet), the Secretariat and the RACs. Specifically, what level of guidance can we expect the government (through Cabinet) to provide the RACs and what is the ambit of the advice that RACs will provide in return as input into the development of the final plan that will be reviewed and approved by Cabinet?

4.2.1.1. *Template for Regional Plans*

One of the fundamental issues not fully addressed in the *ALSA*, but for which there is guidance in the *Lower Athabasca Terms of Reference* relates to the content of the regional plans. While the *ALSA* provides that a regional plan “must (a) describe a vision for the planning region, and (b) state one or more objectives ...”,⁵⁶ there is little guidance in the legislation as to what the government intends as the common core of such plans — if indeed there is to be a common core. In the *Terms of Reference*, however, the government clarifies that all regional plans will have the same seven core components:⁵⁷

- a profile of the region — a summary of the “key economic, environmental and social considerations and trends in land use”, with an emphasis on the major issues confronting the region;
- the policy context for the particular plan, including the “key policy direction and instructions provided by Cabinet” in this respect;
- a regional vision statement (as required by the legislation);
- regional outcomes — a qualitative description of what the plan hopes to achieve in terms of the *LUF*'s three desired outcomes noted earlier (i.e. a healthy economy, healthy ecosystems and environment, and people-friendly communities);

⁵⁶ *ALSA*, ss. 8(1)(a)-(b); additionally the legislation suggests a “laundry list” of what a plan may do in s. 8(2).

⁵⁷ *Athabasca Terms of Reference*, at 4-5.

- objectives and goals — referring here to the setting of “quantitative, measurable targets and thresholds” as well as the identification of trade-offs and choices between economic development on the one hand and environmental and social considerations on the other;
- strategies, actions and approaches for achieving the objectives and goals — including recommendations for both regulatory and non-regulatory measures; and
- provisions for monitoring and reporting — describing how the government will track and report on the quantitative indicators set in the plan.

The *Terms of Reference* also clarify the process for developing a regional plan, beyond the general provision in *ALSA* that the Land Use Secretariat has the mandate to “prepare or direct the preparation of regional plans ... for consideration by Cabinet”.⁵⁸ Under the *Terms of Reference*, it is specified that the Secretariat will develop the plan in collaboration with an interdepartmental project team, and will also provide policy, research and administrative support to the RACs.⁵⁹ The actual development of the plan is conceived of in the *Terms of Reference* as an iterative process, beginning with a broad conceptualization on the part of the RAC as to “**what** the region should look like over the long-term and **how** activities in the region should be planned.”⁶⁰ As additional information is received in the form of data, modeling results and guidance from the provincial government, the advice to be provided by the RAC is to become more focused. The relationship between the RAC and the provincial government (i.e. for these purposes, Cabinet) is described as “an evolving conversation”,⁶¹ with the former providing increasingly refined advice and the latter providing guidance in certain areas of special policy significance.

The key role of Cabinet in providing guidance to the RACs with respect to how the expectations for the region fit with government’s broader view of those for the province as a whole is also re-affirmed.⁶² While there was some speculation on how interventionist the Cabinet role would prove *vis-à-vis* the RACs in particular, the *Terms of Reference* suggest that Cabinet guidance in this respect will focus on three key aspects: the balance between development and the economy; the assessment and allocation of natural resources (focusing on the carrying capacity of the respective resources, but leaving to the RACs the more specific issues relating to allocation of resources for particular uses),

⁵⁸ *ALSA*, s. 58(f).

⁵⁹ *Athabasca Terms of Reference*, at 5.

⁶⁰ *Ibid.* at 6 [emphasis in original].

⁶¹ *Ibid.*

⁶² *Ibid.*

and issues related to alignment of policy between the regional plan and provincial policies more generally.⁶³

As noted above, while the Cabinet is to provide guidance on certain key policy issues, the RAC in turn is to provide advice. In this respect the *Terms of Reference* suggest both the nature of the advice that is being sought and those issues that fall outside the purview of the RAC's consideration. With respect to the former, RACs are to offer advice in five general areas:

- long-term future development of the region consistent with the three desired outcomes set out in the *LUF*;
- subject to the broader provincial outcomes as determined by Cabinet, the desired regional outcomes;
- the application of provincial policies at the regional level;
- the reconciliation of competing regional land uses; and
- consultations with the public and stakeholders (other than Aboriginal groups).⁶⁴

Of at least equal significance for how the planning process is to be carried out, the RACs are also explicitly *precluded* from considering seven important issues:

- municipal governance — in particular, any consideration of municipal re-organization or restructuring;
- Aboriginal consultation, which will be guided by the province's existing policy in this respect;⁶⁵
- limits on population growth and settlement;
- any issues regarding taxation;
- provincial royalties;
- levels of government expenditures;
- current laws and regulations (although RACs it is provided somewhat ambiguously that they “may pass comments on to Cabinet as part of their advice should something become apparent as part of their deliberations”).⁶⁶

⁶³ *Ibid.* at 6-7.

