QUASI-JUDICIAL AGENCIES REVIEW PAPER

Prepared by Brownlee LLP for RMA
Jeneane S. Grundberg, KC
Alifeyah Gulamhusein
Hayley Tarnasky
Brendan Dzioba

Brownlee LLP . 2200, 10155 – 102 Street NW, Edmonton AB T5J 4G8 . Ph: 780.497.4800

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Disclaimer

This resource is not legal advice and does not purport to anticipate every aspect, circumstance, or situation that municipalities may encounter when dealing with a particular quasi-judicial agency. This report is current to September 2023. Future amendments to the MGA, other legislation, and other developments to the applicable law, may significantly alter the accuracy of the information in this document.

Introduction

A core responsibility of municipalities is to manage local land use planning and development decisions. Certain quasi-judicial agencies in Alberta can have a major impact on this responsibility. A quasi-judicial agency is an independent body that has the delegated provincial authority to interpret laws, regulations, and policies, and to make decisions on specific subjects. There are three main quasi-judicial agencies in Alberta that will be discussed in this report. The decisions of these agencies have significant ramifications for local governments and their residents. These agencies are the Alberta Utilities Commission (AUC), responsible for approving renewable energy developments, the Alberta Energy Regulator (AER), which deals with oil and gas wells and pipelines, and the Natural Resources Conservation Board (NRCB), which largely deals with confined feeding operations (CFOs) and manure storage.

The purpose of this report is not to provide all of the solutions to all of the current problems arising from the three regimes referenced (the AER, NRCB and AUC); rather, it is to highlight the key challenges – from a municipal perspective – so these areas can be further reviewed.
Municipalities recognize that regulatory frameworks, by their very nature, must grapple with polycentric issues. There will never be unanimous agreement respecting a specific approval or the key elements of a particular regime framework. That said, any regime should strive to achieve certain themes: certainty (not ad hoc); a level playing field; uniformity (with appropriate adjustments for specific situations); minimum best practices; transparency; clear, enforceable requirements; the ability to quickly enforce compliance; and a user-pay philosophy.

This report delves into the regulatory approach and practices of the three agencies through the lens of if and how their current project approval processes consider municipal perspectives on the possible risks and impacts of the project, as well as if and how they protect municipalities from such risks. For most development types, municipalities serve as the development authority and can therefore assess such risks (as well as benefits), as well as whether the development aligns with local land use plans. Because municipalities do not have the same level of regulatory authority over the developments approved by these quasi-judicial agencies, it is crucial that their approval processes are designed to allow for municipal perspectives to be considered in a way that reflects the significant impact of these developments as well as the land use planning power and responsibilities that municipalities hold.

The report outlines how the approval processes and considerations used by all three quasi-judicial agencies contain serious barriers and gaps that prevent municipal plans and input from being consistently considered during project approval processes; these barriers and gaps undermine the public interest, and may also place municipalities in positions of long-term risk related to land use, environmental, infrastructure, and nuisance impacts, as well as project reclamation.

The purpose of this report is not to provide all of the solutions to all of the current problems arising from the three regimes referenced (the AER, NRCB and AUC); rather, it is to proposed recommendations to address key challenges – from a municipal perspective – within the approval processes of each.

In summary, our key recommendations are as follows:

1. **NRCB** – the NRCB's legislation is outdated. When considering municipal planning documents, it only references municipal development plans. It should be updated to reference intermunicipal development plans.

2. **AER** – despite recent adjustments to the legislative framework, more significant changes must be made to enhance payment of municipal property taxes. Further, substantial changes must be made to reclamation, including security. The debacle arising from unpaid municipal taxes and breached reclamation requirements is staggering. There is an adage: "When you're in a hole, stop digging". Changing shovels will not fix the problem. A major challenge with the situation of AER-regulated projects is that the 'hole' (whether it be for municipal tax arrears, or reclamation requirements) has become massively deep for certain proponents or projects. Some recent regulatory changes will be helpful, but lessons must be learned and applied – by firstly not allowing any companies with unpaid municipal taxes to operate in the province, and by secondly imposing proactive requirements respecting reclamation security (administered provincially).

3. **AUC** – a comprehensive 'cradle to grave' analysis of all aspects of renewable power projects must be performed, well beyond the specific issues referenced in the AUC inquiry inter electricity generation announced in August 2023. From a municipal standpoint, this must include consideration and analysis of the impact on the following: municipal roads, emergency response/fire service, vegetation and weed/dust control, agricultural production, reclamation (including security), and property taxes. At present, the AUC has relatively minimal Rules (such as Rule 012: Noise Control). The lack of comprehensive Rules results in an *ad hoc* consideration of issues at the hearing level (at great expense to all participants) and a negotiation process with municipalities with varied results, highly dependent on the whim and temperament of the proponent. Going forward, the number and scope of various Rules must be greatly expanded to provide better certainty, enhanced standards, and a level playing field for projects across the province.

PART 1: OVERVIEW OF ALBERTA'S QUASI-JUDICIAL AGENCIES

A. The Alberta Energy Regulator

i) Jurisdiction and Mandate

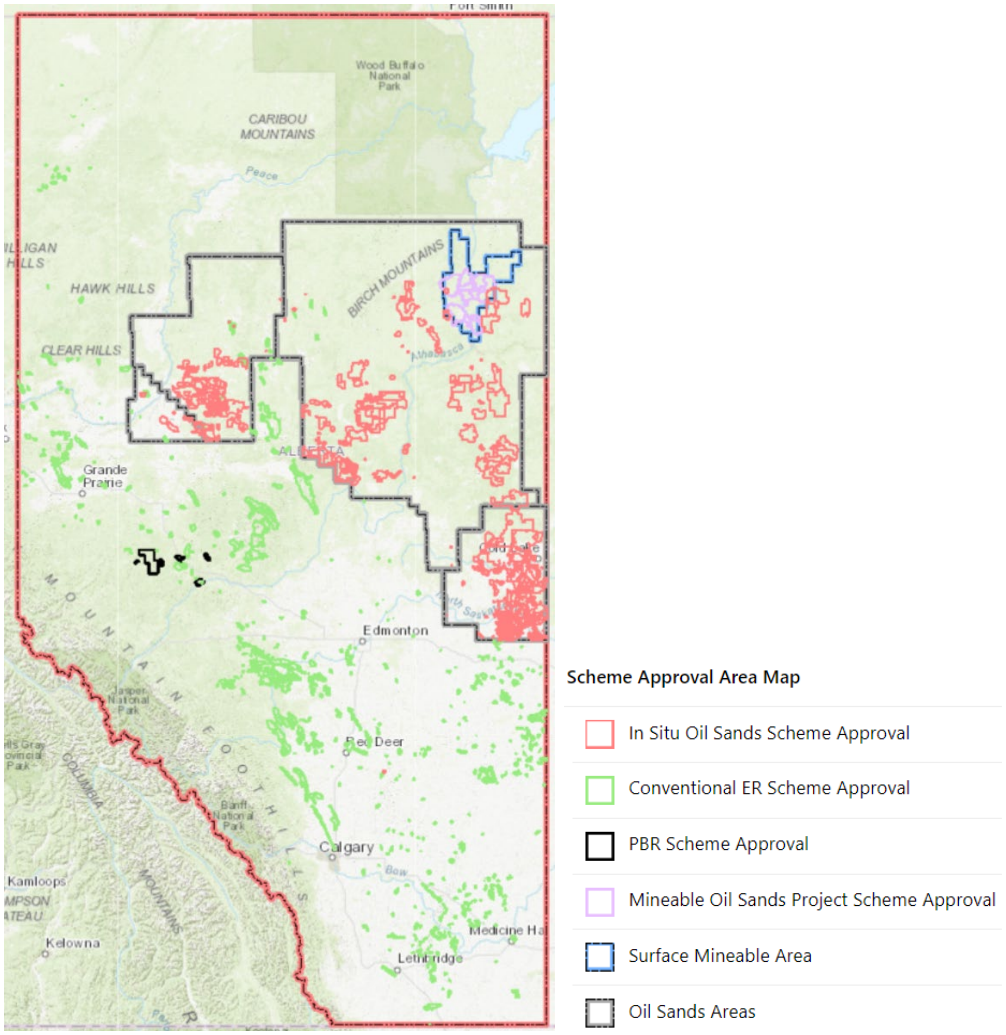
The AER was established in 2013 under the *Responsible Energy Development Act* (REDA).[1] It regulates the development of oil, oil sands, natural gas, coal resources, geothermal, and brine-hosted mineral resources over their entire life cycle.

The AER is responsible for administering provincial legislation designed to ensure Alberta's energy resources are developed responsibly.[2] It considers and decides applications and other matters in respect of pipelines, wells, processing plants, mines, and other facilities and operations for the recovery and processing of energy and mineral resources.[3] It also oversees the abandonment and closure of these projects at the end of their life cycle, including regulating remediation and reclamation.[4]

The AER's historic decision-making has been very significant in defining what the rural landscape looks like today.[5] The extent of this industry's impact on Alberta is demonstrated by the following map, showing approval areas for active conventional AER scheme approvals, in situ oil sands scheme approvals, and mineable oil sands scheme approvals.[6]

[1] *Responsible Energy Development Act*, SA 2012, c R-17.3 [REDA]
[2] the AER replaced the energy regulatory functions of its predecessor, the Energy Resources Conservation Board (ERCB) and the functions related to public lands, water and the environment from the Environment and Sustainable Resource Development (now Alberta Environment and Protected Areas). It has regulatory and quasi-judicial duties under a number of Alberta statues: *Gas Resources Preservation Act*, RSA 2000, c G-4; *Oil and Gas Conservation Act*, RSA 2000, c O-6; *Pipeline Act*, RSA 2000, c P-15
[3] REDA, s 2(2)
[4] REDA, s 2(2)
[5] AER has several maps available, including AER Map-90: Designated Oil and Gas Fields, and Oil Sands Deposits showing Alberta's designated oil and gas fields, oil sands areas, and development entities (https://static.aer.ca/prd/documents/catalog/Map90_Oil_Gas_Fields_Large.pdf) and OneStop: Public Map Viewer showing industry assets within a specific area (https://extmapviewer.aer.ca/Onestop/Public/index.html)
[6] AER Scheme Approval Area Map Viewer, (https://extmapviewer.aer.ca/AERSchemeApprovalArea/Index.html);

Figure 1: AER Scheme Approval Area Map Viewer



The stated mandate of the AER is:

> (a) to provide for the efficient, safe, orderly and environmentally responsible development of energy resources and mineral resources in Alberta through the Regulator's regulatory activities, and
>
> (b) in respect of energy resource activities, to regulate
> (i) the disposition and management of public lands,
> (ii) the protection of the environment, and
> (iii) the conservation and management of water, including the wise allocation and use of water, in accordance with energy resource enactments and, pursuant to this Act and the regulations, in accordance with specified enactments.[7]

When deciding applications for well drilling, the AER has a mandate to not only ensure safe and efficient practices, but also to "provide for the economic, orderly and efficient development in the

[7] REDA, s 2(1)

public interest".[8] This suggests the AER must take into account land use planning considerations, and can impose conditions to lessen any negative impacts on surrounding land uses.[9] There are, however, no court cases discussing this topic.

ii) Municipal Standing and Involvement in the Approval Process

The REDA specifies that when considering an application, the AER "shall… consider any factor prescribed by the regulations, including the interests of landowners".[10]

With respect to pipelines, the AER must issue a permit before a pipeline can be constructed. The regulations require that applicants for a permit provide information regarding present surrounding land use and any land use plans and bylaws that are in effect.[11] Therefore, although municipal planning legislation does not govern these types of developments (i.e. no development permit can be required), a municipality's planning framework will be relevant to some extent.

When an oil and gas company applies for a new licence, or for the transfer of an existing licence, the AER treats a municipality like any other interested party. The municipality can participate in the application process by filing a document called a Statement of Concern. A Statement of Concern is a mechanism, set out in the REDA, whereby a party who considers itself to be directly and adversely affected by an application to the AER can make its concerns known to the AER.[12] If the AER holds a hearing on an application, a written request to participate must be filed by the interested municipality.[13] The AER will then decide if participation will be allowed and if so, the nature and scope of the allowed participation.[14]

Participation does not guarantee the AER will refuse to grant the company's application or make changes based on municipal concerns. Under its governing legislation, the AER has wide discretion in deciding whether to allow new licences or licence transfers, and concerns of a municipality are just one of many factors it may consider.

There are signs, however, that unpaid taxes will be an increasingly important consideration for the AER in the future. Most significantly, on March 16, 2023, the Minister of Energy signed Ministerial Order 043/2023, which essentially directs the AER to require, as a condition of approving a new well licence or transfer of an existing well licence, confirmation that the transferor or transferee either has no outstanding municipal tax arrears exceeding $20,000 provincewide, or has entered into a payment plan for such taxes.[15]

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[8] *Oil and Gas Conservation Act*, RSA 2000, c O-6, s 4(b), 4(c)
[9] Laux, *Planning Law and Practice in Alberta*, 4th ed (Edmonton: Juriliber, 2019), 4-41
[10] REDA, s 15
[11] *Pipeline Regulation*, Alta Reg 91/2005
[12] REDA, s 32
[13] *Alberta Energy Regulator Rules of Practice*, Alta Reg 99/2013 [AER Rules of Practice], s 9
[14] AER Rules of Practice, s 9.1
[15] See the following link to the Ministerial Order: https://open.alberta.ca/publications/energy-043-2023. See also the news release that accompanied this Order: https://www.alberta.ca/release.cfm?xID=86773FBAC4491-C8E6-9165-B46EC9F21FDD894D

At the time of writing (fall 2023), the full impact of the Ministerial Order is unknown. In conjunction with Municipal Affairs, the AER has developed a system for gathering unpaid tax information directly from municipalities on a quarterly basis, with initial municipal data requested by April 30, 2023. The full legal impact of this change is something that may not be immediately clear, and may need to be explored through AER regulatory decisions or even court decisions.[16] Accordingly, municipalities should follow this issue closely to see what new processes and requirements ultimately result from the Ministerial Order, and consider how they can best become involved in them to inform the AER about outstanding taxes owed by oil and gas licencees. Clearly, a gap in these changes is that the AER only reviews unpaid tax information on license approval or transfer; this does not address the situation of unpaid taxes where there is continued operation by an approval holder.

A major downfall of the AER regulatory process is that many approval holders have defaulted on the payment of property taxes to Alberta municipalities. This includes proponents who continue to operate and are not insolvent. Another major downfall in the AER's regulatory process has been the proponent's default on reclamation requirements. We will discuss these failures in greater detail below.

Recommendation #1: AER standing and cost recovery

The AER's framework should be modified so municipalities should be routinely granted not only intervenor standing, but also intervenor costs. The proponent, not the municipality's other taxpayers, should bear the cost of processing an application, including the cost of the municipality's intervention (legal and expert costs). These changes to the AER's regulatory regime are warranted given the magnitude of breaches respecting payment of municipal taxes and reclamation responsibilities.

Currently, the AER treats a municipality's application for standing like any other application. There is no special category for considering a municipality's application for intervenor status, or costs. Applying for intervenor status can be a costly and time-intensive exercise. With the concept of user-pay, the proponent of a project should bear the cost of its regulatory process.

B. The Natural Resources Conservation Board

i) Jurisdiction and Mandate

The NRCB was established under the *Natural Resources Conservation Board Act* ("NRCB Act") in 1991 to determine the public interest of proposed natural resource projects.[17] This includes projects related to the forest industry, recreation or tourism, and water management.[18] Projects of this nature may not be commenced prior to an approval being granted by the NRCB. The NRCB

[16] Of interest, in the recent compliance order issued by the AER against AlphaBow Energy, the AER has suspended AlphaBow's operations in part because of the inability to pay municipal property taxes. There are several additional reasons for this decision:
https://www1.aer.ca/compliancedashboard/enforcement/20230358_AlphaBow%20Energy%20Ltd_Order.pdf
[17] *Natural Resources Conservation Board Act*, RSA 2000, c N-3 [NRCB Act]
[18] NRCB Act, s 4

can also order that a municipality not issue any permits with respect to a reviewable project until an approval has been granted under the NRCB Act.[19]

The NRCB Act states that its purpose "is to provide for an impartial process to review projects that will or may affect the natural resources of Alberta in order to determine whether, in the Board's opinion, the projects are in the public interest, having regard to the social and economic effects of the projects and the effect of the projects on the environment".[20] The NRCB must "weigh, and balance, and evaluate, and try where possible to reconcile these conflicting goals" and consider the "interests of the public at large, not a specific person or group".[21] The goal of meeting the public interest with respect to social, economic, and environmental considerations, however, are not absolutes and are not a condition precedent to an approval by the Board.[22]

In 2002, a significant expansion occurred respecting the NRCB's jurisdiction: the NRCB was given additional responsibility for regulating Alberta's CFOs and manure storage facilities through the *Agricultural Operation Practices Act* ("AOPA").[23] Under AOPA, the NRCB is responsible for issuing permits, along with delivering compliance and enforcement functions for CFOs and manure storage facilities over prescribed thresholds.[24] It also hears appeals relating to permitting and compliance actions.

