

**MAPPING THE LEGAL FRAMEWORK  
FOR OIL SANDS DEVELOPMENT IN ALBERTA**

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*Oil sands development in Alberta has become a focal point for a challenging discussion on how to balance global energy demand with critical environmental, climate, and social considerations. This article contributes to the discussion by providing a detailed account of the current legal framework for oil sands development in Alberta. It begins with policy and land-use planning, moves through the mineral and surface rights disposition stages, and then considers the project review, approval, and final reclamation stages. Throughout, it discusses what has changed (and what has not changed) in the legal framework since the last comprehensive review was undertaken in 2007, and underscores important areas of concern moving forward.*

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**I. INTRODUCTION**

In recent years, oil sands development in Alberta has become a focal point for a polarizing debate on how to balance the global energy demand with important environmental, climate, and social considerations. This article contributes to the conversation by delineating the current legal framework for oil sands development in Alberta. The last thorough treatment was undertaken by Vlavianos in 2007, and much has changed since then.<sup>1</sup> There is a need to update that work and to provide important information and analysis so as to assist in informing the discussion about this type of development.

In 2007, Vlavianos identified three key problem areas in the (then) provincial regulatory framework. First, there was a lack of direction in the form of comprehensive plans or strategies for oil sands development.<sup>2</sup> In particular, there was a need for regional land-use plans, which commentators argued were essential to guide decision-making throughout the development process. It was hard to understand how cumulative effects management could

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<sup>1</sup> Nickie Vlavianos, “The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis” (August 2007), online: <[prism.ucalgary.ca/bitstream/handle/1880/47188/OP21Oilsands.pdf](http://prism.ucalgary.ca/bitstream/handle/1880/47188/OP21Oilsands.pdf)> [Vlavianos, “2007 Oil Sands Review”].

<sup>2</sup> *Ibid* at 63–64.

even be attempted without effective integration and coordination amongst decision-makers at the various stages in the oil sands development framework. Even the key regulator at the time, the Energy and Utilities Board (EUB), was finding it difficult to decide on oil sands project applications without guidance from regional development plans and strategies.<sup>3</sup>

The second conclusion reached in 2007 was that the existing legislative and regulatory framework was characterized by significant complexity, overlapping mandates, and uncertainty.<sup>4</sup> There were multiple decision-makers involved, operating under different pieces of legislation, which created a framework that was challenging to navigate. It was also difficult to have confidence in terms of who the ultimate decision-maker was in relation to certain aspects of the development process. The result was a system that lacked transparency, accessibility, and accountability at different stages in the regulatory process.

Lastly, the 2007 Oil Sands Review concluded that this lack of transparency was exacerbated by issues around a lack of effective and meaningful public participation.<sup>5</sup> Commentators have long argued that public participation in natural resources development leads to better decisions and provides accountability and legitimacy for those decisions. Vlavianos concluded that public participation was entirely missing at certain points in the decision-making process and, at other points, the opportunities available were insufficient to ensure representation from a broad spectrum of stakeholders.

The objectives of this article are twofold. First, the article provides a detailed account of the current legal framework for oil sands development in Alberta. Second, in outlining the current framework, the article discusses what has changed (and what has not changed) since the 2007 Oil Sands Review. The focus is on the three key problem areas identified at that time, but new issues are also highlighted.

The article proceeds as follows. Part II provides some context and discusses the scope of the article. In Part III, the current legal framework for oil sands development is reviewed. It begins with a discussion of the first stage that should drive all other points in the development process, namely the adoption and implementation of effective and comprehensive plans or strategies to help guide decision-making. Next, the article considers the three main stages in the current framework for oil sands development in Alberta: (1) the mineral rights disposition stage; (2) the surface rights disposition stage (for both oil sands exploration and production activities); and (3) the project review and approval stage. Part IV provides some concluding remarks on where things stand today, especially in relation to the three problem areas identified in 2007. It also highlights new areas of concern moving forward.

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<sup>3</sup> The Board's first call for a regional strategy for the oil sands was in *Application by Syncrude for the Aurora Mine* (24 October 1997), Decision No 97-13, online: *Alberta Energy and Utilities Board* <[static.aer.ca/prd/documents/decisions/1997/D97-13.pdf](http://static.aer.ca/prd/documents/decisions/1997/D97-13.pdf)>.

<sup>4</sup> Vlavianos, "2007 Oil Sands Review," *supra* note 1 at 64–65.

<sup>5</sup> *Ibid* at 65–66.

## II. BACKGROUND AND SCOPE

The bitumen contained in Alberta's oil sands is one of the largest known hydrocarbon deposits in the world.<sup>6</sup> Alberta's oil sands are located in the northern part of the province. Three areas have been defined — the Athabasca, Cold Lake, and Peace River Oil Sands Areas. Crude bitumen is produced by mining and extracting deposits located at or near the surface and by in situ thermal or non-thermal recovery of deposits located deep below the surface.

Between 2009 and 2019, oil sands production in Alberta increased from 1.5 million barrels per day to 3.1 million barrels per day. In 2019/20, however, a decrease in world oil prices and the COVID-19 pandemic contributed to a slowdown. Moreover, environmental scrutiny of oil sands production has intensified sharply in recent years. In 2020, Teck Resources Ltd. cancelled its planned \$20 billion oil sands mine, citing the ongoing debate over climate policy in Canada.<sup>7</sup> A lack of pipeline capacity has also been a problem, with pipeline applications facing increasing opposition on environmental and other grounds. In January 2021, for example, a presidential order revoked the permit in the United States for the proposed Keystone XL pipeline (a proposed expansion of capacity to ship crude oil from Alberta to the Gulf of Mexico).<sup>8</sup>

Nonetheless, assuming market and other factors will support it, predictions are that oil sands production will likely continue and will increase, at least in the foreseeable future. By 2030, the Alberta Energy Regulator (AER) expects production to reach 4 million barrels per day.<sup>9</sup> Looking forward to 2050, the Canada Energy Regulator (CER) predicts an overall growth in oil sands production over the next two decades with production declining slightly but holding at approximately 3.25 million barrels per day in 2050.<sup>10</sup> Much of the growth is expected to come from optimization and expansions to existing facilities, but also from new in situ oil sands projects.<sup>11</sup>

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<sup>6</sup> Canada Energy Regulator, *Canada's Energy Future 2020* (Calgary: Canada Energy Regulator, 2020) at 76, online: <[www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2020/canada-energy-futures-2020.pdf](http://www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2020/canada-energy-futures-2020.pdf)>.

<sup>7</sup> Teck Resources Ltd, News Release, "Teck Withdraws Regulatory Application for Frontier Project" (23 February 2020), online: <[www.teck.com/news/news-releases/2020/teck-withdraws-regulatory-application-for-frontier-project](http://www.teck.com/news/news-releases/2020/teck-withdraws-regulatory-application-for-frontier-project)>. Similarly, in July 2020, Total E&P Ltd announced it was writing off \$9.3-billion worth of oil sands assets in Alberta citing both its carbon reduction commitments and high production costs: Dan Healing, "Total Writes Off \$9.3B in Oilsands Assets, Cancels CAPP Membership," *Global News* (29 July 2020), online: <[globalnews.ca/news/7233046/total-writes-off-oil-sands-assets-alberta-capp/](http://globalnews.ca/news/7233046/total-writes-off-oil-sands-assets-alberta-capp/)>.

<sup>8</sup> US, Executive Office of the President, *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis* (FR Doc No 2021-01765) (Washington, DC: US Government Publishing Office, 2021) at 7041, online: <[www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01765.pdf](http://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01765.pdf)>. Approving new pipelines in Canada has also been challenging. For a discussion of the two key issues in Canada's current pipeline debates (namely, the obligations owed to Indigenous peoples and Canada's climate change commitments), see Andrew Leach, "The No More Pipelines Act?" (2021) 59:1 *Alta L Rev* 7.

<sup>9</sup> Alberta Energy Regulator, *ST98: Alberta Energy Outlook 2021: Executive Summary* (Calgary: Alberta Energy Regulator, 2021) at 10, online: <[static.aer.ca/prd/documents/sts/ST98/2021/st98-2021-executive-summary.pdf](http://static.aer.ca/prd/documents/sts/ST98/2021/st98-2021-executive-summary.pdf)>.

<sup>10</sup> Canada Energy Regulator, *Canada's Energy Future 2021* (Calgary: Canada Energy Regulator, 2021) at 41, online: <[www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2021/canada-energy-futures-2021.pdf](http://www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2021/canada-energy-futures-2021.pdf)>.

<sup>11</sup> *Ibid* at 42.

This article focuses on the provincial legislative and regulatory framework for upstream oil sands development in Alberta. Although the literature would benefit from a review of the current federal role in oil sands development, it is beyond the scope of this article.<sup>12</sup> Another significant topic that is beyond the scope of this article, especially given its importance and complexity, is the law in relation to Indigenous peoples who live in the oil sands areas.<sup>13</sup> This law includes the Crown's constitutional duty to consult and accommodate Indigenous peoples who are, or may be, impacted by oil sands development activities. A thorough review of this law must be conducted to obtain a complete picture of the legal framework for oil sands development in Alberta. Addressing the actual and potential impacts of proposed development on Indigenous peoples is critical to any proposed oil sands development.<sup>14</sup>

### III. ALBERTA'S LEGISLATIVE AND REGULATORY FRAMEWORK

This Part reviews the main aspects of Alberta's current legal framework for oil sands development by moving through the following key stages in the development process: (1) the disposition of oil sands rights; (2) the granting of access to public lands for oil sands exploration and production; and (3) project reviews and approvals. It begins, however, with a discussion of a first stage, namely the adoption of policies, plans, and strategies that should guide decision-making across subsequent stages.

#### A. OIL SANDS (OR ENERGY) POLICY AND LAND-USE PLANNING IN ALBERTA

In 2007, Vlavianos concluded that a lack of an overall oil sands (or energy) policy along with a comprehensive regional planning framework was hindering decision-making, especially in relation to cumulative effects management, across the stages in the development process.<sup>15</sup> At the time, with oil sands development booming, many were calling on the government to provide critical policy direction to help drive decision-making on this development. There were calls for a "comprehensive" and "integrated" energy strategy.

<sup>12</sup> Federal involvement was discussed in Vlavianos, "2007 Oil Sands Review," *supra* note 1 at 67–75, but it is now out of date. Another helpful report is M Howlett & J Craft, "Application of Federal Legislation to Alberta's Mineable Oil Sands" (May 2013), online: <era.library.ualberta.ca/items/ace3ffb2-0229-44e8-9a42-87c02b3f9d35/view/d37032a5-a82e-4983-9953-7abb56e9b6f9/TR-33-20--20Federal-20Legislation.pdf>, but it too must be read in light of recent changes to federal legislation.

<sup>13</sup> In 2016, it was estimated that about 23,000 Indigenous peoples from 18 First Nations and six Métis Settlements live in the oil sands areas in northeast Alberta: "Oil Sands: Indigenous Peoples" (May 2016) at 1, online: *Natural Resources Canada* <www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/oilsands-sablesbitumineux/14-0696%20Oil%20Sands%20-%20Indigenous%20Peoples\_e.pdf>.

<sup>14</sup> Several treaty and Aboriginal rights issues arise in relation to oil sands developments. On treaty rights, see Robert Hamilton & Nick Ettinger, "Yahey v British Columbia and the Clarification of the Standard for a Treaty Infringement" (24 September 2021), online (blog): <ablawg.ca/2021/09/24/yahey-v-british-columbia-and-the-clarification-of-the-standard-for-a-treaty-infringement/>; Robert Hamilton & Nick Ettinger, "Blueberry River First Nation and the Piecemeal Infringement of Treaty 8" (20 July 2021), online (blog): <ablawg.ca/2021/07/20/blueberry-river-first-nation-and-the-piecemeal-infringement-of-treaty-8/>. For the duty to consult and accommodate in the oil sands context, see David K Laidlaw, "Alberta Energy Projects and Indigenous Accommodation?" (June 2021), online: <www.canlii.org/en/commentary/doc/2021CanLIIDocs1567>; David Laidlaw, "Alberta First Nations Consultation & Accommodation Handbook – Updated to 2016" (March 2016), online: <www.canlii.org/en/commentary/doc/2016CanLIIDocs4647>. See also *Fort McKay First Nation v Prosper Petroleum Ltd.*, 2020 ABCA 163 [*Fort McKay First Nation*] (holding that the AER has an obligation to consider the honour of the Crown in applications for new oil sands projects); Nigel Bankes, "The AER Must Consider the Honour of the Crown" (28 April 2020), online (blog): <ablawg.ca/2020/04/28/the-aer-must-consider-the-honour-of-the-crown/>.

<sup>15</sup> Vlavianos, "2007 Oil Sands Review," *supra* note 1 at 5–9, 62–64.

Existing policies were criticized for being inconsistent, lacking in specifics, and prioritizing development over environmental protection.<sup>16</sup> Along with effective policy, commentators were calling for a comprehensive regional land-use planning framework to guide decision-making across the full range of activities on the landscape.

Fifteen years later, where do things stand today?

## 1. ENERGY AND CLIMATE POLICY

There have been attempts at an overall energy or oil sands policy over the years, but unless enshrined in legislation in some way, policy can come and go with changes in government.<sup>17</sup> A current search of Alberta Energy's website does not reveal an obvious umbrella policy for energy or oil sands development in the province. In any event, commentators today suggest a shift in focus to the need for several policies and strategies, each designed to address pressing economic, environmental, and social issues with energy and oil sands development. In particular, the global shift in awareness and concern for climate change in recent years has propelled calls for rigorous and effective climate change policies and actions to the forefront of any discussions about oil sands development in the province.<sup>18</sup>

Although exact estimates may vary, there is no doubt that oil sands development (mining and in situ) is responsible for substantial greenhouse gas emissions that are contributing to the global climate crisis and making it difficult for Canada to meet its international climate commitments.<sup>19</sup> The withdrawal by Teck Resources Ltd. of its application to build a \$20.6 billion oil sands mine and the cancellation of the Keystone XL pipeline in the US mentioned above are direct signals that much more needs to be done to address climate impacts in the context of oil sands development.

In a 2019 report, the Pembina Institute outlines key areas where energy policy leadership is needed today. These include policy and strategies to: (1) help industries be competitive with fewer emissions (for example, supporting innovative technology, renewable energy, energy efficiency, low emission production); (2) ensure healthy communities and landscapes (for example, cleaner transportation options, coal phase-out, land conservation, addressing ongoing oil and gas reclamation liabilities); and (3) address climate change more directly (for example, through legislative emissions reduction targets that are consistent with Canada's international obligations under the *Paris Agreement*, setting an economy-wide price on

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<sup>16</sup> *Ibid* at 6.

<sup>17</sup> See e.g. Alberta Energy, *Launching Alberta's Energy Future: Provincial Energy Strategy*, No 4256197 (Edmonton: Alberta Energy, December 2008), online: <[open.alberta.ca/publications/9780778563419#summary](http://open.alberta.ca/publications/9780778563419#summary)>; Alberta, Treasury Board, *Responsible Actions: A Plan for Alberta's Oil Sands*, No 4284820 (Edmonton: Treasury Board, 2009), online: <[open.alberta.ca/publications/9780778580546#summary](http://open.alberta.ca/publications/9780778580546#summary)>.

<sup>18</sup> According to Bankes, a climate policy is an energy policy (and vice versa): Nigel Bankes, "Carbon Security or Carbon Whimsy?" (17 July 2019), online (blog): <[ablawg.ca/wp-content/uploads/2019/07/Blog\\_NB\\_CarbonSecurity.pdf](http://ablawg.ca/wp-content/uploads/2019/07/Blog_NB_CarbonSecurity.pdf)>.

<sup>19</sup> See e.g. Rod Nickel & Nia Williams, "Canada's Climate Plan Charts Hard Road Ahead for High-Polluting Oil Sands," *Reuters* (21 June 2021), online: <[www.reuters.com/business/environment/canadas-climate-plan-charts-hard-road-ahead-high-polluting-oil-sands-2021-06-22/](http://www.reuters.com/business/environment/canadas-climate-plan-charts-hard-road-ahead-high-polluting-oil-sands-2021-06-22/)>.

carbon pollution, and maintaining and enhancing Alberta's output-based system for large emitters).<sup>20</sup>

A review of how climate change is being addressed by both the Alberta and federal governments is outside of the scope of this article. However, a few key developments can be mentioned here. First, in 2016, Alberta passed legislation to cap overall greenhouse gas emissions for the oil sands sector. Under section 2(1) of the *Oil Sands Emissions Limit Act*, a limit of 100 megatonnes is set for greenhouse gas emissions "for all oil sands sites combined" in any given year.<sup>21</sup> Some exceptions are set out, including for certain experimental schemes, primary production, and enhanced recovery activities, as well as for certain emissions attributable to the electric energy portion of cogeneration, new upgraders (since 2015), and increased capacity from expansion at existing upgraders.<sup>22</sup>

Section 4 confirms that the *OSELA* is to be interpreted as part of Alberta's *Emissions Management and Climate Resilience Act*.<sup>23</sup> Regulations passed under the *EMCRA* require that a "large emitter" (defined as a facility that has direct emissions of 100,000 tonnes or more of greenhouse gases per year) must not exceed allowable emissions.<sup>24</sup> Allowable emissions are based on an output-based benchmark, also called an "intensity-based" approach, and facilities can meet the benchmark through four options: (1) improving the facility's operating efficiency; (2) submitting emission performance credits; (3) submitting emission offsets; or (4) paying for fund credits.<sup>25</sup> Performance credits are awarded if a facility's emissions are below their allowable limit, and offsets must adhere to the Standard for Greenhouse Gas Emission Offset Project Developers.<sup>26</sup> Fund credits are obtained by contributing to the Technology Innovation and Emissions Reduction Fund.<sup>27</sup> Money paid into the fund is used for a range of programs "that are reducing emissions, boosting the economy and getting Albertans back to work."<sup>28</sup>

Other Alberta carbon reduction initiatives include the *Methane Emission Reduction Regulation* (which sets a framework for the reduction of methane emissions from oil and gas

<sup>20</sup> "Energy Policy Leadership in Alberta" (March 2019), online: *Pembina Institute* <[www.pembina.org/reports/energy-policy-leadership-in-alberta.pdf](http://www.pembina.org/reports/energy-policy-leadership-in-alberta.pdf)>.

<sup>21</sup> SA 2016, c O-7.5, s 2(1) [*OSELA*].

<sup>22</sup> *Ibid*, s 2(2).

<sup>23</sup> *Ibid*, s 4; *Emissions Management and Climate Resilience Act*, SA 2003, c E-7.8 [*EMCRA*].

<sup>24</sup> *Technology Innovation and Emissions Reduction Regulation*, Alta Reg 133/2019, ss 1(1)(cc), 12 [*TIER*].

<sup>25</sup> *Ibid*, ss 9, 11, 18; "Carbon and Greenhouse Gas Legislation in Alberta" (March 2021), online: <[www.osler.com/en/resources/regulations/2015/carbon-ghg/carbon-and-greenhouse-gas-legislation-in-alberta](http://www.osler.com/en/resources/regulations/2015/carbon-ghg/carbon-and-greenhouse-gas-legislation-in-alberta)> ["Carbon and Greenhouse Gas Legislation"]; "Technology Innovation and Emissions Reduction Regulation," online: <[www.alberta.ca/technology-innovation-and-emissions-reduction-regulation.aspx](http://www.alberta.ca/technology-innovation-and-emissions-reduction-regulation.aspx)>.

<sup>26</sup> *TIER*, *supra* note 24, ss 2(c), 18; Alberta Environment and Parks, *Standard for Greenhouse Gas Emission Offset Project Developers: Technology, Innovation, and Emissions Reductions Regulation* (Edmonton: Alberta Environment and Parks, November 2019), online: <[open.alberta.ca/publications/standard-for-greenhouse-gas-emission-offset-project-developers-version-3](http://open.alberta.ca/publications/standard-for-greenhouse-gas-emission-offset-project-developers-version-3)>.

