

# Municipalities and Environmental Law

## *Part 2: Municipal Management of Water Bodies*



Environmental  
Law Centre

**A Community Conserve Project**  
Building environment and conservation  
capacity for municipalities

April 2018

**Municipalities and Environmental Law  
Part 2: Municipal Management of Water  
Bodies**

April 2018

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# Water Bodies and the *Municipal Government Act*

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Alberta's water bodies are a precious resource. They provide Albertans with drinking water and support industrial, agricultural and recreational activities. They perform numerous biologic functions and are home to birds, animals, fish and aquatic plants. Regulation of these water bodies is important to preserve, among other things, safe drinking water, healthy aquatic ecosystems and watershed resiliency.

## Municipalities have “direction, control and management” of water bodies

Generally, municipalities have jurisdiction over water bodies that fall within their boundaries. Section 60(1) of the *Municipal Government Act*<sup>1</sup> provides that “[s]ubject to any other enactment, a municipality has the direction, control and management of the bodies of water within the municipality, including the air space above and the ground below”. The *MGA* defines “body of water” as “(i) a permanent and naturally occurring water body, or (ii) a naturally occurring river, stream, watercourse or lake.”<sup>2</sup>

When read together with section 3 of the *Public Lands Act*<sup>3</sup> (discussed in greater detail below) the *MGA* provides that a municipality controls the “bodies of water” within its boundaries while the Crown in Right of Alberta owns the beds and shores of said bodies of water.

Note that, previously, the *MGA* stated municipalities had control over “the rivers, streams, watercourses, lakes and other natural bodies of water within

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<sup>1</sup> RSA 2000, c M-26 [*MGA*].

<sup>2</sup> *MGA*, s. 4(a)(iii)(bb.1) and s. 60.

<sup>3</sup> R.S.A. 2000, c. P-40, s. 3.

the municipality” and did not define the term “body of water”. However, in Fall 2017 the Act was revised. In its current form, the *MGA* provides that all water bodies under municipal jurisdiction must be naturally occurring and permanent, with the exception of rivers, streams, watercourses or lakes, which can be temporary and/or seasonal.

These revisions have had the effect of removing certain water bodies, such as temporary and seasonal wetlands, bogs and fens, from municipal jurisdiction under section 60(1) of the *MGA*. However, for the reasons discussed in greater detail below, it is likely that the land around these water bodies can still be regulated using other environmental powers held by a municipality.



## What constitutes a “naturally occurring” body of water?

The term “naturally occurring” is not defined in either the *MGA* or the *Public Lands Act*. However, the Government of Alberta has issued a *Guide for Assessing Permanence of Wetland Basins* (the “*Guide*”),<sup>4</sup> which provides some assistance. The *Guide* notes that a naturally occurring wetland feature must be of “geomorphic origin and not a man-made landscape feature”.<sup>5</sup>

Whether a body of water is natural or not can usually be decided using common sense. A human made canal or reservoir is not naturally occurring, whereas a glacier fed river or lake is naturally occurring. A water body is also likely to remain natural even where it is enlarged or deepened by human activity. Section 3(3) of the *Public Lands Act* states that a river, stream or watercourse does not cease to be naturally occurring by reason only that its water is diverted by human act.



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<sup>4</sup> Government of Alberta, 2016, *Guide for Assessing Permanence of Wetland Basins*, Land Policy Branch, Policy and Planning Division, online: Alberta Environment and Parks (AEP) < <http://aep.alberta.ca/forms-maps-services/directives/documents/AssessingPermanenceWetlandBasins-Feb2016A.pdf> > [*Guide*].

<sup>5</sup> *Guide*, at 5.

But what about instances where changes caused by human activity are so substantial that a previously naturally occurring body of water disappears? Does the now non-existent body of water lose its naturally occurring status? What if it is restored? Arlene J. Kwasniak considers the issue of whether a landowner who drains and fills a permanent, naturally occurring wetland on their property could acquire Crown land in her book, *Alberta's Wetlands: A Law and Policy Guide*, 2nd ed. (Canada: Canadian Institute of Resources Law, 2016).