The NRCB states that the purpose of AOPA is to ensure Alberta's livestock industry can grow to meet the opportunities presented by local and world markets in an environmentally sustainable manner. Public interest is not specifically mentioned in AOPA other than in the context of considering whether to engage in a co-operative review with another board, commission or body. However, the Act does state that when determining an application, the effects on the environment, economy and the community, and the appropriate use of land must be considered as follows:[25]

1. **Initial Approval (by approval officer):** When presented with an application, an approval officer must consider whether the application is consistent with municipal development plan ("MDP") land use provisions.[26] This does not include any provisions related to tests, the construction of a CFO or manure storage facility site, or the application of manure, composting materials or compost.[27] If the application is "inconsistent" with MDP land use provisions, it must be denied by the approval officer.[28] If an approval is granted, terms and conditions may be imposed, including those that a municipality could impose if it were issuing a development permit.[29]

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[19] NRCB Act, s 5
[20] NRCB Act, s 2
[21] *Henkelman v Alberta (Natural Resources Conservation Board)*, 2004 ABCA 358 at paras 10, 12
[22] *Henkelman v Alberta (Natural Resources Conservation Board)*, 2004 ABCA 358 at paras 13
[23] *Agricultural Operation Practices Act*, RSA 2000, c A-7 [AOPA]
[24] see *Agricultural Operations, Part 2 Matters Regulation,* AR 257/2001, Schedule 2 for thresholds for CFOs (attached as Appendix "A"); for manure storage facilities that are not part of a CFO, authorization is required if it contains a total of 500 tonnes or more of manure, composting materials and compost for 7 months or more in any calendar year (see *Agricultural Operations, Part 2 Matters Regulation,* AR 257/2001, s 4)
[25] AOPA, s 20(1)(b)(ix)
[26] AOPA, s 20(1)
[27] AOPA, s 20(1.1)
[28] AOPA, s 20(1)(a)
[29] AOPA, s 20(1)(b)(i)

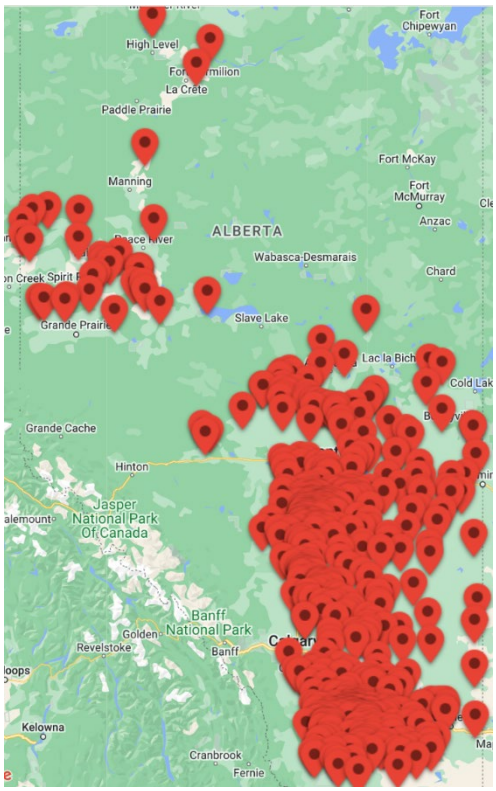
2. **Appeal to NRCB:** The decision of an approval officer can be appealed to the NRCB. If a review of a decision is conducted, the Board "must have regard to, but is not bound by, the municipal development plan".[30] This allows the NRCB discretion to override the provisions of an MDP with respect to issues such as the siting of a CFO.[31] Although the NRCB has this discretion, it has acknowledged that it has a responsibility to carefully weigh "the planning objectives of municipal planning documents in relation to an application".[32]

   When an application has been denied by an approval officer (at first instance) because it was inconsistent with an MDP, the NRCB can (on appeal) consider the process for the adoption of an MDP, among other factors, during its review.[33] However, if an application is consistent with the substance an MDP, the NRCB does not have the authority to question whether proper procedures were undertaken during the adoption of the MDP.[34]

Since 2002, there have been a large number of approvals for CFOs issued by the NRCB. These approvals are shown on the following map[35]:

[30] AOPA, s 25(4)(g)
[31] NRCB Decision 2011-03/FA10003, April 11, 2011; leave to appeal denied in *Grow North Inc. v Alberta (Natural Resources Conservation Board)*, 2011 ABCA 236
[32] NRCB Review Decision 2022-16/FA1002, Hutterian Brethern Church of Cleardale, December 19, 2022, p 2
[33] NRCB Request for Review Decision RFR 2022-12/RA21030, October 26, 2022, p 6
[34] NRCB Request for Review Decision RFR 2022-12/RA21030, October 26, 2022, p 6; this is in keeping with legal authority to the effect that any legal challenge to process in the adoption of a municipal bylaw should be before the Alberta Court of King's Bench.
[35] CFO Search (https://www.nrcb.ca/confined-feeding-operations/cfo-search#)

Figure 2: NRCB Permits Issued for Confined Feedings Operations in Alberta from 2002 to Present



ii) Municipal Standing and Involvement in the Approval Process

As discussed, there are two parts to the NRCB jurisdiction: authority outside of AOPA, and authority under AOPA (CFOs and manure storage exceeding prescribed thresholds). If a municipality is, or may be, directly affected by a reviewable natural resource project (i.e. outside of AOPA), it can make submissions as an intervener for proceedings under the NRCB Act.[36] In its submissions, the intervener can state which disposition of the application it advocates for and the reasons why, along with the information the intervener would like to present in evidence. An intervener may also make a claim for funding "in respect of costs that are reasonable and are directly and necessarily related to the preparation and presentation of the intervener's submission".[37] An intervener can make a request to the Board for an advance of funds that are reasonably anticipated to be incurred when preparing and presenting the intervener's submissions.[38] Costs awarded to an eligible intervener will be paid by the applicant.[39]

[36] *Rules of Practice of the Natural Resources Conservation Board Regulation*, Alta Reg 77/2005 [NRCB Rules of Practice], ss 1(1)(f), 11; AOPA, s 11(1)
[37] NRCB Rules of Practice, s 28
[38] NRCB Rules of Practice, s 37
[39] NRCB Rules of Practice, ss 32, 40

This differs from the process under AOPA. If a proposed development is located within a municipality, that municipality is **automatically** categorized as both an affected person and a directly affected party with respect to that development.

Under the Regulations, municipalities that have a border within the affected party radius from a proposed development, are also treated a directly affected party.[40] However, the MDPs of these neighbouring municipalities are not relevant to the "MDP consistency" requirement in s. 20(1) and 22(1) of AOPA. The application must only be consistent with the MDP of the "local municipality", the municipality in which the proposed development is located.[41]

Municipalities, as directly affected parties, will be given an opportunity to review the information relevant to the application that has been submitted and can provide evidence and written submissions.[42] Unlike the NRCB Act however, there are no provisions in AOPA with respect to intervener funding or awarding the costs of participation of municipalities. As a result, municipalities are not compensated for any costs or expenses they may incur when participating in proceedings and providing information to the NRCB with respect to CFOs or manure storage facilities. This can result in situations where the costs of legal representation and obtaining expert evidence makes it cost-prohibitive for municipalities to participate to the fullest extent. For example, almost all CFO's will have access onto and require use of a municipal road network; further, all will have an off-site odour impact. While road impact issues would (for other developments, in the ordinary course) be typically addressed in a appropriate agreements such as a development agreement (for required road construction or upgrades of municipally controlled roads) and road use agreement (for required haul routes or hauling hours, or dust suppression), the NRCB process does not provide a municipality with the opportunity to:

- impose conditions at the development permit stage; or
- recover costs for vetting an application through a development permit application fee;

as no development permit is required for a CFO or manure storage over the thresholds in AOPA.

In relation to considering the municipal legislative framework, if a neighbouring municipality refers to its MDP in its written response to the application, this may become relevant in an approval officer's consideration of other AOPA permitting factors, including the effects of the application on the community and whether the proposed development is an appropriate use of land.[43]

In addition, the NRCB's Operational Policy states that if the neighbouring municipality has entered into an inter-municipal development plan (IDP) with the local municipality, and the IDP is cross-referenced in the local municipality's own MDP, the approval officer will need to consider any relevant provisions in the IDP as part of their MDP consistency determination.[44] Even without a cross-reference, in recent decisions, the NRCB has directed approval officers to consider any

[40] *Agricultural Operations, Part 2 Matters Regulation*, Alta Reg 257/2001, s 5; AOPA, s 19(6)
[41] NRCB Operational Policy 2016-7: Approvals (the Approvals Policy), s 6.4
[42] AOPA, s 20(1)(b)(iii)
[43] AOPA, s 20(1)(b)(ix); NRCB Operational Policy 2016-7: Approvals (the Approvals Policy), s 6.4
[44] NRCB Operational Policy 2016-7: Approvals (the Approvals Policy), s 6.4

relevant IDP, in addition to MDPs, when assessing whether an application is consistent with land use planning.[45] We will discuss this further below.

Recommendation #2: NRCB cost recovery

While the NRCB legislative framework does grant a municipality intervenor standing, the NRCB framework should be revised so that municipalities are automatically granted intervenor funding.

With the concept of user-pay (the proponent of a project should bear the cost of its regulatory process), municipalities should be automatically granted not only intervenor standing but also intervenor costs. The proponent, not the municipality's other taxpayers, should bear the cost of processing an application, including the cost of the municipality's intervention (legal and expert costs) before the NRCB.

C. The Alberta Utilities Commission

i) Jurisdiction and Mandate

The AUC regulates the utilities sector, natural gas, and electricity markets, including renewable energy. Owners intending to build and operate a power plant with a total generating capability of 10 megawatts or more are required to submit a full application to the AUC for approval.[46]

The AUC has a mandate to "ensure that the delivery of Alberta's utility service takes place in a manner that is fair, responsible and in the public interest".[47] This is discussed in s. 6 of the *Alberta Utilities Commission Act* ("AUC Act"), which states that every member of the AUC has a duty to act "in the public interest".[48] In addition to this, s. 17 states that when considering an application to construct or operate a hydro development, power plant, transmission line, or a gas utility pipeline, the Commission must contemplate whether the proposed development "is in the public interest, having regard to the social and economic effects of the development, plant, line or pipeline and the effects of the development, plant, line or pipeline on the environment".

When determining an application, the AUC must also look at the purposes of the *Electric Utilities Act* and the *Hydro and Electric Energy Act*, whether the applicant has met the requirements under its Rules, and whether the applicant has obtained all approvals required by other applicable provincial or federal legislation.[49]

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[45] NRCB Decision 2022-02 / LA21033, Double H Feeders Ltd., March 17, 2022

[46] A checklist application form can be filed if the generating capability is between one and 10 megawatts (see https://media.www.auc.ab.ca/prd-wp-uploads/regulatory_documents/Reference/Rule007_PowerPlantChecklistApplicationForm.pdf) and no application is required for projects for personal use with a generating capacity less than one megawatt (see *Hydro and Electric Energy Act*, RSA 2000, c H-16, s 13; *Hydro and Electric Energy Regulation*, Alta Reg 409/1983, s 18.1). Even if no application is required, the AUC retains the jurisdiction to investigate issues in relation to compliance with its Rules and to confirm that the requirements for exemption from filing an application are satisfied.

[47] AUC website 2023

[48] *Alberta Utilities Commission Act*, SA 2007, c A-37.2 [AUC Act]

[49] AUC Decision 24266-D01-2020, East Strathmore Solar Project, September 25, 2020 at para 11

If the AUC determines that a project is in the public interest, this is informed by, and is often contingent on, the commitments made by an applicant.[50] These commitments are binding on an applicant whether or not they are turned into a condition by the AUC.[51] The AUC can also order conditions to attach to a project approval to balance various public interest factors. However, these must fall within its powers as set out in its enabling legislation.[52]

Since the AUC's jurisdiction involves regulating the construction and operation of power plants, any imposed conditions must relate directly to this in order to fall within the parameters of the AUC's statutory mandate.[53] Therefore, the AUC can attempt to mitigate concerns by imposing conditions related to the design or operation of a project. If there are impacts that cannot be completely mitigated, for example, visual intrusions or potential property value impacts, the AUC is required to carefully consider whether the project is in the public interest notwithstanding this.[54]

In addition to regulating the approval, construction and operation of electric facilities, the AUC is also tasked with ensuring these facilities are decommissioned in an efficient and environmentally responsible way.[55]

In 2017, the *Renewable Electricity Act* was passed.[56] This outlines Alberta's commitment to increasing the amount of renewable electricity generation produced in the province, including geothermal, hydro, solar, sustainable biomass, and wind. It created a legislated target that by 2030, at least 30% of the electric energy produced in Alberta will be from renewable energy resources.[57] The Act also required that interim targets be set.[58] In February 2019, targets for the percentage of electrical energy produced from renewable energy resources in Alberta were established by Ministerial Order as follows:

a) at least 15% by 2022;
b) at least 20% by 2025;
c) at least 26% by 2028.[59]

These targets have resulted in a high rate of growth in Alberta's renewable energy sector and an increased rate of quasi-judicial development approvals in recent years.

These projects can be very large. For example, the Sharp Hills wind project in eastern Alberta, near the Village of Consort and the Hamlets of Sedalia and New Brigden, spans over 49,000 acres

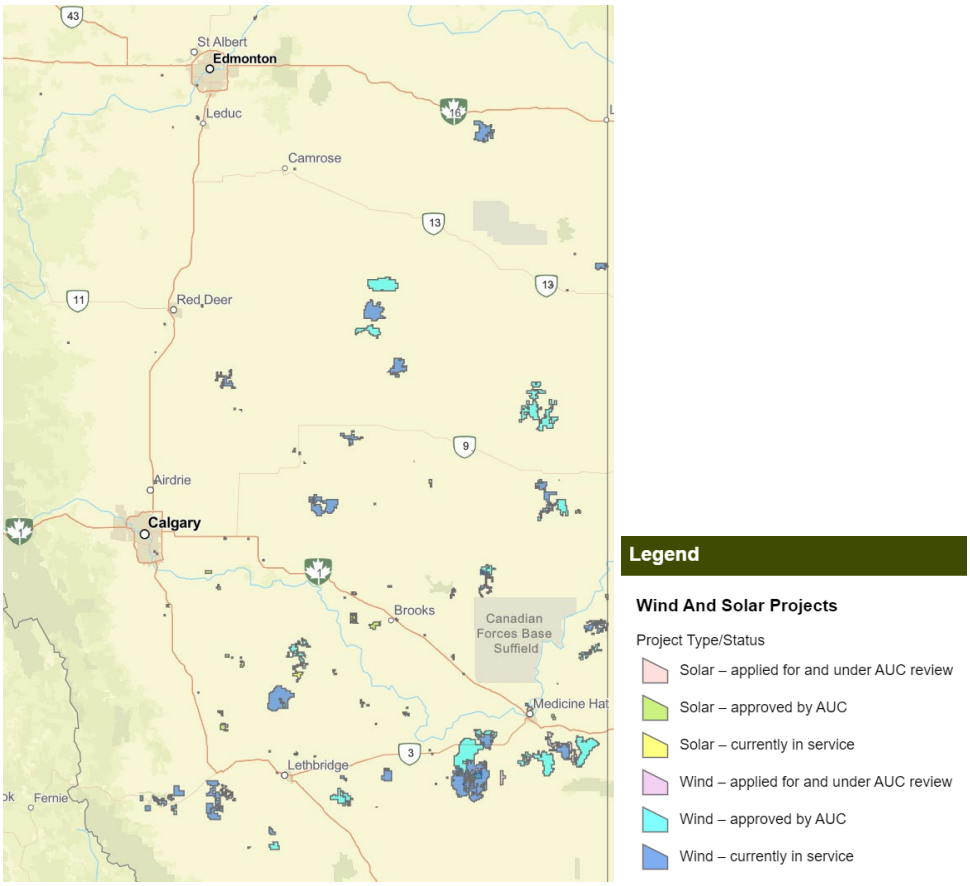
[50] AUC Decision 26214-D01-2022, Buffalo Plains Wind Farm, February 10, 2022 at para 31
[51] AUC Decision 26214-D01-2022, Buffalo Plains Wind Farm, February 10, 2022 at para 31
[52] AUC Decision 26214-D01-2022, Buffalo Plains Wind Farm, February 10, 2022 at para 23; see also *ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board),* 2006 SCC 4 at paras 24, 35
[53] AUC Decision 26214-D01-2022, Buffalo Plains Wind Farm, February 10, 2022 at paras 24, 25
[54] AUC Decision 26214-D01-2022, Buffalo Plains Wind Farm, February 10, 2022 at para 118
[55] AUC website 2023
[56] *Renewable Electricity Act*, SA 2016, c R-16.5
[57] *Renewable Electricity Act*, SA 2016, c R-16.5, s 2(1), 2(2)
[58] *Renewable Electricity Act*, SA 2016, c R-16.5, s 2(3)
[59] Ministerial Order 141/2019

and has a capacity of nearly 300 megawatts.[60] Its generation is equivalent to the consumption of more than 160,000 homes in Alberta.[61]

The size of these projects and the high approval rates, has placed an increased focus on how provincial planning impacts both municipalities and municipal concerns.

The Provincial practice of not allowing renewable energy projects on Crown lands has exacerbated the removal of lands from agricultural production. This is demonstrated by the following Wind and Solar Interactive Map from the AUC for central and southern Alberta, showing the location of approved, constructed and operating wind and solar projects, and those where approval is pending.[62]

Figure 3: AUC Wind and Solar Interactive Map for Central and Southern Alberta



In order to achieve sustainable growth for all of Alberta, it is essential to find a balance between provincial considerations and local plans, policies, and community needs. With rural

[60]AUC Exhibit 2265_X0235, Opening Statement of EDP Renewables SH Project GP Ltd.; AUC Decision 22665-D01-2018

[61] EDP Renewables North America website 2023 (https://www.edpr.com/north-america/sharp-hills-wind-farm)

[62] See https://abutilcomm.maps.arcgis.com/apps/webappviewer/index.html?id=81809f0f929c41f4b95d9abebba2e4fe (updated monthly)

municipalities covering roughly 85% of Alberta's land, it is vital their concerns be heard and voices be included in the quasi-judicial approval process.

On August 3, 2023[63] the Government of Alberta announced a pause on AUC approvals of renewable power projects.[64] The press release referenced the need to review certain issues (including the role of municipal government in land selection, consideration of Crown lands for siting, the impact on views, and increased measures respecting reclamation security).

ii) Municipal Standing and Involvement in the Approval Process

When an application for AUC regulatory approval, the proponent must provide notice to various potentially affected parties, which may include municipalities. If a municipality receives notice, or learns of the application through other means, the municipality may file a Statement of Intent to Participate in the proceeding. This document allows the municipality to declare its intention to become involved in the regulatory proceeding, and to set out its interests and concerns with what is being applied for.

The municipality may then, subject to the AUC's discretion, be allowed to participate in the proceeding and make submissions. The extent of the municipality's involvement will depend on whether the AUC considers that the municipality is "directly and adversely affected" by the application, as this is the standard test for whether a third party (including municipalities) can participate fully in the proceeding.[65]

When addressing standing, the AUC has treated municipalities differently than other parties. The AUC's rulings on standing reference various factors, including the following:

1. *Different legal rights* - The AUC has ruled that concerns related to a municipality's obligations, responsibilities, and liabilities are not the same as legal rights that may be directly and adversely affected.[66] General municipal concerns regarding things such as "land use, access, permitting and compliance with municipal requirements do not amount to an interest in land or legal right".[67]

2. *Specific concerns* - A municipality must demonstrate a more specific concern in order for standing to be granted. For instance, the AUC has granted standing to a municipality with concerns regarding the reliability of a proposed transmission line and the visual and environmental effects of above-ground transmission lines.[68]

   It has also granted standing where a municipality raised concerns regarding a project's impact on existing infrastructure and facilities, a planned road allowance upgrade on

[63] https://www.alberta.ca/release.cfm?xID=887605547987E-EABF-5E23-DFF2C9F72DB845E6
[64] This analytical report was commissioned prior to the Government of Alberta's press release on the AUC pause and the scope of the Report is therefore broader.
[65] see AUC Act, s 9(2).
[66] AUC Exhibit 27077_X0063, AUC Ruling on Motion to Reconsider Standing Ruling, July 12, 2022 at paras 10-12
[67] AUC Exhibit 27582_X0156_27582, Standing Ruling and Hearing Schedule, December 6, 2022 at para 15
[68] AUC Exhibit 2215_X0245, Ruling on Municipality of Jasper's Standing, October 12, 2017

roadways within its jurisdiction that it had care and control over, and the use of a right-of-way the municipality was entitled to occupy.[69]

3. *Road ownership* – The AUC has also confirmed that concerns regarding future residential growth and development of a municipality, or potential impacts on the development of roads owned by a municipality, are specific enough to meet the test for standing.

