Michael M. Wenig

The 'Sleeping Giant' of Watershed Protection

Some environmental laws lie dormant for years or even decades, but are then awoken by creative lawyers looking for new ways to solve their private clients' environmental problems or to promote the causes of environmental non-profits. This column is about one such dormant law that, if awoken, might add a new, controversial front in the campaign to conserve Alberta's watersheds.

The law is part of section 54 of the Alberta *Public Lands Act*. That section generally prohibits various activities on or that adversely affect the province's public lands. The Act further provides that it is an "offence" to violate these prohibitions (s. 56(c)), punishable (in an enforcement action brought either by the government or by private citizens) by a fine of up to $5,000 per day of violation (s. 59(2)). The Act also allows Alberta's public lands Minister to issue and enforce administrative orders to stop or remedy the effects of these violations (s. 59.1).

This basic regulatory scheme is common in public lands and forest management laws. But what makes Alberta's scheme so noteworthy is the scope of prohibited activities and harms listed in that section. The list specifically includes

- acts on public land that "may injuriously affect watershed capacity;"
- any "disturbance" of public land that may cause "injury" to the "bed or shore of any river, stream, watercourse, lake or other body of water or land in the vicinity of" the disturbed public land; and
- the "creation of any condition" on public land that is likely to cause "soil erosion" (s. 54(d), (e), and (f)).

The breadth of these three prohibitions is quite remarkable. Viewed collectively, they could apply, not only to activities that occur on public lands, but also to activities occurring outside of public lands that induce certain effects within public lands. And the first two prohibitions apply to a very wide range of water-related harms. The third prohibition does not refer specifically to water. But, because soil erosion can injure water bodies (for example, through sediment pollution and by causing loss of riparian, or riverbank, vegetation), this prohibition also has an obvious water-related purpose.

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Given their breadth, the three *Public Lands Act* prohibitions provide potentially significant tools for government or public efforts to discourage land users — including loggers, miners, ranchers, oil and gas producers, residential developers, and off-road vehicle drivers — from conducting their activities in ways that hurt surface water bodies, the aquatic ecosystems they support, and watershed health more generally.

These prohibitions have been on the legislative books for nearly forty years. During that time, the Legislature has strengthened them somewhat by raising the accompanying penalties and deleting provisions suggesting that the prohibitions could be enforced only when the public lands Minister deemed them to have been violated. But besides these changes (and a bizarre 1982 amendment stating that a person could not be considered to have violated any of the prohibitions solely due to the person's compliance with a government approval), the prohibitions appear today in virtually the same form in which they were originally adopted in 1966. And other than the Legislature's occasional tinkerings, they have been essentially ignored. The province does not appear to have administratively enforced these prohibitions for at least ten years. (See www3.gov.ab.ca/srd/ forests/enforce_compl — Alberta's web-based list of administrative enforcement of *Public Lands Act* violations, going back through 1996). Nor could I find any evidence, in reports of court decisions, of a judicial case brought either by the province or by a concerned citizen to enforce any of these prohibitions.

There are several possible reasons why these unusual prohibitions have been ignored. First, although the prohibitions may seem broad, they would be judicially limited in enforcement by the availability of various defences. They would also be limited by the burden of proving the factual link between cause and effect. This particular burden is rigorous even with legal standards, like those in the three prohibitions, that require proof of only a *likelihood* or *potential* harm. Ironically, the breadth of the terms used in these prohibitions, especially the term

"watershed capacity," might also provide a corresponding limitation. Courts may be inclined to interpret the terms more narrowly than warranted by their plain meaning to avoid constitutional problems that arise from the enforcement of vague standards. The prohibitions may also be difficult to apply to activities whose threats are more cumulative than individual in nature.

Besides these legal limitations, there are daunting practical ones for citizens seeking to enforce the prohibitions, not the least of which is the difficulty of covering lawyers' and expert witness fees and other litigation costs.

These costs pose relatively small hurdles for judicial enforcement actions brought by the province, which has the more efficient administrative enforcement option noted above. But there are other hurdles for the government. One stems from the fact that most large-scale activities on public lands, and many other water-polluting or water-using activities on or outside of public lands, require a permit, licence, or some other kind of formal government approval. The province might be hard pressed to enforce prohibitions against any such provincially-approved activity, even though regulatory approvals do not appear to provide a blanket defence in an action to enforce the prohibitions. In addition, Alberta's formal enforcement of these prohibitions — in either administrative or judicial proceedings — is inconsistent with the province's self-professed aversion to using *heavy-handed* enforcement to encourage environmentally sound practices.

But mark my words: these prohibitions are just the kind of *sleeping giant* that some courageous lawyer will try to awaken when prompted by an equally undaunted client who is concerned about large-scale or cumulative activities that have been allowed to wreak havoc on Alberta's watersheds. Because of their simple structure — broad prohibition backed by a penalty — laws like these typically do not solve complex environmental problems by themselves. When awoken and used vigorously, however, they have been known to provide considerable incentive for interested but intransigent parties to search harder for, and come to agreement on, solutions. In short, the main chapter in the history of these three prohibitions has yet to unfold and could well be an intriguing one.

For a previous *discovery* of these prohibitions — at least by law scholars — see Arlene J. Kwasniak, *Alberta Public Rangeland Law and Policy* (Environmental Law Centre, 1993).

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