<sup>27</sup> *TIER*, *ibid*, ss 19–21. The fund is regulated under the *Technology Innovation and Emissions Reduction Fund Administration Regulation*, Alta Reg 120/2009. The current prescribed price is \$40 per tonne, but will need to keep pace with any increases in federal emissions thresholds under the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186, which was upheld as a valid exercise of federal constitutional jurisdiction by the Supreme Court of Canada in 2021: "Carbon and Greenhouse Gas Legislation," *supra* note 25; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

<sup>28</sup> "Cutting Emissions and Diversifying the Economy" (1 November 2021), online: <[www.alberta.ca/release.cfm?xID=802609F6EB575-E22B-32A7-B61FE3B3C19692E7](http://www.alberta.ca/release.cfm?xID=802609F6EB575-E22B-32A7-B61FE3B3C19692E7)>. For criticism of how the money paid into the fund has been used, see Drew Yewchuk, "Alberta's Plan for Climate Resilience is Government Propaganda" (8 September 2021), online (blog): <[ablawg.ca/2021/09/08/albertas-plan-for-climate-resilience-is-government-propaganda/](http://ablawg.ca/2021/09/08/albertas-plan-for-climate-resilience-is-government-propaganda/)>.

operations),<sup>29</sup> the *Renewable Fuels Standard Regulation* (requires a minimum annual average of 5 percent renewable alcohol in gasoline and 2 percent renewable, bio-based diesel in diesel fuel sold in Alberta),<sup>30</sup> and the *Specified Gas Reporting Regulation* (which sets out requirements for facilities that emit 10,000 tonnes or more of specified gases to report on gas that has been released into the environment).<sup>31</sup>

Even this cursory review signals some key changes in relation to energy and oil sands policy since the 2007 Oil Sands Review. First, climate change has necessarily moved to the forefront of the policy agenda, and the Alberta government has responded with some regulatory responses. Second, the carbon intensity of the oil sands has led to significant increased scrutiny and concern for this type of development, despite the economic value of the development. As noted, this scrutiny has already impacted proposed projects and will continue to do so unless progress is made. Many commentators observe that the province's current framework for addressing the climate change impacts from oil sands development is insufficient.<sup>32</sup>

By most accounts, more needs to be done, especially in relation to ensuring Canada can meet its international climate commitments.<sup>33</sup> The Pembina Institute notes that even with the current regulatory framework carbon emissions from the oil sands are the fastest-growing source of emissions in Canada.<sup>34</sup> This continuing upward trajectory reduces Canada's ability to meet its 2030 emissions reduction commitments and its plan to become carbon-neutral by 2050.<sup>35</sup>

Commentators are therefore calling on Alberta to adopt a climate plan that "articulates an end-goal and the emission reduction trajectory to get there — a percentage target of emissions reduction by 2030 and net-zero by 2050 — across all sectors of Alberta's economy."<sup>36</sup> This would "provide clarity and policy certainty for industry and investors and would align with the federal government's announcement at COP26 ... to put a hard cap on Canada's oil and gas emissions."<sup>37</sup>

<sup>29</sup> Alta Reg 244/2018.

<sup>30</sup> Alta Reg 29/2010.

<sup>31</sup> Alta Reg 251/2004.

<sup>32</sup> See e.g. Nigel Bankes, "Oil Sands Emission Limit Legislation: A Real Commitment or Kicking it Down the Road?" (3 November 2016), online (blog): <ablawg.ca/2016/11/03/oil-sands-emission-limit-legislation-a-real-commitment-or-kicking-it-down-the-road/>; Mark Friedman, "Assessing Greenhouse Gas Emissions in the Oil Sands: Legislative or Administrative (In)Action?" (2015) 6:3 Western J Leg Studies 1; Ian Hussey, "Five Things to Know About Alberta's Oil Sands Emissions Cap" (22 February 2017), online (blog): <www.parklandinstitute.ca/five\_things\_to\_know\_about\_albertas\_oil\_sands\_emissions\_cap/>.

<sup>33</sup> For Canada's slow progress in this regard, see Peter Zimonjic, "Canada's Climate Change Efforts Going From 'Failure to Failure,' Says Commissioner's Report," *CBC News* (25 November 2021), online: <www.cbc.ca/news/politics/environment-commissioner-report-failure-to-failure-1.6262523/>.

<sup>34</sup> Benjamin Israel et al., "The Oilsands in a Carbon-Constrained Canada: The Collision Course Between Overall Emissions and National Climate Commitments" (February 2020) at 4, online: *Pembina Institute* <www.pembina.org/reports/the-oilsands-in-a-carbon-constrained-canada-march-2020.pdf/>.

<sup>35</sup> *Ibid.* See also Marwa Hannouf, Getachew Assefa & Ian Gates, "Carbon Intensity Threshold for Canadian Oil Sands Industry Using Planetary Boundaries: Is a Sustainable Carbon-Negative Industry Possible?" (2021) 151:111529 *Renewable & Sustainable Energy Reviews*.

<sup>36</sup> Pembina Institute, News Release, "Alberta's Emission Reduction Investments No Substitute for Climate Plan" (2 November 2021), online: <www.pembina.org/media-release/albertas-emission-reduction-investments-no-substitute-climate-plan/>.

<sup>37</sup> *Ibid.* Recently, Canada's oil sands producers announced they will work with the federal and Alberta governments to help Canada meet its climate goals: Rithika Krishna, "Canada's Oil Sands Producers Form Alliance to Achieve Net-Zero Emissions by 2050," *Reuters* (9 June 2021), online: <www.reuters.com/business/sustainable-business/canadas-oil-sands-producers-form-alliance-achieve-net-zero-emissions-by-2050-2021-06-09/>.

## 2. LAND-USE PLANNING

Along with questions around oil sands/energy policy, the 2007 Oil Sands Review highlighted that the lack of a regional land-use framework for the province, and particularly for the oil sands areas, was significantly impeding attempts to manage development, especially in relation to cumulative effects.<sup>38</sup> The consensus was that without mandatory regional land-use plans, and ideally plans with detailed thresholds and limits for environmental impacts, there was no ability to assess and proactively manage the cumulative effects of all kinds of development, including oil sands, on the landscape.

Since 2007, the *Alberta Land Stewardship Act*<sup>39</sup> was enacted in 2009, based on the Land-Use Framework (LUF) it implements. The purpose of the LUF is to “manage growth, not stop it, and to sustain our growing economy, but balance this with Albertans’ social and environmental goals.”<sup>40</sup> The LUF divides Alberta into seven regions and calls for the development of a regional plan for each. These plans are developed under the *ALSA*.

To date, only two regional plans have been developed, with another one in progress.<sup>41</sup> The first plan was the Lower Athabasca Regional Plan (LARP) in 2012, which covers most of the Athabasca and Cold Lake oil sands areas where about 82 percent of Alberta’s oil sands resource is located.<sup>42</sup> In describing the LUF’s vision, the LARP notes as follows:

The vision describes a desired future state for the Lower Athabasca in which the region’s diverse economic opportunities are balanced with social and environmental considerations using a cumulative effects management approach. Cumulative effects management focuses on achievement of outcomes, understanding the effects of multiple development pressures (new and existing), assessment of risk, collaborative work with shared responsibility for action and improved integration of economic, environmental and social considerations.<sup>43</sup>

The LARP covers several matters, including optimization of the oil sands resource, new and existing conservation areas, air and water (surface and groundwater) quality, surface and groundwater quantity, recreation and tourism, and monitoring and reporting. It sets triggers and limits for air quality, surface water quality, and groundwater quality.<sup>44</sup> It also specifies what types of activities (for example, oil sands development, forestry, grazing) are permitted within the conservation areas in the region.<sup>45</sup>

Under the *ALSA*, the LARP binds all governments, decision-makers, regulated industry, and private individuals.<sup>46</sup> It prevails over conflicting provisions in provincial regulations or

<sup>38</sup> Vlavianos, “2007 Oil Sands Review,” *supra* note 1 at 5–9, 63–64.

<sup>39</sup> SA 2009, c A-26.8 [*ALSA*].

<sup>40</sup> Alberta, Land Use Secretariat, *Land-Use Framework* (Edmonton: Land Use Secretariat, December 2008) at 2, online: <[open.alberta.ca/dataset/30091176-f980-4f36-8f5a-87bc47890aa8/resource/bc4b3fac-5e59-473b-9a99-1a83970c28e7/download/4321768-2008-land-use-framework-2008-12.pdf](https://open.alberta.ca/dataset/30091176-f980-4f36-8f5a-87bc47890aa8/resource/bc4b3fac-5e59-473b-9a99-1a83970c28e7/download/4321768-2008-land-use-framework-2008-12.pdf)>.

<sup>41</sup> “Regional Plans,” online: <[landuse.alberta.ca/REGIONALPLANS/Pages/default.aspx](https://landuse.alberta.ca/REGIONALPLANS/Pages/default.aspx)>.

<sup>42</sup> Alberta, Land Use Secretariat, *Lower Athabasca Regional Plan: 2012-2022* (Edmonton: Land Use Secretariat, August 2012) at 14, online: <[landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%202012-2022%20Approved%202012-08.pdf](https://landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%202012-2022%20Approved%202012-08.pdf)>.

<sup>43</sup> *Ibid* at 23.

<sup>44</sup> *Ibid*, Schedules A–C at 73–78.

<sup>45</sup> *Ibid*, Schedule F at 83–91.

<sup>46</sup> *ALSA*, *supra* note 39, s 15(1).



regulatory instruments like municipal bylaws and codes of practices.<sup>47</sup> Further, it may affect an existing licence, approval, or authorization to achieve or maintain its objectives.<sup>48</sup> As Arlene Kwasniak notes, the “*ALSA* is remarkable legislation. It provides the provincial government with unprecedented legislative and policy tools to comprehensively plan and manage public and private lands and interests, including natural resources.”<sup>49</sup>

Under the LARP, five management frameworks have been developed to guide decision-making across all stages of the development process (discussed below in relation to oil sands development) in the Lower Athabasca region. There is a management framework for air quality, surface water quality, surface water quantity, groundwater quality and quantity, and tailings from mining operations.<sup>50</sup> These frameworks set regional environmental triggers and limits for air, surface water, and groundwater quality; set limits for overall regional water use at various times of the year; and provide direction for the management of tailings produced from oil sands mining operations. Monitoring stations have been installed to monitor air, groundwater, and surface water quality and oil sands operations are monitored on a regional basis, with enforcement triggers based on the cumulative environmental impacts in the region. These management frameworks are used by the AER when assessing and regulating oil sands projects. In short, the LARP establishes resource and environmental management outcomes for air, land, and water and guides decision-making for oil sands development. This is clearly a significant step since 2007.

Nonetheless, the LARP is “still a work in progress.”<sup>51</sup> From the start, some argued that it is not as specific or as comprehensive as it should be, and that it does not go far enough (for example, it only identified 16 percent of the land base as new conservation areas). Others identified significant weaknesses in the public consultation process that led to its development.<sup>52</sup> In 2015, a review panel struck to review the LARP through an application brought by six First Nations under section 19.2 of the *ALSA* concluded that the traditional lands of the First Nations were being “encroached upon and reduced by rapid industrial development of the Lower Athabasca Region.”<sup>53</sup> It called upon the government to develop a traditional land-use management framework as part of the LARP, which would recognize and honour the constitutionally-protected rights of the First Nation communities residing in the area. The review panel strongly recommended to the government that in order to achieve effective cumulative effects management as prescribed in the LARP, an “equalization” must

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<sup>47</sup> *Ibid*, s 17.

<sup>48</sup> *Ibid*, s 11.

<sup>49</sup> Arlene J Kwasniak, “Public Lands and Resources Planning and Management: Policies, Tools, and Legislation” in Elaine L Hughes, Arlene J Kwasniak & Alastair R Lucas, eds, *Public Lands and Resources Law in Canada* (Toronto: Irwin Law, 2016) 121 at 132.

<sup>50</sup> “Lower Athabasca Regional Planning,” online: <[www.alberta.ca/lower-athabasca-regional-planning.aspx](http://www.alberta.ca/lower-athabasca-regional-planning.aspx)>.

<sup>51</sup> *Report of the Joint Review Panel: Teck Resources Limited Frontier Oil Sands Mine Project*, Catalogue No En106-222/2019E-PDF (25 July 2019), 2019 ABAER 008 at xiv, online: *Alberta Energy Regulator and Canadian Environmental Assessment Agency* <[iaac-aeic.gc.ca/050/documents/p65505/131106\\_E.pdf](http://iaac-aeic.gc.ca/050/documents/p65505/131106_E.pdf)> [*Teck Resources Ltd*].

<sup>52</sup> See e.g. Monique M Passelac-Ross, “Public Participation in Alberta’s Land-Use Planning Process,” *Resources* 112 (2011) 1, online: <[prism.ucalgary.ca/bitstream/handle/1880/48541/Resources112.pdf](http://prism.ucalgary.ca/bitstream/handle/1880/48541/Resources112.pdf)>.

<sup>53</sup> Alberta Environment and Parks, *Review Panel Report 2015: Lower Athabasca Regional Plan* (Edmonton: Alberta Environment and Parks, 2015) at 6, online: <[open.alberta.ca/publications/review-panel-report-2015-lower-athabasca-regional-plan](http://open.alberta.ca/publications/review-panel-report-2015-lower-athabasca-regional-plan)>.

be achieved to “find a balance” between industrial activity and the rights of Indigenous peoples in the region.<sup>54</sup>

The latest progress report from the Land Use Secretariat, tasked with preparing such reports under the *ALSA*, is from 2016.<sup>55</sup> It states that several strategic commitments outlined in the LARP have been completed, but seven have been deferred. These include the development of a sub-regional plan using a strategic environmental assessment approach for the south Athabasca oil sands area, the development of a biodiversity management framework for the region, and the development of a landscape management plan for public lands in the Green Area.<sup>56</sup> There is no mention of the traditional land-use management framework recommended by the 2015 review panel. Moreover, in its 2019 decision on Teck Resources Ltd.’s Frontier Oil Sands mine project application, the Joint Review Panel assessing the project urged the Alberta government to continue to implement the LARP and put in place the frameworks, plans, and thresholds it identifies as quickly as possible.<sup>57</sup> It also made recommendations for further mitigation and management plans to be developed under the LARP.<sup>58</sup>

Scholars have noted the challenges inherent in current methods and approaches to environmental monitoring and adaptive management within the land-use planning framework.<sup>59</sup> According to Joshua Cronmiller and Bram Noble, although significant advances are being made in cumulative effects science and management (including in the Lower Athabasca region of Alberta), “an enduring challenge has been the design and integration of monitoring programs to ensure that they advance the science of cause–effect determination and, at the same time, meet the day-to-day needs of those tasked with [cumulative effects] management and regulatory decision making.”<sup>60</sup>

### 3. THE ROLE OF PUBLIC PARTICIPATION

According to Arnstein, citizen participation in public policy and planning processes is the “cornerstone of democracy.”<sup>61</sup> Several scholars have delineated the rationale for public

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<sup>54</sup> *Ibid.*

<sup>55</sup> Alberta, Land Use Secretariat, *Land-Use Framework Regional Plans Progress Report: A Review of Our Progress in 2016* (Edmonton: Land Use Secretariat, December 2017), online: <landuse.alberta.ca/LandUse%20Documents/Progress%20Report%202016%20-%20Final%20PDF.pdf>.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Teck Resources Ltd*, *supra* note 51 at xiv.

<sup>58</sup> *Ibid.*

<sup>59</sup> See e.g. Joshua G Cronmiller & Bram F Noble, “The Discontinuity of Environmental Effects Monitoring in the Lower Athabasca Region of Alberta, Canada: Institutional Challenges to Long-Term Monitoring and Cumulative Effects Management” (2018) 26:2 *Environmental Reviews* 169; Martin ZP Olszynski, “Failed Experiments: An Empirical Assessment of Adaptive Management in Alberta’s Energy Resources Sector” (2017) 50:3 *UBC L Rev* 697 [Olszynski, “Failed Experiments”]; Martin ZP Olszynski, “Environmental Monitoring and Ecosystem Management in the Oil Sands: Spaceship Earth or Escort Tugboat?” (2014) 10:1 *JSDLP* 1.

<sup>60</sup> Joshua G Cronmiller & Bram F Noble, “Integrating Environmental Monitoring with Cumulative Effects Management and Decision Making” (2018) 14:3 *Integrated Environmental Assessment & Management* 407 at 416.

<sup>61</sup> Sherry R Arnstein, “A Ladder of Citizen Participation” (1969) 35:4 *J American Institute Planners* 216 at 216.

participation in environmental and resource management decision-making.<sup>62</sup> They argue that public participation is consistent with the public nature of natural resources and with the public nature of the air, water, and land that is impacted by natural resources development. Some suggest it is a democratic and human right. The most widespread view is that public participation is important because it promotes better outcomes, since decision-making is improved when a range of opinions, concerns, information, and types of knowledge are heard. Moreover, public participation is critical to ensuring transparency and accountability in the decision-making process, thereby increasing public trust and confidence.<sup>63</sup>

With respect to the development of energy (or climate) and natural resources policy in Alberta, there are currently no legislated requirements for public participation. Sometimes governments adopt ad hoc consultation processes, but these are discretionary and unpredictable.<sup>64</sup>

As regards regional planning under the *ALSA*, there is a requirement for public participation in the development or amendment of a regional plan. Section 5 of the *ALSA* states that before a regional plan is made or amended, the Minister must ensure that “appropriate public consultation with respect to the proposed regional plan or amendment has been carried out, and present a report of the findings of such consultation to the Executive Council.”<sup>65</sup> Section 51 grants Cabinet broad discretion to describe the public and stakeholder communication and consultation required in a regional planning process, and to set the terms of reference for the process.<sup>66</sup>

The public consultation that must occur under the *ALSA* (and that occurred in the development of the LARP) has been described as “*ad hoc*, discretionary and entirely defined and driven by government.”<sup>67</sup> There are no specific details in the *ALSA* setting out the process of public participation in the development of regional plans. According to Monique Passelac-Ross, although the government generally offered the public various opportunities to be consulted on the development of the LARP (for example, through an online comment process), there was a lack of transparency and accountability in the process.<sup>68</sup> For example, it was unclear how participants were selected to participate in “stakeholder focus groups.”<sup>69</sup> Moreover, there was a lack of clear process rules for participation, and ultimately, “we do not know how the views of the public and stakeholders have influenced the *outcome* of the

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<sup>62</sup> See e.g. Barry Barton, “Underlying Concepts and Theoretical Issues in Public Participation in Resources Development” in Donald N Zillman, Alastair R Lucas & George (Rock) Pring, eds, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002) 77; Shaun Fluker, “The Right to Public Participation in Resources and Environmental Decision-Making in Alberta” (2015) 52:3 *Alta L Rev* 567 [Fluker, “Public Participation”]; Rebeca Macias, “Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation” (December 2010), online: <[prism.ucalgary.ca/bitstream/handle/1880/48390/CriteriaOP34w.pdf](http://prism.ucalgary.ca/bitstream/handle/1880/48390/CriteriaOP34w.pdf)>.

<sup>63</sup> *Ibid.*

<sup>64</sup> Nickie Vlavianos, “The Issues and Challenges with Public Participation in Energy and Natural Resources Development in Alberta,” *Resources* 108 (2010) 1, online: <[prism.ucalgary.ca/bitstream/handle/1880/47996/?sequence=1](http://prism.ucalgary.ca/bitstream/handle/1880/47996/?sequence=1)>.

<sup>65</sup> *ALSA*, *supra* note 39, s 5.

<sup>66</sup> *Ibid.*, s 51.

<sup>67</sup> Passelac-Ross, *supra* note 52 at 4.

<sup>68</sup> *Ibid.* at 5.

<sup>69</sup> *Ibid.* at 4–5.

land-use planning process in the Athabasca region.”<sup>70</sup> Passelac-Ross recommends that, going forward, steps be taken to ensure a more effective, transparent, and accountable public consultation process in the development of land-use plans under the *ALSA*.<sup>71</sup>

Under section 6(1) of the *ALSA*, the Land Use Secretariat must review each regional plan at least once every ten years and report to the Minister on its “ongoing relevancy and effectiveness.”<sup>72</sup> Section 6(3) states that a regional plan expires if a review is not started within ten years of the date it is made.<sup>73</sup> The LARP has an expiry date of 2022, and it is currently unclear whether a review by the Secretariat has been commenced. Although the extent and nature of the review is in the discretion of the Secretariat, this is subject to any terms of reference set by Cabinet, which can (and should) include direction on public and stakeholder consultation. Presumably, the LARP will be reviewed, and if so, it is strongly recommended that the government look to the literature for guidance on ensuring effective and meaningful public participation in that process.

## B. THE DISPOSITION OF OIL SANDS RIGHTS IN ALBERTA

The province owns about 97 percent of Alberta’s oil sands resource.<sup>74</sup> As of 2017, the province had entered into agreements granting rights to develop the oil sands over an area of 82,000 km<sup>2</sup>, representing 58 percent of the total oil sands areas.<sup>75</sup> In exchange for oil sands rights, companies pay a fee, bonus bid payments, annual rentals, and ultimately, royalties on recovered minerals.<sup>76</sup>

Alberta Energy administers the legislation that allows for the disposition (or sale) of oil sands rights in the province. The tenure regime is established through the *MMA*, the *Oil Sands Tenure Regulation, 2020*,<sup>77</sup> and the *Mines and Minerals Administration Regulation*.<sup>78</sup> The rights are granted through agreements that convey exclusive rights to drill for, win, work, recover, and remove oil sands owned by the province.<sup>79</sup> New oil sands rights are offered by way of a primary lease for a term of 15 years.<sup>80</sup> Previously, rights were also granted via permits for five-year terms, but that is no longer the case.<sup>81</sup> Existing permit holders can apply to convert permits to a primary lease, which will have a 15-year term

<sup>70</sup> *Ibid* at 5 [emphasis in original].

