

ALBERTA'S OIL AND GAS BOOM FUELS LAND-USE CONFLICTS – BUT SHOULD THE EUB BE TAKING THE HEAT? _____

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Introduction

Alberta's booming oil and gas industry is generating more than huge budget surpluses for the provincial government and share-the-wealth cheques for residents. Land-use conflicts are also flaring up around the province. While the cash pours into government coffers and the provincial economy fires on all cylinders, the Energy and Utilities Board (EUB) is taking much of the heat.

The EUB has become the lightning rod for land-use conflicts surrounding energy development in Alberta because it is the principal regulator of Alberta's upstream energy industry. But is the EUB always the appropriate forum to address concerns with oil and gas development? Can the Board get at the root causes of land-use conflicts, or provide even band-aid solutions on a project-by-project basis? Is anger currently directed at the Board by frustrated landowners and stakeholder groups focused on the right target in all cases? Should anyone else be taking some of the heat?

Answering these questions requires looking at the broader context for the EUB's regulatory decisions. From this perspective, three factors limit the Board's ability to resolve many of the land-use conflicts thrust upon it as the footprint of oil and gas operations expands across much of Alberta: (1) the lack of policy and planning guidance on key issues; (2) the influence of mineral rights issuance on subsequent decision-making; and (3) the difficulty of managing cumulative effects.

Before discussing each of these factors, it is necessary to address the Board's general role and legal mandate in more detail.

The Perfect Storm

The EUB is a quasi-judicial tribunal with a technical and legal staff which regulates the Alberta oil and gas industry essentially by issuing generic operating rules and by reviewing individual approval applications for wells, pipelines, gas plants and oil sands projects. The Board also monitors and enforces compliance with its generic rules and project-specific approval conditions.

The EUB's licensing role puts the Board on the front line when landowners, citizen groups, Aboriginal people, environmentalists, municipal governments, regional health authorities and a growing list of other parties oppose proposed oil and gas development or are adversely affected by industry operations. Nothing focuses a landowner's mind like a proposal to drill a sour gas well on his or her quarter section or just upwind of the local community.

Because of the EUB's licensing role, the Board's seat will always be warm. But recent developments suggest the EUB's seat is getting particularly hot. Historically high oil and gas prices have prompted a flood of production activities. In addition, finding and producing the remaining conventional reserves will



RÉSUMÉ

Le Alberta Energy and Utilities Board (EUB) est au centre d'une «tempête» de conflits sur l'utilisation du territoire résultant des activités du secteur énergétique. Habituellement, le public compte sur l'EUB pour résoudre ces conflits, puisque cet office est le principal organisme de réglementation des opérations pétrolières et gazières dans la province. Pourtant, l'EUB est mal équipé pour jouer ce rôle pour les raisons suivantes: 1) il n'existe pas de politiques et de planification de haut niveau suffisants pour éclairer ses décisions; 2) les déterminations de l'«intérêt public» par l'EUB sont faussées par l'octroi de droits miniers pas le ministère de l'Énergie; 3) l'EUB n'est pas habilité à gérer les effets cumulatifs de toutes les activités sur toutes les catégories de terres. C'est pourquoi le public devrait se tourner vers le Conseil des ministres et l'Assemblée législative, non seulement vers l'EUB, pour résoudre les conflits sur l'utilisation du territoire.

require more and more drilling to drain pools that are already tired or are increasingly harder to reach. One area slated for increased activity is the geologically complex and environmentally sensitive foothills region. Other land uses in the region include ranching, recreation, and rural residential development. As the industry footprint grows, conflicts will heat up along the Eastern Slopes.

Maturation of the western sedimentary basin from exploration and development perspectives is also shifting attention to 'unconventional' gas such as coalbed methane. Tapping these reserves will require an increased density of wells, pipelines, compressor stations and roads.

And then there are the oil sands – Alberta's Eldorado. Estimated reserves are in the same league as those in Saudi Arabia, but the catch is getting that oil out of the ground. There are two principal methods: surface mining that strips off the 'overburden' and *in situ* production that entails a dense network of injection and recovery wells and associated infrastructure. Production also consumes huge inputs of water and energy. The almost \$39 billion of investment projected for the oil sands over the next decade will tread heavily on the landscape.

