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# The Next Installment in the Continuing Debate Over Pore Space Conflict in Alberta

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**Decisions Commented On**: (1) Request for a Regulatory Appeal by E3 Lithium Ltd. (E3), April 14, 2026; (2) Request for a Regulatory Appeal by PrairieSky Royalty Ltd. (PrairieSky), April 14, 2026; and (3) Request for Regulatory Appeal by Canpar Holdings Ltd. (Canpar), April 14, 2026

On July 30, 2025, the Alberta Energy Regulator (AER) granted an application from Enhance Energy Inc. (Enhance) for a $CO_2$ sequestration scheme approval under s 39(1)(d) of the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (*OGCA*) for Enhance's Origins Project. The AER granted Enhance its approval without holding a public hearing. The approval is available here. Enhance anticipates the sequestered $CO_2$ will result in a 4 km plume radius, up to a maximum radius of 5.6 km.

Enhance also holds a Carbon Sequestration Agreement (CSA) for the Origins Project from the Government of Alberta. This gives it the right to inject CO2 into the Leduc Formation within the Woodbend Group. The province has adopted a standard form CSA which I analyzed here.

Many parties filed Statements of Concern (SOC) with respect to the application. I discussed some of those SOCs here. At least three of the companies that filed a SOC in relation to the proposed approval also filed a request with the AER for a regulatory appeal under s 38 of the *Responsible Energy Development Act*, SA 2012, c R-17.3. Section 38 read together with its definition section (s 36) allows an eligible person to request a regulatory appeal in a circumstance in which the AER had made a decision without holding a public hearing. An "eligible person" is a person who is "directly and adversely affected" by that decision.

In the decisions listed above, the AER rejected each of the applications of E3 Lithium, PrairieSky and Canpar on the grounds that each of the parties was ineligible to request an appeal under s 38 since none was an "eligible person." This post examines the reasons given by Martin Foy, the AER's Chief Operations Officer ("on behalf of the AER adjudicative committee") for this conclusion. I begin with the E3 Lithium decision since each of the other parties relied to some degree on the submissions of E3 Lithium (hereafter E3).

## E3 Lithium

E3 based its SOC and its request to appeal on Crown licences for brine-hosted lithium (BHL) extraction covering 332,000 net acres across the Leduc Formation and the adjacent and hydraulically connected Nisku Formation, as well as its application to the AER for approval for

its brine/lithium extraction scheme known as the Clearwater Project. E3 already has two well licences for that Project. E3's Crown licences give it the right to explore for brine-hosted minerals but not the right to produce. (Alberta licence terminology is confusing but think of E3's Crown BHL licence as a property grant and the AER well licence as a regulatory approval, in the same way as Enhance's CSA is a property grant and its sequestration scheme approval is a regulatory approval).

E3 contended that the injection of $CO_2$ into the Leduc Formation would increase lithium production costs from the Leduc Formation and possibly the Nisku Formation if injected $CO_2$ were to migrate up into that Formation.

The AER in this and the other two decisions began by observing that for the purposes of assessing an "eligible person", "direct" requires that there be "a sufficient degree of location or connection" between the decision and its effect on E3. By their nature such effects will be prospective, but "they must not be too remote or speculative" (E3 Decision at 5 – 6). Effects that are indirect will not satisfy the requirement. As for "adverse" effects, that is a question of degree and requires an examination of the magnitude of risk faced by the person requesting the regulatory appeal. The AER also dealt with the nature of the burden assumed by an applicant: is it proof of a direct and adverse effect on the balance of probabilities, or some sort of *prima facie* case? One would have thought that this would be well established by now in the practice of the AER, but that is apparently not the case. In my view, the lower *prima facie* threshold seems more suited to the gatekeeping function of s 38, while the balance of probabilities seems more apt if there is a question on the merits as to whether the appeal should succeed or whether, for example, it is appropriate to include additional terms and conditions. In the end it didn't matter to the AER because:

