

ENVIRONMENTAL RIGHTS IN ALBERTA: Phase I: Do We Have the Rights We Need? Environmental Rights today and in the future.

A publication of the Environmental Law Centre's Environmental Rights Program



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The Environmental Law Centre (Alberta) Society

The Environmental Law Centre (ELC) believes that law is the most powerful tool to protect the environment. Since it was founded in 1982, the ELC has been and continues to be Alberta's only registered charity dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in the Province of Alberta. The ELC's mission is to educate and champion for strong laws and rights so all Albertans can enjoy clean water, clean air and a healthy environment.

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PROJECT SUPPORTER: ASSESSMENT OF ENVIRONMENTAL RIGHTS IN ALBERTA



PROGRAM SUPPORTER: ENVIRONMENTAL BILL OF RIGHTS IN ALBERTA

Alberta **LAW**
FOUNDATION

Executive Summary

Legal rights to pursue and maintain environmental quality are fundamental to our quality of life and more fundamentally to the exercise of other human rights. Most Canadians and Albertans are in the privileged position of living with clean air and clean water yet many people in the country still live with degraded (and often dangerous) water quality, degraded air quality and threats to biodiversity. Laws which grant and protect rights to a clean and healthy environment provide us with tools to restore and maintain our environment today and for future generations.

In this context the Environmental Law Centre (ELC) has undertaken a review of the current state of environmental rights in Alberta (Phase 1 *Environmental Rights in Alberta: Do we have the rights we need?*). While Alberta has passed laws that uphold various procedural rights there are many gaps and shortcomings.

The ELC review concludes that all sectors of environmental management (oil and gas, mining, forestry, agriculture, development under municipal jurisdiction, public lands management) have various deficiencies. These deficiencies include:

- Narrow standing tests for legal reviews and hearings;
- Gaps and insufficiency in cost awards to support participation and informed decision making;
- Failures to adequately recognize and manage cumulative environmental effects;
- Insufficient review or hearing options for policies, regulation and administration of environmental decision making;
- Insufficient tools for engaging public participation in enforcement.

Phase 2 of the ELC's work articulates a road map to resolve these issues. Specifically Alberta should pursue law reform to:

1. Provide participation rights for environmental or public resource decision making;
2. Enable participation in enforcement and compliance;
3. Integrate environmental law principles in laws and regulations; and
4. Provide strategic and operational oversight of policies, regulations, laws and enforcement/compliance.

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A. What is a right to a healthy environment and why is it important?

A right to a healthy environment (also referred to as “environmental rights” in this report) is premised on the fact that humans depend on a clean or healthy environment to flourish and thrive. As a subset of human rights, environmental rights are central to the exercise of other rights and freedoms. A compromised environment may compromise human health and economic prosperity thereby limiting and undermining individual human rights.

As with most rights, it is important to protect rights which are typically easily trampled by the state or by individuals and corporations, particularly for those with little access to courts.¹ Environmental rights act as a counter weight to the impetus of government and market decisions that disregard or undervalue environmental quality and its importance to human dignity and freedom.

Does Canada or Alberta recognize environmental rights?

The Canadian Charter of Rights and Freedoms does not expressly recognize a right to a healthy or clean environment. While the Charter doesn’t state outright that environmental rights exist, many view environmental rights as being inherent or implied in the Charter’s recognition of a “right to life, liberty, and the security of the person”.²

In Alberta our laws do not expressly recognize substantive environmental rights but some legal rights do exist that may support environmental quality. This report summarizes and evaluates Alberta’s laws and how they uphold or undermine the concept of a provincial right to a healthy environment.

Do environmental rights extend to nature itself?

Our interactions with the planet will often harm other flora and fauna prior to causing harm to ourselves. The notion of environmentally sustainability leads to the question of whether we would be better served by granting legal rights to nature itself. To paraphrase the oft cited Christopher Stone

¹ See David Boyd, *The Right to a Healthy Environment: Revitalizing Canada’s Constitution* (Vancouver: UBC Press 2012).

² Recently litigation that included arguments that the Charter included an inherent right to a clean environment was discontinued spring of 2016. See Press release, Ecojustice, online: <http://www.ecojustice.ca/pressrelease/statement-ecojustice-comments-discontinuation-chemical-valley-charter-case/>. See the notice of application for judicial review in *Lockridge v. Ontario (Ministry of Environment)*, Notice of Application # 528-10 <http://www.ecojustice.ca/wp-content/uploads/2014/10/Applicants-Application-Record-Tab-1-AMENDED-Notice-of-Application-FILED.pdf>. *Lockridge v. Director, Ministry of the Environment*, 2012 ONSC 2316 (CanLII), <<http://canlii.ca/t/fz754>>, retrieved on 2016-06-23. Also see David Boyd *The Right to a Healthy Environment: Revitalizing Canada’s Constitution* (Vancouver: UBC Press 2012).

article, we as a society should grant the trees legal standing so that the environment may be represented in legal processes.³

Some states have begun to recognize nature as a legal person with Ecuador entrenching legal rights for nature in its constitution.⁴ We have *amicus curiae*, “friends of the court”, and some jurisdictions have considered standing attorneys for animals.⁵ It appears a logical extension to extend this notion to the environment, *amicus environment et curiae*, a “friend of the environment and court”.⁶

Currently some legal doctrines allow people to act as a proxy for granting legal rights to nature (in a limited degree), such as the public trust doctrine in the United States and the granting of public interest standing to bring matters before courts by interested parties. We will revisit how the environment holds legal rights at various points of this paper to evaluate which approach may be best for Alberta to pursue.⁷

Environmental rights and cumulative environmental effects

Another important aspect of recognizing environmental rights is that they can, if framed properly, be used to address the cumulative environmental effects of our activities on the landscape. Typically human activities add increments of pollution (in relative terms) to our environment or result in incremental degradation of our natural ecosystems.

How much environmental impairment are we willing to permit? From an ecological perspective this question may be reframed as “when do our activities push species or ecosystems past a tipping point (i.e. past their inherent resilience)?”.⁸ Legal recourse for cumulative environmental effects is typically limited due to issues related to problems in establishing causation (between the polluters and the cumulative harm) and limited statutory ability to respond effectively. A right to a healthy

³ Christopher D. Stone “Should Trees have Standing?—toward legal rights for natural objects” (1972) 45 Southern California Law Review 450, online: http://sites.harvard.edu/fs/docs/licb.topic498371.files/Stone.Trees_Standing.pdf

⁴ See Erin Daly, “The Ecuadorian Exemplar: The First Ever Vindications Of Constitutional Rights Of Nature” (2012) *Review of European, Comparative & International Environmental Law* 21(1). The County of Mora New Mexico had tried to entrench this notion municipally through an Ordinance 2013-01, 29 April 2013, online: <http://therightsofnature.org/wp-content/uploads/pdfs/Mora_County_Ordinance_2013.pdf>. The ordinance attempted to ban fracking for oil and gas but was subsequently overturned by a federal judge.

⁵ *Ibid.* in Switzerland. At 21-22.

⁶ This idea of a standing “environmental attorney” that is a friend of the court will be explored by the ELC further in future work.

⁷ We must answer the question of whether a right to a healthy environment includes other species or biodiversity more generally.

⁸ See Lance H. Gunderson “Ecological Resilience – in Theory and Application” *Annu. Rev. Ecol. Syst.* 2000, 31:425-39.

environmental enables a broader suite of legal avenues to tackle these issues (although significant barriers remain).

Temporal aspects of environmental rights

Effective and proactive protection of rights requires an environmental monitoring, management and regulatory regime that deals with environmental quality at multiple time scales, including:

1. prior to an activity being proposed (assessment of laws and policies for gaps/barriers & strategic and regional planning and assessment),
2. during the consideration of whether to allow an activity to proceed (project planning and assessment),
3. once the activity has been established and is impacting the environment (project monitoring and mitigation), and
4. when an activity concludes but continues to have a legacy impact on the environment (post project reclamation and restoration).

In this way, protection of environmental rights takes a step past “cradle to grave” management of activities; rather it starts prior to the conception of how development will occur.

What do environmental rights look like?

A right to a healthy environment may be protected by both common law and codified law (i.e. statutes, regulations, and constitutional documents). Laws drafted to protect environmental rights may include provisions protecting individual rights as well as external processes to ensure those rights are upheld.

Our laws may include:

1. A substantive right to environmental quality;
2. Procedural rights which allow the rights holder to participate in decisions where the right may be impacted;
3. Independent oversight of environmental laws, policies and programs (including enforcement); and
4. Integrate environmental law principles into environmental rights.

I. Substantive environmental rights

In discussing environmental rights one quickly realizes how nuanced the notion of a “healthy environment” can be. What exactly is a healthy environment? Do we demand a right to a pristine environment? What if environmental harm results from naturally occurring substances, such as mercury, radon or lead?

Is there an environmental standard that we should consider inviolable? Should the right to a healthy environment ensure ongoing environmental quality or is it a right of last resort when pollution has significantly impacted our lives in such a way as to justify redress?

This difficult question of what is the “right” environmental standard of environmental rights will be discussed further in this report but certain principles pervade the discussion (or are fundamental to discuss and decide).

Why express a substantive right?

The primary objective of expressing a substantive environmental right in our laws is to ensure that the actions and decisions of governments, corporations and individuals do not result in degradation of the environment below a set standard. To be effective, a substantive environmental right sets the bar that must be met in terms of environmental quality. In this way a substantive environmental right may promote and grant protection to environmental quality which supersedes government authorizations. In practice however substantive rights are often constrained by limiting remedies to instances where the harm that is occurring is unauthorized.

Generally, environmental rights laws allow for private court action in relation to unlawful pollution. Where pollution is authorized by government there is typically no recourse. That is to say, if the government of the day chooses to make decisions that result in an unhealthy environment that is its prerogative; redress occurs on election day. This approach unfortunately fails to address environmental justice issues and disenfranchisement of the most environmentally vulnerable populations. This is why constitutional protections of environmental rights are so important, as a measure against undue environmental harm being perpetuated by day to day decisions of the state.⁹ Placing a substantive

⁹ A prime example of the relevance of placing a constitutional right to environmental quality is *Mendoza Beatriz Silva v. National Government of Argentina* (English https://www.escr-net.org/sites/default/files/Sentencia_CSJN_2008_english.pdf). See also Body, *supra* note 1.

right in the Canadian Charter of Rights and Freedoms, like rights of freedom of expression or rights to be free from unreasonable search and seizure, ensures government action that undermines the right is constrained by laws to the extent “demonstrably justified in a free and democratic society”.¹⁰

Obviously the standard that is prescribed is of the greatest relevance for a clearly articulated substantive right. A right to a “clean”, “healthy” or “healthful” environment is only relevant if one can define health.¹¹

How might a substantive right be legally protected?

