

## Section 11

# Public Hearings and Regulatory Board Processes



# 11. Public Hearings and Regulatory Board Processes

If there are concerns about a project that cannot be addressed through negotiation or the alternative dispute resolution process, the Alberta Energy Regulator may hold a public hearing to explore the concerns and make a decision to approve, to approve with conditions or to deny a project. If the issue is around compensation, a hearing may be held by the Surface Rights Board. If the approval is related to pipelines that cross provincial or national borders, the National Energy Board may hold a hearing. As each regulatory body has different mandates and considerations for participation, this section outlines the general hearing process for each and who may participate in these hearings.

## What's in this chapter

11.1	Alberta Energy Regulator hearings.....	11-2
11.1.1	When does the AER decide to hold a hearing? .....	11-4
11.1.2	What to consider before a hearing .....	11-6
11.1.3	Filing a statement of concern.....	11-7
11.1.4	The pre-hearing .....	11-12
11.1.5	Submissions and preliminary steps in the AER hearing process.....	11-12
11.1.6	Evidence to submit at a hearing .....	11-13
11.1.7	The hearing .....	11-16
11.1.8	Funding and participant costs .....	11-17
11.1.9	Post-decision follow-up .....	11-19
11.1.10	Reconsiderations and legal challenges to hearing decisions.....	11-20
11.2	Regulatory appeals for AER decisions made without a hearing .....	11-21
11.3	Surface Rights Board procedures and hearings .....	11-22
11.3.1	Right-of-entry orders by the Surface Rights Board .....	11-23
11.3.2	Types of Surface Rights Board hearings.....	11-24
11.3.3	The compensation hearing process.....	11-25
11.3.4	Cost of a Surface Rights Board hearing .....	11-26
11.3.5	Rehearing .....	11-27
11.3.6	Appealing a Surface Rights Board decision.....	11-27
11.4	National Energy Board hearings .....	11-28

It is important to distinguish between the roles of the Alberta Energy Regulator (AER), the Alberta Surface Rights Board, and the National Energy Board.

The AER provides all permits, approvals or licences for energy resource activities in Alberta such as a licence for an *operator* to *drill* a well, construct and operate a pipeline, or other energy projects. Any concerns or objections to a project may be brought to the attention of the AER (Section 11.1) through a *pre-application concern* (Section 2.1) or a *statement of concern* (Section 11.1.3).

Formerly, appeals on environmental, water and public land approvals related to the energy resources were heard by the Environmental Appeals Board. Since the creation of the AER, all decisions related to energy resource activities including appeals on *reclamation certificates*, environmental protection orders and enforcement orders are appealed to the AER. The AER has discretion to decide if it will reconsider any of its decisions, and if it will do so with or without a *hearing*.

The Surface Rights Board has the power to grant a *right-of-entry order* after a company has received a licence or permit from the AER, even if the *owner* or *occupant* refuses access to the property. The Surface Rights Board will then decide on the appropriate compensation, and to whom it should be paid. All concerns about compensation must be brought to the Surface Rights Board, as the AER does not have jurisdiction over compensation (Section 11.2).

The National Energy Board has jurisdiction over decisions about interprovincial or international pipelines (Section 5.5). The Alberta Utilities Commission regulates applications for electricity generation and transmission, which is a separate process and is not discussed in this guide.

## 11.1 Alberta Energy Regulator hearings

A hearing is a quasi-judicial and formal public process where the company, *landowner(s)* and others affected by a proposed development, and/or their legal representatives, can present their views. The panel consists of one or more AER hearing commissioners, and can be completed electronically or in person. The AER then makes a decision on the specific issue(s) at hand, based on the evidence it has received.

If there are outstanding concerns about a proposed development that cannot be addressed through *negotiations* or the AER's *Alternative Dispute Resolution (ADR)* process (Section 2.4), a person who feels they are *directly* and *adversely affected* can submit a statement of concern to the Regulator when a company has submitted their application.

If the statement of concern is received before the Regulator makes a decision and before the filing deadline, the AER may recommend the file to the chief hearing commissioner to hold a hearing. Additionally, the AER has the ability to hold a hearing, even if no one has been found to be directly and adversely affected.

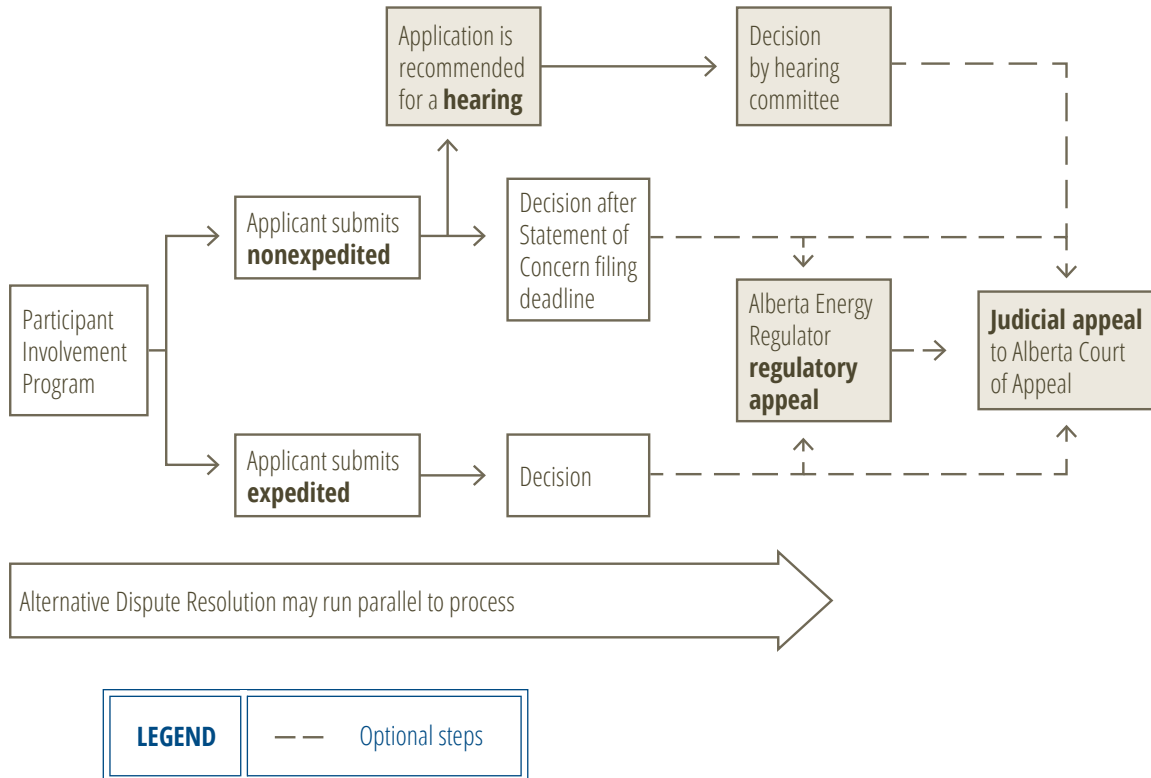


Figure 7. Regulatory process for energy development

If a hearing has been requested, the AER will encourage the parties to continue to reach a negotiated or mediated settlement, either privately or through the ADR process. Since hearings are very expensive and can delay projects, the company may be motivated to resolve concerns, or decrease the number of issues that will be discussed in a hearing.

The AER has several documents outlining its hearing process. The public hearing process is set out in the AER’s Rules of Practice<sup>1</sup> but *Manual 003: The Hearing Process for*

<sup>1</sup> Alberta, Alberta Energy Regulator Rules of Practice, 99/2013. Alberta government acts and regulations are available at Alberta Queen’s Printer, “Laws Online/Catalogue.” [http://www.qp.alberta.ca/Laws\\_Online.cfm](http://www.qp.alberta.ca/Laws_Online.cfm)

the Alberta Energy Regulator describes the process in plainer terms.<sup>2</sup> Additionally, you can contact the AER's Hearing Services office,<sup>3</sup> who can provide you with more information about the hearing process, and may offer hearing information sessions near the area of the proposed project.

