

# RESOURCES

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## **PERSISTENT ISSUES AND CHALLENGES IN ALBERTA'S OIL SANDS REGULATORY FRAMEWORK**

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### **Introduction**

Oil sands development in Alberta has become a focal point for a challenging debate on how to balance global energy demand with critical climate, environmental, and social considerations. This article contributes to the conversation by reflecting upon ongoing problem areas in the current provincial legal and regulatory framework for oil sands development.

In 2007, I undertook a comprehensive review of the (then) provincial oil sands regulatory framework and identified three key problem areas. First, there was a lack of direction in terms of comprehensive plans or strategies for oil sands development. Commentators were calling for effective energy or oil sands policies together with a regional land use framework to support cumulative effects management. Second, the existing legal framework at the time was characterized by significant complexity, overlapping mandates and uncertainty. Not only were there several statutes and regulations involved, there were multiple decision makers operating under these various enactments. The result was a system that lacked transparency, accessibility and accountability at various stages in the regulatory process. Third, this lack of transparency was exacerbated by issues around a lack of effective and meaningful public participation. Public participation was entirely missing at some points in the oil sands development decision-making process and, at other points, the opportunities available did not allow for a broad spectrum of stakeholders to be heard.<sup>1</sup>

Fifteen years later, what has changed in relation to these problem areas identified in 2007? What has not changed? In this article, I reflect upon these questions and highlight persistent issues and challenges in Alberta's oil sands regulatory framework.<sup>2</sup>

### **Oil Sands/Energy and Climate Policy**

Although there have been attempts to develop energy or oil sands policies over the years, they have fallen short of the type of "comprehensive" and "integrated" strategies commentators have long argued are needed to provide critical direction for decision-making on this type of development.<sup>3</sup> Moreover, at the forefront of the policy debate today are calls for rigorous and effective climate change policies and actions. Although exact estimates may vary, there is no doubt that oil sands development is responsible for substantial greenhouse

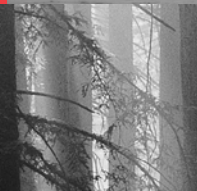
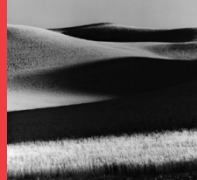
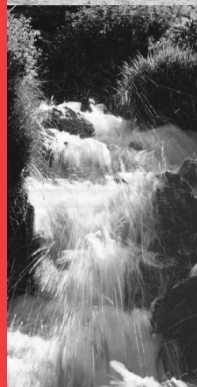
gas emissions that are contributing to the global climate crisis and making it difficult for Canada to meet its international climate commitments.<sup>4</sup> Oil sands projects have been cancelled and pipelines not approved because of the climate impacts of this development.<sup>5</sup>

A review of how climate change is (or is not) being addressed by both the Alberta and federal governments is beyond the scope of this article. However, a few key developments can be mentioned here at the provincial level in relation to oil sands development. First, in 2016, Alberta passed legislation to cap overall greenhouse gas emissions for the oil sands sector under the *Oil Sands Emissions Limit Act (OSELA)*.<sup>6</sup> A limit of 100 megatonnes is set for greenhouse gas emissions "for all oil sands sites combined" in any given year. There are, however, some important exceptions, including certain experimental schemes, primary production and enhanced recovery activities, and increased capacity from expansion at existing upgraders.<sup>7</sup>

Section 4 of the *OSELA* confirms that it is to be interpreted as part of Alberta's *Emissions Management and Climate Resilience Act*.<sup>8</sup> Regulations passed under that Act require that a "large emitter" (a facility that has direct emissions of 100,00 tonnes or more of greenhouse gases per year) must not exceed allowable emissions. Allowable emissions are based on an output-based benchmark (an "intensity-based" approach) and facilities can meet the benchmark through four options: improving the facility's operating efficiency; submitting emission performance credits; submitting emission offsets; or paying for fund credits.<sup>9</sup> Fund credits are obtained by contributing to the Technology Innovation and Emissions Reduction (TIER) Fund.<sup>10</sup>

Other Alberta carbon reduction initiatives that impact oil sands production include the *Methane Emission Reduction Regulation*<sup>11</sup> (which sets a framework for the reduction of methane emissions from oil and gas operations) and the *Specified Gas Reporting Regulation*<sup>12</sup> (which sets out requirements for facilities that emit 10,000 tonnes or more of specified gases to report on gas released into the environment).

