

Oil Sands Emission Limit Legislation: A Real Commitment or Kicking It Down the Road?

By: Nigel Banks

Legislation Commented On: Bill 25: [The Oil Sands Emission Limit Act](#)

Alberta's [Climate Leadership Plan](#) has four key planks:

1. Phasing out emissions from coal-generated electricity and developing more renewable energy
2. Implementing a new carbon price on greenhouse gas emissions
3. A legislated oil sands emission limit
4. Employing a new methane emission reduction plan

The province introduced legislation to implement an economy-wide carbon price in June (the [Climate Leadership Implementation Act](#)) and in the resumed session this fall (2016) it has introduced Bill 25: *The Oil Sands Emission Limit Act* to implement the third objective, a legislated oil sands emission limit. This was not something that the [Leach Report](#) had recommended but here is what the Government said in making this [commitment](#):

A legislated emissions limit on the oil sands of a maximum of 100Mt in any year with provisions for cogeneration and new upgrading capacity. This limit will help drive technological progress and ensures Alberta's operators have the necessary time to develop and implement new technology that takes more carbon emissions out of every barrel and helps bend Alberta's overall emissions trajectory downward.

Alberta can't let its emissions grow without limit. But we can grow our economy by applying technology to reduce our carbon output per barrel.

The 100 Mt limit provides room for growth and development of our resource as a basis for a strong economy. Overall, Alberta's new approach will incent changes that see the number of produced barrels increase relative to associated emissions. The future production achievable within the annual 30Mt "room" in the limit will be higher than at any time in our past or present. And Alberta will be able to sell its product into global markets as one of the world's most progressive and forward-looking energy producers.

A legislated emissions limit is an unprecedented step, taken as part of new climate leadership. It can help change the debate about Alberta's most important export and the infrastructure needed to get it to market

The annual emissions limit was jointly recommended to government by Canadian and international leaders in Alberta's oil sand industry and leaders in Canadian and international environmental organizations. Government will begin immediately to

seek the advice of the industry, regulators, environmental organizations and Indigenous and Metis communities on the implementation of the 100 Mt limit.

Bill 25 delivers on this basic commitment to legislate the cap but it also contains a number of carve-outs. I think that the legislation is largely interesting for what it does not address. It is one thing to legislate the cap but how will that cap translate into decision-making by regulatory authorities and guidance to private actors? The Bill does not address these issues. This post briefly summarizes the contents of Bill 25 and then addresses both aspects (regulatory authority and guidance to private actors) of this omission.

What does Bill 25 do?

Bill 25 consists of a preamble and four sections. The Preamble references “Alberta’s role as a global leader in addressing climate change and as one of the world’s most progressive energy-producing jurisdictions” (that’s a bit rich!) and the commitments to “limiting oil sands greenhouse gas emissions”, “creating the conditions for the oil sands sector to innovate and become more globally competitive” while framing a limit on oil sands emissions “that provides room for growth and development of our resource as a basis of a strong economy by applying technology to reduce our carbon output per barrel”. All very self-congratulatory, but at the same time pragmatic and utilitarian. What’s missing from this preamble is any expression of solidarity with the rest of the world in addressing the challenge of climate change, any sense of global equity issues, and any reference to the [Paris Agreement](#) which will come into force later this week on November 4.

Section 1 sets out definitions, section 2 establishes the limit (100 Mt per year), section 3 authorizes some broad regulation-making powers (principally concerned with definitional matters) and section 4 deals with the relationship between the *Oil Sands Emission Act* and the *Climate Change and Emissions Management Act*, [SA 2003, c C-16.7](#).

Section 2 is the most significant, and, as it turns out, the 100 Mt cap is perhaps not quite as hard as might have been expected. In fact, the cap is subject to several exemptions. First, the energy portion of co-generation emissions does not count towards the cap (emissions attributable to the steam portion do). Second, upgrading emissions (defined as emissions attributable to the production of synthetic crude oil) will not count, up to a cap of 10Mt per year and then only in relation to upgraders that come on line after the end of 2015. These are the firm exceptions. In addition, section 2 creates a number of discretionary exceptions insofar as the Lieutenant Governor in Council may, by regulation, prescribe exclusion of emissions related to experimental schemes, primary production operations (which, while still to be defined, might refer to oil sands that can be produced using more conventional means of production) and enhanced recovery operations.