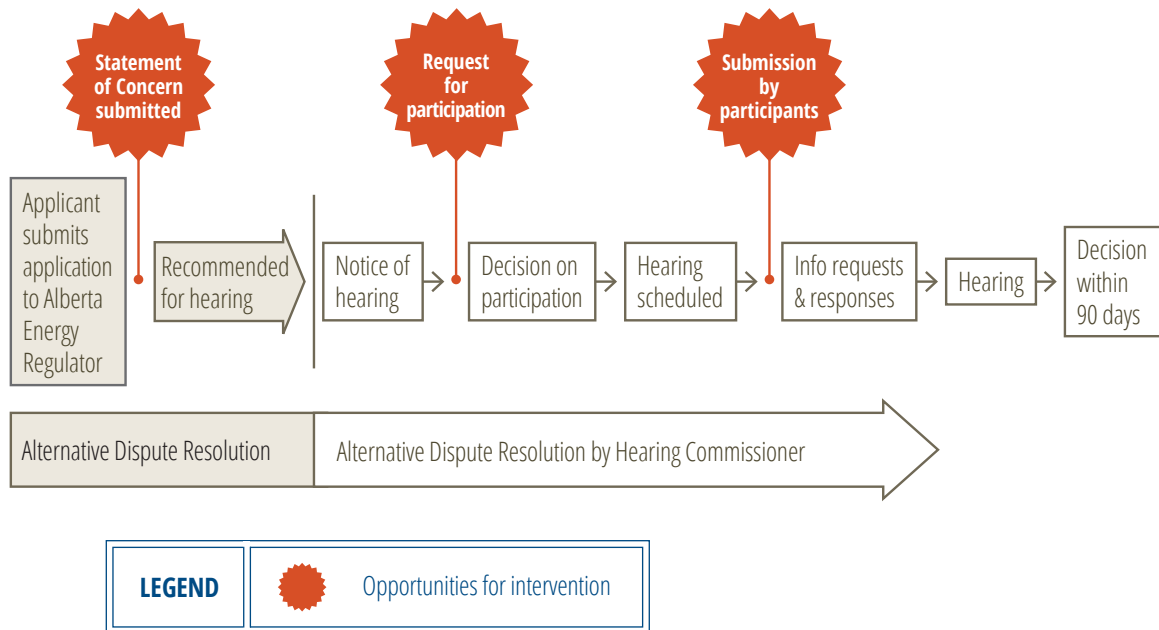


Figure 8. Typical AER public hearing process

### 11.1.1 When does the AER decide to hold a hearing?

The AER has considerable discretion to determine when to hold a hearing, and more discretion than its predecessor, the ERCB. In very few circumstances it is required by its own regulations to hold a hearing. Most hearings are held when the Regulator receives and accepts a statement of concern about an application, or a regulatory appeal on an AER decision is requested.

Any person who feels they are considered directly and adversely affected by a decision of the AER can attempt to request a hearing by filing a statement of concern (see Section 11.1.3 below). When a project is submitted to the Regulator with no outstanding concerns it may be *expedited*, which allows the Regulator to make a decision immediately. However, if a company is aware of outstanding concerns, they must

<sup>2</sup> Alberta Energy Regulator, *Manual 003: The Hearing Process for the Alberta Energy Regulator* (2013), s. 10. <https://www.aer.ca/documents/manuals/Manual003.pdf>

<sup>3</sup> AER hearing office: [hearing.services@er.ca](mailto:hearing.services@er.ca), or General Inquiries toll-free 1-855-297-8311.

inform the AER of those concerns and provide those who raised them with a copy of the notice of application. With outstanding concerns, the company is required to file its application as a *non-expedited* application, and the Regulator must wait until the filing deadline described in the notice of application has passed. It is important to submit your statement of concern within the timelines stated in the public notice of application, or the Regulator may dismiss your statement of concern. In extenuating circumstances, you may be able to request to file a late statement of concern.

As a landowner or occupant of the specific land in question, you can request a hearing by submitting a statement of concern if negotiations have failed and you are unable to reach agreement with a company about a proposed development. Anyone else who is directly and adversely affected, such as neighbours objecting to a well, pipeline or other energy project, can also request a hearing, although they may have a harder time being considered directly and adversely affected by the Regulator. When the AER is reviewing the application it will consider all of the registered statements of concern before making a decision whether to hold a hearing. However, even if a statement of concern has been submitted, the Regulator can decide not to hold a hearing. Typically, the Regulator will not hold a hearing if they don't find anyone to be directly and adversely affected, or if they consider that concerns have been adequately addressed.

As the AER will only make its decision on the evidence that it has before it, it is important to explain your concerns fully and to clearly outline how you are directly and adversely affected. The AER will ask the company to respond to your statement of concern, and the company will likely try to refute your statement of concern. You may wish to provide more information to the AER about your statement of concern or to refute information provided by company. The AER may accept additional information about registered statements of concern until it makes a decision. Every person who filed an statement of concern will be provided a copy of the AER's decision.

Once the AER decides to hold a hearing and a hearing panel is assigned, a notice of a hearing will be issued. The notice will provide details on how to *request to participate* in the hearing. The AER's Rules of Practice allow those who think they are directly and adversely affected to request to participate. Additionally, those who think they have a tangible interest in the matter and can materially assist the AER in their decision are allowed to request to participate in a hearing, even if they are not considered directly and adversely affected.<sup>4</sup>

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<sup>4</sup> Alberta Energy Regulator Rules of Practice, s 9(2)(c).

The hearing panel will decide who can participate, and determine the scope of participation for those it allows to participate. Certain parties may be automatically granted participation, such as the applicant or a regulatory appeal requestor. However, automatic participation is not given those who submitted a statement of concern. Therefore, if you want to participate in the hearing you must submit a request to participate within the timeline given in the notice, even if you already filed a statement of concern.

### 11.1.2 What to consider before a hearing

A hearing takes a lot of time and is costly to all parties involved. A hearing can last from one day to several weeks, depending on the complexity of the problems to be resolved and the number of participants. If negotiation or *mediation* has failed, asking for a hearing is another opportunity to have your views heard; however, you can continue negotiations right up until the start of a hearing. Before you decide to ask for a hearing, you may want to talk with other people in your area so you can all work together (Section 2.7).

An AER hearing is a quasi-judicial process so while it is not essential to have a lawyer represent you, it is strongly advisable. Certainly, the company seeking approval for a project will employ a lawyer who will build the company's case, and try to challenge the legitimacy of yours. The company lawyer may question your eligibility to participate, such as suggesting you may not be directly and adversely affected.<sup>5</sup>

If you wish to provide additional information about your request or to refute the company's information, generally an AER hearing panel will admit additional information, unless accepting that additional information is unfair to other parties or unnecessarily delays the process. In practice, hearing panels have discretion in how rules and procedures are applied. They may try to accommodate participants who are not represented by a lawyer, while ensuring that the process is fair to everyone.

Preparation for a hearing often involves a lot of technical work. Depending on the issues, you may want to draw on a range of experts. These experts might include a geologist to review drilling plans, someone to critique the gas emission modeling work conducted by the company, an engineer to examine the specifications for the design and

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<sup>5</sup> Although the example is from 1999, see EUB Decision 99-16 with respect to the Canadian 88 Lochend application, where the company challenged the rights of interveners living in the emergency response zone. <https://www.aer.ca/documents/decisions/1999/d99-16.pdf>

materials to be used in constructing a pipe or *casing*, and a medical person to review the potential impacts of a *sour gas* release.