A substantive right may be established as an environmental standard in our laws and regulations or it may evolve in jurisprudence (i.e. the courts). Who should define what constitutes a “healthy environment”: the government or the courts?

Both approaches have their advantages and disadvantages. Enabling government to establish the level of environmental quality or the environmental attributes that must be protected may be inflexible and unresponsive (once the standard is set it may be hard or slow to change) or it may be open to change for political and ideological reasons.

Relying on a court or judges’ determination of the level of environmental quality allows for greater flexibility in how we approach environmental quality and the balance of other rights and values that may arise. However; this also burdens the court with often complex scientific determinations and competing expert evidence that the court may be ill equipped to evaluate. Courts may also feel that the issues of environmental protection should be dealt with through policy rather than law.¹² Judicial determinations also come with significant cost, and typically reactive and may be quite slow. If we seek to proactively protect rights, environmental standards may be preferred.

¹⁰ See section 1, Canadian Charter of Rights and Freedoms.

¹¹ Similarly, prohibitions against “significant” environmental harm are only of value if the definition of “significant” is adequately protective.

¹² See Dinah L. Shelton, “Developing Substantive Environmental Rights” (2010) *J. Ham. Rts. & Env’t.* 1:89, online: <http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2049&context=faculty_publications> and Mary Ellen Cusack “Judicial Interpretation of State Constitutional Rights to a Healthful Environment” *Boston College Env. Affairs Law Review* (1993) 20-1. (note up).

II. Procedural rights

A right to access to legal processes to challenge government decisions and harms are a cornerstone of rights protection. These legal process rights must include:

- i. Access to information;
- ii. Public participation; and
- iii. Access to justice.

Access to environmental information

The need for relevant environmental information is essential to environmental rights. In the absence of knowledge - the "who, what, where and how" of environmental harm - it is very difficult to effectively participate in legal processes, let alone claim an infringement of a substantive environmental right.

One of the main barriers to protecting a right to a healthy environment is having sufficient information to compel state or individual action to remedy or prevent environmental degradation. Further, proactive treatment of environmental rights is only feasible through a thorough and effective environmental monitoring and disclosure process.

Environmental information must be generated and made available in a way that will be accepted by a decision maker or adjudicator. In this way access to environmental information is a central pillar to access to environmental justice. Part of this process must assure environmental information is not considered confidential or is otherwise withheld from those potentially impacted. In this regard, several jurisdictions create "registries" where relevant information, including information that is filed in support of specific developments are open and freely accessible (assuming that an internet connection is available).¹³

¹³ See for example the Ontario Environmental Registry at <https://www.ebr.gov.on.ca/ERS-WEB-External/>.

Public participation

A central pillar of environmental rights, public participation is essential to realize a broad and sustainable future. Public participation fosters accountability, transparency and integrity in decision making.¹⁴

Public participation may take various forms but it is necessary to have legal rights to participate in decisions that have environmental ramifications. These rights to participate may be established in either common law or codified laws.¹⁵

Public participation, to be effective, must be accompanied by specific procedural rights including, but not limited to:

- Being granted standing by statute or by the decision maker (or tribunal);
- Access to relevant information;
- The ability to present evidence (and to test the evidence of other parties); and
- The ability to recover costs.

Public participation may also take the form of individuals pursuing the enforcement of environmental laws or providing individual rights to bring legal actions in protection of the environment. In this way, individual rights to a clean or healthy environment are not solely reliant on the exercise of government discretion to pursue remedies for violations of our environmental laws.

The process of environmental assessment provides a nexus of procedural rights to access to environmental information and participate in environmental decision-making. Environmental impact assessment is “the process of identifying, predicting, evaluating and mitigating the biophysical, social and other relevant effects of development proposals prior to major decisions being taken and commitments made.”¹⁶ In other words, environmental assessment is a means to improve decision-

¹⁴ The Auditor General of British Columbia has enumerated principles for public participation in *Report 11: Public Participation – Principles and Best Practices for British Columbia* (2008) which is published on www.bcauditor.com. Public participation is a widely adopted principle in both federal and provincial legislation. Federally, the principle of public participation appears in the *Canadian Environmental Assessment Act* (preamble, s. 4(d)); the *Canadian Environmental Protection Act, 1999* (s. 29(1)(e)); the *Pest Control Products Act*, S.C. 2000, c. 28 (s. 4(2)(c), 5, 28); and the *Canada National Parks Act*, S.C. 2000, c. 32 (s. 12).

¹⁵ The courts have recognized the importance of public participation and dissent by disallowing strategic lawsuits against public participation. See *Scory v. Krannitz*, 2011 BCSC 674 and 2011 BCSC 936.

¹⁶ International Association for Impact Assessment, in cooperation with Institute of Environmental Assessment, UK, *Principles of Environmental Impact Assessment Best Practice* (January 1999).

making and to lead to improved selection and design of undertakings to minimize negative environmental impacts. Meaningful public participation is an essential element of environmental assessment and should be accommodated to the extent that there is public interest.

In order to achieve meaningful public participation, there must be full and convenient access to information by the public, as well as sufficient notice and time to enable preparation of public input. All public input must be fairly and explicitly considered by the relevant decision-maker.

Access to Justice

Access to justice requires that environmental rights and decisions impacting the environment can be adjudicated by the courts. Currently courts may address environmentally related issues through judicial review, appeals, including appeals to tribunals, or through common law rights of actions. These have limitations (both in our legislation and that have evolved at common law).

To ensure protection of one's rights it is important that barriers to accessing the justice system are removed or minimized. Access to justice may include the right to have the government initiate an investigation and the right to bring actions to force compliance with environmental laws.

III. Independent oversight of the administration of environmental laws

Government must be accountable for the decisions it makes regarding the environment and the potential impact these decisions have on Albertans. Accountability for administration of our environmental laws can be fostered by having independent oversight of decision making processes, policies and guidelines. For this reason an independent (or quasi-independent) third party, such as an environmental tribunal or an "Environment Commissioner", is often enabled in environmental rights legislation to undertake the auditing of government administration of laws and policies and to review enforcement and compliance approaches taken by government.

IV. Environmental law principles for environmental rights

One of the main conundrums of environmental law is that it is typically reactive in its approach. Environmental or individual harm occurs, we investigate what causes the harm, and then we attempt to remedy the harm. It is very important that legal processes are in place to react to environmental harms but it is also essential that environmental rights be proactively protected. Our decisions about polluting

activities can be guided by core environmental principles in an effort for more proactive protection of environmental rights. Environmental law principles that proactively support environmental rights include:

- i. Precautionary principle;
- ii. Pollution prevention;
- iii. Polluter pays principle;
- iv. Intergenerational equity;
- v. Environmental justice; and
- vi. The public trust doctrine.

The precautionary principle

The precautionary principle was enunciated as Principle 15 in the *United Nations Rio Declaration on the Environment and Development* (UNCED 1992) stating “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

The precautionary principle has been considered and cited by numerous courts across the country and its proactive application is essential to avoiding irreparable environmental harm.¹⁷ In a recent case, the court found that the failure to properly apply the precautionary principle in a regulatory decision and in licence conditions undermined the government’s claim that the decision was “reasonable”.¹⁸ In that case it was noted:¹⁹

The precautionary principle recognizes, that as a matter of sound public policy the lack of complete scientific certainty should not be used as a basis for avoiding or postponing measures to protect the environment, as there are inherent limits in being able to

¹⁷ See for example *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)* [2001] 2 S.C.R. 241, *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 (CanLII), *Weir v. Canada (Minister of Health)*, (2011) FC 1322, *Blaney et al. v. British Columbia (The Minister of Agriculture Food and Fisheries) et al.*, (2005) BCSC 283. The *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (s. 4(1)(a)) provides that one of the purposes of the Act is “to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects”. The precautionary principle also appears in the *Species at Risk Act*, S.C. 2002, c. 29 (preamble); the *Pest Control Products Act*, S.C. 2002, c. 28 (s. 20); the *Oceans Act*, S.C. 1996, c. 31 (preamble); and the *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18 (preamble).

¹⁸ See *Morton v. Canada (Fisheries and Oceans)*, 2015 FC 575 (CanLII), <<http://canlii.ca/t/ghjfq>>

¹⁹ *Ibid.* citing *Spraytech*.

predict environmental harm. Moving from the realm public policy to the law, the precautionary principle is at a minimum, an established aspect of statutory interpretation, and arguably, has crystallized into a norm of customary international law and substantive domestic law.

Pollution Prevention

The Canadian Council of Ministers of the Environment defined pollution prevention in *A Strategy to Fulfil the CCME Commitment to Pollution Prevention* (May 1996) as:²⁰

The use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants and wastes, at the source.... Pollution prevention is the preferred strategy for protecting the environmental. Pollution prevention does not include measures such as diluting constituents to reduce hazard or toxicity, or transferring hazardous or toxic contaminants from one medium to another or to the work place.

Polluter Pays

The principle of polluter pays was enunciated as Principle 16 in the *United Nations Rio Declaration on the Environment and Development* (UNCED 1992) as "the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."²¹

²⁰ The Canadian Council of Ministers of the Environment (CCME), online: CCME http://www.ccme.ca/files/Resources/pollution_prevention/commitment_to_p2_eng.pdf. In Alberta, the key pollution prevention legislation is Part 5 of Alberta *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and the related *Substance Release Regulation*, A.R. 124/1993. The reduction of greenhouse gas production is addressed by the *Climate Change and Emissions Management Act*, S.A. 2003, c. C-16.7. Other pieces of Alberta legislation deal with pollution control as an incidental matter: the *Coal Conservation Act*, R.S.A. 2000, c. C-17; the *Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16; the *Pipeline Act*, R.S.A. 2000, c. P-15; and the *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7. The key federal legislation dealing with pollution prevention is Part 4 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33. There are other federal statutes that deal with pollution prevention: the *Canada Shipping Act*, S.C. 2001, c. 26; the *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12; and the *Fisheries Act*, R.S.C. 1985, c. F-14.

²¹ Rio Declaration on environment and development <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

The Supreme Court of Canada commented on the polluter pays principle in *Imperial Oil v. Quebec (Minister of Environment)* noting that the: ²²

...principle has become firmly entrenched in environmental law in Canada. It is found in almost all federal and provincial environmental legislation... That principle is also recognized at the international level. One of the best examples of that recognition is found in the sixteenth principle of Rio Declaration on Environment and Development, UN Doc. A/Conf. 151/5/Rev. 1 (1992).

To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.