Since all of this activity requires EUB approval, the Board has its work cut out for it. Drilling numbers are one measure of this task and those numbers have ballooned. According to the Canadian Association of Petroleum Producers, the oil and gas industry drilled a record 19,365 wells in Alberta in 2004 – up from 8,175 in 1998. Each of these wells is licensed by the Board.

Mounting pressure on the EUB is illustrated by a report in *Enviroline* from a workshop convened in April 2005 by the Canadian Energy Research Institute.¹ The workshop's theme was "Sharing the Land". *Enviroline's* headline better reflects the situation on the ground: "Land-Use Conflicts Escalating, Solutions Urgently Needed".

Michael Bruni, a senior EUB executive, told workshop participants that the Board is at the "centre of a storm" of conflicting demands from industry, government departments, landowners and other stakeholders. Bill Sutherland, chief commissioner for Strathcona County east of Edmonton, invited the EUB to join with municipal governments in a land-use planning partnership to meet everyone's needs. Author and landowner Andrew Nikiforuk advocated fundamental changes in the funding and composition of the EUB, including public election of Board members.

Disagreements about how to share – or carve up – the land won't go away in the near future, nor will demands on the EUB to deal with the environmental fall-out of rapid development and to resolve conflicts between the energy industry and other land users. Soaring world energy prices and declining conventional reserves in Alberta are a potent combination.

The surging pace of drilling is the leading edge of the wave of oil and gas development set to sweep across Alberta's landscapes. Can the Board deal with the resulting land-use conflicts as the demands placed upon it increase in volume and complexity?



Legal Mandate and Technical Expertise

The starting point for answering this question is the EUB's legal mandate, which is essentially to regulate upstream oil and gas production so as to promote the "public interest" of Albertans. Provincial legislation fleshes this mandate out somewhat by directing the EUB to carry out its oil and gas regulatory role in order to "provide for the economic, orderly and efficient development" of the province's oil and gas, to "conserve" and prevent the "waste" of those non-renewable resources, to ensure the observance of safe and efficient production practices, and to control pollution.² In the context of reviewing individual project applications, Alberta legislation specifically requires the EUB to consider projects' social, economic, and environmental effects in deciding whether the projects are in the "public interest."³

Besides giving the EUB its broad mandate, Alberta legislation empowers the Board to review proposed oil and gas activities, and gives the Board discretion to conduct court-like "hearings" on individual applications when public concern has been raised. Board members and staff have considerable technical expertise regarding oil and gas operations and administer an extensive and detailed body of statutes, regulations and administrative requirements, backed by capacity for inspection and enforcement. The Board sets regulatory requirements and consults with stakeholders regarding proposed regulatory initiatives. It can also undertake broader 'inquiries' into matters relating to energy resources and energy more generally.

The EUB's legal mandate and its technical expertise are not, however, sufficient for it to address the storm of land-use conflicts that has been triggered by the oil and gas boom. These shortcomings naturally fuel frustration among interveners who see the EUB as 'the regulator'. Frustration, in turn, may lead to cynicism regarding the project review and regulatory process. Anger is palpable on the web sites of certain landowner groups and at some public meetings. Why can't the Board act decisively to stem the rising tide of landowner and stakeholder discontent? The following sections highlight three reasons for the Board's predicament.

Decision-Making in a Policy Vacuum

The EUB's project licensing and other regulatory decisions are infused with implicit or explicit policy choices. These policy choices, in turn, reflect basic choices about the

acceptability of environmental and health risks. These choices also reflect rankings of fundamental values relating to economic growth, environmental protection, and human health. In short, EUB decisions require choices among core views about the meaning of progress and sustainable development.

Even the EUB's seemingly 'technical' decisions, like those required for managing site-specific environmental, health and safety risks, are based on policy choices. Trade-offs between risk levels and cost are unavoidable in decisions regarding the protection of groundwater through well casing requirements, the use of specialized equipment and emergency response procedures to minimize the risks from sour gas development, and the timing and manner of abandonment and reclamation of facilities.

