Legal Backgrounder

Bill 2: Responsible Energy Development Act

Overview

Bill 2, the *Responsible Energy Development Act* (*REDA*), is scheduled to come into force in June 2013. *REDA* proposes significant changes to the way energy projects are approved and regulated in Alberta. The scope of *REDA* includes not only those energy resources statutes and regulations (defined as "energy resources enactments") that are currently administered by the Energy Resources Conservation Board (ERCB), but also other statutes, defined as "specified enactments" (i.e. *Environmental Protection and Enhancement Act* (*EPEA*), the *Public Lands Act*, the *Water Act*, and Part 8 of the *Mines and Minerals Act*) but only as they relate to energy resources and energy resources activities.

Authorization and approval processes under energy resources and specified enactments will all be brought within the mandate of the single Regulator created by *REDA*, as will all the powers and function related to inspections, investigations and other compliance and enforcement matters. More specifically, the Regulator is granted all of the ERCB's responsibilities under Alberta's energy resource statutes and regulations as well as Alberta Environment and Sustainable Resource Development's responsibilities under the *EPEA*, the *Public Lands Act*, and the *Water Act*.

Key issues with REDA

Generally speaking, *REDA* leaves many important issues, some of which were previously prescribed by statute, to regulation or to the Regulator itself. As such, the full impacts of the changes that will occur under the *REDA* regulatory scheme are still unknown.

Some of the main concerns with *REDA* are outlined below, along with recommendations as to how amendments to *REDA* or the enactment of associated regulations could improve the forthcoming regulatory system scheme and provide greater clarity and certainty moving forward.

Issue #1: Standing

The current standing test of "directly affected" under the *EPEA* and the *Water Act* would be changed to the narrower "directly and adversely affected" test for energy developments (section 52). Such a narrowing of the standing test is inconsistent with the trilogy of Kelly cases from the Alberta Court of Appeal, which moved to expand the test for standing.

Recommendations

- *REDA* should be amended, or regulations should be enacted, to broaden the standing test. The requirement that individuals be "adversely" affected should be removed and a provision that provides standing to individuals that have

"relevant information or expertise" should be added. Such an approach is taken in the *Canadian Environmental Assessment Act*, 2012, and the *National Energy Board Act*. It is unclear why the Alberta government has chosen such a narrow test for standing compared to important pieces of federal legislation, and contrary to the direction of the Alberta Court of Appeal in the Kelly cases. A broader standing test would provide the Regulator opportunity to hear from those with identifiable concerns and expertise relating to energy projects.

- The regulations could also introduce a public interest standing test (i.e. a genuine interest), especially in the case of public lands in Alberta (where there is often no one directly and adversely affected).

Issue #2: Costs

Costs go hand-in-hand with the issue of standing. The granting of standing is important, but is truly made meaningful where interested parties can be assured that they will compensated for the costs associated with their participation. At the very least, there should be clarity around who is eligible for costs. Section 28 of the *Energy Resources Conservation Act* (*ERCA*) provides legislative direction on who is entitled to possible costs awards, including a provision regarding the entitlement to advance costs. However, like section 26(2) of the *ERCA* (discussed below), section 28 has not been brought into *REDA*. Instead, *REDA* is virtually silent with respect to costs, leaving the entire issue to be dealt with through rules and regulations.

Recommendations

- *REDA* should be amended, or Regulations enacted, to include provisions regarding eligibility for, and the awarding of costs (including advanced costs). In particular, a cost award should be available to anyone who meets the broader standing tests suggested above.

Issue #3: Decision-making

REDA sets out very little of the Regulator's decision-making processes, leaving details to be provided through regulations or rules to be made by the Regulator. REDA does not contain a purpose section and it removes the public interest test that was to guide decision-making under the ERCB.

Currently, the only direction given under REDA is that the Regulator is to provide for "the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta". This provides very broad discretion and does not provide adequate direction to guide decision-making in situations of legislative uncertainty.

Recommendations

- REDA should be amended, or regulations should be enacted, that provide further guidance for decision-making. In particular, guiding principles such as sustainability, inter-generational equity, and precaution in the face of scientific uncertainty should be included. There should also be a requirement that decision-making include a consideration of cumulative impacts and whether the proposed development will align with existing provincial and federal policies and programs, including those non-legally-binding programs with

which Alberta Environmental and Sustainable Resource Development is expected to align in its decision-making under the Water Act, EPEA and Public Lands Act.

Issue #4: Hearings

Section 33 of *REDA* states that the Regulator "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 Regulator must conduct a hearing in the following situations: (a) where the Regulator is required to do so pursuant under an energy resource enactment; (b) when required by the rules; or (c) under circumstances prescribed by the regulations.

As such, *REDA* gives virtually no guidance as to when a hearing should be conducted, preferring to give substantial discretion to the Regulator in making that determination. Ultimately, there is discretion even if a person may be directly and adversely affected. This approach is contrary to the ERCB requirement, whereby a hearing was triggered whenever a statement of concern was filed by an individual that may be directly or adversely affected. *REDA* makes an allowance for statements of concern to be filed, but fails to indicate how, if at all, they are to be considered by the Regulator.