Many commentators observe that the province's current framework for addressing the climate change impacts of oil sands development is insufficient. According to the





Pembina Institute, even with the current regulatory framework, carbon emissions from the oil sands continue to be the fastest-growing source of emissions in Canada.<sup>13</sup> This upward trajectory diminishes Canada's ability to meet its 2030 emissions reduction commitments and its plan to become carbon-neutral by 2050.<sup>14</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>15</sup>

### Land Use Planning

Along with concerns about inadequate oil sands/energy policy, a key problem identified in 2007 was the lack of regional land use plans to guide decision-making across the various stages of the oil sands development process. The consensus was that without guidance from regional land use plans and strategies, much-needed cumulative effects management was impossible, and decisions were being made in a vacuum.<sup>16</sup> Ideally, the land use plans would be mandatory and would set out detailed thresholds and limits for different kinds of environmental impacts.<sup>17</sup>

Remarkably, in 2009, the *Alberta Land Stewardship Act (ALSA)*<sup>18</sup> was enacted, 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 Alberta's social and environmental goals."<sup>19</sup> The LUF divides Alberta into seven regions and calls for the development of a regional plan for each. The plans are developed under the *ALSA*.

To date, only two regional plans have been developed, with another in progress.<sup>20</sup> The first was the Lower Athabasca Regional Plan (LARP) in 2012, which covers the oil sands areas where about 82% of Alberta's oil sands resource is located.<sup>21</sup>

The LARP, which is binding on all decision makers, industry and private individuals, covers several matters with a view to balancing the region's "diverse economic opportunities" with "social and environmental considerations using a cumulative effects management approach."<sup>22</sup> It includes provisions relating to: 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. The LARP sets triggers and limits for air, surface water, and groundwater quality, as well as specifies the types of allowable activities (e.g., oil sands development, forestry, grazing) within the conservation areas in the region.<sup>23</sup>

Under the LARP, five management frameworks have been developed to guide decision-making. There are management frameworks covering air quality, surface water quality, surface water quantity, groundwater quality and quantity, and tailings from mining operations. These frameworks set regional environmental triggers and limits for air, surface 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. The management frameworks are used by the energy regulator to regulate and assess 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 a significant step since 2007.

Nonetheless, the LARP remains "a work in progress."<sup>24</sup> From the start, it was criticized for not being as specific or as comprehensive as it should have been and that it did not go far enough in terms of creating conservation areas and protecting the environment in the region. Others identified significant deficiencies in the public consultation processes used in its development.<sup>25</sup> A review panel struck to hear an application by six First Nations in 2015 concluded that evidence established that traditional lands were being encroached upon by rapid development in the area. It recommended that the government develop a traditional land use management framework as part of the LARP.<sup>26</sup>

The latest progress report for the LARP from the Land Use Secretariat is from 2016. Although it concludes that several strategic commitments outlined in the LARP have been completed, seven have been deferred.<sup>27</sup> 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. There is no mention of the traditional land use management framework recommended by the 2015 review panel. In 2019, a joint review panel assessing a proposed oil sands mine project urged the Alberta government to continue to implement the LARP and to put in place the frameworks, plans and thresholds it identifies as quickly as possible.<sup>28</sup> It also made recommendations for further mitigation and management plans to be developed under the LARP.<sup>29</sup> Scholars have also noted the failure of the LARP to "contemplate a management framework for the greenhouse gas emissions associated with oil sands activity in the Lower Athabasca Region."<sup>30</sup>

In sum, much work remains to be done in relation to the LARP, not only to evaluate current progress but also to "consider the LARP's ongoing relevancy and effectiveness in light of existing gaps in management frameworks."<sup>31</sup> As required by the *ALSA*, the Land Use Secretariat began a 10-year review of the LARP in August 2022. Public engagement has commenced via an online survey, but there are already concerns about critical questions not being included in this survey.<sup>32</sup>

Along with gaps in the current land use framework for Alberta's oil sands regions, scholars have noted the challenges inherent in current methods and approaches to environmental monitoring and adaptive management within the land use planning framework. Although advances have been made in cumulative effects science and management, "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>33</sup>

