

Alberta Energy Regulator's New Directive 067 increases scrutiny on licence eligibility

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In July 2020, the Alberta government issued its new Liability Management Framework (the Framework), aimed at reducing the province's inventory of orphan and inactive well sites. In December 2020, the Alberta Energy Regulator (the AER) announced steps to implement the Framework through changes to the *Oil and Gas Conservation Rules* (OGCR) and *Pipeline Rules* that allow the AER to develop new liability management programs.

You can find a summary of the Framework in our [Osler update](#) from August 2020, and an overview of changes to the OGCR and *Pipeline Rules* in our December 2020 [Osler update](#).

In its latest move to implement the Framework, the AER released a new edition of Directive 067 (the New Directive) on April 7, 2021, replacing the previous version of the rules on licence eligibility that had been in place since December 2017.

The New Directive makes changes in three key areas of licence eligibility:

- financial disclosure requirements;
- assessment criteria for determining "unreasonable risk"; and
- general requirements for maintaining licence eligibility.

Together, these changes represent increased scrutiny by the AER to ensure that licences are "only granted to and maintained by responsible parties throughout the energy development life cycle." These changes are part of a shift to replace the previous Licensee Liability Rating program (which only looked at a licensee's assets and liabilities) with a more holistic "licensee capability assessment" that accounts for broader factors, such as a licensee's financial capability.

In this update, we provide an overview of the changes implemented through the New Directive.

Three key changes to licence eligibility requirements

Increased financial disclosure

The New Directive requires additional financial information from companies, both when they apply for a licence or approval from the AER and throughout the life cycle of a project. This additional information will be used by the AER to assess licensee eligibility and the ability of a licensee or approval holder to meet their regulatory and liability obligations throughout the life cycle of a project, as well as to administer the AER's liability management programs and

fulfill its mandate of ensuring safe, orderly and environmentally responsible energy development.

In particular, a new fillable form (Schedule 3^m) must now be used to submit required financial information. A completed Schedule 3 form and financial statements must be submitted when a company applies for a licence or approval from the AER and annually thereafter (once finalized, but within 180 days of fiscal year end).

The required financial statements must be audited, although management-prepared statements may be acceptable if audited statements are not available. In the case of a new company with no financial history, details of financing must be provided. In the case of a company whose financial records are consolidated into a parent company's financial statements, a financial summary (Schedule 3) and the consolidated financial statements for that parent company must also be submitted when the company applies for a licence or approval from the AER.

Financial information provided to the AER under this new requirement will be kept confidential for the time period outlined in section 12.152(2) of the OGCR (currently, 5 years). After reviewing the financial information provided by an applicant or by a licensee or approval holder, the AER may request additional information from the company.

The first annual Schedule 3 and financial statement (based on 2020 data) must be submitted this year within 180 days of a company's fiscal year end. The AER has also encouraged all licensees and approval holders to submit Schedule 3 forms and financial statements for the 2018 and 2019 fiscal years (if they have not already done so), which the AER can require under the New Directive.

New factors for assessing unreasonable risk

The New Directive also introduces additional factors that the AER may consider when determining whether the applicant, licensee or approval holder poses an "unreasonable risk" of orphaning assets and is therefore ineligible to hold a licence or approval. These additional factors significantly expand what the AER can examine in its evaluation of a company and they include:

- failure to maintain persons in Alberta who are authorized to make decisions and take actions on behalf of the licensee or approval holder to address any matters or issues that arise in respect of the wells, pipelines, facilities, well sites and facility sites of the licensee or approval holder;
- working interest participant arrangements, including participant information and proportionate shares;
- the financial health of entities currently associated or affiliated with the applicant, licensee, or approval holder or its directors, officers and shareholders (in addition to the financial health of the company itself);
- the assessed capability of the applicant, licensee or approval holder to meet its regulatory and liability obligations throughout the energy development life cycle;
- the assessed ability of the applicant, licensee or approval holder to provide reasonable care and measures to prevent impairment or damage in respect of a pipeline, well, facility, well site or facility site;

- outstanding debts owed for municipal taxes, surface lease payments or public land disposition fees or rental payments by the applicant, licensee or approval holder, or by current or former AER licensees or approval holders that are directly or indirectly associated or affiliated with the applicant, licensee or approval holder, or its directors, officers or shareholders;
- cancellation of or significant reduction to insurance coverage; and
- any other factor the AER considers appropriate in the circumstances.

These factors are in addition to those carried over from the previous edition of Directive 067, which the AER may also consider. These pre-existing factors include compliance history; the experience of the company; its corporate structure and financial health; outstanding debts or non-compliances; involvement of the company's directors, officers or shareholders in entities that have initiated or are subject to bankruptcy or receivership proceedings; and naming of directors, officers, or shareholders under section 106 of the *Oil and Gas Conservation Act* (in connection with the contravention of an order of the AER or an outstanding debt for suspension, abandonment, remediation or reclamation costs).

New requirements to maintain eligibility

As with the previous edition of Directive 067, licensees must meet the New Directive's licence eligibility requirements on an ongoing basis and inform the AER within 30 days of a "material change." However, the New Directive adds to the list of changes that require notification and imposes other requirements.

Under the New Directive, material changes now include reductions in insurance coverage and any "significant change to working interest participant arrangements, including participant information and proportionate shares." In the past, a material change included changes to "control persons", defined as "any person or company, or combination of persons and companies, that hold or control more than 20%". Now, the New Directive specifies that "changes to directors, officers, or shareholders directly or indirectly holding 20% or more of the outstanding voting securities of the licensee or approval holder" are material changes triggering a requirement to inform the AER.

The New Directive also now requires licensees and approval holders to:

- submit financial information on an annual basis (as noted above);
- have and maintain at all times an official regulatory email address that is frequently monitored for regulatory communication with the AER;
- immediately notify the AER if contact information has changed, insurance coverage is cancelled or significantly reduced, or in the event of insolvency proceedings; and,
- notify the AER within 30 days of defaulting on debt or violating debt covenants.

Also in the New Directive, the AER may now request additional information following a material change in order to better assess whether the licensee now poses an unreasonable risk.

What changes are still to come?

The AER has announced that several changes to requirements, processes and systems are planned to implement the new Framework. While there is no set timeline for these changes, we expect to see further developments soon, along with opportunities for public input.

Future AER directives and regulatory or policy changes will have to address the following outstanding aspects of the Framework:

- proposed mandatory five-year rolling spending targets for site reclamation;
- a guidance and support program for operators; and
- a process for addressing how to fully reclaim legacy and post-closure sites to current reclamation standards.

In addition, it remains unclear whether the AER intends to amend its requirements or practices related to licence transfers, which we expect will also be clarified in the coming months.

These future changes could present material challenges and opportunities for certain market participants, and we encourage all market participants to closely follow these developments over the coming months.

[1] Instructions from the AER on how to use the new Schedule 3 are available online: https://static.aer.ca/prd/documents/forms/Directive067_Schedule_3_HowTo.pdf.