Recommendations

- *REDA* should be amended, or regulations should be enacted, to clearly outline the considerations that will trigger a hearing. In particular, if someone that may be directly affected by the proposed project or activity has filed a statement of concern, then a hearing should be triggered. At the very least, the Regulator should be required to consider the statement of concern when determining whether to hold a hearing. Other objective factors that should be considered are:
    - considerations relevant for triggering an environmental impact assessment, as listed in section 44(3) of the *EPEA*;
    - whether the project will contribute to cumulative impacts where thresholds for those impacts (as set out in the plans, policies and programs) have already been exceeded or can reasonably be expected to be exceeded by projects under approval; and
    - whether substantive knowledge is missing or impacts are not clear or cannot be determined.
- Section 34(3) of *REDA* should be amended to retain the rights related to hearings that are currently set out in section 26(2) of the *ERCA*.

Issue #5: Hearing Commissioners

REDA 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" (section 11). The hearing must be conducted by a panel of one or more hearing commissioners selected by the chief hearing commissioner from the roster (section 12). However, there is no direction in *REDA* as to

how hearing commissioners will be appointed or how they will be chosen to sit on particular hearings.

Recommendations

- The regulations should specify objective criteria for the appointment of hearing commissioners. In particular, the regulations should require the panel of hearing commissioners to represent a broad range of relevant interests and constituencies, including environmental expertise. The Regulations should require panels of more than one hearing commissioner.

Issue #6: Opportunity for adequate review of the Regulator's decisions

Appeals under *EPEA* and the *Water Act* to the Environmental Appeals Board, an independent quasi-judicial body, are eliminated for energy developments and replaced with self-reviews or "regulatory appeals" by the Regulator of its own decisions. A "regulatory appeal" is available to "eligible persons" with respect to "appealable decisions" (section 36). The list of appealable decisions refers to decisions that have been made by the Regulator without a hearing. Thus, it appears that where the Regulator decided to hold a hearing, a regulatory appeal will not be available. The regulatory appeal is an internal one, and it may or may not be granted. The Regulator 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" (section 39(4)).

The right to seek judicial review of the Regulator's actions, as well as related legal remedies, is excluded by *REDA*. Typically procedural issues, such as whether a party had the right to be heard or whether the decision-maker is biased, are dealt with through judicial review. These are matters that must be heard by the courts, as it is highly unlikely that any Regulator will make an impartial finding on such matters in relation to its own decisions.

While the judicial appeal to the Court of Appeal remains, it is restricted to issues of law and jurisdiction only and, unlike judicial review, it is subject to the Court of Appeal granting leave. Appeals to the Alberta Court of Appeal are also more costly, time consuming, and do not offer the same scope of resolution that may be obtained from the Environmental Appeals Board process.

Recommendations

- Section 40 of *REDA* states that "Subject to the regulations, the Regulator may conduct the appeal with or without conducting a hearing." The regulations should clearly provide for the availability of a regulatory appeal where a hearing has been conducted.

- Some measure of independent or third party review needs to be introduced to the "regulatory appeals." Self-reviews are extremely problematic as it is unlikely that the Regulator will be receptive to interpretations of the legislation that differ from those that informed the original decision under review. Such internal review will not provide the necessary checks and balances that must exist to ensure that decision-making is proceeding in compliance with the law and in the public's best interest.

- Section 56 of *REDA* must be removed, to enable judicial review to be applied to the Regulator's activities and decisions

Issue #7: Independence and Transparency

There is no obligation on the Regulator to report annually, either publicly or to the Legislature. Section 16 provides for disclosure of information to the Minister on request, but there is no subsequent duty on the Minister to make such information publicly available. As scoped, this section opens the door to the Minister seeking information on matters under active review and determination by the Regulator, which would be a clear erosion of the Regulator's independence in review and decision-making.

There are several other sections that raise concerns regarding independence of the Regulator. Section 22 requires the Regulator to give prior notice to the Minister before making any rules. This section implies some form of authority by the Minister over the existence and content of rules. Section 67 enables the Minister to order the Regulator to follow directions in relation to how its work is carried out and obliges the Regulator to comply with such orders.

Finally, there should be full disclosure of documentary information submitted as part of applications, as well as the evidence and reasoning for decisions by the Regulator. As currently drafted, *REDA* does not require the Regulator to release its reasons for deciding not to hold a hearing. It also does not require the Regulator to provide reasons for its decision on an application where a hearing is not held.

Recommendations

- *REDA* must have clearer reporting and public disclosure requirements. It should be amended, or regulations should be enacted, to require the Regulator to file a report annually with the Legislature, addressing its activities and decision-making under all statutes it administers.

- Section 22 should be amended to provide for prior public notice of planned rules by the Regulator, rather than notice to the Minister.

- Section 67 should be removed.

- The regulations should provide for increased public transparency with respect to the documents that are employed in the application, hearing and reviews processes. For example, the regulations should require the Regulator to make its reasons for failing to hold a hearing publically available. The regulations should also require the Regulator to provide reasons for its decision on an application where a hearing is not held, including an explanation of how the Regulator has considered and addressed the issues raised in any statements of concern filed.