### Single Regulator

As noted, in 2007, the existing legal framework for key stages in the oil sands development process was characterized by complexity, overlapping mandates and uncertainty.<sup>34</sup> With the exception of the mineral rights disposition process, which was (and still is) administered by Alberta Energy,<sup>35</sup> decision-making at other stages in the process was difficult to track. These stages include the disposition of surface rights to access public lands for oil sands exploration and





production,<sup>36</sup> the oil sands project review and approval process, and the ultimate reclamation of oil sands sites. At each of these stages in 2007, there were multiple decision-makers involved and the division of labour between them was unclear. These decision-makers included the (then) Energy and Utilities Board, Alberta Sustainable Resource Development and Alberta Environment. The result was a system that was unduly complex and lacked accessibility, accountability and transparency.<sup>37</sup>

Several statutes and regulations govern the oil sands development process in Alberta.<sup>38</sup> These include the *Mines and Minerals Act (MMA)*,<sup>39</sup> the *Public Lands Act (PLA)*,<sup>40</sup> the *Environmental Protection and Enhancement Act (EPEA)*,<sup>41</sup> the *Water Act (WA)*,<sup>42</sup> the *Oil Sands Conservation Act (OSCA)*<sup>43</sup> and the multitude of regulations passed under these statutes. There is also a host of guides, directives and manuals authorized under these enactments that form part of the complex web that makes up the regulatory framework for oil sands development in Alberta.

Although the web of statutes, regulations and directives has not changed much since 2007, a significant change occurred in 2013 with the enactment of the *Responsible Energy Development Act (REDA)*<sup>44</sup> and, through it, the creation of the Alberta Energy Regulator (AER). The *REDA* significantly changed the way energy projects, including oil sands projects, are approved and regulated in the province. Except for the mineral rights disposition process (which remains with Alberta Energy), the *REDA* grants all approval and decision-making authority under both energy resource statutes (e.g., the *OSCA*) and under "specified enactments" (e.g., the *PLA*, the *EPEA*, and the *WA*) as they relate to energy resource activities to the AER.<sup>45</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 (and typically does) require all applications to be combined together.<sup>46</sup> Through the *REDA*, the AER effectively became a "single" regulator for all provincial aspects of oil sands (and energy resources) development in Alberta.<sup>47</sup>

While concerns about the risks associated with placing all decision-making into the hands of a single regulator remain, the goals behind the *REDA* of streamlining processes and reducing complexities were undoubtedly laudable. Significant complexities and overlapping and unclear mandates in any regulatory framework are not a good thing, neither for governments nor for industry. They are also not good for other stakeholders and for the general public who often want to understand and follow decision-making processes.<sup>48</sup>

Under the *REDA*, the regulatory framework for the various stages of the oil sands development process is certainly clearer than it was in 2007 from the perspective of identifying the responsible regulator. All applications under the various energy resources and specified enactments must be made to the AER. These include applications for: oil sands exploration approvals under the *PLA*; dispositions (like mineral surface leases) for production activities under the *PLA*; approvals under the *OSCA* to construct and operate oil sands recovery and oil sands processing projects; authorizations required under the *EPEA* in relation to environmental impact assessment, air, water, land impacts, and reclamation; and approvals and licences required under the *WA* in relation to impacts to water and aquatic ecosystems.<sup>49</sup>

An important advantage of this single regulator approach is of course clarity in terms of who the ultimate decision maker is on these various types of applications. There is no longer the possibility of one governmental department pushing things onto another, or two

decision-makers rendering inconsistent decisions on the same matter. There is also more clarity in terms of the process of decision-making. The AER now provides an integrated process for collecting and reviewing information that used to go to different governmental departments (often without clear guidance on how those departments were coordinating their reviews).

Another upside is that the AER now provides public notice of applications under the various enactments on 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>50</sup> Moreover, although accessibility to some could be improved,<sup>51</sup> most AER decisions made under the various statutes are now available through its website.<sup>52</sup> On balance, the publication of notices of applications along with the publication of decisions on these applications (especially through one website) reveals a more accessible and transparent process than was the case in 2007.

