January 7, 2013

The *Responsible Energy Development Act* and the *Water Act* – cloudy confluences

Written by: Arlene Kwasniak

After 18 consecutive hours of steamed debate Alberta Legislature passed Bill 2, the *Responsible Energy Development Act*, (REDA) into law on November 21st, 2012 (see *Calgary Herald*, 11-21-2012, here). The Bill received Royal Assent on December 10th, and except for some exceptions, comes into force on Proclamation (REDA, s 113). The ABlawg has distilled much of the Bill in its numerous discussions posted on Bill 2 (see posts under the category Responsible Energy Development Act here) and will continue its stream of comments on the REDA. This ABlawg post navigates some of the actual and potential impacts of the REDA on water management in the Province under the *Water Act*, RSA 2000, c W-3 (canlii), one of the "specified enactments" under the REDA. As will be seen, subject to forthcoming regulations, there could be a deluge of potential impacts, that could, unless the regulations are very clear, circumscribed, and publicized, obfuscate water management and perplex water users and the public.

The mandate of the Alberta Energy Regulator ("Regulator") under the REDA includes to "consider and decide applications and other matters under the *Water Act* in respect of energy resource activities" (REDA s 2(2)(d)); "to monitor energy resource activity site conditions and the effects of energy resource activities on the environment" (REDA s 2(2)(i)); and "to monitor and enforce compliance with energy resource enactments *and specified enactments* in respect of energy resource activities (REDA s 2(2)(j) emphasis added).

Section 24 of the REDA more broadly states that except as otherwise provided by regulations:

(a) all powers, duties and functions of officials set out in a specified enactment are to be carried out by the Regulator instead of the officials to the extent that those powers, duties and functions are to be carried out in respect of energy resource activities,
(b) all powers, duties and functions of a department, the Government or the Crown set out in a specified enactment are to be carried out by the Regulator instead of the department, Government or Crown to the extent that those powers , duties and functions are to be carried out in respect of energy resource activities,
(c) the administration of provisions of a specified enactment relating to the carrying out of a power, duty or function in respect of energy resource activities is to be carried out by the Regulator,
(d) the Regulator shall act in accordance with the specified enactment in the carrying out of the powers, duties and functions referred to in clauses (a), (b), and (c), and

(e) a reference in a specified enactment to an official, a department, the Government or the Crown in relation to the carrying out of a power, duty or function in respect of energy resources activities is a reference to the Regulator.

Section 23 of the REDA defines an "official" to include (among others) a director, inspector, and investigator. These, especially a director, have key roles under the *Water Act.* Section 25 of the REDA provides that, except as otherwise set out in regulations "an application, decision or *other matter* under a specified enactment in respect of an energy resource activity must be considered, heard, reviewed or appealed, as the case may be, in accordance with this Act and the regulation and rules instead of in accordance with the specified enactment" (emphasis added).

An "application" means for an approval (REDA s 1(1)(a)); an "approval" means a "permit, licence, registration, authorization, disposition, certificate, allocation, declaration, or other instrument or form of approval, consent or relief (REDA s 1(1)(b)); a "decision" of the Regulator includes an "approval, order, direction, declaration or notice of administrative penalty … (REDA s 1(1)(f)); and "other matter" is not defined, but under rules of statutory interpretation would include , any other matter, which can be read *esjudem generis* with an already very broad class of matters.

In addition, subject to regulations, the Regulator has the powers to exercize inspection, investigation, compliance, and enforcement matters under specified enactments, such as the *Water Act* (REDA, s 69).

Taking all of the provisions above together, the Regulator appears to have jurisdiction to consider and decide applications and other matters, to conduct or oversee appeals, and to monitor, and investigate, enforce compliance under the *Water Act* "in respect of energy resource activities" and generally to monitor effects of resource activities "on the environment" which by definition in the REDA includes water (s 1(1) (k)). In short, it seems that, again, subject to regulations, the REDA requires that almost anything that can be done by a statutory delegate under the *Water Act*, must be done by the Regulator, provided that the anything is "in respect of energy resource activities." So the key to anchoring the relationship between the REDA and the *Water Act* is determining what "in respect of energy resource activities" means.

The Supreme Court of Canada directs that legislation be interpreted in accordance with E. A. Driedger's modern principle (e.g. *United Taxi Drivers Fellowship of Southern Alberta v Calgary (City)*, [2004] SCJ No 19 (SCC), at para 8). This approach requires "the words of an Act ... to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*ibid*, referring to E. A. Driedger, Construction of Statutes (2nd ed. 1983), at 87; and *Bell ExpressVu Limited Partnership* v *Rex*, [2002] 2 SCR 559, 2002 SCC 42, at para 26). In *United Taxi* the Supreme Court points out that this approach is consistent with section 10 of Alberta's *Interpretation Act*, RSA 2000, c I-8, "which provides that every provincial enactment must be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects" (*United Taxi*, *ibid*).

