

The Proposed Single Energy Regulator: Where Are We Now and Where Do We Go from Here?

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Report commented on:

Enhancing Assurance: Developing an integrated energy resources regulator, [A Discussion Document, May 2011](#)

It has been over a year since the latest proposal to move to a single regulator for energy development in Alberta was released (see *Enhancing Assurance: Developing an integrated energy resources regulator, A Discussion Document, May 2011 (Discussion Document)*). Many Albertans are likely asking what, if anything, has happened since then. This post outlines the proposal currently before government, updates readers on any progress made, and highlights the critical issues that ought to be addressed on a go-forward basis.

What is the proposal?

In May 2011, the Alberta government published the *Discussion Document* describing a new vision for energy regulation in the province. My colleague Nigel Bankes commented on the proposal last May (see [here](#)). In a covering letter by then Premier Ed Stelmach, Albertans are urged to read the report and “envision a regulator that will meet the needs of a new century.” The report talks about integrating and consolidating project approval and review processes in order to create a more efficient and transparent regulatory regime for energy development. It also says this integration exercise presents an “opportunity to enhance energy sector regulation based on the ... principles of effectiveness, efficiency, adaptability, predictability, fairness and transparency” (at 6).

The *Discussion Document* distinguishes between the making of energy and natural resources policy from the delivery of that policy. Policy development will continue to be undertaken by the Alberta government and encompasses policies in the areas of air, water and land management, including conservation, extraction, processing and the transportation of resources. The second component is policy delivery (or, as the report calls it, policy assurance). Under the new regime, policy delivery will be performed by a single regulator with responsibility for all upstream oil, natural gas, oil sands and coal activities. The regulatory functions will cover the entire lifecycle of projects and include project review and authorization, compliance monitoring, enforcement, facilities abandonment and site reclamation. Resource conservation, processing and transportation issues will also fall to the new regulator.

How significant is this?

Right now there are several decision-makers involved in upstream oil and gas development. Alberta Energy starts the ball rolling with the sale of Crown-owned oil and gas rights. Alberta Sustainable Resource Development (SRD) grants surface leases to companies to develop those rights on public lands and regulates reclamation and remediation on those lands. The Energy Resources Conservation Board (ERCB) grants the key licences and approvals for oil and gas facilities as well as regulates most aspects of those facilities. Alberta Environment (AENV) grants licences and approvals in regard to air and water impacts relating to those facilities, conducts environmental impact assessments for some facilities, and regulates reclamation and remediation over private lands in the province. While Alberta Energy's role in disposing of oil and gas rights will remain unchanged according to the *Discussion Document*, the mandates of SRD, the ERCB and AENV will be rolled into one entity, a single regulator.

The new entity will thus have the following responsibilities in the context of energy projects: (1) AENV's current responsibilities for inspections, compliance, reclamation, remediation, and the issuing of licences and authorizations under Alberta's *Water Act* (RSA 2000, c W-3) and *Environmental Protection and Enhancement Act* (EPEA, RSA 2000, c E-12); (2) SRD's current responsibilities for issuing public lands dispositions, geophysical authorizations, rights of entry, reclamation and remediation on public lands; and (3) the ERCB's current responsibilities over well licence authorizations, subsurface scheme approvals, oil sands and facility authorizations, the energy project application process, adjudication as well as the public hearing process.

The ultimate goal to be achieved is a more efficient and competitive system through the creation of a more streamlined, consistent and less complex regulatory regime for project approvals and project monitoring. There is no doubt that the current system, with three different decision-makers involved in various aspects of energy facility regulation, suffers from some complexities, overlapping and unclear mandates, unnecessary and costly duplication, and possibly inconsistent or contradictory decision-making (see *Discussion Document* and *Regulatory Enhancement Project: Stakeholder and First Nations Engagement Summary*, [December 2010](#), at 4-6). This is not a good thing from either an industry perspective or a public involvement perspective which at a minimum requires transparent processes (see for example Nickie Vlavianos, *The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis*, [Occasional Paper #21 \(Canadian Institute of Resources Law, 2007\)](#)).

To create the single regulator, significant amendments to several statutes will be required, including the *Public Lands Act*, RSA 2000, c P-30, *EPEA*, *Water Act*, RSA 2000, c W-3, *Alberta Land Stewardship Act*, RSA 2009, c A-26.8, *Energy Resources Conservation Act*, RSA 2000, c E-10 [ERCA], *Oil and Gas Conservation Act*, RSA 2000, c O-6 [OGCA], *Pipeline Act*, RSA 2000, c P-15, and *Coal Conservation Act*, RSA 2000, c C-17. An array of regulations, directives, guidelines and codes of practice will also need to be amended.

