AER Reform or Revolution?

By Phillip Meintzer

The Alberta Energy Regulator currently holds less than one percent of the $130 billion total estimated reclamation costs for conventional oil and gas cleanup, meanwhile only one square kilometre of Alberta's oilsands (pictured) have been reclaimed to date.

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The Alberta Energy Regulator "is a joke, a complete joke" according to Chief Allan Adam of Athabasca Chipewyan First Nation (ACFN). Chief Adam made this statement back in April 2023, during a parliamentary committee hearing in Ottawa following news that a tailings pond at the Imperial Oil-owned Kearl oil sands mine had been leaking for nine months without any notification from either Imperial or the Alberta Energy Regulator (AER). But he's not the only one ringing the alarm bells. There seems to be growing concerns over the AER's ability (or lack thereof) to effectively regulate Alberta's fossil energy industry.

Mounting evidence seems to show the AER operates without sufficient public transparency and has vast discretionary powers. Rather than serving the best interests of Indigenous communities, the environment, and the public at large, the agency seems to be held captive by industry interests. Criticism of the AER seems to have voices from all angles, calling for either large-scale reforms or dismantling the regulator altogether. In any case, the time for change is now.

THE KEARL INCIDENT LEAK REVIEW

In February 2023, 5.3 million litres of toxic oil sands wastewater (known as tailings) spilled from a storage pond at Imperial's Kearl mine. Following this news, the AER also issued a public notice stating that significant volumes of tailings had been leaking at the Kearl mine for nearly nine months, since at least May 2022. Neither the AER nor Imperial notified any of the Indigenous communities within whose territories the Kearl mine is situated, nor any downstream communities while this leak was happening. These communities include ACFN as well as Mikisew Cree First Nation (MCFN).

Results of an independent, third-party investigation into the AER and how it handled the Kearl incident, published in a report by consulting firm Deloitte in September 2023 raised major concerns over the AER's internal policies. It found, based on procedures performed by AER during the Kearl incident, AER had followed protocol. It also found AER's policies, standards, procedures, and manuals for emergency response, incident reporting, and investigation contain dated information and guidance, and are not in line with the "C&IR Framework and/or the expectations of external stakeholders interviewed."

If allowing a leak to proceed for nine months without informing potentially impacted Indigenous communities doesn't violate any of the AER's own policies, then it necessarily follows that the AER's policies are woefully inadequate. The results of this investigation can only reinforce our concerns that the AER cannot be trusted to make decisions in our best interest. Broad, sweeping changes are needed immediately to address this problem.

More news broke in October when evidence surfaced that AER knew Kearl's tailings ponds were seeping into groundwater as far back as 2019/20. Despite this evidence, the AER and Imperial again conspired to hide this incident from the public, choosing to manage the issue internally. It's another demonstration of transparency issues, and, in this case, to the benefit of an oilsands company that avoided the public spotlight for leaking toxic substances into the environment and Indigenous traditional territories.

HIDDEN SCOURGE

In 2021, Alberta-based ecologist and author Kevin Timoney published *Hidden Scourge: Exposing the Truth about Fossil Fuel Industry Spills*. In his book, Timoney discusses his analysis of more than 100,000 spills caused by the fossil fuel industry across Alberta, Saskatchewan, the Northwest Territories, Montana, and North Dakota. His analysis addresses several key issues such as the misinformation from oil and gas corporations, and misreported or underreported data. It also touched on the regulatory capture of the AER, which is when a regulatory body is coerced into acting in favour of private interests within the industry it is charged with regulating.

The data collected and presented by Timoney showed that in Alberta there was an average of 1.9 oil spills and 1.7 saltwater spills per day between 1975 and 2018, which accounted for approximately 290,578 and 979,849 cubic metres of oil and saltwater respectively. Those numbers only represent the spills that industry has self-reported. Timoney's investigation originally kicked off because he noticed spill volume data reported by the AER exactly matched the reported recovery volumes. Somehow every drop of spilled oil had been miraculously recovered, despite the near impossibility of that task. Something suspicious was taking place in spill reporting between the energy companies and the AER.

