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The Premier's Review of the AER: A Recipe for How Industry Can Have its Cake and Eat it too

By: Drew Yewchuk, Shaun Fluker, Martin Olszynski, and Nigel Bankes

Commented on: [Final report: Premier's Review of the Alberta Energy Regulator \(May 2024\)](#)

The UCP government continues to overhaul energy policy and regulation in Alberta with no meaningful opportunities for public scrutiny or input. In January 2023, Premier Danielle Smith [appointed a five-person Premier's Advisory Council on Alberta's Energy Future](#) (Energy Future Council) to prepare a report on Alberta's energy future. The terms of reference for this Energy Future Council were set by [Ministerial Order 02/2023](#), which was only released to the public in response to a FOIP request (see [When Does a Ministerial Order Have to be Published?](#)). The Energy Future Council submitted its report to the Premier in June 2023, but that report [has never been made public](#). In response to this non-published report, the Minister of Energy and Minerals initiated another panel, similarly closed to public input, to review and report on the Alberta Energy Regulator (AER). On May 22, 2024, the Government of Alberta elected to release this second report (the AER Report) under the names of two of the five members of the Energy Future Council, David Yager and Bob Curran. As was the case with [the rescission of the 1976 Coal Policy](#), the AER Report demonstrates that the UCP government takes its instructions on the direction of energy policy primarily from industry, rather than from the public it serves.

The Advisory Council on Alberta's Energy Future was chaired by David Yager, a former president of the Alberta Wildrose Party and [oil industry executive and consultant](#). The other four members were oil and gas executives and a former director at the AER (Bob Curran). Because the Energy Future Council's report has never been published, the AER Report has the awkward task of explaining its own existence within the context of the Energy Future Council's review. The AER Report tells us that over the course of the first four months of 2023, the Advisory Council on Alberta's Energy Future "conducted 25 separate research and investigation sessions involving 163 senior executives, stakeholders, and subject matter experts on all aspects of Alberta's energy future" (at 4). Similarly, we are told that the AER review panel (a panel which includes David Yager and Bob Curran – other members of this panel remain undisclosed) "investigated and considered stakeholders' comments and ministerial mandates, interviewed stakeholders and AER staff, and recommended ways to enhance and modernize the AER" (at 5). Who these executives, stakeholders, and AER staff are – and what they actually told the panel – we can only guess. Their names have been withheld and there is no public record of their comments. Does this list include Indigenous peoples, landowners, environmental groups, or any non-industry and regulatory experts? Based on the AER Report, there is no reason to believe that it did.

While we do agree with a few of the AER Report's observations (as further set out below), in our view the AER Report fails to substantiate most of its claims and fails to properly acknowledge serious deficiencies in AER governance identified by Alberta's Auditor General in recent years (see [here](#) and [here](#)). But the AER Report is still a significant document worth discussing. Why? [Order in Council 090/2024](#) appointed David Yager as a member of the board of directors of the AER for a two-year term in April 2024. Curiously, [Mr. Yager informed media](#) he will be a non-voting member, but his non-voting status is not established in the Order in Council and section 4.4(d) of the [AER General Bylaw](#) states that each director is entitled to a vote on matters submitted at any board meeting. In any event, the appointment of Mr. Yager confirms that Cabinet has decided to implement at least some of the panel's prescriptions for changes to the AER.

The Problems with the AER Report

The AER Report sets out changes to the AER that appear to be desired by [oil and gas CEOs](#) and at least some AER staff. The Report barely refers to climate change mitigation and avoidance measures or net-zero commitments except for passing references to carbon taxes, emissions caps, and divesture movements as current challenges facing the industry (it does so only on page 4, in its description of the unpublished Energy Future Council's report). There is zero mention of recent tailings spills and the AER's well-known problems and deficiencies in regulating [pollution in the oil sands](#). The AER Report does disclose, however, that the Energy Future Council concluded that "for Alberta to fully exploit and capitalize on its energy future, the Government of Alberta must take the clear and unequivocal public policy position that energy is the most important driver of Alberta's economy and will be for the foreseeable future" (at 4).

The AER Report is correct about a few of the problems at the AER. The AER is understaffed and underfunded, particularly in terms of field staff and inspectors after the 2019 staffing cuts (at 7, 8, 11, and 15). And the AER has been excessively focused on building automated computer systems that have been an ineffective replacement for field staff and inspections (at 10). We also agree that the AER focuses too much on image management and reputational protection at the expense of real task completion (at 10 and 18). This was perhaps most clearly illustrated in the [roll out](#) of this year's Liability Management Performance Report (for some commentary on this, see [Grading the AER Liability Management Performance Report](#)).

The AER's focus on image over substance, and its strategy of replacing in-person inspections with automation, are ongoing mistakes in the AER's approach. This is something that the Auditor General has identified as a specific concern in relation to AER approval of reclamation certificates for oil and gas sites, as several of us noted [previously](#).

