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Protecting Alberta's Environment Act: A Keystone Kops Response to Environmental Monitoring and Reporting in Alberta

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Legislation commented on: *Protecting Alberta's Environment Act*, [SA 2013, c P-26.8](#)

The *Protecting Alberta's Environment Act* received [royal assent](#) on December 11, 2013, and the statute will come into force on proclamation at a later date. The title of this new legislation suggests it is a reworking of environmental protection laws, along the lines of the *Alberta Land Stewardship Act*, SA 2009, c A-26.8, which enacted a new framework for land use planning in 2009, or the *Responsible Energy Development Act*, SA 2012, c R-17.3, which reconfigured energy project regulation this year in Alberta. Anyone with these kinds of expectations will be disappointed though. The sweepingly broad title is misleading as the Act really just targets environmental monitoring and reporting, and is the Alberta legislature's response to the 2012 Report issued by the Alberta Working Group on Environmental Monitoring, Evaluation and Reporting (see [here](#)). What follows are my comments on the *Protecting Alberta's Environment Act*. My overall synopsis is that the Act accomplishes very little, reads as if it was put together in a hurry, and unfortunately allows politics to override science and transparency when it comes to environmental monitoring and reporting.

Generally speaking the law on environmental protection is largely contained in statutes, regulations, and bylaws. In other words, the courtroom takes a backseat to the legislature when it comes to the legal implementation of environmental norms, principles or concepts such as the precautionary principle or ecological integrity. There are some good reasons for the dominance of legislation in the environmental arena, including the fact that the common law is reluctant to recognize the sort of collective rights or interests embedded within environmentalism. Indeed the fact that environmental norms gain legal traction largely by statutory rules has lots of implications (good or bad depending on your viewpoint), and I mention it here only to emphasize the importance of content in environmental legislation. If the legislature is to be our primary lawmaker on environmental matters, then good environmental stewardship demands good legislative drafting.

The *Protecting Alberta's Environment Act* is deficient on so many counts it is difficult to pick a starting point for the analysis. But since the Act purports to implement the 2012 Working Group Report, a good starting point might be to assess how the Act implements the Working Group's recommendations. The Working Group was tasked with providing recommendations on

establishing a new environmental monitoring and reporting structure in Alberta. The Working Group observed the current approach to environmental monitoring is not well coordinated, lacks a scientific foundation, has little credibility, and is not cost-effective. The Working Group formulated 12 recommendations intended to help fix this, and most notably these included recommendations to: (1) establish a single monitoring agency which is independent of line departments such as energy and sustainable resource development and representative of various stakeholders with an interest in environmental quality; (2) ensure stable and sustainable funding for monitoring, evaluation and reporting activity; and (3) ensure information and data produced by the monitoring system is timely and scientifically sound. So what does the *Protecting Alberta's Environment Act* deliver in this regard? Not too much I'm afraid.

Section 2 of the Act establishes the Alberta Environmental Monitoring, Evaluation and Reporting Agency and section 3 sets out the various purposes of the Agency which more or less follow from the Working Group Report. The purpose of the Agency is to obtain environmental data, analyze it, and report it to the public. So far so good, but the Act contains no structure on how or when the Agency will monitor and report. There are no legislated timelines. In short, there is precious little accountability or transparency here.

There is also nothing in the Act to ensure the Agency is at arm's length or otherwise independent of the executive. The directors of the new Agency are appointed by Cabinet, hold their office at the pleasure of Cabinet, and have their remuneration fixed by Cabinet (section 5). Section 11 gives Cabinet the power to enact regulations that expand or limit the powers or functions of the Agency. Section 3 states the Agency will carry out any activities prescribed by the Minister. The directors require the Minister's approval before appointing a person as the Agency's CEO (section 10). The Act makes it very clear that this Agency has close ties to the inner circle of the Alberta government and is accountable to the Minister.

