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Amended Rules of Practice for the Alberta Energy Regulator: More Bad News for Landowners and Environmental Groups

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Legislation commented on: *Alberta Energy Regulator Rules of Practice* as amended by Alta Reg 203/2013

In the Fall of 2012 ABlawg published a series of entries concerning the enactment of the *Responsible Energy Development Act*, SA 2012, c R-17.3 (*REDA*) and the transition to a single regulator for energy projects in Alberta. That transition is now underway. The Alberta Energy Regulator is responsible for the approval and ongoing oversight of energy projects – and will soon be responsible for all energy project approvals and oversight other than the disposition of mineral rights by Alberta Energy.

REDA is umbrella legislation, which means much of the detail on how the Regulator will administer its mandate is left for subordinate rules and regulations. The details have begun to emerge with the *Specified Enactments (Jurisdiction) Regulation*, Alta Reg 201/2013, *Responsible Energy Development Act General Amendment Regulation*, Alta Reg 202/2013, *Rules of Practice Amendment Regulation*, Alta Reg 203/2013, and the *Enforcement of Private Surface Agreement Rules*, Alta Reg 204/2013. And I'm sure more is on the way. All of these new rules and regulations are posted to the Regulator's website. The *Rules of Practice Amendment Regulation* provides some insight into landowner and public participation before the Regulator, and this is my focus here. Osler has also posted some commentary on its website (see here). That the rules of practice need to be amended to such an extent only 6 months after their initial enactment suggests the first version was not fully considered – this is not good governance and reflects poorly on the Alberta government in my view.

The most relevant provisions of *REDA* governing participation before the Regulator concerning an application made for energy project approval are sections 31 thru 34:

> 31. The Regulator shall on receiving an application ensure that public notice of the application is provided in accordance with the rules.
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> 32. A person who believes that the person may be directly and adversely affected by an application may file a statement of concern with the Regulator in accordance with the rules.
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> 33(1) Where a statement of concern is filed in respect of an application, the Regulator shall decide, in accordance with the rules and subject to section 34, whether to conduct a hearing on the application. …

> 34(1) Subject to subsection (2), the Regulator may make a decision on an application with or without conducting a hearing.
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> (2) The Regulator shall conduct a hearing on an application
> (a) where the Regulator is required to conduct a hearing pursuant to an energy resource enactment,
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> (b) when required to do so under the rules, or
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> (c) under the circumstances prescribed by the regulations.
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> (3) If the Regulator conducts a hearing on an application, a person who may be directly and adversely affected by the application is entitled to be heard at the hearing.
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> (4) A hearing on an application must be conducted in accordance with the rules.

I've made a number of observations concerning these provisions in an earlier ABlawg entry (See Bill 2 and its implications for landowner participation in energy project decision-making) and for ease of reference I'll summarize them again.

The first observation is that the provisions of *REDA* alone do not provide a legal right to participate in front of the Regulator. Section 34(2) obligates the Regulator to conduct a hearing only in circumstances where an 'energy resource enactment' requires it (these enactments are defined in *REDA* to mean the various energy sector-specific statutes such as the *Oil and Gas Conservation Act*, RSA 2000, c O-6, which provide hearing rights for energy companies, not landowners or the public in general) or in circumstances set out in rules or regulations. The amendments to the Rules described in this comment are presumably to be some of these circumstances. To be clear however, these Rules contain no legal right to a hearing for landowners or the public in general and if anything the Rules speak more to denying hearings or the ability to otherwise participate before the Regulator.

The second observation is that a person who feels they may be directly and adversely affected by an energy project must initially file a statement with the Regulator documenting their concern(s). The amended Rules now clearly indicate that failure to properly file this statement of concern with the Regulator pretty much extinguishes any possibility of participation under *REDA* by a landowner or anyone else.

The third observation is that participation by landowners or the public generally in energy project decision-making is entirely within the discretion of the Regulator. *REDA* itself does not obligate the Regulator to conduct a hearing before deciding whether to approve a project application.

The amended Rules now provide some insight into how the Regulator will exercise its discretion concerning who gets a hearing or otherwise participates in an energy project decision. In many respects the Rules amount to a list of factors the Regulator may (not must) consider in exercising this discretion. What follows is a description of the new Rules organized under particular topics.