As the pace, extent and intensity of development increase, a series of broad questions regarding appropriate land use also come to the fore. For example:

- Should the native fescue grassland west of Longview, the local ranching economy, and some of Alberta's most scenic and ecologically important rangeland be put at risk by drilling for oil and gas?
- Is a significant portion of Alberta's boreal forest ecosystem expendable in the interests of oil sands production?
- Should the use of fresh water by the oil sands industry and enhanced recovery projects be authorized if it contributes to bringing instream flows below levels that biologists consider necessary to sustain aquatic ecosystems?
- How should the interests of the energy industry, the provincial government and local residents be balanced when sour gas wells are proposed along the fringes of major urban centres or in close proximity to rural communities and residences?
- How much habitat loss and fragmentation due to well sites and linear disturbances such as roads and pipeline rights-of-way are acceptable within a given area? And what if the cumulative effect of these disturbances, along with other land uses such as forestry, places woodland caribou at risk of extirpation?

Once again, answering these questions requires choices among different fundamental values, economic interests and priorities regarding land use. Does the province provide adequate answers for the EUB to apply in carrying out its regulatory functions?





On the one hand, the province has made it clear that rapid development of Alberta's oil and gas reserves is a cornerstone of its economic strategy. And the province has set ambitious growth targets for key energy sectors, as well as for non-energy land users such as forestry and agriculture. On the other hand, government policy often provides little or no useful guidance on how sectoral growth trajectories on a fixed land base should be reconciled with each other or with limits on the stress tolerance of landowners, communities and ecosystems.

Citizens often believe that the EUB's 'public interest' mandate provides sufficient policy guidance for the Board to resolve land-use conflicts. But this faith is mistaken, because the 'public interest' term is itself empty of value choices. The EUB's enabling legislation provides no guidance on how that test should be applied, beyond the requirement to consider social, economic and environmental effects. While this requirement clarifies the broad nature of the scope of 'public interest' factors the Board must *consider*, these embellishments too lack meaningful guidance on how the Board must weigh conflicting values in its considerations.

Board decisions confirm that interpreting and applying this broadly worded test is not easy. For example, in its decision this year on the controversial application by Compton Petroleum to drill sour gas wells on the outskirts of Calgary, the Board conceded that "[i]t is difficult to define concretely what is meant by the public interest and how the Board will apply consideration of this interest in any given situation."⁴ The decision notes that the interests at stake include not only those of the applicant and the interveners, but also "the interests of all the citizens of the province of Alberta."⁵ Furthermore, "[c]oncepts as fluid as social, economic, and environmental impact are not easily resolved through the application of fixed principles."⁶

The Board attempts to give substantive content to these generalities when dealing with the characteristics of individual projects. Specific benefits and risks associated with each project are weighed. The challenge, the Board states, is to ensure that "any site-specific or local impacts are mitigated to an appropriate and acceptable level."⁷

This language highlights the fundamental policy choices that may underlie even the Board's apparently technical language. Who determines what "level" of impacts is "appropriate and acceptable", and on what basis?

Applying the 'public interest' test at the level of individual facility applications inevitably requires the Board to ask, explicitly or implicitly, whether or not the proposed project 'fits' within a pre-existing policy framework. Where such a framework is absent, the public interest test is simply black-box decision making by another name. Thus, it is no wonder that many citizens objecting to oil and gas developments come away from EUB hearings wondering how the interests and values they cherished were actually factored into the public interest equation that the EUB applied in reaching its approval decision.

Put on the front lines of land use conflicts but without adequate provincial policy tools for resolving them, why can't the EUB simply make up the necessary policy as it goes along? In some sense, policy-making is an inevitable function of any regulatory body, because legislatures and cabinets cannot be expected to establish the full suite and hierarchy of generic policies required for complex regulatory decision-making. However, regulatory tribunals like the EUB are poorly situated to make high level, broad, cross-cutting policies, for several reasons.

First, making high level policy generally requires broad, inter-disciplinary considerations and is arguably best made through broad public consultations. The EUB's project-specific reviews – arguably the 'meat and potatoes' of the Board's regulatory diet – are poorly suited for this kind of high level policy making exercise.

Second, the Board's statutory jurisdiction overlaps in confusing ways with those of several provincial Ministries – most notably, Environment, Sustainable Resources Development, and Energy. As an energy regulator, the Board recognizes and respects the sectoral mandates of other departments and agencies. Decision-making 'silos' are a common, if regrettable, feature of land and resource management in Alberta, as in other jurisdictions. Absent clear, over-arching guidance from the Legislature or Cabinet, it is functionally difficult for the EUB to make broad policy calls that would inevitably set direction for other provincial regulators and other decision-makers.

