

# Directly and Adversely Affected

## Public Participation in Tar Sands Development 2005-2014

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*Will Albertans have a voice in the fate of the tar sands under the new Alberta Energy Regulator? Lessons from the previous regulatory regime suggest it will be an uphill battle.*

On April 1, 2014, the landscape of energy regulation in Alberta shifted significantly, with both fanfare and concern. With the new Alberta Energy Regulator (AER) fully taking over the former responsibilities of the Energy Resources Conservation Board (ERCB), Alberta Environment and Sustainable Resource Development (AESRD), and the Environmental Appeals Board (EAB), the Alberta government and the oil and gas industry proclaimed a new, streamlined era of responsible and sustainable energy development. On the day the transition was completed, Minister McQueen pledged a future in which the environment would be “a top priority.”<sup>1</sup> Industry will surely be watching carefully to see whether the new regulator makes the process speedier and more efficient. It will be up to Albertans to monitor whether the regulator is keeping the environmental end of the bargain.

### RESOURCE DEVELOPMENT AND CITIZEN POWER

A very big part of whether the AER will be able to deliver on this pledge is the extent to which it allows the citizens of Alberta a fair chance to effectively influence the fate of prospective energy projects, particularly within Alberta’s bitumen deposits. People acting as part of an engaged citizenry are a crucial potential check on the scale and speed of development in Alberta’s bitumen deposits.<sup>2</sup> Given the long-term economic and environmental stakes at play, Albertans—not just those who happen to be property owners, provincial politicians, bureaucrats, or investors—should be given every opportunity to engage robustly and effectively in determining the rate, scale, and conditions under which this public resource is extracted and transported.

Significant economic incentives for governments, in the form of royalties and revenues, and for companies and investors—whose returns are dependent on increased extraction—help

drive natural-resource development in Alberta. The provincial government, for example, has hitched its fiscal wagon firmly to accelerated development of Alberta’s bitumen, with just over 1/3 of its total targeted revenue growth coming from bitumen royalties (See Table 1). In light of this, the citizens of Alberta represent the only really ‘disinterested’ group in the regulatory process.

Alberta’s bitumen is a public resource. Its fate should rest in public hands. In practice, this means making the processes of project licensing, approval, monitoring, and appeal as transparent, inclusive, and deliberative as possible, and exercising a degree of caution proportional to the risks and potential benefits embodied in the resource. Unfortunately, as we show below, Alberta’s record on enabling public participation so far leaves much to be desired.

While it is true that both the federal and the provincial governments have some degree of authority over natural-resource development, we opted to look at the provincial process for two reasons. First, Alberta retains the lion’s share of the power over the disposition of resources. Alberta has the authority to accelerate, moderate, or halt the development of bitumen, and the federal government has been very hesitant to infringe on this authority, even where it has some latitude to regulate the environmental impacts of tar sands activity.<sup>3</sup> Second, the federal government moved aggressively in 2012 to limit its own capacities to regulate natural-resource development, to limit public participation in environmental governance, and to allow the provinces greater control over the Environmental Impact Assessment (EIA) process.<sup>4</sup> While Canadians have depended heavily on the Canadian Environmental Assessment Act to ensure public participation in the past, recent changes to the legislation threaten to significantly narrow this as a means of public influence.<sup>5</sup> As such, the provincial framework for public participation will become even more salient in the coming years. So, we need to ask if Alberta can be relied

**Table 1: Alberta Revenue: millions of dollars (% of total revenues)**

	2012-13 Actual	2013-14 Forecast	2014-15 Estimate	2015-16 Target	2016-17 Target	Targeted % growth 2012-17
Bitumen Royalty	3,560 (9.2)	4,774 (10.6)	5,579 (12.5)	5,962 (13)	7,040 (14.5)	97%
Crude Oil Royalty	1,918	2,311	2,019	1,852	1,676	-13%
Natural Gas and By-Products Royalty	954	802	823	779	595	-38%
Total Non-Renewable Resource Revenue	7,659	8,627	9,209	9,327	10,070	31%
Total Revenue	38,635	44,732	44,354	45,898	48,697	26%

Source: Government of Alberta, Department of Finance, Fiscal Plan Tables, Fiscal Plan 2014-17, p. 138.

upon to enable citizens to participate meaningfully—that is, to exercise power—within the process of deciding what happens in the province’s bitumen deposits.