<sup>71</sup> *Ibid*.

<sup>72</sup> *ALSA*, *supra* note 39, s 6(1).

<sup>73</sup> *Ibid*, s 6(3).

<sup>74</sup> The remaining 3 percent, which will not be discussed here, is held privately or by the federal Crown. “Oil Sands Facts and Stats” (June 2017) at 2, online: <[open.alberta.ca/dataset/b6f2d99e-30f8-4194-b7eb-76039e9be4d2/resource/063e27cc-b6d1-4dae-8356-44e27304ef78/download/fsoilsands.pdf](https://open.alberta.ca/dataset/b6f2d99e-30f8-4194-b7eb-76039e9be4d2/resource/063e27cc-b6d1-4dae-8356-44e27304ef78/download/fsoilsands.pdf)>.

<sup>75</sup> Alberta Energy administers the royalty regime for oil sands under the *Mines and Minerals Act*, RSA 2000, c M-17 [*MMA*] and the *Oil Sands Royalty Regulation, 2009*, Alta Reg 223/2008. In 2009, the royalty regime (based on a revenue minus cost calculation) was updated to add a sliding scale based on the price of oil. In the early years of a project, the royalty rate is lower than the rate applied after capital investment and other costs are recovered: Alberta Energy, *Alberta Oil Sands Royalty Guidelines: Principles and Procedures* (Edmonton: Alberta Energy, June 2018), online: <[open.alberta.ca/publications/alberta-oil-sands-royalty-guidelines-principles-and-procedures-2018](https://open.alberta.ca/publications/alberta-oil-sands-royalty-guidelines-principles-and-procedures-2018)>.

<sup>77</sup> Alta Reg 92/2020 [*OSTR*].

<sup>78</sup> Alta Reg 262/1997.

<sup>79</sup> *OSTR*, *supra* note 77, s 4.

<sup>80</sup> *Ibid*, s 8.

<sup>81</sup> Alberta Energy, *Alberta Oil Sands Tenure Guidelines: Principles and Procedures* (Edmonton: Alberta Energy, December 2020) at 7, online: <[open.alberta.ca/publications/alberta-oil-sands-tenure-guidelines-principles-and-procedures-2020](https://open.alberta.ca/publications/alberta-oil-sands-tenure-guidelines-principles-and-procedures-2020)> [*Tenure Guidelines*].

starting from the expiration date of the permit.<sup>82</sup> Primary leases may be continued indefinitely as long as certain conditions are met.<sup>83</sup>

The *OSTR* is enacted under the *MMA*. Section 16 of the *MMA* authorizes Alberta's Minister of Energy to dispose of oil sands rights subject to the *Act* and regulations and "any express provision in any applicable ALSA regional plan limiting mineral development within a geographic area."<sup>84</sup> Although other methods are possible, most oil sands rights are disposed of by way of sale by public tender.<sup>85</sup> Interested parties initiate the process by submitting a request to Alberta Energy for a posting for a specific date. Parties who request the posting are expected to bid when the rights are made available.<sup>86</sup>

Alberta Energy reviews a request and provides the requestor with an interim posting regarding the availability of the rights and any existing surface restrictions. The request is then "forwarded to other ministries to capture relevant concerns and considerations through an established process," which "reviews the land [and] identifies and advises Alberta Energy of any potential surface access restrictions resulting from policy, legislation, or legal mandate."<sup>87</sup> Although not mentioned by name in these Guidelines, this internal review appears to be conducted by the Crown Mineral Disposition Review Committee (CMDRC), an interdepartmental committee with representatives from Alberta Energy, Environment and Parks, Culture and Status of Women, and Municipal Affairs, as well as the Special Areas Board (a Crown agency).<sup>88</sup> The Committee "reviews proposed mineral dispositions to identify environmental impacts both certain and possible."<sup>89</sup> The assessment is a "general" one intended to "identify major concerns that can affect surface access for mineral exploration and development."<sup>90</sup>

The CMDRC passes its review, including suggested restrictions, to Alberta Energy, which then determines if the restrictions should prevent a sale. If not, the minerals are posted for sale.<sup>91</sup> Once this internal review is complete, "the requestor is advised about any additional restrictions and contacts."<sup>92</sup> A public offering notice, which includes details about the terms and conditions under which the rights are being offered and information about any surface restrictions that apply, is then published eight weeks before the sale date.<sup>93</sup> Interested parties submit confidential bids, and the highest bidder is awarded the oil sands rights. Alberta

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<sup>82</sup> *OSTR*, *supra* note 77, s 7; Daisy Dai & Alicia K Quesnel, "2020 Oil Sands Tenure Regulation: A Summary of Changes" (13 August 2020), online: <[www.bdplaw.com/insights/2020-oil-sands-tenure-regulation-a-summary-of-changes/](http://www.bdplaw.com/insights/2020-oil-sands-tenure-regulation-a-summary-of-changes/)>.

<sup>83</sup> *OSTR*, *ibid*, s 9. A continued lease is designated as either producing or non-producing depending on whether the minimum level of production set out in section 10 of the *OSTR* has been met: *Tenure Guidelines*, *supra* note 81 at 21–24. Non-producing continued leases are subject to escalating rent: *Tenure Guidelines*, *ibid* at 25–27; *OSTR*, *ibid*, ss 11–12.

<sup>84</sup> *MMA*, *supra* note 76, s 16.

<sup>85</sup> Direct purchases under section 16(a) are possible but limited to two circumstances: (a) to facilitate a company to acquire oil sands rights in a drilling spacing unit; and (b) to facilitate common ownership of oil sands rights and natural gas rights: *Tenure Guidelines*, *supra* note 81 at 12–13. In direct purchases, the minimum bid is fixed and not negotiable.

<sup>86</sup> *Ibid* at 8.

<sup>87</sup> *Ibid* at 9.

<sup>88</sup> "Crown Mineral Disposition," online: <[www.alberta.ca/crown-mineral-disposition.aspx](http://www.alberta.ca/crown-mineral-disposition.aspx)>.

<sup>89</sup> *Ibid*.

<sup>90</sup> *Ibid*.

<sup>91</sup> *Ibid*.

<sup>92</sup> *Tenure Guidelines*, *supra* note 81 at 9.

<sup>93</sup> *Ibid*.

Energy estimates that the whole process takes about 17 weeks, from the initial posting request to the sale.<sup>94</sup>

In 2007, Vlavianos noted that commentators were calling for the development of regional land-use plans to guide decision-making on the disposition of oil sands rights.<sup>95</sup> Many noted the lack of guidance or direction in the *MMA* for the exercise of the Minister's discretion, and they argued that price should not be the driving consideration.<sup>96</sup> Today, as noted, the LARP has been developed, which should provide direction for some restrictions regarding the types of development that can occur within certain parts of the region. With the exception of one website, however, it is difficult to find information about the CMDRC and what else it considers in its decision-making process. There are no readily accessible public records of the Committee's deliberations and decisions.

The most widespread criticism about the disposition of oil sands rights process has been the lack of opportunities for public participation.<sup>97</sup> As noted, there are several reasons for why public participation is thought to be critical in the context of natural resources development. With respect to mineral rights disposition, it has also been noted that, although there is no guarantee that the rights will ultimately be developed, the tenure process is the first step in the development process. It "kick starts" the "exploration and development activities of [companies] holding the rights, and creates legal and political pressures to allow [them] to exercise [their] property rights."<sup>98</sup> As Nigel Bankes observes, in deciding to offer the rights to industry, the Crown "has made the decision that the lands in question are potentially open to oil sands exploration; and most important of all the Crown has made the decision that other values including environmental values ... are not sufficiently important to deny industry's request to have the lands posted."<sup>99</sup> Thus, scholars have argued that without public participation, the current mineral rights disposition process is "wholly inadequate ... because it unjustifiably limits citizens' rights to participate in decision-making about land use, with all of the consequences that such decisions entail."<sup>100</sup> Public participation is needed to ensure that public concerns about the economic, social, and environmental impacts of development can be heard early in the development process.<sup>101</sup>

<sup>94</sup> *Ibid* at 10.

<sup>95</sup> Vlavianos, "2007 Oil Sands Review," *supra* note 1.

<sup>96</sup> *Ibid* at 13–17.

<sup>97</sup> *Ibid* at 65–66. See also Nickie Vlavianos, "Public Participation and the Disposition of Oil and Gas Rights in Alberta" (2007) 17:3 *J Envtl L & Prac* 205.

<sup>98</sup> Vlavianos, "2007 Oil Sands Review," *ibid* at 13. See also Peggy Holroyd, Simon Dyer & Dan Woynillowicz, "Haste Makes Waste: The Need for a New Oil Sands Tenure Regime" (April 2007), online: *Pembina Institute* <[www.pembina.org/reports/OS\\_Haste\\_Final.pdf](http://www.pembina.org/reports/OS_Haste_Final.pdf)>; Steven A Kennett & Michael M Wenig, "Alberta's Oil and Gas Boom Fuels Land-Use Conflicts – But Should the EUB be Taking the Heat?" *Resources* 91 (2005) 1, online: <[prism.ucalgary.ca/bitstream/handle/1880/47049/Resources\\_91.pdf](http://prism.ucalgary.ca/bitstream/handle/1880/47049/Resources_91.pdf)>.

<sup>99</sup> Nigel Bankes, "Crown Oil Sands Dispositions and the Duty to Consult" (8 April 2015), online (blog): <[ablawg.ca/2015/04/08/crown-oil-sands-dispositions-and-the-duty-to-consult-2/](http://ablawg.ca/2015/04/08/crown-oil-sands-dispositions-and-the-duty-to-consult-2/)> [Bankes, "Crown Oil Sands"].

<sup>100</sup> Michael S Quinn et al, "The Ecological and Political Landscapes of Alberta's Hydrocarbon Economy" in Laurie E Adkin, ed, *First World Petro-Politics: The Political Ecology and Governance of Alberta* (Toronto: University of Toronto Press, 2016) 114 at 144.

<sup>101</sup> *Ibid*. See also Vlavianos, "2007 Oil Sands Review," *supra* note 1; Holroyd, Dyer & Woynillowicz, *supra* note 98; Kennett & Wenig, *supra* note 98. One suggested option is strategic environmental assessment prior to opening up new areas for mineral leasing: see e.g. Meinhard Doelle, Nigel Bankes & Louie Porta, "Using Strategic Environmental Assessments to Guide Oil and Gas Exploration Decisions in the Beaufort Sea: Lessons Learned from Atlantic Canada" (September 2012), online: <[prism.ucalgary.ca/bitstream/handle/1880/49278/StrategicEAsOP39.pdf](http://prism.ucalgary.ca/bitstream/handle/1880/49278/StrategicEAsOP39.pdf)>.

What, if anything, has changed since 2007 in relation to public participation at the oil sands rights disposition stage? One significant change has been, as noted, the enactment of the *ALSA* and the adoption of the LARP. Section 16 of the *MMA* now requires mineral rights to only be disposed subject to applicable *ALSA* regional plans “limiting mineral development within a geographic area.”<sup>102</sup> Although there still are no public participation opportunities in the oil sands rights disposition process, one could argue there was at least some type of consultation in the development of the LARP. Nonetheless, the questions around the LARP consultation noted above make it doubtful that this can serve as a substitute for the type of public participation commentators argue should also be part of the rights disposition process.<sup>103</sup>

A modest first step could be including some type of public participation through the CMDRC. Given that the Committee’s composition does not appear to be statutorily mandated, the membership could presumably be changed to include others.<sup>104</sup> At the very least, this could help provide valuable information about how the CMDRC (and consequently, Alberta Energy) is making decisions on whether particular rights should be put up for sale, and if so, on what conditions. It could provide transparency as to how, for example, the LARP is being followed in these decisions. As commentators have noted, the lack of public record of the CMDRC’s deliberations or its final recommendations, or even the identity of its members, raises questions about the review it conducts in informing Alberta Energy’s decisions in posting mineral rights for sale.<sup>105</sup> Allowing for membership from the broader public or from non-governmental organizations could go some way toward improving the transparency and accountability of this process.<sup>106</sup>

### C. ACCESS TO THE SURFACE OF THE LAND

Most of the land under which oil sands are located in Alberta is provincially owned (that is, Crown) land that is managed under the *Public Lands Act*.<sup>107</sup> Under the *PLA*, authorization to access public lands for oil sands development is required for both oil sands exploration (OSE) activities and subsequent production operations.

<sup>102</sup> *MMA*, *supra* note 76, s 16.

<sup>103</sup> Interestingly, in an article written shortly after the *ALSA* was enacted, the authors suggested that public participation in the Crown mineral rights disposition “may become a reality under *ALSA*”: Alan Harvie & Trent Mercier, “The *Alberta Land Stewardship Act* and its Impact on Alberta’s Oil and Gas Industry” (2010) 48:2 *Alta L Rev* 295 at 326. They pointed to British Columbia and the Yukon as examples for broad-based public participation in Crown mineral disposition processes.

<sup>104</sup> The statutory underpinning for the CMDRC is hard to track. The only website that discusses the Committee suggests it is authorized by section 10(2) of the *EPEA*, but that section allows the Director under the *EPEA* to establish committees to advise it on matters related to *EPEA*: “Crown Mineral Disposition,” *supra* note 88. It is not obvious how that provision applies to a committee that advises Alberta Energy on disposition decisions under the *MMA*.

<sup>105</sup> See e.g. Michael M Wenig & Michael S Quinn, “Integrating the Alberta Oil and Gas Tenure Regime with Landscape Objectives: One Step Toward Managing Cumulative Effects” in Henry Epp, ed, *Access Management: Policy to Practice* (Edmonton: Alberta Society of Professional Biologists, 2004) 27.

<sup>106</sup> Although an important political move, it is unlikely that public participation at the mineral rights disposition stage is currently legally required. Even in relation to the constitutional duty to consult Indigenous peoples, courts have held this duty does not apply at this stage in the development process: *Buffalo River Dene Nation v Saskatchewan (Energy and Resources)*, 2015 SKCA 31. See also Bankes, “Crown Oil Sands,” *supra* note 99 and his review of the lower Court decision.

<sup>107</sup> *RSA 2000*, c P-40 [*PLA*]. Although other types of ownership exist in the oil sands areas (for example, some private lands in the Peace River and Cold Lake areas and some federal lands), they are not discussed here.

## 1. OIL SANDS EXPLORATION

The 2007 Oil Sands Review outlined the (then) legislative and regulatory framework for approvals for OSE activities on public lands.<sup>108</sup> The framework was not easy to track and several statutes, regulations, and policy documents were engaged. Critically, there was a complicated and unclear division of labour between two departments at the time, Alberta Sustainable Resource Development and Alberta Environment. The role of each department and how their functions related to each other was not apparent, nor were the criteria or factors guiding decision-making in this context. Adding to the lack of transparency was the fact that there did not appear to be any public involvement in the decision-making processes of these two departments with respect to dispositions of public lands, nor was there any information available about what (if any) interdepartmental review or coordination was occurring. Lastly, commentators were noting that approvals to access the surface of public lands for OSE were being granted without the benefit of a comprehensive and integrated land-use framework that included details about acceptable land uses, ecological limits, and thresholds.<sup>109</sup>

What has changed since 2007 with respect to OSE approvals?

A major change that occurred since the 2007 Oil Sands Review is the enactment of the *Responsible Energy Development Act*<sup>110</sup> in 2013 and, through it, the creation of the Alberta Energy Regulator (AER).<sup>111</sup> The *REDA* significantly changed the way energy projects, including oil sands projects, are approved and regulated in Alberta. It will therefore feature prominently throughout the rest of this article.

Except for the mineral rights disposition process (which remains with Alberta Energy), the *REDA* grants all approval and decision-making authority under both energy resources statutes (for example, the *Oil Sands Conservation Act*) and under “specified enactments” (that is, the *Public Lands Act*, Part 8 of the *MMA*, the *Environmental Protection and Enhancement Act*, and the *Water Act*) as they relate to energy resource activities to the AER.<sup>112</sup> Applications under both energy resource enactments and specified enactments in respect of an energy resource activity must be made to the AER, who may require all applications to be combined together.<sup>113</sup> Through the *REDA*, the AER has effectively become a “single” regulator for all provincial aspects of resource development in Alberta (except for, as noted, the disposition of mineral rights). This includes the disposition and management of public lands for energy resource activities.

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<sup>108</sup> Vlavianos, “2007 Oil Sands Review,” *supra* note 1 at 17–22.

<sup>109</sup> *Ibid.*

<sup>110</sup> SA 2012, c R-17.3 [*REDA*].

<sup>111</sup> *REDA, ibid.*, came into force in stages. By 1 April 2014, the AER had regulatory oversight of energy projects from the disposition of public lands for energy development to abandonment and reclamation.

<sup>112</sup> *Ibid.*, s 2.

<sup>113</sup> *Ibid.*, s 30.



While commentators have noted the risks associated with placing all decision-making into the hands of a single regulator,<sup>114</sup> the goals behind the *REDA* of streamlining processes and reducing complexities were undoubtedly laudable. As the 2007 Oil Sands Review demonstrated, complexities and overlapping and unclear mandates in any regulatory framework are not a good thing, for neither governments nor industry, but also not for the other stakeholders and the public generally, who want to understand and follow decision-making processes.<sup>115</sup>

Under the *REDA*, the framework for OSE activities is clearer than it was in 2007. Today, companies who want to conduct OSE activities on public lands must obtain an approval from the AER. Section 2(2)(b) of the *REDA* mandates the AER to “consider and decide applications and other matters under the [PLA] for the use of land in respect of energy resource activities, including approving energy resource activities on public land.”<sup>116</sup> Other subsections of section 2 grant the AER authority to consider matters under the *Environmental Protection and Enhancement Act*<sup>117</sup> and the *Water Act*<sup>118</sup> in relation to energy resource activities, as well as to “monitor and enforce safe and efficient practices in the exploration for and the recovery, storing, processing and transporting of energy resources.”<sup>119</sup>

Through the *REDA*, the AER approves and regulates OSE activities on public lands under both the *PLA* and the *EPEA* (as well as the *Code of Practice for Exploration Operations* made under the *EPEA*).<sup>120</sup> The *PLA* allows for authorizations to be granted for persons to “enter on and occupy ... public land for a stated period for the purpose of ... conducting appraisals, inspections, analyses, inventories or other investigations of the natural resources or underground formations that might exist on the land.”<sup>121</sup> Also engaged is the *EPEA* because the “conduct or reclamation of an exploration operation” is an activity for which notice must be given under that *Act*.<sup>122</sup> “Exploration operation” for this purpose means “any investigation, work or act to determine the presence of ... oil sands by test drilling, excavation or other means that results in surface disturbance or that may cause an adverse effect.”<sup>123</sup>

<sup>114</sup> See e.g. “Legal Backgrounder – Bill 2: Responsible Energy Development Act” (May 2013), online: <[www.ecojustice.ca/wp-content/uploads/2015/03/REDA-backgrounder-May-2013.pdf](http://www.ecojustice.ca/wp-content/uploads/2015/03/REDA-backgrounder-May-2013.pdf)>; Shaun Fluker, “Bill 2 *Responsible Energy Development Act*: Setting the Stage for the Next 50 Years of Effective and Efficient Energy Resource Regulation and Development in Alberta” (8 November 2012), online (blog): <[ablawg.ca/wp-content/uploads/2012/11/Blog\\_SF\\_Bill2\\_Nov2012.pdf](http://ablawg.ca/wp-content/uploads/2012/11/Blog_SF_Bill2_Nov2012.pdf)>; Cindy Chiasson, “Single Energy Regulator Bill a Poor Deal for Alberta’s Environment” (1 November 2012), online (blog): *Environmental Law Centre* <[elc.ab.ca/single-energy-regulator-bill-a-poor-deal-for-albertas-environment/](http://elc.ab.ca/single-energy-regulator-bill-a-poor-deal-for-albertas-environment/)>.

<sup>115</sup> Vlavianos, “2007 Oil Sands Review,” *supra* note 1. See also Nickie Vlavianos, “A Single Regulator for Oil and Gas Development in Alberta? A Critical Assessment of the Current Proposal,” *Resources* 113 (2012) 1, online: <[prism.ucalgary.ca/bitstream/handle/1880/49151/Resources113.pdf](http://prism.ucalgary.ca/bitstream/handle/1880/49151/Resources113.pdf)>.

