

February 12, 2015

The AER and the Values of Efficiency, Flexibility, Transparency and Participation: Best in Class?

By: Nigel Bankes

Matter Commented On: [AER Bulletin, 2015-05](#) and an amendment to the *Oil and Gas Conservation Rules* creating the concept of a “Subsurface Order”

On February 10, 2015 the Alberta Energy Regulator (AER) issued Bulletin 2015-05 announcing a change to the [Oil and Gas Conservation Rules](#). This change authorizes the AER to issue something called a Subsurface Order:

11.104 Notwithstanding sections 3.050, 3.051, 3.060, 4.021, 4.030, 4.040, 7.025, 10.060, 11.010, 11.102 and 11.145, if the Regulator is satisfied that it is appropriate to do so, the Regulator may, on its own motion, issue a subsurface order that

- (a) designates a zone in a specific geographic area, and
- (b) prescribes requirements pertaining to spacing, target areas, multi-zone wells, allowables, production rates and other subsurface matters within that zone, in which case if there is a conflict or inconsistency between the subsurface order and any of the sections referred to above, the subsurface order prevails to the extent of the conflict or inconsistency.

The Bulletin provides additional guidance as to how the AER will use this significant new power – which evidently allows it to suspend and vary the default rules relating to important issues such as spacing, target areas, allowables and production rates over broad geographic areas. The amendment likely has something to do with the AER’s experimentation with the play-based approach (see post welcoming that development [here](#)). The Bulletin does not specifically mention that initiative although it does indicate that the change is particularly directed at tight oil and gas resources.

So what about the above values? I confess these are not the same values identified by the AER’s [Best in Class](#) project of protective, effective, efficient and credible (PEEC), although there is some common ground – efficiency is common to both, and how can a regulator be credible absent opportunities to participate in its rule development exercises? The Rule scores well on

efficiency and obviously on flexibility: no surprises there. It also scores reasonably well on transparency (at least on *ex post* basis) since the Bulletin stipulates that “When complete, a subsurface order will be implemented with a bulletin announcing the order, and AER information systems, including the well spacing map, will be updated accordingly.”

But it gets a poor grade on participation. The Rule itself is silent (except to state that the AER will proceed “of its own motion”); it does not, for example, say that the AER will seek input from affected parties prior to issuing an Order. It does not provide that a draft of the Order will be published on the AER’s website for comment before being finalized. The Bulletin provides the following guidance:

AER staff, as part of ongoing regulatory system performance evaluation, will assess trends in down-spacing and other resource applications to identify potential opportunities for subsurface orders. Assessments will consider input from AER stakeholders, including industry and other government entities.

There are a number of concerns here, the first being the AER’s (traditional) conception of its stakeholders (industry and government – no mention of ENGOs, landowners or First Nations), and the second being its failure to articulate how this input will be solicited.

The Bulletin makes some effort to assure other interests (such as those listed in the last paragraph) that they need not be concerned since Subsurface Orders will not address surface activities and surface interests will continue to be protected by the *Alberta Land Stewardship Act*, [SA 2009, A-26.8](#) and regional plans. But that is hardly completely convincing. We know that subsurface rules will have an impact on surface activities; and we only have two [regional plans](#) in place (the South Saskatchewan Plan and the Lower Athabasca (LARP)). Even these plans lack some of the necessary implementing frameworks (e.g. LARP’s biodiversity management framework and the landscape management plan)). Furthermore, there is at least some evidence that LARP doesn’t operate at the necessary level of granularity to have an impact on AER decision-making: see AER Decision, [2014 AER 13](#) re Prosper Petroleum). Finally, it seems more than a little odd for the integrated single-window regulator to be emphasizing the distinction between subsurface and surface approvals. It should be possible for this body to do a better job of integrating the two and was that not supposed to be one of the goals of play-based regulation?

So how can the AER do a better job on the participation value? First, it needs to recognize in all that it does that its stakeholders are not limited to industry and government departments. Second, on the process side, it could take a leaf from the book of its fellow Alberta energy regulators (and quasi-regulators) like the Alberta Utilities Commission (AUC, [Rule Development](#)), the Market Surveillance Administrator and the Alberta Electric System Operator ([AESO](#)) – all of whom seem to have better and more developed ideas as to how to engage in rule making than does the AER.

[Best in Class](#)? I don’t think so; not yet anyway.

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>
Follow us on Twitter [@ABlawg](#)