## POWER AND PARTICIPATION

There are a couple of ways that we can look at the extent to which people or organizations exercise power. One is to look at instances of direct conflict and see who ‘wins’. In this case, we look at instances of conflict between citizens and the corporations proposing to develop bitumen projects, and see how often citizens can either stop or significantly modify the proposed development. But power is often exercised before overt conflict even appears. The kinds of conflict we can most easily see occur under established rules and systems that are themselves reflections and products of power. One easy metaphor is with elections. In the end, we all know who wins and who loses. However, the rules of the contest can favour certain contestants, or handicap others. Rules governing campaign financing, for example, or the specific boundaries of electoral districts—which are themselves the subject of conflict—confer advantages and disadvantages. Power is frequently exercised prior to any overt conflict taking place, so we have to look carefully at the rules to see who might be facing an uphill battle, who might have an unfair advantage, and who might be excluded from the battle entirely. In this case, that means looking carefully at whether the rules for citizen involvement in bitumen development set up prohibitive hurdles for citizen participation, while ensuring an easier path for corporate proponents.

## CITIZEN POWER, PRE-AER

The results of our research into the pre-2014 system suggest that the public’s engagement in the process of decision-making in relation to bitumen projects was negligible, and that this was due in considerable part to the province’s rules governing who could participate, and under what conditions. In particular, the definition of terms like ‘directly affected,’ along with prohibitive procedural requirements restricting who can be heard, seriously limited citizens’ power. Questions about these definitions and requirements remain live as the AER takes the helm of energy regulation.

Under the previous regime, proposed oil and gas development projects required tenure, access, approval from AESRD, and a license from the ERCB. Citizens could get involved in either the approvals or the licencing process.

### *Project approvals (AESRD)*

Beyond simple public notice that a project had been proposed, the approvals process became ‘participatory’ (i.e. provides opportunity for citizen power) when somebody who was likely to be ‘directly affected’ by a development project filed a statement of concern. This was a crucial step, as anyone wishing to contribute to the decision-making process beyond accessing information *must* have filed a statement. Directly affected parties had the chance to comment on the terms of reference of Environmental Impact Assessments (EIA), and could also appeal approvals granted (in part through consideration of the EIA) by AESRD Directors.

These appeals—which had to be filed within 30 days of the approval—went to the Alberta Environmental Appeals Board (EAB), which also employs a ‘directly affected’ test. When a notice of appeal was issued, the EAB checked with the involved parties to see if mediation was appropriate.<sup>6</sup> If outstanding concerns remained, a public hearing went ahead. To gain standing before the EAB, individuals must have filed a statement of concern at the outset, be ‘directly affected’, and have filed a notice of appeal on time. The onus was therefore on members of the public to constantly monitor the local papers and the departmental websites where the notices were posted in order to ensure they could file a statement of concern.

### *Licensing (Energy Resources Conservation Board)*

Licences for energy projects in Alberta were issued by the ERCB. The ERCB did not use the term ‘public involvement’ or ‘participation’, substituting instead the notion of ‘participant involvement’.<sup>7</sup> For a member of the public to become a ‘participant’ in the decision-making process, they again had to be ‘directly and adversely affected’ by the proposed project, meaning that the project potentially affected their safety, their property rights, or their bank balance. In determining whether this was the case, the ERCB considered the potential participant’s ability to demonstrate a “reasonable and direct connection between the proposed development and the rights or interests he/she believes to be affected.”<sup>8</sup> This is a very narrow definition of ‘directly affected’, and the Board’s determination of who can be heard has become more restrictive over time.<sup>9</sup> Alberta court decisions dating back to the mid-1990s have generally supported this restrictive administrative determination,<sup>10</sup> though a 2012 Alberta Court of Appeals ruling on the question of intervener funding (*Kelly vs Alberta (Energy Resources Conservation Board)*) did affirm the importance of “openness, inclusiveness, accessibility, and effectiveness” as “an end unto itself.”<sup>11</sup>

