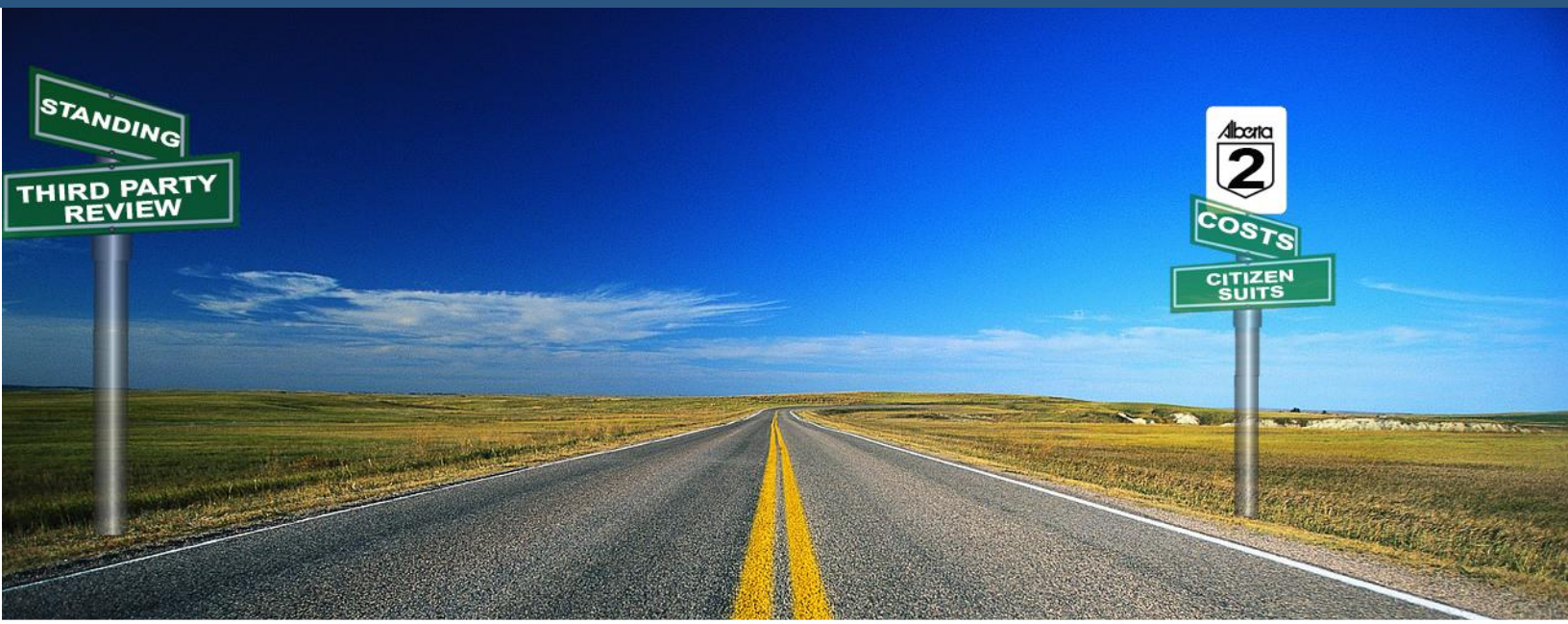
A Road Map for Environmental Rights in Alberta:

Rights for a Sustainable 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) is Alberta's oldest and most active public interest environmental law organization and 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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This work is in support of enacting laws that will foster environmental quality for future generations of Albertans.

The ELC would also like to thank Nickie Nikolaou of the University of Calgary Faculty of Law, Fraser Thomson of Ecojustice and Gavin Fitch of McLennan Ross LLP for providing advice on the project. All opinions, interpretations and conclusion in this report are the product of the ELC.

Executive Summary

Rights for Albertans to participate in environmental decision making, policy making and enforcement vary by sector and are often limited in scope. The Environmental Law Centre (ELC) recommends adopting legislative and regulatory approaches to foster environmental rights and to ensure there is environmental accountability for current and future generations of Albertans.

The ELC's recommendations are focused on making decisions that are environmentally accountable, ensuring government is accountable to its citizens, and ensuring government is effectively implementing and administering environmental laws. The report recommends a path for invigorating environmental accountability in the province by ensuring legal rights that:

1. Allow for meaningful participation in environmental decision making, including in relation to decisions about public resources and lands;
2. Provide citizens with enforcement tools;
3. Provide oversight and review of laws, policy and administration.

A core function of environmental rights is to assure environmental quality can be maintained and protected at multiple geographic and temporal scales. The recommendations set out in Table 1 are focused on ensuring environmental quality, citizen engagement and effectiveness in meeting legislative mandates. While some of the recommendations may be viewed in isolation the intention is to have recommendations adopted as a whole.

Table 1: Recommended legal rights and policy for fostering environmental quality, citizen engagement and legislative accountability.

Recommended path to environmental rights	Environment quality	Citizen engagement	Legislative accountability
#1: Codify public interest participation in decisions that impact on public resources (such as air, water, public land and wildlife).	✓	✓	
#2: Ensure environmental data is freely available to interested citizens.	✓	✓	✓
#3: Ensure disclosure regarding environmental quality, including monitoring data and pollution abatement and redress in administrative decisions, appeals and mediations.	✓	✓	✓
#4: Codify opportunities for legal aid for issues related to public interest (including the environment).	✓	✓	
#5: Codify a right to cross-examination on oral and written evidence in appeals.	✓	✓	
#6: Codify a costs structure which insures clear and timely identification of recoverable costs early in administrative and appeal proceedings.		✓	

