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Alberta Energy Regulator Makes Rule Changes Aimed At Gutting Participation by ENGOs

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Matter Commented on: Alberta Energy Regulator, [Bulletin 2026-22: New Editions of the Alberta Energy Regulator Rules of Practice and Directive 031](#) and *Alberta Energy Regulator Rules of Practice*, [Alta Reg 99/2013](#), as amended by [Alta Reg 88/2026](#).

Last month (May 2026) the Alberta Energy Regulator (AER) issued a Bulletin announcing changes to its Rules of Practice. The AER made these changes on February 5, 2026 and filed them April 30, 2026; they were gazetted “for information purposes” in the [Alberta Gazette, Part 2, May 15, 2026](#). The AER Bulletin is dated May 5, 2026. The AER has the authority to make the Rules of Practice under s 61 of the *Responsible Energy Development Act*, [SA 2012 c R-17.3](#) (*REDA*) but only, of course, to the extent that such Rules are consistent with the Act and with any regulations made under the Act (see *REDA*, ss 60 and 61). So far as I know, the AER made these Rule changes without following any notice and comment procedure. In other words, the AER provided no advance notice of its intention to make these amendments, no supporting rationale for the amendments, and no opportunity for anybody to comment on the amendments. The amendments appear to be part of a systematic effort by the AER to limit the right of those trying to speak for the environment and public lands to participate in the AER’s decision-making processes. Whether or not the AER was prodded into making these changes by industry or by the Department or Minister of Energy and Minerals will likely only be revealed by a responsive access to information filing.

Some of the changes are evidently designed to institutionalize the authority of the AER’s chief executive officer (CEO) over AER hearing commissioners. The CEO first usurped this authority last year in Summit Coal’s Mine 14 application (see ABlawg posts [here](#) and [here](#), and the Court of Appeal’s decision granting permission to appeal: *Alberta Wilderness Association v Alberta Energy Regulator*, [2025 ABCA 389 \(CanLII\)](#); the appeal itself is pending)

This post examines some of these Rule changes and concludes with some comments on the judicial review of AER rule-making powers.

The Changes

For present purposes I will focus on three main changes: (1) cancellation of hearings when no parties are directly and adversely affected, (2) the decision to deny not-for-profits access to the costs provisions of the Rules, and (3) Crown requests to expedite matters. I also discuss one other change which allows supporters of projects to file statements of concern as to the potential adverse

effects that they may suffer if the AER were to reject a project application. This is certainly a significant Rule change but it is harder to assess its implications.

Cancellation of Hearings When No Parties are Directly and Adversely Affected

Most applications to the AER for regulatory approvals are dealt with administratively and without a hearing. Occasionally, the executive branch of the AER will refer an application to a hearing by AER hearing commissioners appointed under Division 2 of Part 1 of *REDA*. When this happens, the chief hearing commissioner sends a boilerplate letter to the applicant (or counsel for the applicant) informing them of the decision to hold a hearing and further advising that:

A hearing will be held unless the issues are resolved in some other manner, such as by alternative dispute resolution (ADR). Hearings are led by hearing commissioners who are independent from the day-to-day operations of the AER. I assign one or more hearing commissioners to sit on hearing panels to decide matters sent to them by the AER. Their decisions may only be reviewed by the Court of Appeal of Alberta ...(at 1, emphasis added). [This example is excerpted from the letter sent to counsel for Summit in the Mine 14 matter, [October 7, 2024](#)]

Once a decision to hold a hearing is made, the hearing commissioners invite participation and through that process may decide to grant interested parties full participation rights (including the right to present evidence, cross examine and provide final argument), or more limited participation rights. Parties that the Panel considers to be “directly or adversely affected” will generally be granted full participation rights whereas those speaking to environmental and public lands values (e.g. environmental non-governmental organizations (ENGOS)) may be relegated to more limited participation rights (e.g. the right to make a short oral or written submission to the Panel). In some cases, however, the Panel may grant an ENGO full participation rights. Such was the case in Summit’s Mine 14 application. There, the hearing Panel granted full participation rights to both the Alberta Wilderness Association (AWA) and Canadian Parks and Wilderness Society (Northern Alberta Chapter) (CPAWS-NAB).