   For example, standing was grated to the City of Airdrie respecting the Sollair Solar Energy Project, which would abut the City's boundaries and impact an adjacent road owned by the City.[70] While road ownership was not the only factor in granting the City standing, the AUC's reliance on road ownership by a city demonstrates a lack of understanding respecting responsibilities for roads by municipalities other than cities. Under s. 18 of the MGA, all municipalities have "direction control and management" of municipal roads within their boundaries (this excludes provincially controlled roads such as primary and secondary highways).[71] The fact that title is vested in the provincial Crown (for municipal roads in all municipalities in Alberta other than cities)[72] is inconsequential in the context of development impact on municipal roads:

   a. Liability – Municipalities are obligated to keep municipal roads in a reasonable state of repair, and are liable for damages caused by a failure to do so.[73]

   b. Court of Appeal consideration – the Alberta Court of Appeal has indicated that s. 18 of the MGA (i.e. the authority over municipal roads) should be interpreted in a broad and purposive manner "to give municipalities wide-ranging authority over the roads within the municipality".[74] It noted that this grants municipalities "all rights with respect to roads short of an ability to alienate the title to the road, or the right to unilaterally close the road (see s. 22)".[75] Therefore, the Court of Appeal has determined that for municipalities other than cities, the fact that title is vested in the Crown rather than the municipality is of little consequence. The AUC's focus on road ownership (as opposed to road management) is at odds with the Court of Appeal's pronouncement.

   c. Subdivision and development conditions – the municipality's responsibility and liability respecting municipal roads informs subdivision and development approval conditions. In the ordinary course (i.e. when the MGA s. 619 does not apply, and the jurisdiction of the AUC, AER and NRCB are not engaged) when a municipality grants subdivision or development approval, the approval will (if the subdivision/development impacts the road network) include a impose a standard condition requiring an applicant to enter into a development agreement

[69] Exhibit 26707_X0074, Standing Ruling, October 15, 2021
[70] AUC Exhibit 27582_X0156_27582, Standing Ruling and Hearing Schedule, December 6, 2022
[71] MGA, s 18
[72] MGA, s 16
[73] MGA, s 532
[74] *St. Paul (County) No. 19 v Belland*, 2006 ABCA 55 at para 18
[75] *St. Paul (County) No. 19 v Belland*, 2006 ABCA 55 at para 18

on terms acceptable to the municipality, to address, among other things, construction of new or upgraded municipal roads.[76]

4. *Limited participation* – Even where the AUC decides that a municipality is not "directly and adversely affected" by an application and therefore denies formal intervenor status to a municipality, it still has the discretion to allow a municipality to participate in a more limited capacity. For instance, the Municipal District of Taber filed a statement of intent to participate in a hearing regarding a solar project.[77] The municipality was concerned by the project's lack of compliance with its land use bylaws and its MDP, with respect to taking prime agricultural land out of production. It also was concerned about the project's potential impact on irrigation infrastructure, drainage, overland flooding, weeds, native grassland, water and wind erosion, and related mitigation measures. The municipality argued its legal rights would be directly and adversely affected because:

    - it would have an increased responsibility to provide services to the project;
    - it has a duty to ensure municipal laws are complied with;
    - it may become partially responsible for the reclamation of the project if applicant went bankrupt; and
    - its municipal fire department will be responsible for providing services to the site.

    Despite these concerns, the AUC held that the municipality did not meet the test for standing as an intervenor. However, it concluded the municipality held information that would assist the AUC in understanding the local land use requirements relating to the project and it granted the municipality a limited scope of participation specific to those issues.

In the context of a merit decision, the AUC has commented that it is helpful when municipalities are involved in the approval process.[78] However, these comments must be taken in context. In the case where the AUC made this comment, the AUC rejected the application for environmental reasons advocated by neighbouring landowners (the AUC's only rejection of an application for solar project on record). Therefore, the AUC's comments respecting municipal participation are essentially *obiter dictum* (remarks made in passing, not going to the core of the decision). Nevertheless, the AUC stated that municipalities are able to provide the AUC with context and insight into the public processes, along with the local issues and concerns, that are reflected in a municipality's planning instruments.[79] In fact, the AUC has stated that it may defer to the municipal controls in place if it is of the view that such controls can sufficiently address any identified risks and concerns.[80]

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[76] MGA, ss 650 and 655
[77] AUC Exhibit 27077_X0044_27077, Standing Ruling, May 12, 2022; AUC Exhibit 27077_X0063, AUC Ruling on Motion to Reconsider Standing Ruling, July 12, 2022
[78] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 29
[79] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 29
[80] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 27

Despite these acknowledgements by the AUC about the benefits of municipal involvement, there is no legislated requirement for the AUC to grant standing to a municipality, or for their concerns or planning instruments to be given any weight. Indeed, the AUC has chosen to overlook an IDP, negotiated between two municipalities when considering the Buffalo Plains wind project, located within Vulcan County. Vulcan County did not participate in the AUC proceedings, but the Village of Lomond participated as a member of a group of impacted parties (the Lomond Opposing Wind Projects group).

The application before the AUC was for 83 towers. 81 of the towers had been previously approved pursuant to Vulcan County development permits. The two remaining towers were within intermunicipal fringe. The AUC's reasoning on this point did not contain great detail – it only referenced the fact the lands were located in "Urban Fringe".

The AUC stated that it understood that the purpose of the Urban Fringe zone was to "protect the agricultural land base of the municipality and ensure the fringe areas of urban municipalities are protected for future expansion and development, while allowing non-agricultural uses that complement the area's economy and do not conflict with an urban environment".[81] The AUC decision did not clearly delineate between provisions of the Vulcan County's land use bylaw, or provisions within the IDP between Vulcan County and the Village of Lomond.

Essentially, however, the AUC rejected arguments that the two towers should not be granted approval on these lands as there was no clear evidence suggesting there were planned expansions or development to Lomond that would be compromised by the presence of turbines. In effect, the AUC decision ignored the municipal planning framework (i.e. the IDP agreed to by the two municipalities) and granted approval of the two towers at issue.

This is not an uncommon outcome for municipalities. In fact, although municipalities have raised concerns in numerous solar and wind project applications, the AUC has only denied one application in recent years (and was not denied as a result of municipal concerns).[82]

Another roadblock for municipalities is the cost of becoming involved in AUC proceedings, and the lack of funding to participate. Under the AUC process, there is no legislated funding to cover the costs of municipal involvement. In fact, even when the AUC has granted a municipality status as an intervenor, the municipality is typically denied costs recovery. This is in contrast with the standard process for non-municipal intervenors before the AUC who typically have the AUC confirm orders requiring the proponent to reimburse them for legal and expert fees.

Under s. 22 of the AUC Act, and AUC Rule 009: *Rules on Local Intervener Costs*, parties that meet the definition of "local intervener" and are granted standing, are eligible to file costs claims, seeking recovery of the costs of their participation. This, however, does not guarantee full recovery of costs. Following a proceeding, the AUC will assess the value of a party's contributions, and will determine if there shall be cost recovery, and in what amount.

[81] AUC Decision 26214-D01-2022, Buffalo Plains Wind Farm, February 10, 2022 at para 294

[82] This was for a solar project in Foothills County. In that decision, although numerous municipal concerns were submitted, these were not decided on in the hearing. The project was denied on the basis that it would not be in the public interest due to environmental impacts and the potential for high bird mortalities.

The AUC has stated that the purpose of s. 22 is to provide local landowners funding so they can have the opportunity to protect their ownership or occupation property rights. The AUC does not treat municipalities as local landowners. Even if a municipality is granted standing, if the primary reason it has "intervened is to advance the collective interests of the residents it represents, and not to protect its property rights", then the costs incurred by the municipality will not be recoverable.[83]

Further, if the AUC does not grant a municipality standing, but still allows it participate in the proceeding, the municipality will not be eligible for cost recovery under Rule 009.[84]

This lack of funding for municipalities is an important consideration. Involvement in AUC proceedings can be a time-intensive and costly undertaking, and is often the only practical way for municipalities to have local concerns heard.

The AUC has consistently denied a municipality intervenor costs, despite the scale of projects being considered. For instance, in a recent application, the AUC considered a solar project covering 28 quarters with a project budget exceeding $1 billion. In contrast, the municipality's annual budget was only $20 million. The proponent, not the municipality's other taxpayers, should bear (at least the majority of) the cost of the municipality's participation in the AUC hearing.

In a typical system where a municipality is processing a development permit, a municipality may set variable application charges based on the value of the project, or consider that certain types of projects are costly to process (such as gravel permit applications). This will assist a municipality with cost recovery on a "user pay" system and ensures that municipal general revenue is not subsidizing the cost of certain expensive applications. However, a municipality is not at liberty to impose variable charges on application costs for the AUC approval itself.

Recommendation #3: AUC standing and cost recovery

The AUC's regime should be revised to automatically grant standing to municipalities and guarantee (rather than preclude) intervenor funding.[85]

The AUC's decisions on whether to grant a municipality standing as an intervenor are not consistent. Unlike the NRCB, the AUC does not automatically grant municipalities intervenor status. For example, the AUC's decisions on standing fail to appreciate that a municipality, which has care and control of local roads, will be greatly impacted by the solar or wind project being considered, particularly given the scale of projects currently being processed. While on one hand the AUC has stated that it appreciates the input from municipalities to explain both the municipal planning framework and municipal concerns[86], these inconsistent decisions on standing create uncertainty and underscore a lack of understanding as to how these projects impact municipalities.

[83] AUC Exhibit 27077_X0063, AUC Ruling on Motion to Reconsider Standing Ruling, July 12, 2022 at paras 13-14
[84] see AUC Exhibit 27077_X0044_27077, Standing Ruling, May 12, 2022
[85] Subject to appropriate checks and balances that the municipality's contribution is beneficial to the AUC's deliberations.
[86] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 29

Further, the fact that a municipality has to make an application for intervenor status (or as a fallback, more limited participation status) by itself can be a costly and time-intensive exercise.

Based on the concept of user-pay (the proponent of a complex project should bear the cost of its regulatory process), municipalities should be routinely granted not only intervenor standing but also intervenor costs (instead of being denied costs, as under the current system). The proponent, not the municipality's other taxpayers, should bear the cost of processing an application, including the cost of the municipality's intervention (legal and expert costs) before the AUC.

The AUC has adopted Rule 007:[87] Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines. Rule 007 addresses, among other things, consultation requirements with municipalities and other stakeholders. Rule 007:

a) contemplates that consultation with municipalities and other stakeholders must occur prior to the proponent filing a formal application;
b) a list of participant involvement program guidelines is referenced as Appendix A1.

Unfortunately, Rule 007 does not impose standard requirements for the identifying the proposed project; an application number is not assigned by the AUC until a formal application is submitted (after the participant involvement program occurs). This can cause confusion particularly as there may be consultation occurring for several projects simultaneously.

Further, on closer review, the participant involvement program guidelines contain only high level references respecting the content of the information to be circulated through consultation process. Consider the following reference:

- "A description of the general natural of potential impacts of the project, such as potential impacts on environment, traffic and construction impacts, visual impacts, noise impacts, etc."

Unfortunately, the result is that some proponents provide only cursory information. Then, based on the information provided, the proponent asks whether the municipality has any concerns- it can be very challenging for a municipality to provide a meaning response if the proponent has only provided cursory information circulated in the participant involvement program is cursory.

Recommendation #4: AUC Consultation Requirements

The AUC should revise Rule 007 to require the proponent to consistently identify proposed projects prior to submitting the formal application to the AUC; one option would be for the AUC to assign pre-application numbers/description. Further, the AUC should revise Rule 007 to include more stringent minimum benchmarks for the substantive information to be circulated as part of the participant involvement program.

[87] https://www.auc.ab.ca/rule-007/

PART 2: PARAMOUNTCY

Under Part 17 of the MGA, municipalities are given authority with respect to planning matters including development permits. Under this Part of the MGA, municipalities are given the power to control and regulate land use and development within their boundaries. Part 17 enables them to create land-use bylaws and statutory plans, including MDPs, IDPs, and Area Structure Plans (ASPs), which guide the development of land.

The MGA states that the purpose of this Part is to provide a means where plans and related matters may be prepared and adopted to achieve orderly, economical and beneficial development, and to maintain and improve the quality of the physical environment.[88]

However, as outlined below, there are certain public or quasi-public approvals that are exempted (in whole or part) from the application of the land planning provisions in Part 17 of the MGA. In these cases, other legislation will take precedence and the authority given to municipalities to create regulations and local bylaws with respect to planning will not apply (see Appendix B – chart on provincial paramountcy).

A. Wells, Batteries and Pipelines - Section 618(1) of the MGA

Section 618(1) states (emphasis added):

> 618(1) This Part and the regulations and bylaws under this Part do not apply when a development or a subdivision is effected only for the purpose of
> (a) a highway or road,
> (b) a well or battery within the meaning of the *Oil and Gas Conservation Act*, or
> (c) a pipeline or an installation or structure incidental to the operation of a pipeline.

Therefore, section 618(1)(b) and (c) exempts wells or batteries, and pipelines from the planning provisions in the MGA Part 17. The wording in s. 618(1)(c) excludes pipelines, along with "an installation or structure incidental to the operation of a pipeline". This wording is somewhat ambiguous, but indicates that this category will include a broad range of associated structures.

This means a municipality **cannot** require planning approvals for these types of developments, which comprise the majority of oil and gas operations in the province.[89] A municipality cannot

[88] MGA, s 617

[89] There is an appropriate role for municipalities to plan for and address the realities of wells, batteries and pipelines – as well as other developments falling outside the scope of the MGA Part 17-- within the long range municipal planning documents and the land use bylaw. For example, it would be appropriate for a municipality to incorporate setbacks from sour gas facilities (or other incompatible developments) directly into the municipal land use bylaw or statutory plans. Similarly, where a regional plan has been adopted under the *Alberta Land Stewardship Act SA 2009, c A-26.8*, and the regional plan's provisions speak to developments outside the scope of the MGA Part 17, it would be appropriate for a municipality to dovetail those policy references within the municipal planning framework. A full discussion of these initiatives is beyond the scope of this paper.

require a parcel of land to be redistricted prior to the construction of a pipeline or a gas well, and a municipality cannot require a development permit to be issued for a pipeline or a gas well. The authority to make decisions on licence applications in this category falls completely to the AER. Although the AER holds public hearings and interested parties, including municipalities, can raise land use concerns, this is just one of many factors the Board will take into consideration.

There are several possible reasons for excluding wells, batteries and pipelines from the operation of Part 17. The oil and gas industry is essential to the provincial economy and this requires consistency, as opposed to local planning which could vary from location to location.[90] Further, for a development such as a pipeline that goes through several municipalities, it would be inefficient for the proponent to have to obtain approval from all municipalities. In addition to this, the location and timing of these types of developments (particularly for wells and batteries) is largely dictated by location of the resource itself and cannot be changed to suit municipal planning as other developments could be.[91] Once in place, there is also typically much less interference with planning and the use of the land as other developments (for instance, solar panels or CFOs), would have.

B. CFOs and Manure Storage - Section 618(2.1) of the MGA

The MGA s. 618(2.1) states (emphasis added):

> (2.1) This Part and the regulations and bylaws under this Part respecting development permits do not apply to a confined feeding operation or manure storage facility within the meaning of the *Agricultural Operation Practices Act* if the confined feeding operation or manure storage facility is the subject of an approval, registration or authorization under Part 2 of the *Agricultural Operation Practices Act*.

Therefore, similar to s. 618(1), this section indicates that Part 17 respecting development permits does not apply to a CFO or manure storage facility if it is the subject of an approval, registration or authorization under AOPA.[92] This gives the NRCB full regulatory authority under AOPA in relation to CFOs and manure storage over the thresholds prescribed under that legislation.

C. Power Projects and Residual Authority - Section 619 of the MGA

As discussed by the AUC, the Boards' "decision making authority and municipal planning authority intersect at sections 619 and 620 of the *Municipal Government Act*".[93]

Section 619 of the MGA provides that licences, permits, approvals, or other authorizations granted by the AER, NRCB or AUC will prevail over any municipal planning concerns or decisions.[94] The reference in s. 619 to both the AER and NRCB is somewhat misleading (as discussed further

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[90] Laux, *Planning Law and Practice in Alberta*, 4th ed (Edmonton: Juriliber, 2019), 4-41
[91] Laux, *Planning Law and Practice in Alberta*, 4th ed (Edmonton: Juriliber, 2019), 4-41
[92] this provision was previously s 618.1 of the MGA, however, this section was repealed by the *Red Tape Reduction Implementation Act, 2020 (No 2)*, SA 2020, c 39 and it is now found under s 618(2.1)
[93] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 24
[94] s 619 also lists the Energy Resources Conservation Board (ERCB) and the Alberta Energy and Utilities Board (AEUB) but these boards are no longer active. Their regulatory functions have been replaced by the AER.

below); therefore, we will focus on how s. 619 impacts jurisdictional issues respecting municipal planning and AUC approvals.

The Alberta Court of Appeal has stated that the purpose of s. 619 is to:

> … reduce regulatory burdens and increase administrative efficiency and consistency…by granting paramountcy to decisions of certain provincial bodies, to ensure projects are not blocked at the municipal level for issues already considered and approved at the provincial level.[95]

The section also precludes a municipality from having a hearing to address matters already decided by the AUC. In practise, this provision would curtail hearings in two situations namely: a public hearing by Council (respecting a planning bylaw adoption or amendment); or a hearing before the Land and Property Rights Tribunal or a Subdivision and Development Appeal Board (respecting a development permit appeal).[96]

Once an approval for a power project is provided by the AUC, the project cannot be denied the right to proceed at the municipal level or by local planning authorities.[97] In other words, while municipal approval is still required, municipalities[98] must exercise their decision-making authority in a way that is consistent with AUC-issued licences, permits, approvals and other authorizations.

There is no doubt that from a municipal standpoint, s. 619 of the MGA curtails the authority of a municipality – including the jurisdiction of a Council, as democratically elected officials. The municipality will not be able to deny a development permit if the applicant has obtained an approval from the AUC.[99]

Because s. 619 prohibits municipalities from addressing matters already decided by the AUC, the ramifications are significant. For instance, if an AUC wind project approval addressed matters such as the location, size and type of turbines, setback distances, wildlife impacts, and lighting, these topics cannot be revisited by a municipality.[100] Similarly, s. 619 may prevent a municipality from approving a development application that conflicts with setback distances from an oil or gas facility prescribed by the AER.[101]

If a municipality holds a hearing with respect an application, the only matters it can address are whether a development permit complies with an approval, and any planning matters not already addressed by the approval.[102]

In the planning context, hearings would typically arise in relation to two scenarios:

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[95] *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192 at paras 21-23
[96] See MGA s 619(4)
[97] *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192 at paras 21, 23
[98] Including appeal boards such as the Land and Property Rights Tribunal
[99] *Gustavson v County of Paintearth No. 18*, 2021 ABLPRT 703 at para 33
[100] see *Buffalo Atlee 1 Wind LP v Special Areas No. 2, 2021 ABLPRT 764* at para 53
[101] see *Canadian Natural Resources Limited v Municipal District of Greenview No. 16 Subdivision and Development Appeal Board*, 2019 ABCA 143
[102] *Buffalo Atlee 1 Wind LP v Special Areas No. 2, 2021 ABLPRT 764* at para 53

- Planning bylaws – adoption of amendments of the land use bylaw, or statutory plans;[103] or
- Development permit application appeals – appeals to a subdivision and development appeal board or the Land and Property Rights Tribunal.[104]

In either scenario, a municipality cannot consider any issues that were already decided by the agencies referenced in s. 619, except to determine if a land use bylaw or statutory plan is required to be amended.[105]

The exact scope of "already decided" is not clear. For instance, if the AUC considered submissions on a particular issue but the proponent did not agree to specific commitments on that issue, and the AUC did not impose related conditions (nor expressly state that the matter is deferred to be addressed by a municipality), it may be unclear whether the issue was "decided" by the AUC.

The AUC has stated that s. 619 of the MGA is meant to resolve conflicts or inconsistencies,[106] and that it is designed to "ensure that municipalities do not exercise their planning authority in a way that frustrates or contradicts the findings of the provincial regulatory authority".[107]

Where there is no conflict between an AUC decision and a municipal planning instrument, both can apply. For instance, if conditions attached to an AUC approval do not address issues such as dust and traffic congestion, additional conditions could be applied by the municipality to recognize local land use and planning approval matters related to the project.[108] However, if there is a conflict or inconsistency between a Board approval and municipal land use planning approval, this section of the MGA removes a municipality's decision-making authority and local autonomy.