Kwasniak notes that the Crown must follow very specific procedures in order to grant or transfer public land to the private sector. Moreover, ownership in such circumstances would never revert to the private landowner, as the *Public Lands Act* provides that “[n]o person may acquire by prescription an estate in public land”.<sup>6</sup> In addition, given that the Crown has a stated desire to restore drained wetlands on private lands, it is possible that even where a body of water has been drained and restored, it would still be considered “naturally occurring” by the Crown.<sup>7</sup>

### What constitutes a “permanent” body of water?

Practically speaking, wetlands are likely to be the only type of water body that must be “permanent” to fall under the purview of s. 60(1) of the *MGA*. Determinations of wetland permanence are usually undertaken by Alberta Environment and Parks (AEP). Although, where enquiries involve multiple basins or industrial plans, parties should hire an environmental consultant to assist with the assessment.<sup>8</sup>

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<sup>6</sup> *Public Lands Act*, s. 3(4).

<sup>7</sup> Arlene J. Kwasniak, *Alberta's Wetlands: A Law and Policy Guide*, 2<sup>nd</sup> ed. (Canada: Canadian Institute of Resources Law, 2016) at 116.

<sup>8</sup> AEP, Wetlands, online: AEP <http://aep.alberta.ca/land/shorelands/wetlands.aspx>.



The Government of Alberta has issued a series of publications that set out guidelines for assessing wetland permanence,<sup>9</sup> including the *Guide*, and has adopted its own standardized provincial wetland classification system, the Alberta Wetland Classification System (AWCS).<sup>10</sup> The AWCS was established in June 2015 with the goal of providing a standardized provincial system for classifying wetlands across the entire province.<sup>11</sup> It incorporates and merges information from existing wetland classification systems and is designed to be aligned with legislation and policies that may affect wetlands such as the *Water Act*,<sup>12</sup> *Public Lands Act* and *Alberta Wetland Policy*.<sup>13</sup>

The *Guide* notes that a key identifier of wetland permanence is the length of time the basin in question is inundated with water – the longer the basin is flooded the greater the likelihood of permanence.<sup>14</sup> For instance, a basin that is flooded for 5-17 weeks per year is characterized as a “seasonal” AWCS wetland type, whereas one that is flooded for 52 weeks per year is considered “permanent”.<sup>15</sup> Associated vegetation indicators are also diagnostic of permanence type.<sup>16</sup>

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<sup>9</sup> See for example the *Guide* and Government of Alberta, 2015, *Alberta Wetland Identification and Delineation Directive*, Water Policy Branch, Policy and Planning Division online: AEP <http://aep.alberta.ca/water/programs-and-services/wetlands/documents/WetlandIdentificationDelineation-Jun2015.pdf>.

<sup>10</sup> Government of Alberta, 2015, *Alberta Wetland Classification System*, Water Policy Branch, Policy and Planning Division, online: AEP <http://aep.alberta.ca/water/programs-and-services/wetlands/documents/ClassificationSystem-Jun01-2015.pdf> [AWCS]. See document for a list of the full AWCS wetland classes.

<sup>11</sup> *AWCS*, at 2.

<sup>12</sup> RSA 2000, c W-3.

<sup>13</sup> Government of Alberta, 2013, *Alberta Wetland Policy*, online: AEP <http://aep.alberta.ca/water/programs-and-services/wetlands/documents/AlbertaWetlandPolicy-Sep2013.pdf>.

<sup>14</sup> *Guide*, at 6.

<sup>15</sup> *Guide*, at 6. For more information see Table 2. Cowardin Water Regime Modifiers (modified from Hauer et al, 2000 and Cowardin et al, 1979).

<sup>16</sup> *Guide*, at 6.

The below table, which appears in the *Guide*, includes the wetland classes, forms and permanence types in the AWCS cross-referenced with wetland classes established by experts Robert E. Stewart and Harold A. Kantrud.<sup>17</sup>

The table also includes an assessment of potential crown claimability:

**Table 1. The major wetland groupings of the Alberta Wetland Classification System and their Stewart and Katrud equivalents (Government of Alberta, 2016, *Guide for Assessing Permanence of Wetland Basins*, Land Policy Branch, Policy and Planning Division).**