Recommended path to environmental rights	Environment quality	Citizen engagement	Legislative accountability
#7: Codify a process to provide relief from costs or exemptions from adverse cost awards in environmental public interest cases.		✓	✓
#8: Clarify regulations around when disclosure of documents and subpoenaing of witnesses will be pursued. Where the relevance of evidence to the matter before the appellant body is established evidence and witnesses should be made available.	✓		✓
# 9: Codify a process to establish environmental quality standards and mandate adherence to those standards.	✓		
#10: Codify *de novo* reviews of administrative decisions by review tribunals and/or courts.	✓		✓
#11: Codify mechanism to trigger internal review of policies and regulations (e.g. strategic environmental assessment).	✓		✓
#12: Codify a third party reviewer of administration of laws and policies.	✓	✓	✓
#13: Codify a mechanism for legal representation of environmental interests.	✓		✓
#14: Review and amend administrative penalties.	✓		✓
#15: Codify environmental law specific whistleblower protection.		✓	✓
#16: Develop clear metrics and transparency in evaluating enforcement effectiveness.			✓
#17: Codify citizen based suits which allow for fines and injunctive relief.		✓	✓
#18: Codify third party review and assessment of policy and program administration.	✓		✓

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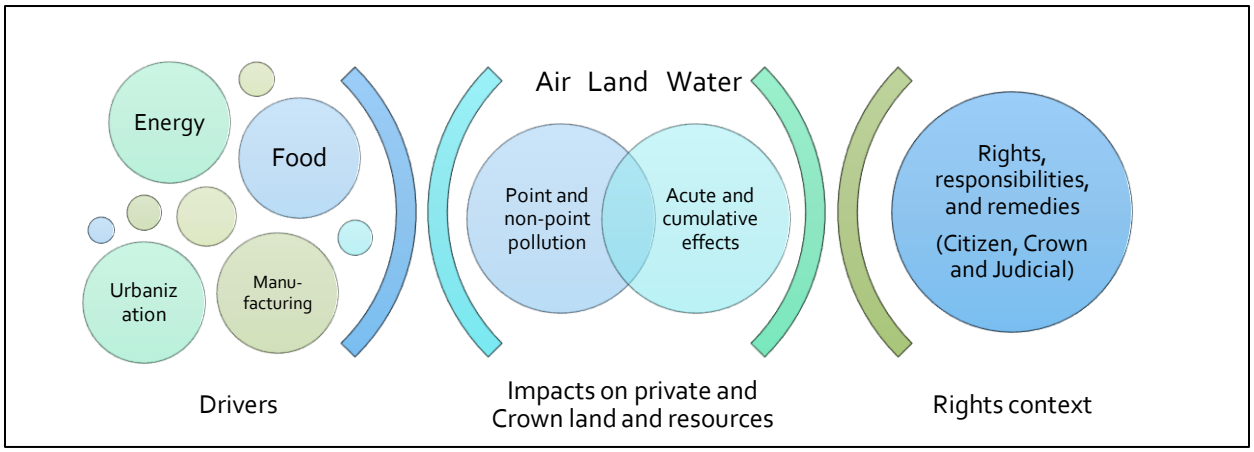
A Road Map for Effective Environmental Rights in Alberta

The laws of Alberta grant a variety of procedural rights to Albertans to allow them to engage in environmental decision-making in the province. These rights (as evaluated in Phase I: Do we have the Rights we need?) should be expanded to ensure accountable environmental decision-making and to guarantee access to environmental justice. The focus of the Phase II report is to set out a path of increased engagement with government and the judiciary to protect environmental quality.

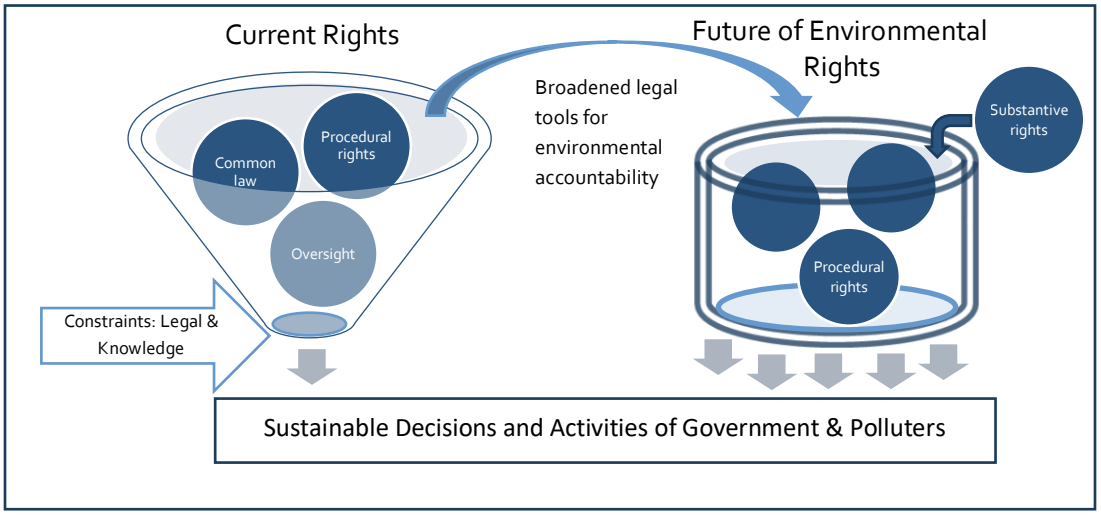
When considering environmental rights it is important to understand the scope and scale of issues that must be considered. Figure 1 provides the context in which to think about environmental rights, from drivers of environmental degradation, to the nature of scope of environmental impacts, to the roles, responsibilities and remedies that we have in our laws.

Figure 1: From activity to rights and responsibilities: the path of effects and remedies



The ELC recommends adopting legal rights in Alberta to create a system that serves environmental quality today and into the future. The rights proposed are focused on accountability: accountability to citizens; accountability to the environment; accountability to laws. This accountability can best be achieved by ensuring that citizenry is informed and can avail themselves of a full suite of legal rights that provide multiple conduits to influence decisions that result in environmental harm (see Figure 2). This is the aim of environmental rights.