Most experienced lawyers will know the best experts and some will provide up-front coverage of costs for you. However, you may also want to look at the written reports of AER decisions from previous cases to give you some idea of the type of evidence presented at a hearing.<sup>6</sup>

You should contact knowledgeable lawyers and experts in the field before you apply for a hearing, so you know the costs involved and whether the experts you wish to hire will be available if the AER decides to hold a hearing. When discussing your case with these individuals, be clear that you are only inquiring, and that you are not engaging their services until it is certain that the AER will hold a hearing. Also, reach an understanding up front about the rates and terms of payment.

Where possible, engage these professionals on a contingency basis, where you agree to apply for participant funding and will pay reasonable fees if costs are awarded to you by the AER. Many professionals will agree to this if it is clear that you are a “directly and adversely affected” party and have a valid case. Some people may also agree to work for lower rates that reflect a contribution to the “public interest,” or ask only that you reimburse out-of-pocket expenses if participant funding is not granted. You can also negotiate directly with the company to ask them to pay reasonable costs or ask the AER for an advance costs award. Without establishing this understanding from the start, you may be exposed to costly professional fees.<sup>7</sup> See Section 11.1.8 for more details around hearing and participant costs.

### 11.1.3 Filing a statement of concern

If negotiations have failed and you want the AER to formally address your concerns after the company has submitted their application, the next step is to submit a statement of concern to the AER about an application or project.<sup>8</sup> It is important for you

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<sup>6</sup> AER, “Decisions.” <http://www.aer.ca/applications-and-notice/decisions>

<sup>7</sup> One hearing into a proposed well near Calgary resulted in more than \$54,000 in legal fees and \$61,500 in expert fees, although most hearings are not so costly. See ERCB, *Bernum Petroleum Ltd.: Applications for One Facility Licence and Two Well Licences*, Energy Cost Order 2013-002. <http://www.aer.ca/documents/orders/cost-orders/ECO2013-002.pdf>

<sup>8</sup> Notice of applications are found on the AER website, and may also be issued in public newspapers in your area.



to submit a statement of concern at this stage of the process, or your concerns will not be considered when the AER makes a decision on the application.

When submitting a statement of concern, you need to concisely explain why you believe you are both directly and adversely affected by the Regulator’s decision, the nature of your objection to the application, and the outcome you advocate for.<sup>9</sup> You need to include other relevant details, such as your contact info, and your location relative to the location of the proposed energy resource activity.

It is important to submit your statement of concern within the filing period and carefully make your case as to why you are both directly and adversely affected. The AER must consider all statements of concern that it accepts when making a decision on an application, and determine if it is necessary to hold a hearing. You should review recent participatory and procedural decisions that are listed on the AER website, as they will give you a good sense of how the AER decides who is directly and adversely affected, what concerns they will address, and what information is useful to the AER when deciding to hold a hearing.<sup>10</sup> Currently, the AER has a fairly narrow interpretation of who is directly and adversely affected, and typically does not include people who don’t live or own the land where the project will be located, or who cannot establish that they are negatively impacted.

The types of concerns that might be raised include potential impacts on air quality, *groundwater* and *surface water* quality; noise; waste; risk from emergency *blowouts*; and concerns about conservation and *reclamation* issues. However, it’s not enough to simply raise a concern; you must explain how you will be directly and adversely impacted based on your concern. For example, it may not be enough to say you are concerned about an emergency blowout. But, if you are required to evacuate through an unsafe zone in the event of an emergency, your statement of concern is more likely to be considered. You shouldn’t assume that the AER will have this information unless you provide it in your statement of concern. The AER considers each case on its own merits when it decides whether a hearing is required and does not work on precedent. Be sure to provide all the legitimate arguments you can and give as much detail as possible. Make it as easy as possible for the AER to follow your arguments by putting each specific concern about an application in a separate, numbered paragraph.

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<sup>9</sup> Alberta Energy Regulator Rules of Practice, s. 6(1).

<sup>10</sup> AER, “Participatory/Procedural Decisions”. <http://www.aer.ca/applications-and-notices/decision-reports/participatory-procedural-decisions>

Calling the Regulator does not count as submitting a statement, as it must be in writing. You must submit your statement before the date specified in the notice (the time for comment can be as short as 10 days or as long as 30 days). In some cases there is no time set, such as when the project is filed as an expedited application (also known as a *routine application*). In these cases, the Regulator may make a decision on the application immediately. When the project is filed as a non-expedited (or *non-routine*) application, the Regulator must wait for the period for filing a statement of concern to pass before they will approve a project. Companies are allowed to fill an expedited application if they do not require regulatory leniency, and only if there are no outstanding concerns at the time of application.<sup>11</sup> If the Regulator does not receive any statements of concern, they are very unlikely to hold a hearing. If the Regulator has already made a decision on an application, then they can't consider a statement of concern, so it is important to submit your statement as soon as possible.<sup>12</sup>

The Regulator has considerable discretion to hold a hearing, and there are very few instances where the Regulator is required to hold a hearing. Additionally, under the legislation that enables the AER, there is no longer a formal right to a hearing for those who are directly and adversely affected. Therefore, you need to make your case for a hearing as strong as possible by being as specific as possible, and presenting all the main arguments in your statement of concern. However, if the Regulator decides to hold a hearing, according to the Responsible Energy Development Act (Section C.1), you may be entitled as a directly and adversely person to be heard in a hearing.<sup>13</sup>

Any statement of concern you submit will be publicly posted on the AER website, so you should not include personal, medical, financial, or otherwise confidential information in your statement. If it is important that the AER consider your personal private information, you can request that information be held confidential. However, it may be enough for you to describe the information and offer further details if necessary. You

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<sup>11</sup> Exceptions, including routine applications, are described in Alberta Energy Regulator Rules of Practice, s 5.2(2).

<sup>12</sup> Alberta Energy Regulator Rules of Practice, s 6.2(1c)

<sup>13</sup> The Regulator may refuse to allow you to participate if they find your request to participate frivolous, vexatious, abuse of process, or without merit; if they are of the opinion that you haven't demonstrated that you will materially assist the process, have a tangible interest in the manner, not unnecessarily delay the hearing, or not repeat and duplicate evidence. The Regulator has further discretion to refuse participation. Alberta Energy Regulator Rules of Practice, s. 9.1(3).

don't have to prove you are directly and adversely affected for the AER to consider your statement of concern, just that you may be directly and adversely affected.

### 11.1.3.1 Notice of a hearing and requesting to participate

If the AER decides to hold a hearing, the branch of the AER that would approve the application forwards the file to the chief hearing commissioner. The chief hearing commissioner will send a letter people who have filed statements of concern, advising them that the file has been sent to the hearing commissioner's office.<sup>14</sup> A hearing panel will be assigned to the file, and if considered beneficial, a second panel will be assigned to conduct an ADR process.<sup>15</sup> The hearing panel and the ADR panel work separately, to avoid unduly influencing the hearing process if it proceeds.

Once the hearing panel believes the matter is ready to proceed to a hearing, it will issue a notice of a hearing. The notice will be sent to all those who submitted a statement of concern and to all those listed in the application, and will be posted on the AER's Notices web page.<sup>16</sup> Additional information and documentation will be posted on the AER's website.<sup>17</sup> The AER may also publish notices in local or provincial newspapers. The notice will outline relevant details about the hearing, such as the subject of the hearing, where to see copies of the relevant documents to the application, and how to request to participate.

Even if you have submitted a statement of concern for the original application, you must submit a request to participate, also known as a written submission, within the time laid out in the hearing notice. You should submit:

- a copy of your statement of concern (or an explanation as to why you didn't file a statement of concern)
- an explanation of how you are directly and adversely affected by the decision of the AER

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<sup>14</sup> This is not a notice of a hearing, which will be announced at a later time.

<sup>15</sup> This ADR differs from earlier stages of ADR, in that they are conducted by hearing commissioners. If ADR had been conducted before the file was sent to the Chief hearing commissioner, then some AER staff from the previous ADR process may be included.