The issue in the Mine 14 case, however, was what happens when parties who have full participation rights based on direct and adverse effects withdraw from the hearing, leaving as the only full participants ENGOS who could not claim to be directly and adversely affected? The Mine 14 Panel gave a reasoned decision to continue with the hearing, thereby allowing AWA and CPAWS-NAB to present evidence and test the evidence of Summit. That decision prompted Summit and its parent company to effectively lobby for a different outcome by directly approaching the AER’s CEO. The CEO intervened to overrule the hearing Panel, cancel the hearing, and have the application considered administratively. The legality of that decision (as noted above) is currently on appeal. See the earlier ABlawg posts referenced above for additional details.

In the meantime, while awaiting the outcome of that appeal, the AER has evidently decided to shore up its position (at least prospectively) by amending its Rules to add a new s 9.01 which provides, so far as relevant here, that:

(2) If each person whom the Regulator has permitted to participate in a hearing on an application on the grounds that the person may be directly and adversely affected by the Regulator's decision on the application withdraws their request to participate in accordance with subsection (1), the Regulator shall discontinue the hearing and make a decision on the application without conducting or completing the hearing.

(3) For greater certainty, the Regulator shall discontinue a hearing under subsection (2) regardless of whether the Regulator has permitted a person other than a person described in subsection (2) to participate in the hearing.

This is a bright line rule. It removes from the hearing Panel any discretion to continue the hearing, and any discretion to assess whether the contributions of those left with full participation rights are important enough to outweigh a proponent's interest in expediting the application process. A Panel's responsibility is to impartially assess the public interest in these matters, not just to defer to the proponent's self-interest. This Rule change fundamentally undermines the independence of a hearing Panel.

Not-for-profits Denied Access to the Costs Provisions of the Rules

Shaun Fluker and Eric Dalke have provided an excellent overview of the history of costs awards by the AER and its predecessor the Energy Resources Conservation Board (ERCB) in this article: [“An Analysis of Costs Awards by the Alberta Energy Regulator”](#) (2018) 55:3 Alta L Rev 805. With the adoption of *REDA* and costs awards under the Rules, awards have been made not only to those directly and adversely affected (which was the case under the rules governing the ERCB (see *Kelly v Alberta (Energy Resources Conservation Board)*, [2012 ABCA 19 \(CanLII\)](#)) but also to other parties participating in hearings, at least to the extent that the AER considers that the participant has contributed to the proceeding.

To this point, the only category of parties that has been precluded from making a costs application is “a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource” (see definition of “participant” in s 58(1)(c) of the Rules). For an example of recent costs award see the costs award to the AWA and CPAWS-NAB in the Summit Coal case: [AER Costs Order, 2026-01, February 5, 2026](#). That decision granted the ENGOS' costs requests at least in part. The order is otherwise unremarkable except for the decision of the hearing commissioners to deny the costs claims incurred by the two ENGOS as a direct result of Summit's successful efforts to do an end-run around the hearing Panel by approaching the CEO directly. This tied the Panel's hands to the detriment of the interveners:

We disallow the legal fees claimed by AWA and CPAWS NAB in relation to Summit's reconsideration motion to the CEO of the AER. Section 5.1 of Directive 031 states that “a submission for costs will not include arguments about things not being considered or not related to the application.” The reconsideration motion was not before the panel and was not part of this proceeding. (*Ibid* at para 41, emphasis added).

While technically correct, this decision was also perverse and profoundly unjust.

In any event, with this change to the Rules the AER has simply made ENGOs like AWA and CPAWS-NAB ineligible to make any costs claim whatsoever. The AER has achieved this result by adding the following to the excluded class of ineligible applicants (or participants):

... a person or group or association of persons organized as a non-profit organization, soliciting or receiving contributions for the purpose of carrying out the non-profit organization's objects or purposes; (new s 58(1)(c))

This new categorical exemption is subject to two exceptions. First, the AER has retained the discretion to otherwise so order ("unless otherwise authorized"), and second, such a non-profit or person may be eligible to claims costs if such organization or person is also determined by the AER to be directly and adversely affected (new s 58(1.1)). I note that while the AER has retained its discretion to "otherwise authorize", the new edition of [Directive 031, REDA Energy Cost Claims](#), which was released with the new Rules, provides no guidance as to when and how the AER may so authorize.