Figure 2: Liberating environmental accountability through environmental rights



Accountability to citizens

Public participation in decision-making is a central pillar of effective environmental laws. Alberta laws offer participation rights but there are significant gaps and barriers to participation. Accountability to citizens means that public participation must be effective and informed. In this regard, the door to environmental decision-making must be opened (i.e. interested parties need to be granted standing), relevant information must be readily available, and procedural rights must enable effective participation.

A. Opening the door to decision making (standing)

Laws may allow for participation in various environmental decisions and provide avenues for reviewing those decisions. Typically, this may include:

1. Legal standing to participate in government decisions (administrative review);
2. Legal standing to participate in an appeal to a regulatory tribunal (quasi-judicial review);
3. Legal standing to review government and tribunal decisions before a court (judicial review); and[1]
4. Legal standing before a third party oversight body (such as an auditor, commissioner or ombudsperson).

Rights to participate in decision-making in Alberta are typically focused on whether or not a person is considered directly [and adversely] affected. The determination of who will be considered to be

[1] See, for example, the various approaches taken in several European countries, Jan Darpo, *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Members States of the European Union* 2013-10-11/final, online: European Commission http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf.

"directly affected" is discretionary but it has generally limited participation in government and appeal tribunal decisions to those who can establish a direct economic, health or property interest.[2] This is contrasted with the right to bring a judicial review, where a more expansive test allows those who can establish a genuine interest in the matter brought before the court to be granted standing.[3]

Our laws and procedures admittedly struggle with various environmental and governance realities. From a standing perspective, the core areas where policies and laws have limited public participation include decisions which:

1. May impact quality of life (i.e. directly affected tests excluding recreational and other environment interests in lieu of demonstrable harm to health or economic interests);
2. May result in to cumulative effects[4]; and
3. Which result in impacts on public land and resources, where no party is typically considered "directly affected".

A more inclusive standing test would enable informed public participation, leading to more informed and sustainable decision-making. The ELC has previously advocated for the adoption of a "genuine interest" test (see *Standing in Environmental Matters*), which would allow individuals and groups who have an established record of interest and concern over an issue to participate in decisions and trigger appeals and hearings.[5] Alternatively, codifying the robust version of the public trust doctrine would have a similar effect.[6]

Recommendation #1: Expand standing to allow broader participation in decisions that impact on public resources (such as air, water, public land and wildlife).

B. Transparency and access to environmental information

Access to information is necessary to understand how environmental rights may have been harmed in the past, may be currently harmed or could be harmed in the future. Ideally information should be sufficient to discern the probability that future action may cause harm. In this way, environmental information needs must address:

1. Acute impacts from environmental effects (including cumulative effects);

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[2] See Environmental Law Centre, *Standing in Environmental* Matters (Edmonton: ELC, 2014) online: Environmental Law Centre http://elc.ab.ca/media/98894/Report-on-standing-Final.pdf

[3] *Ibid*.

[4] The issue of cumulative effects is also problematic where standing is broad but the issues that may be dealt with on appeal may be construed narrowly. A broad standing test will be stymied by limits imposed on the scope of issues to be addressed. As noted in relation to the *Arhus Conven*tion some states have broad standing but limit the issues dealt with (*supra* note 1 at 13).

[5] *Supra* note 2.

[6] For additional context around the public trust doctrine in the United States see Douglas Quirke, *The Public Trust Doctrine: A Primer*, (Eugene: University of Oregon School of Law Environmental and Natural Resources Law Center, 2016) online: University of Oregon School of Law <https://law.uoregon.edu/images/uploads/entries/PTD_primer_7-27-15_EK_revision.pdf>

2. Chronic impacts from environmental effects (including cumulative effects);
3. Trends and forecasts of additive effects resulting from changes in
    a. industry practices,
    b. regulation,
    c. climate variability.

This information should be freely and readily available to the public and, where third parties hold relevant information it should not generally be considered proprietary or confidential in nature. Disclosure rules should facilitate analysis of environmental assessments and forecasts by participants and outside experts.

There is also tremendous opportunity with emerging technology to monitor, report and involve citizens in the process, so called "next generation compliance".[7]

Recommendation #2: Ensure environmental data is freely available to citizens (via an online registry), including documents in support of applications, ongoing ambient and point source monitoring data, and related follow up research and programming.

Recommendation #3: Ensure disclosure regarding environmental quality, including monitoring data and pollution abatement and redress in administrative decisions, appeals and mediations.

C. Participating effectively: other aspects of procedural fairness

A variety of legal rights (in addition to standing and access to information) will impact the effectiveness of citizen engagement, including having sufficient notice of decisions/applications, the ability to cross-examine and subpoena witnesses, the ability to have some costs covered to allow effective and informed participation, and the authority to grant appropriate remedies. Existing legislation typically provides for heightened level of procedural rights based on the potential impact on a potentially impacted party.

1. Notice

Sufficient notice of applications is needed to ensure a potentially impacted or genuinely interested party has sufficient time and knowledge to understand and respond to project applications. The time given to respond to the notice of an application may be so short as to significantly undermine the effectiveness of the notice itself. For example, the timing for filing a statement of concern and submitting a notice of appeal for an approval under the *Water Act* is 7 days.[8] The concern over short notice periods may be confounded by the fact that appeal

[7] See for example Chrisna Baptista, "Next Generation Compliance; EPA embraces technology and transparency to promote compliance with environmental laws" *July/August 2016 Volume 47, Number 6* (American Bar Association Section of Environment, Energy, and Resources) https://www.epa.gov/sites/production/files/2016-09/documents/article-next-gen-embraces-technology-and-transparency.pdf.