Timoney's investigation and the publication of *Hidden Scourge* helped to provide a detailed track record of the AER abandoning its duty as a public regulator by neglecting to sufficiently monitor industry operations and/or fine companies when spills occurred. Meanwhile, Alberta's wilderness ecosystems, Indigenous communities, agricultural producers, and the public at large have been left to deal with the destruction and contamination that industry has left behind because of the AER failing to meet its obligations as a public regulator.

A MADE-IN-ALBERTA FAILURE

A new report published in October 2023 by the University of Calgary's School of Public Policy describes Alberta's policy on inactive oil and gas wells as a "massive regulatory failure characterized by a historical lack of transparency, excessive regulatory discretion, and regulatory capture." This report, titled *A Made-in-Alberta Failure*, was co-authored by three lawyers — Drew Yewchuk, Shaun Fluker, and Martin Olszynski — with expertise in Alberta's environmental law, and it focused specifically on the topic of unfunded [conventional] oil and gas closure liabilities in the province.

The authors reviewed Alberta's 2020 *Liability Management Framework,* which is the current policy intended to deal with the problem of closure work (including remediation and reclamation) for oil and gas wells that are inactive and orphaned. Wells are classified as orphans when there is no owner or licensee, which typically happens due to insolvency of the previous owner.

As of July 2023, there are approximately 230,000 drilled wells in the province that need to be abandoned and reclaimed, with an additional 90,000 other wells that have already been abandoned but are still not reclaimed. That's 320,000 wells total that need to be reclaimed and the numbers reported likely underestimate the true size of the problem. Official — yet, likely unreliable — closure liability estimates are at least $60 billion, but in 2018, internal estimates from the AER were leaked to the public claiming that the real number was closer to $130 billion. Using just the lower number of $60 billion, the AER currently holds less than $295 million in closure liability security, which would be only 0.49 percent of the total estimated reclamation costs. Less than one percent.

Essentially, almost all this closure liability is currently unfunded. That's because Alberta has failed to require oil and gas licensees to post adequate security to cover these costs, or neglected to use other financial tools to ensure that funding will be available so that industry can cover the cost of reclamation. The authors describe the liability framework as being unlikely to uphold what's known as the "polluter-pays principle," which typically holds that the individual or entity who causes environmental pollution should be responsible for cleaning it up. As a result, the report states that the framework is likely going to be ineffective at reducing the number of orphan or inactive sites.

The report emphasizes that the history of Alberta's approach to managing its orphan well problem — including the 2020 liability framework — has consistently been hampered by the persistence of three key factors. 1) A lack of transparency, where the problem has been permitted to grow in the absence of public scrutiny. 2) Excessive discretion from the regulator, with an absence of binding targets or timelines for closure work, and 3) Regulatory capture. The evidence presented shows that the AER has prioritized its relationship with the oil and gas industry over accountability to the public, and that the liability framework has been designed to meet industry's goal of minimizing costs (and therefore maximizing profits), rather than meaningfully addressing cleanup.

And it's important to remember that this U of C report only focused on Alberta's conventional oil and gas reclamation liabilities. Meanwhile, only one square kilometre of Alberta's oilsands mining footprint has been certified as reclaimed to date, according to the AER. The authors of this report are currently working on another assessment which will focus specifically on oilsands reclamation to be released in the coming months.

MONITORING SHORTCOMINGS

The failings of the AER to regulate the energy industry are concerning enough in isolation, but especially so

when the program set up to monitor the impacts of oil sands activities seems broken as well.

The operational framework agreement for the joint Canada-Alberta Oil Sands Monitoring Program (OSM Program) was signed in 2018, with the vision of establishing: "An integrated monitoring, evaluation and reporting system inclusive of and responsive to Indigenous Communities, that includes the acquisition and reporting of regional and sub-regional data on baseline environmental conditions, tracking any environmental impacts, and the assessment of cumulative environmental effects from oil sands development to inform management, policy and regulatory action and respects potential impacts to section 35 Rights."

