

## **An Overview of *Bill 2: Responsible Energy Development Act* — What are the changes and What are the issues?\***

**By Nickie Vlavianos**

### **Bill commented on:**

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On the heels of a sweeping overhaul to federal legislation to streamline federal approval processes for major energy projects, it is now Alberta's turn. *Bill 2* – the proposed *Responsible Energy Development Act (REDA)* proposes significant changes to the way oil and gas (and coal) projects are approved and regulated in the province. This post provides an overview of the Bill by highlighting the key changes that will be made to the current regulatory regime and the issues they raise.

### **Background**

The goals behind the proposed *REDA* are undoubtedly laudable — to streamline processes, reduce complexities, and increase Alberta's economic competitiveness. The Bill is the result of a regulatory enhancement project undertaken by the provincial government (see [here](#)). Elsewhere, I have argued that the complexities, overlapping and unclear mandates in the existing legislative framework for energy development in Alberta is not a good thing, neither for industry nor for landowners and the Alberta public generally (see for example Nickie Vlavianos, *The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis*, [Occasional Paper #21 \(Canadian Institute of Resources Law, 2007\)](#)). Nonetheless, streamlining must not come at all costs. It must be balanced alongside critical competing goals. Within a few days of its release, Bill 2 has already generated criticism from environmental groups (see for example ELC, "Single energy regulator bill a poor deal for Alberta's environment" ([here](#))), landowners (see for example Keith Wilson, "The Responsible Energy Development Act – Bill 2" ([here](#))), and academics (see ABlawg postings for example by Shaun Fluker and Nigel Bankes under category heading "Responsible Energy Development Act" [here](#).)

### **What does Bill 2 do?**

Under the existing legislative regime for energy development in Alberta, there are several decision-makers (operating under various statutes) involved. With respect to the 80% of oil and gas resources owned by the province, Alberta Energy starts the ball rolling with the sale of those oil and gas rights under the *Mines and Minerals Act*, RSA 2000, c M-17 (*MMA*). Alberta Environment and Sustainable Resource Development (ESRD) then grants surface leases to companies to develop those rights on public lands and regulates reclamation and remediation on

those lands pursuant to the *Public Lands Act*, RSA 2000, c P-10 (*PLA*). The Energy Resources Conservation Board (ERCB) grants the key licences and approvals for all manner of oil and gas wells and facilities as well as regulates most aspects of those facilities (from construction to operations to final abandonment). Various statutes set out the ERCB's jurisdiction in this regard including the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (*OGCA*), the *Oil Sands Conservation Act*, RSA 2000, c O-7 (*OSCA*), and the *Pipeline Act*, RSA 2000, c P-15 (*PA*). Along with the ERCB, Alberta ESRD grants licences and approvals in regard to air, land and water impacts relating to certain energy facilities pursuant to the *Environmental Enhancement and Protection Act*, RSA 2000, c E-12 (*EPEA*) and the *Water Act*, RSA 2000, c W-3 (*WA*). It also conducts environmental impact assessments for some energy facilities, as well as regulates reclamation and remediation over private lands in the province under *EPEA*.

While Alberta Energy's role in the disposition of oil and gas rights will remain unchanged, the mandates of ESRD and the ERCB (and Alberta Energy with respect to the issuance of exploration approvals under Part 8 of the *MMA*) will be rolled into one entity, a single regulator. Under Bill 2, this single regulator will be the Alberta Energy Regulator (AER). The ERCB will be dissolved, and its governing statute, the *Energy Resources Conservation Act*, RSA 2000, c E-10 (*ERCA*) repealed.

Thus, the scope of Bill 2 includes not only those energy resources statutes and regulations (defined as "energy resources enactments") that are currently administered by the ERCB, but also other statutes, defined as "specified enactments" (*i.e.*, *EPEA*, the *PLA*, the *WA*, and Part 8 of the *MMA*) but only in regard to energy resources and energy resources activities. Existing authorizations and approvals processes under energy resources and specified enactments will remain the same, but they will all be brought within the mandate of one regulator (and presumably applied for through one application). More specifically, the AER is granted all of the ERCB's responsibilities under Alberta's energy resource statutes and regulations (including the *Coal Conservation Act*, the *OGCA*, the *PA*, the *OSCA*) as well as ESRD's responsibilities under *EPEA*, the *PLA*, and the *WA*.