In Alberta, the *Environmental Protection and Enhancement Act* adopts the principle noting, in the purpose section that it is the "responsibility of polluters to pay for the costs of their actions".²³

Intergenerational Equity

The principle of intergenerational equity expands the notion of recognizing the right of the environment to the temporal context of recognizing the resource needs of future generations.²⁴

In discussing the principle Edith Brown Weiss notes:²⁵

This ethical and philosophical commitment acts as a constraint on a natural inclination to take advantage of our temporary control over the earth's resources, and to use them only for our own benefit without careful regard for what we leave to our children and their descendants.

²² [2003] 2 S.C.R. 624 at para. 23.

²³, R.S.A. 2000, c. E-12 at s.2. The principle of polluter pays is incorporated into the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c.33 (preamble and s. 287); the *Antarctic Environmental Protection Act*, S.C. 2003, c. 20 (s. 50.9); the *Fisheries Act*, R.S.C. 1985, c. F-14 (s. 42); and the *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12 (ss. 6 and 7). In these pieces of legislation, the polluter pays principle appears as a factor in sentencing or as imposition of liability under the legislation.

²⁴ This principle is tied to the definition of sustainable development put forth in the *Brundtland Report*. The principle of sustainable development incorporates the concept of intergenerational equity: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

²⁵ Weiss, Edith Brown. "In Fairness to Future Generations and Sustainable Development." *American University International Law Review* 8, no. 1 (1992): 19-26.

... [and that] we, the living, are sojourners on earth and temporary stewards of our resources.

This principle is also tied to the principles of pollution prevention and polluter pays. The principle of pollution prevention is designed to prevent or, at least, minimize the use of pollutants that persist and bioaccumulate thereby affecting future generations. The principle of polluter pays is designed to ensure that liabilities are not deferred to future generations.

Application of the principle of integrational equity is difficult as it attempts to guide choices today in view of an uncertain future. Nevertheless it is recognized in various legal instruments, including in Alberta, where *EPEA* supports sustainable development “which ensures that the use of resources and the environment today does not impair prospects for their use by future generation”.²⁶ Typically the statement of this principle in laws is not prescriptive, leaving one to wonder how relevant it has become.

Environmental Justice

Environmental justice refers to the need to ensure that no specific group is overly-burdened by environmental harms. Development of polluting activities will often have a disproportionate adverse effect on people who are marginalized in our society based on race, ethnicity, gender and income. The concept of environmental justice seeks to address this inequality and ensure equal ability for people to participate in decisions which may affect them.²⁷

Public trust doctrine

All aspects of the natural environment can be undermined by government decisions about what destructive activities are allowed to take place. In the absence of a statutory or common law legal obligation towards the environment the government largely need not concern itself with the results of its approvals.

²⁶ *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 at s.2 (c).

²⁷ See Kaitlyn Mitchell, *Environmental Racism: The first step in recognizing we have a problem*, Ecojustice Blog May6, 2015, online: Ecojustice <http://www.ecojustice.ca/enviro-racism-we-have-a-problem/>

For this reason environmental rights legislation often stipulates that the Crown management of natural resources is governed in the nature of a public trust.²⁸ A recent federal bill defined the “public trust” as “the federal government’s responsibility to preserve and protect the collective interest of the people of Canada in the quality of the environment for the benefit of present and future generations.”²⁹

B. Scope of existing rights in Alberta

What is the state of environmental rights in Alberta? To define the relative state of rights one must have a reference point for environmental rights. The ELC’s assessment of environmental rights is based on past academic work, adherence to environmental law principles and lessons that can be learned from other jurisdictions.³⁰

In this part the ELC canvasses:

1. Whether we, as residents of the province, have a substantive right or guarantee of environmental quality;
2. Procedural rights in Alberta; and
3. Independent oversight of the administration of environmental laws in Alberta.

I. Substantive rights in Alberta

Is there a right to environmental quality (i.e. a substantive environmental right) in Alberta? The short answer is no. We have a variety of environmental standards embedded in our laws (and authorizations) but a standalone right to a level of environmental quality does not currently exist.

In evaluating whether environmental standards are likely to protect citizens from environmental harm one must first consider the systemic, regulatory and governance requirements that are needed to realize prescribed levels of environmental quality. A regulatory system may minimize the likelihood of causing harm (and thus infringing on a substantive environmental right) when it is:

- i) comprehensive,

²⁸ The previous federal Bill C-634, An Act to establish a Canadian Environmental Bill of Rights, 2nd Sess, 41st Parl, 62-63 Elizabeth II, 2013-104, stated at s.9. “The Government of Canada is the trustee of Canada’s environment within its jurisdiction and has the obligation to preserve it in accordance with the public trust for the benefit of present and future generations.” <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6746697&File=50#7> and s.6.

²⁹ *Ibid.* at s.2.

³⁰ For example, see Boyd *supra* note 1.

- ii) integrated,
- iii) enforceable, and
- iv) designed to measure, plan and respond to cumulative effects.

Key barriers in upholding substantive environmental rights are that planning and regulatory systems are typically focused on project specific impacts, failure to integrate planning and management of all activities that contribute to specific environmental impairment, and lack of legally enforceable responses to respond to cumulative impacts on the landscape. To paraphrase, we govern our impacts on the environment too narrowly, often with too little information, and no legal recourse to counteract environmental harm (whether incremental and cumulative, chronic or acute).

The Alberta approach

Alberta has some environmental standards in place which are enforceable but generally the provincial regulatory and planning systems run into the barriers mentioned above (i.e. it lacks integration, standards are rarely enforceable and regulatory systems fail to adequately address cumulative effects). Infringement of environmental rights becomes more likely where there is overreliance on the ability of the environment to dilute pollution or a lack of consideration, knowledge and regulation of the cumulative effects of activities.³¹

Our regulation of pollution is typically based on a case-by-case or project-by-project basis. Individually these “authorized” polluting activities may have various impacts on environmental quality but even small impacts may act cumulatively to degrade our environment. Also, regulation is typically sector based which results in problems in integrating environmental management across sectors (i.e. the “silo” effect).

A key aspect of historical environmental regulation in the province is that it has failed to operate from a perspective of the receiving environment (i.e. it has failed to manage toward environmental outcomes

³¹ A substantive environmental right must therefore tackle the major challenge of dealing with cumulative environmental impacts. The nature of this challenge is significant for various reasons, some of the major ones being we do not regulate all activities on the landscape which impact environmental quality (particularly when they are of a non-point source of pollution) and we often do not have a clear understanding of the environmental carrying capacity or dilution capacity, the epidemiological effects of some substances on the environment, and the potential synergistic effects among chemicals released to the environment.

in an integrated fashion) rather it functions to dictate pollution standards allowable at a point source.³² Non-point source pollution clearly contributes to the potential impairment and infringement of environmental rights but fails to properly be considered in our legal frameworks.

Where general prohibitions against pollution exist the focus continues to be on specific releases and specific environmental impacts (e.g. “significant adverse effect”) being caused by those releases.³³ The legal system is in many ways ill-suited to deal with cumulative environmental impairment. This requires a renewed emphasis in law of principles of pollution prevention and the precautionary principle.

Alberta examples in fostering environmental quality

One example of an environmental standard in Alberta relates to potable water in a water works system that must meet a minimal standard set by the federal *Guidelines for Canadian Drinking Water Quality*.³⁴ This standard again reflects a lack of preventative approach, focusing rather on reactive treatment requirements to bring water to your tap, leaving the source of water open to ongoing pollution. In this way we are mitigating risks to humans quite myopically with less focus on preventing pollution.

Alberta has responded to the cumulative environmental effects conundrum by creating “environmental management frameworks”.³⁵ These regionally based frameworks have only been approved for two regions of the province to date and focus on creating trigger levels and limits to manage environmental degradation. These triggers and limits are intended to result in management actions to prevent further environmental impairment. The frameworks have laudable objectives but they do not guarantee environmental quality across an entire region, and are likely to face numerous enforcement difficulties.³⁶

³² For example *Siksika Nation Elders Committee and Siksika Nation v. Director, Southern Region, Regional Services, Alberta Environment, re: Town of Strathmore* (18 April 2007), Appeal Nos. 05-053-054-R (A.E.A.B.) online: Environmental Appeals Board <<http://www.eab.gov.ab.ca/dec/05-053-054-R-Erratum.pdf>>.

³³ For instance *EPEA* prohibits releases that are likely to cause significant adverse environmental effects but this only deals with activities where a “significant” effect results from a given release.

³⁴ See s.6 of the *Potable Water Regulation* AR 277/2003.

³⁵ See Alberta Environment and Parks, *Environmental Management Frameworks*, online: <<https://www.landuse.alberta.ca/CumulativeEffects/EnvironmentalMgmtFrameworks/Pages/default.aspx>> accessed on November 25, 2016.

³⁶ See Jason Unger, *Comments on Surface Water Quality Management Framework for the Lower Athabasca Regional Plan*, January 24, 2013, online: Environmental Law Centre. <http://elc.ab.ca/Content_Files/Files/Comments_re_SurfaceWaterQualityEMF2013Jan.pdf>.

Public health legislation also provides powers for the government to respond to “nuisances” which relates to conditions that might become “injurious or dangerous to the public health”.³⁷ This legislation includes the ability to inspect and make administrative orders in relation to the nuisance.³⁸ The *Nuisance and General Sanitation Regulation* also prohibits the creation of a nuisance, requires the supplier of water to ensure potability, and takes a risk mitigation approach to regulating around wastewater.³⁹

Similarly the *Occupational Health and Safety Act* allows for the issuance of administrative orders to remedy “unhealthy” or “unsafe” work. Definitions of what constitutes “unhealthy” is not provided in the act or regulation.

In each case there remains a level of “significance” or clear linkage with a specific activity and a demonstrable impact on human health. While these types of provisions could feasibly be proactively applied to prevent environmental releases often complexities in linking causation of impacts to specific activities undermines any type of regulatory proactivity in maintaining environmental quality.

³⁷ *Public Health Act*, at s.1 (ee).

³⁸ Powers of inspection (s.59 – 60), administrative order (by executive officer) s.62 where violation of act or where it is deemed an emergency

³⁹ *Nuisance and General Sanitation Regulation* Alta. Reg., 243/2003 at s.1f, s. 2 and s.15.

II. Procedural environmental rights in Alberta

This section of the report provides a general assessment of procedural laws in Alberta. Alberta has two broad cross-sectoral environmental laws (excluding recent climate change legislation); the *Water Act* and the *Environmental Protection and Enhancement Act (EPEA)*. Also discussed under this cross sector legislation is the *Alberta Land Stewardship Act (ALSA)*, which has potential implications for protection of environmental rights.⁴⁰

The procedural rights under both the *Water Act* and *EPEA* are similar in most respects. (*ALSA* is quite different in its approach and relies heavily on existing legislation and is described later.)