Generally, once a regulatory body has made its decision, it is *functus officio* – its function is officially over and it cannot revisit the decision. Municipalities, who are directly affected by the decisions can only apply to review the decision on limited grounds and may not have the ability to later raise deficiencies to the Board.

In the context of the AUC, there is a theoretical exception to this principle: the AUC, like the AER, can change its Rules over time. That said, the reality is that once the AUC approves a project, it will be very challenging (from a financial and practicality standpoint) for significant design changes to be incorporated by the proponent. Understandably, the AUC will be slow to make retroactive changes to any approval, and the proponent will resist the same. In other words, if the AUC makes changes to its Rules, it will be pressured to ensure that those changes only apply prospectively (i.e. to future approvals), and projects that are the subject of past approvals are 'grandfathered' under the technical requirements of the Rule in place at the time of the approval, or the specifics of the approval itself.

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[103] MGA s. 692
[104] MGA s. 684. Theoretically, these appeal hearings could also arise in the subdivision context (MGA s. 678), but typically power projects do not involve subdivision applications.
[105] MGA, s 619(4)
[106] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 27
[107] AUC Decision 27652-D01-2023, Creekside Solar Project, July 14, 2023
[108] *Fitzpatrick v Starland County*, 2021 ABLRPT 789 at paras 1, 3; see also AUC Decision 27652-D01-2023, Creekside Solar Project, July 14, 2023 at paras 139, 140

Once an AUC approval is granted, it will be difficult, if not impossible, to impose additional requirements to address concerns. This can be especially problematic with respect to key municipal concerns, such as emergency response plans, municipal road impacts, waste management, or weed control, when proponents before the AUC attempt to obtain an approval based only on very high-level details. On occasion, a proponent is only willing to agree to ambiguous commitments or conditions that merely require that they "consult", "work with", or "collaborate" with a municipality, which is a requirement for a process with no real substance.[109] Specific municipal considerations that have the potential of being overlooked by the current process will be discussed in more detail below.

On other occasions, municipalities have been able to negotiate commitments acceptable to the municipality on matters such as entry into development agreements for road construction or entry into road use agreements[110].

i) Application of Section 619 to the AER and the NRCB (respecting CFOs and manure storage)

The s. 619 references to the AER and NRCB are misleading in that they suggest there can be some municipal involvement in planning matters that are not addressed in an AER or NRCB approval, and are not inconsistent with it. However, s. 619 cannot be looked at in isolation. As a result of:

- s. 618(1), respecting matters under the AER authority, namely wells, batteries and pipelines, and
- s. 618(2.1) respecting matters under the NRCB authority, namely CFOs and manure storage;

municipalities do not have any planning authority regarding to these developments.

ii) AER Residual Authority under s. 619

When read together with the preceding provisions, s. 619 can only apply to certain authorizations by the AER. Section 618(1)(b) and (c) completely exempts wells, batteries and pipelines, along with their associated structures and installations, from the planning provisions in Part 17. As a result, there is no allowance for municipal planning with respect to these projects.

Section 619 will only apply to oil and gas projects not covered by s. 618. These will continue to require municipal planning approval, but any licence or approval granted by the AER with respect to the development will prevail over any municipal statutory plan, land use bylaw, or subdivision or development decisions. If the municipality receives an application for a permit, or for an

[109] See, for example AUC 27842_X0165, containing the proponents' commitments in an application for a solar project in the County of Forty Mile No. 8. With respect to an emergency response plan, the applicant stated it intended "to continue to consult" with the County.
[110] See for example, AUC 27652_X0202, containing the proponents' commitments in an application for a solar project in Leduc County.

amendment to its statutory plans or bylaws, that is consistent with an approval granted by the AER, the municipality must approve the application to the extent that it complies with the AER approval.

The Municipal Government Board (MGB)[111] has noted that s. 619 promotes the timely development of projects that have been approved by the quasi-judicial agency by removing or restricting any municipal action that could hinder or unduly burden an applicant that has received an approval.[112] Although the AER may consider municipal land use policies and plans during its determination of whether or not a project is in the public interest, its decisions will take precedence over any land use bylaws or other planning instruments enacted by municipalities, as well as over decisions of local development appeal boards and other planning agencies. Section 619 of the MGA makes it clear that the AER does not have to give effect to municipal planning instruments when deciding an application, or delay its consideration of a matter until after the conclusion of a municipal permitting process. Municipalities will only retain authority over planning considerations that are not addressed by the AER in its decision.

iii) Application of Section 619 to the NRCB

Section 618(2.1) states that Part 17 respecting development permits cannot apply to CFOs or manure storage facilities over specific thresholds if they are the subject of an authorization under AOPA. Therefore, municipalities will not have any direct regulatory authority related to these developments. Section 619 of the MGA will only apply to NRCB authorizations related to the forest industry, recreation or tourism, and water management under the NRCB Act.

An example of the application of s. 619 to a NRCB decision is found in a series of cases related, not to CFOs or manure storage (under the authority of AOPA), but rather to the development of a golf resort and recreation area within the boundaries of the Town of Canmore. An application was made to the NRCB and it was determined the proposed project was in the public interest and an approval was issued. Following this, the developer submitted ASPs for the municipality's approval. The developer submitted these on the basis that they were consistent with the prior NRCB approval and as a result, s. 619 of the MGA required the municipality to adopt them. The Town Council considered and refused to adopt the ASPs. The developer appealed the refusal to the Land and Property Rights Tribunal (LPRT) and it was concluded that the ASPs were consistent with the NRCB approval.[113] The LPRT agreed that s. 619 of the MGA provides that municipalities must approve bylaw amendment applications where they are consistent with an NRCB approval. It concluded the ASPs fell within the scope of s. 619 and directed the municipality to adopt the plans in the form of bylaws. The municipality has appealed this decision and it was granted permission to be heard by the Court of Appeal.[114] The Court will consider several issues including the retrospectivity of s. 619 of the MGA and whether the ASPs were consistent with the NRCB approval. However, the decision of the Court of Appeal has not yet been issued.

[111] The MGB's authority is now subsumed by the LPRT.
[112] *AES Calgary ULC (Re)* (July 2, 2002), S02/ROCK/MD-012, [2002] AMGBO No 110 at para 35
[113] *Three Sisters Mountain Village Properties Ltd v Town of Canmore*, 2022 ABLPRT 671; 2022 ABLPRT 673
[114] *Canmore (Town of) v Three Sisters Mountain Village Properties Ltd.*, 2022 ABCA 346

It is also noteworthy that the NRCB has jurisdiction over additional matters. Cabinet can direct the NRCB to vet approval of a particular project that does not automatically fall within the jurisdiction of another quasi-judicial board, such as was done for a Sulphur Processing facility in Lamont County.[115] Cabinet rarely exercises that authority,[116] but when it does, the NRCB's decision would fall within the scope of the reference in the MGA s. 619, curtailing the municipality's planning authority in a manner similar to approvals by the AUC.

iv) Application of Section 619 to the AUC

With the high rate of AUC approvals, municipalities frequently deal with the impacts of these developments. If the AUC approves a development in an area where this is prohibited under a municipality's land use bylaw, the municipality will be obliged to redistrict to accommodate the development, to the extent it has received AUC approval; amendments to the municipality's statutory plans may also be required.

For example, the AUC approved a solar project in Edmonton in an area that was not districted for this type of development under the municipality's land use bylaw.[117] Since the decision was silent on whether the City's approval would be required, it was argued that the AUC did not make a decision regarding the redevelopment of the area.[118] However, since there was nothing in its decision indicating that the construction and operation of the power plant would be subject to the City's bylaw amendments, and the decision was specific about the location where the plant would be constructed, it was held that the AUC decided the issue.[119] As a result of s. 619 of the MGA, the City did not have any authority in this regard and did not have any discretion regarding the approval of the redistricting to permit the construction.

Similarly, following the approval of the Buffalo Plains wind project in Vulcan County, the municipality, despite its concerns, had to amend its planning bylaws so that the Urban Fringe area allowed for the development.[120]

These types of approvals interfere with not only the future expansion of municipalities but also land that is districted for agricultural use. As these industrial developments can have a long-term (indeed, indefinite) impact on the lands, this creates issues with valuable agricultural land being redistricted and permanently losing productivity.

[115] NRCB Decision – AST-NR2009-01.
[116] Therefore, this paper will not comment further on this aspect of the NRCB jurisdiction.
[117] AUC Decision 23418-D01-2019
[118] *Edmonton River Valley Conservation Coalition Society v Council of the City of Edmonton*, 2022 ABQB 11 at para 26
[119] *Edmonton River Valley Conservation Coalition Society v Council of the City of Edmonton*, 2022 ABQB 11 at paras 26-31
[120] AUC Decision 26214-D01-2022, Buffalo Plains Wind Farm, February 10, 2022

PART 3: "PUBLIC INTEREST": HOW IS IT DEFINED AND RECOGNIZED IN THE APPROVAL PROCESS?

A. The AER

The AER legislation is supplemented by numerous Directives and Manuel references; despite these documents as well as the AER's Compliance and Enforcement Program,[121] there are two major shortfalls in the AER's regulatory regime that are contrary to the public interest. These shortfalls that we will focus on are firstly, non-payment of municipal taxes and secondly, breaches of reclamation requirements.

Non-payment of municipal taxes remains a major concern. For example, as of December 31, 2022, Alberta's rural municipalities books show: [122]

- Over $268,000 million in property taxes are unpaid by oil and gas companies;
- Operational companies are responsible for 41% of the $268 million unpaid tax burden – these operational companies continue to profit from Alberta's natural resources without meeting their legislated responsibilities.

The Government of Alberta has taken two steps to address this issue. First, a recent amendment to the MGA provides municipalities a "special lien" over the company's assets if the company becomes insolvent.[123] However, there is no guarantee for payment given insolvency processes typically become protracted over several years. Secondly, the AER now has the discretion to consider property tax and surface lease payment records when assessing their risk levels;[124] how this discretion will be exercised remains to be seen.

A large part of the challenge with enforcing payment of municipal taxes or addressing other issues relates to the scale. Historically, the AER has not taken enforcement measures until the breaches are acute (i.e. the holes are so deep). Once an oil and gas company has significant breaches (whether for non-payment of tax arrears or end-of-life reclamation requirements) the AER has shown intransigence, given that if the AER triggers insolvency of the company, this may compound the challenges – the receivership process is expensive. From a municipal perspective, earlier and more drastic measures are required to ensure that timely payment of municipal property taxes occurs.

Going forward, mandatory checks and balances should be put in place so that the AER intervenes before a company's struggles reach a "point of no return". In relation to municipal property taxes, these checks and balances should be automatic and mandatory: an oil and gas company that fails/refuses to pay municipal property taxes could have their operating approval withdrawn by the

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[121] See https://www.aer.ca/regulating-development/rules-and-directives/directives and https://static.aer.ca/prd/documents/manuals/Manual013.pdf

[122] https://rmalberta.com/wp-content/uploads/2023/03/As-oil-and-gas-industry-booms-municipalities-seek-accountability.pdf; note this $268 million figure does not include unpaid tax revenue already written off as uncollectable.

[123] MGA, ss 348, 348.1

[124] https://rmalberta.com/wp-content/uploads/2023/03/As-oil-and-gas-industry-booms-municipalities-seek-accountability.pdf

AER. The AER should hold industry accountable for paying their municipal taxes on an ongoing basis.

The cost of reclamation of Alberta's orphan wells is also staggering. Since 2020:

- the Government of Canada has allocated $1 billion for the cleanup of orphan wells in Alberta, and provided a $200 million loan to the Orphan Well Association;[125]
- the Government of Alberta has provided $100 million investment to the Orphan Well Association to hire approximately 500 service workers to decommission 800 to 1,000 wells.[126]

The fact that reclamation of orphan wells requires an astronomical investment of public funds cost demonstrates a systemic breakdown. It is the users (the particular oil and gas companies that benefitted from wells when they were in production), not the federal and provincial taxpayers, that should be footing the bill for this clean up.

Albert Einstein once said:

> "The definition of insanity is doing the same thing over and over and expecting different results."

Until we fix a broken system, we will continue to have the same results. Whatever definition of public interest the AER espouses when it grants or continues its approval, the public interest is not served when:

a) the federal and provincial taxpayers must subsidize reclamation of orphan wells to this extent; and
b) Certain oil and gas companies (including operating companies) perpetually shirk their legal obligation to pay municipal taxes.

B. The NRCB

As discussed earlier in this report, AOPA, the legislation governing the NRCB with respect to CFOs and manure storage facilities, requires a NRCB approval officer to deny an application if there is an inconsistency with the relevant MDP land use provisions. In the case of an appeal to the Board, the NRCB must have regard to MDPs, but it is not bound by them. The NRCB (on appeal) retains the authority to approve applications that are not consistent with a municipality's MDP.[127]

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[125] https://www.pgic-iogc.gc.ca/eng/1588343274882/1588355750048

[126] https://www.alberta.ca/release.cfm?xID=687241B0B7102-BA98-7E50-A2A4FB3D7B648C5C

[127] see, for example, NRCB Review Decision, 2022-16/FA21002, Hutterian Brethern Church of Cleardale, December 19, 2022, where the NRCB directed the approval officer to issue an approval for the construction and operation of a CFO even though the setbacks were inconsistent with the county's MDP. The NRCB found that the MDP's setback requirements had an indiscriminate and far-reaching impact and most, if not all, applications for CFOs would be inconsistent with this. The NRCB held that the county's MDP was inconsistent with the legislative scheme and the spirit of the Act.

The legislation, however, does not make any mention of the treatment to be given to an IDP; this gap is present because of historical reasons; prior to 2018 many rural municipalities had not adopted IDPs. In 2018 the Province created a requirement that all municipalities in Alberta must prepare IDPs with their neighbouring municipalities. An IDP is a long-term, strategic plan between two or more municipalities that have common boundaries. Its purpose is to provide a coordinated and collaborative framework respecting, among other things, future land use and development, economic development, and environmental matters in the area.[128]

The requirement for municipalities to adopt IDPs is found in s. 631(1) of the MGA. This states that it is mandatory for municipalities to adopt an IDP for the areas of land lying within the boundaries of the municipalities. While there are some exceptions to the mandatory adoption of an IDP, their formation has become very common, particularly in areas where the lands are in the vicinity of an urban/rural boundary.[129] As one of their main considerations, IDPs often address noxious developments, such as CFOs, within these fringe areas.

Since the provisions in AOPA referencing MDPs predate the mandatory IDP rules being put into place, there is no express requirement in AOPA to consider whether an application is consistent with an IDP. Therefore, there is a concern that these important planning instruments may be ignored during the application approval process.

However, as discussed above, the NRCB has policies in place that state if an IDP is cross-referenced in a municipality's MDP, the approval officer will need to consider any CFO provisions in the IDP as part of their MDP consistency determination.[130]

IDPs have also been considered by the NRCB in several recent decisions. In Board Review Decision 2022-02/LA21033 (Double H Feeders Ltd.), the NRCB held that the introduction of s. 631(1) in the MGA elevated the relevance of the IDP adopted by the City of Lethbridge and Lethbridge County. It directed approval officers consider any relevant IDP, in addition to MDPs, when assessing whether an application is consistent with land use planning.

Additionally, IDPs can be considered under s. 20(1)(b)(ix) of AOPA. This provision states an approval officer "must consider the effects on the environment, the economy and the community and the appropriate use of land". Although this provision has rarely been relied upon by approval officers to deny an application, it has been discussed by the NRCB and is an important provision for municipalities.

For instance, in the Decision LA20004 Hutterian Brethren Church of Granum, the application met all of the required AOPA requirements and was consistent with the municipality's MDP. Despite this, the approval officer found that the proposed CFO was likely to have a material and long-lasting negative impact on the community, including the municipality's overall economy. It also noted that the municipality's existing infrastructure was inadequate to support the CFO and because of this, it was not an appropriate use of the land under s. 20(1)(b)(ix).

[128] see MGA, s 631(8)
[129] see MGA, ss 631(2) and (3)
[130] NRCB Operational Policy 2016-7: Approvals (the Approvals Policy), s 6.4

Recently, in an October 2022 Board Request for Review Decision, the NRCB stated that when considering s. 20(1)(b)(ix), approval officers can determine whether an application is consistent not only with an MDP and AOPA regulations, but also any IDPs and land use bylaws,[131] and further, that there should be importance and weight given to consistency with the MDP/IDP.[132] If an application is consistent with all municipal planning documents and AOPA regulations, there is a presumption that the effects of the CFO under s. 20(1)(b)(ix) are acceptable. This presumption would then have to be rebutted through submissions during the application process.[133]

The NRCB went on to conclude that the proper test under AOPA is as follows:

> An application must first be tested as to whether it is consistent with municipal planning documents, and then whether it meets the requirements of the [AOPA] Standards. This is a logical order to proceed since, should an application not meet the appropriate Standards or is inconsistent with the MDP/IDP, the application must be denied…. [O]nce approval officers are satisfied that an application is consistent with the MDP/IDP and meets the Standards, then s.[20(1)(b)](ix) must be considered… [A]n application may be consistent with the MDP/IDP and meet relevant Standards, but still pose an unacceptable effect under s. [20(1)(b)](ix).[134]

Therefore, in practice, the NRCB policies and decisions currently reflect the importance of IDPs in municipal planning. However, past decisions are not binding, and policies can change. The legislation should be updated to include a consideration of IDPs to reflect the current state of the municipal land use planning.

Recommendation #5: NRCB legislation (AOPA) update

The NRCB legislation (AOPA) is currently outdated as it does not reference intermunicipal development plans (IDPs). The Government of Alberta should update AOPA to include references to not only municipal development plans (MDPs), but IDPs as well. Although the NRCB and approval officers have, in practice, acknowledged the importance of consistency with IDPs, the actual legislation has not yet been amended, which could create unnecessary confusion and uncertainty.