[8] Water Act, R.S.A., 2000, c. W-03 at s.109(2)(a).

timelines are not readily extended, even when the approval holder consents to such an extension.[9]

2. A right to a hearing

The right to trigger a hearing on the merits of a given decision is a central aspect of environmental rights. While the nature and scope of a hearing may be limited to deal with specific issues, the hearing is the primary mechanism to review and test evidence and to get expert and lay-opinion before decision makers. Depending on the circumstances, hearings in person or written hearings may be appropriate.

In other instances hearings may be avoidable where other settlement mechanisms exist. These alternative dispute resolution processes however should always have a right to legally binding process.

3. Cross-examination and interrogatories

Rights to cross-examine witnesses in environmental matters can make a significant difference. Alberta's laws allow significant (if not open-ended) discretion to determine when cross-examination of witnesses will be allowed. While requiring cross-examination in every instance would be burdensome, there is a need to ensure that evidence, particularly evidence not supported by a high level of scientific rigor, is placed under the microscope of cross-examination either in a hearing or through a separate discovery process.[10]

4. Subpoenaing of witnesses

The ability to call and have relevant witnesses attend is necessary for an adjudicator to have a clear picture of the factual, scientific and policy context in which decisions are being made. In Alberta, many hearings are conducted without the attendance of relevant government staff who may provide important context to decisions, policies and government interpretation of laws.

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[9] See *Valleau v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, re: Town of Wainwright* (19 September 2016), Appeal No. 16-009-ID1 (A.E.A.B.). http://www.eab.gov.ab.ca/dec/16-009-ID1.pdf. In this case the Director opposed the extension of time agreed to by the Town and the appellant. Others have been caught by the seven-day time frame, including in R*ely-On Ltd v. Director, Lower Athabasca Region, Alberta Environment and Parks* (21 June 2016), Appeal No. 15-039-D (A.E.A.B.). *Walls et al. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, re: Aurora Cannabis Enterprises Inc*. (31 March 2016), Appeal Nos. 15-022-026-ID1 (A.E.A.B.). *Pratch v. Director, Northern Region, Alberta Environment and Sustainable Resource Development, re: ATCO Electric Limited* (29 September 2015), Appeal Nos. 15-013-018-D (A.E.A.B.) (2015 AEAB 14). *Peaire and McGinnis v. Alberta Environment and Parks* (09 October 2015), Appeal Nos. 15-003 and 15-007 (Summary) (2015 AEAB 17).

[10] This process would require sworn affidavits from relevant parties providing evidence in a hearing.

The subpoenaing of witnesses should be available and pursued where the evidence is relevant to the matter before the board, tribunal or regulator.[11]

5. Costs

When confronted with complex scientific and legal challenges, processes should ensure that participants can have a portion or all of their costs of bringing evidence forward covered. The nature of cost awards varies greatly by sector (see Phase I report). The timing of granting costs is also relevant as some situations will require advance or interim orders of costs to allow for fair and equitable participation.

Further, there are limitations on the nature of legal aid claims that are feasible for environment regulatory and civil matters. In Manitoba legal aid is available for public interest environmental and consumer rights issues.[12]

In addition, in relation to legal costs when bringing court actions for public interest litigation the risk of an adverse cost award can be a significant barrier to participation. This should be addressed by recognizing the uniqueness of public interest litigation and insulating meritorious actions from adverse cost orders.

6. Effective Remedies

Remedies arising from participation must assure accountability to orders, conditions and mediated settlements arising from legal processes and participation. This includes the ability to revisit the decision-making body to address shortcomings in meeting conditions or other similar concerns.[13] This also should include the ability to revisit decisions where environmental information has been found to be wrong or where additional relevant information has been learned.[14]

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[11] See Document Production Motions: Imperial Oil Limited v. Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment Appeal No. 01-062-ID, online: Alberta Environmental Appeals Board <http://www.eab.gov.ab.ca/dec/01-062-ID.pdf>

[12] See section 4(2) of the *Legal Aid Manitoba Act* C.C.S.M. c. L105. A review in Europe (*supra* note 1) found that in "Denmark, Romania, Slovenia, Spain and Hungary, …organisations representing public interests have the possibility to access legal aid. In Austria, the Czech Republic, France, Germany, Slovakia and Sweden, the government provides some funding for ENGOs to enable various participatory activities, in some of those countries even including participation in judicial proceedings. Generally, however, because of the high costs of the environmental procedure, public interest groups rely on either in-house lawyers or lawyers providing services on a pro bono basis." At 20-21.

[13] In the past Alberta mediated settlements, which would be used to avoid objections and hearings were only enforceable through court action. This resulted in removal of regulatory jurisdiction and frustration arising from non-compliance with mediated settlements. Alberta, to its credit, amended legislation to allow for the registration and regulatory enforcement of private agreements in relation to energy developments. See *Responsible Energy Development Act* S.A. 2012 c. R-17.3 at Part 3.

[14] This approach is central to principles of adaptive management and continuous improvement and yet rarely are there opportunities to revisit conditions or the validity and impacts of a granting government authorization. Some authorizations have renewal periods where such information may be considered but clear remedies and linkages to environmental concerns remain highly discretionary.

7. Independence

Independence of an adjudicator is essential to public trust in the process. Bias, real or perceived, must be minimized in all areas of environmental regulation and management. Similarly, risks and concerns over agency capture should be minimized by ensuring processes are in place that establish regulator and adjudicator independence.

Recommendation #4: Codify opportunities for legal aid for issues related to environmental public interest actions.

Recommendation #5: Codify a right to cross-examination on oral and written evidence in appeals.[15]

Recommendation #6: Codify a costs structure which insures clear and timely identification of recoverable costs early in administrative and appeal proceedings.

Recommendation #7: Codify a process to provide relief from costs or exemptions from adverse cost awards in environmental public interest cases.