<sup>116</sup> *REDA*, *supra* note 110, s 2(2)(b).

<sup>117</sup> RSA 2000, c E-12 [*EPEA*].

<sup>118</sup> RSA 2000, c W-3 [*WA*].

<sup>119</sup> *REDA*, *supra* note 110, ss 2(2)(c)–(d), (f).

<sup>120</sup> “Oil Sands Exploration,” online: *Alberta Energy Regulator* <[www.aer.ca/regulating-development/project-application/application-process/oil-sands-exploration](http://www.aer.ca/regulating-development/project-application/application-process/oil-sands-exploration)>. OSE approvals do not occur through Part 8 of the *MMA*, which applies to conventional oil and gas exploration: Vlavianos, “2007 Oil Sands Review,” *supra* note 1 at 17–18.

<sup>121</sup> *PLA*, *supra* note 107, s 20(1)(a)(i).

<sup>122</sup> *EPEA*, *supra* note 117, s 87; *Activities Designation Regulation*, Alta Reg 276/2003, s 5(3) [*ADR*].

<sup>123</sup> *ADR*, *ibid*, s 4(a.1).

Pursuant to section 38 of the *EPEA* and section 3.1 of the *Conservation and Reclamation Regulation*,<sup>124</sup> the *Code of Practice for Exploration Operations* has been adopted and applies to OSE activities.<sup>125</sup> This Code outlines application information requirements as well as operating guidelines. It requires the preparation of an activities plan, which must include information about the proposed land (for example, its boundaries, ownership, current land use, areas disturbed to date, and so on) and proposed exploration activities (for example, time schedule, type of drilling and support equipment, procedures for containing and disposing drilling fluids and cuttings, salvaging topsoil, and reclamation procedures and timelines).

The AER has consolidated the requirements for OSE applications on public lands in its *Oil Sands and Coal Exploration Application Guide*.<sup>126</sup> The guide is intended “to help industry plan its programs and to help all interested parties understand the regulatory process for exploration.”<sup>127</sup> It encourages (and sometimes requires) applicants to notify and consult with “stakeholders” before submitting OSE program applications. The requirements vary between activities on public and private lands, and also depending on whether the proposed exploration operation is within an approved mine site or a mineral surface lease (MSL) (discussed below). For OSE activities within an approved MSL, the only notification required is under section 3.1 of the *Code of Practice*, which requires certain information to be provided to the AER prior to commencing the operation.<sup>128</sup> OSE activities outside of an approved MSL require an application under section 20 of the *PLA* and notification under the *Code of Practice*.<sup>129</sup> If there are oil sands evaluation wells associated with the OSE program, unless they are within an approved mine site,<sup>130</sup> each well requires a licence in accordance with *Directive 056* before any activity occurs.<sup>131</sup> *Directive 056* requires companies to engage in early notification and consultation and to “develop a participant involvement program that includes people who may be directly and adversely affected” prior to filing an OSE program application with the AER.<sup>132</sup> An OSE approval granted by the AER “satisfies the landowner non-objection requirement under *Directive 056* for activities on public lands.”<sup>133</sup>

Applications for an OSE program must also include consents from overlapping surface rights holders, including forestry management agreement and timber licence holders.<sup>134</sup> Moreover, the AER will not decide on an OSE program application until the province’s Aboriginal Consultation Office determines the adequacy of First Nations consultation.<sup>135</sup> The

<sup>124</sup> Alta Reg 115/1993 [*CRR*].

<sup>125</sup> Government of Alberta, *Code of Practice for Exploration Operations* (Edmonton: Alberta Queen’s Printer, September 2005) [*Code of Practice*].

<sup>126</sup> Alberta Energy Regulator, *Manual 008: Oil Sands and Coal Exploration Application Guide* (Calgary: Alberta Energy Regulator, 19 August 2014), online: <static.aer.ca/prd/documents/manuals/Manual 008.pdf> [*Manual 008*].

<sup>127</sup> *Ibid* at 1.

<sup>128</sup> *Code of Practice*, *supra* note 125.

<sup>129</sup> *PLA*, *supra* note 107, s 20; *Code of Practice*, *ibid*.

<sup>130</sup> *Oil Sands Conservation Rules*, Alta Reg 76/1988, s 4(5) [*OSCR*]; *Oil Sands Conservation Act*, RSA 2000, c O-7, s 1(1)(j) [*OSCA*].

<sup>131</sup> Alberta Energy Regulator, *Directive 056: Energy Development Applications and Schedules* (Calgary: Alberta Energy Regulator, 18 May 2021), online: <static.aer.ca/prd/documents/directives/directive-056.pdf> [*Directive 056*].

<sup>132</sup> *Manual 008*, *supra* note 126 at 2.

<sup>133</sup> *Ibid* at 5.

<sup>134</sup> *Ibid* at 3.

<sup>135</sup> *Ibid*.

AER therefore “strongly encourages companies to have received a decision on the adequacy of First Nations consultation ... before submitting any applications.”<sup>136</sup>

Although *Manual 008* is not the most accessible document from a non-industry point of view, at least it does set out some guidance on how the process works for OSE programs. This is a welcome change from the lack of clarity that existed in 2007. The decision-maker is also clear: it is the AER. The AER now provides an integrated process for collecting and reviewing information that used to go to different government departments without clear guidance on how those departments were coordinating their reviews. The AER also now provides public notice of an OSE program application on its website in accordance with section 31 of the *REDA* and the *Alberta Energy Regulator Rules of Practice*.<sup>137</sup> The notice period is usually 30 days within which “the public can submit any statements of concern (SOC).”<sup>138</sup> The AER also issues public notice for oil sands evaluation well licence applications, but those that can be submitted as “routine” are expedited in accordance with section 5.2 of the *Rules of Practice*.<sup>139</sup>

Although the AER suggests there is an ability for the “public” to file an SOC, as discussed below, an SOC that is filed by someone who cannot establish they may be “directly and adversely affected” by the application is typically not considered. Consequently, there are no broad-based public participation opportunities for Albertans in the OSE program approval process. Commentators had noted this deficiency in 2007, and it continues to subsist.

There is one gap that has now, however, been filled. Commentators were critical of the fact that decision-making in this context was being made without the benefit of mandatory land-use plans. Whether or not the LARP is sufficient, we at least now have a framework that requires the AER to make decisions on OSE activities in accordance with the LARP.<sup>140</sup>

## 2. OIL SANDS PRODUCTION

As with access to public lands for OSE activities, the disposition of surface rights for oil sands production operations on public lands is administered by the AER pursuant to the *REDA* and the *PLA*.<sup>141</sup> Companies who want to access public lands for oil sands production purposes must obtain a disposition from the AER under the *PLA*, which defines a “disposition” as essentially any instrument that grants an interest in public land, or a right or privilege in respect of public land.<sup>142</sup> These include leases, licences, permits, and other agreements.<sup>143</sup> As with OSE programs, the AER requires consents to be obtained from other

<sup>136</sup> *Ibid.*

<sup>137</sup> Alta Reg 99/2013 [*Rules of Practice*].

<sup>138</sup> *Manual 008*, *supra* note 126 at 6.

<sup>139</sup> *Ibid.*

<sup>140</sup> *REDA*, *supra* note 110, s 20(1) emphasizes that in carrying out its powers, duties, and functions under the *REDA* or any other enactment, the AER must act in accordance with any applicable *ALSA* regional plan.

<sup>141</sup> “Public Lands Act,” online: *Alberta Energy Regulator* <[www.aer.ca/regulating-development/project-application/application-legislation/public-lands-act](http://www.aer.ca/regulating-development/project-application/application-legislation/public-lands-act)>.

<sup>142</sup> *PLA*, *supra* note 107, s 1(e).

<sup>143</sup> Alberta Environment and Parks, *Public Lands Administration Regulation (PLAR): Formal Disposition Information Letter*, No IL2017-01 (Edmonton: Alberta Environment and Parks, 1 November 2019) at 9, online: <[open.alberta.ca/publications/public-lands-administration-regulation-plar-formal-disposition-information-letter](http://open.alberta.ca/publications/public-lands-administration-regulation-plar-formal-disposition-information-letter)> [*Disposition Letter*].

dispositions holders under the *PLA* (for example, holders under forest management agreements or timber licences) before applying for a surface rights disposition.<sup>144</sup>

The application for a disposition is made under section 15 of the *PLA*.<sup>145</sup> The *Act* empowers Cabinet to make regulations authorizing and governing dispositions of public land,<sup>146</sup> which has led to the *Public Lands Administration Regulation*.<sup>147</sup> The *PLAR* allows the AER (via the *REDA*) to issue different types of dispositions to allow access to public lands for oil sands production activities. Three types are relevant to oil sands production operations: (1) a licence of occupation (LOC); (2) a mineral surface lease (MSL); and (3) a pipeline agreement (PA).

Sections 91 to 99 of the *PLAR* cover LOCs, which are used primarily for industrial access roads (but can also be used for water intake/outfall sites, airstrips, and so on).<sup>148</sup> The *PLAR* sets out the LOC holder's duties respecting construction, maintenance, and repair of roads, and authorizes the AER to withdraw land from the licensed area on notice to the LOC holder (without compensation).<sup>149</sup> Section 98 requires any other proposed commercial user of a road in a licensed area to obtain consent from the LOC holder or an order under section 124(3) of the *PLA*.<sup>150</sup>

A PA may be required depending on the nature of the oil sands project. Section 122 of the *PLAR* authorizes the AER to enter into an agreement with an operator who requires public land “for the purposes of a pipeline that the operator is authorized to construct” and “for the purposes of a right of way installation that is incidental to the pipeline.”<sup>151</sup> Thus, an operator must first obtain provincial (or federal) approval to construct or operate the pipeline. A PA authorizes the construction of a pipeline or flowline within the right-of-way and construction of right-of-way installations incidental to the pipeline. Sections 123 to 127 set out rights and obligations of operators under a PA disposition.<sup>152</sup> These include obligations to not remove sand, gravel, or topsoil,<sup>153</sup> and to restore and reclaim the surface of the right-of-way to an equivalent land capability within one year of the date of execution of a PA.<sup>154</sup>

The most important public lands disposition for oil sands production operations is the MSL. Section 101 of the *PLAR* authorizes the AER to issue MSLs of public land to “mineral producers that require the land for purposes in connection with or incidental to the recovery and production of mines and minerals.”<sup>155</sup> Section 100 defines a “mineral producer” as a person that “has the right to, or the right to work, minerals in or under public land in

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<sup>144</sup> Alberta Energy Regulator, *Bulletin 2015-02: Consent Submissions for Public Lands Disposition Applications* (Calgary: Alberta Energy Regulator, 12 January 2015), online: <static.aer.ca/prd/documents/bulletins/Bulletin-2015-02.pdf>.

<sup>145</sup> *PLA*, *supra* note 107, s 15.

<sup>146</sup> *Ibid*, s 8(1).

<sup>147</sup> Alta Reg 187/2011 [*PLAR*].

<sup>148</sup> *Ibid*, ss 91–99.

<sup>149</sup> *Ibid*, ss 92–95.

<sup>150</sup> *Ibid*, s 98; *PLA*, *supra* note 107, s 124(3).

<sup>151</sup> *PLAR*, *ibid*, s 122.

<sup>152</sup> *Ibid*, ss 123–27.

<sup>153</sup> *Ibid*, s 126.

<sup>154</sup> *Ibid*, s 127(2)(b).

<sup>155</sup> *Ibid*, s 101.

Alberta.”<sup>156</sup> An MSL may not be issued for a term greater than 25 years,<sup>157</sup> but this term is renewable on application.<sup>158</sup>

MSLs grant “exclusive surface rights for the recovery and production of minerals.”<sup>159</sup> The MSL includes guidelines to control activities and protect the environment and may, for example, set out requirements such as specific setbacks from rivers or nesting areas. It may also restrict access at specific times of the year. Like all dispositions under the *PLA*, an MSL must adhere to applicable *ALSA* regional plans, any integrated resource plans, as well as all applicable policy and legislation.<sup>160</sup>

For any of these dispositions, the *PLA* (via the *REDA*) grants the AER broad authority to impose terms and conditions, to amend a disposition for various reasons, and to ensure that terms and conditions are complied with.<sup>161</sup> A disposition can be cancelled on various grounds, including where the holder fails to comply with its terms and conditions, with the *PLA*, or with the regulations.<sup>162</sup> Along with specific terms and conditions, a master list of standards and conditions applies to dispositions under the *PLA*.<sup>163</sup>

Three key issues with the surface rights disposition process for oil sands production were noted in the 2007 Oil Sands Review.<sup>164</sup> First, as already noted, there was a lack of mandatory land-use plans to drive decision-making in this context. Today, we have the *ALSA*, and we have the LARP. Again, although the jury is still out on how well the LARP is doing in practice, it is at least a step in the right direction since 2007.

The second issue identified in 2007 was the potential for a right of entry order granted under the *Surface Rights Act*<sup>165</sup> to interfere with the authority of the (then) decision-maker (the department of Sustainable Resource Development or SRD) under the *PLA*. Section 15(6) of the *SRA* requires any right of entry order to be “not inconsistent” with any licence or approval granted by the (now) AER.<sup>166</sup> Consequently, it was unclear at the time whether this could amount to a real limitation on SRD’s powers to refuse to allow access to public lands in cases where a licence or approval had been granted by the energy regulator. This raised questions about who the ultimate arbiter (as between SRD and the energy regulator) was over surface access for oil sands development on public lands. Today, with the AER acting as both the approver of dispositions of public lands under the *PLA* and, as discussed below, the approver and regulator of energy projects, this issue has in effect disappeared.

<sup>156</sup> *Ibid*, s 100.

<sup>157</sup> *Ibid*, s 102.

<sup>158</sup> *Ibid*, ss 17–18.

<sup>159</sup> *Disposition Letter*, *supra* note 143 at 7.

<sup>160</sup> *Ibid* at 10. Integrated resource plans predate the *ALSA* regional land-use framework and are being reviewed and brought into that framework over time: “Integrated Resource Plans,” online: <[www.alberta.ca/integrated-resource-plans.aspx](http://www.alberta.ca/integrated-resource-plans.aspx)>.

<sup>161</sup> *PLA*, *supra* note 107, ss 15, 44(1).

<sup>162</sup> *Ibid*, s 26.

<sup>163</sup> Alberta Environment and Parks, *Master Schedule of Standards and Conditions* (Edmonton: Alberta Environment and Parks, April 2021), online: <[open.alberta.ca/publications/master-schedule-of-standards-and-conditions](http://open.alberta.ca/publications/master-schedule-of-standards-and-conditions)>.

<sup>164</sup> Vlavianos, “2007 Oil Sands Review,” *supra* note 1 at 22–30.

<sup>165</sup> RSA 2000, c S-24 [*SRA*].

<sup>166</sup> *Ibid*, s 15(6).

The third issue identified in 2007 was in relation to public participation. Although there were some hints of public involvement and consultation in surface rights disposition decisions, they were vague, undefined, and not transparent. Today, as noted, the AER shares all applications for access to public lands under the *PLA* on its “Public Notice of Application” page for 30 days.<sup>167</sup> The goal is to “encourage public participation in the approval process.”<sup>168</sup> However, the public notice of application states that anyone who believes they “may be directly and adversely affected” can file an SOC within 30 days of the notice.<sup>169</sup> Again, this is unlikely to include broad public participation as discussed below. Still, the AER does publish its *PLA* disposition decisions on its Publication of Decision page.<sup>170</sup> On balance, the publication of notices of surface rights disposition applications and of disposition decisions by the AER (which can be searched by company name or by search terms such as “mineral surface lease”) reveals a more transparent process than was the case in 2007.<sup>171</sup>

#### D. OIL SANDS PROJECT REVIEW AND APPROVALS

In 2007, a key issue with the (then) legislative and regulatory framework for oil sands project review was that, along with a complex web of applicable legislation and regulations, the mandates between the (then) energy regulator (the EUB) and the department administering Alberta’s broad environmental statutes (the *EPEA* and the *WA*) overlapped in significant and confusing ways.<sup>172</sup> A memorandum of understanding signed to try to delineate respective roles raised more questions than it answered.<sup>173</sup> The ambiguities in the overlapping mandates were contributing significant complexity and non-transparency to an already complicated legislative and regulatory framework.<sup>174</sup>

Since 2007, Alberta has moved to a single regulator for energy development under the *REDA*. As noted, the *REDA* grants the AER jurisdiction over energy resource enactments (like the *Oil Sands Conservation Act* discussed below) and over “specified enactments” as they relate to energy resource activities. Along with the *PLA*, the *REDA* grants the AER jurisdiction to “consider and decide applications and other matters” under both the *EPEA* and the *WA* in respect of energy resource activities.<sup>175</sup> The AER also has authority over the remediation and reclamation of energy facilities in accordance with the *EPEA*,<sup>176</sup> as well as a broad mandate to monitor the effects of energy resource activities on the environment and to monitor and enforce compliance with energy resource enactments and specified enactments (like the *EPEA* and the *WA*) in respect of energy resources activities. Through the *REDA*, the lack of clarity and confusion relating to overlapping mandates has now been

<sup>167</sup> “Public Notice of Application,” online: *Alberta Energy Regulator* <webapps.aer.ca/pnoa>.

<sup>168</sup> “Public Lands Act,” *supra* note 141.

<sup>169</sup> “Public Notice of Application,” *supra* note 167.

<sup>170</sup> “Public Lands Act,” *supra* note 141.

<sup>171</sup> What is unclear, however, is why some *PLA* disposition decisions are available directly through the website, while others can only be obtained via information requests to the AER.

<sup>172</sup> Vlavianos, “2007 Oil Sands Review,” *supra* note 1 at 30–60.

<sup>173</sup> *Ibid* at 55–58.

<sup>174</sup> *Ibid* at 57–60, 64–65.

<sup>175</sup> *REDA*, *supra* note 110, ss 2(2)(c)–(d).

<sup>176</sup> *Ibid*, ss 2(2)(h)–(j).

resolved, and there is one single provincial decision-maker and regulator for most aspects of oil sands projects in Alberta.<sup>177</sup>

Nonetheless, the complex web of statutes and regulations still exists. There is no “Oil Sands Development Act” in Alberta. A review of the key features of the applicable legislation and regulations/rules is set out below.

## 1. OIL SANDS CONSERVATION ACT

Along with the *REDA*, the key statute for AER authority over oil sands development is the *OSCA*.<sup>178</sup> Section 10(1) states that no person shall construct a scheme or operation (or commence or continue a scheme or operation) for the recovery of oil sands or crude bitumen unless the AER has granted approval.<sup>179</sup> This prohibition “covers in situ and surface or underground mining operations.”<sup>180</sup> Similarly, section 11(1) prohibits the construction or operation of an oil sands processing plant without AER approval,<sup>181</sup> which “covers bitumen extraction facilities, refineries and upgraders, and certain gas processing facilities.”<sup>182</sup>

As is typical in resource and environmental legislation, the discretion granted to the AER in the *OSCA* is very broad.<sup>183</sup> Sections 10(3) and 11(3) authorize the AER to grant approvals “if in its opinion it is in the public interest to do so” and on “any terms and conditions” it considers appropriate.<sup>184</sup> The AER can also refuse to grant an approval, defer consideration of an application on terms and conditions, or make any other decision the AER considers appropriate.<sup>185</sup> Under section 13, the AER may, on application by an operator or on its own motion, amend an approval granted under section 10 or 11.<sup>186</sup>

The AER’s powers under the *OSCA* are driven by its general mandate under section 2(1) of the *REDA*. This is to: (a) “provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta”; and (b) in respect of energy resource activities, regulate “the disposition and management of public lands” (discussed

<sup>177</sup> Additional approvals may be required under other statutes, for example, the *Municipal Government Act*, RSA 2000, c M-26, the *Historical Resources Act*, RSA 2000, c H-9, and the *Highways Development and Protection Act*, SA 2004, c H-8.5. Moreover, if the oil sands project includes electricity energy generation or transmission, these aspects fall within the mandate of the Alberta Utilities Commission (not the AER). For a discussion of cogeneration in Alberta including in the oil sands, see Nigel Banks, Giorilyn Bruno & Cairns Price, “The Legal and Regulatory Treatment of Cogeneration in Alberta” (2015) 53:2 *Alta L Rev* 383.

<sup>178</sup> *OSCA*, *supra* note 130.

<sup>179</sup> *Ibid.*, s 10(1).