<sup>16</sup> Alberta Energy Regulator, "Notices." <http://www.aer.ca/applications-and-notices/notices>

<sup>17</sup> Almost all hearing and the associated materials will be posted on this search tool. Sometimes you may see materials for a potential hearing that has not had a notice of hearing issued. Alberta Energy Regulator, "Proceeding Search"

[https://www3.eub.gov.ab.ca/eub/dds/eps\\_Query/proceedingSearch.aspx](https://www3.eub.gov.ab.ca/eub/dds/eps_Query/proceedingSearch.aspx)

- the outcome of the application that you advocate for
- how you intend to participate in the hearing
- evidence of your efforts to resolve the issues that you are bringing up in the hearing.

If you are representing a group or association, you should explain the nature of your membership with that group. See the AER's Rules of Practice to look over everything you are expected to include, to ensure your concern is accepted by the Regulator.<sup>18</sup>

If you are not considered directly and adversely affected, you can still apply to participate in a hearing. For example, landowner groups, or *residents* who live outside of a notification zone, may be granted participation status. When applying, you need to be careful to explain the nature of your interest and why you should be allowed to participate. Additionally, you need to elaborate on how your participating will materially assist the hearing panel to make its decision; what tangible interest you have in the subject matter; and how your participation won't delay the hearing or duplicate evidence of the other parties.<sup>19</sup> The panel has the ability to grant partial participation and may limit your participation to an electronic submission, or determine the issues you are allowed to speak to.

Even if you did not submit a statement of concern, you may still be allowed to participate. It is best to respond to the Notice of Hearing and make a written submission. If you did not submit a request to participate, you can still attend the hearing, however you will not be permitted to submit any evidence or make a submission.

Before preparing and submitting your request, it is useful to review the Alberta Energy Regulator Rules of Practice (Alberta Regulation 99/2013), and *Manual 003: The Hearing Process for the Alberta Energy Regulator*. The rules set out the key steps that you must follow in preparing and submitting a request, and what the Regulator will consider in deciding a hearing. The Manual was written to assist participants in AER hearings. Additionally, you can contact the hearing services office, or attend an information session if you are unclear about the process.

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<sup>18</sup> Alberta Energy Regulator Rules of Practice, s 9.

<sup>19</sup> Alberta Energy Regulator Rules of Practice, s 9.

### 11.1.4 The pre-hearing

Once the AER decides to hold a hearing, it may schedule a pre-hearing. A pre-hearing sorts out details such as the date, time and place of the hearing, submission deadlines, and whether an information request is necessary, and will determine the time available for each party to present evidence and cross examine at the hearing. It will also determine the procedures to be used, and make arrangements for the exchange of exhibits or submissions before the hearing itself begins. The AER tries to avoid postponing hearings to avoid undue delays for all parties, but if you are concerned about the timing or any other process you can make a written request to the hearing panel outlining your concerns and your proposed alternatives. If, for example, you do not think there is enough time to get expert witnesses by the date scheduled for the hearing, you could ask for the hearing to be set for a later date. At a pre-hearing, the AER may encourage participants to join with other local interveners to prepare a joint submission. They will also discuss costs and how to submit a request for advance costs. The AER can choose to hold a hearing electronically (submitting files online), or orally (in person). If the hearing is done in person, the AER will usually plan to hold it as close to the project and participants as possible. Following the pre-hearing, the AER will send all those who attended a written memorandum of decision about the issues dealt with at the pre-hearing.

### 11.1.5 Submissions and preliminary steps in the AER hearing process

Usually the AER hosts a hearing information session, which explains the process and allows participants to ask questions. Additionally, the AER may schedule a pre-hearing to discuss details of the process, and address scheduling and logistical items (Section 11.1.4). The AER will send a letter to all hearing participants with a schedule for making submissions to the hearing panel.

Before you prepare your submission you should review the hearing materials, which are the documents the hearing panel uses to make its decisions. These include all the application materials, relevant hearing correspondence, and submissions. Once the notice of hearing is issued the applicant is required to provide a copy of the hearing materials to anyone who requests it. You can also contact Hearing Services who can assist you to get a copy of the hearing materials.<sup>20</sup>

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<sup>20</sup> AER hearing services, [hearing.services@aer.ca](mailto:hearing.services@ aer.ca)

For an example of a submission, see Appendix 3 of Manual 003: The Hearing Process of the Alberta Energy Regulator.

As soon as you know there will be a hearing, you should start preparing your written submission. A written submission is the detailed description of the argument you will be presenting to the AER during the hearing, and is different than the request to participate and a statement of concern. This document should contain the following elements:<sup>21</sup>

- The outcome of the application that you advocate for. At this point, you should indicate whether you are averse to (you oppose any approval), non-averse to (you are not necessarily opposed to an approval but you have issues that you think the AER should consider in making its decision), or in support of the project.
- Reasons why the AER should choose the outcome you are advocating for.
- The facts you plan to prove or rely on in presenting your argument to the AER panel.
- Details about the extent of testimony and any expert reports or evidence you will be including.
- A list of witnesses that you intend to provide evidence at the hearing.

It is very important in your submission to carefully outline all the evidence or information you want to include in the hearing, as hearing commissioners will only consider information in the hearing itself. If you plan to engage a lawyer or other experts, you should contact them immediately to tell them when the hearing will be and make arrangements for hiring them. If you think the hearing date does not provide enough time for you and your experts to prepare your case, you can ask the hearing panel to postpone the hearing date. The AER decides each case on its merit, weighing the arguments for postponement against the parties who may wish to proceed as soon as possible.

You may also want to submit a request for advance payment of participant funding (Section 11.1.8).

### 11.1.6 Evidence to submit at a hearing

The evidence that you, your lawyer or your experts submit will depend on the nature of your objections. It is advisable to get as much relevant evidence as possible and to

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<sup>21</sup> Alberta Energy Regulator Rules of Practice, s 9.2.

provide detailed information to back up your argument. You may want to ask your experts to re-evaluate information submitted by the company.

Remember that the hearing panel can only make its decision based on the information on the record. This includes the hearing record (application materials and submissions of all parties) and the transcript of the oral hearing. The hearing panel must make its decision based on the current regulatory framework such as the legislation, regulatory requirements, and government policy. You or your lawyer should understand the framework so you can understand what the panel needs to consider and provide evidence and argument to persuade the panel that your desired outcome is consistent with the regulatory framework and the best outcome. Past AER decisions are available on the AER website and show what evidence previous hearing panels have found valuable or not valuable.

The types of issues that the AER deals with during a hearing and may be relevant for your case include:

- the need for a well, pipeline or other facility
- the specific location of a well
- *flaring* and air quality
- potential *hydrogen sulphide* release rate, in the case of a sour gas well or pipeline
- drilling, completion and production considerations for a well
- public safety risk assessment
- emergency response plans (ERPs)
- inadequate notification or public consultation
- access roads
- adverse land use impacts
- corrosion of pipelines
- the future integrity of a pipeline system that has already shown corrosion and leaks
- reclamation and *remediation certificates*
- water licences
- potential for cumulative health and environmental impacts of multiple sources on a region or localized area (however the scope of hearings is usually more narrow)

Be sure to outline your specific concerns (e.g., risks to your family, livestock, water or soil quality). Pictures showing the proximity of your home, livestock or outbuildings to the proposed facility will help the AER visualize your situation and understand why you are concerned. If appropriate, support your claims by providing health records of

individuals who are asthmatic or suffer any ailment that might be aggravated by the proposed operations. If you are submitting personal and private information that you do not wish to be made public, you can make a confidentiality request.

You may want to include evidence about a company's past record and can ask them for their compliance record.