And third, the kind of broad policy needed to resolve land-use conflicts is ultimately political in nature. The EUB is hardly entirely immune from political considerations – after all, its members are appointed by government, which also sets its budget and defines its powers. Yet, because of its nature as a quasi-independent, quasi-judicial tribunal, the EUB arguably lacks the kind of political accountability that is



necessary for high level policy-making.

We routinely expect the EUB to take responsibility for filling policy gaps and resolving policy conflicts, but it is really the Legislature and Cabinet to whom we should look in the first instance.

The Board is well aware of its policy-making limitations, particularly when confronting the broader land-use choices raised by surging oil and gas development. Michael Bruni is quoted in *Enviroline* as saying that: “We as a regulatory body are not in a position to decide if development is (inherently) good and whether or not we should defer development.”⁸ Under this circumstance, and without more guidance from the province, the Board’s ‘public interest’ mandate is as transparent as the emperor’s new clothes.

Mineral Rights Skew the EUB’s ‘Public Interest’ Calculation

The previous section characterized the EUB’s ‘public interest’ determinations as ‘black box’ decision-making, but this characterization is inaccurate in one key respect. Applicants for EUB approvals come to the Board with mineral rights in hand, issued by Alberta Energy. These rights are typically auctioned through a sealed bidding process, often for considerable sums of money. Alberta Energy’s web site proudly notes that a sales record was recently set when a single parcel of land (i.e., mineral rights) sold for \$76 million.⁹

Alberta Energy’s web site states baldly that “[i]ndustry pays a bonus amount and is granted the right to drill for and recover petroleum and natural gas or oil sands.”¹⁰ This is an overstatement in that mineral rights are subject to regulatory approvals, so those rights technically do not confer an automatic entitlement to drill and produce. Nonetheless, the granting of mineral rights creates a snowballing effect that leaves regulators like the EUB hard pressed to adopt any kind of limitations that would effectively preclude the exercise of those rights. The EUB cannot lightly ignore a \$76 million dollar transaction between the provincial government and a private company.

In a more technical sense, the EUB plugs the existence of those rights into its ‘public interest’ calculations through its ritualistic “need for the well” analysis. Under this analysis, the Board typically finds that, because an applicant owns the mineral rights in question, it therefore has a “need” for

the EUB approval in question in order to exercise the applicant’s rights. This “need” then tilts the ‘public interest’ calculus in favour of approving the project, all other factors being equal.

This formula for weighing mineral rights in ‘public interest’ considerations makes the outcome of Board hearings largely (if not completely) predictable. Yet, the public is left questioning how the Board reached its ‘public interest’ conclusion without first questioning – and taking public input on – whether the mineral right that tilted the balance was itself in the ‘public interest.’

It might be argued that the Board is reasonable to take mineral rights as a given, because the ‘public interest’ in those rights was considered by Alberta Energy when it issued the rights in the first instance. But this logic is fundamentally flawed, in part, because those rights are issued through procedures that fail to apply the basic ‘look before you leap’ principle of responsible environmental management; they are narrowly sectoral in focus, largely or entirely ignoring the implications of mineral development for other land uses.

Like the EUB’s project review and regulatory processes, Alberta Energy’s sale of mineral rights occurs without clear policy and planning guidance on landscape-level objectives and trade-offs. Land parcels are screened internally for environmental concerns by the Crown Mineral Disposition Review Committee, but government and industry insiders dismiss this closed-door process as a “joke” and a “farce.”¹¹

Remarkably, the rights issuance process lacks meaningful opportunities for public notice and scrutiny. Surface landowners and companies whose operations may be adversely affected by oil and gas development are not notified or consulted when subsurface rights are posted and sold. Nor can the public at large easily make its views known, despite the potential for industry activity to have significant cumulative and long-term impacts on public land, water, wildlife, air quality, and wilderness values.