Alberta Wetland Classification System			S & K Equivalent	Permanency	Dominant Vegetation Zone	Potential Crown Claimability
Class	Form	Type				
-	-	Ephemeral	Class I	Ephemeral	Local Vegetation	No
Marsh (M)	Graminoid (G)	Temporary	Class II	Temporary	Wet Meadow	No
Marsh (M) Shallow Open Water (W)	Graminoid (G) Submersed / Floating Aquatic Vegetation (A)	Seasonal	Class III	Seasonal	Shallow Marsh	Generally* No
Marsh (M) Shallow Open Water (W)	Graminoid (G) Submersed / Floating Aquatic Vegetation (A)	Semi-Permanent	Class IV	Semi-Permanent	Deep Marsh	Yes
Shallow Open Water (W)	Submersed / Floating Aquatic Vegetation (A)	Permanent	Class V	Permanent	Open Water	Yes
Shallow Open Water (W)	Bare (B)	Intermittent	Class VI (Alkaline)	Variable	Open water or bare ground	Case-by-case
Fen (F)	Wooded, coniferous (Wc) Shrubby (S) Graminoid (G)	-	Class VII (Fen)	-	Form will determine dominant vegetation	No

The *Guide* also states that wetlands “must have a boundary that can be clearly defined which separates one landowner from another.”<sup>18</sup> Under

<sup>17</sup> Stewart, R. and H. Kantrud. 1971. *Classification of Natural Ponds and Lakes in the Glaciated Prairie Region*, Resource Publication 92. Bureau of Sport and Fisheries and Wildlife Services, Fish and Wildlife Service, United States Department of the Interior, p. 58.

<sup>18</sup> *Guide*, at 5, footnote 2.

section 17 of the *Surveys Act*,<sup>19</sup> water boundary ownership is legally defined as a “bank” that represents the extent of the bed and shore of the water body. For wetlands, the Crown considers the upland boundary of the emergent aquatic plant community as the boundary delineating the body of water. Certain wetlands, such as fens, bogs, peatlands, and temporary or seasonal wetlands do not have legal banks that can be determined by survey and therefore are unlikely to be considered a “body of water” under s. 60(1) of the *MGA*.

When a naturally occurring wetland is found to be permanent, the AEP will assert the Crown’s claim to ownership pursuant to section 3 of the *Public Lands Act*. Generally speaking, wetlands classified as semi-permanent and permanent by the AWCS are likely to be claimable by the Crown (see table above).<sup>20</sup> Again, the question of permanency and the above analysis is significant insofar as a body of water (other than a river, stream, watercourse or lake) must be permanent to fall under the purview of s. 60(1) of the *MGA*.



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<sup>19</sup> RSA 2000, c S-26.

<sup>20</sup> *Guide*, at 7.

## Impact of the new definition of “body of water” under the *MGA*

The updated definition of “body of water” limits municipal direction and control under s. 60(1) of the *MGA* to a subset of water bodies that are permanent and naturally occurring. In other words, it appears to remove municipal “direction, control and management” of temporary and seasonal wetlands (as they are not permanent bodies of water) and bogs and fens (as they do not usually have legal banks determinable through survey).

As Dr. Judy Stewart points out, the subset of water bodies that does fall under s. 60(1) of the *MGA*, along with their beds and shores, are already owned and/or claimable by the Province.<sup>21</sup> It is precisely those bodies of water that fall outside the defined subset that require municipal oversight. Otherwise, there is no other level of government tasked with regulating them.

Temporary and seasonal wetlands are important as they still provide valuable water storage and release functions, and for the most part, are “permanent” in the sense that they return to the same location each year.<sup>22</sup> Without municipal management, these bodies of water are much more likely to be lost, along with the important watershed resiliency and aquatic environments they provide.<sup>23</sup> Fortunately, the *MGA* also provides municipalities with “broad authority to legislate in respect of generally described powers”.<sup>24</sup> It is likely that, even without specific authority under s. 60(1) of the *MGA*, or any of the other specific sections discussed below, municipalities may still exercise control of temporary and seasonal wetlands.

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<sup>21</sup> Dr. Judy Stewart, “Do Recent Amendments to Alberta’s Municipal Government Act Enable Management of Surface Water Resources and Air Quality?”, CIRL Occasional Paper No. 62, December, 2017 at 30.

<sup>22</sup> Stewart, at 30.