### **Mandate of the AER**

The mandate of the AER is set out in section 2 of Bill 2. It is to "provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta" (s 2). "Energy resources" under the Bill means any natural resource that can be used as a source of energy but hydro energy is specifically excluded (s 1). This mandate is a variation of the oft-cited purpose in section 4 of the *OGCA* which is to "provide for the economic, orderly and efficient development in the public interest of the oil and gas resources in Alberta." Bill 2 drops "economic" and "public interest" and adds "safe" and "environmentally responsible," but, critics will say, the focus is still on development.

Section 2 of Bill 2 further states that the mandate of the AER is to regulate, in respect of energy resources activities, the disposition and management of public lands, the protection of the environment, and the conservation and management of water (including the wise allocation and use of water), in accordance with the relevant legislation. This mandate will be carried out in accordance with energy resource enactments, specified enactments, as well as the *REDA* and its regulations.

While the AER will have a broad energy mandate, Bill 2 contemplates regulations enacted by Cabinet that may restrict the powers, duties and functions of the AER under other enactments (s

26). Bill 2 also allows the Minister to give directions to the AER that set priorities and guidelines for it to follow in carrying out its powers and to ensure that its work is consistent with government policies around energy resources development and the management of public land, environment and water (s 67). Who, by the way, is the Minister contemplated here? Is it the Minister of Energy, or ought it perhaps be a joint effort by the Minister of Energy and that of ESRD?

### **Purposes of the *REDA* (or lack thereof)**

Unlike most recent natural resources and environmental legislation, Bill 2 does not contain a section (or a preamble) setting out broad purposes for the *REDA*. Because such legislation typically grants broad powers, purposes sections are often used by legislatures to provide direction for decision-making. While they do not establish legal rights and entitlements, purposes sections are important because they are used, sometimes out of sheer necessity, to assist decision-makers (and courts) when faced with conflicting interpretations and approaches. For example, should a statutory decision-maker take a precautionary approach when reviewing certain types of evidence and assessing risk in any given application? Without specific legislative direction on the matter, a decision-maker would ask if such an approach would be consistent with the broad purposes of the legislation.

So how will decision-making by the new AER be guided in situations of legislative uncertainty without such purposes and in the event of a lack of specific direction via regulations? The effect of Bill 2's provisions appear to be that the AER will, in discharging its mandate under the *REDA*, have to be guided by any purposes in energy resources and specified enactments. So, in making decisions under the *OGCA* for example, it will have to be guided by the purposes in section 4 of that Act, and for approvals and decision-making under *EPEA*, the purposes of that Act will apply.

But what about decision-making under those statutes, like the *PLA*, where no purposes are provided? If there are no specific regulations covering the matter, then will the AER be left simply with the broad direction to provide for “the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta”?

### **Removal of the Public Interest Test**

A related omission is the disappearance of the public interest test currently found in section 3 of the *ERCA*. Section 3 is the general provision that currently requires the ERCB to make decisions on energy projects “in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment”. It is fundamental to the ERCB's current mandate. The fact that it is not included in Bill 2, nor replaced with anything obvious is surprising. On the other hand, given the long-standing criticisms of the test and the frustrations with it (due to its vagueness, open-endedness and unpredictability), perhaps the government justifiably saw fit to do away with it.

But what will stand in its place? As noted, the purposes provisions in some of the listed statutes will provide some guidance. As well, the general thrust of Bill 2 seems to be that Cabinet will, through regulations, set out government policy and direction that the AER will be required to follow and implement in its decision-making. Section 20 of the Act already directs the AER to carry out all its powers, duties and functions in accordance with any applicable *ALSA* regional land-use plans. Further, broad regulation-making powers on the part of Cabinet suggest that

regulations will be passed to help guide the work of the AER. Regulations could, for example, be passed to require the AER to consider cumulative effects, including social ones, and/or the AER could be required to implement a precautionary approach in its decision-making. According to one commentator, although “[t]his could be a welcome change to the current practice of hardwiring broad social, economic and environmental considerations into the statute, yet it provides no guidance as to what these considerations should be.” (Adam Driedzic, “Single Regulator or Franken-Child?” [ELC, NewsBrief, vol. 27, no. 3](#), at p.7). The devil will of course be in the details. Only time will tell whether the regulations to be enacted will provide sufficient guidance to the AER in its decision-making. Moreover, it ought to be pointed out that, for better or worse, such regulations would be subject to change much more easily by subsequent governments than would be the case with clear statements of purpose or direction entrenched in legislation.

### **Constitutional Jurisdiction of the AER**

Currently, the ERCB is authorized to determine questions of constitutional law, including questions in regard to the adequacy of Crown consultation of Aboriginal peoples in the context of resources development. Such questions have in fact been raised before the ERCB (for example, see ABlawg post by Nigel Bankes, “Who decides if the Crown has met its duty to consult and accommodate?” [here](#)). Bill 2 expressly states that the new AER will have no jurisdiction with respect to questions around the adequacy of Crown consultation (s 21). A forthcoming post by my colleague Nigel Bankes will consider this provision in more detail.