Information about AER closure or *abandonment* orders, environmental protection orders, or other enforcement decisions are available on the AER website,<sup>22</sup> and by contacting the AER inquiries line (Section A.2.4). If you are looking for information on reclamation certificates, environmental protection orders, or anything issued under *specified enactments* (Section C.3), you may also contact the Alberta Environment and Parks for any decisions prior to the creation of the AER, if you're having trouble finding it through the AER.<sup>23</sup> If a company had been issued an environmental protection order by Alberta Environment and Parks prior to the AER, the Environmental Law Centre (Section B.3.2) has copies of all orders that you can obtain for a small fee.

If you cannot obtain information about a company from the company itself or by asking the appropriate person at, for example, the AER or Alberta Environment and Parks, you may want to try getting it through a Freedom of Information request (Section A.8).

If you are concerned about air quality, you might want to hire an expert to critique the company's emissions modeling data for gases and other contaminants that can be emitted from flares. It is important to look at both the maximum and average values of gas emissions and to compare the predicted values with *Alberta Ambient Air Quality Guidelines*.<sup>24</sup>

Dispersion modeling is especially important for sour gas wells and is one of the main assessment tools used to design an ERP for a well or other "sour" facility. Modeling requires information on the hydrogen sulphide (H<sub>2</sub>S) content of the gas and the release rate expected from the well. The modeling should consider the frequency and strength

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<sup>22</sup> The Compliance Dashboard is updated daily, and can be searched by company name. Alberta Energy Regulator, "Compliance Dashboard."

<http://www1.aer.ca/ComplianceDashboard/index.html>

<sup>23</sup> You can contact the compliance support team at Alberta Environment and Parks, and they may have a more complete compliance history pre-dating 2013, before the AER took over environmental regulatory responsibilities for oil and gas activity.

<sup>24</sup> Alberta Environment and Parks, "Ambient Air Quality Objectives."

<http://aep.alberta.ca/air/legislation/ambient-air-quality-objectives/default.aspx>



of prevailing winds (based on information from the nearest meteorological station) and the local topography because pure H<sub>2</sub>S is slightly heavier than air and the sour gas may concentrate in hollows. The output is a prediction of the concentration of H<sub>2</sub>S at various distances from the source, normally under worst case conditions. If your independent expert finds that the modeling is unsatisfactory, you can request the company to modify its modeling or, if funds are available, get your expert(s) to create their own model.

If you are concerned about the possible impact on your water supply, you should get your well tested and submit that information at the hearing to provide baseline evidence (Section 8.4.1). If the safety hazard created by truck traffic is a concern, you may want to include details on the number and times that school buses, pedestrians or cyclists use the same road.

Remember that the AER cannot deal with issues of compensation; this issue must be brought before the Surface Rights Board (Section 10.3).

It helps to offer the AER ideas as to how a particular issue could be resolved or mitigated to an acceptable level. Remember that, while the AER has the responsibility to impartially weigh the various points of view in rendering its decision, the AER's mandate is to allow for hydrocarbon development and will seek to permit the development to proceed while lowering the risk to public health and the environment as much as "practically" possible, especially where these activities meet existing AER regulatory requirements and are consistent with government policy. If you believe that a project should not proceed under any circumstances then you should tell the AER this, and you will need to present your best arguments as to why the benefits do not outweigh the risks for this result. However, if you are seeking higher safeguards for health and environmental safety, then describing possible means to do this gives the AER ways to resolve the dispute that meet the needs of all parties.

### 11.1.7 The hearing

Once the formal hearing begins, a panel of one or more AER hearing commissioners listens to the views and arguments of all parties. The process begins with opening remarks and dealing with any preliminary matters. After opening remarks, they will hear first from the company (always referred to as "the applicant"). The applicant will usually have a witness panel that will speak to and be able to answer questions about their evidence. Then other participants can question the applicant or witness panel, as can AER staff and hearing panel members. Following this, the other participants will have the opportunity to present their own cases and witnesses in turn. After each

participant has presented their arguments, the applicant is given an opportunity to cross-examine. After each party has presented their position and been cross-examined by the other parties, the AER may ask additional questions of the other parties. Once all participants have presented their evidence and the cross-examination is completed, the parties present their final arguments. The AER will then adjourn the hearing to deliberate on its ruling. The AER requires that all evidence presented in the hearing process must have been provided according to the schedule of submissions to the hearing; new evidence introduced late in the hearing process may not be permitted. For more details about each step in the hearing, see *Manual 003: The Hearing Process for the Alberta Energy Regulator*.<sup>25</sup>

The AER may take several weeks and up to 90 days to reach a decision. This will then be published as a decision report. Within 90 days of the hearing, a copy of the decision document will be sent to those who participated in the hearing, or to their lawyer, and be published on the AER website.<sup>26</sup> If a hearing has been completed, the AER's decision is final and the opportunity to appeal is very limited (Section 11.1.9).

AER hearings are transcribed by a court reported, and are made available at the AER library in Calgary. Reviewing transcripts of previous hearings may be helpful for a party or a lawyer preparing to cross-examine a company. If you have to purchase a transcript, you can include this in your cost claim (Section 11.1.8).

### 11.1.8 Funding and participant costs

Hearing participants can apply for costs to compensate them for the expenses they incur when preparing for, and participating in, a hearing before the AER. The AER may award costs to anyone who it allows to participate in a hearing.<sup>27</sup> The Rules of Practice outline a number of factors that it may consider when deciding whether to grant costs, and it would be beneficial for you to know what the AER may decide to cover.

Many of the considerations are different from the former ERCB cost considerations, which focused on the type of contributions participants made, the usefulness of their evidence and participation, and their willingness to cooperate with other participants. Now there are many new considerations that Regulator may consider, such as whether the participant was willing to attend an alternative dispute resolution, or the extent of

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<sup>25</sup> *Manual 003: The Hearing Process for the Alberta Energy Regulator*, s. 10.

<sup>26</sup> *Manual 003: The Hearing Process for the Alberta Energy Regulator*, Appendix 4.

<sup>27</sup> Alberta Energy Regulator Rules of Practice, s 58.1.

their efforts to resolve issues with the applicant beforehand. Notably, there is an emphasis that the Regulator may consider if there is a compelling reason for the participant to bear their own costs, and whether the participant has made an adequate attempt to use other funding sources.<sup>28</sup>

Full details about applying for costs are set out in AER Directive 031: REDA Energy Cost Claims, including outlining the different cost claim forms that are necessary to complete.<sup>29</sup> As Directive 031 explains, the costs have to be

- reasonable and directly related to the hearing
- actual expenditures incurred and paid out of pocket by the participants or, in some cases, other costs for which there was no actual out of pocket expense (such as an honorarium for participation in a hearing)
- properly documented, with receipts for all costs incurred.

The AER may award costs incurred when the hearing participants engage a lawyer or a consultant who helps provide evidence for the hearing. Additionally, it may consider other associated costs of a hearing such as accommodations, transportation, and meals, meeting room rentals, and long-distance phone calls.<sup>30</sup> The AER may award basic participant costs based on an honorarium of \$100 per half day of a hearing. Merely attending the hearing does not qualify for costs, but a participant who takes an active part in a hearing, e.g., by giving evidence and being cross-examined, may claim for time spent at the hearing, as outlined in Manual 003 and Directive 031. This may also include public interest groups or associations, if the hearing panel has granted them participation in the hearing.

The AER will usually only cover costs incurred after a notice of hearing is given, but there may be a situation where the AER considers it reasonable for some costs to accrue before a hearing notice is given.<sup>31</sup> Additionally, the AER may also grant advance funding to enable you to engage the experts you need for a hearing. If you submit such a request you will need to provide a detailed estimate of the costs you expect to incur and, if appropriate, why this information is needed for the hearing. You will still have to prove afterwards, with receipts, that those costs were actually incurred. Section 4 of Directive 031 outlines interim costs in more detail.

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<sup>28</sup> Alberta Energy Regulator Rules of Practice, s 58.1.