This agreement includes a list of objectives, desired outcomes, and actions to meet those outcomes. Among the objectives is to ensure transparency by "timely public reporting through accessible, comparable, and quality assured data and information, reports, and publications evaluating, interpreting and synthesizing the monitoring results of the OSM Program." Some of the desired outcomes are to report on the environmental impacts of oil sands development, including cumulative effects, to provide information to decision-makers and others, and ensure data and reporting is accessible in an open, transparent, and timely manner.

Despite these noble objectives, the last annual report for the OSM Program was published in September 2019, more than four years ago. That's more than four years since the program last provided a comprehensive update for decision-makers and the public on the findings of important monitoring in Alberta's oil sands region.

The completion and dissemination of these reports are crucial for understanding the cumulative effects of oil sands development within Alberta's oil sands region. Reporting delays mean that monitoring results cannot be acted upon in a timely manner, which is a crucial component of adaptive monitoring. Especially if the environment is showing signs of deterioration.

Adaptive monitoring or adaptive management is an iterative process for continually improving management through long-term monitoring. In this process, an adaptive program would learn from existing research and the outcomes of prior monitoring to improve future management. This is only possible if the collected data can be analyzed or mobilized in an effective manner. Without the release of timely oil sands monitoring reports, it's hard to know whether adaptive management within the OSM Program has been successful or not.

These reporting delays seem to echo the previous evidence we have highlighted which demonstrate a lack of transparency across Alberta's energy sector and the institutions put in place to regulate it. A lack of up-to-date monitoring data means that decision-makers are left without the knowledge needed to inform important policy decisions, while the public is kept in the dark about the environmental impacts of oil sands operations.

MINERAL MINING INCOMING

There has been a recent shift globally towards decarbonization and large-scale [green] electrification to mitigate the worst impacts of human-caused climate change. Given this transition, Alberta is currently trying to position itself as a "preferred producer" or metallic and industrial minerals (e.g., lithium) on the international market, much like we have done with oil and gas. As part of this push to become a global leader in mineral production, the Government of Alberta has recently shifted the responsibility for the management and regulation of minerals under the purview of the AER.

If we want to ensure that Alberta doesn't repeat the same mistakes with mineral mining as we have with our mismanagement of the fossil fuel industry, then the AER should be reformed as soon as possible before the mineral mining "Gold Rush" really kicks off in Alberta as global demand continues to increase to meet the needs of electrification across the world. Otherwise, we may be left with even more across Alberta's landscape from another industry that we have failed to regulate in any meaningful way.

WHAT NEXT?

We have barely scratched the surface, yet hopefully, it is already evident that something needs to be done for us to even begin thinking about addressing the problem of oil and gas regulation in Alberta. Would reforming the AER go far enough? Is there any guarantee that a hypothetical future regulator wouldn't continue to prioritize the profiteering of oil and gas companies at the expense of Albertan taxpayers, the environment, and the Indigenous Communities who have lived here since long before these colonial institutions were established? We should not be satisfied if changes only amount to a rebranding of the AER without overhauling the structural power imbalance that permits them to operate in secrecy for the benefit of private interests while polluting our rivers and destroying our landscape.

At a news conference in August 2023, more than 20 chiefs from Indigenous Communities across Canada's prairie provinces expressed their intent to challenge Canada's Natural Resource Transfer Agreement (NRTA), which was signed in 1930 and subsequently granted provincial governments exclusive control over [most] natural resources within their jurisdiction. First Nations were excluded from

this agreement at the time of signing, and the current chiefs are claiming that this agreement was (and is still) unlawful and represents a threat (or violation) of their inherent, Treaty, and Constitutional rights. These communities are demanding a share of the land and resources as promised by their Treaty agreements, but a challenge to the NRTA could ultimately throw into question the provinces' exclusive domain over natural resources, which isn't necessarily a bad thing. It could present an opportunity to pursue an alternative solution to the lack of energy regulation in Alberta.