⁶⁴ *Ibid.* at 7.

⁶⁵ *Alberta's First Nation Consultation Process on Land Management and Resource Development.*

4.2.1.2. *Issues Specific to the Lower Athabasca*

The template described above is to be applied to each of the regional planning exercises and is not unique to the Lower Athabasca region. However, the *Lower Athabasca Terms of Reference* also address the specific peculiarities of the region and how they are to be taken into account in the regional plan. This is reflected in the initial guidance that is provided from the government to the RAC in the *Terms of Reference*. As will be discussed further on, the key areas of guidance can be expected to vary somewhat from plan to plan, although there are also some commonalities.

In the case of the Lower Athabasca, there are four key areas of guidance:

- economic growth and development scenarios;
- land conservation objectives;
- regional air and water thresholds; and
- human development considerations.⁶⁷

Of these, one can expect to see the first as key to all the regional plans. In this respect, it is clear that for the provincial government the fundamental characteristic of the region — and the factor which clearly is expected to drive the regional planning exercise — is the key role the region has to play in advancing the province’s vision of its future status as “a global energy leader”. In particular, the RAC is to proceed on the basis that “oil sands development will continue to form a centerpiece of this vision.”⁶⁸ The question then is not whether there will be significant development of the oil sands, but the particularities of how this is to proceed. In this respect, it is similarly revealing that the RAC is asked to consider three possible development scenarios — a current state scenario, a mid-range scenario and a high-end scenario — all of which are driven by energy prices.

With respect to guidance in the third heading (the one most relevant for the purposes of this paper) — regional air and water thresholds — the most notable feature of the *Terms of Reference* in this respect is the recognition of the need to shift to a regional approach based on managing cumulative effects, and the corollary recognition that watersheds “have a limited carrying capacity”.⁶⁹ Such an approach requires setting regional thresholds for maximum impacts on water resources (and air) and managing development in such a way that these thresholds are not exceeded. It is not the RAC,

⁶⁶ *Ibid.* at 8.

⁶⁷ *Ibid.* at 10.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* at 15.

however, that will set these thresholds; rather the RAC will take thresholds established through other processes and use them in the development of the regional plan.

In looking for regional thresholds for impacts on surface and groundwater resources in the region, the RAC does not have available to it the results of one comprehensive and integrated exercise. Rather it must draw on several water management frameworks; these include the Lower Athabasca River Water Management Framework (discussed separately and in more detail further on in this paper), the Cold Lake-Beaver River Water Management Plan, and three groundwater management frameworks that reflect distinct geological regions — the Athabasca Oil Sands Region (the site of current oil sands mining operations), the South Athabasca Oil Sands Region (for in situ operations) and the Cold Lake-Beaver River Basin area.

These various frameworks, taken together, will establish the basis for water thresholds to be set by the province in the Lower Athabasca region. What is most striking about these thresholds is the degree to which they have as their focus the needs of the oil sands sector. This is especially the case for surface water, as discussed further on with respect to the Lower Athabasca River Water Management Framework, where the various scenarios for water use (current state, mid-range and high-end) are phrased in terms of the demand for freshwater by the oil sands operators. It is these scenarios that the RAC is then to explore in developing its advice on a regional plan. In the event that it is impossible to meet both economic and environmental objectives under each scenario, the *Terms of Reference* do not suggest that environmental objectives should necessarily prevail, but rather (somewhat ambiguously) that “options should be assessed and recommended”.⁷⁰ However, the *Terms of Reference* are less than helpful in this respect, in that they do not suggest the criteria for assessing and weighing different options.⁷¹

4.2.2. The South Saskatchewan Region

The 2006 *South Saskatchewan Terms of Reference* should be considered against the backdrop of the Approved Water Management Plan already existing in the watershed.⁷²

⁷⁰ *Ibid.* at 17.