Moreover, if there is ever any hope of coordinated 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. Coordination 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 comprehensive view of all aspects throughout the lifecycle of a project.

Where problems can arise, however, is if the regulator is under-resourced, controlled and/or does not have the requisite tools, appetite, or ability to consider a broad range of information and perspectives and to act upon them. One particularly troubling area is the role of the AER vis-à-vis government policy. In both AER (and joint review panel) decisions, there are often specific recommendations made to government on various matters following a detailed review of a proposed project. Many of these recommendations relate to the need for more direction and for improvements to the LARP, especially in relation to cumulative effects management and the impacts on Indigenous peoples.<sup>53</sup> 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.

## Public Participation

Scholars have long argued for public participation in environmental and resource management decision-making.<sup>54</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 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. The idea is that 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>55</sup>

As noted, the 2007 Oil Sands Review identified public participation as a third key problem area in relation to oil sands development in the province. It found that public participation was entirely missing at some key stages in the oil sands development decision-making





process. At other stages, the opportunities available did not allow for a broad spectrum of stakeholders to be heard.<sup>56</sup> What has changed since 2007 in relation to the ability of stakeholders and the general public to participate, and to be heard, in the oil sands development process?

#### i. Policy and land use planning

With respect to the development of energy (or climate) and natural resources policy in Alberta, there are currently no legislated requirements for public participation. Governments sometimes adopt *ad hoc* consultation processes, but these are discretionary and unpredictable. In relation to regional planning under the *ALSA*, there is a requirement for public participation in the development or amendment of a regional plan. Before a regional plan is made or amended, section 5 of the *ALSA* requires the Minister to ensure that “appropriate public consultation with respect to the proposed regional plan or amendment has been carried out”. The Minister must also report on the findings from this public consultation to Cabinet. Section 51 of the *ALSA* 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 that process.

Scholars have described the public consultation that must occur under the *ALSA* (and that occurred in the development of the LARP) as “*ad hoc*, discretionary and entirely defined and driven by government”<sup>57</sup> Although the government offered the public various opportunities to be consulted on the development of the LARP (e.g., through an online comment process), commentators argued there was a lack of transparency and accountability in the process. For example, it was unclear how some participants were selected to participate in “stakeholder focus groups” while others were not. 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 influenced the outcome of the land-use planning process in the Athabasca region.”<sup>58</sup>

As noted, consultation has begun in relation to the mandatory 10-year review of the LARP by way of an online survey. There are no specifics yet on how or when “[s]taff from the Land Use Secretariat and government ministries will meet with Indigenous communities and organizations, municipalities and targeted stakeholders to get feedback on the Lower Athabasca Regional Plan review and priorities emerging in the region.”<sup>59</sup> In developing its consultation plan, it is hoped that government will reflect upon and review what commentators identified as problematic with the consultation process that occurred in the LARP’s initial development. This could go some way towards ensuring that a more effective, transparent and accountable public consultation process occurs for the 10-year review.

#### ii. Oil Sands Rights Dispositions

With respect to the disposition of oil sands rights, a step that “kick starts” exploration and development activities, the 2007 Oil Sands Review found that the lack of any opportunity for public participation was widely criticized.<sup>60</sup> Although there is no guarantee the rights will ultimately be developed, scholars have noted that in deciding to offer rights for sale 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>61</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>62</sup> In short, public participation is needed to ensure that public concerns about the economic, social and environmental impacts of development are heard early in the development process.<sup>63</sup>

One significant change since 2007 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 be disposed only subject to “...any express provision in any applicable *ALSA* regional plan limiting mineral development within a geographic area”. Although there still is no direct public participation opportunities in the oil sands rights disposition process, one could argue there is at least some type of consultation through the development of applicable regional plans, which in the case of oil sands is the LARP. The problems identified around the consultation that led to the LARP, however, make it doubtful that this sufficed for purposes of the type of public participation commentators argue should be part of the rights disposition process. As suggested, it is hoped that the 10-year review will do better.