### **Nature, Structure and Independence of the AER**

Like the ERCB, Bill 2 establishes the AER as a corporation. Currently, the *ERCA* sets up the ERCB as a Board consisting of not more than 9 members appointed by the provincial Cabinet (one of whom is designated as chair, 2 or more as vice-chairs, and the rest as Board members). The Board appoints the Chief Executive and determines his or her powers, duties and functions. The ERCB Board members are charged with both the administration/management of the Board as well as the adjudicative/quasi-judicial functions (including hearing powers) of the Board (with the ability of course to delegate to staff and others as required). Board members are appointed for an initial term of 5 years and afterwards at the pleasure of Cabinet. Although Bill 2 transfers the employees of the ERCB to the AER (s 83(4)), it states expressly that this is not the case for ERCB Board members (s 83(7)). Interestingly, there is no mention of any transfer of employees from ESRD to the AER. The funding structure for the AER models the current one used for the ERCB.

Rather than establish a Board like the ERCB with more or less permanent Board members who have managerial but also adjudicative (including hearing) powers, Bill 2 takes a different approach. It mandates the establishment of a Board of Directors (comprised of one Chair and at least two others) for the AER who will be appointed by Cabinet and will be responsible for the general management of the business and affairs of the Regulator. As with the current ERCB, there is no direction as to how Cabinet will choose who will be appointed to the AER, nor is there any requirement that various backgrounds or expertise be represented. Once established, the Board of Directors may then authorize several specified persons including directors, officers, and employees to carry out any of the AER’s powers, duties or functions (s 6(2)). Subject to the approval of the Minister, the Board of Directors will appoint an officer to be called the Chief Executive Officer (responsible for the day-to-day operations of the business and affairs of the AER), but no director may be appointed as the Chief Executive of the AER (s 7(2)).

Unlike the current ERCB, Board members will not sit on any hearings. Bill 2 directs Cabinet to establish a roster of hearing commissioners consisting of a chief hearing commissioner “and such other individuals as are appointed by the Lieutenant Governor in Council” (*per s 11*). Neither a director nor the Chief Executive Officer of the AER may be appointed to the roster, but presumably other officers or employees of the AER could be. In each case where a hearing is required (discussed below), section 12 states that the hearing must be conducted by a panel of one or more hearing commissioners selected by the chief hearing commissioner from the roster. Sections 12(3) and 13 clarify that a decision of a panel of hearing commissioners is a decision of the AER and that hearing commissioners may participate in the development of the AER’s practices, procedures and rules. They are also entitled to receive professional, technical, and administrative support from the AER to assist them in the conduct of hearings. There is no direction in Bill 2 as to how hearing commissioners will be appointed or how they will be chosen to sit on particular hearings.

Why has the government decided to separate the hearing functions from the other functions of the AER? For routine (*i.e.*, non-hearing) applications, a director or officer or any other person authorized by the Board will make a decision. For applications requiring a hearing, however, a hearing will be held by hearing commissioners chosen from a roster.

My colleague Shaun Fluker in his first ABlawg post on Bill 2 “Bill 2 Responsible Energy Development Act: Setting the stage for the next 50 years of effective and efficient energy resource regulation and development in Alberta” has noted that Bill 2’s approach of allowing Cabinet to appoint the hearing commissioners (including the chief hearing commissioner) for indefinite terms and to set their remuneration raises important questions about the level of independence of the AER from the government. As he states, “[o]ne of the defining characteristics of quasi-judicial administrative processes in Canada is independence from the executive.” (see [here](#))).

It is not entirely clear why the government has seemingly removed the model of a (more or less) permanent Board for purposes of hearings under Bill 2, but as Shaun suspects, it likely has to do with the government wanting more control over who sits and when in regard to applications that go to a hearing. As I’ve noted in a previous ABlawg post “The Proposed Single Energy Regulator: Where Are We Now and Where Do We Go from Here?” (see [here](#)), a long-standing charge against the ERCB has been that, over time, for various reasons including the particular backgrounds of Board members, the Board has perhaps become a “captive regulator” in that its interests and thought-processes are too closely aligned with the industry it regulates. Allowing for the appointment of hearing commissioners on a case-by-case basis is perhaps one way of addressing this. On the other hand, with no legislative direction on how commissioners will be appointed or who they might be, this system can also work an evil the other way — in short, commissioners who do not “tow a particular party line” can easily be removed from hearing responsibilities by simply not being chosen from the roster.