In addition there are a host of sector specific laws and regulations and laws dealing with management of public land and laws dealing specifically with access to information.

Table 1 outlines the various aspects of procedural rights afforded by Alberta Legislation and colour codes them based on the ELC’s assessment of the approach. For a more detailed description of rights see Appendix A.

*The **Environmental Protection and Enhancement Act** is the primary pollution regulation law in the province. It determines where environmental assessments are required, what activities must be authorized, and governs waste management, pesticides and point source pollution.*

*The **Water Act** governs diversions of water and activities that have impacts on water bodies. The Act also states that all water in the province is owned by the Crown.*

*The **Alberta Land Stewardship Act** creates a regional planning system in Alberta which may be used to govern activities on the landscape and decisions of provincial and municipal governments.*

⁴⁰ Finally there are requirements under the *Administrative Procedures and Jurisdiction Act* which may trigger some procedural rights. R.S.A 2000, C. A-6 for the Land Compensation Board, the Surface Rights Board and the Natural Resources Conservation Board (see Authorities Designation Regulation, Alta Reg 64/2003).

TABLE 1: ELC SUMMARY OF ALBERTA'S PROCEDURAL RIGHTS

PROCEDURAL RIGHTS	EPEA	WATER ACT	OIL AND GAS	ELECTRICITY	AGRICULTURE	MUNICIPAL	NRCB	ALSA	KEY ELC OBSERVATIONS
Regulatory decision									
Scope of activities covered*									Cumulative effects failings Many unregulated activities
Public notice of application									
Access to information									Inadequate monitoring and public reporting requirements
Standing to participate in the regulatory (authorization) decision									Limited standing (directly and adversely affected)
Timing for participation (via statute)									
Scope of participation in auth.									Some hearings at authorization stage
Notice of decision									
Reasons for a decision									
Appeals									
Appeal of decision to tribunal									Limited standing
Scope of appeal									
Legal rights during appeal									Scope of rights very discretionary
Reasons published									
Costs of an appeal (and public participation)									Highly discretionary. Partial costs if at all.
Appeal to courts									Often requires leave and limited to issues of law or jurisdiction
Overall assessment									
Integration/application of environmental law principles									
General assessment of procedural rights									
Rights are sufficient									
Gaps need to be filled									
Significant gaps									
Rights absent/major adjustment needed									

* While not a procedural right, the scope of activities covered by regulatory process is clearly relevant to an assessment of rights to a healthy environment. This includes thresholds of regulation and how legislation deals with cumulative effects.

Environmental rights and Crown owned resources and land

In Alberta, like many Canadian jurisdictions, citizens have limited rights to participate in decisions relating to activities on public lands. This exclusion of citizen participation is largely a result of a narrow legal standing that governs most procedural rights in Alberta.

The ability to appeal a government decisions on public lands is limited to parties who have received a decision or a person who is directly and adversely affected by the decision.⁴¹

Should environmental rights extend to public lands (and resources)?

The general approach in Alberta for managing activities on public land is to rely on government perspectives alone, informed by information provided to them by proponents regarding activities and related environmental impacts on public land. Since the land is the property of the Crown, it is reasoned, the Crown is the one who may be impacted by its own decisions. From this position the only mechanism to deal with environmental concerns related to Crown land are limited to voting during an election, by applying political pressure, or through judicial review.

Similarly, decisions regarding public resources such as water and wildlife and decisions regarding management of public land including sale and development are governed by Crown discretion.

There are legal doctrines available to recognize public and environmental rights in public resources. Environmental rights legislation often incorporates a notion that the environment is a public trust. A “public trust” or the public trust doctrine as it has evolved in the United States, is based on the notion that while certain resources and lands may be owned by government they are held in trust for the benefit of the broader public. Where public trust principles are applied decisions regarding public resources triggers specific procedural rights (and, on occasion, substantive rights).




Past attempts at change:

Environmental Bill of Rights

(Alberta): Bill 201 (1991) s.4.

The Province of Alberta, as trustee of Alberta's public lands, water and natural resources, shall conserve and maintain them for the benefit of present and future generations



⁴¹ *Public Lands Administration Regulation*, Alta Reg. 187/2011 at s.211.

In United States, this principle is reflected in both the common law public trust doctrine as well in state laws. The public trust doctrine has not been supported by Canadian courts requiring that the doctrine be expressly articulated in provincial laws to become operational.

An alternative to the public trust doctrine applying to Crown resource management is to expand participatory rights to grant standing to organizations which display a genuine interest in the public resource outcomes and management of public land.

III. Third party oversight of administration of environmental rights and laws

Laws, ineffectively applied, will directly undermine any ability to ensure environmental rights. Measures must be in place to mitigate against ineffective or insufficient enforcement of our environmental laws. In addition, a mechanism to evaluate and assess laws and policies to determine whether they are up to the task of assuring environmental rights is absent in Alberta law.

Alberta does have an independent office in the Auditor General which audits programs and policies of the government. The Auditor General undertakes financial audits and reviews of government departments, including programs and policies relevant to environmental management (through various departments). The Auditor General is granted access to all relevant records and electronic data processing equipment of the relevant departments or agencies.⁴² All present and former employees of the provincial government must provide the relevant information and records. The Auditor General may also require a person to provide information under oath (some witnesses cannot be compelled in such a way).⁴³

The most relevant audit function relates to systems audits, which seeks to answer the question “Does the organization have the policies, processes and controls to accomplish its goals and mitigate its risks economically and efficiently?”⁴⁴

Some examples of audits include:

- government information systems for drinking water;⁴⁵

⁴² *Auditor General Act*, R.S.A., 2000, c. A-46 at s.14.

⁴³ *Ibid.* at s.14.1 and s.14.2.

⁴⁴ See Office of the Auditor General of Alberta, Results Analysis Report 2014-2015. <https://www.oag.ab.ca/webfiles/other/ResultsAnalysisReport2014-2015.pdf>

- environmental monitoring;⁴⁶
- management of confined feeding operations and related risks;⁴⁷

The role of the provincial auditor is complemented federally by the work of the Commissioner of the Environment and Sustainable Development, which has conducted review and analysis of programs led by Environment Canada, Health Canada, and the Department of Fisheries and Oceans. These reports include reviews of pesticide programs,⁴⁸ pipeline safety, environmental monitoring, and environmental assessment.⁴⁹

Until recently, the Alberta Government had pursued formation of an independent environmental monitoring body, the Alberta Environmental Monitoring, Evaluation and Reporting Agency.⁵⁰ This agency was wound down in early 2016 and monitoring was returned to Alberta Environment and Parks. Further, the responsibility of benchmarking policies, regulations and enforcement against prescribed standards (for instance environmental law principles) is lacking.

Conclusion on third party oversight

The Auditor General has undertaken important work but the limitations in the current Alberta system must be recognized. The Auditor General's capacity and focus to audit environmental programs on an ongoing and fulsome manner is limited as the Office of the Auditor General has a broad mandate. Perhaps more importantly, the jurisdiction and analysis of the Auditor General is restricted to evaluating government programs within the context of government performance metrics: stand-alone environmental metrics don't exist and the ability to evaluate regulations and policies for adherence to specific environmental outcomes is limited.

⁴⁵ Auditor General of Alberta, *Report of the Auditor General of Alberta*, February 2016, online: Auditor General of Alberta <<https://www.oag.ab.ca/webfiles/reports/OAGFeb2016Report.pdf>>.

⁴⁶ In relation to oil sands development see Alberta Auditor General February 2016 Report *ibid*.

⁴⁷ *Ibid*.

⁴⁸ Auditor General of Canada, *2015 Fall Reports of the Commissioner of the Environment and Sustainable Development*, online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201601_01_e_41015.html>.

⁴⁹ Auditor General of Canada, *2014 Fall Reports of the Commissioner of the Environment and Sustainable Development*, online: Office of the Auditor General of Canada, <http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201410_e_39845.html>.

⁵⁰ This agency was set up pursuant to *the Protecting Alberta's Environment Act*, S.A., 2013, c-P-26.8.

CONCLUSIONS REGARDING ENVIRONMENTAL RIGHTS IN ALBERTA

Alberta was an early adopter in some areas of procedural rights in the environmental context but there are clear deficiencies in Alberta's current treatment of environmental rights. The scope of these rights is restated here to give context to the discussion that follows.

- Right to participate in regulatory decisions which impact environmental quality;
- Right to seek redress for harms that are largely unregulated (i.e. regulatory coverage);
- Right to appeal decisions made by the state to a tribunal or court;
- Right to seek an effective remedy through regulatory and appeal based processes; and
- Right to know the environmental consequences of proposed activities.

Rights to participate (legal standing)

The current test for standing to participate in legal processes is unduly and inappropriately narrow. The "directly affected" or "directly and adversely affected" test has been interpreted in such a way as to exclude genuine concerns about management of the environment. The overt focus on economic interests and provable threats to health undermine public participation and the value it brings.

Regulatory coverage of environmental impacts

A key aspect of environmental rights is managing environmental quality and not merely activity based pollution or harm. Admittedly this is difficult but it is necessary to adequately deal with environmental quality.

There are core aspects of environmental degradation that do not garner regulatory oversight and therefore fail to trigger any substantive or procedural rights.⁵¹

Most notably environmental rights are needed to deal with cumulative environmental impacts and for activities that have the potential to adversely affect environmental quality including non-point source pollution.

⁵¹ Numerous activities may have potentially harmful environmental effects but do not trigger these procedural rights including such things as agricultural activities, some landfills, and gravel pits.

Access to courts

Access to courts to ensure compliance and upholding of procedural (and substantive) obligations is essential to maintaining environmental rights. The current approach to judicial oversight in environmental and natural resource statutes in the province is either through limiting access to courts (through the use of privative clauses) or by limiting access to court oversight to issues of law and jurisdiction. While limiting court reviews to questions of law or jurisdiction appears reasonable it is problematic when dealing with factual information around impacts on the environment. Tribunals and government decision makers should be required to make reasonable decisions around environmental quality concerns and this can occur by broadening judicial review opportunities.⁵²

Public enforcement and remedies

While providing a right to request an investigation under EPEA is laudable, it is narrow in terms of scope of participation in environmental law enforcement. There is no ability to bring legal actions on behalf of the environment (either directly or as claim in public nuisance) and the process for private prosecutions is unduly restrictive and may be limited by the discretion to stay prosecutions.⁵³

Third party oversight of administration of environmental rights and laws

Laws, ineffectively applied, will directly undermine any ability to ensure environmental rights. Measures must be in place to mitigate against ineffective or insufficient enforcement of our statutes and regulations. In addition, a mechanism to evaluate and assess laws and policies to determine whether they are up to the task of assuring environmental rights is absent in Alberta law.

