Achieving Wetland Conservation in the Canadian Prairies: Policy Linkages and Insights from *Alberta Wetlands: A Law and Policy Guide, Second Edition* (2016).

THE TAY THE ALL WITH THE ALL MADE

Arlene Kwasniak Professor Emerita of Law Senior Research Fellow -Canadian Institute of Resources Law University of Calgary and Kwasniak Consulting The first (2003) and second edition (2016)

The purpose of the publication



"Laws and policies have a powerful and definitive role to play in whether a wetland is protected, impacted, restored, or lost. ... This Guide provides macroscopic to microscopic descriptions and explanations of many of the major threads in the tangled web of laws and policies whose implementation can impact wetlands for better or worse. It looks not only at laws and policies that directly apply to wetland impacts, such as wetland drainage laws, or wetland conservation policies, but also at the myriad of regulatory and other legal influences that more indirectly influence and determine the fate of wetlands. These include legal rules and frameworks concerning common law, property rights, energy resource exploration and development, residential, commercial and industrial development, and those relating to dispositions on and use of public land, including for agricultural and forestry operations. It also looks at legal approaches to protect, restore, and recognize wetlands and their values, including from government designation, environmental assessment, international recognition, land use planning, development restrictions, economic instruments, and wildlife laws. The Guide attempts to put the legal concepts and rules within a context so that they will be understandable to readers from a variety of backgrounds."

The first (2003) and second edition (2016)

The purpose of the publication

Although Alberta-centric, the central messages and themes of the book are generally applicable including to other prairie provinces

Wetland policies – although critical to wetland protection, restoration, and management, (conservation) are only a piece of completing the wetland conservation puzzle.

Policies must be implemented both pro-actively and reactively and be immersed and incorporated through larger public sector legislative, policy, education, and private sector wetland conservation frameworks. Both sectors increasingly recognize the ecological goods and services that wetlands provide.



ALBERTA WETLANDS: A LAW AND POLICY GUIDE (2016) – Arlene Kwasniak TABLE OF CONTENTS

Primers:

- 1. Constitutional Matters
- 2. Sources of Law and Legal Directives
- 3. Property Rights and Wetlands
- 4. Aboriginal Rights and Interests and Wetlands
- 5. Resource Acquisition, Exploration, Development, and Reclamation
- 6. Statutory Authorizations
- 7. Environmental Assessment
- 8. Municipalities and Wetlands

Chapters:

- 1. Wetlands, Riparian Rights and Statutory Alteration
- 2. Common law of Drainage
- 3. Three Bed and Shores
- 4. The Alberta Land Stewardship Act
- 5. The Alberta *Water Act*
- 6. The *Alberta Wetland Policy* and Related Policy Approaches
- 7. Provincial Wildlife Legislation and Policy
- 8. Federal Wildlife Legislation and Policy (*migratory birds, species at risk*)
- 9. Wetland Protection through Provincial and Federal Designation
- 10. Wetlands Conservation and Subdivision Development
- 11. Oil and Gas Development
- 12. Pipelines and Transmission Lines
- 13. Other Provincial Legislation (public lands, irrigation, forestry etc.)
- 14. Other Federal Legislation (*fisheries, navigation*)
- 15. Wetlands and International Designations and Commitments
- 16. Stewardship through Common Law Interests, Conservation Easements, Transfer of Development Credits, and other Economic Tools

25. APPENDIX: LEGAL TOOLS FOR MUNICIPALITIES TO CONSERVE ENVIRONMENTALLY SENSITIVE AREAS

BIBLIOGRAPHY.

Wetland Policies and their Primary Focus

The municipal link

Overview of some other policy linkages

The deregulation link

Wetland Policies and their Primary Focus

The municipal link

Overview of some other policy linkages

The deregulation link

THE SURFACE WATER MANAGEMENT ACT (AMENDMENTS TO VARIOUS ACTS TO PROTECT LAKES AND WETLANDS)

	Bilingual version (PDF)	Explanatory Note
(Assented to)	
HER MAJESTY, by and with	the advice and consent of the Legislative Ass	embly of Manitoba, enacts as

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:



MANITOBA'S SURFACE WATER MANAGEMENT STRATEGY



Alberta Wetland Policy

Saskatchewan

THE FEDERAL POLICY ON WETLAND CONSERVATION

Government of Canada 1991



Province Announces New Agriculture Drainage Regulations First Phase in the Development of an Agricultural Water Management