The AER's authority to make Rules regarding costs is found in s 61(r) of *REDA*. The AER may make rules:

(r) governing costs in respect of a hearing on an application, regulatory appeal or reconsideration, including, without limitation, rules respecting

- (i) the awarding of costs,
- (ii) the making of advances of costs,
- (iii) the liability of persons to pay costs,
- (iv) the review of costs awarded, and
- (v) the enforcement of costs awarded;

The combination of the narrow directly affected standing test (rather than a more open public interest standing test) and this new exclusionary Rule on costs makes the AER an increasingly hostile environment for Alberta ENGOs and other seeking to speak for nature, public lands and public interest values more generally. It also contradicts the mutual commitment to public participation reflected in the recently concluded (April 2, 2026) [Co-Operation Agreement on Environmental and Impact Assessment between Canada and Alberta](#). Not only will the new Rule generally preclude organizations like AWA and CPAWS-NAB from recovering the costs of legal representation, it will also preclude them and other similarly situated ENGOs from recovering the costs of retaining experts to review the evidence presented by a proponent and to present their own evidence. For examples of the types of expert evidence an ENGO might wish to present to assist a hearing panel in assessing an application, see AER Costs Order, 2021-004 for the Benga (now Northback) Grassy Mountain Coal Project (1.0) [here](#).

Crown Requests to Expedite Matters

REDA contemplates that the Crown may intervene directly in AER proceedings in some limited circumstances. Thus, in addition to the ability of the Minister to give the AER directions under s 67, the Crown may also participate in hearings (s 49). The former edition of the Rules also contemplated that the Crown might request that the AER hold a hearing to assess impacts on Indigenous people (s 7) or to request a reconsideration for similar reasons (s 34.1).

The new version of the Rules enhances the power of the Crown to request special consideration. Thus, in deciding whether or not to hold a hearing the AER must have regard to

... whether the Crown has requested that a decision on the application be made immediately or on an expedited basis to mitigate an adverse impact to the energy resource activity referred to in the application that may result if the Regulator's decision on the application is delayed in order to conduct a hearing; (new s 7(f.1)).

There is a similar amendment in relation to whether or not the AER should conduct a re-hearing (new s 34.1(b)). It is important to observe that, according to the Gazette, these amended Rules were apparently adopted by the AER on February 5, 2026, well before [Bill 30: Expedited 120 Day Approvals Act](#) was given first reading on April 14, 2026 (see ABlawg post on Bill 30 [here](#).) It is not immediately obvious where the AER finds the power to grant enhanced standing to the Crown by adopting new Rules which further privilege the Crown beyond the provisions of *REDA* itself.

Statement of Concern in Support of Granting an Application

Until the current rule change, the Rules only contemplated the filing of a statement of concern (SOC) by a party who objected to an application. The rule change will, in addition, allow a party to file a SOC “that advocates in favour of the approval sought by the applicant” (new s 6(1)(c)(ii)). Such a SOC should indicate:

- (I) why the person believes that the person may be directly and adversely affected by a decision of the Regulator not to issue an approval in respect of the application,
- (II) the nature of the person's support of the application, including the benefits which the person believes the person may gain if an approval is issued (*ibid*)

In sum, the SOC has principally been used by parties seeking to protect the *status quo* and the existing distribution of costs and benefits associated with that *status quo*. Now, SOC's may be filed by those who stand to gain from a project's implementation. Such parties will presumably still have to show a sufficient degree of connection that is not too speculative in order to establish the risk of a direct and adverse effect, but that may well prove easier to establish than in the case of a person objecting to a change in the *status quo*. It seems, for example, that it might be established by somebody who stands to receive a contractual or other economic benefit if an application were to be granted. If this is correct, then it may stack the deck inappropriately in favour of applicants – especially if such persons have access (unlike ENGOs adverse in interest to a project) to the costs provisions of the Rules.

Challenging the Exercise of a Regulation-making Power

A regulation-making power is ordinarily a legislative function and, as a result, typically cannot be challenged on procedural fairness grounds *Att Gen of Can v Inuit Tapirisat et al.*, [1980 CanLII 21 \(SCC\)](#), [1980] 2 SCR 735. Such a decision can however be challenged on reasonableness grounds as the Supreme Court of Canada recently confirmed in two cases originating from Alberta: *Auer v Auer*, [2024 SCC 36 \(CanLII\)](#) and *TransAlta Generation Partnership v Alberta*, [2024 SCC 37 \(CanLII\)](#). Those decisions also confirmed that the standard of review for challenging a regulation or similar subordinate legislation is reasonableness. This standard would apply to the AER rule making powers since such rules would be challenged in the Court of King's Bench and not in the Court of Appeal using the permission to appeal process contemplated by s 45 of *REDA* (see *Giant Grosmont Petroleum Ltd. v Gulf Canada Resources Ltd.*, [2001 ABCA 174 \(CanLII\)](#)).