Corporations seeking project approvals were expected to contact potentially affected parties, with an aim to addressing concerns about the project, but were only required to do so for those within specifically defined radiuses from the project. Should the concerns not be resolved, there were two available options for directly and adversely affected parties to ‘participate’: Appropriate Dispute Resolutions (ADRs) and public hearings. ADR is a negotiation process, but when the affected parties were unsatisfied with the result of the ADR, a public hearing could be triggered. Anyone could register as an ‘intervener’ in a hearing, but in order to qualify for funding, they also had to prove to the Board that they had an interest in or occupied (or were entitled to occupy) land that is or may be directly and adversely affected by the Board’s decision.<sup>12</sup> Generally, the Board would hear statements from anyone that wished to express their views. However, the Board could dismiss objections based on a lack of legal standing. After the hearing, the ERCB made a recommendation to the Cabinet, which stood as the final decision maker. ERCB decisions were not subject to judicial reviews or appeals before the Environmental Appeals Board (ERCA s. 25). However, they were subject to a statutory right of appeal on law and jurisdiction to the Court of Appeal.

**TALLYING UP THE SCORE – EFFECTIVE CITIZEN INTERVENTION?**

Although the public hearing appears as the best provincial opportunity for institutionalised citizen power to stop bitumen development projects from materialising, in reality, relative to the massive environmental stakes of bitumen development, very few proposed projects go before EAB and ERCB tribunals. While an even smaller percentage of conventional oil projects go before tribunals, the scale and ecological consequences of bitumen projects would be likely to make them more contentious. There were several barriers to having a more robust public-hearing framework: access to resources needed to participate in a hearing, the requirement for interveners to file statements of concern or objections very early on in the approval and licensing process, and the strict limitation imposed through the narrow definition of standing. The result is reflected in the small number of ERCB applications that ever reached the hearing stage.

**THE ENERGY RESOURCES CONSERVATION BOARD**

A search of ERCB public hearings decision reports between 2005 –March 31, 2014 found 51 that dealt with bitumen-related projects. Eighteen did not relate to new licence applications (many were disputes between companies). Of the remaining 33 hearings, 31 projects were approved. This leaves two applications which were withdrawn following intervention by a citizen who was a) able to file a submission upon hearing that the development proposal was in the works, and b) prove that she/he would be directly and adversely affected.

<b>ERCB (2005- March 31, 2014)</b>	
New Lic. Application Hearings	33
Approved	31
Conditions attached as result of hearing	8
Objections withdrawn (ADR)	10
No intervener with standing	2
Public Interest despite objections	11
Withdrawn	2

The first was decision 2008-124, where the landowner objected to the proposal to add additional bitumen wells in close proximity to his residence, and claimed that the compensation offered was inadequate. The application was withdrawn, and the public hearing cancelled. The second was 2012 ABERCB 004, where objections to Petrobank Energy and Resources Ltd.’s application for approval to construct Phase 1 of its May River Project were filed by Conklin Metis Local #193, Chipewyan Prairie Dene First Nation, and Devon Canada Corp. A hearing was scheduled, but Petrobank withdrew its application. So, out of all of the proposals for bitumen project licences between 2005 and April 2014 in Alberta, only 2 were withdrawn following the pursuit of public hearings by citizens.

**APPROVALS AND AMENDMENTS**

Amendment, rather than outright withdrawal or denial of proposals, could also be an indicator of citizen power. If citizens objecting to projects are able to gain additional

environmental safeguards, or reduce the scale of a project, for example, then they are effectively exercising power. Thus, a sketch of the outcomes of hearings where licence applications were approved can also shed some light on the extent to which citizens were able to influence bitumen development. Of the issued licences, eight had conditions attached, mostly monitoring requirements, as a result of a public hearing. In ten decisions, the objections from the interveners were withdrawn, as all parties reached an agreement through the ADR process. These negotiations are not part of the public record, so we cannot be certain what concessions were made by either the project developer or those with concerns about the proposed project. Two hearings found the sole intervener not to have standing, therefore the applications were approved. In two decisions, the ERCB heard the objections and dismissed them on the grounds that the concerns were beyond the scope considered by the Board. What we found to be most interesting, was that in 11 decisions, the licences were issued despite concerns from interveners, following the Board’s determination that the proposed project was in the “public interest” (ERCA s. 3). However, neither an exact definition of the ‘public interest’ nor a specific ‘public interest test’ has been established in the legislation or precedent.<sup>13</sup> So, even if citizens proved that they were directly and adversely affected by a project, the Board still held a narrowly-defined public interest ‘trump card’ to approve any licence application in dispute. In effect, it was much more likely that a proponent would receive a licence despite outstanding concerns than a citizen was to have a project amended.