A modest first step towards including some type of direct public participation in the oil sands rights disposition process could be to allow some public and stakeholder representation on the Crown Mineral Disposition Review Committee (CMDRC). Although there is little available information about this Committee, it appears to be involved in an internal governmental review prior to Alberta Energy determining whether, and on what conditions, to offer requested rights for sale.<sup>64</sup> Since the Committee’s composition does not appear to be statutorily mandated, the membership could presumably be changed to include others.<sup>65</sup> At the very least, this could help provide valuable information about how the Committee (and consequently, Alberta Energy) makes decisions on whether particular rights should be put up for sale, and if so, on what conditions. It could, for example, provide insights as to how the LARP is being followed in these decisions. In short, allowing for membership on the CMDRC from the broader public or from non-governmental organizations could help in improving the transparency and accountability of this process.

#### iii. Surface Rights Dispositions

With respect to dispositions granting access to public lands for oil sands and exploration activities, there is no broad-based public participation opportunities for Albertans.<sup>66</sup> Commentators noted this deficiency in 2007 and it continues to persist. What has changed, however, is of course some indirect type of participation through the development of the LARP, which is binding on all decision-making made under the *PLA*. Another change has been that the AER, who is responsible for disposition decisions under the *PLA* for oil sands exploration and production activities, now provides public notice of these applications on its website. Moreover, there is the ability for someone who may be “directly and adversely affected” by an application to be heard by the AER. Although this avenue is limited and problematic from a public participation perspective (as discussed below), it is at least a possible direct point of entry for stakeholder concerns to be heard in relation to public lands dispositions for oil sands activities. This was not the case in 2007.<sup>67</sup>

#### iv. Project Review and Approvals

The AER requires oil sands project applicants to carry out a “stakeholder involvement program” that must begin before an application is filed and continue throughout the life of the project. 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>68</sup> 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 issue a decision on an application without further notice”.<sup>69</sup> Given their nature and scale, this is unlikely for applications to construct new oil sands mining projects, but in situ oil sands schemes are often approved without a hearing.<sup>70</sup>

As noted, the AER provides public notice of applications through its website. Although it suggests this is done to encourage “public participation” in decision-making, the reality is that only someone who believes they “may be directly and adversely affected by an application” may file a statement of concern (SOC) with the AER. In 2007, a variation on this phrase entitled someone to trigger a hearing (oral or written) before the regulator.<sup>71</sup> Today, under the *REDA*, the route to a hearing before the AER is murkier.

The statutory standing test was removed with the enactment of the *REDA* and in its place is now section 32, which states that a “directly and adversely affected” person may file a SOC in accordance with the AER’s rules. Section 33 then states that where a SOC has been filed, the AER must decide, again in accordance with its rules, whether to conduct a hearing on an application. The AER’s *Rules of Practice* contain several provisions for when it may disregard a SOC and for the factors it may consider in deciding whether to hold a hearing.<sup>72</sup> Generally, the AER has granted itself very wide discretion through its *Rules of Practice* to decide applications without a hearing. Under these rules and the *REDA*, not surprisingly, the trend has been towards very few hearings.<sup>73</sup>

Several commentators have noted that the *REDA* failed to improve public participation opportunities at the project review and approval stage.<sup>74</sup> Instead of a mandatory standing test that existed in 2007, the rules now set out a number of hurdles a party must overcome to be heard by the AER. Moreover, even as hurdles are jumped, there is little certainty about what the participatory outcome will be in any given case. 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.<sup>75</sup>

Due to their nature and size, hearings are typically held for new oil sands mines, but rarely for new in situ operations. Moreover, 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>76</sup>

Requests to be heard by the AER for applications relating to oil sands projects by, for example, individuals, Indigenous groups, municipal authorities, and environmental organizations have been denied.<sup>77</sup> The current approach of the AER of interpreting “directly and adversely affected” as requiring a level of close geographic proximity and specificity in relation to evidence of impacts has been a barrier to allowing for broader participation.<sup>78</sup> This approach has meant that important concerns, including those relating to cumulative effects and health impacts, are not being brought before the AER.<sup>79</sup>

This is so despite an important addition (since 2007) introduced by the AER to its *Rules of Practice* under the *REDA*. The *Rules of Practice* do 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.<sup>80</sup> Nonetheless, the impact of these provisions has been limited. In particular, their placement in Part 2 of the *Rules of Practice*, which applies to “hearings on applications”, means they 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 a SOC to be filed by someone who is “directly and adversely affected”.<sup>81</sup> As noted, especially in the context of public lands where oil sands development occurs, the AER’s interpretation of this test has been very hard to meet.