<sup>180</sup> Alberta Energy Regulator, *Draft Directive 023: Oil Sands Project Applications* (Calgary: Alberta Energy Regulator, May 2013) at 3, online: <static.aer.ca/prd/documents/directives/DraftDirective\_023\_20130528.pdf> [Draft Directive 023].

<sup>181</sup> *OSCA*, *supra* note 130, s 11(1).

<sup>182</sup> *Ibid.* Cabinet authorization used to be required for AER approvals under sections 10 and 11 of the *OSCA*, but was removed through Bill 22, *Red Tape Reduction Implementation Act, 2020*, 2nd Sess, 30th Leg, Alberta, 2020 (assented to 23 July 2020), SA 2020, c 25. Banks says that given their large scale nature, the “removal of political oversight from the oil sands project approval process seems significant”: Nigel Banks, “Oil Sands Approvals and Bill 22, the *Red Tape Reduction Implementation Act, 2020*” (15 June 2020), online (blog): <ablawg.ca/wp-content/uploads/2020/06/Blog\_NB\_Bill\_22.pdf>.

<sup>183</sup> For a discussion of the pros and cons of broad discretion, see Vlavianos, “2007 Oil Sands Review,” *supra* note 1 at 60.

<sup>184</sup> *OSCA*, *supra* note 130, ss 10(3)(a), 11(3)(a).

<sup>185</sup> *Ibid.*, ss 10(3)(b)–(d), 11(3)(b)–(d).

<sup>186</sup> *Ibid.*, s 13.

above), “the protection of the environment,” and “the conservation and management of water, including the wise allocation and use of water” (all in accordance with energy resource enactments and specified enactments under the *REDA*).<sup>187</sup>

## 2. OIL SANDS CONSERVATION RULES

The *OSCR*, enacted under the *OSCA*, stipulates the need for AER approval to “commence, suspend or abandon an oil sands site, an experimental scheme, an in situ operation, a mining operation or a processing plant,” or for any substantial modification to any of these operations.<sup>188</sup> Moreover, section 4 clarifies that operators of oil sands sites must apply for AER licences for most wells associated with their operations such as evaluation and experimental wells, wells associated with in situ operations, and primary production wells.<sup>189</sup> The *OSCR* sets out details for how oil sands operations are to be carried out, including provisions on storage and disposal, reporting, handling sour gas, developing emergency response plans, preventing loss, injury, and damage, flaring and venting of gas, preventing waste, reporting spills, leaks, or other damage, and retaining records of operations. The *OSCR* frequently refers to, and adopts, requirements for conventional oil and gas operations set out in the *Oil and Gas Conservation Rules*.<sup>190</sup>

The *OSCR* contains provisions specific to mining and in situ operations. For oil sands mining, section 24 clarifies that operators must obtain AER approval “for the storage or disposal of any oil sands, reclamation material or discard accumulated during mining or overburden removal.”<sup>191</sup> Under section 26, the mine site plan and any changes made annually that would reduce the amount of oil sands recovered must also receive AER approval.<sup>192</sup> Section 27 further specifies that, unless the AER otherwise approves, an operator must carry out a mining operation in a manner “that does not render more difficult the recovery of other oil sands,” “will maximize the recovery of all oil sands within the mine site” and comply with *Directive 082*,<sup>193</sup> and “ensures public safety.”<sup>194</sup>

For in situ operations, section 36 of the *OSCR* states that, unless the AER otherwise approves, an operator must conduct its operations in a way that will maximize the recovery of crude bitumen, the gathering and use of oil sands products produced, the recycling of produced water, and the recovery from all oil sands zones in the approval area.<sup>195</sup> Operations must minimize the use of fresh make-up water and the disposal of water.<sup>196</sup>

<sup>187</sup> *REDA*, *supra* note 110, s 2(1).

<sup>188</sup> *OSCR*, *supra* note 130, ss 3(1)–(2).

<sup>189</sup> *Ibid*, s 4.

<sup>190</sup> Alta Reg 151/1971.

<sup>191</sup> *OSCR*, *supra* note 130, s 24.

<sup>192</sup> *Ibid*, s 26.

<sup>193</sup> Alberta Energy Regulator, *Directive 082: Operating Criteria: Resource Recovery Requirements for Oil Sands Mine and Processing Plant Operations* (Calgary: Alberta Energy Regulator, 11 April 2016), online: <static.aer.ca/prd/documents/directives/Directive082.pdf> [*Directive 082*] outlines the amount of oil sands operators are required to mine and specifies the volume of bitumen they must recover from mining and processing operations.

<sup>194</sup> *OSCR*, *supra* note 130, s 27.

<sup>195</sup> *Ibid*, ss 36(a)–(b), (c)–(f).

<sup>196</sup> *Ibid*, ss 36(c)–(d).



In Part 5, the *OSCR* outlines specific provisions for oil sands processing plants. Under section 49, an operator must, for conservation purposes, carry out operations to maximize: (1) the processing of all oil sands and crude bitumen; (2) the yield of oil sands products, including compliance with *Directive 082*; (3) the gathering and utilization of gas produced; (4) the gathering of gaseous mixtures containing hydrogen sulphide for delivery to the sulphur recovery plant; (5) the recovery of sulphur contained in the hydrogen sulphide delivered to the sulphur recovery plant; and (6) the recycle of produced water.<sup>197</sup> Operators must minimize the discard of coke, asphaltene, sulphur, or other by products, as well as the use of fresh make-up water and the disposal of wastewater.<sup>198</sup> Several AER directives supplement the requirements in the *OSCR*.<sup>199</sup>

### 3. MANDATE AND FACTORS CONSIDERED

The *OSCA* and *OSCR* provisions outlined above reveal the conservation, public safety, and environmental mandates of the AER in relation to oil sands development in the province. Along with the mandate set out in section 2(1) of the *REDA* (discussed above), in making decisions under the *OSCA*, the AER must take the purposes of that *Act* into account. Section 3 of the *OSCA* sets out the purposes of the *Act*, which include: “to effect conservation and prevent waste of the oil sands resources of Alberta”; “to ensure orderly, efficient and economical development in the public interest of the oil sands resources of Alberta”; “to assist the Government in controlling pollution in the development and production of the oil sands resources of Alberta”; and “to ensure the observance, in the public interest, of safe and efficient practices in the exploration for and the recovery, storing, processing and transporting of oil sands, discard, crude bitumen, derivatives of crude bitumen and oil sands products.”<sup>200</sup>

Two of these purposes refer to the “public interest.” The *REDA*’s predecessor legislation, the *Energy Resources Conservation Act* (now repealed), contained a more generally applicable public interest test that covered all energy resource decisions by the energy regulator.<sup>201</sup> Section 3 of that *Act* used to direct the regulator to consider “whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.”<sup>202</sup> It is not altogether clear why the public interest test was removed from the *REDA*, but, as noted, the concept continues to appear in

<sup>197</sup> *Ibid*, ss 49(a)–(b), (d)–(f), (h).

<sup>198</sup> *Ibid*, ss 49(c), (g).

<sup>199</sup> See e.g. *Draft Directive 023*, *supra* note 180; Alberta Energy Regulator, *Directive 054: Performance Reporting and Surveillance of In Situ Oil Sands Schemes* (Calgary: Alberta Energy Regulator, 3 April 2020), online: <static.aer.ca/prd/documents/directives/Directive054.pdf>; Alberta Energy Regulator, *Directive 073: Requirements for Inspection and Compliance of Oil Sands Mining and Processing Plant Operations in the Oil Sands Mining Area* (Calgary: Alberta Energy Regulator, 17 December 2008), online: <static.aer.ca/prd/documents/directives/Directive073.pdf>; *Directive 082*, *supra* note 193; Alberta Energy Regulator, *Directive 085: Fluid Tailings Management for Oil Sands Mining Projects* (Calgary: Alberta Energy Regulator, 19 May 2022), online: <static.aer.ca/prd/documents/directives/Directive085.pdf> [*Directive 085*].

<sup>200</sup> *OSCA*, *supra* note 130, s 3.

<sup>201</sup> RSA 2000, c E-10 [*ERCA*], as repealed by *REDA*, *supra* note 110.

<sup>202</sup> *ERCA*, *ibid*, s 3.

specific statutes like the *OSCA*. In making decisions on applications under sections 10 and 11 of the *OSCA*, the AER must find the project to be in the public interest.<sup>203</sup>

A more significant change made by the *REDA* is the relocation of the factors in former section 3 of the *ERCA* to the regulations. Section 15 of the *REDA* directs the AER to “consider any factor prescribed by the regulations, including the interests of landowners” in considering any application.<sup>204</sup> Regulations can of course be more easily changed than legislation, so this placement is significant. The upside is that factors could be added to enhance decision-making, but the downside is that factors could be taken away to restrict decision-making. The factors currently set out in section 3 of the *Responsible Energy Development Act General Regulation* look very much like what used to be in section 3 of the *ERCA*, with one important addition in relation to landowners.<sup>205</sup> Section 3 of the *REDAGR* requires the AER to consider the following in making decisions on applications under the *REDA*: (a) “the social and economic effects of the [proposed] energy resource activity”; (b) “the effects of the energy resource activity on the environment”; and (c) “the impacts on a landowner as a result of the use of the land on which the energy resource activity is or will be located.”<sup>206</sup> Although not specifically mentioned, it is well-accepted that cumulative effects are included within section 3 of the *REDAGR*.<sup>207</sup>

In addition, as noted, in all that it does the AER must follow *ALSA* regional plans and therefore, for oil sands activities, the LARP. The AER can direct a person who is subject to an approval, order, or direction under the *REDA* to comply with a provision of an *ALSA* regional plan.<sup>208</sup> *Draft Directive 023* requires all applicants proposing oil sands projects within the boundary of an approved regional plan to provide it with information relating to: (1) whether the proposed project will be located within a designated conservation or park/recreation area; (2) whether the project is consistent with the land uses established in the regional plan or with its outcomes, objectives, and strategies; and (3) how the activity complies with any regional trigger or limit established under the management frameworks of the regional plan or any notice issued in response to exceeding a regional trigger or limit.<sup>209</sup> The AER has no authority to waive compliance with (or to vary any limitation or requirement) under a regional plan, and applicants requesting relief are directed to the Land Use Secretariat under the *ALSA*.<sup>210</sup>

<sup>203</sup> *OSCA*, *supra* note 130, ss 10(3)(a), 11(3)(a). The concept of the “public interest” is of course ubiquitous in resource and environmental legislation. Although definitions vary, it essentially means the result that a decision-maker reaches after exercising its discretion in accordance with its statutory mandate: see e.g. Jodie L Hierlmeier, “‘The Public Interest’: Can it Provide Guidance for the ERCB and NRCB?” (2008) 18:3 *J Envtl L & Prac* 279; Cecilia A Low, “The ‘Public Interest’ in Section 3 of Alberta’s *Energy Resources Conservation Act*: Where Do We Stand and Where Do We Go From Here?” (September 2011), online: <[prism.ucalgary.ca/bitstream/handle/1880/48757/PublicInterestOP36w.pdf](http://prism.ucalgary.ca/bitstream/handle/1880/48757/PublicInterestOP36w.pdf)>.

<sup>204</sup> *REDA*, *supra* note 110, s 15.

<sup>205</sup> *Alta Reg* 90/2013, s 3 [*REDAGR*].

<sup>206</sup> *Ibid*.

<sup>207</sup> In the oil sands areas, the “landowner” is, as noted, typically, the provincial Crown, which presumably has had its concerns considered through the disposition of surface rights process discussed earlier. Some First Nations have argued that they should be considered beneficial owners of reserves in the area: see e.g. *Prosper Petroleum Ltd Rigel Project* (12 June 2018), 2018 ABAER 005 at 24, online: *Alberta Energy Regulator* <[static.aer.ca/prd/documents/decisions/2018/2018-ABAER-005.pdf](http://static.aer.ca/prd/documents/decisions/2018/2018-ABAER-005.pdf)> [*Prosper Petroleum*], where the AER stated it did not have to determine this issue to decide on the project.

<sup>208</sup> *REDA*, *supra* note 110, s 20(2).

<sup>209</sup> *Draft Directive 023*, *supra* note 180.

<sup>210</sup> *Ibid*. See also Alberta Energy Regulator, *AER Bulletin 2014-28: Application Requirements for Activities within the Boundary of a Regional Plan* (Calgary: Alberta Energy Regulator, 19 September 2014), online: <[static.aer.ca/prd/documents/bulletins/AER-Bulletin-2014-28.pdf](http://static.aer.ca/prd/documents/bulletins/AER-Bulletin-2014-28.pdf)>.

In its project review decisions, the AER has set out the categories of matters it considers to be relevant to its determination of whether an oil sands project is in the public interest.<sup>211</sup> The matters considered by the AER in a recent decision considering an application to construct and operate an in situ bitumen recovery scheme included: the safety and efficiency of the proposed scheme; effects on existing rights and traditional land uses of Indigenous peoples in the area; impacts on landowners; social impacts (including impacts on population, housing, employment, transportation, infrastructure, and services); economic impacts (including taxes, royalties, and GDP; capital costs; labour income; and annual operator expenditures); environmental impacts (including the impacts to air quality, soil, vegetation, wetlands, the aquatic environment, wildlife, habitat loss, ecosystem integrity, fresh water, and groundwater); and cumulative effects caused by the proposed activities when considered in combination with the effects of other existing or approved activities.<sup>212</sup> In considering these matters, the AER noted it was fulfilling its mandate under the *OSCA*, as well as under the *EPEA* and the *Water Act*, both of which required approvals for this project (as discussed below).<sup>213</sup>

Due to their nature and size, applications for oil sands mining operations typically engage more complex and additional matters the AER must consider in its public interest determination. Moreover, because oil sands mining projects usually require federal approvals and engage federal environmental assessment, joint review panels are often set up with two members from the AER and one appointed by the federal government to coordinate processes and conduct a review that allows both parties to meet their obligations under their respective statutes.<sup>214</sup> In a 2019 report of a joint review panel established to hear an application by Teck Resources Ltd. for approval of its proposed Frontier Oil Sands Mine Project the range of matters considered was extensive. They included: the purpose and need for the project; alternative means of carrying out the project; mine planning and resource conservation; tailings management; water management; waste management; conservation, reclamation, and closure; accidents and malfunctions; the significance of project and cumulative effects; climate change considerations and the effects of the environment on the project; air quality; greenhouse gas emissions; noise; groundwater; surface water quality and quantity; fish and fish habitat; terrain and soils; vegetation; wildlife; biodiversity; land-use; paleontological, archaeological, and historic resources; public (human) health; social effects;

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<sup>211</sup> Only applications that lead to a hearing (as discussed below) result in a fulsome decision being rendered by the AER. Most applications do not go to a hearing and are disposed of through much shorter disposition documents: see e.g. *Commercial Scheme Approval No 10097MMM* (24 November 2021), online: *Alberta Energy Regulator* <dds.aer.ca/iar\_query/ApplicationAttachments.aspx?AppNumber=1934882&Type=Disposition>; *Commercial Scheme Approval No 88700000* (19 August 2021), online: *Alberta Energy Regulator* <dds.aer.ca/iar\_query/ApplicationAttachments.aspx?AppNumber=1933040&Type=Disposition>.

<sup>212</sup> *Prosper Petroleum*, *supra* note 207.

<sup>213</sup> Ultimately, the AER's approval in the case was vacated on appeal because of its failure to consider the honour of the Crown in relation to treaty rights held by the Fort McKay First Nation. The AER was directed to reconsider its approval on this basis: *Fort McKay First Nation*, *supra* note 14.

<sup>214</sup> See e.g. *Report of the Joint Review Panel: Joslyn North Mine Project, Total E&P Joslyn Ltd Alberta* (27 January 2011), 2011 ABERCB 005, online: *Alberta Energy Regulator and Canadian Environmental Assessment Agency* <static.aer.ca/prd/documents/decisions/2011/2011-ABERCB-005.pdf>; *Report of the Joint Review Panel: Shell Canada Energy, Jackpine Mine Expansion Project* (9 July 2013), 2013 ABAER 011, online: *Alberta Energy Regulator and Canadian Environmental Assessment Agency* <ceaa-acee.gc.ca/050/documents/p59540/90873E.pdf>; *Teck Resources Ltd*, *supra* note 51.

visual aesthetics; effects on Indigenous traditional land and resource use, culture, and asserted rights; economic effects; and reclamation and closure liability.<sup>215</sup>

In rendering its decision on this application, the AER's conclusion reveals the complex nature of its public interest mandate under the *OSCA* and the factors it must consider under section 15 of the *REDA* and section 3 of the *REDAGR*:

The Frontier project is located in an area Alberta has identified as being important for bitumen extraction. The project would provide significant economic benefits. It is expected to create 7000 jobs during construction and up to 2500 operation jobs during the 41-year life of the mine and is anticipated to contribute more than \$70 billion directly to federal, provincial, and municipal governments. Although we find that there will be significant adverse project and cumulative effects on certain environmental components and indigenous communities, under our authority as the AER, we consider these effects to be justified and that the Frontier project is in the public interest.<sup>216</sup>

The application was approved subject to several limitations and conditions.<sup>217</sup>

Along with terms and conditions, the AER expects companies to fulfill commitments made during the public hearing or public consultation process (discussed below). For example, in the 2018 Prosper Petroleum decision, to reduce traffic impacts, "Prosper committed to driving workers to and from the Rigel project by van and bus."<sup>218</sup> To minimize possible impacts on emergency-care facilities, Prosper committed to implementing a drug and alcohol policy at the camp and to prohibit firearms, fishing gear, and all-terrain vehicles on site.<sup>219</sup> The AER approved the application on the basis that the company would honour these (and other) commitments.

#### 4. ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT AND WATER ACT

As noted, under the *REDA*, the AER is responsible for the *EPEA* and the *WA* in relation to energy resource activities. Section 25 of the *REDA* stipulates that, unless otherwise provided for in the regulations, an application, decision, or other matter under a specified enactment (like the *EPEA* and the *WA*) in respect of an energy resource activity must be "considered, heard, reviewed or appealed" in accordance with the *REDA* and its regulations and rules "instead of in accordance with the specified enactment."<sup>220</sup> This includes any required environmental assessments and approvals under the *EPEA* and any required approvals and licences under the *WA*.

To exercise its mandate under these statutes and the *OSCA*, the AER encourages applicants to file one integrated application, which allows the AER to look at the "entire life

<sup>215</sup> *Teck Resources Ltd, ibid.*

<sup>216</sup> *Ibid* at xii.

<sup>217</sup> As noted earlier, however, Teck Resources Ltd ultimately decided not to proceed with the project.

<sup>218</sup> *Prosper Petroleum, supra* note 207 at para 164.

<sup>219</sup> *Ibid* at para 170.

<sup>220</sup> *REDA, supra* note 110, s 25.

cycle (from start to finish) of an energy project.<sup>221</sup> For instance, in a 2019 application for an extension of an oil sands mine, the AER considered applications under the *OSCA* to construct, operate, and reclaim the project, under the *EPEA* to construct, operate, and reclaim the project, under the *WA* for activities and the diversion and use of water, and under the *PLA* to amend an existing mineral surface lease.<sup>222</sup>

## 5. *EPEA*

Given their environmental impacts, both in situ and mining oil sands projects trigger the application of several provisions in the *EPEA*. The potential and actual environmental impacts from oil sands operations include: air emissions (including greenhouse gas emissions and contaminants); soil and water emissions; the use of fresh water and groundwater supplies; the disposal of process and waste water; liquid waste disposal (including tailings); the use and storage of hazardous substances; waste management; surface disturbance and resulting impacts on forests, soil, wildlife, and aquatic systems; soil contamination and reclamation; and cumulative effects.<sup>223</sup> These matters also fall within the AER's broad public interest mandate under the *OSCA*.

In exercising its mandate under the *EPEA* in respect of energy projects, the AER must be driven by the *Act's* purpose as set out in section 2.<sup>224</sup> This purpose is to support and promote the protection, enhancement, and wise use of the environment while recognizing several matters including: (1) that environmental protection is essential to the integrity of ecosystems, human health, and the well-being of society; (2) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning; and (3) the responsibility of polluters to pay for the costs of their actions.<sup>225</sup> Section 2.1 emphasizes that the *EPEA* must be read and applied in combination with the *REDA*,<sup>226</sup> and section 3.1 states that any decision or action under the *EPEA* must comply with any applicable *ALSA* regional plan.<sup>227</sup>

<sup>221</sup> “Integrated Decision Approach,” online: *Alberta Energy Regulator* <[www.aer.ca/regulating-development/project-application/integrated-decision-approach](http://www.aer.ca/regulating-development/project-application/integrated-decision-approach)>. See also “Integrated Applications for Major Projects,” online: *Alberta Energy Regulator* <[www.aer.ca/regulating-development/project-application/integrated-decision-approach/major-projects](http://www.aer.ca/regulating-development/project-application/integrated-decision-approach/major-projects)>, where the AER states that this new process allows it to consider separate elements of a project at once (rather than one at a time over several months or years) and that its “one application, one review, one decision” approach makes the review process more “transparent for anyone looking to understand the full scale of a proposed energy project.”