Phase 2 of this report details a road map toward environmental rights in Alberta.

⁵² While it is foreseeable that an unreasonable factual determination may result in a decision maker making a reviewable error of law the limitation of law and jurisdiction is likely to be an impediment to effective protection of environmental rights.

⁵³ *Kostuch v. Kowalski*, 1991 CanLII 5874 (AB QB), [1991] 6 WWR 160; 81 Alta LR (2d) 214.

APPENDIX A: REVIEW OF PROCEDURAL RIGHTS IN ALBERTA

Procedural rights in Alberta vary by sector and by environmental subject matter. A brief review and evaluation of these rights under the *Water Act*, the *Environmental Protection and Enhancement Act* and under various sector based legislation.

TABLE 1: PROCEDURAL RIGHTS UNDER THE WATER ACT AND EPEA

<i>PROCEDURAL RIGHTS</i>	<i>WATER ACT</i>	<i>EPEA</i>	<i>ELC ASSESSMENT</i>
Public notice of application for an activity	Limited to activities that require a licence or approval under the Act (and many amendments thereto).	Limited to activities that require an approval under the Act (and many amendments thereto).	Appropriate scope so long as meeting principles of procedural fairness and expanded standing test. Separate mechanism needed for cumulative effects.
Access to information	Regulations dictate disclosure of environmental information in support of application and gathered pursuant to conditions. Confidentiality may be claimed.	Regulations dictate disclosure of environmental information in support of application and gathered pursuant to conditions. Confidentiality may be claimed.	Public right to environmental information should be expanded and transparently reported. Confidentiality claims should be limited. All reports and work done in support of authorization requirements which touch on environment outcomes (and public resources) are <i>prima facie</i> , considered public.
Standing to participate in the regulatory (authorization) decision	Limited to “directly affected” parties.	Limited to “directly affected” parties.	Should be expanded beyond narrow confines of property rights and individual rights against harm.

<i>PROCEDURAL RIGHTS</i>	<i>WATER ACT</i>	<i>EPEA</i>	<i>ELC ASSESSMENT</i>
Timing for participation (via statute)	30 days from the notice of application for licences 7 days from the notice of application for approvals. (s.109(2)).	30 days from the notice of application. (s.73)	Timing for <i>Water Act</i> approvals is inadequate.
Notice of decision	Notice of decision to directly affected who submitted statements of concern.	Notice of decision to directly affected who submitted statements of concern.	Difficulty in assessing when costs will be granted. Criteria to guide cost awards may be of value.
Appeal of decision	For directly affected who submitted a statement of concern	For directly affected who submitted a statement of concern	Inappropriately narrow interpretation of “directly affected”. Avenue of appeal to tribunal on questions of law and jurisdiction should be enabled. ⁵⁴
Scope of appeal	Limited to notice of appeal contents	Limited to notice of appeal contents (with discretion to expand)	Appropriate limit
Legal rights during appeal	Written or oral Cross-examination and evidence in chief at the discretion of EAB	Written or oral Cross-examination and evidence in chief at the discretion of EAB	Appropriate limit when done in accordance with procedural fairness.

⁵⁴ For efficiency purposes, questions of law should not be guided by narrow standing tests, thereby forcing appellants to seek judicial review.

<i>PROCEDURAL RIGHTS</i>	<i>WATER ACT</i>	<i>EPEA</i>	<i>ELC ASSESSMENT</i>
Publish of reasons	Report and recommendations of EAB required. Reasons of Minister not required where recommendations not followed. ⁵⁵	Report and recommendations of EAB required. Reasons of Minister not required where recommendations not followed.	Reasons for varying factual determinations and recommendations should be required.
Costs of an appeal (and public participation)	Costs of an appeal are payable by the applicant at the discretion of the Board.	Costs of an appeal are payable by the applicant at the discretion of the Board.	
Appeal to courts	Appeal to courts not considered (EAB reviews and decisions governed by EPEA)	Privative clause - exclusive jurisdiction is with Minister and Board (i.e. no court review or remedy). ⁵⁶	Privative clauses result in excess deference*

*deference may be required in some areas but not in consideration of substantive environmental quality.

As described by the Supreme Court of Canada:⁵⁷

The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a

⁵⁵ *Fenske v. Alberta (Minister of Environment)*, 2002 ABCA 135 (CanLII), <<http://canlii.ca/t/5km2>>.

⁵⁶ *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 at s.102.

⁵⁷ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 71.

proposed development [citations omitted]. In short, environmental assessment is simply descriptive of a process of decision-making.

Alberta does have a formal environmental assessment and as such, at least in some cases, there is a legal right to know the possible environmental consequences of proposed activities. However, this right is unduly limited given that the environmental assessment process applies only to a selection of project-based activities and does not extend to strategic or planning decisions. Furthermore, public participation in environmental assessment is rather limited.

TABLE 2: PROCEDURAL RIGHTS UNDER THE EA PROCESS ESTABLISHED IN EPEA

<i>PROCEDURAL RIGHTS</i>	<i>EA (UNDER EPEA)</i>	<i>ELC ASSESSMENT</i>
Scope of Application	Activity must appear on the Schedule of Activities. Some activities must undergo EA (EA List Reg), some activities are excluded from EA (EA List Reg). Other activities may or may not undergo EA (s.44 EPEA).	Limited to project-based assessments. Should be expanded to include strategic assessment of policy decisions and regional assessments to address cumulative impacts.
Public notice of EA for an activity	Public at various stages through EA process: Public notice is provided when further assessment is considered necessary under s. 44 EPEA. Public notice that EIA report is required and proposed terms of	

PROCEDURAL RIGHTS	EA (UNDER EPEA)	ELC ASSESSMENT
	<p>reference open to public comment (s. 48 EPEA)</p> <p>Public notice of final terms of reference.</p> <p>Public notice of receipt of EIA report.</p>	
<p>Access to information</p>		<p>Public right to environmental information should be expanded and transparently reported.</p> <p>Confidentiality claims should be limited. All reports and work done in support of authorization requirements which touch on environment outcomes (and public resources) are <i>prima facie</i>, considered public.</p>
<p>Standing to participate in EA</p>	<p>Directly affected may submit statements of concern (this is screening stage of EA which leads to decision to not/require EIA report)</p> <p>Project proponent must also conduct public consultation (if mandatory EA or determined that EIA is required under s.44)</p>	<p>Should be expanded to a test for genuine public interest in issues.</p>

PROCEDURAL RIGHTS	EA (UNDER EPEA)	ELC ASSESSMENT
Timing for participation (via statute)	<p>30 days after notice that further assessment is required (for statements of concern at screening stage) under s.44</p> <p>Reasonable time (for comments on proposed terms of reference)</p>	<p>Should be clear time limitations</p>
Publish of reasons	<p>Publication of the final EIA (which feeds into the approvals process)</p>	<p>Reasons should be required to identify and respond to public concerns.</p>

Provincial land use regulation under ALSA

Regional provincial planning legislation was passed in Alberta in 2009.⁵⁸ These binding regional plans have been slow to develop and approve with only two plans being in force as of January 2016. In both of these plans, the language, with minor exceptions, are primarily directional and aspirational in nature, and thus have minimal application to maintaining and protecting environmental rights.

Notwithstanding this brief history with regional plans, because approved regional plans are binding, this legislative instrument provides various opportunities for environmental rights, all of which require the exercise of government discretion to be realized. Specifically, environmental rights are potentially preserved by way of:

- The broad ability to amend statutory consents (through regional plans);
- To direct decision making and activities on the landscape;

⁵⁸ S.A. 2009, c. A-26.8.

- To preserve and protect specific areas of the landscape that are important for maintaining biological diversity and clean water; and
- The implementation of environmental management frameworks (discussed earlier).

Procedural rights in regional planning

ALSA relies heavily on existing legislation for determining participation in regional planning and decisions regarding environmental quality. Regional plans themselves must involve public consultation, which is then presented to the Executive Council.⁵⁹

Public participation leading to a formal plan review or hearing are quite limited. Title holders, primarily those owning land in fee simple or those occupying land may apply for variances of a regional plan.⁶⁰ Requests can also be made for reviews of the regional plan by those “directly and adversely affected by a regional plan” or amendment thereto.⁶¹

Oversight and compliance with regional plans is conducted through existing appeal mechanisms under other enactments, whether that is through *EPEA*, the *Water Act*, or through municipal or tribunal decision making.⁶² Where there is no mechanism to determine compliance a complaint can be made the Stewardship Commissioner who then has sole discretion on seeking court ordered compliance.⁶³

Access to justice over regional plan compliance or decisions is quite limited as appeals for relief from a court is limited by virtue of a very encompassing privative clause.⁶⁴

ALSA does provide opportunities to embed environmental rights in regional plans, subregional plans and issue specific plans.⁶⁵

The powers of regional planning can be applied by:

- Passing new regulation to achieve regional plans,

⁵⁹ *Ibid.* at s.5.

⁶⁰ *Ibid.* See definition at s.2(1)(gg) as others may be considered title holders.S.15.1 ALSA. It should be noted that the variance provisions of ALSA are likely to be used in instances to overcome restrictions on activities found in a regional plan. In this way the variance provision is likely to be engaged in a manner that has an adverse effect on environmental rights, rather than a protective effect.

⁶¹ *Ibid.* at s.19.2.

⁶² Decisions of government designates must be undertaken in compliance with the regional plans. Any failure to do so would constitute a basis for challenging the plan on appeal, albeit standing to bring the appeal may prove to be a barrier.

⁶³ *Ibid.* at s.18.

⁶⁴ *Ibid.* at s.15.

⁶⁵ *Ibid.* at ss. 9 & 10.

- Make law and regulations on any matter to advance regional plans;⁶⁶
- “Manage whatever is necessary to achieve” an objective or policy;⁶⁷
- Specify what constitutes non-compliance and enforcement of regional plans and appeal mechanisms.⁶⁸

A key difficulty with ALSA remains the fact that regional plans must be approved by Cabinet and therefore are open to the vagaries of politics.

Sector based environmental rights, procedures and gaps

Sector specific legislation has implications for how environmental rights are protected in Alberta. The key sectors this reports deals with include:

1. Municipal;
1. Oil and gas;
2. Agriculture; and
3. Recreation, forestry and hard rock mining.

These sectors are chosen as they often have key roles in planning and environmental management in conjunction with the oversight provided by *EPEA* and the *Water Act*.

a) Oil and Gas

The Alberta Energy Regulator (AER) regulates oil and gas activities (as well as other energy related developments such as coal mines) in the province.⁶⁹ This includes administration of the *Water Act*, *EPEA*, the *Public Lands Act*, and part of the *Mines and Minerals Act* as they apply to oil and gas activities.⁷⁰ The previously described processes for these laws are now governed by the AER’s rules.⁷¹

The current regulatory system places approval and operational jurisdiction for oil and gas with the AER while the relevant line departments retain policy control over how the various laws are administered.