⁷¹ In fact, the advice ultimately produced by the RAC for the Lower Athabasca Region is in the form of a “vision statement” consisting of eight general “outcomes”, each of which consists of a number of similarly general objectives, which are in turn to be implemented by a number of recommended strategies. Lower Athabasca Regional Advisory Council, “Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region” (August 2010), online: <<http://landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/LARP-VisionForLowerAthabascaRegion-Aug2010.pdf>>. The degree to which this advice is in fact accepted in the final plan as approved remains to be seen. The list of strategies to be implemented pursuant to the advice is certainly an ambitious one, however.

⁷² Alberta Environment, “Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)” (August 2006).

The Plan was designed to “provide guidance to decision makers and act as a foundation for future watershed management planning of sub-basins in the South Saskatchewan River Basin by Watershed Planning and Advisory Councils, as well as stewardship groups.”⁷³

While the Water Management Plan addresses a range of issues related to both water quality and water quantity, its primary focus is overwhelmingly on the latter. This emphasis reflects the serious concerns about the pressures on water resources of the basin — pressures that are expected only to intensify in coming years. The concerns are evident in the three principal recommendations of the Plan, all of which are directed at the future of water allocation in the basin.⁷⁴ The emphasis on quantity over quality (although the latter is certainly addressed in the Plan⁷⁵) is indicative of the broader context of how water resources have been used in southern Alberta over the past century. In particular, this is a region that has been characterized by heavy investment in irrigation infrastructure to support the agricultural economy — as well as the associated municipal infrastructure that has grown up to serve the needs of a growing population. Additional pressures on water resources are imposed owing to the presence of a significant First Nations population and the requirements of users downstream from the province. In this latter respect, Alberta is required to pass on to Saskatchewan 50 percent of the natural flow in the South Saskatchewan Basin pursuant to the interprovincial Master Agreement on Apportionment, which governs eastward flowing rivers in the Prairie Provinces.⁷⁶ In sum, the Plans describes a current water usage where allocations in three of the four major sub-basins (the Bow, the Oldman and the South Saskatchewan) have reached their

⁷³ *Ibid.* at v.

⁷⁴ The three main recommendations of the Plan are:

- Alberta Environment [should] no longer accept applications for new water allocations in the Bow, Oldman and South Saskatchewan River Sub-basins until the Minister of the Environment specifies, through a Crown Reservation, how water not currently allocated is to be used.
- Water be allocated from the Crown Reservation only for [four specified objectives].
- When allocations in the Red Deer River Sub-basin reach [a specified limit], a thorough review be conducted to identify the maximum allocation limit. *Ibid.*

Most of the other recommendations and provisions in the Plan similarly are directed at water quantity issues.

⁷⁵ The Plan notes, for example, the “poor and declining health of the aquatic environment” and the insufficiency of flows for sustaining aquatic environments in parts of the Basin — which are aggravated by a lack of knowledge as to the precise effects of changes in flow on these environments. *Ibid.* at 5.

⁷⁶ In fact the province has been able to pass on significantly more than this in practice — approximately 75%. However the Plan anticipates that this volume will decline significantly (to a range of “50% to 60%, in at least half the years”) as existing and new allocations are increasingly utilized more completely. *Ibid.* at 4.

limit, while the fourth (the Red Deer) will approach the same situation over the next 30 to 40 years.⁷⁷

Given the very different contexts of the Lower Athabasca and the South Saskatchewan regions, it is not surprising that although a primary focus of regional planning in both regions is the appropriate use of water resources, the terms of reference for the latter differ in some important respect from those for the former. Thus, while the key factors driving regional planning in the Lower Athabasca relate to resource development (in both the oil sands and the forestry sector), the challenges that will face planners in the south arise out population growth (the Basin is the most heavily populated of the seven planning regions in the province) and the associated increased (and diverse) demands on an already stressed water endowment. The RAC for the South Saskatchewan Region is therefore instructed in the *Terms of Reference* to construct development scenarios that will take into account the relationships between six factors:

- population growth;
- water supply and demand
- conservation of valued landscapes and biodiversity;
- economic development;
- regional air and water thresholds; and
- social objectives.⁷⁸

Two of these factors — water supply and demand and regional air and water thresholds — are of particular relevance to this paper. As to the former, the *Terms of Reference* detail the stresses on water supply in the region that have already been noted in the context of the Water Management Plan for the basin. It also refers explicitly to the *Water for Life* strategy insofar as the latter has established a target of 30 percent improvement in water conservation, efficiency and productivity by 2015.⁷⁹ In the guidance that is provided to the RAC in the *Terms of Reference*, this figure is adopted as

⁷⁷ *Ibid.*

⁷⁸ *South Saskatchewan Terms of Reference*, *supra* note 55. As of this writing, the RAC had not provided a document setting out its advice comparable to that produced by the Lower Athabasca RAC. However, it has produced (in July 2010) summaries of both public and stakeholder input, found online at the website for the South Saskatchewan Regional Plan, online: <<http://landuse.alberta.ca/RegionalPlans/SouthSaskatchewan/Default.aspx>>.