Public notice of applications

Section 31 of *REDA* requires the Regulator to give public notice of energy project applications. Section 5 of the Rules now prescribes the mandatory content of the notice. That content includes a description of the proposed project and setting the deadline for receiving a statement of concern. Section 5.1 of the Rules provides the manner in which notice is made public. What is noteworthy about section 5.1 is that 'public' notice does necessarily mean a posting on the Regulator's website. The Regulator may satisfy 'public' notice by a newspaper advertisement or even making the application available in its local office. Why 'public' notice does not necessarily mean posting to its website is a strange one to me in this age of tweets and the internet generally. It is fine to disseminate notice of an application by various means, but surely posting to the Regulator's website should be mandatory. And if that is the intent, why not just say so in the Rules?

Statements of Concern

Section 32 of *REDA* entitles a person to file a statement of concern with the Regulator where they feel an energy project may directly and adversely affect them. Section 5.3 of the Rules now states a person must file their statement of concern no later than 30 days after the issuance of public notice or within a different time period set out in the notice. This is a curious provision. It isn't clear why this section is even necessary since section 5 requires the notice to prescribe the deadline for filing, and so presumably the deadline in the notice will always govern.

Section 6.2(1) of the Rules provides factors the Regulator may consider in deciding whether to accept a statement of concern as duly filed. It is important to understand that simply filing a statement of concern under section 32 of *REDA* does not mean it has been duly filed under *REDA*. The statement must be 'accepted' by the Regulator – you won't find this stated as such in the statute however. It is also noteworthy how section 6.2 is worded. The section describes the factors as circumstances in which the Regulator may disregard a statement of concern. These factors – and others described below – all seem very negative towards public participation. The factors/circumstances which the Regulator may consider in deciding whether to accept or disregard a statement of concern are:

- Has the person demonstrated they may be directly and adversely affected by the application
- Was the statement of concern filed on time
- Has the Regulator already decided the application (i.e. the statement of concern is moot)
- Any other factor the Regulator considers relevant

There is nothing too unusual in this list, and the fact it is non-exhaustive leads me to question the need for 6.2(1). However, section 6.2(2) is more interesting and takes things a step further by setting out factors/circumstances in which the Regulator may disregard a particular concern mentioned in a statement. Presumably this means there will be cases where the Regulator accepts part of a statement but not the entire statement. The factors/circumstances which may lead the Regulator to disregard a particular concern are (together with my own commentary on what I think this means in practice):

- the subject matter of the concern is outside the jurisdiction of the Regulator (think aboriginal rights)
- the concern is unrelated to the application in question or beyond its scope (think cumulative environmental effects)

- the concern relates to government policy (think water, carbon emissions, species at risk and other large-scale environmental issues)
- the concern is too vague (think concerns raised by some unrepresented parties)

Section 6.1 of the Rules also sets out additional cases besides an energy project application where the Regulator may accept a statement of concern. I'm not sure what legislative authority there is for this in section 6.1, but nonetheless it does address what is otherwise an oversight in *REDA* because it provides for the filing of statements of concern in relation to decisions by the Regulator concerning matters such as license amendments or approvals issued under the *Water Act*, RSA 2000, c W-3 for energy projects (part of the transition from Alberta Environment to the Regulator).

Normally the Regulator will not make a decision on a project application before the time period for filing a statement of concern expires (see section 5.2(1) of the Rules). However there are exceptions that allow for expedited decisions. These exceptions are set out in sections 5.2(2) and 5.2(3), and they include:

- routine applications under AER Directive 056 where, for example, there are no objections to the project
- the Regulator forms the opinion the project will have minimal or no impact on the environment
- the decision in question is an amendment to an existing license or approval under the *Water Act*
- emergencies

Hearings

Failure to properly file a statement of concern with the Regulator pretty much extinguishes any possibility of participation in an energy project decision-making process. However, the filing of a statement of concern does not necessarily guarantee participation either. *REDA* does not obligate the Regulator to hear landowners or the public in general, and their participation in energy project decision-making is thus entirely within the discretion of the Regulator. Section 34(3) of *REDA* comes closest to providing persons who may be directly and adversely affected with hearing rights, however the section only obligates the Regulator to hear such persons IF the Regulator first decides to conduct a hearing.