State and Tribal Wetland Program Plans

https://www.epa.gov/wetlands/state-and-tribal-wetland-programplans#r1

-- Eastern Provinces Policies --

An Act respecting compensation measures for the carrying out of projects affecting wetlands or bodies of water - Quebec

Conservation Authorities wetland regulations in Ontario

Wetland Policies and the Primary Focus

- Provincial Wetland Policies are an essential part for wetland conservation
- Primary focus of wetland policies is on applications to approve impacts (drainage, dredging, filling, other impacts) at which point a mitigation hierarchy typically comes into play (the Wetland Conservation *Primary Focus*)
- Wetland Policies Primary Focus limited by nature--
 - > projects already planned, investments made
 - > only applies where a government water related approval is necessary
 - generally reactive rather than proactive
 - may not be effectively incorporated in the web of government functions that can impact wetlands
- Ideally wetland policies in addition to the *Primary Focus* would be *comprehensively linked to and integrated with other policy frameworks* relevant to wetland protection and conservation, and to private conservation programs
- Countless links this presentation considers only a few.

Wetland Policies and the Primary Focus

The municipal link

Overview of some other policy linkages

The deregulation link

Wetlands and Municipalities













Why should municipalities be involved in wetland conservation

- Wetlands occur in municipalities
- Municipalities know their roles in the landscape, local ecology, in flood control, stormwater management, pollution control, and watershed management arguably better than any other level of government
- Municipalities develop land use plans and bylaws, control development, subdivision, transportation and utilities plans
- Municipalities develop and conduct stormwater management
- Municipalities are ideal to set conservation and restoration targets, and to negotiate with local landowners, developers, and other stakeholders to meet targets
- Municipalities develop natural area protection plans
- Municipalities educate, influence, and reflect their citizenry

What can municipalities do – beyond compliance with a provincial wetland policy when the *Primary Focus* is triggered?

- Write wetland protection/conservation into land use and other plans to require avoidance
- Protect/conserve wetlands as part of subdivision and land dedication process *
- Write wetland protection/conservation into development bylaws (e.g. require riparian set backs)
- Establish wetland protection zones
- Establish municipal wetland policies with conservation and restoration targets
- Establish wetland parks and public areas and education programs

From the Saskatchewan Planning and Development Act, 2007, SS 2007, c P-13.2

Environmental reserve

185(1) An approving authority may, in consultation with the minister responsible for the administration of The Environmental Management and Protection Act, 2002, with the Water Security Agency, or with any other agency the approving authority may determine, <u>require the owner of land that is the subject of a proposed subdivision</u> to provide part of that land as environmental reserve, in any amount and in any

location that the approving authority considers necessary, if the land consists of:

- (a) <u>a ravine, coulee, swamp, natural drainage course or creek bed;</u>
- (b) wildlife habitat or areas that:
 - (i) are environmentally sensitive; or
 - (ii) contain historical features or significant natural features;

(c) <u>land that is subject to flooding or is, in the opinion of the approving</u> <u>authority, unstable;</u> or

(d) land that abuts the bed and shore of any lake, river, stream or other body of water and that is required for the purpose of:

- (i) the prevention of pollution;
- (ii) the preservation of the bank; or
- (iii) the protection of the land to be subdivided against flooding.

(2) Land provided as environmental reserve pursuant to subsection (1) becomes the property of the municipality in which the land is situated.

What can municipalities do – beyond compliance with a provincial wetland policy when the *Primary Focus* is triggered?

- Connect wetlands to EGS within the municipality
- Write wetland protection/conservation into land use and other plans to require avoidance
- Protect/conserve wetlands as part of subdivision and land dedication process *
- Write wetland protection/conservation into development bylaws (e.g. require riparian set backs)*
- Establish wetland protection zones
- Establish municipal wetland policies with conservation and restoration targets
- Establish wetland parks and public areas and education programs

From the Provincial Planning Regulation, Man Reg 81/2011

5.1 **PROTECTING WATER GOALS**

To ensure the protection of Manitoba's water and to ensure that the quality and quantity of our water and aquatic ecosystems are healthy and sustainable for future generations.

POLICIES

5.1.1 <u>Water bodies, groundwater and riparian areas must be identified and protected from the risks</u> <u>associated with development</u>. In particular, land uses, activities and developments that have a high risk of causing pollution, such as disposal fields, fuel tanks, waste disposal grounds, lagoons and chemical and fertilizer storage facilities, must be considered and prevented or suitably mitigated.