⁶⁶ *Ibid.* at s.9(2)(c)-(d).

⁶⁷ *Ibid.* at s.9(2)(e).

⁶⁸ *Ibid.* at s.9(3).

⁶⁹ See *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 at s. 1(1)(h) and (j), which sets out the scope of jurisdiction of the Alberta Energy Regulator. Energy resources governed by the exclude hydro and electric power generation.

⁷⁰ Some aspects of the *Water Act* and *EPEA* remain the jurisdiction of Alberta Environment and Parks.

⁷¹ *Responsible Energy Development Act*, S.A. 2012, C. R-17.3 at s.25.

For example, Alberta Environment and Parks still dictates reclamation policy (pursuant to *EPEA*), whereas the AER administers the reclamation portion of the Act.

Procedural Rights

Relative to other industrial sectors oil and gas legislation offers more procedural rights to those potentially impacted but procedural rights guarantees are still needed. Table 2 sets out the various aspects of procedural rights under the *Responsible Energy Development Act*.

TABLE 3: OIL AND GAS PROCEDURAL RIGHTS

<i>PROCEDURAL RIGHTS</i>	<i>OIL AND GAS LAW AND POLICY</i>	<i>ELC ASSESSMENT</i>
Public notice of application	Public notice is required. ⁷² This notice may be variable in scope. General public notice is not required.	Appropriate scope so long as meeting principles of procedural fairness and expanded standing test.
Access to information	Information regarding the activity must be made available to the public. (As set out directives, regulations and required by regulator discretion. See for example Directive 56 and disclosure provisions pursuant to <i>EPEA</i>).	Claims of confidentiality may limit full disclosure of environmental information (as per <i>EPEA</i> and <i>Water Act</i>).
Standing to participate in the regulatory (authorization) decision	<p>Directly and adversely affected⁷³</p> <p>Participation in hearings or reviews may include those the AER finds:</p> <ul style="list-style-type: none"> • would materially assist the AER, • have tangible interest in the matter, 	Unduly narrow interpretation

⁷² *Ibid.* at s.31.

⁷³ See the *Alberta Energy Regulatory Rules of Practice*, Alta. Reg. 99/2013. The Rules require statements of concern to state why person believes they may be directly and adversely affected by a decision on the application, the nature of their objection and outcome sought, and the location of land, residence or activity of the person in relation to the energy resource activity (at s.6). The AER may disregard statements of concern where the filer has not shown that they may be directly and adversely affected, and for many other reasons (see Rules at s.6.2).

<i>PROCEDURAL RIGHTS</i>	<i>OIL AND GAS LAW AND POLICY</i>	<i>ELC ASSESSMENT</i>
	<ul style="list-style-type: none"> undue delay and duplication of evidence would not result.⁷⁴ 	
Timing for participation (via statute)	30 days (or as prescribed) (or as per <i>EPEA</i> , <i>Water Act</i> described above)	Timing for <i>Water Act</i> approvals is too short.
Notice of decision w/o hearing	The AER must publish its decision where no hearing. ⁷⁵	
Appeal of decision	<p>The AER has the discretion to decide whether or not to hold a hearing.⁷⁶</p> <p>Regulatory appeals are available under the provisions of the specified enactments. A regulatory appeal may not require a hearing.⁷⁷</p>	<p>Affected parties should have right to hearing or appeal in statute.</p> <p>Appellant body should be autonomous from AER.</p>
Legal rights during appeal	The scope of rights is determined by the AER. ⁷⁸	Appropriate discretion when done in accordance with procedural fairness.
Publishing reasons	The AER must provide written reasons when it makes a decision pursuant to a hearing or a regulatory appeal. ⁷⁹	
Remedies	Activities may be stayed during the conduct of a hearing.	The ability to register and enforce private agreements is appropriate.

⁷⁴ *Ibid.* at s.32.1. at the discretion of the AER.

⁷⁵ *Supra* note 16, s. 33(2) and *supra* note 20 at s.7.1.

⁷⁶ *Supra* note 16 at s.33.

⁷⁷ *Ibid.* at s.40.

⁷⁸ *Supra* note 20 at s.9.1. There is the ability to, by regulation, set factors that must be considered by the AER in making its decisions. *Supra* note 16 at s.15.

⁷⁹ *Supra* note 16, s.35 and s.41.

PROCEDURAL RIGHTS	OIL AND GAS LAW AND POLICY	ELC ASSESSMENT
	<p>The AER may confirm, suspend or revoke authorizations as a result of a regulatory appeal.⁸⁰</p> <p>Private agreements may be registered with the AER and enforced.⁸¹ The AER may issue orders to comply with a private surface agreement under the Act.⁸²</p>	<p>There is no direct mechanism for compensation for violation of agreements or environmental rights.</p> <p>No other private enforcement options exist.</p>
<p>Costs of an appeal (and public participation)</p>	<p>Costs are available but discretionary.</p>	<p>Costs provisions should be statutory in nature (i.e. moved from Rules to statute).</p>
<p>Appeals to courts</p>	<p>Decisions of the regulator are appealable to the Court of Appeal, with permission of the Court, on questions of law or jurisdiction.⁸³</p>	

b) Electricity generation

The generation and transmission of electricity is governed by legislation administered by the Alberta Utilities Commission (AUC). The Commission oversees the *Electric Utilities Act*, the *Gas Utilities Act* and the *Hydro and Electric Energy Act* (among others). The Commission process is, in most ways analogous to Oil and Gas procedures, as the Commission was formerly merged with the Alberta Energy Regulator as the Energy Resources Conservation Board or ERCB (and earlier as the Energy and Utilities Board or EUB).

⁸⁰ *Ibid.* at s.41.

⁸¹ *Ibid.* at Part 3.

⁸² *Ibid.* at s.64.

⁸³ *Ibid.* s.45.

TABLE 4: PROCEDURAL RIGHTS IN ELECTRICITY GENERATION

<i>PROCEDURAL RIGHTS</i>	<i>OIL AND GAS LAW AND POLICY</i>	<i>ELC ASSESSMENT</i>
Public notice of application	Notice must be given to those whose rights are directly and adversely affected. ⁸⁴	Notice is not provided to the general public.
Access to information	Directly and adversely affected must have "reasonable opportunity of learning the facts being on the application". ⁸⁵ Rules state that information in support of application and "material filed as documentary evidence" must be filed.	
Standing to participate in the regulatory (authorization) decision	Directly and adversely affected ⁸⁶	Unduly narrow interpretation but statutory right to hearing.
Timing for participation (via statute)	As prescribed in the notice of application.	
Appeal of decision	Hearing upon request by directly and adversely affected party	Statutory right to hearing is positive.
Legal rights during appeal	Scope of rights may be limited at hearing. ⁸⁷	Appropriate discretion when done in accordance with procedural fairness.
Remedies	Commission may review and amend orders. ⁸⁸	

⁸⁴ S.9(2) of the *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2. See also section 22 of the *Rules of Practice*, Rule 001.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* at s.9(4).

⁸⁸ *Ibid.* at s.10 and s.24.

PROCEDURAL RIGHTS	OIL AND GAS LAW AND POLICY	ELC ASSESSMENT
	Commission may order any person to do any act or cease to do any act, and to comply with a regional plan. ⁸⁹	
Costs of an appeal (and public participation)	Costs are available but discretionary. ⁹⁰ Local intervener costs are tied to interest in or occupation of land. ⁹¹	
Appeals to courts	Decisions of the regulator are appealable to the Court of Appeal on questions of law or jurisdiction. ⁹² Requires permission of the court.	Limited scope of appeal.

c) Agriculture

The agricultural sector is regulated to a degree by municipal and provincial regulations such as *EPEA*, the *Water Act* and the *Agricultural Operations Practices Act (AOPA)*.⁹³ Agricultural production may have varying impacts on environmental quality making it an important sector to consider when discussing environmental rights.

The AOPA focuses on regulation of confined feeding operations in the province and manure management. Under AOPA, different authorizations are required depending on the capacity of confined feeding operations (in # of animals): higher capacity operations require approvals whereas lower capacity operations require registrations (as set out in Schedule 2 of the *Agricultural Operations, Part 2 Matters Regulation*).⁹⁴ An approval is required for manure storage facilities that contain 500

⁸⁹ *Ibid.* at s.23.

⁹⁰ *Ibid.* at s.22.

⁹¹ Also see Rule 009. Rules on Local Intervener Costs. <http://www.auc.ab.ca/acts-regulations-and-auc-rules/rules/Documents/Rule009.pdf>

⁹² *Ibid.* s.29.

⁹³ *Agricultural Operations Practices Act*, R.S.A. 2000, c. A-7.

⁹⁴ AR 257/2001.

tonnes or more of manure or compost for 7 months or more (of a calendar year).⁹⁵ Authorization decisions may be reviewed by the Natural Resources Conservation Board (NRCB).⁹⁶

Table 5 sets out the procedural rights available under *AOPA*.

TABLE 5: PROCEDURAL RIGHTS IN AGRICULTURAL OPERATIONS

<i>PROCEDURAL RIGHTS</i>	<i>AOPA APPROVALS</i>	<i>AOPA REGISTRATIONS</i>	<i>ELC EVALUATED DEFICIENCY</i>
Public notice of application for an activity	<p>Notice must be provided to “affected persons” and those otherwise notified under EPEA and the Water Act.⁹⁷</p> <p>Affected party” is defined in the regulations (within prescribed set backs).⁹⁸</p>	<p>Notice is required of owners and occupants of land within ½ mile or minimum distance separation as described by regulation (whichever is greater).⁹⁹</p> <p>The approval officer may also direct that “any other persons or organizations” be notified.¹⁰⁰</p>	<p>Notice should be provided to all those potentially effected (which is a factual determination and may not be addressed well with regulated distances)</p>
Access to information	<p>The application must be made available for 15 working days from the date that the application was determined complete.¹⁰¹</p>	<p>Copy of application must be made be supplied to affected person requesting them.¹⁰³</p>	<p>Standards for information sufficiency should be established (reflecting precautionary principle).</p>

⁹⁵ *Ibid.* s.4.

⁹⁶ It should be noted however that the *Rules* of the NRCB do not apply to *AOPA* related authorizations. NRCB *Rules of Practice* Alta Reg 77/2005 at s.2.