Section 3 establishes the Lieutenant Governor in Council’s regulation-making powers under the Act. As noted above, most of these powers are concerned with the power to prescribe or further define matters by way of regulation. The last clause of section 3 identifies a set of issues dealing with limits and thresholds which might need to be addressed in the future. The real question, however, is whether it is appropriate to punt this down the road – but more on that below. The provision confers on the Lieutenant Governor in Council the power to make regulations (section 3(h)):

... establishing and governing mechanisms to keep greenhouse gas emissions from oil sands sites within the limit established by section 2(1), including, without limitation, regulations

- (i) prescribing thresholds, including limits, triggers, ranges, measures or indices;
- (ii) establishing a system of greenhouse gas emission allowances and governing the purchase, auction, trading or retirement of greenhouse gas emission allowances or any other matter related to a system of greenhouse gas emission allowances.

Section 4 is an interpretive provision to the effect that “This Act shall be construed as forming part of the *Climate Change and Emissions Management Act*, and the *Climate Change and Emissions Management Act* shall be construed accordingly.” This is a bit puzzling. I understand that the government might want to consider all of its carbon and climate change legislation as operating *in pari materia* (much as its energy statutes do: see *Giant Grosmont Petroleums Ltd v Gulf Canada Resources Ltd.*, [2001 ABCA 174 \(CanLII\)](#)) so that all such statutes are interpreted in a mutually supportive way. But this provision seems to be saying something else. The question is why?

What does Bill 25 not do?

As indicated in the introduction, public and private actors need to know more about the implications of the cap. Both perspectives are important. Let’s start with the public actors.

If the government is serious about the cap then it must have consequences for those who have responsibilities for assessing and permitting new oil sands activities; in particular the Alberta Energy Regulator (AER). Therefore, one might anticipate that the legislation would result in consequential amendments to the relevant permitting legislation, most obviously the *Oil Sands Conservation Act*, [RSA, 2000, c O-7](#). The relevant amendments might include:

- A requirement that the AER produce an annual oil sands GHG emissions report which addresses both current emissions and emissions expected from approved projects.
- A requirement that an applicant for an oil sands approval demonstrate that the incremental effects of its project will not result in the cap being exceeded.

In addition, there are number of issues on which we all (public and private parties) require clarity. For example, do we not need to know the legal status of current emitters in the context of a cap? Do current emitters have an entitlement to a “share” of the cap? If so, is it a declining share (thereby flowing through the obligation to achieve efficiencies as the *Specified Gas Emitters Regulation*, (SGER) [Alta Reg 139/2007](#) contemplates?) If a project acquires an entitlement to a share of the cap, when does it acquire that entitlement? Is it when the project is approved? Is that entitlement assignable? Should it be assignable, or would that confer a windfall benefit on the project developer that now has an approval in hand? Should an existing operator be permitted to assign part of “its share” of the cap if it achieves efficiencies or efficiencies beyond those mandated by other legislation (i.e. beyond business as usual)? I don’t have answers to these questions, but I think that they do need to be addressed and not just left to a regulation making power.

The most obvious analogy for thinking about these issues is the *Alberta Land Stewardship Act*, (ALSA), [SA 2009, c A-26.8](#)). The drafters of that legislation knew that they needed to provide a

regional plan with some teeth once it had been adopted. A plan, like a cap, is neither self-policing nor self-implementing.

ALSA demonstrates two useful legislative implementation techniques: (1) consequential amendments, (2) and adoption of trumping provisions. As for consequential amendments, the original statute contained an especially long list of consequential amendments to a whole raft of provincial statutes.

As for the second, *ALSA* contains both internal trumping provisions and additional trumping provisions adopted through the consequential amendments. Here's an example of an internal trumping provision:

- 17(1)** Subject to subsection (2), if there is a conflict or inconsistency between
- (a) a regional plan and a regulation made under an Act, the regional plan prevails;
 - (b) a regional plan and a regulatory instrument, the regional plan prevails.
- (2)** A regional plan does not prevail over a General Council Policy or anything authorized under or by the Co-Management Agreement, as amended, referred to in Schedule 3 of the *Metis Settlements Act*.
- (3)** If there is a conflict or inconsistency between an Act and a regional plan, the Act prevails.
- (4)** If there is a conflict or inconsistency between this Act and any other enactment, this Act prevails.