C. The AUC

The enabling legislation for the AUC has a strong public interest mandate. In addition to any other matters the AUC considers, it must determine whether a proposed project is in the public interest by considering the economic, social, and environmental effects of the project.[135]

[131] NRCB Request for Review Decision, RFR 2022-11 / RA21045, G&S Cattle Ltd,, October 21, 2022, p 5
[132] NRCB Request for Review Decision, RFR 2022-11 / RA21045, G&S Cattle Ltd,, October 21, 2022, p 6
[133] NRCB Operational Policy 2016-7: Approvals (the Approvals Policy)
[134] NRCB Request for Review Decision, RFR 2022-11 / RA21045, G&S Cattle Ltd,, October 21, 2022, p 6
[135] AUC Act, s 17(1); AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 18

The AUC has noted that the "concept of the public interest is wide and flexible" and that the "applicant has the onus to demonstrate that approval of its application is in the public interest".[136] This "will be largely met if an application complies with existing regulatory standards, and the project's public benefits outweigh its negative impacts".[137]

When considering public interest, the AUC cannot consider the need for the proposed project or whether it is the subject of a renewable electricity support agreement under the *Renewable Electricity Act*.[138] However, in practice, this may not always be the case. For example, when considering the Dunvegan Hydroelectric Project in 2008, the AUC stated that it "views green power generation, which emits minimal greenhouse gases, as increasingly important and in the public interest".[139]

The AUC has provided various statements that municipal planning documents are relevant considerations that it must take into account. For example, the AUC noted that when deciding if a project is in the public interest, it must have regard for a municipality's land use authority and planning instruments".[140] These are relevant considerations as they demonstrate, from the perspective of a municipality, "the nature of the past, present, and future uses of a proposed site or lands in close proximity to a site".[141]

In fact, the AUC has stated that the land use regime of a municipality, established through its land use authority and its bylaws, form part of the Commission's "overall determination of whether approval of a project is in the public interest".[142] The Commission has acknowledged that municipalities in Alberta "have a statutory, public interest mandate that is similar" to that of the AUC.[143] The planning and development provisions set out in Part 17 of the MGA contain purposes in line with those of the AUC and at "a high level, both acts encourage the economic and orderly development of Alberta's landscape".[144] The local or regional perspective of municipalities provides "additional context into the regional lens through which its planning instruments were enacted. This provides the Commission with insight into the public processes that contributed to the instruments and the local concerns or issues that are specifically reflected in the relevant planning instruments".[145]

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[136] AUC Decision 26214-D01-2022, Buffalo Plains Wind Farm, February 10, 2022 at paras 21, 23
[137] AUC Decision 26214-D01-2022, Buffalo Plains Wind Farm, February 10, 2022 at para 22, citing EUB Decision 2001-111: EPCOR Generation Inc. and EPCOR Power Development Corporation - 490-MW Coal-Fired Power Plant, Application 2001173, December 21, 2001 at p 12; AUC Decision 24266-D01-2020, East Strathmore Solar Project, September 25, 2020 at para 11
[138] AUC Decision 24266-D01-2020, East Strathmore Solar Project, September 25, 2020 at para 11
[139] *Dunvegan Hydroelectric Project, Re*, [2009] A.W.L.D. 793 (Glacier Power Ltd., Dunvegan Hydroelectric Project, Fairview, Alberta, AUC, Dec 19, 2008) at para 52
[140] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 23
[141] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 23, citing Alberta Energy and Utilities Board Decision 2001-101: AES Calgary ULC - 525-MW Natural Gas-Fired Power Plant, Application 2001113, December 11, 2001, at p 8.
[142] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 23; AUC Decision 24266-D01-2020, East Strathmore Solar Project, September 25, 2020 at para 67
[143] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 28
[144] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 28
[145] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 29

Despite this acknowledgment of the importance of municipal land use plans, they are not binding on the AUC and they are often not fully addressed. This creates a situation where many of the municipality's tools are reactionary.

Recommendation #6: AUC comprehensive review

The AUC and the Government of Alberta) should perform a "cradle to grave" review of all aspects of renewable energy – <u>complete with comprehensive municipal input on all aspects</u>. From a municipal standpoint, this review (and enhanced Rules and standard conditions) should include impacts on the following specific areas (as further discussed below): municipal roads, emergency response/fire services, waste management, vegetation/weed/dust management; productivity of agricultural lands, reclamation (including security). and municipal property taxes.

As discussed by the AUC itself, the existence of regulatory standards and guidelines are important elements in deciding if a proposed project will be in the public interest.[146] If more guidelines and standard benchmarks can be developed, this will create more consistency and certainty for municipalities, their residents, landowners, and the industry.

Importantly, this review must incorporate lessons learned from the AER regime, namely the AER's significant failure to properly address both payment of municipal property taxes and reclamation obligations.

PART 4: SPECIFIC MUNICIPAL CONSIDERATIONS IN AUC APPROVALS

The nature of projects under the purview of the AUC raise a plethora of municipal concerns. While the AUC has adopted Rules in limited situations, the regulatory framework must be broadened. For example, the AUC's Rule 012 provides, broadly speaking, a template for how a particular concern should be addressed. The AUC's regulatory framework should be expanded to include Rules to address various municipal concerns.

A. Noise

Noise, like any other nuisance issue, is a concern for municipalities. The AUC's regulatory framework on this issue as an example of a relatively robust approach to addressing the issue. The AUC has developed standard benchmarks for noise associated with energy facilities under its jurisdiction.[147] AUC Rule 012 requires that a proposed project is compliant with permissible sound levels and provides a specific process to evaluate noise complaints.[148]

[146] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 22
[147] AUC Decision 27276-D02-2022, City of Grande Prairie, Eastlink Centre Power Plant, November 7, 2022 at para 25; AUC Rule 012: *Noise Control*
[148] AUC Rule 012: *Noise Control*, ss 2.1-2.11, 5.1-5.3

Although this creates a consistent threshold and provides some predictability for industry, municipalities and their residents, the AUC retains the discretion to allow sound levels in excess of the permissible sound level on a site-specific basis.[149] Rule 012 also gives the AUC the authority to "dispense with, vary, or supplement all or any part of these rules if it is satisfied that the circumstances require it".[150] Further, the AUC, in relation to any Rule, including Rule 012: Noise control, can seek input from stakeholders respecting changes. Indeed, in Bulletin 2022-12 (December 16, 2022), the AUC sought stakeholder consultation on potential changes to AUC Rule 012, particularly in relation to urban environments.

The AUC has stated that in most circumstances, compliance with the permissible sound levels set out in Rule 012 is sufficient to protect the public interest.[151] However, in certain circumstances, the public interest will not be met by compliance with the thresholds set out in Rule 012 and additional noise mitigation may be ordered. In some cases, even if the permissible sound levels as set out in Rule 012 are met, the AUC may exercise its discretion to require additional sound mitigation and reduced sound levels.[152]

The AUC also has the authority to grant an exemption from the permissible sound level requirements in the case of dwellings that are constructed after a facility has been built and is in operation. This will occur as municipalities expand and residences move closer to existing facilities.[153]

In general terms, the AUC's approach for the regulation of noise through Rule 012 should be lauded. Although there is still an allowance for subjective versus objective standards, and the AUC retains the ability to exercise discretion, Rule 012 provides relatively tangible benchmarks and regulatory certainty (although different stakeholders may challenge adequacy of specific provisions). In contrast, however, the current AUC Rules do not, in a fulsome way, provide benchmarks or codification to address numerous other concerns that are relevant to municipalities. These will be discussed in more detail below.

B. Emergency Response/Fire Services

The AUC Rules do not contain any benchmarks for emergency response, such as design parameters that should be included for on-site water storage and other items for fire suppression, and internal access road width and location.

Emergency response issues are a major concern to municipalities for a number of reasons, including the following:

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[149] AUC Rule 012: *Noise Control*, s 1.4(1); see AUC Decision 28154-D01-2023, Future Energy Park Inc., July 12, 2023 at para 20
[150] AUC Rule 012: *Noise Control*, s 1.4(3)
[151] AUC Decision 27276-D02-2022, City of Grande Prairie, Eastlink Centre Power Plant, November 7, 2022 at para 44
[152] see AUC Decision 27276-D02-2022, City of Grande Prairie, Eastlink Centre Power Plant, November 7, 2022; varied by Decisions 27841-D01-2023
[153] see AUC Decision 27444-D01-2022, ENMAX Power Corporation, November 24, 2022 at paras 25, 26; AUC Rule 012: *Noise Control*, s 1.4(3), 2.3

- Budget Constraints – Fire suppression can be costly. Note that a municipality does not have an obligation to ensure there is piped water (with sufficient pressure) for fire suppression.[154] A municipality's budgetary decision to allocate its resources is a policy decision "dictated by financial, economic, social or political factors or constraints" and it does not bear liability for these types of decisions. This includes decisions such as whether to use funds to upgrade a water system, whether to extend piped water systems to a particular residential subdivision, or whether the water supplied to a particular area is adequate to fight fires.[155]

- Municipal authority/responsibility – municipalities have the jurisdiction to determine the appropriate response to a wildfire on project lands. A municipality's authority over fire response is found in its bylaws, the MGA,[156] and the *Forest and Prairie Protection Act* (FFPA).[157]

  The FPPA applies to all land in Alberta except: (a) land within the boundaries of an urban municipality where there is no specific provision in the FPPA to the contrary, and (b) land owned by the federal Crown in respect of which the Minister has not entered into a fire control agreement.[158] Under the FPPA, a county is responsible for fighting and controlling all fires within its boundaries, except parts within a forest protection area.[159] However, the persons responsible for the fire must reimburse the costs and expenses of fighting and controlling the fire if this is demanded.[160]

Further, if the Council of a municipal district finds conditions on privately owned land or occupied public land within its boundaries that, in its opinion, constitute a fire hazard or a burning hazard, it may order the owner or the person in control of the land on which the hazard exists to reduce, remove or eliminate the hazard within a fixed time and in a manner prescribed by Council.[161]

> Conditions or commitments are required to ensure there is proper funding and fire suppression resources available.

Without a requirement for a detailed emergency response plan to be in place during the approval process, emergency responders, employees and contractors at the project site, and members of the public could be placed in harm's way. Additionally, municipalities have limited resources and an emergency response plan cannot dictate how a municipality responds to an incident. Significant municipal input should be provided to a proponent before an emergency response plan can be finalized.

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[154] *Riverscourt Farms Ltd. v Niagara-on-the-Lake (Town)* (1992), 8 M.P.L.R. (2d) 13 (Ont. Gen. Div.) at paras 110, 118 - 121
[155] *Riverscourt Farms Ltd*. at para 113
[156] MGA, s 7(a)
[157] *Forest and Prairie Protection Act*, RSA 2000, c F-19
[158] FFPA, s 2(a), (b)
[159] FFPA, s 7
[160] FFPA, ss 2.1, 7, 9
[161] FFPA, s 10(1)

One challenge respecting municipal emergency response is that cost recovery respecting fire protection services is reactive – once a fire occurs, the FFPA allows a municipality to seek reimbursement of costs and expenses of fighting and controlling the fire. For this reason, a municipality (or a relevant appeal board such as the Land and Property Rights Tribunal or a subdivision and development appeal board) often imposes, as a condition of development permit approval, a condition requiring the developer to submit an emergence response plan satisfactory to the municipality, prior to the development commencing on the parcel.[162]

Recommendation #7: AUC Issue Review – Emergency Response

The AUC should perform a comprehensive review of emergency response issues, and develop Rules to address issues proactively. Key elements of an emergency response plan should be delineated by the AUC in a Rule. This should include features such as on-site or communal fire suppression equipment and facilities (including water or chemical storage) and minimum design standards for internal access roads, such as road width and loadbearing requirements. Further, the AUC should routinely require a condition that prior to finalization of design, the proponent shall develop an emergency response plan acceptable to the host municipality.

C. Nuisance

This can arise in many forms including things such as increased traffic associated with the construction and operation of a facility, loss in property value, solar glare or shadow flicker, negative visual impacts, and odours. Unless there are associated health concerns or negative environmental impacts, the AUC does not spend much time addressing these issues. Nuisance, of course is an umbrella term. We have endeavored to address specific aspects under other headings. Nevertheless, when the AUC is performing the "cradle to grave" analysis of impacts of renewable power projects, we stress that all nuisance impacts should be considered, not just those issues specifically delineated here.

D. Waste Management

Municipalities have a responsibility to "foster the well-being of the environment" and have the authority to pass bylaws addressing public utilities, including waste management.[163] Significant waste can be generated through the construction, replacement (such as solar panels damaged by hail), and end-of-life considerations of a project.

Virtually all Alberta rural municipalities will operate a landfill, either themselves, or with other municipalities through an intermunicipal entity (such as a Commission, Part 9 company, or the like). However, the capacity of these regional landfills will not necessarily have been designed to accept waste from power projects, and in particular solar or wind projects given the size and number being approved by the AUC. Rather, capacity for regional municipal landfills will

[162] See, for example, AUC 27842_X0170 – Written Argument of the County of Forty Mile at PDF pages 19, 25-29,
[163] MGA, ss 3, 7

generally have been calculated based on conventional waste streams. While reliance on private industrial landfills may also be an option for renewable energy projects, there is no clear indication that either the AUC or the Government of Alberta has evaluated viable options respecting waste management.

Recommendation #8: AUC Issue Review – Waste Management

The AUC should perform a comprehensive review of waste management issues, and develop Rules to address issues proactively. As a condition of approval, it should routinely require that the applicant shall, prior to finalization of design, adopt a waste management plan.

The AUC should also develop a Rule setting out key elements of a waste management plan, including management of waste throughout the life of the project and giving consideration to impacts on municipal/regional landfills.

The provincial government should review the waste management impacts of power projects, as these impacts could inform future approval requirements and related Rules (for example, the enhanced ability to recycle certain materials/components).

E. Weed control, Dust Control and Vegetation Management

Municipalities have a responsibility to manage weeds, nuisance and vegetation under Part 1 and 2 of the MGA, and under the *Weed Control Act.*[164] Weeds and crop disease are concerns both during the construction and the operation of a project. During the construction, maintenance and operation of a project, there is the potential for weeds, and other plants that are not strictly categorized as prohibited or noxious weeds, to spread throughout the project site and to adjacent lands. Equipment may disturb the soil and plants and may contaminate the area as it enters and leaves. There may also be concerns regarding chemical used during weed control measures being spread to adjacent lands. Additionally, ongoing vegetation management is a requirement to mitigate nuisances including dust control, soil erosion, and sediment run-off. If these concerns are not addressed as part of the approval process, the ability of municipalities to address any related negative outcomes is reactive, after the problem has already occurred.

Approvals typically only require that the applicant have a weed management policy and that it abides by provincial clubroot procedures, the Alberta *Weed Control Act* and its regulations, and the *Agricultural Pests Act*[165]. The challenge with this legislative framework (i.e. current municipal authority), however, is that these measures are largely reactive – steps can only be taken when there is a breach and the problem exists. The legislative framework is not proactive and does not mandate best practices.

There are instances with past AUC approvals where an applicant agrees to consult with a municipality regarding weed control[166], or ensure weed control methods are approved by the

[164] RSA 2000, c W-5
[165] RSA 2000, c A-8
[166] see AUC Decision 23612-D01-2019, Sunset Solar Inc., June 27, 2019 at para 19

municipality prior to construction.[167] However, these commitments have not always been offered by proponents and this is not something that is routinely required by the AUC.

For example, in AUC Decision 27205-D01-2022, Georgetown Solar & Energy Storage Project, the municipality asked the AUC to either impose conditions related to weed control (among other things), or to condition the project's approval to include regular meetings between the municipality and the applicant to review soil and vegetation management. The AUC stated that the municipality and its development authority are in the best position to communicate the particular mitigation measures they wish to see implemented as the engagement process unfolds. The AUC did not impose conditions on the frequency or the nature of the meetings between the applicant and the municipality but stated that its approval of the project was premised on the understanding that the applicant would continue to engage in good faith with the municipality with respect to vegetation, soil management and related matters.[168] The AUC's approach here – to assume that the proponent will engage in good faith – is a far cry from mandating standards or minimum best practices.

Another example illustrating the gaps in the AUC's regulatory benchmarks and how more is needed, is demonstrated by the impact of a solar project in the County of Warner. In this case, the proponent followed a plan of stripping topsoil, which did not correspond with local policies regarding soil and weed control.[169] This resulted in wind erosion, soil degradation, and invasive weed issues due to the lack of ground cover. Therefore, even though the AUC's approval for solar projects is, relatively speaking, in its infancy, a failure to address soil, dust and vegetation management has already been demonstrated.

Recommendation #9: AUC Issue Review – Weed Control, Dust Control and Vegetation Management

The AUC should perform a comprehensive review of these interrelated issues, and develop Rules to address issues proactively. This review should include consideration of things such as the long-term impacts of shade (from solar projects) on soil productivity, as these impacts could inform approval requirements and related Rules.

Key elements of relevant weed control plans, dust control plans, and vegetation management plans throughout the lifetime of the project should be delineated by the AUC in a Rule. As a condition of approval, the AUC should routinely require that the applicant shall, prior to finalization of design, adopt a weed, soil and dust management plan that is compliant with the Rule.

[167] see AUC Decision 23645-D01-2019, Vulcan Solar Project, February 22, 2019 at para 22
[168] AUC Decision 27205-D01-2022, Georgetown Solar & Energy Storage Project, November 2, 2022 at paras 15-17
[169] See RMA Resolution 8-23 Consideration of Municipal Environmental and Agricultural Policies for Large Scale Solar and Related Energy Developments on Agricultural Lands sponsored by the County of Warner No. 5

F. Impact on agricultural production

The Alberta *Soil Conservation Act* sets out legal requirements for the protection of soil quantity and quality.[170] This requires that appropriate measures be taken to prevent soil loss or deterioration from taking place or continuing.[171]

While multiple soil quality scales and classifications exist, this section will reference the scale used in Agriculture and Agri-Food Canada's Canada Land Inventory, which divides the agricultural capability of land is categorized into seven classes.[172] Class 1 lands have the highest capability of supporting agricultural land use activities. In Alberta, Class 2 land is the highest quality available and is the most productive of soils. The amount of this type of land is very limited. Class 3 soils are also used for agricultural production. There is also some Class 4 land that is used to grow crops, while Classes 5 and 6 or usually used for livestock grazing, and Class 7 is not used for crops or grazing.[173]

With the increased number of large solar and wind projects being approved, there are concerns that prime agricultural lands in the province are being taken out of production indefinitely. Concerns have also been raised (particularly in relation to solar projects) regarding the monitoring of the health of soil during the operation of a project, and whether it can be returned to agricultural production at the end of a project's life.

These concerns were raised during the proceedings regarding the Creekside Solar Project located in Leduc County, where the soil classification was largely Class 2 – the best lands for agricultural production in Alberta.[174] The AUC concluded that, with respect to the potential for weed and clubroot introduction and spread, and the degradation of soil health, it was expected the applicant would monitor and confirm that its environmental protection plan was being adhered to throughout the construction, operation and decommissioning of the project. Aside from a commitment to "work with" Leduc County in relation to these issues, as the plan met the requirements of the *Soil Conservation Act*, the AUC did not require additional monitoring or mitigations.

Interestingly, the potential for agrivoltaics (the concurrent agricultural and solar power generation uses of project land) was also considered in the Creekside Solar Project.[175] The AUC noted that this would help address the loss of productive agricultural lands where a solar project is sited. In terms of the AUC's consideration of agrivoltaics in the context of solar projects, these are early days – while reliance on agrivoltaics shows some promise, this is an area that merits further study for implementation.

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[170] *Soil Conservation Act*, RSA 2000, c S-15
[171] *Soil Conservation Act*, RSA 2000, c S-15, s 3
[172] https://sis.agr.gc.ca/cansis/nsdb/cli/index.html
[173] see Government of Alberta Land Suitability Rating System Classes Map, showing soil Classes 2 and 3 (attached as Appendix "C")
[174] AUC Decision 27652-D01-2023, Creekside Solar Project, July 14, 2023; AUC Exhibit 27652_X0095_Appendix E – Evidence of Green and Jensen, January 3, 2023, p 3, 4
[175] AUC Decision 27652-D01-2023, Creekside Solar Project, July 14, 2023

Agrivoltaics was also considered at the Brooks Solar Project in the County of Newell.[176] It was proposed that the land within the project fence line use sheep grazing under and around the solar panels to manage vegetation and mitigate loss of grazing land. With this, the only area of land that would be taken entirely out of forage would be the located where the land was directly impacted by pilings, access roads and inverter pads. However, as noted by the AUC, this would not mitigate the impacts to cattle grazing land.

The issue of productivity of high-quality agricultural lands is complex. Municipalities recognize that the interests of a landowner (agricultural or otherwise) are critically important, those interests must be balanced with other considerations such as impact on: other lands and users, sustainability and public infrastructure. should have unilateral authority over what use their lands are put to. The whole system of municipal planning is based on a proper balance of the public interest respecting the use of lands, while weighing an individuals' interest in developing their own lands.[177] That balance is polycentric – it varies in different situations depending on multiple factors

Balancing renewable energy development with the protection of agricultural lands should not be based on a blunt and over-simplified delineation that renewable energy projects can be developed on certain classes of lands, but not others. There cannot be a "one size fits all" treatment of agricultural productivity based purely on the 7 classes in the Government of Alberta Land Suitability Rating System, as this may unduly ignore local context. Clearly, additional factors must be taken into account; input by the host municipality respecting priorities for siting renewable energy projects must be accommodated into the AUC framework.For example, even so-called lower-class agricultural lands (Classes 4 & 5) have a valuable contribution to agricultural production.