## Conclusion

This article has reflected upon some issues and challenges in Alberta’s oil sands regulatory framework. Although some problem areas have been addressed since 2007, many continue to persist. In addition, new climate and social priorities have moved to the forefront of discussions. It is hoped that this article contributes to the important ongoing debate about this type of energy development in Alberta.

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## NOTES

<sup>1</sup> Nickie Vlavianos, *The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis*, CIRL Occasional Paper #21 (Calgary: Canadian Institute of Resources Law, 2007), online: <https://ciril.ca/sites/default/files/Occasional%20Papers/Occasional%20Paper%20%2321.pdf> [2007 Oil Sands Review].

<sup>2</sup> For a comprehensive discussion of these issues, see: Nickie Nikolaou, “Mapping the Legal Framework for Oil Sands Development in Alberta” (2022) 60:1 *Alta L Rev* 67, which also provides a detailed account of the current provincial legal framework for oil sands development in Alberta. Given its complexity, the law specifically applicable to Indigenous peoples in the oil sands areas is outside the scope of this article.

<sup>3</sup> *Ibid.* at 70-71.

<sup>4</sup> Jan Gorski et al., *The Oilsands in a Carbon-constrained Canada* (Calgary: Pembina Institute, 2020).

<sup>5</sup> For e.g., in 2020, Teck Resources Ltd. cancelled a planned \$20 billion oil sands mine, citing the ongoing debate over climate policy in Canada. In the same year, Total E&P

Ltd. wrote off \$9.3 billion worth of oil sands assets in Alberta citing its carbon reduction commitments (and high production costs). In 2021, a presidential order revoked a permit in the United States for the proposed Keystone XL pipeline, which would have shipped crude oil from Alberta oil sands to the Gulf of Mexico.

<sup>6</sup> SA 2016, c O-7.5.

<sup>7</sup> OSELA, s 2(2).

<sup>8</sup> SA 2003, c E-7.8.

<sup>9</sup> *Technology Innovation and Emissions Reduction Regulation*, AR 133/2019, ss 9, 11, 12, 18.

<sup>10</sup> 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” (Sept. 8, 2021), at: <https://ablawg.ca/2021/09/08/albertas-plan-for-climate-resilience-is-government-propaganda/>.

<sup>11</sup> AR 244/2018.

<sup>12</sup> AR 251/2004.

<sup>13</sup> *Supra* note 4.





<sup>14</sup> *Ibid.* See also Jan Gorski & Eyab Al-Aini, *Waiting to Launch: The gap between Canadian oilsands companies' climate pledges and actions* (Calgary: Pembina Institute, 2022).

<sup>15</sup> Nina Lothia, "Alberta's emission reduction investments no substitute for climate plan" (November 2, 2021), online: <https://www.pembina.org/media-release/albertas-emission-reduction-investments-no-substitute-climate-plan>.

<sup>16</sup> Even the key regulator at the time, the Energy and Utilities Board, stated that it was having difficulty deciding on oil sands project applications without guidance from regional development plans and strategies: *supra* note 1 at 7-8.

<sup>17</sup> See e.g., Steven A Kennett, *Closing the Performance Gap: The Challenge for Cumulative Effects Management in Alberta's Athabasca Oil Sands Region*, CIRL Occasional Paper #18 (Calgary: Canadian Institute of Resources Law, 2007), online: <https://ciril.ca/sites/default/files/Occasional%20Papers/Occasional%20Paper%20%2318.pdf>.

<sup>18</sup> SA 2009, c A-26.8.

<sup>19</sup> Alberta, Land Use Secretariat, *Land-Use Framework* (2008) at 2, online: <https://landuse.alberta.ca/LandUse%20Documents/Land-use%20Framework%20%202008-12.pdf>.

<sup>20</sup> Alberta, Land Use Secretariat, "Regional Plans", online:

<https://landuse.alberta.ca/REGIONALPLANS/Pages/default.aspx>.

<sup>21</sup> Alberta, Land Use Secretariat, *Lower Athabasca Regional Plan: 2012-2022*, at 14, online:

<https://landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%202012-2022%20Approved%202012-08.pdf>.

<sup>22</sup> *Ibid.* at 23.