⁷⁹ *Ibid.* at 14, using 2005 levels as the reference point.

one of the two key expectations that the RAC is directed to use in examining potential development scenarios in the basin.⁸⁰

There is one peculiarity with respect to water management planning in the *South Saskatchewan Terms of Reference* that represents a divergence from the general approach in the *LUF* that planning for land-use purposes should follow the same boundaries as planning for water management purposes. This is that while the Red Deer watershed is recognized as one of the seven separate regions under the *LUF* for land-use planning, for purposes of water management the “policy for the Red Deer Region will be aligned and set within the overall planning context of the South Saskatchewan River Basin.”⁸¹ This means that the South Saskatchewan Regional Plan will consider the water requirements of the Red Deer Region. The inclusion of the Red Deer basin for these purposes is understandable given the close connection between the two regions. It is not clear from the *Terms of Reference*, however, how this bifurcation of the planning process will be accomplished in a way that is consistent with the holistic planning envisaged in the *LUF* and *ALSA*.

With respect to regional air and water thresholds (and for our purposes, the latter in particular), the *Terms of Reference* for the region reflect an existing water management framework that varies in sophistication depending on the particular river basin or sub-basin under consideration and on the nature of the water source — i.e. surface water or groundwater. The management framework for the former is relatively well developed for most of the region and includes not only purely provincial initiatives (such as the Water Management Plan discussed earlier and the Eastern Slopes Policy), but also interprovincial (the Master Agreement on Apportionment) and international (the Canada-U.S. Boundary Waters Treaty) commitments.⁸² By comparison, with respect to groundwater, the *Terms of Reference* note that this is not currently a significant water source in the region (although it may be important at a local level) — nor is there a good understanding as of yet as to the nature of the province’s groundwater resources.⁸³ A framework for groundwater management must therefore await the results of the ongoing

⁸⁰ *Ibid.* at 21. The other expectation is a regional population increase of 2 million by 2076.

⁸¹ *Ibid.* at 14.

⁸² While the framework for surface water is “relatively well-developed” in the sense of the existence of the documents described, more controversial is the question of whether it is well developed in the sense of employing all the appropriate tools of modern water management planning. In this latter respect the province has been criticized in particular for not fully accommodating instream flow needs in its implementation of existing water management legislation. See: Michael M. Wenig, Arlene J. Kwasiak & Michael S. Quinn, “Water under the Bridge? The Role of Instream Flow Needs (IFNs) Determinations in Alberta’s River Management” in H. Epp & D. Ealey, eds., *Water: Science and Politics*, Proceedings of the Conference held by the Alberta Society of Professional Biologists on 25-28 March 2006, Calgary, Alberta (Edmonton: Alberta Society of Professional Biologists).

⁸³ See *South Saskatchewan Terms of Reference*, *supra* note 55 at 25.

Alberta Groundwater Mapping and Inventory Program which began in 2008. An additional factor that will influence water management planning in the region will be the provincial government's review of the water allocation system and the associated legislative changes that may be expected to result from that process. Again, it is anticipated that this process will, amongst other goals, "advance the outcomes of the Water for Life Strategy".⁸⁴

4.3. *Water for Life* and *LUF/ALSA*

While *the LUF/ALSA* and *Water for Life* both represent initiatives for regional planning on a watershed basis, there are important differences between the two, and in some respects they send out mixed signals. In particular, it is not entirely clear the degree to which the former has essentially overtaken the latter as the central focus for water planning initiatives in Alberta.