<sup>222</sup> *Syncrude Canada Ltd, Mildred Lake Extension Project and Mildred Lake Tailings Management Plan* (16 July 2019), 2019 ABAER 006 at para 1, online: *Alberta Energy Regulator* <[static.aer.ca/prd/documents/decisions/2019/2019ABAER006.pdf](http://static.aer.ca/prd/documents/decisions/2019/2019ABAER006.pdf)> [*Mildred Lake Project*].

<sup>223</sup> Sarah M Jordaan, “Land and Water Impacts of Oil Sands Production in Alberta” (2012) 46:7 *Environmental Science & Technology* 3611; Pierre Gosselin et al, “Environmental and Health Impacts of Canada’s Oil Sands Industry” (December 2010), online: *Royal Society of Canada* <[rsc-src.ca/sites/default/files/RSC%20Oil%20Sands%20Panel%20Main%20Report%20Oct%202012.pdf](http://rsc-src.ca/sites/default/files/RSC%20Oil%20Sands%20Panel%20Main%20Report%20Oct%202012.pdf)>; Dan Woynilowicz, Chris Severson-Baker & Marlo Raynolds, “Oil Sands Fever: The Environmental Implications of Canada’s Oil Sands Rush” (November 2005), online: *Pembina Institute* <[www.pembina.org/reports/OilSands72.pdf](http://www.pembina.org/reports/OilSands72.pdf)>.

<sup>224</sup> *EPEA*, *supra* note 117, s 2.

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*, s 2.1.

<sup>227</sup> *Ibid.*, s 3.1.

a. Environmental Impact Assessment

Although the AER must consider environmental impacts under the *OSCA* for oil sands projects, the *EPEA* also sets out a mandatory environmental impact assessment (EIA) process that applies prior to applications for approvals. The process varies in the required level of assessment depending on the size and nature of the project. The regulations list “mandatory activities” that are always subject to the most rigorous form of assessment (that is, the preparation of an EIA report).<sup>228</sup> For non-mandatory, non-exempt activities, discretion is granted to determine the required level of assessment, which can range from an initial review, preparation of a screening report, or preparation of an EIA report.<sup>229</sup> Factors that determine the required level of assessment include: (1) the location, size, nature, and complexity of the proposed activity; (2) any known concerns expressed by the public; and (3) the presence of other similar activities in the same area.<sup>230</sup>

Given the size and nature of oil sands operations, the preparation of an EIA report under the *EPEA* is required for oil sands mining operations and may be required for in situ operations. The construction, operation, or reclamation of an oil sands mine, as well as the construction, operation, or reclamation of a commercial oil sands, heavy oil extraction, upgrading, or processing plant producing more than 2000 cubic metres of crude bitumen or its derivatives per day are “mandatory activities” under the regulations.<sup>231</sup> By contrast, in situ oil sands schemes are not explicitly listed as mandatory activities. However, those with specified upgrading or processing plants will be caught, as well as those that include certain types of water diversion structures, canals, or reservoirs.<sup>232</sup> Where an in situ operation is not captured by the mandatory list, the AER has discretion to determine the level of assessment required.

Where an EIA report is required, section 48 requires proponents to draft proposed terms of reference,<sup>233</sup> which are made available for public comment.<sup>234</sup> After considering comments received from the public and interested government departments, the AER issues final terms of reference setting out the scope for the EIA report. Section 49 of the *EPEA* requires the EIA to include information about several matters, including: the need for the project; the site selection procedure (including alternative sites); existing baseline environmental conditions and areas of major concern; potential positive and negative environmental, social, economic, and cultural impacts (including cumulative, regional, temporal, and spatial considerations); plans to mitigate potential negative impacts; public consultation programs to be undertaken; and plans to monitor environmental impacts and respond to unpredicted negative impacts.<sup>235</sup>

Under the AER’s current integrated application process, the proponent submits the EIA report along with required project applications (under, for example, the *OSCA*, the *EPEA*,

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<sup>228</sup> *Ibid*, s 44(1)(a); *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta Reg 111/1993, s 1 [*MEA Reg*]. The regulations also list exempt activities.

<sup>229</sup> *EPEA*, *ibid*, ss 44(1)(b), 45(1).

<sup>230</sup> *Ibid*, s 44(3). See also the *Environmental Assessment Regulation*, Alta Reg 112/1993 [*EAR*].

<sup>231</sup> *MEA Reg*, *supra* note 228, Schedule 1(i)–(j).

<sup>232</sup> *Ibid*, Schedule 1(d)–(e).

<sup>233</sup> *EPEA*, *supra* note 117, s 48(1).

<sup>234</sup> *Ibid*, s 48(2); *EAR*, *supra* note 230, s 6.

<sup>235</sup> *EPEA*, *ibid*, s 49.

and the WA). The AER publishes the information, along with notice of the applications, on its Public Notice of Application page. The EIA report thus forms part of the AER's review to determine whether the project is in the public interest, and to set terms and conditions on any approvals.

b. *EPEA* Approvals

Two types of authorizations, approvals, and registrations are set out in the *EPEA*, which are granted in relation to oil sands operations by the AER (via the *REDA*). Sections 60 and 61 prohibit anyone from commencing (or continuing) specified industrial activities without a required authorization.<sup>236</sup>

For oil sands development, the *ADR* requires approvals for several activities. These include the construction, operation, or reclamation of an oil sands processing plant, or an enhanced recovery in situ oil sands or heavy oil processing plant.<sup>237</sup> An approval is also required for the construction, operation, or reclamation of a mine (defined as including oil sands mines), an oil production site (defined as specified field production facilities for recovering oil sands by drilling or other in situ methods, including any injection or pumping facilities and associated infrastructure), and certain pipelines.<sup>238</sup> A registration under the *EPEA* may also be required for waste management facilities, compressor and pumping stations, and other activities associated with oil sands projects.<sup>239</sup>

Specific information must be included in applications for approvals and registrations under the *EPEA*.<sup>240</sup> The AER's review may address several matters, including: proposed methods of minimizing the generation, use, and release of substances and any available alternative technologies; site suitability (including soils, air, and water quality, groundwater conditions, water supply quantity, and wastewater disposal alternatives); proposed emissions monitoring programs; proposed management methods for the storage, treatment, and disposal of substances; plans to complete required conservation and reclamation; and the past performance of the applicant regarding environmental protection in respect of the activity.<sup>241</sup>

Section 68(2) of the *EPEA* authorizes approvals to be issued subject to terms and conditions the AER (via the *REDA*) considers appropriate.<sup>242</sup> These can include emission limits, monitoring and reporting requirements, siting, operating criteria, and decommissioning and reclamation requirements.<sup>243</sup> With respect to monitoring and reporting requirements, there have been several initiatives over the years to monitor emissions and

<sup>236</sup> *Ibid*, ss 60–61.

<sup>237</sup> *ADR*, *supra* note 122, s 5(1) and Schedule 1.

<sup>238</sup> *Ibid*, ss 2(1)(j), 5(1) and Schedule 1; *EPEA*, *supra* note 117, s 1(kk).

<sup>239</sup> *ADR*, *ibid*, s 5(2) and Schedule 2.

<sup>240</sup> *Approvals and Registrations Procedure Regulation*, Alta Reg 113/1993, s 3.

<sup>241</sup> *Ibid*, s 6(2).

<sup>242</sup> *EPEA*, *supra* note 117, s 68(2).

<sup>243</sup> Several directives also apply to address these requirements: see e.g. Alberta Environment and Parks, *Alberta Ambient Air Quality Objectives and Guidelines Summary* (Edmonton: Alberta Environment and Parks, January 2019), online: <open.alberta.ca/publications/9781460134856>; Alberta Environment and Parks, *Environmental Quality Guidelines for Alberta Surface Waters* (Edmonton: Alberta Energy and Parks, 28 March 2018), online: <open.alberta.ca/publications/9781460138731>, which the AER uses in setting minimum release limits for oil and gas facilities.

environmental impacts across projects in the oil sands areas. The AER typically requires oil sands operators to participate in these initiatives.<sup>244</sup>

### c. Reclamation

Section 137 of the *EPEA* requires operators to conserve and reclaim “specified land” and to obtain a certificate indicating that the reclamation complied with all requirements.<sup>245</sup> The *CRR* defines “specified land” as including land that is being or has been used (or held) for (or in connection with) the construction, operation, or reclamation of a mine, plant, well, industrial pipeline, battery, or oil production site (which includes field production facilities used to recover oil sands by drilling or other in situ recovery methods and injection or pumping facilities and associated infrastructure).<sup>246</sup> The objective of conservation and reclamation is to return specified land to “an equivalent land capability.”<sup>247</sup>

Prior to the *REDA*, it was the (then) department of Sustainable Resource Development that issued reclamation certificates for public lands in the province. It followed reclamation standards, criteria, and guidelines established by the (then) department of Alberta Environment. Today, it is the AER that has conservation and reclamation authority under the *EPEA*. Companies must provide a reclamation plan to the AER as part of their application for approval to begin a project. For oil sands projects, companies must submit several plans and reports to guide “progressive reclamation” throughout the life of the project.<sup>248</sup> In reviewing reclamation plans and issuing reclamation certificates, the AER is guided by reclamation standards, criteria, and guidelines established by Alberta Environment and Parks<sup>249</sup> and by its own directives.<sup>250</sup> When all requirements have been met, a company may apply to the AER for a reclamation certificate.<sup>251</sup>

Section 144(1) of the *EPEA* states that no surface lease (or right of entry order) can be surrendered until an operator has obtained a reclamation certificate.<sup>252</sup> Reclamation

<sup>244</sup> For example, the Wood Buffalo Environmental Association monitors environmental quality in the Regional Municipality of Wood Buffalo and a joint federal and provincial initiative is currently underway: “Canada-Alberta Oil Sands Environmental Monitoring,” online: <[www.canada.ca/en/environment-climate-change/services/oil-sands-monitoring.html](http://www.canada.ca/en/environment-climate-change/services/oil-sands-monitoring.html)>. For the challenges facing environmental monitoring programs, see *supra* note 59.

<sup>245</sup> *EPEA*, *supra* note 117, s 137(1).

<sup>246</sup> *CRR*, *supra* note 124, ss 1(l), (t).

<sup>247</sup> *Ibid*, s 2.

<sup>248</sup> “Mine Reclamation Requirements,” online: *Alberta Energy Regulator* <[aer.ca/regulating-development/project-closure/reclamation/mine-reclamation-requirements](http://aer.ca/regulating-development/project-closure/reclamation/mine-reclamation-requirements)>; “In Situ Reclamation Requirements,” online: *Alberta Energy Regulator* <[www.aer.ca/regulating-development/project-closure/reclamation/in-situ-reclamation-requirements](http://www.aer.ca/regulating-development/project-closure/reclamation/in-situ-reclamation-requirements)>.

<sup>249</sup> *Ibid*.

<sup>250</sup> See e.g. Alberta Energy Regulator, *Specified Enactment Direction 003: Direction for Conservation and Reclamation Submissions Under an Environmental Protection and Enhancement Act Approval for Mineable Oil Sands Sites* (Calgary: Alberta Energy Regulator, December 2018), online: <[static.aer.ca/prd/documents/manuals/Direction\\_003.pdf](http://static.aer.ca/prd/documents/manuals/Direction_003.pdf)>, which requires conservation and reclamation planning to be undertaken throughout the life of a mining project. Companies must submit a life of mine closure plan, a mine reclamation plan, and an annual reclamation progress tracking report. The requirements for in situ projects are set out in: Alberta Energy Regulator, *Specified Enactment Direction 001: Direction for Conservation and Reclamation Submissions Under an Environmental Protection and Enhancement Act Approval for Enhanced Recovery In Situ Oil Sands and Heavy Oil Processing Plants and Oil Production Sites* (Calgary: Alberta Energy Regulator, February 2016), online: <[static.aer.ca/prd/documents/manuals/Direction\\_001.pdf](http://static.aer.ca/prd/documents/manuals/Direction_001.pdf)>.

<sup>251</sup> “Mine Reclamation Requirements,” *supra* note 248; “In Situ Reclamation Requirements,” *supra* note 248.

<sup>252</sup> *EPEA*, *supra* note 117, s 144(1).



certificates can be issued subject to any terms and conditions the AER considers appropriate.<sup>253</sup> Even after receiving a reclamation certificate, operators remain liable for certain environmental damage for varying periods of time.<sup>254</sup>

Operators of oil sands mines must contribute to the Mine Financial Security Program (MFSP) established under the *CRR*.<sup>255</sup> The program is based on the principle that the holder of the *EPEA* approval for the oil sands mine operation must “maintain care-and-custody of the land until a reclamation certificate has been issued.”<sup>256</sup> The MFSP sets rules for companies to set aside security to ensure reclamation can be completed. The full security deposit, which is based on estimated liabilities, can be paid at the start of the project, or in four deposits at different times during the course of the project.<sup>257</sup> The deposits focus on potential risks throughout the life cycle of the mine.<sup>258</sup>

Commentators have noted that the MFSP improves on the prior regime, which had significant problems.<sup>259</sup> Others have argued, however, that the MFSP suffers from a lack of transparency, inadequate collection of security, and the use of underinclusive classifications of environmental liabilities.<sup>260</sup> Moreover, in situ oil sands projects, other than “the production (assets) from sites that provide bitumen directly to an MFSP oil sands upgrader,” are not part of the MFSP.<sup>261</sup> They are handled by a different liability management program, which had long-standing problems, but has recently been updated.<sup>262</sup>

Reclamation undoubtedly raises very difficult issues for oil sands development, particularly for the tailings ponds associated with mining operations. Although there are few examples, Wapisiw Lookout is a tailings ponds that has been reclaimed into a solid surface and a wetlands area after having been used as a storage area for oil sands tailings between 1967 and 1997.<sup>263</sup>

<sup>253</sup> *Ibid*, s 138(5); *CRR*, *supra* note 124, s 13.

<sup>254</sup> *EPEA*, *ibid*, s 142; *CRR*, *ibid*, s 15.

<sup>255</sup> *CRR*, *ibid*, ss 16–24.4. See also Alberta Environment and Parks, *Mine Financial Security Program Standard* (Edmonton: Alberta Environment and Parks, 23 December 2021), online: <open.alberta.ca/publications/mine-financial-security-program-standard>.

<sup>256</sup> Alberta Energy Regulator, *Manual 024: Guide to the Mine Financial Security Program* (Calgary: Alberta Energy Regulator, May 2022) at v, online: <static.aer.ca/prd/documents/manuals/Manual 024.pdf> [*MFSP Guide*].

<sup>257</sup> “Mine Financial Security Program,” online: *Alberta Energy Regulator* <www.aer.ca/regulating-development/project-closure/liability-management-programs-and-processes/mine-financial-security-program>.

<sup>258</sup> *Ibid*.

<sup>259</sup> Chrysten Perry & Craig Saloff, “Oil Sands Mining Reclamation in Alberta: A Discussion of the Prior Regime and the New Mine Financial Security Program” (2011) 49:2 *Alta L Rev* 277.

<sup>260</sup> Michelle Cook, “Alberta’s Oil Sands: An Unsecured Asset? An Analysis of the Mine Financial Security Program in Relation to Surface Mining of the Alberta Oil Sands” (2018) 56:1 *Alta L Rev* 177; Drew Yewchuk, “Responding to Concerns that Alberta Does Not Collect Enough Security for Environmental Remediation the AER Chooses to Collect Less Security” (26 May 2021), online (blog): <ablawg.ca/wp-content/uploads/2021/05/Blog\_DY\_MFSP\_Securities.pdf>; Drew Yewchuk, “Another Year Gone Under the Mine Financial Security Program” (19 October 2021), online (blog): <ablawg.ca/wp-content/uploads/2021/10/Blog\_DY\_MFSP\_2021.pdf>.

<sup>261</sup> *MFSP Guide*, *supra* note 256 at 2.

<sup>262</sup> “Liability Management,” online: *Alberta Energy Regulator* <www.aer.ca/providing-information/by-topic/liability-management>; Alberta Energy Regulator, *Directive 088: Licensee Life-Cycle Management* (Calgary: Alberta Energy Regulator, 1 December 2021), online: <static.aer.ca/prd/documents/directives/Directive088.pdf>.

<sup>263</sup> Deborah Jaremko, “What the First Reclaimed Oilsands Tailings Pond Looks Like After Seven Years of Growth” (24 October 2017), online: <www.jwnenergy.com/article/2017/10/24/heres-what-first-reclaimed-oilsands-tailings-pond/>.

In 2007, Vlavianos noted that there was a critical lack of direction in relation to tailings management.<sup>264</sup> In 2015, the *Tailings Management Framework for the Mineable Athabasca Oil Sands* was adopted under the LARP.<sup>265</sup> The *TMF* provides policy direction for the management of fluid tailings volumes to manage and decrease liability and environmental risk.<sup>266</sup> The objective is to minimize fluid tailings accumulation by ensuring they are treated and reclaimed progressively during the life of a project and that all fluid tailings associated with a project are ready-to-reclaim within ten years of the end of the mine life of the project.<sup>267</sup>

The current applicable directive is *AER Directive 085*.<sup>268</sup> It outlines requirements for managing fluid tailings volumes, including application information, fluid tailings management reporting, performance evaluation, and compliance and enforcement processes. Companies must submit a tailings management plan for approval for new oil sands mining projects, to amend an approved tailings management plan, and to amend an existing oil sands mining project approval.<sup>269</sup> The AER publishes applications for tailings management plans, as well as its decisions, on its website. A key goal of *Directive 085* is to clarify the requirements for fluid tailings management over the life of the project early in the design cycle.<sup>270</sup>

Despite the progress on regulatory requirements, commentators highlight that much more needs to be done. Progress on reclamation in the oil sands has been slow, and there are legitimate concerns about permanent impacts on the landscape. There are also serious concerns that significant cleanup liabilities will not be met by the industry.<sup>271</sup>

<sup>264</sup> Vlavianos, “2007 Oil Sands Review,” *supra* note 1 at 52.

<sup>265</sup> Government of Alberta, *Lower Athabasca Region: Tailings Management Framework for the Mineable Athabasca Oil Sands* (Edmonton: Government of Alberta, March 2015), online: <[open.alberta.ca/publications/9781460121740](http://open.alberta.ca/publications/9781460121740)> [TMF].

<sup>266</sup> *Ibid* at 1.

<sup>267</sup> *Ibid* at 8.

<sup>268</sup> *Directive 085*, *supra* note 199. Despite its placement here, the AER’s regulation of tailings also engages its mandate under the *OSCA* and the *WA*.

<sup>269</sup> See e.g. *Mildred Lake Project*, *supra* note 222; Alberta Energy Regulator, *Fort Hills Energy Corporation: Application for Fort Hills Tailings Management Plan* (Calgary: Alberta Energy Regulator, 25 February 2019), 20190225A, online: <[static.aer.ca/prd/documents/decisions/2019/20190225A.pdf](http://static.aer.ca/prd/documents/decisions/2019/20190225A.pdf)>; Alberta Energy Regulator, *Imperial Oil Resources Limited: Application for Kearn Mine’s Tailings Management Plan* (Calgary: Alberta Energy Regulator, 16 July 2018), 20180716A, online: <[static.aer.ca/prd/documents/decisions/2018/20180716A.pdf](http://static.aer.ca/prd/documents/decisions/2018/20180716A.pdf)>.

<sup>270</sup> *Directive 085* was developed in consultation with the Tailings Regulatory Management Technical Advisory Committee, a “multistakeholder committee consisting of participants representing environmental nongovernmental organizations, First Nations, industry, Métis organizations, the municipality of Wood Buffalo, and the regulator”: *Directive 085*, *supra* note 199 at 4. According to the AER, this was the first time it worked with multiple stakeholders to develop requirements, and it will continue to work with this committee to address tailings growth: “Tailings,” online: *Alberta Energy Regulator* <[www.aer.ca/providing-information/by-topic/tailings](http://www.aer.ca/providing-information/by-topic/tailings)>.