The Working Group observed the Agency would need a base budget sufficient to support a wide range of activities including baseline environmental monitoring across the province, ongoing cumulative effects monitoring, evaluation of data, scientific assessments, and reporting. The Working Group noted that the oil sands region alone would likely need at least \$50 million annually to fund these activities. The Working Group considered a number of possible funding sources including specific levies on resource recovery, consumption taxes, surcharge on royalties, and allocations from the general revenue fund. The only statutory provision dealing with funding is section 3(3) of the Act which simply states the Agency may charge fees on a cost-recovery basis for services requested of it. It isn't clear at all from the Act how the Agency will be funded. It is noteworthy to compare section 3(3) of this Act with sections 28 and 29 of the *Responsible Energy Development Act* which provide the Alberta Energy Regulator with power to set and collect specific levies from oil and gas activity and in general more clearly delineate how the Regulator is funded on an annual basis.

Section 18 of the Act requires the Agency to appoint a scientific subcommittee whose members will periodically review the scientific integrity of the Agency's monitoring activities and advise the Agency accordingly. This provision is apparently designed to facilitate the scientifically sound monitoring and evaluation activities. Surprisingly though, the Act does not include any requirements concerning the credentials of these subcommittee members and provides no timelines on when the scientific assessments take place. The Act is also tantalizingly vague on when the Agency is to report monitoring data and evaluation to the public. Section 4 of the Act provides that the Agency will report to the public at a frequency determined by the Agency in *consultation with the Minister*. This provision arguably undermines the whole structure and

suggests that politics can and will override science and transparency on environmental monitoring and reporting.

This Act reads as an umbrella document on environmental monitoring which is very light on substance for an area of this magnitude and provides Cabinet and/or the Minister with a disturbingly large amount of discretionary power over an Agency which is supposed to be at arm's length in order to ensure its work is seen as credible and free of political influence. And it is not as if the Alberta government was unaware of these shortcomings in the Act. The Opposition parties tabled a total of 18 amendments during second and third readings of the Bill directed at the same concerns I've mentioned here, and each and every one of these amendments were rejected by the Conservatives (see [here](#)).

This takes me back to my opening in this post. Since the legislature is our primary lawmaker on environmental matters, good environmental stewardship demands good legislative drafting. We are entitled to expect the legislative process will address substantive shortcomings in proposed legislation and ensure the intention of the legislature is reflected in the text. Here is what the Honourable Minister Diana McQueen told Albertans during the first reading of this Bill:

Bill 31 will establish the Alberta environmental monitoring, evaluation, and reporting agency. It will be the first of its kind in Canada and will fundamentally change the way Alberta's environment is monitored. This arm's-length, open, and transparent public agency will lead environmental monitoring in Alberta. Its focus will be on sound science, a comprehensive, co-ordinated monitoring and reporting of land, air, water, and biodiversity, beginning in the oil sands area. The work of this agency will provide the best possible data that will be used to make the best possible decisions when it comes to responsible development of the province's natural resources. This bill also creates a science advisory panel, that will oversee the scientific work of the agency to ensure integrity is maintained. This is yet another step, Mr. Speaker, that this government has taken to demonstrate to Albertans and to the world that we are committed to environmental stewardship and responsible resource development.

([Alberta Hansard](#), 28th leg, 1st sess, Oct 28, 2013, page 2496)

I can't see how the text of the *Protecting Alberta's Environment Act* accomplishes what the Minister says the Act will do. Much of the legislation contains what I would call boilerplate statutory provisions, and the substantive provisions seem like a meagre effort to facilitate a robust and credible environmental monitoring system in Alberta. The name of the statute is so overly broad it fails to even capture the essence of the legislation – why not the Environmental Monitoring Act or something similar? And if the intention was to establish an arm's-length, open, and transparent public agency responsible for environmental monitoring, the drafting here is terrible. It is a testament to the sorry state of legislative process today that the Conservatives were either unwilling or too embarrassed to vote in favour of amendments tabled by the Opposition parties that would have helped to ensure the text of the Act reflected the intention pronounced by the Minister during first reading.

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