What progress?

If there has been progress on this proposal since last May, nothing has been made publicly available. To my knowledge, no further document or consultation process has been published or announced. Nor have draft legislative amendments been made available yet.

Nonetheless, it is clear that the single regulator proposal remains high on the political agenda. In February 2012, Premier Alison Redford announced that legislation for the single energy

regulator was expected in the fall (Darcy Henton, “Province Plans Single Regulator,” *Calgary Herald* (25 February 2012)). In March 2012, she told Albertans that we would have a single oil and gas regulator by June 2013 (Jeff Lewis, “Alberta to get single oil and gas regulator by June 2013,” *Alberta Oil Magazine* (22 March 2012)). And in a June 2012 letter to her Cabinet she listed “the development of a single regulator for oil and gas” as a priority initiative for her government (see [here](#)).

Moving forward

The proposed move to a single regulator for energy projects in Alberta is poised to provide at least some relief from unclear and overlapping jurisdictions, duplicative processes and complexities inherent in a system with three decision-makers rather than one. Thus there are bound to be some improvements in terms of efficiency and transparency of process. Still, a regulatory overhaul of this nature would seem an opportune time, as the report suggests, to truly “enhance energy sector regulation” (at 6) and improve the existing system rather than simply streamline processes. Unfortunately, despite the rhetoric, much of the detail in the *Discussion Document* does not suggest enhancement and improvement. Instead, for the most part the report envisions simply shifting many of the long-standing issues and challenges plaguing the current regime onto a new — albeit single — regulator.

For one thing, despite all the talk of integration and coordination in the report, there is no discussion whatsoever of the disparate process used to dispose of Crown oil and gas rights in the province. The report shuts down any such discussion with a clear statement that “[t]he single regulator will not assume responsibility for mineral tenure, which will remain the responsibility of the Department of Energy” (at 9). But several commentators have noted the interrelationship between the rights disposition process and the project approval process. The disposition of the rights to explore and drill by Alberta Energy (through a process that focuses primarily on price) represents a critical first step in setting the course of energy development in the province. The sale sets in motion processes that ultimately determine the intensity, location and type of development in the province (see for example Steven Kennett & Michael Wenig, “Alberta’s Oil and Gas Boom Fuels Land-Use Conflicts – But Should the EUB be Taking the Heat?” [\(2005\) 91 Resources 1](#)). Once sold, legally-enforceable property rights are created which often serve to tip the balance when it comes to project approval decisions. For instance, when considering the need for a well or facility, the ERCB simply assumes that need based on the fact that property rights have been granted. It has thus been suggested that disposition decisions are inextricably linked to project approval decisions and to the question of whether the development is in the public interest (see Kennett & Wenig, *supra*).

It is thus unfortunate that there is no discussion at all in the *Discussion Document* about the rights disposition process *vis-à-vis* the project approval process. The establishment of a new regulator could be an opportune time to consider some coordination of these separate processes, thereby ensuring that at least one hand is not predetermining what the other hand does. And while it may be that some of these concerns will be alleviated through the implementation of binding regional land-use plans, this remains to be seen.

There are other long-standing criticisms of Alberta’s current oil and gas regulatory framework that the *Discussion Document* says nothing about. Many of these are based on charges of a lack of fairness, transparency and accountability, and most have been leveled against the ERCB.

One allegation is that the ERCB is a captive regulator. The argument is that it is biased towards making decisions in favor of the industry it regulates. It is thus not able to make decisions that are truly in the public interests of all Albertans. The bias is not intentional, but rather institutional in nature. It arises from several factors including the Board's history, composition, nature, and mandate (see Kennett & Wenig, *supra* and Nickie Vlavianos, "The Issues and Challenges with Public Participation in Energy and Natural Resources in Alberta" (2010) 108 [Resources](#) 1). As evidence of a built-in bias, commentators cite the Board's purpose of providing for the "economic, orderly and efficient development" of the province's oil and gas resources as well as the fact that it is funded by the oil and gas industry and receives most of its appointed members from that industry. In response, there have been periodic calls for ERCB reform — perhaps the need for an elected Board, mandatory representation from certain constituencies, a change in the funding structure, and/or changes in purposes and mandate.

Reform of the ERCB may go a long way towards ensuring trust, legitimacy and accountability. These concerns may be the root cause for why some commentators prefer a three-regulator approach of "checks and balances" (see Bankes, [here](#)). In response to prior initiatives for a single regulator, environmentalists feared that environmental standards and protection would be weakened if all decision-making powers were placed in the hands of an all-powerful board like the ERCB (see Mark Lowey, "Industry backs single regulator, but critics fear environment at risk" *Business Edge* 4:42 (25 November 2004) 1).