<sup>23</sup> Stewart, at 30.

<sup>24</sup> *Kozak v. Lacombe (County)*, 2017 ABCA 351 [Kozak].

Municipalities derive some of these “broad” powers from the following sections:

- S. 3(a.1) of the *MGA* was recently updated to include “foster[ing] the well-being of the environment” as a municipal purpose under the Act.<sup>25</sup> This change was enacted to “give municipalities a clear signal to consider the environment in a multitude of operational and grown decisions”;<sup>26</sup>
- S. 7 and 8 of the *MGA* confer authority to make bylaws over generally defined subject matters, for general municipal purposes, and;
- S. 9 of the *MGA* explicitly states that the power to pass bylaws was set out in general terms so as to give broad authority to municipalities to govern in whatever way they consider appropriate, within their jurisdiction.

Recent caselaw provides additional support for this proposition. In *Kozak v. Lacombe (County)*<sup>27</sup> the Court of Appeal of Alberta held that the broad authority conferred on Lacombe County by ss. 7, 8 and 9 of the *MGA* authorized it to pass bylaws regulating communal sanitary sewage collection systems, despite the fact that more specific municipal powers relating to public utilities were silent on the issue.

Accordingly, while updates to the *MGA* appear to have narrowed the definition of “body of water” in the Act, there is still sufficient authority in the *MGA*’s municipal purposes and more general bylaw-making powers to permit councils to regulate temporary and seasonal water bodies.

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<sup>25</sup> Section 3 (a.1) of the *MGA* provides that one of the “purposes” of a municipality is to foster the well-being of the environment and came into effect on October 26, 2017..

<sup>26</sup> Government of Alberta, 2017, *Municipal Government Review: Governance*, online: Government of Alberta <https://mgareview.alberta.ca/whats-changing/empowered-to-govern/>.

<sup>27</sup> *Kozak*.



## Additional Municipal Powers over Water Bodies

Municipalities can also exercise control over water bodies through their land planning and subdivision powers, zoning and municipal wetland policies.

### Land Planning and Subdivision Powers

#### ***i. Environmental Reserves***

Section 664(1) of the *MGA* may require the developer of a proposed subdivision to set aside a parcel of land as an environmental reserve if it consists of:

- (a) a swamp, gully, ravine, coulee or natural drainage course;
- (b) land that is subject to flooding or is, in the opinion of the subdivision authority, unstable; or
- (c) a strip of land, not less than 6 metres in width, abutting the bed and shore of any body of water.

For the reasons that follow, it is likely that municipalities can create environmental reserves to protect select water bodies and wetlands that would not qualify as a “body of water” under s. 60(1) of the *MGA*.

First, the term “swamp” in s. 664(1)(a) could likely encompass wetlands that are excluded from being a “body of water” for lack of permanence. “Swamp” is not defined in the *MGA*. However, “swamp” is described in the *AWCS* as “a mineral wetland with water levels near, at or above the ground surface for variable periods during the year which contains either more than 25% tree cover of a variety of species or more than 25% shrub cover”.<sup>28</sup> Arguably, so long as a wetland qualifies as a “swamp” as it is defined in the *AWCS*, it is eligible for protection as part of an environmental reserve.

Second, subsection 664(1)(b) includes “land that is subject to flooding” and would likely include flood risk areas and ephemeral wetlands that only appear during spring snowmelt or heavy rainfall events.

Finally, section 664(1.1) of the *MGA* provides that land may only be set aside as an environmental reserve for select purposes. These “purposes” were recently expanded and include: to preserve the natural features of the land, to prevent pollution, to ensure public access, and to prevent development where the natural features of the land would present a significant risk of personal injury or property damage.<sup>29</sup> There is no maximum percentage that may be required as an environmental reserve and the municipality is not required to pay compensation for an environmental reserve.

Note that subsection 664(1)(c) of the *MGA* permits the creation of an environmental reserve consisting of strips of land abutting the beds and shores of any body of water. Six metres of width is just the minimum and municipalities can take wider strips of land where required. However, it is likely that only strips of land that abut “bodies of water” as it is defined in the *MGA* are eligible for protection. Prior to the recent changes to the *MGA*, a

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<sup>28</sup> *AWCS*, at ix.