**THE ALBERTA ENVIRONMENTAL APPEALS BOARD**

AESRD decisions made under the EPEA could be brought before the Environmental Appeals Board (EAB). The EAB provided an avenue for participation after the authorisation phase for those who were directly affected by the decision. As of March 31, 2014, the EAB had published over 800 decision reports on its website. The Board does not summarise their decisions by the type of appeal or by sector, so getting information on bitumen-related appeals involved finding those with bitumen development companies in the decision title, and then sifting through them to find appeals related to bitumen licenses and approvals. This turned up 15 projects that sparked appeals, 14 of which were either withdrawn or dismissed. In the single remaining case, the approval was upheld, as the proponent was found to be complying with the standards set by the regulating authorities.

In sum, the EAB has not been an avenue through which citizens have been able to stop or modify development. One likely cause of this is the ‘kick and cull’ provisions.

<b>EAB (1993- March 31, 2014)</b>	
Total Appeals	823
Bitumen Related Appeals	15
Withdrawn / Dismissed	14
Approval Upheld	1
Approval Denied	0

## THE 'KICK' AND 'CULL' PROVISIONS: LIMITING PARTICIPATION

Three appeals before the EAB were dismissed because of what are known as the “kick and cull” provisions (Sections 95(5)(b) and (2)(a) of the EPEA respectively). These resulted from a 1988 panel commissioned to survey environmental law in Alberta, and recommend ways to make development proposals easier on companies—and regulators and interveners—who were allegedly overburdened with complex application processes under a multitude of statutes. The new EPEA was proposed, and the opportunity for the public to comment on it was offered, all accompanied by much trumpeting of the government’s commitment to participatory democracy. In keeping with the objective of the EPEA to avoid inefficiencies, it was suggested that two review bodies would not oversee the same issue. Therefore, the legislation was structured to dismiss complaints that had already been heard, or had the opportunity to be heard. ‘Cull’ refers to the fact that the EAB does not have to hear matters where the applicant for appeal had the opportunity to participate in a hearing conducted by the ERCB. ‘Kick’ means that the EAB “shall dismiss” a notice of appeal where the person submitting the notice “received notice of and participated in or had the opportunity to participate in the hearing or review.”<sup>14</sup> In our assessment, the ‘kick and cull’ provisions together with the ‘public interest’ determination together provided a context in which citizen power was difficult to access.

### THE AER: SIGNS OF CHANGE?

With the transition to the AER, can we expect that the channels for citizen participation are likely to open up? As the process is now under the control of a single regulatory agency, the kick and cull provisions become irrelevant. With only one process in which they might possibly engage, citizen concerns won’t be dismissed because they had the opportunity to take part in another one. There are also some signs that the AER will increase transparency by maintaining online reporting on applications and decisions.

However, the AER (and the Responsible Energy Development Act which empowers it) maintain a very restrictive stance on public participation.<sup>15</sup> The AER will still hear only those who are “directly and adversely affected” by energy projects, and this term has been interpreted in an unnecessarily narrow and restrictive way by Alberta resource management agencies. Those motivated to participate because of concerns that are not immediately financial, those whose concerns are public, and those who cannot demonstrate a threat to personal, individual interests, will still be filtered out of the process. The reign of the AER was ushered in under a government promise to streamline the regulatory process for corporate developers. However, our research suggests that the previous regulatory regime was much more heavily stacked against concerned citizens than it was against corporate developers. Albertans all have a heavy stake in whether and how bitumen is developed. Unfortunately, all signs suggest that if business as usual continues, there will be no room for consideration of a broadly conceived public interest in Alberta energy development.