Given this statutory interpretation framework, what *Water Act* related decisions, official actions, etc. reasonably might be "in respect of energy resource activities"? The REDA defines an "energy resource activity" to mean "an activity that may only be carried out under an approval issued under an energy resource enactment" (REDA, s 1(1) (i) (i)) or "an activity described in regulations that is directly linked or incidental to the carrying out of an activity referred to in

subclause (i)" (REDA s 1(1) (i) (ii)) (there are no regulations yet). It should be fairly simple to determine what activities may only be carried out under an approval under an energy resource enactment, and that those activities will usually include such things (among others) as exploring, developing, and producing energy resource interests. But the Regulator has jurisdiction under specified enactments that concerns decision and actions "in respect of" such activities. What does "in respect" add? Utilizing a contextual approach, "in respect of" in subclause (i) is broader and more general than "directly linked or incidental" in subclause (ii). Accordingly, on one hand, being *in respect of* an energy resource activity should be interpreted more broadly than being *directly linked or incidental to* the carrying out of an energy resource activity. On the other hand, if subclause (ii) is to be read harmoniously with subclause (i) and not to be absorbed into it, then there must be limitations to interpreting subclause (i) such that *in respect of energy resource activities,* does not include all activities that are directly linked or incidental to carrying out an energy resource activity.

Rather than to plunge into these murky statutory interpretation waters at this time, suffice it to say that, without regulations, it is not possible to be precise on the extent to which water management functions under the *Water Act* belong to the Regulator. However, it is eye opening to canvass the extent to which *Water Act* decisions and other official actions may be caught in the Regulator's net.

Pursuant to section 24 of the REDA, there are a number of statutory delegates under the *Water Act* whose functions may potentially be exercised by the Regulator under the REDA in respect of energy resource activities. As mentioned earlier, these include a director, an inspector, and an investigator, the Department, the Government and the Crown. This ABlawg post will focus only on the functions of a *Water Act* Director, though a similar exercise could be carried out with respect to other statutory delegates.

Here are some of the functions a Director under the *Water Act* is empowered to carry out:

(a) A Director may administer priorities among users, and may issue a water management order with respect to priorities which determines the order of diversions (*Water Act,* s 32(1) and section 97(1) (a)).
(b) A Director has the authority to oversee and voluntary assignments among licencees in times of shortage and to direct that water not be diverted under assignments if rights of household users, and authorized users with a higher priority may be affected (*Water Act,* s 33(4)-(6)).
(c) The Director considers and issues (or refuses to issue) approvals for activities that impact water resources and in doing so must consider effects on the aquatic environment, hydrology, and on other water users (*Water Act,* s 38, definitions of "activity," s 1(1) (c) (b)).
(d) The Director may amend approvals, on accordance with the *Act* (*Water Act,* s 42), or cancel or suspend approvals, for a number of reasons, (*Water Act,* s 43) including if the Director is "of the opinion that a significant adverse effect on the aquatic environment, human health or public safety occurred, occurs or may occur that was not reasonably foreseeable at the time the approval was issued (*Water Act,* s 43(1)(viii)) or an adverse effect on other authorized water users (s 43(1)(ix)).
(e) The Director considers and issues (or refuses to issue) licences for water diversions, and in doing so must consider effects on the aquatic environment, hydrology, and on other water users (*Water Act,* s 51).

(f) The Director may amend licences, in accordance with the *Act* (*Water Act,* s 54), or cancel or suspend licences, for a number of reasons, (*Water Act*, s 55) including, with respect to licences issued under the *Water Act,* if the Director is "of the opinion that a significant adverse effect on the aquatic environment, human health or public safety occurred, occurs or may occur that was not reasonably foreseeable at the time the approval was issued (*Water Act,* s 55(2)), or if in the opinion of the Director, a significant adverse effect on human health or public safety occurred, occurs or may occur that was not reasonably foreseeable at the time the licence was issued (*Water Act*, s 55(1)(j)).

(g) The Director may issue licences for a temporary diversion of water (*Water Act* , s 63) or amend, suspend, or cancel a temporary diversion of water licence (*Water Act*, s 634)

(h) The Director may determine transfers of water allocations and whether there will be a water conservation holdback (*Water Act*, ss 81-83).