There are certainly some structural similarities between the two planning initiatives. Both envisage regional advisory bodies (RACs under *ALSA*, WPACs under *Water for Life*) organized on a watershed basis, with a provincial body (the Land Use Secretariat and the Alberta Water Council, respectively) providing a broader province-wide perspective to the planning process. These similarities, however, are outweighed by two important differences. First, and most obviously, the scope of the planning exercise is much broader for *LUF/ALSA* than is true for *Water for Life*. Given that the former is directed at land use as comprising a wider range of resource-use issues, this raises the obvious question as to the role and value that *Water for Life* has as a resource planning exercise. Ideally of course, resource-use planning should be holistic in nature and take into account as many potential land-use trade-offs as possible. Given its sectoral nature, *Water for Life* is necessarily limited in this respect. Nor is it a sufficient answer to this objection that the results that come out of *Water for Life* can simply be used as input into the *LUF/ALSA* process — as indeed the latter seems to suggest at a number of points. An important point of holistic planning is that the many different (and often conflicting) uses of the resource base available to society should be considered together, since the use of one resource typically has inextricable impacts on another (so, for example, the use of the province's water endowment affects the use of its hydrocarbon potential, and vice versa). There may certainly be reasons why it is sometimes more effective to use a somewhat narrow horizon in considering impacts on specific resources, but while the province refers generally from time to time about the interaction between *LUF/ALSA* and *Water for Life*, it has yet to articulate in any detail how it sees the interaction between these two planning initiatives.

⁸⁴ *Ibid.* at 24.

The second key difference with respect to the two planning processes is the legal impact that attaches to *LUF/ALSA* as compared to *Water for Life*. The legal teeth given to the *LUF* through *ALSA* essentially establish it as the dominant planning process with respect to resource management in Alberta. This means that other processes such as *Water for Life* must proceed in light of the planning parameters established pursuant to the *LUF*. For example, in the case of the two specific basins discussed above, this means taking as a given the dominant role of oil sands development in driving resource management decision-making in the Lower Athabasca region. Similarly, in the South Saskatchewan region, the potential for RACs to consider and make recommendations on restrictions on population growth as an option for responding to pressure on water resources is effectively precluded because of the terms of reference under which the *LUF* process operates.

5.0. Sectoral Planning Exercises

5.1. Introduction

In addition to the broader land-use planning initiatives described above, the province has also engaged in sectoral planning initiatives. Two of the most significant of these for the purposes of this paper, because of their implications for water management in the province, are those directed at managing the impacts associated with the oil sands in the Lower Athabasca region. Obviously these initiatives also have potential implications for the land-use planning process, as described above, that is currently underway in that region. These initiatives are the Cumulative Environmental Management Association and the Lower Athabasca Water Management Framework.

5.2. Cumulative Environmental Management Association (CEMA)

Almost certainly, the most challenging issues with respect to planning in Alberta in recent years have arisen out of the rapid expansion of the oil sands. Concerns with respect to the pace of oil sands activity were expressed in the course of regulatory hearings held in 1997 by the Energy and Utilities Board (EUB).⁸⁵ In particular, there was serious concern expressed as to whether the conventional regulatory approach — predicated on project-by-project approvals — was sufficient to address adequately the cumulative environmental implications of the planned increased in oil sands capacity. In reaction to this concern, the provincial government undertook two planning initiatives, both directed at the implications of development of the Athabasca oil sands area. The first of these was

⁸⁵ The Board has of course since been divided into two separate boards — the Energy Resources Conservation Board and the Public Utilities Board. It is the former that is effectively the successor to the EUB as a regulator of oil sands activity.

the province's 1999 *Regional Sustainable Development Strategy for the Oil Sands Area* (RSDS),⁸⁶ the second was the creation in 2000 of the Cumulative Environmental Management Association (CEMA). As to the former, the RSDS certainly did not constitute a full-blown development plan for the oil sands, nor even a detailed framework for addressing cumulative effects. It did, however, provide some basic parameters indicating how a cumulative effects strategy and management framework might be developed, an approach that attracted some early interest from a range of actors with an interest in the implications of oil sands development. In practice, however, little came of the exercise and it has been suggested that “as an instrument of public policy guiding resource management and environmental stewardship [it] appears to have atrophied from the outset.”⁸⁷ The complementary stakeholder institution, CEMA, nevertheless continued to operate.

The role of CEMA with respect to provincial oil sands policy was purely advisory, and its composition is entirely voluntary, comprising representatives from both the federal and provincial governments as well as environmental NGOs and Aboriginal organisations. The work of CEMA was tied directly to the agenda of environmental issues identified under the RSDS — with the organisation taking on 37 of the 72 issues identified under the latter. As noted, the impact of CEMA is dependant on the degree to which the advice it proffers is accepted by policy- and decision-makers. There is lacking any of the legal mechanisms for enforcement and compliance found in *ALSA* (and indeed one would hardly expect otherwise given the voluntary nature of the association).