> Even applying a *prima facie* standard of proof that is lower than the balance of probabilities, we have concluded the information before us is insufficient to demonstrate E3 may be directly and adversely affected by the Decision. (E3 Decision at 6)

The AER's principal reasons for this conclusion in relation to E3 are as follows:

- E3 has exclusive Crown exploration rights but no right to produce subsurface brines. It was unclear to the AER how Enhance's project would or could interfere with those exploration activities even if some of E3's licences covered areas within the plume of the Origins Project.
- E3 also has two well licences and has filed an application with the AER for the approval of a production scheme (the Clearwater Project), but E3's closest well is 60 km away from Enhance's injection site.
- Even were the AER to accept E3's assertion that Enhance's project could sterilize the Leduc Formation for lithium production purposes in the area of the Origins Project (a contention that the AER did not accept "because of the paucity of information"), E3 is far from being in a position to produce brine for a lithium extraction process:

  > First, E3 will need to identify the existence of that resource. E3 will have to quantify the resource. It will need to obtain the technology to extract the lithium. E3 will need to find a market for the lithium resource and will have to establish

> extraction is economically viable. And finally, E3 will need to obtain a number of regulatory approvals from various agencies. Included in these significant steps will be completion of engineering and procurement to support a full-scale commercial project. We do not consider the alleged adverse impact, which will only occur if these significant hurdles are overcome by E3, to be a direct impact. (E3 Decision at 7)

- Nor was there evidence "even on a *prima facie* basis, that there are recoverable/developable brine-hosted minerals to which E3 holds the rights that are in proximity to Enhance's operation such that it is foreseeable that their economic recovery would be directly impacted by the Approval" (E3 Decision at 7).

That should have been enough to dispose of the "directly and adversely affected" issue, the only issue that the AER had to decide, but instead of concluding there, the AER went on to comment on what can only be thought of as the merits of the competing claims of E3 and Enhance:

> …. E3 has not pointed to any authority or policy that suggests that mineral exploration rights have priority over areas of overlapping valid $CO_2$ sequestration agreements, approvals and operations. In fact, the opposite is true. We note the absence of any clear statement in legislation that injection of $CO_2$ cannot interfere with recovery of minerals such as brine-hosted lithium. (E3 Decision at 7)

The absence of such a provision or policy stands, as the AER noted, in contrast to the legislated priority in s 39(1.1) of the *OGCA* to the effect that:

> The Regulator may not approve a scheme for the disposal of captured carbon dioxide to an underground formation under subsection (1)(d) that is pursuant to an agreement under Part 9 of the *Mines and Minerals Act* unless the lessee of that agreement satisfies the Regulator that the injection of the captured carbon dioxide will not interfere with
>
> (a) the recovery or conservation of oil or gas, or
>
> (b) an existing use of the underground formation for the storage of oil or gas.

**PrairieSky**

Whereas E3's SOC and request for an appeal was based entirely on possible interference with lithium extraction, both PrairieSky and Canpar referred to additional concerns about the implications of the Origins Project for their non-brine-hosted mineral interests. I therefore focus on these incremental considerations in this section of the post.

PrairieSky's principal incremental arguments focused on concerns as to the potential lack of caprock seal integrity and leakage of $CO_2$ from abandoned wells that could affect production from oil and gas wells in which PrairieSky has an interest. PrairieSky also referred to problems associated with increased formation pressure as a result of the Origins Project. The AER considered that these claims were too general and speculative to support a claim of direct and adverse effect:

> Many of the potential impacts referenced in PrairieSky's submissions hinge on its assertion caprock will not serve as an effective seal to injected $CO_2$. The studies provided indicated that caprock integrity may be jeopardized where certain factors or conditions exist. However, the information provided does not show that such factors or conditions exist in the area of Enhance's disposal operations. Moreover, the Leduc Formation is well known and commonly utilized for disposal operations due to the integrity of the caprock seal. It is well known it has been utilized for this purpose for decades.
> ….
> Regarding the potential for leakage of sequestered $CO_2$ through abandoned well bores in the Origins Project area, PrairieSky offered only assumptions that these wells were not properly abandoned and therefore might leak $CO_2$ in sufficient quantities and in locations of PrairieSky's mineral rights so as to directly and adversely affect them. (PrairieSky Decision at 7 – 8)