<sup>29</sup> *MGA*, s. 664(1.1). Section 664(1.2) of the *MGA* clarifies that the terms “bed and shore” mean the natural bed and shore as determined under s. 17 of the *Surveys Act*, RSA 2000, c S-26.

body of water did not need to be permanent or naturally occurring to qualify under subsection 664(1)(c).

**ii. Environmental Reserve Easements**

Section 664(2) of the *MGA* provides that, where both the municipality and the landowner agree, an environmental reserve may be taken as an environmental reserve easement. In these circumstances, the landowner retains title of the reserve lands but an easement is registered against the land in favour of the municipality.

The land must remain in a natural state as if it were owned by the municipality and the easement runs with the land even in the case of a disposition. The easement does not lapse by reason only of non-enforcement, use for an inconsistent purpose, or a change in the land that surrounds or is adjacent to the easement lands. Note that pursuant to s. 664(1) of the *MGA* a municipality must now consider whether an environmental reserve easement is possible before creating an environmental reserve.

**iii. Conservation Reserves**

Conservation reserves are another new instrument in the *MGA* that can be used to protect the land around bodies of water not caught by section 60(1) of the *MGA*. Section 664.2(1) of the *MGA* provides that a municipality may require the owner of a proposed subdivision to provide part of that parcel of land as a conservation reserve if:

- (a) in the opinion of the municipality, the land has environmentally significant features,
- (b) the land is not land that could be required to be provided as environmental reserve,



- (c) the purpose of taking the conservation reserve is to enable the municipality to protect and conserve the land, and
- (d) the taking of the land as a conservation reserve is consistent with the municipality's municipal development plan and area structure plan.

A municipality must provide compensation equal to the market value of the land for a conservation easement. Accordingly, this tool is likely to be used sparingly and only where it is not possible for the land to qualify as an environmental reserve.

#### ***iv. Municipal Land Use Bylaws***

Municipalities may also use their land use bylaw powers to regulate and protect surface water. Division 5 of the *MGA* requires municipalities to pass a land use bylaw, which provides a detailed “blueprint” for the use and development of lands within a municipality.<sup>30</sup> The land use bylaw must provide for the administration of development permits and divide the municipality into districts with permitted and discretionary uses. Land use is typically divided into residential, commercial, industrial, agricultural and park/open-space districts.

Municipalities may use “districting” to conserve environmentally sensitive lands or to minimize intrusive development around bodies of water. For example, in Edmonton the Zoning Bylaw No. 12800 creates a “Metropolitan Recreation District” intended to “preserve natural areas and parkland along the [North Saskatchewan] river, creeks, ravines and other designated areas for active and passive recreational uses and environment protection”.<sup>31</sup>

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<sup>30</sup> Frederick A. Laux, *Planning Law and Practice in Alberta*, 2<sup>nd</sup> ed. looseleaf (Alberta: Carswell, 1996) at 6-1.

<sup>31</sup> City of Edmonton, Bylaw No. 12800, *Zoning Bylaw* (Revised May 2017), s. 540.

## v. **Municipal Wetland Policies**

The province has established the *Alberta Wetland Policy* (discussed in greater detail below). Still, municipalities can and should develop their own wetland policies. Municipal governments are often in the best position to assess and understand the role of wetlands in the local landscape, ecology, flood control systems, storm water management and watershed management.<sup>32</sup>

Municipalities can also incorporate their wetland policy into local and inter-municipal planning processes. In addition, they are able to set conservation and restoration targets and negotiate with local landowners and other stakeholders to meet these targets.<sup>33</sup>

The City of Calgary adopted a wetland policy in 2004<sup>34</sup> and the City of Edmonton followed suit in 2012.<sup>35</sup>

In 2016, the Alberta North American Waterfowl Management Plan (NAWMP) Partnership released *Your Guide to Making Wetlands Work in Your Municipality*.<sup>36</sup> The Alberta NAWMP Partnership is a collaboration of federal, provincial and municipal governments, non-governmental organizations, private companies and individuals that share the goal of achieving better wetland habitat for the benefit of waterfowl, wildlife and people. The guide provides information, tools and support intended to assist municipalities to draft policies and undertake their own wetland conservation.

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<sup>32</sup> Kwasniak, at 225.