Questions have been raised, especially in the context of the accommodation of Aboriginal concerns, as to the ultimate effectiveness of CEMA. In an independent review carried out for the Athabasca Tribal Council and the Government of Alberta,⁸⁸ a number of key shortcomings in CEMA's performance were highlighted. These included, *inter alia*, findings that Traditional Ecological Knowledge had not been adequately incorporated into CEMA Guidelines and Management Frameworks, that the stakeholder-driven process that was a primary goal of CEMA had not been achieved in the context of Aboriginal participation, that there was a “lack of connection between CEMA's

⁸⁶ Alberta Environment, *Regional Sustainable Development Strategy for the Oil Sands Area* (July 1999).

⁸⁷ Steven A. Kennett, *Closing the Performance Gap: The Challenge for Cumulative Effects Management in Alberta's Athabasca Oil Sands Region*, Occasional Paper #18 (Calgary: Canadian Institute of Resources Law, May 2007) at 12. For another critique of the CEMA process, see: Michael M. Wenig, “Federal Policy and Alberta's Oil and Gas: The Challenge of Biodiversity Conservation” in G. Bruce Doern, ed., *How Ottawa Spends 2004-2005: Mandate Change in the Martin Era* (Montreal: McGill-Queens Press, 2004).

⁸⁸ The Athabasca Tribal Council and The Government of Alberta, “Independent Strategic and Program Evaluation of the Cumulative Environmental Management Association”, review carried out by Integrated Environments, with Tumbleweed Consulting Ltd. (January 2008).

recommendations and government's implementation of these recommendations and subsequent inaction to promote sustainable development [which] has played an important role in stakeholders' dwindling faith in the Association", and that "[i]n addition to a lack of implementation by government, there has also been little evidence of implementation by corporate members and a resulting lack of participation by aboriginal groups."⁸⁹

The CEMA review also noted that CEMA's role was increasingly being overtaken by other policy initiatives.⁹⁰ Not surprisingly the introduction of the *LUF* and its attendant institutions — and especially the Land use Secretariat — raised serious questions as to the relationship between CEMA and the new planning regime, particularly given the legislative vesting of the Secretariat with real and significant legal authority. CEMA has itself raised with the provincial government the issue of its future in the light of the *Framework*, but it is still unclear how the government sees CEMA's role in the new planning environment, although it has indicated generally that CEMA can be of assistance to the new planning bodies.⁹¹

5.3. The Lower Athabasca Water Management Framework

The challenges of oil sands development (and the failure of CEMA to adequately respond to its mandate to provide recommendations for meeting these challenges) have given rise to another planning exercise that is limited sectorally and geographically. The Lower Athabasca Water Management Framework (LAWM Framework)⁹² is different, however, from other planning exercises in two important respects: the parties to the initiative and the legal force that attaches to the commitments. With respect to the former, the Framework is a rare example of joint federal-provincial resource management planning, arising generally out of the federal government's constitutional authority over fisheries; with respect to the latter, the commitments are subject to enforcement pursuant to provisions of the federal *Fisheries Act* relating to the protection of fish habitat.⁹³

⁸⁹ *Ibid.* at 53.

⁹⁰ *Ibid.*

⁹¹ For example, in a letter of 11 September 2008 from the Deputy Minister of Alberta Sustainable Resource Development to CEMA with respect to the latter's submission of a Terrestrial Ecosystem Management Framework for the Regional Municipality of Wood Buffalo, it is noted that the "recommendations will be addressed during the development of the regional plan that provides the appropriate context in which to address the full suite of values in the region." Letter online at CEMA: <<http://www.cemaonline.ca>>.

⁹² Alberta Environment and Fisheries and Oceans Canada, *Water Management Framework: Instream Flow Needs and Water Management System for the Lower Athabasca River* (February 2007).

⁹³ *Fisheries Act*, R.S.C. 1985, c. F-14, s. 35(1), which provides:

The LAWM Framework had its roots in CEMA's inability to comply with a request by a 2003 federal-provincial panel reviewing two oil sands proposals.⁹⁴ In particular the panel requested that CEMA develop a recommendation for instream flow needs (IFNs) for the lower Athabasca River. The panel set the deadline for such a recommendation by December 31, 2005, failing which a framework was to be developed by Fisheries and Oceans Canada (DFO) and Alberta Environment. Subsequent to CEMA's inability to agree on a recommendation, DFO and Alberta Environment initiated a process which eventually resulted in agreement on a framework based on CEMA's work.