⁹⁷ *Supra* note 32 at s.19. Minor alterations excluded.

⁹⁸ *Ibid.* at s.5 of Part 2 Reg.

⁹⁹ *Ibid.* at s.21(1). (Minor alterations excluded).

¹⁰⁰ *Supra* note 31 at s.19. Notification is not required for “minor alterations” to facilities with minimal change to its risk to the environment and minimal change to disturbance.

¹⁰¹ *Ibid.* at s.19(3).

PROCEDURAL RIGHTS	AOPA APPROVALS	AOPA REGISTRATIONS	ELC EVALUATED DEFICIENCY
	Copy of application (and information in support) must be made be supplied to affected person requesting them. ¹⁰²		Statutory disclosure of registration activities lacking (provided in regs on request).
Standing to participate in the regulatory (authorization) decision	Those who receive notice must apply within 10 days for a determination of whether they are directly affected. (w/o notice 20 days from application being deemed complete). ¹⁰⁴	Approval officer determines whether is directly affected. ¹⁰⁵ Owner or occupant has 10 days to apply for a determination of directly affected status. ¹⁰⁶	Regulated distance is largely arbitrary and may not reflect potential impacts or cumulative effects. Broaden standing to include with interest genuine interest in environmental subject management. Extend timeline for determination
Nature of participation	The approval officer must give directly affected parties an opportunity to furnish evidence and written submissions. ¹⁰⁷	Affected person may make written submissions re whether application meets regulation requirements.s.21(3)(b)	For registration activities the ability to provide evidence is limited.

¹⁰³ *Ibid.*

¹⁰² *Board Administration Regulation A.R. 268/2001* at s.9.

¹⁰⁴ *Supra* note 31 at s.19(4).

¹⁰⁵ *Ibid.* at s.21(5).

¹⁰⁶ *Ibid.* at s.21(3).

¹⁰⁷ *Ibid.* at s.20(1).

<i>PROCEDURAL RIGHTS</i>	<i>AOPA APPROVALS</i>	<i>AOPA REGISTRATIONS</i>	<i>ELC EVALUATED DEFICIENCY</i>
Notice of decision	A written decision must be provided by the approval officer to those directly affected. ¹⁰⁸		
Appeal of decision	The officer's decision may be appealed to the Natural Resources Conservation Board within 10 working days of the decision. ¹⁰⁹		Timeline for review is unnecessarily short.
Legal rights during appeal ("review")	Reasonable opportunity to review information. Reasonable opportunity to furnish evidence and written submissions relevant to the review. ¹¹⁰ The NRCB may require proponent to provide a report. Directly affected parties are granted the ability to cross-examine witnesses. ¹¹¹		Appropriate discretion when done in accordance with procedural fairness.
Publication of reasons	Written reasons to be provided to directly affected parties. ¹¹²		
Remedies (NRCB)	An officer's decision may be suspended during review. ¹¹³ The Board has broad discretion to grant approvals with conditions, refuse to issue approval or anything else the Board deems appropriate. ¹¹⁴ Board may issue enforcement orders to ensure compliance. ¹¹⁵ Fines for violating various sections of the Act are capped at between \$5,000 & \$10,000. ¹¹⁶		Violations are inappropriately low maximums.
Costs of an appeal (and	AOPA does not provide for costs of participation.		Costs allowance (potentially partial) is

¹⁰⁸ *Ibid.* at ss.19(7) & 21(4).

¹⁰⁹ *Ibid.* at s.20 (5) and s.22(4).

¹¹⁰ *Ibid.* at s.26(4).

¹¹¹ *Board Administration Regulation*.at s.21.

¹¹² *Ibid.* at s.25(8).

¹¹³ *Ibid.* at s.25(6).

¹¹⁴ *Ibid.* at s.25(7).

¹¹⁵ *Ibid.* at s.39.

¹¹⁶ *Ibid.* at s.34-36.

PROCEDURAL RIGHTS	AOPA APPROVALS	AOPA REGISTRATIONS	ELC EVALUATED DEFICIENCY
public participation)			required.
Appeal to courts	<p>Appeals from the Board lie to the Court of Appeal on questions of jurisdiction or law.¹¹⁷ Permission to appeal is required and must be sought within 30 days of the decision appealed.¹¹⁸</p> <p>Board may suspend the decision during the appeal.</p> <p>Evidence limited to that submitted to the board.¹¹⁹</p>		
Other provisions	AOPA undermines environmental rights by directly limiting the action of nuisance for authorized agricultural activities that meet “generally accepted agricultural practices”. ¹²⁰		<p>Remove limitations to nuisance actions.</p> <p>Adopt limitation on actions only where pollution prevention, precautionary principle and polluter pays has been adequately adopted.</p>

Gaps and barriers in agriculture

Many direct environmental impacts are not covered by AOPA leaving a significant regulatory hole in protecting environmental rights. Most importantly activities that are not regulated include:

¹¹⁷ *Ibid.* at s.27.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* at s.27(8).

¹²⁰ *Supra* note 31 at s.2.

- Confined feeding operations which existed on January 1, 2002 (which would otherwise be regulated);¹²¹
- Many activities are below the regulatory threshold but nevertheless result in environmental degradation (either on their own or cumulatively);¹²²
- Scope of substances regulated may be unduly limited (for example phosphorus is not managed);
- Insufficient regulation and enforcement of AOPA regulated activities.

Many agricultural practices result in emissions to air, water and ground and may have adverse effects on biodiversity through habitat destruction and pesticide use. A difficulty in regulating agricultural impacts on the environment results from a significant portion of pollution being non-point source in nature.

d) Recreation, Forestry, water management & prescribed mining projects

The Natural Resources Conservation Board oversees approval of various activities that are likely to have significant impact on the environment (and require an environmental impact assessment report under EPEA).¹²³ The Board oversees:

- Forestry industry projects;
- Recreational and tourism projects;
- Metallic or industrial mineral projects;
- Water management projects; and
- Other projects prescribed by regulation or cabinet order.

Table 6 outlines the procedural rights related to NRCB regulated activities (excluding those regulated under AOPA).

¹²¹ *Ibid.* at s.18.1.

¹²² For a discussion of where issues of this nature may trigger NRCB jurisdiction see Natural Resources Conservation Board *Public Notice on Grandfathering Decisions* Operating Policy 2016-6 https://cfo.nrcb.ca/Portals/2/Documents/Policies/Policy_2016-6_Public_Note_on_Grandfathering_Decisions_Jan26_2016.pdf

¹²³ See *Natural Resources Conservation Board Act*, R.S.A. 2000, c-3 at s.1 where the definitions of projects is provided.

TABLE 6: PROCEDURAL RIGHTS IN NRCB (NON-AGRICULTURAL) REGULATED ACTIVITIES.

<i>PROCEDURAL RIGHTS</i>	<i>NRCB APPROVED ACTIVITIES (EXCLUDING AGRICULTURE)</i>	<i>ELC ASSESSMENT</i>
Public notice of application for an activity	Notice must be provided of applications. ¹²⁴	Appropriate scope so long as meeting principles of procedural fairness and expanded standing test.
Access to information	<p>There must be a reasonable opportunity of reviewing information relevant to the application”¹²⁵</p> <p>Information in support of the application is dictated by the Board.</p> <p>Projects governed by the NRCB are those which require an environmental impact assessment report under EPEA providing the relevant information.</p>	Standards for information sufficiency should be established (reflecting precautionary principle).
Standing to participate in reviews (appeals)	Those “directly affected by proposed project” are granted procedural rights to trigger a review. ¹²⁶ The Board must hold a hearing if they receive a written objection from someone deemed directly affected. ¹²⁷	Broaden standing to include with interest genuine interest in environmental subject management.
Timing for participation (via statute)	As prescribed in the “Notice of Application”. ¹²⁸	Place timing in statute for greater certainty that principles of procedural fairness are met.

¹²⁴ See *Rules of Practice of the Natural Resources Conservation Board Regulation*, AR 77/2005, at s.8(1).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at s.8(2).

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* at s.8(2)(b).

<i>PROCEDURAL RIGHTS</i>	<i>NRCB APPROVED ACTIVITIES (EXCLUDING AGRICULTURE)</i>	<i>ELC ASSESSMENT</i>
Legal rights during appeal	<p>These rights include reasonable access to information, the right to a reasonable opportunity to furnish evidence, a limited right to cross-examine witnesses on evidence, and to make representations to the Board.¹²⁹</p> <p>Where a directly affected person objects to an application a hearing must occur.¹³⁰</p>	Appropriate discretion when done in accordance with procedural fairness.
Costs of an appeal (and public participation)	Those participating in reviews are eligible to apply for costs. ¹³¹ The Board decides the amount and person who will pay costs. ¹³²	
Remedies	<p>The Board may approve a project with conditions (with prior authorization of Cabinet). Board may refuse an approval or make any other disposition it deems fit.¹³³</p> <p>Board may amend an approval on any terms it considers appropriate.</p>	
Appeal to court	<p>Appeals of a board decision lies to the Alberta Court of Appeal on questions of jurisdiction or law.¹³⁴</p> <p>The Board may suspend an order or decision while the appeal takes place.</p>	

¹²⁹ *Ibid.*

¹³⁰ *Ibid.* at s.8(3).

¹³¹ *Ibid.* at s.11(1).

¹³² *Ibid.* Cost awards may be registered as a judgment at the Alberta Court of Queen’s Bench. And costs under the Rules of Practice (part 2).

¹³³ *Supra* note 61 at s. 9.

¹³⁴ *Ibid.* at s.31. There is a time limit of 30 days to seek permission to appeal from the order or direction sought to be appealed.

e) Municipal

Municipalities have a role to play in how our environment is developed and managed. Land use planning functions of municipalities in Alberta enable them to regulate activities that may impact water quality, air quality and pollution of land.

Municipal planning will have direct consequences for cumulative impacts on air quality and reliance on combustion of fossil fuels. Direct impacts can be felt where residential neighbourhoods are polluted by inappropriate siting and/or management of landfills and industrial facilities. Land management and regulation is mostly in the purview of municipal councils with the exception of some resource and energy regulation otherwise regulated by the AER, NRCB or AUC.¹³⁵

In addition, municipalities have powers to augment and build upon provincial and federal environmental laws so long as its regulations don't conflict with those of the other order of government.¹³⁶ The prime example of this is the regulation of pesticides within municipal boundaries.

The powers of municipalities to regulate matters relevant to the environment are found in the *Municipal Government Act* (MGA). The MGA does not prescribe substantive rights to environmental quality but does set out various processes to participate in municipal decisions. Specific decisions of interest include creating and amending bylaws and the subdivision and development permitting process.