Alberta Energy’s web site states unselfconsciously that “[p]etroleum and natural gas and oil sands sales *tend to go unnoticed*”;¹² but the province provides no realistic means for the public to “notice” these sales, let alone any opportunity to advise the government on their appropriateness. Yet, these sales are a key determinant of the future of Alberta’s landscapes and they tilt the playing field decisively in all subsequent discussions of where, when





and at what pace oil and gas development should occur.

The Dilemma of Cumulative Effects

Cumulative environmental effects provide still another impediment to the EUB's ability to get at the root causes of some land-use conflicts. The Board's sectoral mandate and its one-at-a-time approach to project review are ill-suited to managing the cumulative effects of oil and gas development; those effects often arise from the incremental impacts of oil and gas activities together with other land uses that the EUB cannot regulate and they occur on land and bases that the EUB does not directly manage.

The EUB has occasionally acknowledged this problem, notably when confronted with clear evidence of adverse cumulative effects. For example, the Screwdriver Creek decision in 2000 contains a remarkably candid indictment of the provincial government's management of the Castle Crown region in south-western Alberta.¹³

The Board noted the common view of the industry and public participants in the hearing "that it was possible or even likely that the biological thresholds for at least some key species identified as important in the IRP [Subregional Integrated Resource Plan] may now have been exceeded in the region."¹⁴ It concluded that this finding "would appear to strongly suggest that the publicly available planning tools for the region may now be outdated and inadequate to address the current level of development."¹⁵

Turning to the implications for its decision-making, the Board admitted that the absence of thresholds against which to measure ecological effects made it "difficult" to evaluate whether incremental impacts from new development would be "acceptable" and what mitigation measures might be useful "to reduce the cumulative effects to suitable levels."¹⁶ It therefore called for an "updated integrated resource management strategy" to determine whether or not the region's environmental values were being adequately protected.¹⁷ Alternatively, it recommended the creation of strategies "to address the future cumulative effects of human activities, including energy development, in the Castle Crown Region."¹⁸

The Board indicated that it would raise this problem and its recommendations with appropriate land management agencies. In the meantime, it approved the application in question – and it continues to issue well licences and other

approvals in the region despite the government's failure to show significant progress in managing cumulative effects.

A similar pattern is evident in north-eastern Alberta, where a series of EUB decisions contain increasingly pointed requests for direction from the multi-stakeholder Cumulative Environmental Management Association (CEMA) on how to manage the cumulative effects of oil sands development.¹⁹ CEMA's silence on key issues has been deafening, but the Board continues to wring its hands and churn out project approvals.

In a 2004 decision, the Board finally shifted its focus to provincial government decision-makers, recommending that Alberta Environment and Alberta Sustainable Resource Development "consider developing management plans or objectives" if CEMA fails to meet its timelines.²⁰ The Board has also cautioned applicants that it may review approvals in light of eventual management guidelines on cumulative effects.

The best way to manage cumulative effects in both of these regions is through land-use plans that establish specific landscape-level objectives, confront directly the inevitable trade-offs between competing uses, and set quantitative thresholds or limits for disturbance. Whatever role the Board might play in regional planning exercises, it cannot easily take the lead in filling the gaps in this area. Lacking such a lead planning role, the Board could at least make a greater effort to spur other provincial planners by deciding to forego approving additional projects until effective plans and other legal and policy mechanisms for managing cumulative effects are in place or at least significantly underway.²¹

The Board has not been willing to exercise this kind of leverage but, as long as it refuses to do so, we will continue to see the Board's project approval decisions bemoaning the lack of an effective framework for managing the cumulative effects of oil and gas and other activities on the provincial landscape. While the public should expect more from the Board on this front, the real fault lies with the lack of an adequate legal and policy foundation to ensure sound land use planning across Alberta.

Regional planning commissions were disbanded in 1995 and the provincial government's own Integrated Resource Planning process has been eviscerated. While some plans exist, coverage is incomplete, plans are often out of date, and the process itself lacks transparency. *Ad hoc* regional



processes, such as CEMA in the oil sands area, have proven inadequate. The final nail in the planning coffin is section 619 of the *Municipal Government Act*, making municipal land-use plans subordinate to the EUB's project-specific decision making.