Section 7 of the Rules now provides a non-exhaustive list of factors the Regulator may consider in exercising this discretion on whether to conduct a hearing. These factors include those which may be considered by the Regulator in relation to statements of concern noted above, plus the following:

- the extent to which the person who filed the statement of concern has tried to resolve its concerns with the applicant
- whether the project in question will result in minimal or no environmental impact
- whether the Crown has requested a hearing to address the impact of the project on aboriginal rights

In short, the Rules do not require the Regulator to conduct a hearing. So section 34(2)(b) of *REDA* – which requires the Regulator to conduct a hearing when required to do so by the rules - continues to have no substantive meaning since the rules contain no such requirement.

Interveners

Traditionally getting an opportunity to participate as an intervener (as opposed to the person with hearing rights) in a regulatory hearing was straightforward and non-contentious – presumably interveners are generally welcome because they have a genuine interest in the matter and provide the decision-maker with more information concerning the decision to be made. Times have changed. Section 9 of the Rules suggests it will now be more difficult to intervene in a hearing before the Regulator. Remember we are talking about participation in a hearing that will be conducted anyways at the request of another participant. So these are not hearing rights.

As with many of the new provisions noted above, section 9 lists a number of factors the Regulator will consider in deciding whether to allow an intervention. Perhaps the most notable item here is that an intervener must also explain how they may be directly and adversely affected by a project application. Section 9 also suggests that if the intervener did not file a statement of concern with the Regulator, this fact will be used against them, or they will at least have to explain why the statement wasn't filed. Query though what point this has, since if a statement of concern was filed by a person and no hearing was called, in what process will they be hoping to intervene?

If a potential intervener cannot demonstrate how they may be directly and adversely affected by the project, that person must convince the Regulator they nonetheless have a tangible interest in the matter, won't cause unnecessary delay, and won't duplicate the evidence of others at the hearing. Groups or associations will likely have to demonstrate that a majority of their members may be directly or adversely affected by the project in question. The overall message here is that interventions are generally not welcome, and public interest groups need not apply at all!

A person who is allowed to intervene will participate in a manner to be determined by the Regulator. Section 9.1 of the Rules gives the Regulator the power to determine the scope of an intervention, in terms of whether the intervener will be allowed to give evidence, cross-examine the applicant, make legal argument, and the like. This is really a codification of existing practice at the Regulator.

Cost Awards

Section 61(r) of *REDA* provides the Regulator with full discretion to make rules governing the awarding of costs to hearing participants. The Regulator and its predecessors have always had said discretion over cost awards – although the now-repealed *Energy Resources Conservation Act*, RSA 2000, c E-10 did include a legislated framework for how that discretion would be exercised. In *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, the Court of Appeal added to this by ruling that energy project review hearings are an important component of resource development in this province and that cost awards may be a practical necessity if the Regulator is to fulfill its mandate of giving Albertans an open, transparent and accessible process in which to give input to public decisions that affect their rights (at paras 33, 34).

Section 58.1 of the Rules is now the provision which sets out the factors the Regulator will consider in deciding whether to make an interim, advance, or final cost award to a hearing participant. This new section replaces section 64 which had only been in force since June 2013.

As was the case previously, a participant must demonstrate costs incurred are reasonable and directed towards participation that is relevant and helpful (I'm paraphrasing a lot here). But notable in the new section 58.1 is paragraph (a) which states the Regulator will consider whether there is a compelling reason why the participant (landowner) should not bear their own costs. To me this reads like an onus provision – in other words the rebuttable presumption going in is that a landowner or other participant should bear their own costs. In my view, this is inconsistent with the Court of Appeal's 2012 *Kelly* ruling that cost awards may be a practical necessity.

The overall message in these new Rules is that the Alberta government and the Regulator see little value in public participation concerning energy project decision-making and have little regard for participation even by landowners who may be directly affected by a project. Public participation in energy and environmental decision-making in Alberta is almost non-existent. The ability of Albertans to give input into public decisions that affect their rights has suffered a major setback under this new regime. The only real opportunity for public input into how resources owned by the public are to be developed is at the land-use planning stage – when the dialogue remains in generalities and occurs in the future tense. Even at that stage, the decision-making occurs behind closed doors. Once the shovels are poised to hit the ground the time for talk is definitely over.