<sup>271</sup> Nina Lothian, “Fifty Years of Oilsands Equals Only 0.1% of Land Reclaimed” (13 October 2017), online (blog): *Pembina Institute* <[www.pembina.org/blog/fifty-years-of-oilsands-equals-only-0-1-of-land-re-claimed](http://www.pembina.org/blog/fifty-years-of-oilsands-equals-only-0-1-of-land-re-claimed)>; Sharon J Riley, “It’s Official: Alberta’s Oilsands Tailings Ponds Are Leaking. Now What?” *The Narwhal* (14 December 2020), online: <[thenarwhal.ca/tailings-ponds-leaking-alberta-oilsands/](http://thenarwhal.ca/tailings-ponds-leaking-alberta-oilsands/)>; Jodi McNeill, “Tailings Ponds: The Worst Is yet to Come” (10 October 2017), online (blog): *Pembina Institute* <[www.pembina.org/blog/tailings-ponds-worst-yet-come](http://www.pembina.org/blog/tailings-ponds-worst-yet-come)>; Olszynski, “Failed Experiments,” *supra* note 59.

## 6. WATER ACT

In Alberta, the province (that is, the Crown) owns the property in, and the rights to divert and use, water in the province.<sup>272</sup> The oil and gas industry's use of water is regulated through a licensing and monitoring system pursuant to the *WA*, its regulations, and policies/guidelines adopted under that *Act*. Under the *REDA*, the AER applies this framework and makes decisions in relation to energy resource activities.<sup>273</sup> Section 2.1 of the *WA* expressly states it must be read in conjunction with the *REDA* for energy resource activities,<sup>274</sup> and section 4.1 requires decision-making to comply with applicable *ALSA* regional plans.<sup>275</sup>

Proponents of oil sands projects may require two types of *WA* authorizations, an approval and/or a licence.<sup>276</sup> Section 36 prohibits a person from commencing or continuing an activity without a *WA* approval unless the activity is exempted by the regulations.<sup>277</sup> "Activity" is defined broadly in section 1(1)(b) as including any undertaking that alters (or may alter) the flows or levels of water, changes (or may change) the location of water or the direction of flows, causes (or may cause) the siltation of water or the erosion of beds or shores of water bodies, or causes (or may cause) an effect on the aquatic environment.<sup>278</sup> Oil sands operators must thus obtain approvals under the *WA* from the AER before undertaking activities that may disturb groundwater, surface water, or aquatic ecosystems.

In making approval decisions, the AER must consider any applicable *ALSA* regional plan and any applicable approved water management plan, and it may consider any other matter it believes is relevant to the approval, including: effects on public safety; any existing, potential, or cumulative effects on the aquatic environment; hydraulic, hydrological, and hydrogeological effects; and effects on other users and licensees.<sup>279</sup> An approval may be issued subject to terms and conditions, and must include an expiry date (thereby requiring approval holders to apply for renewals).<sup>280</sup>

Operators must also obtain a licence under the *WA* to take or remove water to use in their operations. Section 49(1) requires a licence for the "diversion of water for any purpose" and for the operation of a "works" for the diversion of water.<sup>281</sup> A "diversion of water" is defined broadly as the impoundment, storage, taking, or removal of water for any purpose, and "works" means any structure or device made by persons, or part of it, including a dam or canal.<sup>282</sup> Several licensing exemptions are set out, including section 49(2)(c), which exempts a person who commences or continues a diversion of water or operates a works under a *WA* approval.<sup>283</sup> Factors to be considered in licence applications are similar to those for approvals and also include any applicable water guidelines, conservation objectives, and water

<sup>272</sup> *WA*, *supra* note 118, s 3(2).

<sup>273</sup> *REDA*, *supra* note 110, s 24.

<sup>274</sup> *WA*, *supra* note 118, s 2.1.

<sup>275</sup> *Ibid*, s 4.1.

<sup>276</sup> Other provisions of the *WA*, *ibid*, may also apply (for example, Part 6 for tailings impoundment dams).

<sup>277</sup> *Ibid*, s 36; *Water (Ministerial) Regulation*, Alta Reg 205/1998.

<sup>278</sup> *WA*, *ibid*, s 1(1)(b).

<sup>279</sup> *Ibid*, ss 4.1, 38(2).

<sup>280</sup> *Ibid*, ss 38(3)–(6).

<sup>281</sup> *Ibid*, s 49(1).

<sup>282</sup> *Ibid*, ss 1(1)(m), (mmm).

<sup>283</sup> *Ibid*, s 49(2)(c).

management plans.<sup>284</sup> Discretion is granted to refuse to allow water allocations in an area or from a water body.<sup>285</sup>

Neither an approval nor a licence under the *WA* can be issued until the EIA provisions in the *EPEA*, if applicable, have been satisfied. The *Act* also grants discretion to refuse an approval or licence if the proposed activity, diversion of water, or operation of a works is not in the public interest.<sup>286</sup> Three water management frameworks have been adopted under the LARP to assist in the management of cumulative effects on surface water and groundwater quality and quantity within the Lower Athabasca region.<sup>287</sup>

The AER is also guided by government policy requiring oil sands operators to minimize the use of “high-quality non-saline water.”<sup>288</sup> It requires operators to recycle produced water and use alternative water sources where possible.<sup>289</sup> Along with publishing applications for *WA* approvals and licences and its decisions on those applications, the AER publishes information about the allocation and use of water by oil sands mining and in situ operations.<sup>290</sup>

## 7. PUBLIC PARTICIPATION IN PROJECT REVIEW

### a. Stakeholder Consultation

The AER requires oil sands project applicants to carry out a “stakeholder involvement program,” which must begin before an application is filed and continue throughout the life of the project.<sup>291</sup> Applicants must tailor their consultation programs to fit the unique circumstances (nature, size, and scope) of the proposed project and may range from publication of a notice to “meeting directly with persons who raise concerns about and file objections to the proposed activities.”<sup>292</sup>

<sup>284</sup> *Ibid.*, s 51(4).

<sup>285</sup> *Ibid.*, s 53.

<sup>286</sup> *Ibid.*, s 34.

<sup>287</sup> Alberta Environment and Sustainable Resource Development, *Lower Athabasca Region: Surface Water Quality Management Framework for the Lower Athabasca River* (Edmonton: Alberta Environment and Sustainable Resource Development, August 2012), online: <[open.alberta.ca/publications/9781460105306](http://open.alberta.ca/publications/9781460105306)>; Alberta Environment and Sustainable Resource Development, *Lower Athabasca Region: Groundwater Management Framework* (Edmonton: Alberta Environment and Sustainable Resource Development, August 2012), online: <[open.alberta.ca/publications/9781460105344](http://open.alberta.ca/publications/9781460105344)>; Government of Alberta, *Lower Athabasca Region: Surface Water Quantity Management Framework for the Lower Athabasca River* (Edmonton: Government of Alberta, February 2015), online: <[open.alberta.ca/publications/9781460121733](http://open.alberta.ca/publications/9781460121733)>.

<sup>288</sup> Alberta Environment and Parks, *Water Conservation Policy for Upstream Oil and Gas Operations* (Edmonton: Alberta Environment and Parks, December 2020), online: <[open.alberta.ca/publications/water-conservation-policy-for-upstream-oil-and-gas-operations](http://open.alberta.ca/publications/water-conservation-policy-for-upstream-oil-and-gas-operations)>; Alberta Energy Regulator, *Directive 081: Water Disposal Limits and Reporting Requirements for Thermal In Situ Oil Sands Schemes* (Calgary: Alberta Energy Regulator, 5 November 2019), online: <[static.aer.ca/prd/documents/directives/Directive081.pdf](http://static.aer.ca/prd/documents/directives/Directive081.pdf)>.

<sup>289</sup> *Ibid.*

<sup>290</sup> “Water Use Performance,” online: *Alberta Energy Regulator* <[www.aer.ca/protecting-what-matters/holding-industry-accountable/industry-performance/water-use-performance](http://www.aer.ca/protecting-what-matters/holding-industry-accountable/industry-performance/water-use-performance)>. However, a few searches for *WA* applications and decisions for oil sands projects on the AER’s website revealed that most require contacting the AER for copies of the documents.

<sup>291</sup> *Draft Directive 023*, *supra* note 180 at 15–16.

<sup>292</sup> *Ibid.* at 15. Although wells, pipelines, and surface facilities associated with in situ oil sands projects must also be licenced in accordance with *Directive 056*, a stakeholder involvement program followed by an applicant for an oil sands project application submitted under *Draft Directive 023* “will satisfy the participant involvement requirements for any related subsequent *Directive 056* licences for wells,

Under *Draft Directive 023*, the AER “expects applicants to respond and engage in a meaningful way with any party that has raised a concern or has questions regarding the oil sands project and to make reasonable efforts to address concerns raised before filing an application.”<sup>293</sup> The goal is to inform parties about the proposed oil sands project and to, “where feasible, make *bona fide* efforts to address and resolve concerns raised about the proposed project.”<sup>294</sup> Consultation is also intended to facilitate discussion on alternatives and mitigation measures for the proposed project.<sup>295</sup>

*Draft Directive 023* outlines that at a minimum, stakeholder involvement must include any landowners in the project area and off-setting sections, oil sands leaseholders in off-setting quarter sections, and oil and gas leaseholders and private mineral owners of any unleased lands in the project area and off-setting sections.<sup>296</sup> However, applicants are encouraged to notify, and attempt to address and resolve concerns from, a “range of potential stakeholders”<sup>297</sup> Generally, a stakeholder involvement program for oil sands applications should include:

[P]ersons or groups who have legal rights to conduct activity on the land (including landowners, occupants, residents, local First Nations and Métis groups, and local authorities) and those who have rights to the underlying mineral, energy, or other natural resources (including freehold and Crown mineral owners and lessees).<sup>298</sup>

Compared to *Directive 056*, there are very few stakeholder involvement provisions in *Draft Directive 023*. Outlined above are the key points relating to who should be part of a company’s consultation process. Nonetheless, the requirement to notify and consult with a “range of potential stakeholders” means that, in practice, stakeholder engagement at the consultation stage should be very broad.

Consultation at this stage, however, is with the proponent and does not necessarily mean that those consulted will be heard by the AER. Often consultation leads to concerns being handled through negotiation or mediation. If so, and no party formally objects to an application, the AER may, and is likely to, “issue a decision on [an] application without further notice.”<sup>299</sup> Given their nature and scale, this is unlikely for new oil sands mining projects, but in situ oil sands schemes are often approved without a hearing.<sup>300</sup>

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pipelines, and facilities”: *Draft Directive 023, ibid* at 9. Moreover, approval for a new in situ oil sands project (or amendment to an existing project) must be obtained first under *Draft Directive 023* before filing associated *Directive 056* applications (except for oil sands evaluation wells): *Draft Directive 023, ibid* at 9–11; *Directive 056, supra* note 131 at 22, 24, 62.

<sup>293</sup> *Directive 023, ibid* at 16.

<sup>294</sup> *Ibid* at 15.

<sup>295</sup> *Ibid* at 16.

<sup>296</sup> *Ibid* at 15.

<sup>297</sup> *Ibid*.

<sup>298</sup> *Ibid*.

<sup>299</sup> *Ibid* at 9. See e.g. *Koch Oil Sands Operating ULC: Application for a Bitumen Recovery Scheme, Cold Lake Oil Sands Area* (13 March 2012), 2012 ABERCB 007, online: *Energy Resources Conservation Board* <static.aer.ca/prd/documents/decisions/2012/2012-ABERCB-007.pdf>, where a proposed hearing was cancelled because objections were withdrawn following engagement with the regulator’s appropriate dispute resolution program.

<sup>300</sup> Alberta Energy Regulator, *Hearing and ADR by Hearing Commissioner Summary: April 1, 2018 to March 31, 2019* (Calgary: Alberta Energy Regulator), online: <static.aer.ca/prd/documents/applications/hearings/HearingSummary.pdf> [*Hearing Summary*].

## b. Statements of Concern

As noted above, the AER provides public notice of applications through its website. This is required by section 31 of the *REDA*, which directs the AER (subject to limited exceptions) to provide public notice of any application brought to it under an energy resource or specified enactment in accordance with its *Rules of Practice*.<sup>301</sup>

Prior to the *REDA*, if it appeared to the energy regulator that its decision on an application “may directly and adversely affect the rights of a person,” that person was entitled to trigger a hearing (oral or written) before the regulator.<sup>302</sup> Although the interpretation and application of this standing test was subject to commentary and litigation, it provided a statutory right or hurdle that, if overcome, entitled the person to be heard directly by the regulator.<sup>303</sup> Today, under the *REDA*, the route to a hearing before the AER is murkier.

Section 32 of the *REDA* states that a person who believes they “may be directly and adversely affected by an application” may file an SOC in accordance with the AER’s rules.<sup>304</sup> According to section 33, where an SOC has been filed, the AER must decide, again in accordance with the rules, whether to conduct a hearing on an application.<sup>305</sup> Generally, as outlined below, the AER may decide on an application with or without a hearing.<sup>306</sup>

The *Rules of Practice* contain separate provisions for when the AER may disregard an SOC and for the factors it may consider in deciding whether to hold a hearing on an application. According to section 6.2(1), the AER may disregard (and not consider) a filed SOC on the following grounds: the person who filed the SOC has not demonstrated they may be directly and adversely affected by the application; the SOC was not filed within the 30 day time limit; a decision was made on the application by the AER prior to the SOC being filed; and for any other reason the AER considers that the SOC is not properly before it.<sup>307</sup> Moreover, section 6.2(2) sets out grounds upon which the AER may disregard a concern raised in an SOC.<sup>308</sup> If in the AER’s opinion any of the following apply, it may disregard a concern raised in an SOC: the concern relates to matters outside the AER’s jurisdiction; “the concern is unrelated to, or relates to a matter beyond the scope of the application”; “the concern has been adequately dealt with or addressed through a hearing or other proceeding under any other enactment or by a decision on another application”; “the concern relates to

<sup>301</sup> *REDA*, *supra* note 110, s 31. See also *Rules of Practice*, *supra* note 137, ss 5(1), 5.2.

<sup>302</sup> Vlavianos, “2007 Oil Sands Review,” *supra* note 1 at 42.

<sup>303</sup> *Ibid* at 40–44; Shaun Fluker, “Public Participation at the Alberta Energy Resources Conservation Board,” *Resources* 111 (2011) 1 at 4, online: <prism.ualgary.ca/bitstream/handle/1880/48514/Resources111.pdf>.

<sup>304</sup> *REDA*, *supra* note 110, s 32.

<sup>305</sup> *Ibid*, s 33.

<sup>306</sup> Although the *REDA*, *ibid*, s 34(2) allows for rules or regulations to require hearings in some circumstances, thus far it appears the only requirement for a hearing is in the *REDAGR*, *supra* note 205, s 4, which requires a hearing for a regulatory appeal in certain situations. The hearing process for regulatory appeals is slightly different from the hearing process for applications: *Rules of Practice*, *supra* note 137, ss 30–33. Section 34(2) of the *REDA* also states the AER must conduct a hearing where required to do so by an energy resource enactment, but those instances are limited and provide hearing rights for energy companies only: Shaun Fluker, “Amended Rules of Practice for the Alberta Energy Regulator: More Bad News for Landowners and Environmental Groups” (11 December 2013), online (blog): <ablawg.ca/2013/12/11/amended-rules-of-practice-for-the-alberta-energy-regulator-more-bad-news-for-landowners-and-environmental-groups/> [Fluker, “Amended Rules of Practice”].

<sup>307</sup> *Rules of Practice*, *ibid*, s 6.2(1).

<sup>308</sup> *Ibid*, s 6.2(2).

a policy decision of the Government”; “the concern is frivolous, vexatious, an abuse of process or without merit”; or the concern is so vague that the AER is not able to determine its nature.<sup>309</sup>

Section 7 then allows the AER to consider several factors to decide whether to conduct a hearing on an application.<sup>310</sup> These include whether: any of the circumstances discussed above in relation to an SOC apply; the objection raised in an SOC has been addressed to the satisfaction of the AER; the applicant and persons who have filed SOCs “have made efforts to resolve the issues in dispute directly with each other through a dispute resolution meeting or otherwise”;<sup>311</sup> the application is one described in section 5.2(2) of the rules;<sup>312</sup> “the matter to which the application relates has been adequately dealt with or addressed through a hearing or other proceeding under any other enactment or by a decision on another application”; “the Crown has requested that a hearing be held for the purpose of assessing impacts to and the means to mitigate the impacts on Aboriginal peoples”; “the application will result in minimal or no adverse effect on the environment”; and any other factor the AER considers appropriate.<sup>313</sup> The AER’s extremely wide discretion to deny a hearing is apparent. Under these rules and the *REDA*, not surprisingly, the trend has been toward very few hearings.<sup>314</sup>

### c. Hearings

If the AER decides to conduct a hearing, “a person who may be directly and adversely affected by the application is entitled to be heard at the hearing.”<sup>315</sup> Hearings may be held in writing, electronically, or orally.<sup>316</sup> Whether it holds a hearing or not, it must publish its decisions on applications in accordance with its rules.<sup>317</sup>

If the AER decides to conduct a hearing for an application, a hearing panel is established with one or more (usually three) hearing commissioners.<sup>318</sup> Hearing commissioners are appointed to a roster by the government and are selected from the roster by the chief hearing commissioner to sit on hearing panels.<sup>319</sup> A decision of a panel of hearing commissioners is a decision of the AER, and their proceedings are part of the day-to-day operations of the AER.<sup>320</sup> They may participate in the development of the AER’s practices, procedures, and rules, as well as receive professional, technical, and operational support from the AER to assist them in the conduct of hearings.<sup>321</sup> The current hearing commissioners have

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*, s 7.

<sup>311</sup> *Ibid.*

<sup>312</sup> The *Rules of Practice*, *ibid.*, s 5.2(2) allow for expedited decisions by the AER prior to the end of the 30 day notice period for filing an SOC in certain circumstances (for example, the application is defined as routine under *Directive 056*).

<sup>313</sup> *Ibid.*, s 7.

<sup>314</sup> *Hearing Summary*, *supra* note 300.

<sup>315</sup> *REDA*, *supra* note 110, s 34(3).

<sup>316</sup> *Rules of Practice*, *supra* note 137, s 18. See Part 2 of the *Rules of Practice* for details on the AER’s hearing process.

<sup>317</sup> See *REDA*, *supra* note 110, ss 33(2), 35(3); *Rules of Practice*, *ibid.*, s 7.1. While most decisions are currently available directly, some, as noted earlier, require a request to be made to the AER. The reason for the difference is not clear.

<sup>318</sup> *Rules of Practice*, *ibid.*, s 8(1)(a).

<sup>319</sup> *REDA*, *supra* note 110, ss 11(1), 12(1).

<sup>320</sup> *Ibid.*, ss 12(3), 13(1).

<sup>321</sup> *Ibid.*, s 13(2).

backgrounds and experience in various fields of study, including engineering, geology, environmental science, law, economics, and mediation.<sup>322</sup>

When the AER issues a notice of hearing, those who wish to participate must file a request to participate with the AER within the time limit set out in the notice.<sup>323</sup> The request to participate must contain a copy of the person's SOC (or an explanation as to why the person did not file an SOC) and a statement indicating why and how the person may be directly and adversely affected by a decision on the application.<sup>324</sup> Notably, at this stage in the process (that is, when the AER has decided to hold a hearing), there is the ability for someone who is *not* directly and adversely affected to request to participate in the hearing. Section 9(2)(b)(ii) of the *Rules of Practice* states that if the person will not be directly and adversely affected by a decision of the AER on the application, they must indicate "what the nature of [their] interest in the matter is and why [they] should be permitted to participate."<sup>325</sup> Specifically, they must explain how: (a) their participation will materially assist the AER in deciding the matter; (b) they have "a tangible interest in the subject-matter of the hearing"; (c) their "participation will not unnecessarily delay the hearing"; and (d) "they will not repeat or duplicate evidence presented by other parties."<sup>326</sup>

The AER has broad discretion to refuse to allow a person to participate in a hearing. Filing an SOC does not automatically grant a right to participate.<sup>327</sup> Section 9(3) of the *Rules of Practice* outlines several grounds upon which the AER may refuse to allow a person to participate in a hearing.<sup>328</sup> It may do so if, in its opinion: "the person's request to participate is frivolous, vexatious, an abuse of process or without merit"; the person has not demonstrated that they may be directly and adversely affected by the AER's decision; in the case of a group or association, the request does not demonstrate that "a majority of the persons in the group or association may be directly and adversely affected" by the AER's decision on the application; or the person has not demonstrated that (a) their participation will materially assist the AER in deciding the matter, (b) they have "a tangible interest in the subject-matter of the hearing," (c) their "participation will not unnecessarily delay the hearing," and (d) they "will not repeat or duplicate evidence presented by other parties."<sup>329</sup> Finally, the AER may refuse to allow participation in a hearing if the AER "considers it appropriate to do so for any other reason."<sup>330</sup>

By contrast, section 3.2 of the *REDAGR* does set out three parties that are entitled to participate in a hearing if the AER decides to conduct one.<sup>331</sup> If an Indian reserve, a Métis settlement, or a municipal authority in which an energy resource activity is or will be located (or that is within 2000 metres from the proposed location) files an SOC, and the AER decides

<sup>322</sup> "Hearing Commissioners," online: *Alberta Energy Regulator* <[www.aer.ca/providing-information/about-the-aer/governance/hearing-commissioners](http://www.aer.ca/providing-information/about-the-aer/governance/hearing-commissioners)>.