Two ways around this might be work: (a) ensure that clear direction is provided to hearing commissioners, whomever they might be, on what they must take into consideration in any given application; and (b) ensure that, for any given hearing, the panel of commissioners that is struck represents a fairly broad range of interests and constituencies (and disallow the possibility of a sole commissioner). Such legislative direction would go some way to ensuring trust, legitimacy and accountability in the single regulator.

## Private Surface Agreements

Bill 2 grants the AER an entirely new jurisdiction over the enforcement of what the Bill calls “private surface agreements”. Bill 2 will enable owners and occupiers of land to register private surface agreements with the AER. Once registered, the owner or occupier can require the AER to make an order directing a person to comply with the agreement (s. 64). For a review and critique of this new jurisdiction granted to the proposed AER, see the ABlawg post by my colleague Nigel Banks, “Bill 2, the Responsible Energy Development Act and the Enforcement of Private Surface Agreements,” [here](#).

## Applications, Hearings, Regulatory Appeals, and Reconsiderations

According to section 15 of Bill 2, where the AER is to consider an application or to conduct a regulatory appeal, or reconsideration (or inquiry), it shall, in addition to any factor it may or must consider in considering the application or conducting the appeal, reconsideration (or inquiry), consider any factor prescribed by Cabinet in regulations. Further, section 25 specifies that except to the extent the regulations provide otherwise, 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 the *REDA* and the regulations and rules (made under the *REDA*) instead of in accordance with the specified enactment. In short, the process in the *REDA* governs and not that in for example the *EPEA*.

## Applications, Hearings, Standing and Costs

Pursuant to section 30 of Bill 2, an application under an “energy resource enactment” (defined above) or under a “specified enactment” (defined above) in respect of an energy resource activity must be made to the AER. Bill 2 contemplates applications under one statute being combined with applications under another (*e.g.* an application for a licence under the *OGCA* with an application for a *WA* approval), but allows the AER to consider the applications jointly or separately, as it considers appropriate.

On receiving an application, section 31 requires the AER to ensure that “public notice of the application is provided in accordance with the rules.” This requirement picks up on *EPEA*’s requirement to ensure public notice when approvals and registrations are being applied for. Under *EPEA*, a person who is “directly affected” by an application may file a statement of concern with ESRD which must be considered in its decision-making process. By contrast, section 32 of Bill 2 states that a person “who may be directly *and adversely* affected” by an application may file a statement of concern with the AER. This is the language not from *EPEA* but from the current test for standing to trigger a hearing before the ERCB (*ERCA*, s 26(2)). On its face, the word “adversely” adds an additional element which suggests a more restrictive test than simply “directly affected.”

But the more glaring change in Bill 2 is the removal of the right to a hearing for someone who has convinced the ERCB that they have rights that may be directly and adversely affected by a Board decision on an application (*ERCA*, s 26(2)). Under Bill 2, even if someone is directly and adversely affected and has filed a statement of concern, section 33 states that the AER “shall decide in accordance with the rules and subject to section 34, whether to conduct a hearing on the application.” Section 34 specifies that the AER may make a decision on an application with or without a hearing, but must conduct a hearing in the following situations: (a) where the Regulator is required to do so pursuant under an energy resource enactment (other than

obviously section 26(2) of the *ERCA* which will be repealed); (b) when required by the rules; or (c) under circumstances prescribed by the regulations.

Because the applicable rules and regulations have yet to be passed under Bill 2, it is difficult to assess how, if at all, the proposed provisions will either enhance or curtail the ability to trigger a hearing before the AER. An amendment to Bill 2, added as section 2.1, attempts, but fails, to clarify. Section 2.1 simply states that “[i]f 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” (emphasis added). Ultimately, there is discretion in the AER even if a person is directly and adversely affected. Thus, although it is hard to imagine rules and regulations that do not provide hearings for surface landowners and occupiers, the removal of the mandatory requirement is of some concern.

If the regulations enacted simply reflect current ERCB practice (which grants landowners and occupiers of affected land a right to a hearing), the changes under Bill 2 will not be significant. On the other hand, there is potential here where perhaps none existed before. For example, might the regulations introduce a public interest standing type test, especially in the case of public lands in Alberta (where there is often no one directly and adversely affected)? Another example might be to recognize possible standing for persons who have “relevant knowledge and expertise” although not directly and adversely affected (see for example, *National Energy Board Act*, RSC 1985, c N-7, (*NEB Act*), s 52.2). Despite the promise of possible expansion to the test for standing, however, the level of Cabinet discretion in this regard is worrisome.