<sup>29</sup> AER, Directive 031: REDA Energy Cost Claims (2016). AER Directives are available at AER, “Directives.” <http://www.aer.ca/rules-and-regulations/directives/>

<sup>30</sup> *Manual 003: The Hearing Process for the Alberta Energy Regulator*.

<sup>31</sup> *Manual 003: The Hearing Process for the Alberta Energy Regulator*, 13.

The applicant is responsible for covering the costs of the participants. The AER does not review every cost claim submitted to them after a hearing. When a cost is in dispute between the participant and the applicant, then the AER will review that aspect in dispute. Otherwise, the AER will expect the parties to act in good faith, but can audit a cost claim at any time at its discretion.<sup>32</sup> After the AER has awarded costs, the applicant must pay the participant within 30 days, or they will be subject to enforcement measures by the AER.<sup>33</sup>

For more details on claimant costs, please refer to Directive 031 to help you interpret the section of the AER Rules of Practice that deals with costs. It is also useful to review previous cost order decisions made by the AER to better understand criteria used to determine what is determined to be acceptable in other hearings.<sup>34</sup>

### 11.1.9 Post-decision follow-up

Following a hearing or other decision, the AER expects the company to comply with the decision. Conditions set in the hearing decision may also be incorporated into the company's licence or permit. In some cases, a company may make commitments to interveners that are not specifically spelled out in the licence or permit.

If you have any evidence that a company is not complying with these commitments you should bring this to the attention of the AER (Section A.2.1). The AER will then decide on the appropriate action, which will be determined by the severity of the infringement.

It is also a good idea to keep an ongoing record of any problems you experience as a result of a company's activities, even if the company is acting in accordance with its licence or permit. You then have evidence that you can submit to the AER at a later date, should the company want to extend, amend or renew its activities on your land or in the area.

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<sup>32</sup> AER, *AER Bulletin 2014-07* (March 6, 2014). <http://www.aer.ca/documents/bulletins/AER-Bulletin-2014-07.pdf>

<sup>33</sup> AER, Directive 031, section 9.

<sup>34</sup> AER, "Cost Orders." <http://www.aer.ca/data-and-publications/orders/cost-orders>

### 11.1.10 Reconsiderations and legal challenges to hearing decisions

When the AER has made a decision after a hearing, it is final.<sup>35</sup> You cannot appeal the actual decision to the AER if you do not like it. An appeal on the AER decision made by a hearing panel can only be made to the Alberta Court of Appeal on matters of law and jurisdiction.<sup>36,37</sup> Any appeal must be made within one month of the date on which the decision was issued by the AER.<sup>38</sup> Sometimes several days elapse between the AER signing the decision and the actual announcement, so check the deadline carefully. Section 45 of REDA sets out exactly what is required in the appeal process. When preparing for an appeal, it may also be helpful to review the transcripts of other cases that have gone to appeal.

The AER has the power to confirm, vary, suspend, or revoke any decision that it has made, which is considered a reconsideration. Should you discover new evidence not available at the time of the initial hearing, you could ask the AER to reconsider its decision, citing section 42 of REDA.<sup>39</sup> This situation, in which a hearing is held after the AER has approved a project, might arise where a company did not fully inform the public about a proposed development before applying to the AER for approval. The AER might then issue a licence or permit without realizing that there were serious public concerns. Other grounds for reconsideration include if substantial new information has come to light that is pertinent to health and safety or to environmental aspects of the approved project.

You can request a reconsideration on any AER decision, made with or without a hearing. The AER rarely reconsiders its decisions, so it is important to carefully construct your case to make the best argument as to why new facts or information could have had an impact on the hearing panel's decision. If the Regulator has decided to reconsider its decision, it can do so with or without holding a hearing.

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<sup>35</sup> *Manual 003: The Hearing Process for the Alberta Energy Regulator*, s. 12.1.

<sup>36</sup> Alberta, Responsible Energy Development Act, SA 2012 c R-17.3, s 45.

<sup>37</sup> Decisions made without a hearing may be appealable by an eligible person, under section 36 of the Responsible Energy Development Act.

<sup>38</sup> *Manual 003: The Hearing Process for the Alberta Energy Regulator*, s. 12.2

<sup>39</sup> Responsible Energy Development Act, s 42

## 11.2 Regulatory appeals for AER decisions made without a hearing

Depending on the type of approval, AER decisions that were made without a hearing can be challenged by requesting the AER to conduct a regulatory appeal of the decision.<sup>40</sup> Any decision made by a hearing panel cannot be appealed to the AER, but you may submit a request for reconsideration to the AER, which could lead to a hearing (see Section 11.1.10).

In addition to requesting a reconsideration, you may be able to request an appeal on a decision defined as a ‘appealable decision’ under REDA section 36. Your eligibility to appeal depends on the type of decision.<sup>41</sup> Examples of decisions that may be appealed if they were made without a hearing include:

- An approval or an amendment, addition or deletion of an application under the Environmental Protection and Enhancement Act
- The issuance of an environmental protection order
- The issuance of a reclamation or remediation certificate
- An amendment or issuance of an approval or a renewal of a licence that formerly was a public review under the Water Act
- Any decision of the Regulator under an *energy resource enactment* (see Section C.3)

The length of time that you have to appeal varies with each type of decision.<sup>42</sup> In the case of a decision by the Regulator to issue an approval under the Environmental Protection and Enhancement Act (EPEA), you must appeal within 30 days of an approval being given (EPEA, section 91(4)(c)), though there are different time limits for other appeals. In the case of a reclamation certificate, the company, or any person who has received a copy of the reclamation certificate, has up to a year to file a notice of appeal (EPEA, section 91). In a case where the Regulator refused to issue a reclamation certificate, the company also has 30 days to appeal. The AER also deals with appeals

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<sup>40</sup> Responsible Energy Development Act, s 36.

<sup>41</sup> An “eligible person” is a someone who is directly and adversely affected by an appealable decision, or eligible to appeal under specific clauses of EPEA, the Water Act, or the Public Lands Act if made without a hearing (see Appendix C for a description of these Acts). For a description of an ‘eligible person’ see Responsible Energy Development Act, s. 36.

<sup>42</sup> Appealable decisions and time limits are summarized at AER, “Appeals.” <http://www.aer.ca/applications-and-notice/appeals>

against other AER decisions, including enforcement orders, environmental protection orders, and the designation of a contaminated site. A company is usually more likely to bring an appeal against such decisions, but a landowner may want to take part in the appeal process, to tell the AER why it should not revoke a decision or order, for example.

An appeal to the AER does not usually prevent a company from proceeding with any action allowed by the approval that is being appealed. The person(s) appealing the decision must request a “stay” if they want a project put on hold. While the AER will consider an application for a stay, it is not automatically granted. The AER can only consider granting a stay where it is requested.<sup>45</sup>

If the Regulator decides to proceed with an appeal, it will proceed to the chief hearing commissioner, who will establish a panel. Alternatively, the Regulator may encourage the issue to be dealt with through its Alternative Dispute Resolution process (Section 2.4.1).

## 11.3 Surface Rights Board procedures and hearings

The powers of the Surface Rights Board are set out in the Surface Rights Act and the Exploration Dispute Resolution Regulation (Section C.4.1). The process often starts when a company applies to the board for a right-of-entry order because they have failed to reach agreement with a landowner before receiving an approval from the AER (Section 10.3.1).

Or, once a right-of-entry order has been issued, the board may hold a compensation hearing for both right-of-entry compensation and damages, or an objection hearing. Both types of hearings are described in Section 11.3.3. Additionally, a landowner or occupant can reopen negotiations with the company and negotiate a *private surface agreement*. Additionally, they can request a dispute resolution conference (DRC) to resolve additional considerations, facilitated by a Surface Rights Board member. A dispute resolution conference is similar to the AER’s ADR process, and may be initiated before a hearing is scheduled.

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<sup>45</sup> Responsible Energy Development Act, s. 39 (2).