And here are some examples of trumping provision adopted in the non-*ALSA* legislation that was subject to consequential amendment. For example, the *Alberta Utilities Commission Act*, [SA 2007, c A-37.2](#) was amended to include the following:

8.1 In carrying out its powers, duties and functions under this Act and other enactments, the Commission shall act in accordance with any applicable *ALSA* regional plan.

The predecessor legislation to the AER legislation was amended to include a similar provision but the current provision is now included in the *Responsible Energy Act*, [SA 2012, c R-17.3](#) as s.20. The section provides (in more detail) as follows:

- 20(1) In carrying out its powers, duties and functions under this Act or any other enactment, the Regulator shall act in accordance with any applicable *ALSA* regional plan.
- (2) The Regulator may, in issuing an approval or making or issuing an order or direction that it is authorized to make under this Act or any other enactment, direct a person who is the subject of the approval, order or direction to comply with a provision of an *ALSA* regional plan.

(3) The Regulator may enforce a direction under subsection (2) by any means provided for by this Act or any other enactment for the enforcement of approvals, orders or directions.

No doubt some will say that “we don’t need to worry ourselves with these questions yet; we’re nowhere near the cap and we may never hit the cap.” I think that this response is misconceived from both a regulatory perspective and a private perspective, principally because of the need for certainty.

I think that private parties need certainty around these questions because the answers to the questions above will affect investments; and in particular the willingness of parties to invest in achieving additional efficiencies beyond those mandated by the *SGER* (or any output-based measure that may succeed the *SGER*). Will those enhanced efficiencies be lost to the emitter or might they be assignable to a new entrant? Is the government, as the third preamble suggests, committed to creating the conditions for innovation, and if so doesn’t industry need to know what the incentives are?

We have seen these questions of market and regulatory design before - in the very different context of water management. A legislated cap for oil sands related GHG emissions creates scarcity in much the same way that closing the South Saskatchewan Basin (see post [here](#)) to new diversions creates scarcity with respect to water entitlements within the basin. Closing the basin conferred windfall gains on existing licensees, largely irrigation districts. It also created the need for a market in water entitlements to allow water to move to new uses and users. If you don’t have a market you have to have another way for (re)allocating a scarce resource. A market can operate freely or assignments can be subjected to review to ensure that public values are protected.

Do we want a market for oil sands emissions entitlements or not? And if so what sort of market do we want? Regulated or unregulated? If the government thinks that we don’t need a market then perhaps what the government is really saying is that the cap will never be exceeded (i.e. there is no scarcity); in which case the cap is little more than window dressing.

Which leads to the final set of questions: (1) how did we pick 100Mt, and, (2) should the 100Mt limit not be subject to revision over time?

As for the first, my guess is that 100Mt was entirely arbitrary – or perhaps more pointedly and accurately, there is no connection between 100Mt and what might be a *fair* allocation of GHG absorptive capacity to Alberta and to this sector, in either national or global terms. As for the second, why would we not provide for ratcheting down over time to reflect technological developments in the oil sands sector. Thus, much as the Paris Agreement (Articles 3, 4(11) and 14) commits to re-assessing whether national commitments are adequate to achieve the objective of the Agreement and demonstrate highest levels of ambition, perhaps Bill 25 should contain a similar commitment.

In sum, Bill 25 is a step in the right direction but here are three concrete suggestions to ensure that the Bill provides real guidance to industry and to regulators.

1. The Bill needs to provide for the legal implementation of the cap through necessary changes to other legislation.
 2. The Bill needs to address the legal status of emitters within the cap. Are existing emissions “rights” (or revocable licences, as in the *SGER*, s.10) tradeable? If the cap is reached how might a new entrant acquire an “entitlement”? How might we decide between different new entrants?
 3. Mandate a periodic review of the level of ambition of the cap, taking into account the values and principles embedded in the Paris Agreement in addition to the provincial values embedded in the preamble to this Bill.
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