Recommendation #8: Clarify regulations around when disclosure of documents and subpoenaing of witnesses will be pursued. Where the relevance of evidence to the matter before the appellant body is established evidence and witnesses should be made available.[16]

Accountability for environmental outcomes

Accountability can come in many forms. What does environmental accountability look like from a rights perspective? To be accountable there are a variety of rights and obligations which must attach to citizens and to government.

A. Clear environmental guidance for decision makers;
B. Substantive review of decisions;
C. Review of policies and regulations;
D. Giving nature a legal voice; and
E. Providing objective analysis of environmental quality and forecasts.

A. Clear environmental guidance for decision makers

Procedural rights alone will not result in environmental outcomes, rather they ensure that one's environmental rights are infringed upon without due legal processes (and procedural fairness). To be effective at protecting environmental quality, environmental decision-making must be guided by clear

[15] See for example the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 at s.26(2)(d) which indicates that an opportunity to cross-examine before the board will be provided in the absence of a "fair opportunity" to contradict the facts of the application.

[16] Where capacity challenges constrain government participation in hearings there may be a need to invoke a cost recovery system that would enable participation.

environmental outcomes. These environmental outcomes will book end decisions such that "unsustainable" decisions will be better avoided.

The current state of the law in Alberta is focused on enabling government discretion around environmental management. The use of environmental management frameworks allows for the designation of "limits" to environmental quality which may result in relevant authorizations (which are contributing to the exceedance) no longer being issued. These frameworks however have a high level of discretion in determining when a limit is reached and may not reflect a proactive and protective approach to environmental quality. These frameworks are also narrowly scoped to specific regions (for example main reaches of rivers) which does not result in timely management responses at relevant scales. More generally, Alberta's environmental laws do not constrain decisions regarding environmental harm but provide almost open ended discretion to authorize activities despite impacts.[17]

An additional problem is that, even where environmental quality is impacted and participation is allowed, certain types of impacts are deemed to be beyond the scope of issues that will be addressed by an adjudicator. Adjudicators have a tendency to focus on effects or environmental impacts related directly to the project, and either downplaying the relevance or ignoring cumulative effects of decisions.[18]

Recommendation # 9: Codify a process to establish environmental quality standards and mandate adherence to standards. (See Module 1: Substantive Environmental Rights for further discussion).

B. Substantive review of decisions

When initial administrative decisions are made the ability to review those decisions is often limited in scope and content. For example, statutory appeals and judicial review may be limited to issues of law, jurisdiction or procedural fairness. Where reviews are feasible there is a tendency for courts to defer to the analysis of decision makers and tribunals. This is problematic where legal and factual determinations do not face a reasonable level of scrutiny.[19] The combined effect of having no

[17] For example, the Director under the *Environmental Protection and Enhancement Ac*t may issue or refuse to issue an approval with terms and conditions, with a discretionary scope of considerations being set out in the *Approvals and Registrations Procedure Regulation*, Alta.Reg. 113/93 (at s.6). Similarly, under the *Water Act* the Director may (or may not) consider impacts on the environment in the decision-making process (unless such considerations are mandated in an approved water management plan) (see sections 38 and 51, for example).

[18] See for example *Jackpine Mine Expansion Project Joint Review Panel, Shell Canada Energy Application to Amend Approval 6756 Jackpine Mine Expansion Project* 2013 ABAER 011, online: https://www.aer.ca/documents/decisions/2013/2013-ABAER-011.pdf and *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.). Erratum changes included. http://www.eab.gov.ab.ca/dec/05-053-054-R-Erratum.pdf at pages 112-114.

[19] Martin Olszynski and Meinhard Doelle, "*Ontario Power Generation Inc. v. Greenpeace Canada*: Form over Substance Leads to a "Low Threshold for Federal Environmental Assessment", September 22, 2015, University of Calgary Faculty of Law Blog, online: http://ablawg.ca/2015/09/22/ontario-power-generation-inc-v-greenpeace-canada-form-over-substance-leads-to-a-low-threshold-for-federal-environmental-assessment/

substantively constraining environmental criteria guiding original decisions combined with judicial deference on factual and legal determinations made by administrative or quasi-judicial decision-makers leads to environmental decision-making being immune from substantive review.

Therefore, it is important to enable review of government decisions by tribunals and courts on the environmental merits. This approach will impose accountability on the original decision maker to meet the substantive environmental goals as articulated in Recommendation 8.

Recommendation #10: Codify *de novo* reviews of administrative decisions by review tribunals and courts.[20]

C. Review of policies, regulations and enforcement

Alberta currently relies on the Office of the Auditor General to provide government oversight of environmental and natural resource departments. Regulatory tribunals may, on occasion, "impose" policy interpretations on decisions which may not have otherwise occurred.[21] A robust system of independent review of regulations, policies and programs does not otherwise exist in Alberta.

Typically, the review of policies and regulations is conducted internally (if at all). Policies and regulations otherwise evolve as a result of lobbying efforts (from the myriad of positions these may come) which may in turn raise concerns about the relevance and consideration of environmental outcomes and decision independence (i.e. related concerns regarding regulatory or agency capture).[22]

Policies and regulations should be reviewed and measured relative to stated and/or prescribed environmental outcomes. This means establishing clear metrics to benchmark and measure progress.[23]

Also see Shaun Fluker "The Supreme Court of Canada (By a Slim Majority) Confirms the Presumption of Deference in Alberta, November 8, 2016, University of Calgary Faculty of Law Blog, online: http://ablawg.ca/2016/11/08/scc-by-a-slim-majority-confirms-the-presumption-of-deference-in-alberta/.

[20] A "de novo" review (meaning "anew) is one where the appellant body may consider evidence and argument as if the first hearing had not taken place, and may make its decision without reference to the original decision.