While recent focus on loss of agricultural lands has mainly been in relation to renewable energy developments, it is a broader ongoing policy challenge in Alberta related to urbanization and a broad range of development types. The Government of Alberta has, for some time, identified agricultural land loss (through fragmentation and conversion of agricultural land) as an area in need of further analysis and possible policy development.[178] In fact, Alberta lost 34,700 acres of class 2 and 3 land to non-agricultural usage during the 2012-2016 period.[179] Continuation of this analysis should be supported.

While wind energy projects (once constructed) will have a relatively limited footprint, solar energy converts massive swaths of agricultural lands. Although there is an assumption of reclamation to pre-construction uses at end-of-life, there is the practical danger that solar energy projects may remain indefinitely. Solar panels may only have a shelf life of approximately 25 years, but the economic demand may result in solar project longevity well beyond that period. Therefore, once land is taken out of agricultural production by a solar project, it is uncertain if and when it will be brought back into production. Even if a solar project is eventually taken out of service completely, it is likely to leave behind a massive series of concrete pilings drilled into the ground. These pilings will be extremely expensive to remove and may result in permanent damage to the soil.

[176] AUC Decision 26435-D01-2022, Brooks Solar Farm, May 18, 2022
[177] see MGA, s 617
[178] See https://www.alberta.ca/fragmentation-and-conversion-of-agricultural-land
[179] See "Food Security in the Context of Agricultural Land Loss in Alberta", 2017 Alberta Agriculture and Forestry

To date, the AUC has not once denied the approval of a renewable energy project on grounds that the project is taking agricultural land out of production. This demonstrates a lack of understanding of the importance of productivity of agricultural lands.

The Government of Alberta's policy (to date) to not allow renewable energy projects on Crown land has no doubt exacerbated the conversion of productive agricultural lands for renewable energy projects – this practice is clearly contrary to the public interest. It is critical to understand that the title "Crown lands" simply refers to the status of the owner, i.e. the provincial Crown. Crown lands will come in many shapes and forms – some parcels will be environmentally sensitive, others will not.

Any transfer (sale or lease) of Crown lands should also meet the goal of a "level playing field". A proponent should not gain a windfall by accessing Crown lands at below market level. If the province is going to transfer (sale or lease) Crown lands, it should do so on a basis that Crown lands are a resource held by the provincial Crown as a trustee for the benefit of all Albertans. By way of comparison, when the federal government under the auspices of the Canada Lands Company, allows for the transfer of certain surplus federally owned lands, the sale/transfer must be achieved "with optimal return…to the benefit of all Canadians and our shareholder, the Government of Canada."[180]

Recommendation #10: AUC Issue Review – Agricultural Land Productivity and Access to Crown Lands

The AUC should perform a comprehensive review of agricultural productivity. The review must resulting in development of a Rule to mitigate the conversion of high-quality agricultural lands. However, this Rule cannot be based on a blunt differentiation of lands based strictly on soil classifications. There can be no "one size fits all" – the Rule must accommodate input from the host municipality on priorities for siting. Because this is a broad policy issue with many perspectives, the review and the development of the Rule should occur in conjunction with the Government of Alberta as well as stakeholders from the municipal, agricultural, renewable energy, and other sectors.

The review must also include an analysis of allowing renewable energy projects on Crown lands. The term "Crown lands" simply references that ownership is by the provincial Crown. The current practice of prohibiting renewable energy projects on Crown lands places an inordinate demand on productive agricultural lands for all relevant classes (Class 2-5). The AUC needs to develop and implement a Rule or Rules mitigating the conversion of agricultural lands for solar projects in particular. Further, the review of accessing Crown lands should also ensure there is a level playing field; any transfer (sale or lease) of Crown lands must recognize that province is akin to a trustee: Crown lands should only be

[180] Canada Lands Company website, retrieved September 18, 2023. See https://www.clc-sic.ca/newsroom/our-operations

transferred with optimal return to the benefit of all Albertans. Any access will need to review countervailing factors such as environmental impacts.

G. Other environmental impacts

The environmental impact of a project will vary from case to case. In wind and solar projects, one of the primary environmental concerns is siting, the impact on native prairies and vegetation, damage to the ecosystem, and concerns of permanent habitat loss for wildlife.[181] Solar and wind projects may also have a negative impact on bird and bat populations.

For instance, during the Foothills Solar Project application, the only renewable energy project that was denied by the AUC, it was concluded that the project would cause significant adverse environmental impacts and a high number of bird mortalities. The proposed location was sited close to a lake that was important to a large and diverse number of birds and would have direct and indirect negative environmental impacts, with a limited ability to mitigate the project's effects.

When looking at the environmental impacts of a project, the AUC expects applicants will conduct an environmental evaluation and consider provincial resources, such as the *Wildlife Directive for Alberta Solar Energy Projects*, that address appropriate site selection for projects.[182]

AUC Rule 033: *Post-Approval Monitoring Requirements for Wind and Solar Power Plants*, also requires successful applicants to submit annual post-construction monitoring survey reports to the AEPA and the Commission. This is to monitor wildlife mortalities and determine if additional mitigation measures are required.

Although the AUC encourages applicants to seek ways to minimize impacts on the environment, the role of municipalities as stewards of the rural landscape is often ignored in the process. This is somewhat of an 'umbrella' issue, and specific recommendations are covered through the other recommendations referenced in the paper.

H. Municipal roads

The MGA discusses the ownership and management of roads in a municipality. Section 16(1) states that the title to all roads in a municipality, other than those in a city, is vested in the Crown in right of Alberta. However, s. 18 confirms that a municipality has the direction, control and management of all roads within the municipality. The Court has interpreted this section as intending to "give municipalities wide-ranging control of the roads in a municipality, with all rights, short of the ability to alienate the title to the road or unilaterally close it".[183]

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[181] see AUC Decision 22563-D01-2018, Capital Power Generation Services Inc. - Halkirk 2 Wind Power Project, April 11, 2018 at para 239

[182] AUC Decision 27652-D01-2023, Creekside Solar Project, July 14, 2023 at para 103

[183] *CL Ranches Ltd v Rocky View*, 2021 ABQB 504 at para 39, citing *St Paul (County) No 19 v Belland*, 2006 ABCA 55

The AUC has granted standing to municipalities in situations where there would be potential impacts on the development of roads owned by a municipality.[184] It has also granted standing where projects would impact roadways within a municipality's boundaries that it did not own, but had care and control over.[185]

New projects often require the construction of new access roads and the upgrading of roads, due to infrastructure strain from heavy equipment use; related issues include dust suppression, haul routes and hours, and crossing agreements.

Section 650 of the MGA states that a development permit can require a development agreement, and these are routinely imposed as a condition of a development permit approval. These agreements can include requirements for a developer to construct or pay for "a road required to give access to the development". It can also address the upgrading of existing roads or other requirements related to capital infrastructure.

Road Use Agreements (between a municipality and a developer) are sometimes imposed as a condition of a development permit (in the ordinary course) to address additional operational or maintenance issues during the course of construction and operations. They can address things such as access routes and hauling hours to enhance public safety, along with ongoing maintenance requirements including dust suppression particularly on municipally controlled roads in the vicinity of residences.

Similarly, a development permit condition (in the ordinary course) may also require as a condition of approval that a developer enter into a Crossing Agreement on terms acceptable to a municipality. Sometimes these agreements are entered into even without being a condition of development approval. These Crossing Agreements will address the specifics including location and design details, as well as relocation and reimbursement of costs is the municipal asset is damaged in the course of the proponent constructing or maintaining the crossing. However, since projects often include electrical lines and infrastructure over roads managed and controlled by a municipality, this is an issue that should be addressed, with proper agreements entered into, as a condition of the AUC approving the project. Alternately, the AUC could defer these road related conditions to be addressed by the municipality when issuing the development permit.

Recommendation #11: AUC Issue Review – Municipal Roads

Given rural municipalities have care control and management of municipal roads in their boundaries, proponents should be routinely required to enter into. and abide by relevant agreements (Development Agreements, Road Use Agreements, and Crossing Agreements) to ensure impacts of the project on municipal roads are properly addressed.

The AUC should develop a Rule with standard conditions for municipal road use that can be imposed, including conditions for Development Agreements, Road Use Agreements and Crossing Agreements, on terms acceptable to the municipality. Alternately, the AUC should,

[184] AUC Exhibit 27582_X0156_27582, Standing Ruling and Hearing Schedule, December 6, 2022
[185] Exhibit 26707_X0074, Standing Ruling, October 15, 2021

in the Rule and approval, expressly defer these conditions to be addressed by the municipality upon issuance of the development permit.

Either option is feasible, and preferable, to the current situation where the AUC is:

- leaving it to the municipalities to negotiate with proponents on an *ad hoc* basis (with mixed results) and;
- not imposing clear, enforceable conditions requiring agreements with the municipality when a project clearly will have an impact on municipal roads.

PART 5: ENFORCEMENT

A. The AUC

After a wind or solar project is approved, AUC Rule 033 specifies that the approval holder must abide by all of the requirements, commitments, mitigation, and monitoring outlined in the project's referral report. It must also abide by a post-construction wildlife monitoring and mitigation plan that has been reviewed and approved by the AEP and provide annual reports to the AUC and AEP. The AUC has found that an applicant's commitment to use an independent environmental monitor for enforcement purposes to be "sufficiently protective".[186]

The AUC does not, however, conduct regular monitoring to ensure compliance with decisions, orders, rules, or relevant legislation. Instead, its enforcement process completely relies on complaints and referrals. These can be made by utility customers, referrals from other agencies, self-reporting by utility providers, or staff observations.

Once a complaint is received regarding a possible contravention of an AUC decision, order or rule, it is forwarded to AUC enforcement staff who will conduct a preliminary investigation. If it is determined that further action is warranted and in the public interest, a formal enforcement proceeding will be commenced. This involves the AUC issuing a notice outlining the contravention and the nature of the sanctions being sought. The AUC has broad and discretionary powers to order that projects be suspended while issues are being remedied.

For example, in 2021 AUC received a complaint from a residents' association in Sturgeon County regarding noise from a gas power plant. The AUC investigated and concluded the company had been operating the plant without approval of the AUC and that its operations exceeded the permissible noise levels in Rule 012. The AUC issued an enforcement order, shutting down the power plant's operations during the night.[187] There are currently ongoing proceedings to consider the penalties that will be imposed.

Penalties can be issued pursuant to sections 63 and 63.1 of the AUC Act. This can be up to $1,000,000 for each day or part of a day that the contravention occurs or continued, or a one-time amount where it is determined a person has gained an economic benefit directly or indirectly as a result of the contravention. Additionally, if a person fails to comply with an order of the AUC

[186] AUC Decision 26214-D01-2022, Buffalo Plains Wind Farm, February 10, 2022 at para 105
[187] AUC Enforcement Order 26379-D01-2021, March 19, 2021

made under the AUC Act, they will be guilty of an offence and liable to a fine up to $3,000,000 each day for which the offence continues, and an amount equal to any economic benefit derived from the offence.

B. The NRCB

The NRCB also relies on a complaint-driven process. While NRCB inspectors track ground and surface water conditions at CFOs, they will only conduct inspections for other matters in response to complaints or operator self-reports. The NRCB can then make enforcement order and compliance directives.

The NRCB will become aware of potential non-compliance issues through:

- complaints by the public;
- referrals from NRCB approval officers, other government agencies, or municipalities;
- compulsory reporting required by AOPA, its regulations, or permits; and
- by observations of inspectors while conducting inspections at other operations.[188]

If a CFO is creating a risk or inappropriate disturbance to the environment or is contravening AOPA, its regulations, or a permit, an enforcement order may be issued under s. 39 of AOPA. This will direct an operator to remedy an issue or develop a plan to do so. It may also specify actions to be taken. An order will be posted on the NRCB website until its requirements are met and the municipality will be informed. Emergency orders may also be issued if there is an immediate and significant risk to the environment.[189]

The NRCB will deal with complaints regarding things such as odour, manure application, dust, flies and other inappropriate disturbances, non-compliance with AOPA or a permit condition, water quality, and unauthorized construction. If a complaint relates to manure transport and road use, this does not fall under the NRCB's jurisdiction. The NRCB will forward these types of complaints to the appropriate provincial or municipal authority, depending on whether the road is classified as a municipal or provincial road.[190]

C. The AER

The AER states it takes a "hands on" approach and in addition to responding to complaints, by conducting regular inspections (field examinations) and audits (reviewing paperwork and reports) of a company's activity. The AER has a range of compliance and enforcement tools, such as issuing notices, warnings or orders, administrative sanctions, fees, administrative penalties, and initiating court proceedings.[191] Orders require companies to take corrective action by a set deadline and often take the form of environmental protection orders, suspension orders, and enforcement orders. Administrative sanctions are typically imposed on companies with a poor history of

[188] NRCB Operational Policy 2016-8, Compliance and Enforcement, August 11, 2021, p 4
[189] AOPA, s 42.1
[190] NRCB Website, 2023: https://www.nrcb.ca/confined-feeding-operations/compliance-enforcement/complaints
[191] AER Manual 013: Compliance and Enforcement Program, December 2020

compliance and can restrict certain activities, the company's entire operation, and can even cancel the AER approval.

Recommendation #12: Enhanced enforcement measures for all Boards (AUC, NRCB and AER)

Each Board should review whether enhanced and proactive enforcement measures (user-pay) should be developed, as part of ongoing approval requirements, to ensure that compliance is occurring.

The AER's failures respecting reclamation requirements demonstrates that a system that is reliant on proponent's self-reporting or that is driven by stakeholder complaints does not work.

PART 6: RECLAMATION

As stated by the Alberta Energy and Utilities Board, the "public and the province are entitled to assurance that significant liabilities such as decommissioning costs, reclamation costs and potential public liability for injury or damage to persons or property are properly addressed in power plant applications".[192] The AUC has stated that it agrees with this sentiment and has stated that when deciding whether an approval is in the public interest, it is important to consider how an applicant intends to finance and approach the decommissioning and reclamation of a project.[193] There must be assurance that an applicant has the means and capability to address end-of-life liabilities and that reasonable measures are in place to guarantee this work will be done.

Alberta has a securities program for coal, oilsands mines, coal processing plants, sand and gravel pits, and oil production sites. This is collected under the *Conservation and Reclamation Regulation*.[194] Oil and gas developments also generally have significant environmental obligations associated with them, but as discussed below the ability of the AER to require security (including cash payment) for end-of-life obligations has not, in practice, adequately protected the public interest.

A. CFOs and Manure Storage (NRCB)

At this time, we are not aware of a systemic failure respecting reclamation obligations relating to CFOs and manure storage. If and when this becomes a prevalent issue, further assessment may be warranted.

[192] Decision 2001-101, AES Calgary ULC - 525-MW Natural Gas-Fired Power Plant, Application 2001113, December 11, 2001, section 9.1.3, pages 48-49.
[193] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 81
[194] *Conservation and Reclamation Regulation*, Alta Reg 115/1993

B. Non-Renewable Energy Projects (AER)

Alberta has a securities program for coal, oilsands mines, coal processing plants, sand and gravel pits, and oil production sites. This is collected under the *Conservation and Reclamation Regulation*.[195] Oil and gas developments also generally have significant environmental obligations associated with them.

Under Alberta's oil and gas legislation, a company that receives a licence from the AER to use oil and gas assets also assumes end-of-life obligations for those assets. This involves such steps as plugging and capping oil wells to prevent leaks, dismantling surface structures, and restoring the surface to its previous condition. These obligations, which are very expensive to complete, are generally known as abandonment and reclamation obligations (or "ARO").

In cases where an oil and gas company cannot satisfy the ARO for its assets as required, such as when a company becomes insolvent, the AER relies on an organization called the Orphan Well Association ("OWA") to carry out the required cleanup activities. The OWA is an industry-funded agency that is separate from the AER, but works under the direction of the AER as its delegate. The OWA's mandate is to manage and remediate oil and gas properties that do not have a legally or financially responsible party that can be held to account.

By the AER's own statistics, there has been an exponential increased in the number of:[196]

a) orphan sites: 451 in 2014 to 3,124 currently; and
b) orphan wells: 705 in 2014 to 2,224 currently.

The AER has a framework it calls a 'liability management rating' used to calculating the deemed liability, one of the key criteria in these calculations is revenue, which is inherently volatile. Considering the massive and unfunded reclamation requirements, the AER's approach respecting reclamation needs a comprehensive review; the failure is of such significance, retaining an independent external auditor may be prudent.

Recommendation #13: AER Issue Review – Reclamation Security

The AER should perform a comprehensive review of reclamation obligations, including enhanced security requirements.

While in theory, the AER has the ability to require an approval holder to provide cash security, in practice, this jurisdiction has not been sufficiently exercised. For example, the AER's 'liability management rating' relies on a key criteria of revenue, which is inherently volatile. The AER's track record speaks for itself; the sheer magnitude of the outstanding reclamation obligations shows a systemic failure to protect Albertans respecting reclamation obligations. Given this track

[195] *Conservation and Reclamation Regulation*, Alta Reg 115/1993
[196] See: https://www.orphanwell.ca/wp-content/uploads/2018/01/OWA-2014-15-Ann-Rpt-Final.pdf and https://www.orphanwell.ca/about/orphan-inventory/

record, perhaps the review should be performed not by the AER itself, but by an independent auditor.

Moreover, the reliance on the Orphan Well Association ("OWA") and its funds should not be viewed as a long-term solution:

- The funds used by the OWA for reclamation are provided by industry. This places the burden of reclamation on players who have, and are, meeting their obligations, further compounding the economic challenges for the 'good actors';
- The Board of Directors is weighted in favour of industry. One would question whether the path of least resistance for those stakeholders would be to defer reclamation measures as long as possible, in order to not place an immediate and inordinate burden on industry players (the good actors) who are providing the funding.

C. Renewable Energy Projects

The *Conservation and Reclamation Regulation* specifically addresses renewable energy operations, which are subject to the reclamation obligations in s. 137 of the *Environmental Protection and Enhancement Act*.[197] Operators of renewable energy projects must obtain a reclamation certificate managed by Alberta Environment and Parks (AEP). In 2018, the Government of Alberta released a *Conservation and Reclamation Directive for Renewable Energy Operations*. This provides details on conservation and reclamation planning and reclamation certificate requirements for renewable energy operators in Alberta.[198] It places a statutory obligation on operators to decommission their projects and to reclaim the project footprint in accordance with the *Environmental Protection and Enhancement Act*.[199]

All applicants are required to provide a plan outlining how they will reclaim land so that it is functionally equivalent to its pre-disturbance state. Once decommissioning and reclamation is complete, a proponent must obtain a Reclamation Certificate, or its equivalent, from the AEP. However, as discussed above, even if reclamation is carried out to the satisfaction of the AEP, it may not be possible to truly reclaim land, especially prime agricultural land, to its pre-disturbance state. This creates a long-term loss for valuable land.

Another issue with reclamation obligations is that there is no provincial or federal legislation requiring renewable energy projects in Alberta to provide security deposits in any form.