Not surprisingly, the planning vacuum is acutely felt by those who believe that the future of Alberta's landscapes and rural communities should be defined by more than the sum total of incremental land-use decisions. For example, the Pekisko Group's campaign to protect fescue grassland includes, as "Specific Goal One", a call for a provincial land use plan "that recognizes the concept of a Dominant Land Use and requires policy makers to consider the effects of cumulative development in their decisions about land use."²² As noted above, municipal districts such as Strathcona County appeal for an effective land-use planning partnership involving the EUB.

Beyond the EUB

Given this context, why do citizens continue to turn up at EUB hearings to raise concerns about cumulative effects and the compatibility of industrial development with other land uses and values? One reason, noted above, is that project applications crystallize these concerns, even if they also send an implicit signal to the informed observer that it may already be too late to address some of them. Another reason is that landowners and citizen groups currently have few other places to go – except the ballot box – to voice their concerns about the impacts of oil and gas development on other land uses.

The EUB is therefore left taking the heat on land-use conflicts, while lacking an adequate legal mandate and institutional capacity to resolve many of the underlying issues. A cynic might conclude that this situation is not an accident.

The Board's public process and much touted quasi-judicial status make it an effective means to insulate the political and bureaucratic drivers of Alberta's energy boom from the frustration of landowners and stakeholder groups. The public directs its attention, time and money to an endless stream of individual hearings, while some of the key decisions that shape energy development in Alberta occur with little or no public profile or input.

The best hope to address the root causes of land-use

conflicts and, incidentally, shift Alberta towards a more sustainable path is to look not only to the EUB, but also to other decision-makers who can deal more proactively with land-use conflicts. Filling the policy and planning vacuum at cabinet level and subjecting mineral rights issuance to public scrutiny and rigorous environmental review would be good places to start. Meaningful steps towards integrated land and resource management would be even better.²³ Tackling land-use conflicts at the policy, planning and rights issuance stages – as well as keeping the Board's feet to the fire on project review and regulation – is essential.

Decisive action in these areas is needed to ensure that the future for Alberta's landscapes, communities and ecosystems will be shaped through serious public discussion and an explicit consideration of priorities, limits and trade-offs. The alternative is to resign ourselves to a future that is simply whatever we are left with when the latest oil and gas boom runs its course.

- ♦ Mr. Kennett and Mr. Wenig are Research Associates at the Canadian Institute of Resources Law. Research for this article was funded by the Alberta Law Foundation.

Notes:

1. "Land-Use Conflicts Escalating, Solutions Urgently Needed" (April 1 – May 17, 2005) 16:4 *EnviroLine* at 1-3.
2. See, e.g., *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6, s. 4(c); *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7, s. 3(c).
3. *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 3.
4. EUB Decision 2005-060, June 22, 2005 at 12.
5. *Ibid.*
6. *Ibid.*
7. *Ibid.* at 13.
8. *EnviroLine*, *supra* note 1 at 2.
9. See, www.energy.gov.ab.ca (October 11, 2005).
10. *Ibid.*
11. Confidential interviews, cited in: Daniel Farr, *et al.*, *Al-Pac Case Study Report – Part 2: Regulatory Barriers and Options*, Prepared for the National Round Table on the Environment and the Economy, July 2004 at 15 (available at www.nrtee-trnee.ca).





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12. *Supra*, note 9 (emphasis added).
13. EUB Decision 2000-17, March 8, 2000.
14. *Ibid.* at 10.
15. *Ibid.*
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*
19. See: EUB Decision 99-7, July 23, 1999 at 36-38; EUB Decision 2000-50, July 14, 2000 at 14; EUB Decision 2002-089, October 22, 2002 at 55; EUB Decision 2004-005, January 27, 2004 at 76-78; EUB Decision 2004-009, February 5, 2004 at 78; EUB Decision 2004-113, December 30, 2004 at 21.
20. EUB Decision 2004-009, February 5, 2004 at 78.
21. Michael M. Wenig, "Cumulative Effects: Oil, Gas, and Biodiversity" (October/November 2002) *LawNow* at 28.
22. See, www.pekisko.com/sp_goal_01.html (October 11, 2005).
23. Steven A. Kennett, *Integrated Resource Management in Alberta: Past, Present and Benchmarks for the Future*, Occasional Paper #11 (Calgary: Canadian Institute of Resources Law, 2002).

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