<sup>23</sup> *Ibid.*, Schedules A-C at 73-78 and Schedule F at 83-91.

<sup>24</sup> *Report of the Joint Review Panel: Teck Resources Ltd Frontier Oil Sands Mine Project* (25 July 2019), 2019 ABAER 008 at xiv.

<sup>25</sup> See e.g., Monique Passelac-Ross, "Public Participation in Alberta's Land-Use Planning Process", 112 *Resources* 2011, online:

<https://ciril.ca/sites/default/files/Resources/Resources112.pdf>.

<sup>26</sup> *Review Panel Report 2015: Lower Athabasca Regional Plan* at 6, online:

<https://open.alberta.ca/dataset/5c910acf-9e8c-46b5-b52d-60fc8bd2bbbd/resource/d9a6bff5-f9b5-45fe-81ed-a8de3492e271/download/2016-review-panel-report-2015-lower-athabasca-regional-plan-2016-06-22.pdf>.

<sup>27</sup> Alberta, *Land-use Framework Regional Plans Progress Report: A Review of our progress in 2016* (December 2017), online: <https://open.alberta.ca/dataset/029b17a1-b71d-40ae-ad4f-fb21fa604866/resource/590306df-77a0-435d-a8fb-9223b8d3620b/download/lus-luf-regional-plans-progress-report-2016.pdf>.

<sup>28</sup> *Supra* note 24 at xiv.

<sup>29</sup> *Ibid.*

<sup>30</sup> Nigel Bankes, Sharon Mascher & Martin Olszynski, "The Sad State of Regional Land Use Planning in Alberta" (10 March 2022), online: [http://ablawg.ca/wp-content/uploads/2022/03/Blog\\_NB\\_SM\\_MO\\_Sad\\_State\\_Regional\\_Land\\_Use.pdf](http://ablawg.ca/wp-content/uploads/2022/03/Blog_NB_SM_MO_Sad_State_Regional_Land_Use.pdf).

<sup>31</sup> *Ibid.*

<sup>32</sup> David Laidlaw, "Lower Athabasca Regional Plan 10-Year Review" (12 October 2022), online: <https://ablawg.ca/2022/10/12/lower-athabasca-regional-plan-10-year-review/>.

<sup>33</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>34</sup> *Supra* note 1 at 17-57 and 64.

<sup>35</sup> The Province owns about 97% of Alberta's oil sands resource.

<sup>36</sup> Most of the land under which oil sands are located in Alberta is provincially-owned (Crown) land.

<sup>37</sup> *Supra* note 34.

<sup>38</sup> For a detailed review, see Nikolaou, *supra* note 2.

<sup>39</sup> RSA 2000, c M-17,

<sup>40</sup> RSA 2000, c P-40.

<sup>41</sup> RSA 2000, c E-12.

<sup>42</sup> RSA 2000, c W-3.

<sup>43</sup> RSA 2000, c O-7.

<sup>44</sup> SA 2012, c R-17.3.

<sup>45</sup> REDA, s 2.

<sup>46</sup> REDA, s 30(1) and (3).

<sup>47</sup> Except for, as noted, the disposition of mineral rights.

<sup>48</sup> See *supra* note 1 and Nickie Vlavianos, "A Single Regulator for Oil and Gas Development in Alberta? A Critical Assessment of the Current Proposal", (2012) 113 *Resources* 1, online: <https://ciril.ca/sites/default/files/Resources/Resources113.pdf>.

<sup>49</sup> For a detailed review of these requirements, see Nikolaou, *supra* note 2.

<sup>50</sup> *Alberta Energy Regulator Rules of Practice*, AR 99/2013 (*Rules of Practice*).

<sup>51</sup> For example, some decisions (like some PLA disposition decisions) can only be obtained via information requests to the AER: see Nikolaou, *supra* note 2 at 88.

<sup>52</sup> This includes participatory and procedural decisions, which is a welcome change from previous practice: see Nigel Bankes, "The Alberta Energy Regulator Announces that it will Publish a Broader Range of Decisions" (29 September 2015), online:

[https://ablawg.ca/wp-content/uploads/2015/09/Blog\\_NB\\_AERbulletin2015\\_28\\_sept2015.pdf](https://ablawg.ca/wp-content/uploads/2015/09/Blog_NB_AERbulletin2015_28_sept2015.pdf)

<sup>53</sup> See, for e.g., *supra* note 24.