### 11.3.1 Right-of-entry orders by the Surface Rights Board

If negotiations between a landowner/occupant and a company fail, yet the AER has decided to issue the company a licence (with or without a hearing), the company can apply to the Surface Rights Board for a right-of-entry order after they have received an approval from the AER. As long as the AER has provided a licence, an application for a right-of-entry order is a formality, as the Surface Rights Board will not refuse entry.

After the board receives a right-of-entry application, the company must serve a copy of the application to the landowner. However, if the landowner or occupant believes they have valid objections, they can refuse to sign and appeal to the Surface Rights Board for a hearing (Section 11.2), although according to the Surface Rights Board such hearings are rarely held for objections to right-of-entry orders.<sup>44</sup> Any initial objection must be related to something other than compensation, as monetary concerns are dealt with in the next stage of the process. If no issues are raised, the Surface Rights Board will issue a right-of-entry order no earlier than 14 days after the application has been provided to the landowner or occupant. After the Surface Rights Board has issued the order, and if the issues haven't been settled through private negotiations, the Board will set a date for the compensation hearing.

When you receive a company's application for right of entry and you still have outstanding objections, you should immediately (within the 14 day window) file an objection with the Surface Rights Board to the right-of-entry order, and ask the Surface Rights Board to hold an objection hearing. Previous decisions from the Surface Rights Board have held that you cannot challenge the AER's decision on its technical legitimacy, but objecting to a right-of-entry order may allow you an opportunity to capture in writing additional requirements that the Board can include in its decisions; however, this is certainly not guaranteed.

As explained in Section 10.3, even if a landowner and company are close to reaching an agreement on entry and the amount of compensation, a landowner may request that a company obtain a right-of-entry order from the SRB. The board will issue a right-of-entry order as requested, then issue a board compensation order to formalize the amount of compensation the company and landowner have agreed to. This has mainly fallen out of practice, but remains a way for landowners to have the agreement additionally legitimized through the Surface Rights Board.

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<sup>44</sup> Surface Rights Board, "Objections to Right of Entry."  
<http://surfacerights.alberta.ca/ApplicationTypes/RightofEntry/ObjectionstoaRightofEntry.aspx>



### 11.3.2 Types of Surface Rights Board hearings

The main type of hearing held by the Surface Rights Board is a compensation hearing. Compensation hearings are scheduled automatically by the board after a right-of-entry order has been issued. In the meantime, the company can start building the access road, well or pipeline.<sup>45</sup> However, the company is required to pay the landowner the full entry fee and 80% of the compensation offered in the *last written* offer — not necessarily the *last best* offer — before they start operations (Surface Rights Act, section 20). The compensation hearing process is described in Section 11.3.3.

Objection hearings are rare, but if the Surface Rights Board holds an objection hearing for a right-of-entry order,<sup>46</sup> the company cannot enter the land prior to the hearing. As noted previously, the reasons for objection must not be related to compensation, and should instead focus on any technical failings in a company’s proposed development. Although the Board will not dismiss an approval, an objection hearing is an opportunity for you to seek additional conditions on the agreement. Unlike compensation hearings, objection hearings are typically conducted through writing rather than an oral process.<sup>47</sup>

The Surface Rights Board may also hold proceedings to resolve a dispute between a company and a landowner/occupant about any damages done by a company, where damage has been done outside the area covered by the lease or *right-of-way* agreement (Surface Rights Act, section 30(2)(c)). As indicated in Section 10.3.3, claims must be brought to the Surface Rights Board within two years and the total amount of the claim must be for less than \$25,000.<sup>48</sup>

Prior to any hearing by the Surface Rights Board, there may be a dispute resolution conference (DRC) facilitated by a Surface Rights Board member, which may allow you to come to agreement on terms that are outside the jurisdiction of the Surface Rights Board. If the parties come to an agreement through the DRC process, this agreement may be formalized by the Surface Rights Board in a written decision.

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<sup>45</sup> The only exception is when the Surface Rights Board holds an objection hearing.

<sup>46</sup> Alberta, Surface Rights Act, RSA 2000, c S-24, s 15.5.

<sup>47</sup> “Objections to Right of Entry.”

<sup>48</sup> If an unresolved claim for damages exceeds \$25,000, you may need to sue the company to obtain compensation. Companies may try to settle out of court. Out-of-court settlements often have a condition that the parties cannot publicly reveal the terms of the settlement.

### 11.3.3 The compensation hearing process

This section focuses on the compensation hearings that are held when a landowner and a company are unable to agree on compensation and the Surface Rights Board has issued a right-of-entry order.

While a hearing before the AER is a rather formal process, the Surface Rights Board tries to make it as easy as possible for individuals to present their own case. The board meets in different locations across the province, as close as possible to the site, so it will usually not be necessary to travel to the main office in Edmonton for a hearing. It is also possible to have your lawyer or a personal associate represent you at the hearing; if the representative is personal, you must fill out an Appointment of Personal Representative form and submit it to the board.<sup>49</sup>

Before the compensation hearing begins, the board will hold a Dispute Resolution Conference by telephone to see if the parties can agree on compensation before proceeding to the main hearing. If agreement occurs, the hearing process ends immediately and a board compensation order can be obtained. If not, a mutually convenient date will be determined for the hearing.

At the hearing, you must tell the board members why you object to the last offer from the company, and why you think the compensation being offered by the company is insufficient. It is helpful to have your ideas on paper and the board does prefer a written statement. Provide the board with any evidence you have, such as the value of recent land sales and copies of access agreements for similar projects with other landowners that provide greater compensation. When calculating the value for loss of use, it helps to have receipts for the costs of inputs and to document revenue from sales and your estimated net return. If the board has held previous hearings in your area, it could be useful to read the board decisions and perhaps use them as evidence.<sup>50</sup> Provide all the evidence you have, as the board has to base its decision on evidence. The board will request five copies of all documents — one for each of the three board members, one for the file, and one for the company.

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<sup>49</sup> Available at Surface Rights Board, “Forms.”

<http://surfacerights.alberta.ca/ApplicationTypes/BoardReview%7CRequestforReconsideration/Forms.aspx>

<sup>50</sup> Surface Rights Board, “Decisions.” <http://surfacerights.alberta.ca/Decisions.aspx>

If you are unable to attend the hearing and you have no one else to represent you, you must send the board your written statement 14 days in advance of the hearing, or request an adjournment.<sup>51</sup>

If construction of the well, access road or pipeline is completed before the hearing,<sup>52</sup> you may wish to take photographs showing the extent of any damage, although members of the Surface Rights Board may inspect the site. The company will also provide exhibits at the hearing.

When the hearing is over, the board will make a decision and issue the compensation order. The amount of compensation ordered by the board may be more or less than the amount offered by the company. If it is less than the preliminary amount already paid by the company, the landowner will have to give back the difference.

A separate hearing is usually held for each person who refuses right of entry to a company. In the case of pipelines, however, when several people raise objections, the board may request the landowners to join in one hearing as this will lead to a more efficient discussion. As an individual landowner, you may still ask for your own case to be heard separately.

For more information about the hearing process, visit the Alberta Surface Rights Board website, or contact them via email or telephone (Section A.3.1). You may also wish to consult the Surface Rights Act or the Surface Rights Board Rules.<sup>55</sup>

### 11.3.4 Cost of a Surface Rights Board hearing

The board may award costs for a compensation hearing to a specific party, not necessarily just the landowner. This depends on a number of factors including complexity of the hearing, whether a party delayed the process, the use of lawyers, and source of costs.<sup>54</sup> The Surface Rights Board may deal with the cost award at the hearing. It is thus advisable to bring any receipts and other evidence of costs and the time involved in preparing for the case to the actual hearing. Unlike the AER, the Surface

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<sup>51</sup> Surface Rights Board, *Surface Rights Board Rules* (2010).