The express provincial authority over the physical remediation and reclamation of renewable power generation facilities, including the authority to require security related to the construction and operation of renewable power generation facilities, lies with AEP. During the approval phase of a project, the AEP will provide support to the AUC by reviewing and assessing the submitted renewable energy operation conservation and reclamation plans. The AEP is responsible for issuing reclamation certificates once conditions are met.

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[197] *Conservation and Reclamation Regulation*, Alta Reg 115/1993; *Environmental Protection and Enhancement Act*, RSA 2000, c E-12

[198] Government of Alberta – Alberta Environment and Parks (GOA: AEP). 2018. Conservation and Reclamation Directive for Renewable Energy Operations. Edmonton, Alberta.

[199] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 at para 137

To date, the AUC has stated that because AEP, and not the Commission, is the provincial authority empowered to require security for renewable power generation facilities, the AUC will not impose a security requirement on applicants.[200] Although the AUC can consider things such as the expected salvage value of components of a project and whether there are lease provisions to set aside reclamation funds, there is no current mechanism for it to require security for renewable power generation facilities.

AUC has stated that a municipality could potentially address security obligations through its development permit process.[201] In practice however, the municipality may only have jurisdiction to impose security requirements for reclamation obligations if the AUC expressly deferred that requirement to the municipality to be addressed in a subsequent development permit. The AUC (or the province), and NOT municipalities should be charged with imposing and monitoring reclamation requirements. Reclamation security should be mandated at the provincial (not municipal) level because reclamation is integral to approval; further, provincial oversight should enhance uniformity and certainty.

Security requirements may also be addressed in private leases, and clearly, many proponents are negotiating with landowners in relation to these requirements. However, there is little guidance for landowners or industry in this regard. Standard leases have not been developed and there is no centralized governing body or organization like the OWA to carry out reclamation work for renewable energy projects. This leads to inconsistent approaches and gaps in obligations and their fulfillment. As stated above, the OWA only exists because of a failure in the regulatory regime in the oil and gas context; the appropriate means for meeting the public interest is not establishing a body similar to the OWA in the renewable power project context, but rather ensuring the 'user pay' philosophy is achieved by enhancing regulatory requirements and holding the actual proponent to account for its reclamation responsibilities.

Without more oversight and a consistent and tangible plan, renewable energy projects pose a very real risk for reclamation challenges. This has already been demonstrated in the non-renewable energy industry.

High rates of development, along with the lack of any clear, structured process for reclamation or obtaining financial security to ensure developments are properly reclaimed, puts municipalities and private landowners at risk of becoming exposed to reclamation challenges and related costs.

Establishing a security system at the provincial (as opposed to a municipal) level would help provide uniformity across the province. Moreover, periodic evaluations would be required to ensure that security requirements are sufficient and current, for example, keeping up with the pace of inflation.

[200] AUC Decision 27652-D01-2023, Creekside Solar Project, July 14, 2023; AUC Decision 26435-D01-2022, Brooks Solar Farm, May 18, 2022 at para 152
[201] AUC Decision 27652-D01-2023, Creekside Solar Project, July 14, 2023 at para 137

Recommendation #14: AUC Issue Review – Reclamation

The AUC should develop a Rule and impose, as a standard condition of all approvals, a mandatory requirement that the proponent provide reclamation securities through a provincially-administered program.

We need to apply 'lessons learned' from the AER's failures in the non-renewable sector, to the AUC's regime in the renewable sector. The Rule must ensure that proponents not only commit to a specific reclamation plan, but also make a direct financial commitment to reclamation that will be maintained even if project ownership changes. Reclamation security must be managed at the provincial level, and not left to be addressed by either landowners or municipalities.

PART 7: PROPERTY TAXES

A. NRCB

Tax recovery for CFOs and manure storage has not posed challenges as proponents are only assessed on regulated rates, not tied to fair market value.

B. AER

A survey conducted by the RMA has shown that as of December 31, 2022, rural municipalities were owed approximately $268 million in unpaid property taxes by oil and gas companies.[202] There is a further $45 million in unpaid taxes that are currently subject to tax repayment agreements and are not reflected in this number. This represents an increase of over 230% from 2018, when RMA began collecting this data. In addition to this, over 40% of these unpaid taxes are the responsibility of operational companies.

The provincial government has amended legislation to allow municipalities to register a "special lien" on unpaid oil and gas property taxes, giving them status as a secured creditor in bankruptcy proceedings. However, AER-regulated assets generally have significant environmental obligations associated with them and will have ARO end-of-life obligations. These are typically very expensive to complete. In bankruptcy proceedings, if an insolvent company has outstanding ARO, the company's assets will be used to address this ahead of all other secured creditors, including municipalities. As a result, it is often the case that outstanding taxes remain unpaid.

As discussed above, the Government of Alberta has also recently given the AER the authority to consider property taxes and surface lease payment records when considering an approval. Although this is a step in the right direction for municipalities, the AER is not obligated to deny or suspend an approval if a company is in arrears, and there is no mandatory application respecting oil and gas companies that are currently operating and have unpaid property taxes.

[202] See https://rmalberta.com/news/another-year-another-mountain-of-unpaid-property-taxes-as-oil-and-gas-industry-booms-municipalities-seek-accountability/ ;

These missing revenues have a significant impact on municipalities and their ability to provide infrastructure and services to their residents. It also results in a greater tax burden being placed on other taxpayers, all contrary to the 'user pay' philosophy. It is crucial to learn from this situation so it is not simply repeated in other industries, such as the rapidly growing renewable energy industry.

Payment of property taxes is not only a legal requirement, it is also crucial to ensuring municipalities have adequate revenue to build and maintain infrastructure used by industry. From a broader regulatory perspective, non-payment of municipal taxes is also a warning sign that a company may be unable or unwilling to meet other regulatory requirements. The current regulatory framework contains too much discretion and flexibility; mandatory checks and balances must be imposed.

Recommendation #15: AER Issue Review – Municipal Tax Payment

The *Responsible Energy Development Act* (REDA) should be revised to ensure that the AER imposes as a standard condition of all approvals, and as a condition of operating on an ongoing basis, the proponent shall pay all municipal property taxes. If the proponent fails to do so, the approval shall be suspended until all municipal property taxes are paid (or a tax repayment agreement entered into and abided by on terms acceptable to the municipality). This requirement shall be imposed[203] on projects that have already been approved.

C. AUC

Currently, the AUC may choose to consider unpaid taxes as part of its overall consideration of the public interest. For instance, an application for a Bitcoin Mine Power Plant was denied by the AUC.[204] This was for a number of reasons, including the fact the applicant did not comply with the Commission's participant involvement rules or the requirements in the *Electric Utilities Act*. However, the AUC also considered the outstanding municipal taxes owed by the applicant. It noted that the applicant had significant tax arrears and although the company had entered into a Municipal Tax Payment Plan, there was insufficient evidence presented regarding its ability to repay the taxes or of any payments being made. In addition to the AUC's concerns with these municipal tax arrears, it also raised the fact that the applicant had a long record of non-compliance incidents with the AER. The AUC concluded that when considering the public interest test, the applicant would have benefitted from establishing a stronger track record of proactively addressing both its tax liability with the municipality and its non-compliance history with the AER.[205]

While this decision is encouraging for municipalities, it should be kept in mind that unpaid municipal taxes were just one of the many problems facing the applicant in this decision. Further, this is just one decision by the AUC. The AUC has not, as far as we are aware, ever imposed a

[203] Some consideration may be necessary for transitional provisions relating to projects that have been approved previously.
[204] AUC Decision 27527-D01-2023, Mojek Resources Inc., Gage Bitcoin Mine Power Plant, March 7, 2023
[205] paras 34-36

condition that the proponent shall pay municipal property taxes as a requirement of an approval itself. Further, we are not aware of any suggestion the AUC plans to use its regulatory authority to force applicants to address unpaid taxes, or that keeping current with taxes will be a requirement for approval.

Recommendation #16: AUC Issue Review – Municipal Tax Payment

The AUC should develop a Rule and impose, as a standard condition on all approvals, and as a condition of operating <u>on an ongoing basis</u>, the proponent shall pay all applicable municipal taxes. If the proponent fails to do so, the approval shall be suspended until all municipal property taxes are paid (or a tax repayment agreement entered into and abided by) on terms acceptable to the municipality. This requirement shall be imposed[206] on projects that have already been approved.

To date, non-payment of municipal taxes in the context of renewable energy projects has not been a significant issue; this is because, relatively speaking, these projects are in, their infancy. The AUC must adopt a mandatory framework for payment of municipal tax obligations, so that proponents understand payment of municipal property taxes is a cost of doing business.

PART 8: OTHER JURISDICTIONS

A. Saskatchewan

Municipalities in Saskatchewan appear to be given greater involvement in the approval process for industrial developments.

Developers require approval through the Saskatchewan Ministry of Environment. However, they also need to satisfy all other relevant permitting requirements, including obtaining all necessary municipal permits. Through the *Planning and Development Act, 2007*, municipalities in Saskatchewan are able to address local development and land use issues through zoning bylaws and by adopting a community plan.[207] Numerous communities have zoning bylaws that contemplate renewable energy developments, such as wind turbine developments as a discretionary use for land that is zoned agriculture. This requires a development permit application to be presented to the municipal council for review and a decision. Some bylaws also include development standards including things such as setback requirements, a prohibition on developments if it can be demonstrated that there will be noise or visual disturbances of neighbouring properties, and prescribed consultation areas, where a professional engineering certificate is required.

However, s. 47 of the *Planning and Development Act, 2007*, does allow for the province to override the zoning bylaws of a municipality. This states that to achieve "consistency with any provincial

[206] Some consideration may be necessary for transitional provisions relating to projects that have been approved previously.
[207] *Planning and Development Act, 2007*, SS 2007, c P-13.2

land use policies or statements of provincial interest, the minister, after consulting with the council, may direct the council to prepare and adopt an amendment to a zoning bylaw".

CFOs and livestock operations require the approval of the Saskatchewan Ministry of Agriculture. However, rural municipalities generally have discretionary use approval requirements for intensive livestock developers and have the sole authority for land use decisions and defining areas where these developments may be sited.[208] As such, the provincial government recommends developers to determine if they meet municipal requirements early in their planning stages.

Similarly, to obtain a licence to construct and operate and oil and gas facility, a developer must ensure they have obtained all required development permits from the rural municipality, prior to applying for a licence from the provincial government.

A critical difference between Alberta and Saskatchewan, is the involvement of the government of Saskatchewan in electrical power. In Saskatchewan, SaskPower has an exclusive monopoly to supply, transmit, distribute and sell electrical energy in Saskatchewan.[209] As such, Saskatchewan will not have an elaborate regulatory regime to grant approvals to private proponents in this area because there are no private entity proponents *per se*. Similarly, there will not be the same risks relating to municipal concerns because SaskPower, a provincial corporation, is responsible for all facets of electrical energy.

B. Ontario

Large-scale solar, wind, and bio-energy projects in Ontario require a Renewable Energy Approval (REA) from the Ministry of the Environment, Conservation and Parks.[210] Waterpower facilities are subject to the *Environmental Protection Act* and siting requirements. Depending on the location and the nature of the project, approvals, permits and/or authorizations from other ministries and approving bodies may be required. This includes municipal building permits, drainage assessments, and road use agreements or permits. Most renewable energy project developers are also required to consult with the public and municipalities. They are encouraged to work with local communities as much as possible.

The REA application form contains a section with Municipal Consultation Requirements where the applicant must provide documentation regarding municipal concerns including infrastructure and servicing, road access and traffic management plans, municipal service connections, landscaping design, emergency management and safety, natural features and water bodies, and building code permits and licenses.[211] There is also a section that must be filled out by the municipality outlining any issues, recommendations and comments on the above topics. Municipal concerns will be addressed by the applicant providing additional information, explanation,

[208] https://www.saskatchewan.ca/business/agriculture-natural-resources-and-industry/agribusiness-farmers-and-ranchers/livestock/livestock-and-the-environment/regulation-of-intensive-livestock-operations-in-saskatchewan
[209] See the *Power Corporation Act*, RSS 1978, c. P-19
[210] *Environmental Protection Act*, RSO 1990, c E.19; *Renewable Energy Approvals Under Part C.0.1 of the Act*, O Reg 359/09
[211] https://forms.mgcs.gov.on.ca/en/dataset/012-2095

changing the project design. The Ministry can also attach conditions to the approval in response to local input.[212]

The REA application also requires that the applicant provide a Decommissioning Plan Report. This will describe how the applicant proposes to restore the project location and manage the excess materials and waste. If the project is approved, a final comprehensive plan must be submitted six months in advance of the start of decommissioning. For agricultural sites, the applicant is expected to propose methods for restoring the nutrient content of soil.

To help ensure compliance with the regulations and conditions of approval, the Ministry will undertake unannounced, proactive inspections of facilities and will conduct inspections in response to complaints. The Ministry also typically requires Financial Assurance against potential future environmental impacts and liability, and against potential future waste disposal costs.

Livestock operations in Ontario (including CFOs and manure storage) are not subject to municipal regulatory approval; they are governed provincially and approvals are provided by the Ontario Ministry of Agriculture, Food and Rural Affairs. The *Nutrient Management Act* stipulates that where provincial regulations and municipal bylaws or provisions deal with the same subject matter, the provincial regulation will supersede the municipal legislation.[213] As long as livestock operations meet all applicable laws, including zoning requirements, this has largely removed municipalities from planning considerations. There are also no requirements for detailed approval strategies or plans to be provided to municipalities.

C. Nova Scotia

Nova Scotia's renewable energy industry, which largely focuses on wind energy, also has greater municipal involvement. Before a project can be built, it must comply with municipal zoning bylaws.[214] Municipalities in Nova Scotia have the authority to determine setback requirements and separation distances of turbines, which will vary between the various regions of their jurisdiction. If municipal permits are needed for a project, these must also be acquired. In addition to following these municipal requirements, all large wind projects must undertake an environmental assessment through the provincial Department of Environment. This takes important ecological and socio-economic issues into account.[215]

Land reclamation is usually negotiated as part of land agreements and can also be part of a municipality's regulations. For example, in 2022, a municipality in Nova Scotia amended its wind turbine regulations to require decommission bonds of 125% of removal costs less salvage. It also created a timeline for malfunctioning turbines to be repaired or decommissioned.[216]

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[212] https://www.ontario.ca/document/technical-guide-renewable-energy-approvals/consultation-requirements-and-guidance-preparing-consultation-report

[213] *Nutrient Management Act*, *2002*, SO 2002, c 4 at s 61

[214] https://energy.novascotia.ca/sites/default/files/Wind%20regulations.pdf

[215] https://static1.squarespace.com/static/6346c6d2eb4eb555f1565a2a/t/6359d8c0d89bad67e7fb3757/1666832578534/Wind%2BEnergy%2BFact%2BSheets%2Bfor%2BNova%2BScotian%2BMunicipalities.pdf

[216] https://www.plancumberland.ca/wind

D. Texas

Texas has experienced similar issues to Alberta. Texas has a regulatory climate that encourages growth in the energy industry and the amount of wind and solar developments in Texas has increased significantly in recent years. This is largely a result of federal incentives, the State having few regulations for renewable energy, and the State's desire to ensure there is enough energy being produced after experiencing a power crisis in recent years.

This growth has led to rural counties and their residents raising concerns about potential environmental harm from renewable energy facilities and seeking more regulations for the construction and operation of these projects. However, a Bill in support of this was successfully voted down in June 2023.[217] This Bill would have established a permitting system through the Public Utilities Commission with a specific application process. The permit application process would have required, among other things, that the Texas Parks and Wildlife Department review environmental impacts for wind and solar projects, that renewable power developers provide notice, hold public meetings and allow counties to present information to the commission on the application, and that facilities comply with setback requirements from property lines and homes. It would have also established a renewable energy generation facility cleanup fund and the levy of an annual environment impact fee.

Currently, the Texas Utilities Code imposes statutory decommissioning requirements for wind power facilities.[218] This was added to the Code in 2019 and stipulates that all wind power facility agreements must provide that the grantee is responsible for removing the facilities from the landowner's property and return the property to as near as reasonably possible to the same condition as it was prior to construction. The grantee must also obtain and deliver to the landowner evidence of financial assurance to secure the performance of its decommissioning obligations. This could be in the form of a parent company guarantee with proof of a minimum credit rating, a letter of credit, a bond, or another form of assurance acceptable to the landowner. The amount of the financial assurance must be equal to the estimated cost of the decommissioning and reclamation as prepared by an independent engineer. This must be done at least every five years. Therefore, at least at the present time, any requirement for reclamation security is between the proponent and landowner.

In 2021, Texas also passed laws for the decommissioning of solar power facilities. This contains similar requirements as those imposed on wind companies.[219]

[217] Senate Bill 624; https://capitol.texas.gov/tlodocs/88R/billtext/pdf/SB00624S.pdf#navpanes=0
[218] https://statutes.capitol.texas.gov/Docs/UT/htm/UT.301.htm; Texas Utilities Code, Title 6, Chapter 301
[219] Senate Bill 760; Texas Utilities Code, Title 6, Chapter 302

E. Montana

State permits and approvals for renewable energy are provided through the Montana Department of Environmental Quality. However, for a development to proceed, it must also comply with the zoning requirements of the local government.

The State also requires owners of wind generation facilities, 25 megawatts or greater, or solar facilities of 2 megawatts and greater, to provide decommissioning plans and bonds.[220] A bond is set at the estimated amount to perform the decommissioning work required of an owner. A decommissioning plan will include, among other things, a commitment to remove all above and underground materials, and a commitment to reclaim the facility site to achieve the same utilities as the surrounding area at the time of decommissioning, to repair and reconstruct any damaged public roads, and to remove and grade of all access roads. If a company fails to submit a bond, fines of up to $1,500 per day can be issued. Additionally, if an owner does not decommission a facility in the manner or timelines required by the decommissioning plan, and deficiencies are not rectified within 90 days of notification, the bond for the entire facility can be forfeited.

Permits for concentrated animal feeding operations in Montana are also provided through the Department of Environmental Quality. When an application is made, the Department will conduct an environmental assessment. Part of this process is a site-specific evaluation of the potential impacts on locally adopted environmental plans and goals. In addition, applicants must comply with any local management plans or regulations, and must obtain any applicable approvals or permits in this regard.[221]

With respect to oil and gas operations, local governments can have legislation that supplements state and federal law, such as zoning and permitting programs and best management practices.[222] However, local governments cannot enact regulations inconsistent with state laws. They cannot have standards or requirements that are less stringent than the State standards, and they cannot make rules that prevent the complete use, development, or recovery of any mineral, forest or agricultural resource.

[220] https://rules.mt.gov/gateway/Subchapterhome.asp?scn=17%2E86%2E1; https://leg.mt.gov/bills/2019/billpdf/SB0093.pdf
[221] https://deq.mt.gov/files/Water/WQInfo/Documents/2023%20Public%20Notices/PN-MT-23-04-MTG010000/2023_DEA_MTG010000.pdf
[222] http://www.oilandgasbmps.org/laws/montana_localgovt_law.php

PART 9: RECOMMENDATIONS AND CHANGES THAT WOULD ENHANCE MUNICIPAL PARTICIPATION/INPUT AND CONSIDERATION OF SPECIFIC MUNICIPAL INTERESTS

We take the opportunity to provide the RMA with a compilation of the aforementioned recommendations, for consideration.

Recommendation #1: AER standing and cost recovery

The AER's framework should be modified so municipalities should be routinely granted not only intervenor standing, but also intervenor costs. The proponent, not the municipality's other taxpayers, should bear the cost of processing an application, including the cost of the municipality's intervention (legal and expert costs). These changes to the AER's regulatory regime are warranted given the magnitude of breaches respecting payment of municipal taxes and reclamation responsibilities.