For a broader discussion of legal process for environmental matters where municipalities have jurisdiction see the James Mallet, *Municipal Powers, Land Use Planning, and the Environment: Understanding the Public's Role*.¹³⁷

i) Procedural rights in passing bylaws

Municipal councils can only act by passing resolutions or bylaws.¹³⁸ This includes the power to amend or repeal a bylaw. While a resolution is merely an expression of the opinion of council, a bylaw is law and therefore legally enforceable.

¹³⁵ *Municipal Government Act*, R.S.A. 2000, c. M -26 at s.619.1.

¹³⁶ This power, and the determination of what will be viewed as a conflict with other orders of government, has been interpreted broadly to allow municipalities to regulate and prohibit activities that may have adverse environmental effects. See *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40.

¹³⁷ (Edmonton: Environmental Law Centre, 2005), online: Environmental Law Centre <http://www.elc.ab.ca/media/7600/MunicipalPowersLandUsePlanning.pdf>

Before being passed, proposed bylaws and resolutions must go through three readings.¹³⁹ All meetings and hearings before council and council committees must be open to the public unless exceptions apply.¹⁴⁰ Citizens within the municipality may also petition the government to amend or enact some types of bylaws.¹⁴¹

While anyone may attend a meeting, the public only has a right to address council where the *MGA* provides for a formal hearing. Council is only required to notify the public and hold public hearings in connection with specified planning and development matters.¹⁴² However, even when a hearing is not required, council may nevertheless agree to hear from any person wishing to speak to a matter before council.¹⁴³

The scope of participation is limited to presenting opinion or factual evidence to council. In this regard, the procedural rights are quite limited and informal.

Statutory appeal of bylaws and resolutions

The *MGA* provides that a person can apply to the Court of Queen's Bench for an order declaring a bylaw or resolution to be invalid.¹⁴⁴ It is likely that only persons who are directly and specifically affected by the bylaw or resolution have standing to bring the application.¹⁴⁵ Public interest standing may be available to applicants where there is a serious or triable issue, the applicant has a genuine interest in the matter, and there are no other persons more directly affected who might reasonably be expected to bring the application.¹⁴⁶

¹³⁸ *MGA*, *supra* note 73, s. 180.

¹³⁹ *Ibid.* at s. 187.

¹⁴⁰ Meetings may be closed to the public to discuss certain matters that are excepted from public disclosure under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25. Municipal planning commissions and subdivision and development authorities and appeal boards may deliberate and make decisions in meetings closed to the public: *MGA*, *supra* note 4, ss. 197(2), (2.1). Normally, no more than two readings may be carried out at any one council meeting. *MGA*, *supra* note 4, s. 187(4).

¹⁴¹ *Supra* note 73 at ss. 217-240.

¹⁴² *Ibid.*, ss. 230, 692. Hearings are also required before council concerning specified municipal action in connection with reserve lands (*Ibid.*, ss. 674, 676). An opportunity to address council may also be required under the formal petition process (*Ibid.*, s. 229).

¹⁴³ See e.g. City of Edmonton, By-law No. 12300, *Procedures and Committees Bylaw*, ss. 200-214.

¹⁴⁴ *Supra* note 73, s. 536.

¹⁴⁵ Frederick A. Laux, *Planning Law and Practice in Alberta*, 3rd ed. (Edmonton: Juriliber, 2002), s. 16.4(2) [*Planning Law*].

¹⁴⁶ *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Reese v. Alberta (Minister of Forestry, Lands & Wildlife)* (1992), 7 C.E.L.R. (N.S.) 89 (Alta. Q.B.).

A statutory appeal is not available where the basis of the challenge is that the bylaw or resolution is unreasonable.¹⁴⁷ There is a 60-day time limit to apply where the basis of the challenge is that the process or manner in which the decision was made did not comply with the *MGA*.¹⁴⁸

ii) Subdivision procedural rights

The *MGA* requires each municipality to establish a subdivision authority to decide subdivision applications.¹⁴⁹ An application to subdivide a parcel of land must comply with Part 17 of the *MGA*, the *Subdivision and Development Regulation* (the Regulation), any applicable statutory plans and, subject to exceptions, the local land use bylaw.¹⁵⁰

Adjacent landowners are entitled to notice of a subdivision application, unless the land to be subdivided is within an area structure plan or conceptual scheme for which a public hearing has been held.¹⁵¹ The notice must set out information about the application and explain how written submissions may be made to the subdivision authority. The authority must consider, but is not bound by, submissions made by adjacent landowners who were entitled to notice. The authority is not required to hold a hearing, or to provide adjacent landowners with notice of the decision or reasons.¹⁵²

Adjacent landowners and concerned neighbours have no right to appeal a subdivision approval.¹⁵³ However, where the subdivision authority has exceeded its jurisdiction, the decision may be judicially reviewable.

iii) Development permit process

The *MGA* requires that each municipality establish a development authority to decide development permit applications.¹⁵⁴ The authority may consist of municipal officials, a municipal planning commission, an inter-municipal planning commission or service agency, or any other person or organization.¹⁵⁵

¹⁴⁷ *Supra* note 73 at s. 539.

¹⁴⁸ *Ibid.*, at s. 537. For discussion see *Planning Law*, *supra* note 68, s. 16.4(4).

¹⁴⁹ *Ibid.* at s. 623.

¹⁵⁰ *Ibid.* at s. 654; *Subdivision and Development Regulation*, *supra* note 104.

¹⁵¹ *Ibid.* at s. 653. "Adjacent land" is defined in s. 653(4.4).

¹⁵² *Ibid.* at s. 656.

¹⁵³ *Ibid.* at s. 678.

¹⁵⁴ *Ibid.* at s. 624.

¹⁵⁵ *Ibid.* at ss. 624-626.

With exceptions, the *MGA* prohibits development without a development permit.¹⁵⁶ “Development” is very broadly defined by the Act, and includes an excavation, a building, or a change of use or intensity of use of land or a building.¹⁵⁷ Where an application is for a use permitted by the land use bylaw and fully conforms to the bylaw, the authority must issue the permit, with or without conditions.¹⁵⁸ Where the use is a discretionary use under the bylaw, the authority has the discretion to issue the permit, with or without conditions. A land use bylaw may also provide the authority with the power to issue a development permit even where it does not comply with the land use bylaw, where certain criteria are met.¹⁵⁹ Regulations regarding application procedures, exemptions from the permit requirement, conditions, notice, and the scope of the authority’s discretion are provided by most land use bylaws.

The *MGA* does not require a development authority to hold a hearing before deciding on a development application, and there is likely no common law requirement to do so.¹⁶⁰ However, some land use bylaws may provide for a hearing for specified discretionary uses. Alternatively, a land use bylaw may require that notice of the application be posted on the site and that objectors be given the opportunity to file written comments before a decision is made.¹⁶¹

A land use bylaw must specify how and to whom notice of the issuance of a development permit must be given.¹⁶² Affected persons can then exercise their right to appeal the decision to the subdivision and development appeal board. However, many land use bylaws only impose notification requirements for discretionary use permits.¹⁶³

Subdivision appeals

A decision of a subdivision authority may only be appealed by the applicant or, in certain cases, by a provincial government department, municipal council, or school authority.¹⁶⁴ In most cases the appeal is brought before a subdivision and development appeal board (SDAB), which each municipality is

¹⁵⁶ *Ibid.* at s. 683.

¹⁵⁷ *Ibid.* at s. 616(b).

¹⁵⁸ *Ibid.* at s. 640.

¹⁵⁹ *Ibid.* at s. 640(6).

¹⁶⁰ *Planning Law*, *supra* note 83, s. 9.3(2).

¹⁶¹ *Ibid.*, s. 9.4.

¹⁶² *Supra* note 73, s. 640(2)(d).

¹⁶³ Laux argues that because there are limited grounds for appeal of a permitted-use permit by affected persons, there is a common law right to notice for such permits (*Planning Law*, *supra* note 83, s. 9.4(2)).

¹⁶⁴ *Supra* note 73, s. 678.

required to establish.¹⁶⁵ Adjacent landowners are entitled to five days' notice of an appeal hearing before the SDAB, and have a right to make submissions, either in person or by agent.¹⁶⁶ Other concerned citizens are not entitled to notice, and the board is not required to hear from them.

Development appeals

A decision of a development authority may be appealed by the applicant or by any affected person.¹⁶⁷ However, where a permit was issued for a permitted use, no appeal is available unless the development authority relaxed, varied, or misinterpreted the provisions of the land use bylaw.

Development permit appeals are made to the subdivision and development appeal board.¹⁶⁸ After notice of issuance of a development permit is given according to the land use bylaw, affected persons have 14 days in which to file a notice of appeal with the board.¹⁶⁹

On receiving a notice of appeal from an appellant, the subdivision and development appeal board must proceed to hold a hearing within 30 days.¹⁷⁰ The appellant, the development authority, and anyone required by the land use bylaw to be notified of the issuance of the development permit must be given five days' written notice of the hearing. Before the hearing, the board must make available to the public all relevant documents, including the application, the decision of the development authority, and the notice of appeal.

A person who was given notice of the hearing is entitled to make representations at the hearing, as is any other person who claims to be affected and that the board agrees to hear.¹⁷¹ Such individuals may also be represented by another person at the hearing.

The board may ultimately confirm, revoke or vary the order, decision or development permit, or any condition attached. The board may also substitute an order, decision or permit of its own.

¹⁶⁵ *Ibid.* ss. 627-628, 678(2). For land in the Green Area of the Province and certain other lands, the appeal is made to the Municipal Government Board.

¹⁶⁶ *Ibid.* ss. 679-680.

¹⁶⁷ *Ibid.* s. 685.

¹⁶⁸ *Ibid.* ss. 627-628.

¹⁶⁹ *Ibid.* s. 686. If the notice of issuance is mailed, it may be deemed to have been delivered after seven days have lapsed, extending the appeal period to 21 days.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, s. 687.

There is a further statutory appeal to the Court of Appeal from any decision of a subdivision and development appeal board.¹⁷² The appeal lies on a question of law or jurisdiction only. Questions or findings of fact cannot be appealed. Leave of the Court is required, and must be sought within 30 days of the board's decision.

Under most land use bylaws, a development permit will be suspended while an appeal is underway at a subdivision and development appeal board or the Court of Appeal.¹⁷³ The requirement of a separate leave application at the Court of Appeal can create significant delays that can affect the viability of a development project.

¹⁷² *Ibid.*, s. 688.

¹⁷³ Dennis R. Thomas, "Statutory Appeals – The Poor Man's Injunction" (2000) 15:4 *Environmental Law Centre News Brief* 11.