That solution could be nationalization. Nationalization is the process of turning privately owned assets into public assets by bringing them under state control. In Canada these are known as crown corporations, and they include institutions such as Canada Post and the Canadian Broadcasting Corporation (better known as the CBC). Petro-Canada is an example of a crown corporation that was created by our federal government in reaction to the oil crisis of the 1970s, and it was intended to retain a greater share of energy revenues for Canada at a time when most of the money was flowing into the hands of American corporate interests. Unfortunately, in 1991, the Mulroney government decided to privatize Petro-Canada, and as of 2009 it has been majority owned by Suncor.

Nationalization wouldn't be guaranteed to eliminate all the problems of energy regulation by any means, especially when considering Indigenous Rights given the deep history of colonial oppression and active genocide imposed on Indigenous Communities by the settler-state of Canada. However, it would theoretically enable Canada to manage (or even scale back) oil and gas production in a way that's in line with our many international climate and biodiversity commitments rather than just hoping Alberta and energy companies comply with federal policies. There are examples from other jurisdictions across the world where nationalization (or re-nationalization) has been accomplished with varying degrees of success.

Bolivia's oil and gas industry was privatized in 1996. However, after a prolonged period of economic stagnation, the hydrocarbon industry was re-nationalized in 2006 by newly elected president Evo Morales. To do so, he re-founded a state-owned enterprise and used it to purchase a majority of shares in private oil and gas corporations operating within the country. This meant that foreign natural resource companies in Bolivia were forced to turn over a larger portion of extracted resources to the state, as well as a greater proportion of their revenues. Under Morales' regime, by increasing state sovereignty over economic policy, Bolivia was able to dramatically increase spending on public social programs by redistributing these revenues. By re-nationalizing the industry, the Bolivian government were enabled to increase spending on social programs — with a percentage of hydrocarbon revenues dedicated to universities, Indigenous groups, and low-income residents. In addition, the state now had greater control in the extraction, production, sale, distribution, and transportation of its own natural resources. This is a blueprint that Canada could follow.

I recognize that we live in a world — or at least in a country — where the free-market reigns supreme. And we also live in a province that's ideologically anti-government (especially anti-federal government) to the extreme. But if we need a more effective way to regulate the oil and gas industry in Alberta with greater public accountability, then maybe we could shift the narrative away from a rebranded AER and towards demanding the larger project of nationalization for the industry. Especially if there are already demands being made by Indigenous leadership across the country to revoke the legislation that put control over natural resources in the hands of the provinces in the first place.

There's no doubt that the AER needs to be dismantled. But, regardless of the path we choose any changes that are made to the way that energy is regulated in Alberta (or even Canada as a whole) must be oriented in a way that recognizes, upholds, elevates, and/or prioritizes Indigenous Inherent, Treaty and Constitutional Rights. Thinking back to the Indigenous challenges to Canada's Natural Resource Transfer Agreement, if the establishment of the NRTA is seen as having violated Indigenous Rights, then the AER can be understood as a byproduct of this violation which would never have existed had the provinces not been handed resource jurisdiction. But, as I have learned from my Indigenous colleagues, it's also important for us to seek to reshape the world beyond the colonial conception of rights as we know it, and towards a new system (or relationship) based around our collective responsibilities for stewardship and sustainability as part of the broader earth ecosystem of which we play a part. The colonial system of my rights versus your rights is what got us into this mess in the first place, and based on the evidence provided, the AER has functioned in a way that has prioritized the privately held rights of corporations [for the extraction of natural resources] over the rights of Indigenous peoples and the [non-existent] rights which settler society has long denied to natural ecosystems. This means that whatever regulatory institution replaces the AER, if any, it needs to operate in a decolonial way that genuinely ensures a sustainable relationship between human activities and the non-human world.