(i) The Director may issue water management orders for the purposes set out in section 97 of the *Water Act*, and determine the terms of such order under section 99 of the Act.

(j) The Director may declare an emergency if a water diversion, activity, or operation of works where they is or may be an immediate and significant adverse effect on the aquatic environment, human health, property or public safety (*Water Act* s 105).

(k) The Director plays key roles in determining with respect to determining compliance with the *Water Act*, including inspections, investigations, and in issuing and following up with enforcement orders (*Water Act*, Part 10).

So how is the Regulator to take the Director's place in carrying out some of the functions (subject to regulations)? The Director is not just one person under the *Water Act.* There are different Directors for different regions, each whom is immersed in the numerous water issues and concerns in the region. These issues and concern include, among countless others, groundwater and surface water allocations (and their interactions), flooding, drought, uses by households, municipalities, agriculture, a variety of industries, instream flow for fisheries and aquatic habitat, health and human needs, priorities among users, particularities of licenced and exempt uses within a region, and so on and on. One of the Director's functions almost assuredly to be taken over by the Regulator is (e) above, issuing diversion licences where carrying out an energy resource activity requires one. As set out above, under the *Water Act* in considering a licence application, the Director may consider, among other things, the effect on the aquatic environment, hydraulic, hydrological and hydrogeological effects, and effects on household users, other licencees and authorized users, and effects on public safety. How is this meant to play out when the REDA is in force? The existing Director presumably already has the knowledge and experience (or knows where to go to get it) to consider the myriad of information and data required to make a reasoned determination in accordance with the *Water Act.* It is hard to see how making the Regulator responsible for that decision will result in greater efficiency (a key policy driver for the REDA). Also it is hard to see how the Regulator's mandate under the REDA to provide for the "development of energy resources in Alberta" (albeit in an "efficient, safe, orderly, and environmentally responsible" manner (REDA, s 2)) will jibe with the more general conservation and management of water resources mandate under the *Water Act* (*Water Act*, s 2) that the Regulator also would be obliged to recognize when determining whether to issue a diversion licence in respect of an energy resource activity.

And issuing licences is a straightforward case. What about some of the other functions of a Director under the *Water Act*? Suppose a household user of water contacts a *Water Act* Director reporting that the licenced use of water by an energy resource operator in respect of an energy resource activity (e.g. use of groundwater for secondary recovery) is negatively impacting the household use (e.g. groundwater pumping for household purposes under section 21 of the *Water*

Act). Under the *Water* Act a household user's use has priority over a licenced water use (*Water Act*, s 27(b)). If the Director investigates under Part 10 of the *Water Act*, and as a result of an investigation agrees with the household user, the Director can administer priorities (*Water Act*, s 32(1)) and issue a water management order to the energy resource operator, if necessary (*Water Act*, section 97(1)(a)). What happens after the REDA is in force? There are a couple of possibilities. None of these Director's functions might be given to the Regulator under the REDA forthcoming regulations, or one or more of these functions might be given to the Regulator. If all of these functions are given to the Regulator then the Director must hand the matter over to the Regulator to investigate and follow through or not. If only one or some of these functions are given to the Regulator then authority will bob back and forth. In the meantime, what is the position the household user? To whom should he or she go for information, help, and action?

Then there is a perhaps bottomless pool of iffy cases. For example, suppose an energy resource operator wishes to transfer a portion of its energy resource related water licence under sections 81-83 of the *Water Act.* Is this an application in respect of an energy resource activity? Who will decide this? To whom does the energy resource operator apply for the transfer, the *Water Act* Director, or the Regulator? What if the wrong process is invoked? Would it matter if the proposed transferee was another energy resource operator who needed the water in an energy resource related activity? What if the proposed transferee was someone independent of the energy industry (e.g. an agricultural user)? Would this make a difference?

So where will water management end up after the REDA is in force? Probably not at an always knowable and readily accessible port, at least for many water related matters. It is hard to imagine that water management will be as clear and efficient as it is today (and this is not to say that it is completely clear or efficient today). Given the tremendous importance of water to all Albertans and the aquatic environment, as reflected in numerous Alberta government water policies, (e.g. *Water for Life*, Alberta's *Wetland Policy* for the White Area of the Province (and forthcoming comprehensive policy), the *Provincial Wetland Restoration/Compensation Guide*, the *Instream Flow Needs and Water Management System for the Lower Athabasca River*) one can only hope that the regulations will be as comprehensive, clear, and available as possible, and that they will rationally take into account the multi-faceted features, goals, and purposes of water management under the *Water Act.*