<sup>33</sup> Kwasniak, at 225.

<sup>34</sup> City of Calgary, 2004, *Calgary Wetland Conservation Plan*, online: City of Calgary Parks [http://www.calgary.ca/CSPS/Parks/Documents/Planning-and-Operations/Natural-Areas-and-Wetlands/wetland\\_conservation\\_plan.pdf](http://www.calgary.ca/CSPS/Parks/Documents/Planning-and-Operations/Natural-Areas-and-Wetlands/wetland_conservation_plan.pdf).

<sup>35</sup> City of Edmonton, 2012, *City of Edmonton Wetland Strategy*, online: City of Edmonton [https://www.edmonton.ca/city\\_government/documents/FINAL\\_Wetland\\_Strategy\\_low\\_res.pdf](https://www.edmonton.ca/city_government/documents/FINAL_Wetland_Strategy_low_res.pdf).

<sup>36</sup> Alberta North American Waterfowl Management Plan (NAWMP) Partnership, 2016, *Your Guide to Making Wetlands Work in Your Municipality*, online: Alberta NAWMP [http://www.abnawmp.ca/media/uploads/NAWMP\\_MunicipalWetlandGuide\\_Final.pdf](http://www.abnawmp.ca/media/uploads/NAWMP_MunicipalWetlandGuide_Final.pdf).

For the most part, a municipal wetland policy (even a more stringent one) should be able to co-exist with the *Alberta Wetland Policy*. However, in the case of conflict between the two the provincial policy (or any provincial decisions regarding wetland drainage or alteration) will prevail.



## Where does municipal “direction” start and stop?

Municipal jurisdiction over bodies of water in the province is “[s]ubject to any other enactment”<sup>37</sup> and therefore subordinate to any other provincial legislation concerning water (unless otherwise expressed). In addition, *The Constitution Act*<sup>38</sup> establishes that the federal government has exclusive legislative authority over, among other things, fisheries, federal lands and the resources on those lands, migratory birds, and the management of boundary waters with the United States. Accordingly, the following legislation, among others, may impact municipal jurisdiction over water bodies.

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<sup>37</sup> *MGA*, s. 60(1).

<sup>38</sup> *The Constitution Act*, 1867, 30 & 31 Vict, c 3.

## Provincial Legislation

### *i. Public Lands Act*

The provincial Crown owns the bed and shores of most water bodies in Alberta. Section 3 of the *Public Lands Act* provides the following:

Title to beds and shores, etc.

**3(1)** Subject to subsection (2) but notwithstanding any other law, the title to the beds and shores of

**(a)** all permanent and naturally occurring bodies of water, and

**(b)** all naturally occurring rivers, streams, watercourses and lakes,

is vested in the Crown in right of Alberta and a grant or certificate of title made or issued before, on or after May 31, 1984 does not convey title to those beds or shores.

The *Public Lands Act* does not define “bed” or “shore”. However, section 17(3) of the *Surveys Act* characterizes the bed and shore of a body of water as “the land covered so long by water as to wrest it from vegetation or as to mark a distinct character on the vegetation where it extends into the water or on the soil itself”.<sup>39</sup> The bed and shore of a water body ends at the bank, a “natural boundary formed by the action of water for a long enough time to leave its signature on the ground”.<sup>40</sup> The “bank” forms a physically ascertainable line that separates Crown owned land from private land. It is usually located using a visual inspection of vegetation and soil

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<sup>39</sup> *Surveys Act*, s. 17.

<sup>40</sup> Government of Alberta, “Water Boundaries”, online: AEP <http://aep.alberta.ca/land/shorelands/water-boundaries.aspx>.

characteristics as well as a review of surveys and/or aerial photographs over time.<sup>41</sup>

When read together, the *MGA* and *Public Lands Act* provide that the Crown is the owner of the bed and shore of all permanent and naturally occurring bodies of water along with all naturally occurring rivers, streams, watercourses and lakes, whether on public or private land.

## **ii. Water Act**

The *Water Act* establishes the Crown as the owner of all water in Alberta:

### **Water vested in Crown**

**3(1)** In this section, “use” includes but is not limited to use for the purposes of drainage, flood control, erosion control and channel realignment.