Currently, the AER treats a municipality's application for standing like any other application. There is no special category for considering a municipality's application for intervenor status, or costs. Applying for intervenor status can be a costly and time-intensive exercise. With the concept of user-pay, the proponent of a project should bear the cost of its regulatory process.

Recommendation #2: NRCB cost recovery

While the NRCB legislative framework does grant a municipality intervenor standing, the NRCB framework should be revised so that municipalities are automatically granted intervenor funding.

With the concept of user-pay (the proponent of a project should bear the cost of its regulatory process), municipalities should be automatically granted not only intervenor standing but also intervenor costs. The proponent, not the municipality's other taxpayers, should bear the cost of processing an application, including the cost of the municipality's intervention (legal and expert costs) before the NRCB.

Recommendation #3: AUC standing and cost recovery

The AUC's regime should be revised to automatically grant standing to municipalities and guarantee (rather than preclude) intervenor funding.[223]

The AUC's decisions on whether to grant a municipality standing as an intervenor are not consistent. Unlike the NRCB, the AUC does not automatically grant municipalities intervenor status. For example, the AUC's decisions on standing fail to appreciate that a municipality, which has care and control of local roads, will be greatly impacted by the solar or wind project being considered, particularly given the scale of projects currently being processed. While on one hand the AUC has stated that it appreciates the input from municipalities to explain both the municipal planning framework and municipal concerns[224], these inconsistent decisions on standing create uncertainty and underscore a lack of understanding as to how these projects impact municipalities.

Further, the fact that a municipality has to make an application for intervenor status (or as a fallback, more limited participation status) by itself can be a costly and time-intensive exercise.

Based on the concept of user-pay (the proponent of a complex project should bear the cost of its regulatory process), municipalities should be routinely granted not only intervenor standing but also intervenor costs (instead of being denied costs, as under the current system). The proponent, not the municipality's other taxpayers, should bear the cost of processing an application, including the cost of the municipality's intervention (legal and expert costs) before the AUC.

Recommendation #4: AUC Consultation Requirements

The AUC should revise Rule 007 to require the proponent to consistently identify proposed projects prior to submitting the formal application to the AUC; one option would be for the AUC to assign pre-application numbers/description. Further, the AUC should revise Rule 007 to include more stringent minimum benchmarks for the substantive information to be circulated as part of the participant involvement program.

[223] Subject to appropriate checks and balances that the municipality's contribution is beneficial to the AUC's deliberations.

[224] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 29

Recommendation #5: NRCB legislation (AOPA) update

The NRCB legislation (AOPA) is currently outdated as it does not reference intermunicipal development plans (IDPs). The Government of Alberta should update AOPA to include references to not only municipal development plans (MDPs), but IDPs as well. Although the NRCB and approval officers have, in practice, acknowledged the importance of consistency with IDPs, the actual legislation has not yet been amended, which could create unnecessary confusion and uncertainty.

Recommendation #6: AUC comprehensive review

The AUC and the Government of Alberta) should perform a "cradle to grave" review of all aspects of renewable energy – complete with comprehensive municipal input on all aspects. From a municipal standpoint, this review (and enhanced Rules and standard conditions) should include impacts on the following specific areas (as further discussed below): municipal roads, emergency response/fire services, waste management, vegetation/weed/dust management; productivity of agricultural lands, reclamation (including security). and municipal property taxes.

As discussed by the AUC itself, the existence of regulatory standards and guidelines are important elements in deciding if a proposed project will be in the public interest.[225] If more guidelines and standard benchmarks can be developed, this will create more consistency and certainty for municipalities, their residents, landowners, and the industry.

Importantly, this review must incorporate lessons learned from the AER regime, namely the AER's significant failure to properly address both payment of municipal property taxes and reclamation obligations.

Recommendation #7: AUC Issue Review – Emergency Response

The AUC should perform a comprehensive review of emergency response issues, and develop Rules to address issues proactively. Key elements of an emergency response plan should be delineated by the AUC in a Rule. This should include features such as on-site or communal fire suppression equipment and facilities (including water or chemical storage) and minimum design standards for internal access roads, such as road width and loadbearing requirements. Further, the AUC should routinely require a condition that prior to finalization of design, the proponent shall develop an emergency response plan acceptable to the host municipality.

[225] AUC Decision 27486-D01-2023, Foothills Solar Project, April 20, 2023 at para 22

Recommendation #8: AUC Issue Review – Waste Management

The AUC should perform a comprehensive review of waste management issues, and develop Rules to address issues proactively. As a condition of approval, it should routinely require that the applicant shall, prior to finalization of design, adopt a waste management plan.

The AUC should also develop a Rule setting out key elements of a waste management plan, including management of waste throughout the life of the project and giving consideration to impacts on municipal/regional landfills.

The provincial government should review the waste management impacts of power projects, as these impacts could inform future approval requirements and related Rules (for example, the enhanced ability to recycle certain materials/components).

Recommendation #9: AUC Issue Review – Weed Control, Dust Control and Vegetation Management

The AUC should perform a comprehensive review of these interrelated issues, and develop Rules to address issues proactively. This review should include consideration of things such as the long-term impacts of shade (from solar projects) on soil productivity, as these impacts could inform approval requirements and related Rules.

Key elements of relevant weed control plans, dust control plans, and vegetation management plans throughout the lifetime of the project should be delineated by the AUC in a Rule. As a condition of approval, the AUC should routinely require that the applicant shall, prior to finalization of design, adopt a weed, soil and dust management plan that is compliant with the Rule.

Recommendation #10: AUC Issue Review – Agricultural Land Productivity and Access to Crown Lands

The AUC should perform a comprehensive review of agricultural productivity. The review must resulting in development of a Rule to mitigate the conversion of high-quality agricultural lands. However, this Rule cannot be based on a blunt differentiation of lands based strictly on soil classifications. There can be no "one size fits all" – the Rule must accommodate input from the host municipality on priorities for siting. Because this is a broad policy issue with many perspectives, the review and the development of the Rule should occur in conjunction with the Government of Alberta as well as stakeholders from the municipal, agricultural, renewable energy, and other sectors.

The review must also include an analysis of allowing renewable energy projects on Crown lands. The term "Crown lands" simply references that ownership is by the provincial Crown. The current practice of prohibiting renewable energy projects on Crown lands places an inordinate demand on productive agricultural lands for all relevant classes (Class 2-5). The AUC needs to develop and implement a Rule or Rules mitigating the conversion of agricultural lands for solar projects in particular. Further, the review of accessing Crown lands should also ensure there is a level playing field; any transfer (sale or lease) of Crown lands must recognize that province is akin to a trustee: Crown lands should only be transferred with optimal return to the benefit of all Albertans. Any access will need to review countervailing factors such as environmental impacts.

Recommendation #11: AUC Issue Review – Municipal Roads

Given rural municipalities have care control and management of municipal roads in their boundaries, proponents should be routinely required to enter into. and abide by relevant agreements (Development Agreements, Road Use Agreements, and Crossing Agreements) to ensure impacts of the project on municipal roads are properly addressed.

The AUC should develop a Rule with standard conditions for municipal road use that can be imposed, including conditions for Development Agreements, Road Use Agreements and Crossing Agreements, on terms acceptable to the municipality. Alternately, the AUC should, in the Rule and approval, expressly defer these conditions to be addressed by the municipality upon issuance of the development permit.

Either option is feasible, and preferable, to the current situation where the AUC is:

- leaving it to the municipalities to negotiate with proponents on an *ad hoc* basis (with mixed results) and;
- not imposing clear, enforceable conditions requiring agreements with the municipality when a project clearly will have an impact on municipal roads.

Recommendation #12: Enhanced enforcement measures for all Boards (AUC, NRCB and AER)

Each Board should review whether enhanced enforcement measures (user-pay) should be developed, as part of ongoing approval requirements, to ensure that compliance is occurring. The AER's failures respecting reclamation requirements demonstrates that a system that is reliant on proponent's self-reporting or that is driven by stakeholder complaints does not work.

Recommendation #13: AER Issue Review – Reclamation Security

The AER should perform a comprehensive review of reclamation obligations, including enhanced security requirements.

While in theory, the AER has the ability to require an approval holder to provide cash security, in practice, this jurisdiction has not been sufficiently exercised. For example, the AER's 'liability management rating' relies on a key criteria of revenue, which is inherently volatile. The AER's track record speaks for itself; the sheer magnitude of the outstanding reclamation obligations shows a systemic failure to protect Albertans respecting reclamation obligations. Given this track record, perhaps the review should be performed not by the AER itself, but by an independent auditor.

Moreover, the reliance on the Orphan Well Association ("OWA") and its funds should not be viewed as a long-term solution:

- The funds used by the OWA for reclamation are provided by industry. This places the burden of reclamation on players who have, and are, meeting their obligations, further compounding the economic challenges for the 'good actors';
- The Board of Directors is weighted in favour of industry. One would question whether the path of least resistance for those stakeholders would be to defer reclamation measures as long as possible, in order to not place an immediate and inordinate burden on industry players (the good actors) who are providing the funding.

Recommendation #14: AUC Issue Review – Reclamation

The AUC should develop a Rule and impose, as a standard condition of all approvals, a mandatory requirement that the proponent provide reclamation securities through a provincially-administered program.

We need to apply 'lessons learned' from the AER's failures in the non-renewable sector, to the AUC's regime in the renewable sector. The Rule must ensure that proponents not only commit to a specific reclamation plan, but also make a direct financial commitment to reclamation that will be maintained even if project ownership changes. Reclamation security must be managed at the provincial level, and not left to be addressed by either landowners or municipalities.

Recommendation #15: AER Issue Review – Municipal Tax Payment

The *Responsible Energy Development Act* (REDA) should be revised to ensure that the AER imposes as a standard condition of all approvals, and as a condition of operating on an ongoing basis, the proponent shall pay all municipal property taxes. If the proponent fails to do so, the approval shall be suspended until all municipal property taxes are paid (or a tax repayment agreement entered into and abided by on terms acceptable to the municipality). This requirement shall be imposed[226] on projects that have already been approved.

Recommendation #16: AUC Issue Review – Municipal Tax Payment

Applying lessons learned in the oil and gas sector, the AUC should develop a Rule and impose, as a standard condition on all approvals, that as a condition of operating, the proponent shall pay all applicable municipal taxes. If the proponent fails to do so, the approval should be suspended until all municipal property taxes are paid (or a tax repayment agreement entered into and abided by) on terms acceptable to the municipality. This requirement should be imposed227 on projects that have already been approved.

[226] Some consideration may be necessary for transitional provisions relating to projects that have been approved previously.
[227] Some consideration may be necessary for transitional provisions relating to projects that have been approved previously.

Appendix A – Threshold Levels for CFOs

Schedule 2

Threshold Levels

Category of Livestock	Type of Livestock	Column 2 Number of Animals (registration)	Column 3 Number of Animals (approvals)
Feedlot Animals	Cows/Finishers (900+ lbs)	150 – 349	350+
	Feeders (450 – 900 lbs)	200 – 499	500+
	Feeder Calves (< 550 lbs)	360 – 899	900+
	Horses – PMU	100 – 399	400+
	Horses – Feeders > 750 lbs	100 – 299	300+
	Horses – Foals < 750 lbs	350 – 999	1000+
	Mules	100 – 299	300+
	Donkeys	150 – 449	500+
	Bison	150 – 349	350+
Dairy (*count lactating cows only)	Lactating cows* (Lactating cows only – associated Dries, Heifers and Calves are not counted)	50 – 199	200+
Swine (*count sows only)	Farrow to finish*	30 – 249	250+
	Farrow to wean*	50 – 999	1000+
	Farrow only*	60 – 1249	1250+
	Feeders/Boars	500 – 3299	3300+
	Growers/Roasters	500 – 5999	6000+
	Weaners	500 – 8999	9000+
Poultry	Chicken – Breeders	1000 – 15999	16000+
	Chicken – Layer (includes associated pullets)	5000 – 29999	30000+
	Chicken – Pullets/Broilers	2000 – 59999	60000+
	Turkeys – Toms/Breeders	1000 – 29999	30000+
	Turkey – Hens (light)	1000 – 29999	30000+
	Turkey – Broiler	1000 – 29999	30000+
	Ducks	1000 – 29999	30000+
	Geese	1000 – 29999	30000+
Goats and Sheep	Sheep – Ewes/Rams	300 – 1999	2000+
	Sheep – Ewes with Lambs	200 – 1999	2000+
	Sheep – Lambs	1000 – 4999	5000+
	Sheep – Feeders	500 – 2499	2500+
	Goats – Meat/Milk	200 – 1999	2000+
	Goats – Nannies/Billies	400 – 2999	3000+
	Goats – Feeders	500 – 4999	5000+
Cervid	Elk	150 – 399	400+
	Deer	200 – 999	1000+
Wild Boar	Feeders	100 – 299	300+
	Sow (farrowing)	50 – 99	100+

- When Dairy Replacement Heifers are housed away from the dairy, treat as Beef – Feeders.
- When Dairy calves are housed away from the dairy, treat as Beef – Feeder Calves.

Appendix "B"

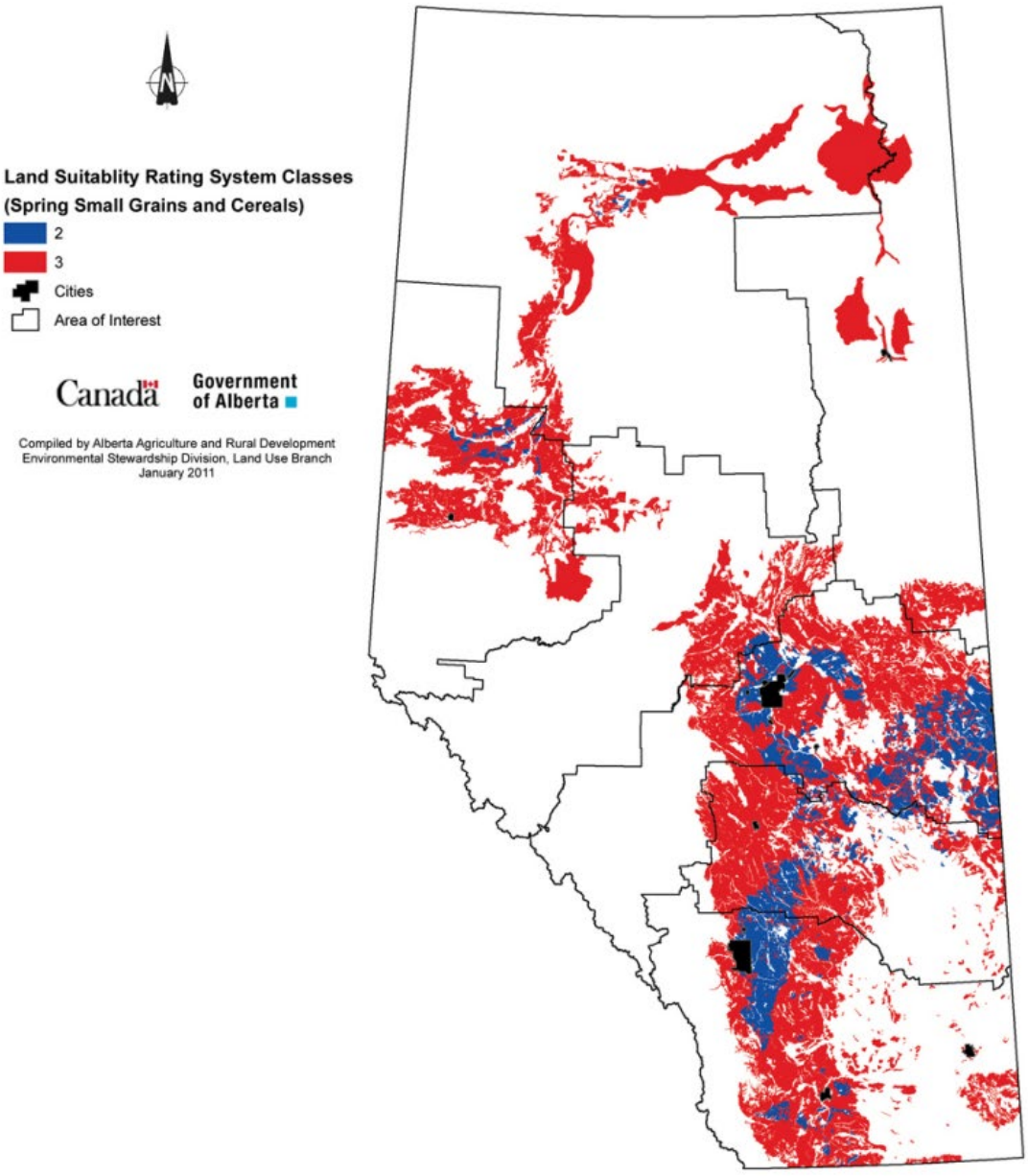
Provincial Paramountcy in Planning Decisions

Greatest Provincial Paramountcy

MGA Reference **Subject matter**	s. 619 NRCB, ERCB, AER, AEUB, and AUC approvals/licences/permits	s.618(2.1) NRCB Approvals for specified confined feeding operations and manure storage facilities	ss. 618(1)(b) and (c) Well, battery, or pipeline approvals
Legislation	*Municipal Government Act*	*Agricultural Operations Practices Act*	*Municipal Government Act*
Scope or mandate of provincial body	The NRCB, ERCB, AER, AEUB, and AUC may issue licences, permits, and approvals etc. (municipalities may wish to participate in the proceedings before these boards. Examples: NRCB: recreational or tourism projects like the Town of Canmore three Sisters Development[228] ERCB: see AER[229] AER: Pipelines, wells, processing plants[230] AEUB: See AUC[231] AUC: power plant[232] (including wind projects or solar facilities).	In considering an application an approval officer must consider whether the application is consistent with the Municipal Development Plan land use provisions, and deny the application if not. [233] However, on a review of a decision the NRCB must only have regard to, but is not bound by the Municipal Development Plan.[234]	A well, battery, Pipeline, or an installation or structure incidental to the operation of a pipeline may be approved for land within a municipality with no municipal input or authorization.
Impact on municipal planning authority	A municipality planning authority can be forced to alter municipal legislation and issue development permit if application is consistent with provincial tribunal approval.	MGA s. 618(2.1): part 17 of the MGA and the regulations and bylaws thereunder respecting development permits do not apply to confined feeding operations or manure storage facilities within the meaning of the *Agricultural Operation Practices Act*, if subject to approval or registration under Part 2 of that Act. Therefore, no municipal development permits can be required; municipal planning framework is to be considered (see above)	A municipal planning authority has no control over where a well, battery, pipeline, or an installation or structure incidental to the operation of a pipeline may be located.

[228] *Natural Resources Conservation Board Act*, RSA 2000 c N-3 s 4(b).
[229] *Responsible Energy Development Act*, SA 2012, c R-17.3 ss 1(1)(p), 82
[230] *Responsible Energy Development Act*, SA 2012, c R-17.3 s 2(2)(a).
[231] AUC Act, ss. 80, 83.
[232] AUC Act, ss.9(3)(b), 17(1), 22(1).
[233] AOPA, ss 20(1), 22(2).
[234] AOPA, s 25(4)(g).

Appendix "C"


Land Suitablity Rating System Classes
(Spring Small Grains and Cereals)
2
3
Cities
Area of Interest
Canada
Government of Alberta
Compiled by Alberta Agriculture and Rural Development
Environmental Stewardship Division, Land Use Branch
January 2011