This is also the case in regard to intervener costs. Currently under section 28 of the *ERCA*, there is clear legislative direction on who is entitled to a possible costs awards by the ERCB. Such persons are those who have an interest in or have actual occupation (or are entitled to occupy) land that is or may be directly and adversely affected by a decision of the Board. Like section 26(2), section 28 has not been moved into Bill 2. Instead, section 61(r) grants authority, this time to the AER, to make rules governing costs in respect of hearings. Again, this holds both the promise of possible expansion and the fear of possible restriction at the same time.

Upon completion of a hearing, section 35 requires the AER to issue a written decision that includes its reasons for decision. As well, similar to recent amendments to federal energy legislation (see for example *NEB Act*, s 52), the proposed *REDA* contemplates fixed time limits for decision-making that will be prescribed in the rules.

## **Regulatory Appeals**

A “regulatory appeal” is available to the AER for “eligible persons” with respect to “appealable decisions” (s 36). Along with a catch-all of “any other decision or class of decisions described in the regulations”, the list of appealable decisions in section 36 refers to decisions that have been made by the AER without a hearing. Thus, it appears that where the AER decided to hold a hearing, a regulatory appeal to it on the same application will not be available. However, where a decision was made by the AER without a hearing under an energy resource enactment, a person who is directly and adversely affected by the decision may file a request for a regulatory appeal. Similarly, where a hearing has not been held by the AER, and a decision has been made in respect of which a person would otherwise be entitled to file a notice of appeal under the *EPEA*, the *WA*, or the *PLA*, that person may file a request for a regulatory appeal in accordance with the AER’s rules (s 38). The regulatory appeal is an internal one within the AER, however, and it may or may not be granted by the AER. The AER has broad discretion to dismiss the request “if

for any...reason the Regulator considers that the request for regulatory appeal is not properly before it” (s 39(4)). Subject to the regulations, the AER may conduct the appeal with or without conducting a hearing (s. 40). For a review of the shortcomings with this regulatory appeal process especially in light of the current *Environmental Appeal Board* process (which will be abolished under Bill 2 in relation to energy resource activities), see the ABlawg post by my colleague Nigel Bankes, “Bill 2 and its implications for the jurisdiction of the Environmental Appeal Board,” [here](#).

## Reconsiderations and Appeals

Just like the ERCB, the AER will be granted the ability (“in its sole discretion”) to reconsider a decision made by it and may confirm, vary, suspend or revoke the decision (s 42). It can do so with or without a hearing and must provide written reasons for its decision within the time prescribed by the rules. Appeals to the Court of Appeal for the most part are the same under Bill 2 as set out in the *ERCA*. Although the time may change via regulation (the *ERCA* currently grants a 30 day time limit), appeals from decisions of the AER are appealable to the Court of Appeal only with leave of that Court and only on questions of law or jurisdiction.

## The Missing Policy Piece

Although not explicit in Bill 2, the *Discussion Document* that preceded the drafting of this Bill (see [here](#)) envisioned a clear separation between the making of energy, natural resources, and environmental policy from the delivery of that policy. The *Discussion Document* stated that policy development would continue to be undertaken by the Alberta government (encompassing policies in the areas of air, water and land management, including conservation, extraction, processing and the transportation of resources). By contrast, what the single regulator would be mandated to do is deliver that policy, or implement it, not make it.

In various ways, especially in the repeated directions throughout Bill 2 that the AER must make decisions and act in accordance with Cabinet regulations, Bill 2 reflects this desire to clarify that policy will be set by the government and not the AER. The Task Force that ultimately recommended the establishment of a single regulator for policy implementation also recommended the creation of a Policy Management Office to act as an interface between the development of policy and the policy assurance or implementation stage (see the Task Force’s report [here](#)) The proposed development of such an office led some commentators to suggest that the extent of interaction between the policy development and policy delivery functions in the new regime “could threaten the single Regulator’s ability to render independent quasi-judicial decisions free from government influence.” (M. Massicotte, “Bill 2, Responsible Energy Development Act: The Creation of a single energy regulator in Alberta”, November 5, 2012). Unfortunately, as noted by Massicotte, there is no mention of the policy management office in Bill 2, nor is there any information “as to the degree of interaction between the policy functions of Alberta Energy and AESRD, and the regulatory functions of the single Regulator.”

Moreover, the Discussion Document also talked about public engagement and consultation in the creation of policy. Unfortunately, there is nothing in Bill 2 discussing such avenues for public participation in energy and resources development policy-making. One suspects that, as previously, any such public involvement opportunities will remain *ad hoc* and at the discretion of government.



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