

# Alberta Energy Regulator Review (2019)

Pembina Institute submission to Alberta Energy on mandate and system operations review of the Alberta Energy Regulator

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## Purpose

To outline the Pembina Institute's assessment of the current function and operation of the Alberta Energy Regulator (AER), and outline issues that the ongoing review should address to ensure the credibility and proper function of the sole regulator of oil, gas and coal industries in Alberta.

### Key Issues

- **Alberta's energy industry is facing increasingly complex issues** with global financial pressures, shifting economics, and growing environmental expectations (both domestic and international). The regulator is tasked with overseeing an industry that may be directly impacted by these issues, and, as these pressures affect industry profitability and behaviour, must maintain its ability to regulate and ensure it can protect the public and the environment.
- **It is apparent that the AER's environmental mandate continues to be a secondary consideration in operational and funding decisions**, while there remains a clear prioritization of efficiency and approval timeline improvements.
- **If this direction is maintained, it will undermine the regulator's credibility and likely the credibility of the industries regulated by the AER.** This will represent a financial risk for companies with shareholders that are increasingly concerned about ensuring environmental issues are addressed.
- Although it has been made clear from recent reports that there has been inappropriate expenditures and questionable leadership by the AER's previous CEO, we do not recommend "throwing the baby out with the bathwater," but to instead **ensure the credibility of the regulator by ensuring resources are put to appropriate use.**
- **It is vital that the government review ensures the independence of the regulator is maintained, and that it can fulfill its current mandate.** Many of its recent failures can be attributed to a lack of government direction and a prioritization of cost cutting.

This document is roughly organized according to the organization of the discussion document provided by Alberta Energy in its AER review process. Although some comments may be addressed under the first section addressing the AER's mandate, many of these areas of work overlap with considerations under the second section addressing systems operations, and can be considered in either context.

## The mandate of the AER

As described in the discussion document, the review by Alberta Energy will examine whether the AER has met its mandate, over-stepped its mandate, or whether the AER should pursue additional work to fulfil its mandate. In our experience, the AER has overly prioritized the "orderly" and "efficient" elements laid out in its mandate, and has failed to deliver promised improvements in the past several years to address longstanding concerns in fulfilling the other essential elements of its mandate for "safe" and "environmentally responsible" development.

It is our assessment that some programs implemented in the first few years after the creation of the regulator had begun to focus on addressing some of the complex issues necessary for the it to credibly regulate. There are several areas of work that are justified under the AER's mandate, which need to be strengthened and prioritized to ensure the AER can remain credible, relevant, and demonstrate any claims that the AER is an example of a "world class" regulator. We have focused on those programs and opportunities for improvement in the table below.

## The mandate for the AER: Areas of work and assessment

### One Stop and approval timelines

NEEDS MAJOR REPRIORITIZATION | WITHIN MANDATE FOR SAFETY, ORDER AND ENVIRONMENT

**Too much emphasis on accelerated timelines will erode the integrity of the system, which is needed to assure credibility and balance in decision-making.**

- The One Stop program has promised to make the regulator more efficient and effective, however, this program has overly prioritized accelerated timelines. Approvals are now seen to be “rubber stamped,” with no credible follow-up by way of robust risk management and compliance assurance systems that confirm applications and approvals are accurate and consistent with what the operator is doing.
- There is little evidence of the integration of key environmental and cumulative effects programs into the One Stop initiative. Although this was a promise early in the roll out of the One Stop system, it is not apparent how this program improves the approval process in relation to issues of environmental impacts.
- Any additional cost savings or freed resources from faster approval timelines need to be reprioritized into AER programs that advance other core elements of mandate.

### Environmental consideration in regulatory processes

NEEDS MAJOR IMPROVEMENT | WITHIN MANDATE FOR ENVIRONMENT

**Recent regulatory decisions have not adequately addressed growing environmental concerns.**

- There have been continuing examples of AER approvals that remain silent on matters of growing public importance (i.e. climate change, liability management, species at risk considerations) and do not assess the significance of environmental impacts, or whether impacts have been properly mitigated to ensure the public benefit.
- For example, in the recent Teck Frontier Oil Sands Mine report, the panel failed to consider and discuss the significant adverse effect of greenhouse gases, and ensure the inclusion of conditions (or, at minimum, make recommendations) that would address climate change impacts of the project. The panel remained virtually silent on these considerations, exposing its report to legal challenges in the future.
- An ongoing failure to incorporate increasingly urgent concerns will contribute to a growing lack of confidence in the regulator’s impartiality and ability to regulate public interest issues that are within its mandate.

### Area Based Review (ABR)

NEEDS IMPROVEMENT | WITHIN MANDATE FOR SAFETY, ORDER AND ENVIRONMENT

**The program scope needs to be broadened and prioritized. Although the ABR pilot was a good start, promises to advance key issues within the program have seemingly stalled:**

- The ABR approach was tentatively supported by the environmental community at the concept stage, with reassurance from AER leadership that longstanding environmental issues would be incorporated into the project focus.