The LAWM Framework takes a two-phase approach to the problem of IFNs, with the two phases proceeding to some extent in parallel. The stated goal of the first phase (September 2006 to September 2010) is to "[use] scientific information on in-stream flow needs as well as information on water use to outline management actions for varying flow conditions in the lower Athabasca River."⁹⁵ Essentially the Phase 1 component provides the framework for water protection in the near future, pending the additional work to be accomplished under Phase 2 (discussed further on in this section), with a view to implementing a final framework document beginning in January 2011.

The central management tool for implementing Phase 1 of the LAWM Framework rests on the weekly delineation of river flow conditions according to a scale of green, yellow or red. During the green management zone ("water availability is sufficient"), which will prevail most of the year, industry will have available for its use 15 percent of the instantaneous flow of the river. Under the yellow management zone ("Cautionary Threshold"), a target of 10 percent of the flow is available, subject to maximum withdrawal caps. Finally, under the red zone ("Potential Sustainability Threshold") maximum withdrawals are set at 5.2 percent of the historical median weekly flow, again subject also to maximum withdrawal caps. There has already been a triggering of the yellow flow condition, in January 2009.

It is not anticipated that the Framework will have a major impact on existing oil sands operations. This is especially the case for the earliest operations because of the vintage of the water licences acquired by Syncrude and Suncor. Both these were issued prior to 1977, when the *Fisheries Act* was amended to include the current section 35; DFO

No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

This provision is, however, subject to the exempting provision in s. 35(2):

No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

⁹⁴ Canadian Natural Resources' Horizon project and the Shell Jackpine Phase 1 Project.

⁹⁵ LAWM Framework, at 4.

effectively accepts that such licences are grandfathered from the application of that section (although expansions to those operations would not be so-protected).⁹⁶ The most significant impacts of the restrictions, therefore, would be felt by new oil sands operations. (The Albion sands withdrawal is *sui generis* in that it is already has an authorization under the *Fisheries Act* which deals explicitly with diversion rates.)

Despite the underlying threat of using section 35 of the *Fisheries Act* to enforce compliance with the obligations under the LAWM Framework, there is still some ambiguity with respect to the full legal implications of the Framework. This is because of the ultimate dependence on federal as opposed to provincial enforcement to ensure compliance. It has been noted, for example, that in other watersheds in Alberta the regulation of allocations and diversions is accomplished by the province's powers under the Water Act, in particular as the result of the development and approval of Water Management Plans pursuant to that legislation. Although DFO and Alberta Environment apparently looked at this option as a possible means for ensuring compliance by oil sands operators, to date no such Plan has been approved, and the legal mechanisms available for provincial enforcement with respects to withdrawals in other watersheds are not available in the lower Athabasca.⁹⁷ Additionally, despite the emphasis placed in the Framework on the critical role of monitoring, some environmental groups have questioned the province's capacity to accomplish this effectively during low-flow conditions.⁹⁸

With respect to Phase 2 of the Water Management Framework process (beginning with preliminary work in 2007), this was geared to producing a framework for achieving environmental and socio-economic objectives over the long term, employing both additional research and adaptive management techniques (which will include to this end "rigorous monitoring programs"⁹⁹) to draw upon and apply the experience from Phase 1;¹⁰⁰ it is this framework that is to prescribe the permissible level of cumulative

⁹⁶ It would not appear that this grandfathering is a legal requirement but rather a policy decision. Moreover, it is not impossible that the two operators would always be unaffected by low flows. However, under Phase 1's implementation plan, any constraints that might operate on withdrawals during the winter season (i.e. the period of low flows) are tied to "a maximum of rates equal to their average annual allocation rate". "Oil sands diversions and the lower Athabasca River", *Water Matters* (4 February 2009), online: <<http://www.water-matters.org/node/266>>. On the same point see: Wenig, Kwasniak & Quinn, *supra* note 82.

⁹⁷ *Ibid.* at 1.

⁹⁸ *Ibid.* at 2.

⁹⁹ *Ibid.* at 7.

¹⁰⁰ The LAWM Framework sets out common objectives to be achieved in both phases:

1. To provide a high level of protection of the aquatic ecosystem over the long-term.
2. To provide incentive to develop cooperative management options for water in the Athabasca River.

water withdrawals for oil sands operations over the longer term. The process for developing the Phase 2 framework involved the creation of a multi-stakeholder committee (the Phase 2 Framework Committee — P2FC), supported by CEMA, but including non-CEMA members with a view to achieving a broader base of interested stakeholders. In February 2010 the Committee issued a report with its recommendations and forwarded this to provincial and federal regulators. The report does not, however, represent a consensus on the part of all committee members, and, as of this writing, the recommendations contained in the report are the subject of ongoing public input, on the basis of which regulators will produce a final framework document.