<sup>323</sup> *Rules of Practice*, *supra* note 137, ss 8(1), 9(1). See also Alberta Energy Regulator, *Manual 003: Participant Guide to the Hearing Process* (Calgary: Alberta Energy Regulator, December 2020), online: <[static.aer.ca/prd/documents/manuals/Manual003.pdf](http://static.aer.ca/prd/documents/manuals/Manual003.pdf)> [*Manual 003*].

<sup>324</sup> *Rules of Practice*, *ibid*, ss 9(2)(a)–(b)(i).

<sup>325</sup> *Ibid*, s 9(2)(b)(ii).

<sup>326</sup> *Ibid*, s 9(2)(c).

<sup>327</sup> *Manual 003*, *supra* note 323 at 3.

<sup>328</sup> *Rules of Practice*, *supra* note 137, s 9(3).

<sup>329</sup> *Ibid*.

<sup>330</sup> *Ibid*, s 9(3)(e).

<sup>331</sup> *REDAGR*, *supra* note 205, s 3.2.



to conduct a hearing, the Indian reserve, Métis settlement, or municipal authority is entitled to participate in the hearing.<sup>332</sup>

Along with deciding who can participate, the AER (via the hearing panel) has broad scope to determine the level of participation that will be granted. Section 9.1 of the *Rules of Practice* requires the AER to specify the nature and scope of a person's permitted participation, including: (1) setting the issues for which the participant is allowed to make submissions, representations, and argument; (2) determining whether the participant may make oral or only written submissions; and (3) determining whether the participant may question witnesses.<sup>333</sup>

As noted, due to their nature and size, hearings are typically held for new oil sands mines, but rarely for new in situ operations.<sup>334</sup> Many applications in relation to both types of activities do not result in a hearing. Over 2018/19, despite thousands of applications relating to both oil sands mining and in situ operations, only two hearings were held (one for a new oil sands mine and the other for an expansion to an existing oil sands mine and processing plant).<sup>335</sup>

Where a decision has been made without a hearing, a regulatory appeal may be available to eligible persons, including a person who is directly and adversely affected by a decision of the AER under an energy resource enactment.<sup>336</sup> Although the AER may make a decision on a regulatory appeal with or without a hearing, a hearing must occur if the concerns of an eligible person have not been addressed through an ADR process, or otherwise resolved by the parties.<sup>337</sup>

Given the location of oil sands projects, most requests to participate in a hearing have been made by Indigenous groups, municipal authorities, environmental organizations, and industry competitors. For example, in the case of the Prosper Petroleum Ltd.'s Rigel Project, requests to participate were received from six Indigenous groups and associations (but only three were granted full participation rights).<sup>338</sup> In an earlier in situ oil sands application, Fort McKay First Nation, Fort McKay Métis Community Association, and the Regional Municipality of Wood Buffalo, were granted full participation in the hearing.<sup>339</sup> By contrast, for a proposed hearing in 2014 for an in situ oil sands expansion project, submissions were filed by several First Nations in the affected area as well as by the Oil Sands Environmental Coalition, a group with "a long-standing and documented interest in a range of environmental

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<sup>332</sup> *Ibid.*

<sup>333</sup> *Rules of Practice*, *supra* note 137, s 9.1.

<sup>334</sup> Hearings may also be required under federal impact assessment legislation: David V Wright, "The New Federal Impact Assessment Act: Implications for Canadian Energy Projects" (2021) 59:1 Alta L Rev 67.

<sup>335</sup> *Hearing Summary*, *supra* note 300. The AER states that the number of hearings has decreased since hearing commissioners have been able to use alternative dispute resolution (ADR) processes introduced into the adjudicative process by the REDA in 2013. For information about these processes, see Alberta Energy Regulator, *Manual 004: Alternative Dispute Resolution Program and Guidelines for Energy Industry Disputes* (Calgary: Alberta Energy Regulator, December 2020), online: <static.aer.ca/prd/documents/manuals/Manual004.pdf>.

<sup>336</sup> REDA, *supra* note 110, ss 36–41; *Rules of Practice*, *supra* note 137, ss 30–33.

<sup>337</sup> REDAGR, *supra* note 205, s 4.

<sup>338</sup> *Prosper Petroleum*, *supra* note 207.

<sup>339</sup> Alberta Energy Regulator, *Dover Operating Corp: Application for a Bitumen Recovery Scheme, Athabasca Oil Sands Area* (6 August 2013), 2013 ABAER 014, online: *Alberta Energy Regulator* <static.aer.ca/prd/documents/decisions/2013/2013-ABAER-014.pdf>.

issues in the oil sands area,” but the AER held that none of these parties would be allowed to participate in the hearing.<sup>340</sup> Since there was no other party with standing to participate in the hearing, the AER cancelled it, and rendered a decision on the application without a hearing.<sup>341</sup>

#### d. Reflections on Current Approach

Prior to the *REDA*, commentators noted the ongoing litigation and uncertainty around the “directly and adversely affected” test, which, as noted, previously allowed a person whose “rights” were so affected to trigger a hearing.<sup>342</sup> Today, the “rights” language is gone, as is the entitlement to trigger a hearing before the AER at the application stage. However, the “directly and adversely affected” language remains and in fact features prominently throughout the participation provisions under the *REDA*. It is critical in relation to whether an SOC can be filed, whether an SOC will be considered, whether the AER will hold a hearing or not, and whether participation rights will be granted or not.

The detailed review of the participation framework under the *REDA* (and its rules and regulations) above was intentional. It is meant to highlight the number of hurdles a party must overcome to be heard by the AER. Even as hurdles are jumped, however, there is still uncertainty about what the participatory outcomes will be in any given case. As noted, the AER has ultimate authority to deny a hearing, even if someone has established they may be “directly and adversely affected” by a decision on an application. This lack of certainty makes it impossible to conclude that the regulatory framework from a public participation perspective has improved since the *REDA*. In fact, it may be worse.<sup>343</sup>

One important change should be highlighted, although its potential impact is limited. As noted, the *Rules of Practice* contemplate participation by a broader range of parties than only those who are “directly and adversely affected.” If a person has a tangible interest in the subject matter of the hearing, will materially assist the AER in deciding the matter, will not unnecessarily delay the hearing, and will not repeat or duplicate evidence presented by other parties, they may be allowed to participate. These provisions are like those in former federal environmental assessment legislation that allowed persons with relevant information and expertise to participate in hearings.<sup>344</sup>

In 2018, the AER applied these provisions to allow for the participation of the Southern Alberta Group for the Environment (SAGE) in a hearing for an application by Granite Oil Corp. to drill four enhanced recovery wells in an area that was a quarter-section away from

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<sup>340</sup> Nigel Bankes, “Directly and Adversely Affected: The Actual Practice of the Alberta Energy Regulator” (3 June 2014), online (blog): <ablawg.ca/2014/06/03/4447/> [Bankes, “Directly and Adversely Affected”].

<sup>341</sup> *Ibid.* Hearings for new oil sands mining projects typically result in a broader range of full participants, which may be the result of applicable federal environmental assessment legislation. For example, in *Teck Resources Ltd.*, *supra* note 51, several First Nations and environmental organizations (for example, the Canadian Parks and Wilderness Society Northern Alberta and the Oil Sands Environmental Coalition) were granted full participation status.

<sup>342</sup> Vlavianos, “2007 Oil Sands Review,” *supra* note 1 at 40–44.

<sup>343</sup> See e.g. Fluker, “Amended Rules of Practice,” *supra* note 306.

<sup>344</sup> Recent changes to federal legislation have now removed even these restrictions and have opened up participation to any member of the public (subject to the discretion of the decision-maker in terms of the manner of participation): *Impact Assessment Act*, SC 2019, c 28, s 1.

the Twin River Heritage Rangeland Natural Area in southern Alberta.<sup>345</sup> In its SOC and request to participate, SAGE stated that it had “a direct interest in the subject matter due to its long involvement in advocating for conservation of the southern Alberta grasslands ecosystem, and that this experience ... would provide a valuable historical context for the panel.”<sup>346</sup> The AER granted SAGE full participation rights on the basis that SAGE’s participation would materially assist it in deciding the matter due to SAGE’s specific knowledge of the area.<sup>347</sup> SAGE also had a tangible interest in the subject matter given its history of involvement in activities associated with development in the area, and it had committed to preventing duplication and unnecessary delay by coordinating efforts with other parties participating in the hearing.<sup>348</sup>

While this opening for participation beyond a “direct and adverse effect” is a welcome addition to the regulatory framework under the *REDA*, it is significantly limited in its possible impact. Its placement in Part 2 of the *Rules of Practice*, which applies to “hearings on applications,” means that it will only apply *after* the AER has otherwise decided to set a matter down for a hearing. And to make that decision in the first place, we are back to the provisions that require an SOC to be filed by someone who is directly and adversely affected. Indeed, in the Granite Oil Corp. application, there were two persons, co-lessees of valid grazing leases on the affected lands, who had requested to participate (and were granted full participation rights) on the basis that they may be “directly and adversely affected” by the AER’s decision on the application.<sup>349</sup> In short, it appears that the AER had already decided to hold a hearing when it granted SAGE participation rights in the hearing.

Moreover, as noted, the AER’s decision to allow SAGE to participate in the hearing was based on the group’s specific knowledge of, and long-standing conservation work in, the particular area involved. In denying participation rights to another environmental group in the same hearing, the AER made clear that the opening for broader participation is limited. The AER denied a request to participate by the Alberta Wilderness Association (AWA) on two grounds. First, it held that the AWA had not shown how it may be “directly or adversely affected” by a decision on the matter, and that “[a]sserting use of an area [for hiking] does not constitute a direct and adverse effect nor does having members [with grazing leases] that may be affected by a project.”<sup>350</sup> Second, in regard to the provisions allowing persons who are not directly affected to participate, the AER concluded that the AWA’s participation would not materially assist the hearing because it had not provided specific details on how its participation would do so.<sup>351</sup> The AER stated that “[m]uch of the AWA’s information

<sup>345</sup> Chidinma B Thompson & Matthew Schneider, “The Alberta Energy Regulator Grants Standing to Environmental Group for Oil Well License Hearing” (18 December 2018), online: <[www.blg.com/en/insights/2018/12/the-alberta-energy-regulator-grants-standing-to-environmental-group-for-oil-well-license-hearing](http://www.blg.com/en/insights/2018/12/the-alberta-energy-regulator-grants-standing-to-environmental-group-for-oil-well-license-hearing)>.

<sup>346</sup> *Ibid.*

<sup>347</sup> *Re Request to Participate, Southern Alberta Group for the Environment: Granite Oil Corp, Applications 1893274, 1893275 & 1893277* (19 November 2018), online: *Alberta Energy Regulator* <[www.aer.ca/regulating-development/project-application/decisions/participatory-procedural-decisions](http://www.aer.ca/regulating-development/project-application/decisions/participatory-procedural-decisions)>.

<sup>348</sup> *Ibid.*

<sup>349</sup> *Re Request to Participate, Audrey Taylor and Robert Taylor: Granite Oil Corp, Applications 1893274, 1893275 & 1893277* (15 November 2018), online: *Alberta Energy Regulator* <[static.aer.ca/prd/documents/decisions/Participatory\\_Procedural/1893274\\_20181115.pdf](http://static.aer.ca/prd/documents/decisions/Participatory_Procedural/1893274_20181115.pdf)>.

<sup>350</sup> *Re Request to Participate, Alberta Wilderness Association: Granite Oil Corp, Applications 1893274, 1893275 & 1893277* (19 November 2018) at 1, online: *Alberta Energy Regulator* <[www.aer.ca/regulating-development/project-application/decisions/participatory-procedural-decisions](http://www.aer.ca/regulating-development/project-application/decisions/participatory-procedural-decisions)>.

<sup>351</sup> *Ibid.* at 2.

appears to be general in nature and is not specific to the matters of the hearing. Some information is related, but appears to overlap and duplicate information of other parties.”<sup>352</sup>

The current framework for public participation before the AER under the *REDA* is clearly one of such broad discretion that it is difficult to have any type of certainty around whether a hearing will be held, who will be permitted to participate, and to what extent they will be able to participate. As noted by commentators, the *REDA* suggests discretion in nearly “every participation opportunity.”<sup>353</sup> The *REDA* also provides the AER with full discretion regarding another critical aspect of participation, namely, the awarding of costs to hearing participants.<sup>354</sup> Consequently, criticism and litigation are inevitable.<sup>355</sup>

Commentators have long argued for a different approach that would allow for broader public participation before Alberta’s energy regulator. They point to the rationale discussed above in support of public participation in resources and environmental decision-making. These include democratic principles, the public nature of Alberta’s natural resources, ensuring transparency and accountability, and realizing the benefits that come from having a broad range of interests considered and represented when decisions are made about public resources.<sup>356</sup>

After a detailed review of the AER’s current practice, Nikki Way, Adam Driedzic, and Duncan Kenyon conclude that there is an important need for “more guidance on when, where, why and for what hearings will be held.”<sup>357</sup> Moreover, they argue that the AER’s current approach of interpreting the “directly and adversely affected” test (as requiring a level of close geographic proximity and specificity in relation to evidence of impacts) is creating a situation where important concerns cannot be addressed.<sup>358</sup> These include concerns in relation to cumulative effects and health impacts.<sup>359</sup> The AER’s approach has even led it to deny participation to Indigenous groups where the project is located within traditional territory.<sup>360</sup>

Way, Driedzic, and Kenyon make a strong case for the need for a broader approach to that currently taken by the AER.<sup>361</sup> This would allow for broader public interests to be brought into the project review stage, especially in relation to cumulative effects management. First, they recommend that the AER relax its high evidentiary burden requiring parties to establish specific and detailed links between impacts and the proposed project.<sup>362</sup> Second, they point

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<sup>352</sup> *Ibid.*

<sup>353</sup> Nikki Way, Adam Driedzic & Duncan Kenyon, “Standing at Energy Regulators in Alberta: Issue Update and Recommendations” (January 2017) at 88, online: *Pembina Institute* <[www.pembina.org/reports/standing-reform-report-2017.pdf](http://www.pembina.org/reports/standing-reform-report-2017.pdf)>.

<sup>354</sup> *REDA*, *supra* note 110, s 61(r); *Rules of Practice*, *supra* note 137, ss 58–67; Alberta Energy Regulator, *Directive 031: REDA Energy Cost Claims* (Calgary: Alberta Energy Regulator, 24 February 2016), online: <[static.aer.ca/prd/documents/directives/Directive031.pdf](http://static.aer.ca/prd/documents/directives/Directive031.pdf)>.

<sup>355</sup> See e.g. *O’Chiese First Nation v Alberta Energy Regulator*, 2015 ABCA 348; *Coulas v Ferus Natural Gas Fuels Inc*, 2016 ABCA 332.

<sup>356</sup> Barton, *supra* note 62; Fluker, “Public Participation,” *supra* note 62; Macias, *supra* note 62; Way, Driedzic & Kenyon, *supra* note 353.

<sup>357</sup> Way, Driedzic & Kenyon, *ibid* at 89.

<sup>358</sup> *Ibid* at 90–95. See also Bankes, “Directly and Adversely Affected,” *supra* note 340.

<sup>359</sup> Way, Driedzic & Kenyon, *ibid* at 94–95.

<sup>360</sup> Bankes, “Directly and Adversely Affected,” *supra* note 340.

<sup>361</sup> Way, Driedzic & Kenyon, *supra* note 353.

<sup>362</sup> *Ibid* at 121.

to jurisdictions that have expanded participation and have not experienced floodgates.<sup>363</sup> Third, although they credit the AER for improving some matters of transparency (for example, publishing its participatory/standing decisions), they maintain that the “continued exclusion of parties bringing forth concerns in the public interest contributes to the constant criticisms around transparency of decision-making, accountability for public resources, and regulatory capture.”<sup>364</sup> The authors conclude with important recommendations for how the AER could broaden its approach to public participation.

#### IV. CONCLUSION

The goals of this article were twofold. The article has provided a detailed account of the current legal framework for oil sands development in Alberta. In doing so, it has outlined changes since the last significant review of this framework was undertaken in 2007. It is hoped that the information provided here will help to inform the ongoing debate about this type of development in Alberta.

As noted, the 2007 Oil Sands Review identified three key deficiencies in the legal framework at that time. There was a lack of policy and plans to drive decision-making across the different stages in the development process. There was undue complexity and a corresponding lack of transparency due to the number of decision-makers involved along with overlapping and unclear mandates. Lastly, there was a lack, or insufficiency, of public participation opportunities at different stages in the development process.

With respect to the lack of policy and plans, one of the most significant changes since 2007 has been the adoption of a mandatory land-use framework for the province. Under that framework, we now have a regional land-use plan, the LARP, that is providing direction for oil sands development across the different stages in the process. This is an important step in trying to grapple with cumulative effects from this kind of development. However, as noted, the LARP has some critical gaps and remains a work-in-progress. Various aspects require improvement, which hopefully will be seriously addressed as the LARP approaches its ten year anniversary.

Another important change since 2007 has been the emergence of the pressing need for effective climate policy and a legal framework to implement that policy to address the intensity of greenhouse gas emissions from oil sands development. As noted, the consensus is that oil sands development in Alberta is precluding Canada from meeting its international obligations, and the impacts on the industry (with companies cancelling projects and facing strong public opposition) are apparent. The only way around the problem is through it.

As regards to the complexity, overlapping mandates, and lack of transparency that existed in 2007, the adoption of the single regulator through the *REDA* has significantly addressed this issue. The web of statutes and regulations remains, but at least most decision-making in relation to oil sands development is centred in one regulator. While this creates a monopoly in decision-making, on balance, it is likely a better system than the previous one where there were real questions about who had the final say over certain matters. Today, as a single

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<sup>363</sup> *Ibid* at 27–55.

<sup>364</sup> *Ibid* at 102.

regulator, we know who the responsible decision-maker is: it is the AER. This allows for more transparency and accountability than was previously the case.

Moreover, if there is ever any hope of co-ordinated and integrated decision-making to try to address cumulative effects in this context, it is hard to imagine this being done without a centralized decision-making process. Co-ordination and integration benefit from someone who gathers all the data and information (preferably from a wide variety of sources), consolidates it, and is able to have a big picture view of all the aspects throughout the life cycle of a project. Where problems can arise, however, is if the regulator is under-resourced, controlled, or does not have the requisite tools, ability, or appetite to consider a broad range of information and perspectives. One particularly troubling area in Alberta's current oil sands framework is the role of the AER vis-à-vis government policy. As noted above, the AER (or joint review panel) often makes specific recommendations to governments on various matters after a detailed review of a proposed project. Many of these recommendations have related to the need for more direction and for improvements to the LARP, especially in relation to cumulative effects management and impacts on Indigenous peoples. It is always awkward reading these lists of recommendations and wondering what effect (if any) they will have. A simple solution could be to legislate a requirement that governments take them seriously.

With respect to public participation, there are many reasons to believe that fulsome public participation should be part of each stage in the energy development process. In 2007, both the disposition of oil sands rights and the disposition of rights to access the surface of public lands occurred without any clear ability for public involvement. This is still the case for the disposition of oil sands rights, but surface rights are now part of the AER's requirements for stakeholder consultation by a proponent and its rules for considering SOCs and possibly holding hearings. For mineral rights disposition, critics continue to advocate for opportunities for public engagement in this process. The opportunities afforded through consultation processes for developing Alberta's regional land-use plans may address these concerns to a certain extent, but those processes must be clear, transparent, and meaningful. The shortcomings with the consultation process undertaken in the development of the LARP provide some important lessons.

At the oil sands project approval stage, the issues around public participation have unfortunately not improved since 2007. Although the prior regime undoubtedly was not perfect, the current system is even murkier and essentially reads like a list of ways to avoid hearing from even "directly and adversely affected" parties and certainly from broader public interests. Commentators are calling for the AER to broaden its approach to allow for more meaningful engagement from interested parties who have important information and perspectives to share. This would not only improve decision-making, but would add legitimacy, transparency, and accountability to the process. Under the *REDA*, the AER now has broad discretion to set its own rules for public participation and therefore, has the ability (and some would say the obligation) to make important changes in this regard.