**(2)** The property in and the right to the diversion and use of all water in the Province is vested in Her Majesty in right of Alberta except as provided for in the regulations.

Activities that are authorized pursuant to the *Water Act*, such as water diversions or drainage activities, will supersede any municipal authority in this area.

## **iii. Wildlife Act**

The *Wildlife Act*<sup>42</sup> includes some limited protections for wildlife habitat associated with water bodies and wetlands. The term “wildlife” includes “big game, birds of prey, fur-bearing animals, migratory game birds, non-game animals, non-licence animals and upland game birds”. Section 36(1) of the

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<sup>41</sup> *Ibid.*

<sup>42</sup> RSA 2000, c W-10.

Act provides that “[a] person shall not wilfully molest, disturb or destroy a house, nest or den of prescribed wildlife or a beaver dam in prescribed areas and at prescribed times”.

Section 6 of the *Wildlife Act* also establishes an Endangered Species Conservation Committee which is supposed to advise and make recommendations to the Minister with respect to endangered species and recovery plans for same. A number of the currently listed endangered or threatened species have wetland habitat, such as the whooping crane (*Grus Americana*), western grebe (*aechmophorus occidentalis*), and northern leopard frog (*Rana pipiens*).<sup>43</sup>

#### **iv. Alberta Wetland Policy**

The province has also implemented the *Alberta Wetland Policy* with the stated goal to “conserve, restore, protect, and manage Alberta’s wetlands to sustain the benefits they provide to the environment, society, and economy”.<sup>44</sup> The *Alberta Wetland Policy* applies to all natural wetlands in Alberta, including bogs, fens, swamps, marshes and shallow open water, as well as all restored natural wetland and wetlands constructed for the purposes of wetland replacement.

The *Alberta Wetland Policy* is engaged any time a developer seeks an approval, license or other authorization under the *Water Act* or *Public Lands Act*. In instances where development activities may impact wetlands, the wetland policy promotes avoidance and minimization as preferred courses of action. In instances where wetland loss cannot be avoided or minimized and permanent wetland loss must be incurred, then wetland replacement is

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<sup>43</sup> AEP, 2015, *Species At Risk – A Guide to Endangered and Threatened Species, and Species of Special Concern in Alberta*, Version 2, online: AEP < <http://aep.alberta.ca/fish-wildlife/species-at-risk/species-at-risk-publications-web-resources/documents/SpeciesAtRiskGuide-Jan-2015.pdf>>.

<sup>44</sup> *Alberta Wetland Policy*, at 2.

required. The policy looks at relative wetland value to help inform overall wetland management and decision-making.<sup>45</sup>

## Federal Legislation

### **i. Fisheries Act**

The federal government has exclusive legislative authority over coastal and inland fisheries in Canada. They are currently in the process of revising the *Fisheries Act*<sup>46</sup> and reinstating select protections that were rolled back in 2012.<sup>47</sup> Key provisions of the Act that may affect the water bodies within municipal boundaries include sections 35 and 36.

In its present form, section 35 of the *Fisheries Act* provides that no person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery. The term “serious harm” is defined to mean “the death of fish or any permanent alteration to, or destruction of, fish habitat.” Currently, section 35 focuses only on protecting commercial, recreational or aboriginal fisheries and permits the alteration, disruption or destruction of fish habitat so long as it doesn’t cause death or a permanent result.

Upcoming changes to the *Fisheries Act* propose to restore section 35 to state that no person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat. This is known as the “HADD” provision and is generally understood to provide a

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<sup>45</sup> *Alberta Wetland Policy*, at 11-14.

<sup>46</sup> RSC 1985, c F-14.

<sup>47</sup> Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence*, 1<sup>st</sup> Sess., 42<sup>nd</sup> Parl., 2018 (First Reading on February 6, 2018) [Bill C-68].

higher degree of protection to all fish and fish habitat, not just those that form part of a commercial fishery.<sup>48</sup>

Section 36 of the *Fisheries Act* prohibits the deposit of deleterious substances in water frequented by fish or in places where the substance may enter such waters. The Act defines “deleterious substance” broadly to include any substance that, if added to any water, would degrade or alter its quality such that it could be harmful to fish, fish habitat or the use of fish by people. Note, however, that there are various effluent regulations under the Act which permit the deposit of select deleterious substances in authorized quantities. These include, among others, the *Wastewater Systems Effluent Regulations*,<sup>49</sup> *Petroleum Refinery Liquid Effluent Regulations*,<sup>50</sup> and *Metal Mining Effluent Regulations*.<sup>51</sup>

Section 36 likely applies to all Canadian waters frequented by fish (i.e. not just to waters that support commercial, recreational or aboriginal fisheries). There are no proposed changes to section 36 of the Act at this time.