Unfortunately, many of the AER Report's recommendations will make [three existing deficiencies](#) at the AER even more problematic: regulatory capture; non-transparency; and excessive discretionary power. The Report's recommendations would further entrench regulatory capture, which is to say the substitution of the broader public interest with the industry's private interests, by calling for "a stronger linkage to the challenges and needs of the regulated, not just the government" (at 9), and recommending the AER second (i.e., borrow) "industry technical personnel on a rotating bases (*sic*) into the AER" (at 13, recommendation 20). Furthermore, the Report considers that AER performance should be guided by the industry that it regulates and AER

executive compensation should be tied to “energy sector performance, resource royalty flow to the Government of Alberta, and industry competitiveness” (at 16, recommendation 25).

[Liability management issues](#), or the inactive and orphan oil and gas asset problem, gets no more than a couple of mentions, and these appear largely erroneous:

Liability management, a financial matter, was assigned to the AER even though it had limited experience in this area. This had material unintended consequences with foreign investors resulting in thousands of assets ending up in the Orphan Well Association. (at 9)

The AER and its predecessors have been responsible for liability management for more than three decades – more than enough time to hire or build technical expertise on the issue. The AER has acknowledged the problems in their [old liability management rating](#) program, and three of us have shown how [AER and industry lobbyists caused the current problem at the turn of this century](#).

The AER Report also complains about the AER’s belated attempt to do something about liability management issues: “It’s [*sic*] also developed tools to try to anticipate or predict future risk, specifically expanding how it determines which licensees will be unable to meet their closure commitments” (at page 19). The Report recommends moving responsibility for liability management to the Ministry of Energy and Minerals, a suggestion that would very likely worsen transparency and prove to be unworkable given the AER’s roles in approving license transfers and approvals (at 24, recommendation 35).

The AER Report also asks for more discretion to be given to AER decision makers, including the ability to overlook compliance issues that industry considers not to produce risks (at 18). The panel writes:

The people who licensees used to contact to work through problems either no longer work at the AER or don’t have the authority or management support to conduct risk-based situational analysis leading to quick and cost-effective decisions. (at 17)

This seems a lot like an industry request for more special exceptions and discretionary waivers of regulatory requirements. The AER’s past tradition of [granting these requests](#) was problematic for liability management and led to a perception that regulatory requirements are mere suggestions that can be negotiated away in meetings with regulatory staff.

The AER Report includes some discussion of Indigenous relations and Indigenous engagement. The Report states that improvement on Indigenous engagement is necessary primarily because of “successful legal challenges and restricted access by Indigenous peoples for various resource development and transportation projects” (at 20). The panel does not appear to have consulted any Indigenous peoples or governments and the Report seems to understand obligations to Indigenous peoples and governments primarily through the lens of their ability to cause delay and other problems for oil and gas development, rather than through the lens of Aboriginal rights to consultation and accommodation guaranteed under the constitution and international law.

The AER Report also argues for large salary increases for AER staff (at 12) and suggests that operational funding of the AER should eventually be changed so that it will come from either the budget of the Ministry of Energy and Minerals or from royalties. While it is clear that AER salaries need to be competitive with industry in order to recruit and retain a strong staff, that is not itself a reason to have the public pay the increased cost of an AER designed to better serve the interests of industry (at 24, recommendations 36, 39, and 40).

Finally, the AER Report sends extremely mixed messages about the anticipated independence of the regulator going forward. While the Report bemoans the loss of the AER's independence (e.g., at 9) and contains many calls for greater independence (e.g., recommendations 1 and 2 at 9), the Report also signals that the new AER should be more responsive to government needs and directions. For example, and even on the same page, we are told that the AER must "improve long-term planning and strategic alignment between the Government of Alberta and the AER with routine quarterly reviews and updates" (recommendation 5 at 9). Still later we are told that we must "[e]nsure that the performance of an independent regulator is guided by the Government of Alberta, the industry it regulates, and its founding objectives ..." (recommendation 23 at 16). In sum, this is not a vision of real independence, either from the line departments of government, the Minister's office, or even from the industry it regulates. Instead, it is a vision of dependence and direction, as evidenced by Mr. Yager's own appointment to the AER's board after chairing both the Energy Future panel and the AER review panel.

The AER Report reads like it was written by insiders for insiders. The advice it contains will exacerbate many of the AER's existing problems. If implemented, the changes will do nothing for transparency, they will increase the AER's discretionary negotiation of regulatory standards, and they will deepen industry's capture of the AER.

In the interests of disclosure, Martin Olszynski met with David Yager in May of 2023. They discussed closure liabilities and Martin pressed the importance of transparency with Albertans, first and foremost.

This post may be cited as: Drew Yewchuk, Shaun Fluker, Martin Olszynski, & Nigel Bankes, "The Premier's Review of the AER: A Recipe for How Industry Can Have its Cake and Eat it too" (30 May 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/05/Blog_DYSFMONB_Premier_AER_Review.pdf

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