<http://surfacerights.alberta.ca/Portals/0/Documents/Right%20of%20Entry/SURFACERIGHTSBOARDRules.pdf>

<sup>52</sup> Construction could have been started as a result of the right-of-entry order issued by the Surface Rights Board, while waiting for the compensation issue to be addressed.

<sup>53</sup> *Surface Rights Board Rules*.

<sup>54</sup> *Surface Rights Board Rules*, s. 31.

Rights Board has not published special instructions about how to apply for compensation of costs incurred.

Additionally, the Surface Rights Board may issue a cost award for preliminary costs that occur before and outside of the hearing, even if compensation is settled between parties privately. This occurred in the case where both the company and the *lessor* settled on the amount of compensation for the project, but did not agree on the cost award for a landowner hiring a representative.<sup>55</sup> Although the Surface Rights Board was not involved in determining the rate of compensation, it found that awarding reasonable costs associated with negotiating a private surface access agreement was consistent with the principles of the Surface Rights Board. Particularly, awarding reasonable private costs encouraged parties to privately resolve their disputes, allowed landowners the benefit of representation, and made landowners “whole” when negotiating an agreement primarily for the benefit of companies seeking surface access.<sup>56</sup>

### 11.3.5 Rehearing

A landowner may ask the Surface Rights Board for a rehearing if the damage done by the company is greater than originally expected, or if they believe they have a legitimate complaint with the hearing process. For example, a rehearing might be possible in the case of a pipeline where construction was still underway at the time of the hearing and unexpected damage occurred after the board decision.

### 11.3.6 Appealing a Surface Rights Board decision

Either the company or landowner/occupant may appeal a decision made by the Surface Rights Board to the Court of Queen’s Bench. The appeal can relate to the amount of the compensation order or to the person to whom the compensation is payable, or both (Surface Rights Act, s.26). The appeal must be made within 30 days of the date on which the compensation order was received. Section 26 of the Surface Rights Act sets out exactly what is required with respect to an appeal. It is also possible to appeal a decision made by the Court of Queen’s Bench up to the Court of Appeal.

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<sup>55</sup> Surface Rights Board, *Apache Canada Ltd. v Collier Enterprises Ltd.*, 2016 ABSRB 573. <https://www.canlii.org/en/ab/absrb/doc/2016/2016absrb573/2016absrb573.html>

<sup>56</sup> *Ibid*, para. 32.

## 11.4 National Energy Board hearings

The National Energy Board (NEB) regulates pipelines that cross provincial or international borders. The NEB is required to hold a hearing for applications for the construction of a major interprovincial or international pipelines (known as a facilities hearing), the abandoning of a pipeline, and when there is opposition from landowners on the detailed route of an approved pipeline.

The NEB may hold two hearings on a project. The first hearing is to determine whether the construction of a pipeline over forty kilometres in length is in the public interest and to review the general route or corridor for the pipeline. The NEB decides whether to provide the company with a Certificate of Public Convenience and Necessity, so this hearing is called a certificate hearing.

Once a company holds a certificate, it will plan the detailed route of the pipeline. As with provincial energy development, the company and landowner should first try to resolve all issues through direct discussions or use of appropriate dispute resolution (see Section 2.4.1 for the similar provincial process). If problems remain with respect to the location of the pipeline or other issues (with the exception of compensation), the NEB may hold a detailed route hearing.<sup>57</sup>

NEB hearings can be written or oral proceedings and are usually held at locations in or near communities most impacted, sometimes in multiple locations.<sup>58</sup> The NEB is a quasi-judicial body and operates somewhat like a court. Its powers include the swearing in and examination of witnesses and the taking of evidence. The NEB accepts written evidence prior to a hearing and allows oral cross-examination at the hearing.<sup>59</sup>

Anyone who has a legitimate interest and wants to participate in a NEB hearing can apply by filing out an Application to Participate with the NEB. The NEB allows two categories of people to participate: those who can show that their interest is related to the outcome of the application (considered ‘directly affected’), and those who have relevant information or expertise. The public notice for the hearing will explain how to register.

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<sup>57</sup> NEB, “National Energy Board Hearing Process Handbook.” <https://www.neb-one.gc.ca/prtcptn/hrng/hndbk/index-eng.html>

<sup>58</sup> “National Energy Board Hearing Process Handbook.”

<sup>59</sup> Canada, National Energy Board Rules of Practice and Procedure, SOR/95-208, s 36. <http://laws-lois.justice.gc.ca/eng/regulations/SOR-95-208/>

There are two ways to participate in a certificate hearing. You may be asked to submit a Letter of Comment, which is written testimony that contains comments on how you will be impacted, suggestions or comments on conditions of approval, and any other information that supports your comments. Otherwise, you can participate as an intervener, which allows you to attend the oral hearing to present evidence, cross examine other witnesses, and give a final argument. Interveners must show that they have an interest in the results of a certificate hearing.”<sup>60</sup>

In a detailed route hearing, the National Energy Board Act clearly distinguishes between people who own land that the company requires for pipeline development,<sup>61</sup> and people who believe that pipeline development may negatively affect their land.<sup>62</sup> Both groups have the right to submit a written statement of objection that describes their interest in the land and their objections to the pipeline. The purpose of the hearing is not to oppose the principle of the project, but to discuss the details and logistics of the route. The company is obligated to notify anyone who was found to have legitimate concerns of the Hearing Order for the detailed route hearing.<sup>63</sup> The NEB must receive all written statements within 30 days of the public notice announcing the hearing. The NEB may also allow other people who are not interveners to present their comments.

Interveners at an NEB certificate hearing can apply for the Participant Funding Program to help cover expenses. Participants in detailed route hearings are not eligible for cost coverage under the NEB’s Participant Funding Program; however, the NEB may direct the company to reimburse hearing costs to landowners who are directly or indirectly affected by the project.

Where a right-of-way agreement has not been signed between the company and landowner, the NEB can grant a right-of-entry order allowing the company immediate access to the land, although the landowner or occupant does have the opportunity to submit a written objection.<sup>64</sup>

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<sup>60</sup> National Energy Board Rules of Practice and Procedure, s 28.

<sup>61</sup> Canada, National Energy Board Act, RSC 1985, c N-7, s 34(3).

<sup>62</sup> National Energy Board Act, s 34(4).

<sup>63</sup> NEB, *Pipeline Regulation in Canada: A Guide for Landowners and the Public* (2010).  
<https://www.neb-one.gc.ca/prtcptn/Indwnrgd/Indwnrgd-eng.pdf>

<sup>64</sup> For information about expropriation law in Canada, see Expropriation Law Centre,  
<http://www.expropriationlaw.ca>

If the project application is approved, the NEB sets and enforces conditions to ensure that the company protects the environment and ensures public health and safety. The NEB audits and inspects the company's construction activities, the operation of its system, and the company's routine maintenance and monitoring procedures.. You can find a description of the NEB's processes in *Pipeline Regulation in Canada: A Guide for Landowners and the Public*. More information is provided in Section A.12.

An NEB decision can be appealed to the Federal Court of Canada, but the appeal is limited to a point of law or jurisdiction. An appeal must be made to the court within 30 days of the NEB's decision.

Proposed pipeline projects submitted to the NEB are also subject to review under the Canadian Environmental Assessment Act, 2012 (Section A.12).

A 2015 review of the NEB by the Canadian Auditor General found that the NEB did not adequately track company implementation of pipeline approval conditions, or consistently follow up on deficiencies in company compliance with regulatory requirements, so improvements in these processes are expected in the next few months.<sup>65</sup>

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<sup>65</sup> Auditor General of Canada, *Report 2: Oversight of Federally Regulated Pipelines*, 2015 Fall Reports of the Commissioner of the Environment and Sustainable Development. [http://www.oag-bvg.gc.ca/internet/English/att\\_\\_e\\_41033.html](http://www.oag-bvg.gc.ca/internet/English/att__e_41033.html)

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