<sup>54</sup> See, for e.g., Barry Barton, "Underlying Concepts and Theoretical Issues in Public Participation in Resources Development" in Donald N Zillman, Alastair R Lucas & George Pring, eds., *Human Rights in Natural Resources Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002) and Rebeca Macias, *Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation*, CIRL Occasional Paper #34 (Calgary: Canadian Institute of Resources Law, 2010).

<sup>55</sup> *Ibid.*

<sup>56</sup> *Supra* note 1.

<sup>57</sup> See e.g., *supra* note 25.

<sup>58</sup> *Ibid.* at 5. See also David Laidlaw, "Lower Athabasca Regional Plan 10-Year Review Part 2: Alberta's Regional Plan Development" (26 October 2022), online:

<https://ablawg.ca/2022/10/26/lower-athabasca-regional-plan-10-year-review-part-2-athabasca-regional-plan-development/>.

<sup>59</sup> Alberta Land Use Secretariat, 10-Year Review, online:

<https://landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/10YearReview/Pages/default.aspx>.

<sup>60</sup> *Supra* note 1 at 13-17 and 65-66.

<sup>61</sup> Nigel Bankes, "Crown Oil Sands Dispositions and the Duty to Consult" (8 April 2015), online: <https://ablawg.ca/2015/04/08/crown-oil-sands-dispositions-and-the-duty-to-consult-2/>.

<sup>62</sup> Michael S Quinn *et al.*, "The Ecological and Political Landscapes of Alberta's Hydrocarbon Economy" in Laurie Adkin, ed., *First World Petro-Politics: The Political Ecology and Governance of Alberta* (Toronto: University of Toronto Press, 2016) at 144.

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

<sup>64</sup> For more information on this process, see Nikolaou, *supra* note 2 at 78-81.

<sup>65</sup> The statutory underpinning for the CMDRC is hard to track: see *ibid.*

<sup>66</sup> See Nikolaou, *supra* note 2 at 85 and 88.

<sup>67</sup> See *supra* note 1 at 21 and 27-28.

<sup>68</sup> *Draft Directive 023: Oil Sands Project Applications* (May 28, 2013) at 3. For details about the consultation requirements, see Nikolaou, *supra* note 2 at 102-103.

<sup>69</sup> *Draft Directive 023, ibid* at 9.

<sup>70</sup> See AER, *Hearing and ADR by Hearing Commissioner Summary: April 1, 2018 to March 31, 2019*, online:

<https://static.aer.ca/prd/documents/applications/hearings/HearingSummary.pdf>.

<sup>71</sup> A hearing was triggered if an application may have "directly and adversely affect[ed] the rights of a person": see *supra* note 1 at 40-44 and Shaun Fluker, "Public Participation at the Alberta Energy Resources Conservation Board" (2011) 111 *Resources* 1, online: <https://ciril.ca/sites/default/files/Resources/Resources111.pdf>.

<sup>72</sup> For a review of these provisions, see Nikolaou, *supra* note 2 at 104-108.

<sup>73</sup> *Supra* note 70.

<sup>74</sup> See e.g., Shaun Fluker, "Amended Rules of Practice for the Alberta Energy Regulator: More Bad News for Landowners and Environmental Groups" (December 11, 2013), online: <https://ablawg.ca/2013/12/11/amended-rules-of-practice-for-the-alberta-energy-regulator-more-bad-news-for-landowners-and-environmental-groups/>.

<sup>75</sup> See Nikolaou, *supra* note 2 at 104-111.

<sup>76</sup> *Supra* note 70.

<sup>77</sup> See Nikolaou, *supra* note 2 at 107-110.

<sup>78</sup> See e.g., Nikki Way, Adam Driedzic, and Duncan Kenyon, *Standing at Energy Regulators in Alberta: Issue update and recommendations* (Calgary: Pembina Institute, January 2017).

<sup>79</sup> *Ibid.* at 90-95.

<sup>80</sup> *Rules of Practice*, s 9(2)(b)(ii) and (c).

<sup>81</sup> See Nikolaou, *supra* note 2 at 109-110.



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