- Despite promises that the ABR pilot focus would broaden in later stages, there are concerns that it has remained too narrow (with its original focus on water approvals and licenses) and hasn't incorporated other urgent environmental considerations.

## Cumulative Effects Management (CEM)

NEEDS MAJOR IMPROVEMENT | WITHIN MANDATE FOR ENVIRONMENT

**The program is sorely needed, but requires resources to integrate into other system operations.**

- Earlier progress in the design stage of the CEM program was promising, with the dedication of the Chief Environmental Scientist and support staff to advance the file. However, previous momentum has been lost in recent years.
- Previous commitments to decision making that is informed by science and cumulative effects assessments have not been demonstrated.
- The regulator has not met its timelines to deliver this program, with little progress demonstrated over the last few years. The perception is that it has not been adequately resourced, and has been de-prioritized in favour of other programs to reduce approval timelines.

## Compliance Dashboard (compliance transparency)

NEEDS IMPROVEMENT | WITHIN MANDATE FOR SAFETY, ORDER AND ENVIRONMENT

**The Compliance Dashboard fails to communicate basic information or assurance that the AER enforces its regulations adequately.**

- The dashboard is not truly transparent, in that it only communicates particular instances of non-compliance or accidents, as it is restricted to reporting on a select few contraventions under energy enactments, while excluding contraventions under specified enactments (i.e. the Environmental Protection and Enhancement Act, the Water Act or the Public Lands Act).
- Therefore, by design, the dashboard fails to communicate the majority of contraventions at sites of public concern (such as an oilsands mine regulated by environmental enactments, for example).
- The dashboard contains minimal information on the contravention or the necessary data to assess compliance trends, severity of non-compliance, or a useful connection to other information in the dashboard (such as investigations or enforcement actions).

## Integrated Compliance and Assurance Framework (compliance assurance)

NEEDS IMPROVEMENT | WITHIN MANDATE FOR SAFETY, ORDER AND ENVIRONMENT

**The AER needs resources to ensure compliance and retain the integrity of a self-reporting compliance system.**

- A full and proper compliance program is a critical component of a risk-based approach, and the regulator needs to be able to verify that risk assessments are accurate, and that compliance is occurring.

- Without proper checks and balances, emphasis on automated approvals increase the risk of companies “gaming the system.” It is not clear that the roll-out of other priorities, such as the automated approval program for reclamation certificates, are appropriately backed by processes that ensure companies are in compliance (i.e. previous processes aimed to ensure 15 per cent of reclamation approvals were field audited). This is a crucial element of any self-reporting program relied upon by a regulator.

**There is minimal evidence that the majority of compliance tools are used when appropriate, a quality that is necessary for a functional “self-reporting” compliance system.**

- To date, by assessing public data, the AER has routinely used directions and orders to address spills and non-compliance with abandonment, remediation, reclamation and liability management requirements.
- However, the AER has seldom escalated enforcement actions beyond directions and orders. Further, the AER has often been slow to escalate enforcement, allowing licensees to benefit financially from non-compliance. In some cases, licensees have been able to reallocate revenues obtained while in non-compliance beyond the AER’s jurisdiction.
- In order to provide a level playing field for all licensees and maintain the credibility of its compliance systems, the AER must strictly enforce the statutory and regulatory requirements with respect to spills, abandonment, remediation, reclamation and liability management.

## Species at risk and biodiversity

NEEDS IMPROVEMENT | WITHIN MANDATE FOR ENVIRONMENT

**The regulator needs to employ the tools at its disposal more often for project approvals for projects that deal with species at risk concerns.**

- Projects within the critical habitats for species at risk continue to be approved without conditions for appropriate mitigation efforts in place (i.e. employing conservation offsets in woodland caribou habitat), due to uncertainty over whether the regulator can exercise this authority. This erodes the province’s significant efforts to ensure the recovery of woodland caribou, and further exposes the province to risk of federal emergency protection orders.
- To be consistent with its role as an environmental regulator, the AER needs to have the authority to employ tools that will mitigate the adverse impacts of development.

## Liability management oversight

NEEDS IMPROVEMENT | WITHIN MANDATE FOR SAFETY, ORDER AND ENVIRONMENT

**The growing oil and gas liability issue needs resources, new tools, and clear policy guidance to prevent public liabilities from continuing to accumulate.**

- Growing oil and gas liabilities are not being effectively managed with current efforts, which don’t address core, large-scale issues like widespread lack of timely reclamation and inadequate funds for reclamation efforts.
- Publicly available data is not transparent about the extent or details of the problem. This undermines opportunities for third parties and companies to craft solutions.
- There is a critical need to update methodologies to more accurately estimate liabilities and publicly report those findings; to place timelines on inactive projects and ensure timely reclamation; and to report annually on compliance with liability program requirements.

- The government needs to support the regulator by ensuring it has the resources to proactively address these issues, and authority to collect a form of security (such as bonds) on new and existing wells.