According to *Vavilov* there are two types of fundamental flaws that would make an administrative decision unreasonable: (1) there is a failure of rationality internal to the reasoning process; or (2) the decision is untenable in light of the factual and legal constraints that bear on it (*Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#) at para 101 and *Auer* at para 51). The legal constraints include the overall structure of the legislation authorizing the rule-making power. To give but one example: suppose that the applicants in the ongoing Alberta Court of Appeal decision questioning the CEO's decision to cancel the Mine 14 hearing can successfully argue that that decision was unreasonable since it is inconsistent with the deep structure of *REDA* which maintains a separation between matters that are dealt with administratively within the AER, and those matters that are assigned to a hearing Panel (see this [ABlawg post](#) for an outline of the argument). If that were the case, it should also be possible to argue that the adoption of a new Rule of Practice that interferes with the autonomy of decision-making of a hearing Panel might also be considered unreasonable.

The decisions in *Auer* and *TransAlta Generation* theoretically have made it easier to contest the validity of regulations since it is no longer necessary to show that such regulations are “irrelevant”, “extraneous” or “completely unrelated” to the purpose of the legislation (see *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, [2013 SCC 64 \(CanLII\)](#) at para 28), but successful cases are few and far between. For example, neither applicant prevailed in *Auer* or *TransAlta*. That said, we have also seen some cases decided in favour of the applicant including the high profile public order emergency decision in the Federal Court of Appeal: *Canada (Attorney General) v Canadian Civil Liberties Association*, [2026 FCA 6 \(CanLII\)](#) and, in Alberta we have Lukaszuk's case successfully questioning the authority of the chief electoral officer to require petition canvassers to swear out affidavits: *Lukaszuk v McClure*, [2025 ABKB 570 \(CanLII\)](#).

Conclusions

The AER has changed its Rules of Practice in a manner that will have a significant negative effect on organizations, like ENGOS, that seek to participate in AER proceedings in order to protect important public interest values, public lands and waters, and the environment. The AER has done so with zero public participation or consultation.

Insofar as these changes will make it costlier and riskier to participate in these proceedings (costlier because there will be no cost recovery from proponents, and riskier because a hearing may be cancelled even when an ENGO has invested time and resources in preparing for a hearing), it may discourage ENGO participation. This may in turn encourage proponents to cut corners, hoping that their application will not be tested in a public hearing because of the barriers to participation faced by ENGOs and others.

This is a giant step backwards for the AER that will simply reinforce the impression of many Albertans that the AER is too beholden to industry in its decision-making. Perhaps the AER needs reminding of the advice it received from Alberta's Court of Appeal over a decade ago in the *Kelly* case cited above. At that time the regulator, then the ERCB, had less control over the costs awards than it does now, and thus the Court's advice is now even more pertinent:

In the process of development, the Board is, in part, involved in balancing the interests of the province as a whole, the resource companies, and the neighbours who are adversely affected ... Granting standing and holding hearings is an important part of the process that leads to development of Alberta's resources. The openness, inclusiveness, accessibility, and effectiveness of the hearing process is an end unto itself. Realistically speaking, the cost of intervening in regulatory hearings is a strain on the resources of most ordinary Albertans, and an award of costs may well be a practical necessity if the Board is to discharge its mandate of providing a forum in which people can be heard. In other words, the Board may well be "thwarted" in discharging its mandate if the policy on costs is applied too restrictively. It is not unreasonable that the costs of intervention be borne by the resource companies who will reap the rewards of resource development. (*Kelly*, at para 34.)

The AER has clearly either forgotten that advice or has chosen to ignore it.

This post may be cited as: Nigel Bankes, "Alberta Energy Regulator Makes Rule Changes Aimed At Gutting Participation by ENGOs" (8 June 2026), online: ABlawg, http://ablawg.ca/wp-content/uploads/2026/06/Blog_NB_AERChanges.pdf

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