And yet, the *Discussion Document* contemplates a continuation of the current ERCB model for the new regulator. Although the report envisions a new entity and not simply "an expanded ERCB" (at 6), most of the details of the proposed regulator are identical to the ERCB. For example, the proposed single regulator will: (a) be established as a corporation, arm's-length from government; (b) have a Board whose members are appointed by Cabinet; and (c) be funded using the current approach for ERCB funding.

With respect to the purposes that will guide the new regulator, the list provided amounts to a compilation of purposes found in the ERCB's key statutes, the *ERCA* and the *OGCA*. Included is the key purpose of ensuring the orderly, efficient and economic development of energy and coal resources. There is no mention of the purposes (like sustainable development) from Alberta's *EPEA*, a key statute empowering AENV. Under "issues to be examined" the report at least acknowledges that it may not be appropriate to simply adopt purposes that are a "combination of existing clauses in legislation today" (at 11).

The *Discussion Document* also foresees sticking with the same public interest test that currently sets the ERCB's mandate (requiring it to consider whether a project is "in the public interest" having regard to its economic, social and environmental effects) (see *ERCA*, s 3). The inherent vagueness and elusiveness of this test has long-been another outstanding criticism of the existing ERCB process. Other than the general reference to "economic, social and environmental effects", it has been argued that the existing test does not provide the ERCB with sufficient detailed guidance for making appropriate, fair and balanced decisions (see for example Jodie L. Hierlmeier, "'The Public Interest': Can it Provide Guidance for the ERCB and NRCB?" (2008) 18 *JELP* 279). Moreover, because the vast majority of applications proceed via routine application (without scrutiny via a hearing), it has been said that the public interest, as far as the ERCB is concerned, simply means compliance with the Board's technical requirements.

The perceived lack of fairness, transparency and accountability *vis-à-vis* the ERCB is made worse by the limited avenues for public involvement at the project approval stage. Over the last

few decades, Albertans, like others worldwide, have demanded increasing involvement in natural resources and environmental decision-making. Scholarly literature reveals several reasons why public participation is critical in this context, including that it: (a) allows for broader information and knowledge gathering and therefore results in better (more accurate, more appropriate) decisions for resources management and environmental protection; (b) allows for broader interests to be part of the decision-making process thereby ensuring less biased decision-making; and (c) legitimizes decisions and generates “buy in” by increasing government accountability and transparency of decision-making processes.

At the project approval stage for energy development in Alberta, the following deficiencies with respect to meaningful public participation have been identified:

- the stakeholder consultation carried out by project proponents suffers from several inadequacies; in any event, by any account, it is not meaningful participation in *governmental* decision-making;
- the standing test of “directly and adversely affected” to trigger a hearing before the ERCB (along with the “directly affected” language for participation under the *EPEA*), and the way these have been narrowly interpreted, unduly restrict participatory rights to a narrow group of Albertans (surface landowners and other property owners in close proximity to a proposed project); this represents an “inadequate vision of a decision-making process that is designed to protect the broader public interest” (Bankes, [here](#))
- the restricted interpretation of directly and adversely affected parties means that there is often no one able to trigger a hearing for projects on public lands; and
- the costs provisions for participating at ERCB hearings are even narrower than the standing provision, requiring that a property interest (in land) be directly and adversely affected by the proposed project.

(see Vlavianos, “The Issues and Challenges,” *supra* and Shaun Fluker, “Public Participation at the Alberta Energy Resources Conservation Board” (2011) 111 Resources 1).

Without discussion, the report indicates that all of these features will be carried over to the new regulator. Further, rather than setting up (or adopting) a more accessible appeal process to a specialized tribunal (like the Environmental Appeals Board), the report specifically states that appeals from decisions of the single regulator will be on questions of law and jurisdiction “to the courts” (at 19). Presumably this means the current appeal mechanism for ERCB decisions which is to the Court of Appeal with leave. From a public involvement standpoint, this is of course a restrictive, expensive and cumbersome process (with ultimately little chance of success given the applicable standards of review).

Conclusion

Especially because the *Discussion Document* says that the move to the new regulator will “enhance energy sector regulation” based on principles including “fairness and transparency,” one would have thought that at least some of the issues outlined above would form part of the discussion. Instead, the report largely envisions maintaining the status quo as far as current ERCB mandates and practices are concerned. This is unfortunate. As we move to a single regulator, it is critical to ensure that any lost “checks and balances” inherent in a three-regulator system are replaced with enhancements in transparency and accountability for the new regulator.

It is thus hoped that the *Discussion Document* is just that, a discussion document, and not the final word.

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