[21] For example, the Environmental Appeals Board has previously taken issue with government interpretation and application of policies. *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.). Erratum changes included. http://www.eab.gov.ab.ca/dec/05-053-054-R-Erratum.pdf at pages 112-114. In this case a wastewater effluent approval was issued with allowable phosphorus levels much higher than what government's policy suggested should be used.

[22] See David Freeman Engstrom, "Agencies as Litigation Gatekeepers" (2013) Yale Law Journal 123:616, online: Yale Law Journal http://www.yalelawjournal.org/pdf/EngstromArticle_fqq9d15f.pdf.

[23] See Sidney A. Shapiro & Ren Steinzo "Capture, Accountability and Regulatory Metrics" (2007) *Texas Law Review* 86:1741 where eight principles of metrics were outlined:

1. Statutory Mission. Positive metrics should be aligned with an agency's statutory mission and, if available, its more detailed statutory mandates.
2. Short and Concise. Metrics should be short and concise, focusing on an agency's core statutory mission or missions.
3. Independent Selection. An independent body of experts familiar with the agency's work should select positive metrics.

This can be done internally and externally to a specific government agency and is central to adapting and continuously improving regulation and policy. Alberta should adopt systems that allow for both, a system to trigger review of policies and regulations against environmental outcomes, and a third party review agency that oversees the effectiveness of government programs, policies, spending and enforcement.

The scope and approach of reviews should lead to an open and transparent dialogue about the framing, administration and delivery of regulatory outcomes. This does occur to a degree in relation to regulatory reviews now, as typically agencies reach out to regulated parties to get feedback. However, there is a need to broaden the scope, increase the independence, and provide valuable reference points for these regulatory reviews.

An example of this exists in Ontario where if, in the opinion of the Minister, a proposed policy, regulation or Act may have a "significant effect on the environment", the Minister may provide notice to allow for public input.[24]

This approach of vetting or assessing proposed and existing laws and regulations, policies and programs is in line with strategic environmental assessments, which can stand as the framework under which this would occur.[25]

An environment-specific third party review body is required to ensure consistent and effective assessment of regulations, policies and administration. It is important to note that such third party reviews for environmental performance are typically advisory only and do not usurp the regulation and

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4. Unbounded Rationality. Whether or not information is available to answer the question behind a metric should not have a bearing on its selection.
5. Outcomes versus Outputs. Positive metrics should emphasize outcome, rather than output, measurements wherever possible.
6. Constant Change. Metrics should be changed as often as possible to reflect progress and spur further advances.
7. Diagnostic. Metrics should have the potential to help diagnose the causes of regulatory failure-including funding gaps, technical complexity, lack of political will, inadequate statutory design, and agency capture.
8. Ready Availability. Agencies must feature positive metrics on their Internet sites and avoid what appears to be a powerful motivation to bury information about poor performance behind a wall of nonobvious links requiring multiple "clicks" to reach the desired data, thereby rendering Internet sites accessible only to the very patient or to the already well informed.

http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1603&context=fac_pubs&sei-redir=1&referer=https%3A%2F%2Fscholar.google.ca%2Fscholar%3Fstart%3D20%26q%3Dperformance%2Bmetrics%2Bfor%2Bgovernment%2Bregulation%26hl%3Den%26as_sdt%3D0%2C5#search=%22performance%20metrics%20government%20regulation%22.

[24] *Ontario Environmental Bill of Rights*, S.O. 1993, c. 28 at s.15 and 16. This excludes policies and regulations which are "predominantly financial or administrative in nature".

[25] For context of strategic environmental assessment see Lisa White and Bram F. Noble "Strategic environmental assessment for sustainability: A review of a decade of academic research" *Environmental Impact Assessment Review* (September 2013), online: ResearchGate https://www.researchgate.net/profile/Bram_Noble/publication/257048733_Strategic_environmental_assessment_for_sustainability_A_review_of_a_decade_of_academic_research/links/54b692110cf2e68eb27ea038.pdf.

policy making function of government; rather, they bring an independent lens to how government approaches environmental issues (and thereby increases environmental accountability).

Recommendation #11: Codify mechanism, including mechanisms for the public, to trigger internal review of policies and regulations.

Recommendation #12: Codify a third party reviewer of administration of laws and policies (as described in Environmental Rights Module 2: Third party review).

D. Giving nature a legal voice

Typically, the government is assumed to speak for nature in its decision making. This need not be the case as there are a variety of risks with overreliance on government discretion and proponent based environmental assessments. But if not government, to whom do we grant this voice? To paraphrase Christopher Stone[26], should Alberta grant trees standing?

Giving a voice to the environment can only occur by designating a proxy for the environment. This may take the form of non-government organizations so long as standing requirements are applied liberally. Other opportunities include enabling a third party advocate or adjudicator to represent the interests of the environment. The third party adjudicator could be enabled to provide an environmental voice through a clear legislated mandate.

There are various proxies that may be chosen:

1. **Non-governmental organizations**
   By liberalizing standing tests and bolstering procedural rights for environmental non-government organizations they can be an effective legal representative for nature.

2. **A standing "friend" or environmental *amicus* of the court or adjudicator**
   The third party advocate could take the form of a standing "friend of the environment" (like an *amicus curiae* or "friend of the court"). This "friend" could then provide advice to decision makers and adjudicators.

3. **Adjudicators with a clear legislative mandate and technical capacity**
   By guiding and providing capacity of adjudicators to pursue independent scientific evidence and advice (for example a specialized environmental court with internalized capacity to assess and challenge evidence) and a clear legislative mandate.[27] A key issue often cited by courts and adjudicators in not assessing the scientific rationale for decisions (i.e. substantive review) is based on the notion that they are not well placed to assess these considerations.[28] Providing

[26] See Christopher D. Stone, "Should Trees Have Standing?- Toward Legal Rights for Natural Objects" (1972) *Southern California Law Review* 45:450.
[27] It should be noted that concerns around bias of such a body is likely to arise.
[28] *Supra* note 15.

broad powers and capacity for tribunals and courts to hear, investigate and adjudicate decision on the environmental merits (*de novo*) of reasoning given for making the decision will ensure accountability around environmental decisions. Similarly, the role could be taken on by an environmental court.