5.1.2 In order to ensure water quality is protected, <u>development in or near water bodies or riparian areas</u> <u>must not be permitted if the development may result in</u>

a) the contribution of nutrients, deleterious chemicals or materials to water bodies or a riparian area;

b) an acceleration of erosion or bank instability;

c) the removal of natural vegetative cover; or

d) an impact on any in-stream flows needed to maintain a healthy aquatic ecosystem.

5.1.3 To ensure the protection, retention and, where required, rehabilitation of riparian areas, the following setbacks must be applied in respect of development:

a) a minimum setback of 15 metres upslope from the normal high water mark of

i) first and second order drains, and

ii) artificially created retention ponds;

b) a minimum setback of 30-metres upslope from the normal high water mark for all natural water bodies and waterways, including ephemeral streams;

c) a minimum setback greater than 30 metres upslope from water bodies and waterways that

i) are designated under an enactment,

ii) are socially, historically or culturally important, or

iii) contain unique aquatic assemblages and species.

The natural vegetative cover must be retained or rehabilitated within the above setbacks.

Continues with some exceptions ...

What can municipalities do – beyond compliance with a provincial wetland policy when the *Primary Focus* is triggered?

- Write wetland protection/conservation into land use and other plans to require avoidance
- Protect/conserve wetlands as part of subdivision and land dedication process *
- Write wetland protection/conservation into development bylaws (e.g. require riparian set backs)*
- Establish wetland protection zones
- Establish municipal wetland policies with conservation and restoration targets
- Establish wetland parks and public areas and education programs

Wetland Policies and the Primary Focus

The municipal link

Overview of some other policy linkages

The deregulation link

Some other Policy Linkages



Oil and Gas and wetlands

- Direct loss and/or fragmentation, clearing, excavation, drainage
- Road and trail access even where no drainage can cause infilling and drying out of wetlands
- Sedimentation and ongoing erosion can reduce biological productivity, stress wildlife
- Water quality impacts from activities near wetlands
- Noise and wetland wildlife impacts

A Wetland Policy's Primary Focus will catch drainage and perhaps major impacts – but what else can be done?

- Catch proposed development in the planning stage through binding directives and guideline to avoid impacts
- Do it despite that conventional oil and gas wells normally are exempt from environmental assessment in the prairie provinces
- Make it a condition of permits, leases, other authorizations, build in wetland impact monitoring –

Wetland Policies and the Primary Focus

The municipal link

Overview of some other policy linkages

The deregulation link

Wetland Policies and Deregulation

- *Primary* Focus: policies typically are triggered by the need for a government approval, such as a water licence or drainage approval
- Deregulation exempting activities from approval requirements will thus exempt application of wetland policies, unless a policy or an exemption otherwise provides
- Examples:
 - Deregulation in the federal Navigation Protection Act (2012 amendments) and federal Fisheries Act (2012 amendments) affect the application of the Federal Wetland Policy, and generally protection/conservation of wetlands
 - Using Codes of Practice instead of approvals for activities such as Alberta Code of Practice for Outfall Structures on Water Bodies, and Code of Practice for Watercourse Crossings affect the application of the Alberta Wetland Policy
- Wetland impact avoidance and wetland conservation should be embedded in the policies that govern deregulated activities

Wetland Policies and the Primary Focus

The municipal link

Overview of some other policy linkages

The deregulation link

Wetland Policies – A New Generation

- Essential element *Primary Focus*
- Make wetland policies a part of an overriding legal framework (*e.g. The Alberta Land Stewardship Act*)* so they are law, not just policy
- Requirement that *avoidance* be part of provincial/provincial agency regulatory instruments and plans, directives, industry planning, conditions of approvals
- Requirement that municipal development and other plans, bylaws, and permitting authorities be exercised to avoid of impacts on wetlands (compulsory dedications, development bylaws, riparian area setbacks, wetland conservation requirements, proactive municipal wetland policies)
-]
- Provincial, municipal and private pro-active wetland protection and designation
- Proactive wetland protection incentive programs
- Recognition of the EGSs that wetlands provide throughout.

Wetland Policies – A New Generation

- Alberta Wetlands: A Law and Policy Guide <u>http://cirl.ca/publications</u> link to books and reports 1991-present
- B.C. Environmental Stewardship Wetland Ways
 <a href="http://www.env.gov.bc.ca/wld/documents/bmp/wetlandways2009/wetlandwa