In addition to these observations which speak to both lack of directness and the speculative nature of the objections, the AER also pointed to conditions included in Enhance's scheme approval designed to verify the geological containment of the injected fluids and to require assessment of abandoned wells within the area of the projected plume. The AER also confirmed its view that Enhance's project would not interfere with the recovery or conservation of oil or gas (per s 39(1.1) of the *OGCA* above). Once again, these observations seem more concerned with the merits than the threshold question of standing to initiate an appeal.

**Canpar**

Canpar's claim to be directly and adversely affected rested on its fee simple interest in mines and minerals for a tract located adjacent to Enhance's injection well and within the projected plume for the project. While much of the AER's reasoning in response mirrors what I have already discussed for E3 and PrairieSky, the more immediate physical adjacency of Canpar's property did require some additional reasoning to support the AER's decision to deny the application. In effect, the AER concluded that physical adjacency was not enough; Canpar needed to show temporal immediacy as well, as the following paragraph demonstrates:

> … the modelled plume, which relates in part to activities and facilities not currently authorized by the Approval, is predicted to not be reached for a number of years. The modelled plume relates to the full extent of the Origins Project. That full extent is not approved by the current Approval. To reach that full extent, Enhance will require additional approvals for which it will have to apply to the AER and in relation to which Canpar will have the opportunity to participate by filing an SOC. (Canpar Decision at 5 – 6)

Given that Canpar's fee simple mineral interest presumably included oil and gas rights it is perhaps surprising that the Canpar Decision did not follow the PrairieSky Decision and include an express finding that the project would not interfere with the recovery or conservation of oil or gas (per s 39(1.1) of the *OGCA* above). But perhaps that was because Canpar was not in a position to adduce evidence of prospective oil or gas activities on its lands.

The Canpar Decision also contains some discussion of whether the terms of Enhance's CSA required that Enhance needed Canpar's consent, but the AER held that this was not a relevant consideration:

> While we do not see a basis for saying Enhance was required to obtain Canpar's consent, we do not believe that issue bears on whether Canpar is eligible to request a regulatory appeal. (Canpar Decision at 6)

**Conclusions**

In formal terms, all three decisions are standing decisions – standing to launch a regulatory appeal of an AER decision that was issued without a hearing. As such, they confirm that parties holding competing pore space interests (in this case principally brine-hosted mineral interests) will need to establish the necessary geographical and temporal proximity (i.e. actual operations or operations anticipated to commence with some degree of certainty in the immediate future) and a likelihood of actual conflict, in order to show a direct and adverse effect and gain standing. Collectively the decisions suggest that this will be challenging. Canpar perhaps had the best case since it could claim both a petroleum and natural gas interest with a statutory priority as well as relative proximity (within the area of the projected plume of injected $CO_2$). But even that was not enough to get over the threshold to obtain standing for an appeal.

The decisions don't tell us a lot about the relative priority of different pore space uses, although they do confirm that while the *OGCA* directs the AER to accord priority to current and prospective oil and gas operations, as well as existing natural gas storage operations, over sequestration activities, this priority does not extend to brine-hosted mineral operations. The decisions also tend to confirm the advantage that accrues to the fleet of foot, i.e. the first to develop a concrete proposal to utilize pore space (or as E3 put it, the "race to file") (E3 Decision at 4). That however is not germane to establishing a direct and adverse effect even though it means that having acquired an approval, Enhance becomes an incumbent and regulators tend to protect incumbents.

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This post may be cited as: Nigel Bankes, "The Next Installment in the Continuing Debate Over Pore Space Conflict in Alberta" (8 May 2026), online: ABlawg, http://ablawg.ca/wp-content/uploads/2026/05/Blog_NB_PoreSpace.pdf

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