While #2 and #3 above will give rise to new governance structures and efficiency concerns, the need to rely on a third party advocate or adjudicator should decrease through time, as the level of decision-making is elevated to meet the needs of assessment.

Recommendation #13: Codify a mechanism for legal representation of environmental interests.

E. Providing objective analysis of environmental quality and forecasts

Environmental outcomes will only be attained or maintained where there is sufficient knowledge about the state of the environment and about the various impacts of pollution. Accountability in the areas of knowledge and monitoring is not well suited to legal prescription. Nevertheless, there is a need to ensure systems are in place to identify, hopefully in a proactive way, areas where environmental harm are likely. Measures to do this include:

- Ensuring proactive analysis and modelling of site specific and cumulative impacts in environmental assessment;
- Ensuring uncertainty is properly characterized and considered using a precautionary decision-making approach;
- Ensuring timely responses to identified trends and risks;
- Ensuring mechanisms of testing knowledge are in place, to ensure forecasts and impact assessments are as objective as feasible; and
- Ensuring there is timely public reporting and transparency in monitoring data and research.

Other programs and policies will need to be in place to ensure robust monitoring systems are created and funded, effective knowledge transfer occurs and relevant communities are engaged.

Accountability to laws

The executive branch of government should be held accountable with respect to the laws passed by the legislative branch. Currently the law provides the ability to pursue judicial review of government decisions. Private prosecutions are also possible, providing citizens with a mechanism to pursue third party compliance with our laws where the government has failed to pursue a prosecution (see Module 3 *Citizen Enforcement* for further details).

Legal accountability to our laws is essential to our democracy. Executive and administrative actions must comply with the purpose, intent, and letter of the law. Typically, this accountability to laws is left to the judicial branch, as an independent overseer of the lawfulness of government actions.

Several judicial reviews relating to the interpretation and application of the federal *Species at Risk Act*[29] are illustrative of how these reviews can function. In one case concerning identification of critical habitat of species at risk, the court held that the government had failed to abide the enabling legislation. The judge noted that the case was "a story about the creation and application of policy by the Minister in clear contravention of the law, and a reluctance to be held accountable for failure to follow the law".[30] The judicial decisions under the *Species at Risk Act* were made possible by the specific provisions and clear intent of the legislation, creating clear positive obligations for government decision makers.[31]

Courts in other cases have been quite deferential to government decision makers. Open-ended deference becomes a problem where legislative purposes and intents are undermined by government discretion. This deference may encompass both the specific rationale used to make a decision and also the interpretation of the enabling statutes.

A high level of deference also applies to decisions around environmental prosecutions. In the past private prosecutors had their seemingly clear violations of the law stayed by the Crown.[32] While some deference to Crown prosecutorial discretion is required there is also a need to acknowledge capacity constraints and enabling compliance mechanisms which may foster a greater deterrent effect. See Module 3 *Citizen Enforcement* for further details.

In addition, the making of regulations and policy is largely immune from judicial review. A role for judicial review in this area may allow for greater environmental accountability.[33]

The ELC recommends that Alberta move beyond constrained judicial review and lead the country in areas of creating accountability to our environmental laws, for government and for polluters. The focus of this recommendation is bolstering the effectiveness of regulatory enforcement undertaken by government and interested citizens. This includes providing for:

A. Effective enforcement and reporting system;
B. Citizen empowerment; and
C. Third party assessments of effectiveness and administration of laws.

A. Effective enforcement and reporting system

There should be an expectation that enforcement decisions and processes are effective. What "effective enforcement" is can be summed up as providing the motivation to individuals and firms to

[29] *Species at Risk Act*, S.C. 2002, c. 29.
[30] *Environmental Defence Canada v. Minister of Fisheries and Oceans* 2009 FC 878 at para 2.
[31] The court in *David Suzuki Foundation v. Canada (Fisheries and Oceans)*, 2010 FC 1233 (CanLII), <http://canlii.ca/t/2dw8l>, retrieved on 2017-03-06 confirmed this (at para 175).
[32] The prime examples of this involved the attempted prosecution relating to the Oldman River Dam in southern Alberta and relating to wastewater discharge by the City of Victoria.
[33] See Eduardo Jordão and Susan Rose-Ackerman "Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review" (2014) *Faculty Scholarship Series* Paper 4943.

comply with environmental laws, i.e. the specific and general deterrence of the regulatory compliance response is effective.[34] Admittedly, the effectiveness of environmental enforcement is difficult to assess.

Effective enforcement may include:[35]

1. Appropriate administrative fines

Specific and general deterrence will benefit from fines that elicit or trigger an appropriate assessment of risks by would be polluters.[36] Also, regulatory efficiency is an important aspect of effective enforcement. Administrative penalties in the province remain quite low under the *Administrative Penalties Regulation* and related regulations.[37] As noted by the Supreme Court of Canada "the amount of the penalty should reflect the objective of deterring non-compliance with the administrative or regulatory scheme".[38]

Recommendation #14: Review and amend administrative penalties to ensure regulatory outcomes are achieved.