## Tailings remediation

NEEDS IMPROVEMENT | WITHIN MANDATE FOR SAFETY AND ENVIRONMENT

**Tailings pond approvals cumulatively fail to meet Directive 085, while tailings volumes are projected to continue growing for another decade.**

- Directive 085 does not provide clear criteria for success (an outcome based regulation would have a clearly defined desired outcome).
- Directive 085 has not clearly defined what constitutes “ready to reclaim” nor the consequences of non-compliance, resulting in a convoluted series of approvals with dozens of conditions.
- In order to make tailings regulations more reasonable and efficient for everyone, the government needs to set much clearer and more stringent expectations for what the industry needs to achieve, and by which date.

## System operations of the AER

In an effort to address longstanding issues, the regulatory enhancement project made notable headway with the 2013 creation of the Alberta Energy Regulator, which then led a variety of initiatives during its first few years. This progress was reflected in properly resourced programs that would significantly increase the AER’s capacity to deal with complex environmental issues within its mandate, engage meaningfully with stakeholders, and integrate policy and decision-making across other levels of relevant government programs.

This progress has since stalled, and meaningful engagement has been significantly reduced and de-prioritized by the regulator in recent years. We have focused on opportunities for systemic improvement in the table below.

## System operations of the AER: Areas of work and assessment

### Single regulator with unified responsibility

CLEAR PROGRESS

**This has been well resourced, and it is clear that efforts have been made to bring several systems of information from multiple regulators under one roof.**

### Policy integration through Integrated Resource Management System

NOT ADEQUATELY ADDRESSED

**The Integrated Resource Management System (IRMS), which partially replaced some responsibilities of the Policy Management Office (PMO), hasn't delivered on a promise of better coordination between government prioritization, external engagement, and accountability.**

- The shift did not ensure accountability of progress towards promised outcomes, with obvious signs of conflicting priorities between departments, which were not resolved or balanced with respect to environmental interests.
- The change also did not advance policy that would provide the AER with the needed direction to advance its environmental mandate.
- IRMS engagement has been minimal in recent years, and remains opaque to external stakeholders, who have minimal opportunities for input or to discuss advancing solutions.

### Meaningful stakeholder and public engagement and public

NEEDS IMPROVEMENT (WITH SOME EXCEPTIONS SHOWING PROGRESS)

**Public input into decision making is being eroded.**

- Public input has been constrained (in the majority of decisions) by the prioritization of accelerated timelines.
- Shortened timelines lead to a reduction or elimination in opportunities for public input. The majority of applications have been classified as "routine," limiting the window for public engagement, including input from nearby landowners. This has not been clearly replaced by an equivalent public engagement process through the One Stop model.
- Tailings Management Review (TMR): this was an example of good inclusion of stakeholders to adequately inform decision making. Incorporating intervenors who can help inform the panel on issues critical to fulfilling its mandate is good practice

This needs to be expanded into other processes of the AER for decisions that are complex and involve consideration of multiple factors and information not immediately available to the regulator without third party input.

## AER efforts for public reporting

SOME IMPROVEMENT | NEEDS MORE

**There are some examples of more transparent reporting, but this needs to be expanded to cover all metrics of public interest, and the paywall needs to be removed.**

- There has been some good data reporting by the AER in the past, demonstrating regulatory improvements (i.e. Industry Performance Program), which was well-communicated, accessible and exportable. However only two issues are reported on (water use and pipeline performance). Many of the outstanding concerns surrounding the industry are not reported on with transparency or accessibility.
- These efforts seem to have been stalled – the AER has not made progress in recent years since these two reports were released.
- Much of the AER’s data remains behind paywalls, discouraging third parties from assessing performance.

## Alternative Dispute Resolution (ADR) and landowner tools to protect interests

NEEDS IMPROVEMENT

**Pathways for landowners to express concerns and have them heard have been eroded.**

- Implementation of the Responsible Energy Development Act (REDA) has significantly reduced the right for the affected public to be heard during the decision-making process – with significant discretion with regard to Statements of Concern (SOC) – and the removal of rights to a hearing for “directly and adversely affected” (DAA) parties.
- Transparency of decision-making has improved, but is still low. Decisions on rejected SOCs are published, but little information about what the AER considers DAA, how many stakeholders are considered DAA, and how these are treated by the AER in the decision making process.
- ADR has been helpful for avoiding costly hearing processes, but the process relies heavily on confidential agreements. Without broader transparency, this obscures trends in landowner and environmental concerns, and puts local residents on an unlevel playing field when negotiating with companies that have considerably more information about common issues and risks that may impact local residents.
- The creation of the Private Surface Agreement was good in theory, by allowing landowners an avenue for AER to help protect landowner interests laid out in the agreement. As it only applies to recent agreements, it is not clear whether this tool will protect the majority of landowners, or whether it addresses typical concerns from landowners negotiating with energy companies for proposed development.