In sum, both CEMA and the LAWM Framework are directed at dealing with the needs and impacts of oil sands operations in the Lower Athabasca watershed, although the former is more broadly directed at environmental effects than is the latter, which is focused on water use. The two initiatives also vary in the legal teeth that attach — with CEMA recommendations having no legal force in themselves,¹⁰¹ while the water use provision under the LAWM Framework are enforceable pursuant to section 35 of the *Fisheries Act*.¹⁰² Apart from these differences, however, there are also some commonalities between the two initiatives. In particular, both initiatives are suggestive of an approach to planning on the part of the province that is reactive, iterative and *ad hoc*. In the case of CEMA, the province was reacting to disquiet on the part of provincial energy regulators with respect to the use of a project-by-project approval process to address a problem that was inherently cumulative in its environmental implications. The LAWM Framework was similarly a response to a request to CEMA (which it was ultimately unable to meet) by a federal-provincial review panel for a recommendation on IFNs. In both cases, then, the province found itself playing catch-up to regulators with respect to cumulative effects issues, although one could certainly make a case that the pressing need for cumulative effects analysis for oil sands operations was already well-known.

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3. To provide incentive for achieving more efficient water use.
 4. To provide a reliable supply of good quality water.
 5. To ensure water use restrictions are realistic and the framework is straightforward to administer. *Ibid.* at 7.

¹⁰¹ It is possible, of course, that some of them may eventually have legal significance to the extent that they are adopted in other processes — most notably if they become incorporated into a regional plan pursuant to *ALSA*.

¹⁰² Although, as noted above, concerns have been expressed as to whether the threat of *Fisheries Act* penalties will suffice to ensure compliance.

6.0. Conclusions

The introduction in 2003 of the *Water for Life* strategy was hailed by the by the Alberta government as a major event in water management planning — one that would mark the province as a leader in the use of modern approaches to comprehensively planning the use of water resources. While, especially in its initial form, the strategy was arguably more a vision than a specific plan, taken together with the re-vamping of Alberta's *Water Act* several years earlier, *Water for Life* suggested a welcome recognition of the need to tackle ambitiously the emerging water use challenges in both the north and the south of the province.

As noted at the beginning of this paper, however, *Water for Life* was not introduced in a vacuum and the accomplishment of the strategy's ambitious agenda will be advanced or impeded to the degree to which it is integrated successfully with the broader regulatory environment. This environment includes not only the conventional regulatory regime for resource management in the province, but also a number of other planning initiatives introduced by the province more or less contemporaneously with *Water for Life*. While the pre-existing regulatory regime itself raises some interesting issues as to overlapping responsibilities for water in different government agencies, the focus of this paper has been on the more recent efforts at planning undertaken by the province and how they intersect with *Water for Life*.

Looking at the various planning initiatives undertaken by the province over the past decade, one is left with an overall impression of ambitious agendas, but not always agendas that are clearly integrated. As suggested in this paper, initiatives often appear to be more iterative and reactive than holistic and proactive (as one would hope would be the case with planning); this has especially been the case for the Lower Athabasca, where the province has struggled to keep up with emerging challenges posed by the rapid development of the oil sands.

It may be that the introduction of the *LUF/ALSA* will prove an important step in the direction of more holistic treatment of resource planning in the province (leaving aside the separate question of whether that process achieves an appropriate balance in accommodating both regional and province-wide interests). However, the legal predominance (and for that matter, policy predominance) of *LUF/ALSA* as a planning process does leave open two important questions. First, even assuming the province maintains its commitment to the *Water for Life* strategy, how will the implementation of the strategy be affected by the *LUF/ALSA*? (And, in particular, how will the former provide effective input into the former — as indeed seems to be the intent of the province?) Second, to what extent will there indeed be a continuing commitment to *Water for Life* as a unique process in light of the demands that *LUF/ALSA* will impose not only on the human resources available to the provincial government, but, at least as important, on the resources of those regional entities expected to provide the advisory

capacity vital to the functioning of both planning processes? Put differently, will *Water for Life* fall victim to the regulatory fatigue that has been observed in other processes that depend on public input?

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