## **ii. Navigation Protection Act**

The federal government also has exclusive legislative authority over navigation and shipping. Similar to the *Fisheries Act* mentioned above, the *Navigation Protection Act*<sup>52</sup> is also undergoing revisions and is expected to be renamed the *Canadian Navigable Waters Act*.<sup>53</sup>

At present, relevant sections of the *Navigation Protection Act* that impact municipal water bodies include section 5(1), which provides that anyone who

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<sup>48</sup> Bill C-68, cl. 22(1).

<sup>49</sup> SOR/2012-139.

<sup>50</sup> CRC, c. 828.

<sup>51</sup> SOR/2002-222.

<sup>52</sup> RSC 1985, c N-22.

<sup>53</sup> Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1<sup>st</sup> Sess., 42<sup>nd</sup> Parl., 2018, cl. 46 (First Reading on February 8, 2018) [Bill C-69].



proposes to construct, place, alter, repair, rebuild, remove or decommission a work located in a navigable water listed in the schedule to the Act must give notice to the Minister. The Minister then determines whether the work will “substantially interfere with navigation” and if so, the owner requires an approval under the Act. “Designated works” are excepted.

The current schedule of navigable waters is made up of only 100 lakes and 64 rivers. Changes to the Act are projected to broaden the definition of “navigable waters” and strengthen the approvals process for “major works” on navigable waters.<sup>54</sup>

Additional relevant sections include sections 21, 22 and 23 of the *Navigation Protection Act* which prohibit deposits of sawdust, stone, etc. and dewatering of most navigable waters, whether or not they are listed in the schedule.

### **iii. Migratory Birds Convention Act, 1994**

The *Migratory Birds Convention Act, 1994*<sup>55</sup> applies to most species of migratory birds in Canada, regardless of whether they are on federal, provincial, municipal or private land. The Act and its associated regulations provide some protection for migratory bird habitat, which often includes water bodies and wetlands. For example, section 5.1(1) of the Act provides that “[n]o person or vessel shall deposit a substance that is harmful to migratory birds, or permit such a substance to be deposited, in waters or an area frequented by migratory birds or in a place from which the substance may enter such waters or such an area.”

### **iv. Species at Risk Act**

The *Species at Risk Act (SARA)*<sup>56</sup> aims to protect select Canadian wildlife species and their habitat. With respect to bodies of water, section 58 of SARA

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<sup>54</sup> Bill C-69, cl. 47(3) and 49.

<sup>55</sup> SC 1994, c 22.

<sup>56</sup> SC 2002, c 29.

prohibits the destruction of any part of the critical habitat of any listed endangered, threatened or extirpated (but only when reintroduction is recommended) species if the listed species is, among other things, an aquatic species. The term aquatic species includes fish and marine plant, as defined in the *Fisheries Act*.



## Conclusion

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More and more, the Government of Alberta appears to recognize that municipalities are vital partners in environmental management. With respect to surface water, local governments are often in the best position to observe, predict and prevent the loss, destruction or pollution of these resources, especially through their land-use decision-making processes. Recent amendments to the *MGA* appear to further empower municipalities to manage and protect Alberta's water bodies. For instance, the *MGA* now includes the explicit authority to foster the well-being of the environment, an expanded role for environmental reserves, and the new addition of conservation reserves.

Still, there continue to be challenges. The addition of the definition of “body of water” from the *Public Lands Act* to the *MGA* has mostly excluded seasonal and temporary wetlands, water bodies, bogs and fens from municipal jurisdiction under s. 60(1) of the *MGA*. Municipal authority also continues to be subject to various pieces of provincial and federal legislation that take precedence. Nevertheless, the opportunities are there for municipalities to regulate and protect Alberta’s surface water – they just have to take advantage of them.