- 1 Alberta Energy Regulator, “Alberta Energy Regulator Completes Transition to a Single Regulator,” News Release, March 31, 2014, accessed May 23, 2014, [www.aer.ca/about-aer/media-centre/news-releases/news-release-2014-03-31](http://www.aer.ca/about-aer/media-centre/news-releases/news-release-2014-03-31).
- 2 National Energy Board, “The National Energy Board Projects a Tripling of Bitumen Output in the Next Decade,” Canada’s Oil Sands – Opportunities and Challenges to 2015: An Update [online], 2010, accessed January 26, 2012, <http://www.neb.gc.ca/clf-nsi/rnrgynfntn/nrgyrprt/lsnd/pprntnsndchllngs20152006/qapprntnsndchllngs20152006-eng.html>. Total capital investment between 2010 and 2035 is projected at \$250 billion, up from \$10 billion in 2009. (Government of Alberta, Alberta’s Oil Sands: Economic Investment [online], 2011, accessed September 16, 2011, <http://www.oilsands.alberta.ca/economicinvestment.html>.)
- 3 Environment Canada, “Memorandum to the Minister: Oil Sands Tailing Ponds” [online], 2009, accessed July 29, 2014, [http://www.cec.org/Storage/83/8361\\_ASUB-II.pdf](http://www.cec.org/Storage/83/8361_ASUB-II.pdf).
- 4 These moves include substantial changes to the Canadian Environmental Assessment Act (CEAA), building on changes introduced in 2010, as well as changes to the Fisheries Act and the Navigable Waters Protection Act. A complete description of the reforms is beyond the scope of this paper, but on the CEAA, see M. Doelle, “CEAA 2012: The End of the Road for Federal Environmental Assessment,” *Journal of Environmental Law and Practice* 24(1), 2012: 1-17. On the Fisheries Act, see Ecojustice, “Legal Background: Fisheries Act,” 2012, accessed July 30, 2014, <http://www.ecojustice.ca/files/fisheries-act>. On the Navigable Waters Protection Act, see K. Mackrael, “Environmentalists Decry Changes to Law Governing Navigable Waters,” *The Globe and Mail*, October 18, 2012.
- 5 Evidence for the narrowing of public participation at the Federal level can be found in M. Doelle, “CEAA 2012: The End of the Road for Federal Environmental Assessment,” *Journal of Environmental Law and Practice* 24(1), 2012: 1-17; G.H. Salomans and G. Hoberg, “Setting Boundaries of Participation in Environmental Impact Assessment,” *Environmental Impact Assessment Review* 45, 2014: 69-75; A. Bond, J. Pope, A. Morrison-Saunders, F. Retief, and J.A.E Gunn, “Impact Assessment: Eroding Benefits through Streamlining?” *Environmental Impact Assessment Review* 45, 2014: 46-53. Our thanks to an anonymous reviewer for pointing out that project reviews so far under the CEAA suggest that panel reviews have continued with the liberal interpretation of the “directly affected” test adopted under the former regime.
- 6 Alberta Environmental Appeals Board, “Rules of Practice,” [online], 2008, accessed November 17, 2011, <http://www.eab.gov.ab.ca/rules.htm>.
- 7 Energy Resources Conservation Board (ERCB), “ERCB Directive 056: Energy Development Applications and Schedules” [online], 2011: 2-1, accessed January 30, 2012, <http://www.ercb.ca/docs/documents/directives/directive056.pdf>.
- 8 *Ibid.*, A-52.
- 9 Shaun Fluker, “The Right to Public Participation in Resources and Environmental Decision-Making in Alberta,” *Alberta Law Review*, 52(3), April 30, 2014. 2015 forthcoming. Available at SSRN: <http://ssrn.com/abstract=2438979>.
- 10 Fluker, forthcoming: 42-51.
- 11 Quoted in Fluker, forthcoming: 49.
- 12 ERCA s28 (1).
- 13 C.A. Low, “The ‘Public Interest,’” Section 3, “Alberta’s Energy Resources Conservation Act: Where Do We Stand and Where Do We Go from Here?” 2011, CIRL Occasional Paper #6 (Calgary: Canadian Institute for Resources Law).
- 14 EPEA 95(5)(b).
- 15 The works of Professor Shaun Fluker and Nigel Bankes on the early indicators of the AER’s position on public participation are excellent, and need no replication here. See especially Shaun Fluker, “The Right to Public Participation in Resources and Environmental Decision-Making in Alberta,” *Alberta Law Review*, 52(3), April 30, 2014. 2015 forthcoming. Available at SSRN: <http://ssrn.com/abstract=2438979>; and Bankes’ and Fluker’s blogs on the AER at <http://ablawg.ca/2014/06/03/4447/> and <http://ablawg.ca/2013/12/11/amended-rules-of-practice-for-the-alberta-energy-regulator-more-bad-news-for-landowners-and-environmental-groups/>.