2. Whistleblower protections

Whistleblower protection provisions in legislation ward against retribution by employers who have violated a law against their employees who have reported the violation. Alberta has specific legislation protecting government employees under the *Public Interest Disclosure (Whistleblower Protection) Act*[39] and workers who report non-compliance with the *Occupational Health and Safety Codes Act*.[40] There are also prohibitions in the *Criminal Code* which prevent retribution or retaliation

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[34] See for example a review of deterrence in the USA in Wayne B. Gray and Jay P. Shimshack "The Effectiveness of Environmental Monitoring and Enforcement: A Review of the Empirical Evidence" (2011) *Review of Environmental Economics and Policy*, 5:1, pp. 3– 24. http://isites.harvard.edu/fs/docs/icb.topic1362011.files/Gray%20and%20Shimshack_2011_Effectiveness%20of%20Environmental%20Monitoring%20and%20Enforcement.pdf.

[35] Further work needs to be done in this area to understand how best to evaluate enforcement. A new system around "randomized control trials". See also United States of America Environmental Protection Agency "Next Generation Compliance", online: https://www.epa.gov/compliance/next-generation-compliance.

[36] See for example the work of Dorothy Thornton, Neil Gunningham and Robert A. Kagan "General Deterrence and Corporate Environmental Behavior" (2005) *Law and Policy* 27:2 online: https://escholarship.org/uc/item/4t7862s1.

[37] A.R. 23/2003. The basic penalty is low however administrative penalties may be increased where there is a calculation of the amount of benefit (i.e. cost saving) to the violating party. This is a central aspect of administrative penalties which should be used to the fullest extent possible.

[38] See G*uindon v. Canada*, 2015 SCC 41 at para 77. Limits to administrative penalties and relationship to *Charter* actions have been discussed in G*uindon v. Canada* noting "the relevant question is not the amount of the penalty in absolute terms, it is whether the amount serves regulatory rather than penal purposes" at para 81.

[39] *Public Interest Disclosure (Whistleblower Protection) Act,* S.A. 2012, c. P-39.5.

[40] R.S.A. 2000, c. 0-2 at s. 36.

against an employee. This prohibition only applies where reporting of information is to "a person whose duties include the enforcement of federal or provincial law".[41]

Federally there is employee protection under section 16(4) of the *Canadian Environmental Protection Act* that allows for a request of confidentiality in reporting an offence under the Act.[42] Ontario's *Environmental Bill of Rights* sets out a complaints process for employees to deal with employer reprisals related to a variety of "prohibited grounds", which not only includes employer offences but also covers the employee participating in a variety of processes under the Act.[43] It also imposes the burden of proof on the employer to prove that a reprisal was not taken.[44]

Alberta's provincial environmental and natural resources legislation currently does not cover whistleblower protection.

Some central aspects of effective whistleblower protections include:

- Clear prohibitions against retaliation by the employers or agents;
- Anonymity and confidentiality in reporting; and
- Clear processes for complaints and remedies.

Recommendation #15: Codify whistleblower protection in Alberta's environmental laws, allowing for anonymity and a fair and efficient complaints and remedy process.

3. Clear metrics, monitoring and transparent reporting for enforcement performance

Performance metrics for compliance and enforcement are rarely transparently defined. Transparency in enforcement effectiveness and assessment of regulatory capacity is necessary to ensure accountability. [45]

Recommendation #16: Develop clear metrics and transparency in evaluating enforcement effectiveness.

B. Citizen empowerment

Citizen empowerment should go beyond judicial review, private prosecutions and requesting investigations. The ELC recommends codifying civil actions to ensure compliance among government

[41] *Criminal Code*, R.S.C. 1985 c. C-46 at s.425.1(1)(a).
[42] *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.
[43] *Supra* note 11 at s.104(3). The process for dealing with complaints about reprisals is through the labour relations officers and Board. Noncompliance with Board orders under this legislation can be enforced as if it were a court order.
[44] *Ibid*. at s.109.
[45] Fox, Jonathan (2007) 'The uncertain relationship between transparency and accountability', *Development in Practice*, 17:4, 663 – 671 URL: http://dx.doi.org/10.1080/09614520701469955.

and third parties who violate environmental laws. [46] This civil cause of action should including details regarding fines, injunctive orders, declarations in relation to government action, security for costs, and coverage of attorney fees.[47]

A full discussion of enabling civil causes of action against government and polluters in relation to compliance with environmental laws is reviewed in Module 3: Citizen Enforcement.

In addition, opportunities for judicial oversight of policy formulation and implementation should be considered.

Recommendation #17: Codify citizen based suits which allow for fines and injunctive relief.

C. Third party assessments of effectiveness and administration of laws

Measuring success in policy implementation and administration should fall to a neutral and objective third party. The identification of metrics around environmental compliance and policy performance should identified and be audited regularly by third party auditors (or an environment commissioner). This process would ensure that performance of enforcement and compliance will be evaluated on an ongoing basis. (For additional information see Module 2: Third Party Oversight and Environmental Rights).

Recommendation #18: Codify third party review and assessment of policy and program administration.

[46] Private citizen suits and public enforcement: Substitutes or complements?
C Langpap, JP Shimshack – (2010) *Journal of Environmental Economics and Management* 59:3…., 2010.
[47] *Supra* note 22.

Which path to take?

Alberta has a mixture of rights and responsibilities related to the environment across sectors. It must be recognized, however, that some of the proposed recommendations may fit with existing statutes and may be possible to integrate across existing governance structures.

The ELC recommends adopting a more thorough and unified approach to substantive and procedural legal rights to environmental quality by way of an Environmental Bill of Rights for Alberta. This report extrapolates on the core components of these rights that the ELC recommends embedding in Alberta law. The central benefits of pursuing an Environmental Bill of Rights versus a piecemeal approach to altering existing statutes, include:

- Strong messaging and intent reflected in recognition of "environmental rights";
- A unified Bill of Rights would ensure cross sectoral coverage, which may not otherwise occur;
- Many provisions fit appropriately in an umbrella "bill of rights" such as third party oversight.

The core function of having these rights is to provide the tools for current and future Albertans to ensure we maintain and restore environmental quality.