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Alberta's New Energy Regulator: What Does it Mean for Project Development?

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On October 24, 2012, the Government of Alberta introduced Bill 2: the *Responsible Energy Development Act* ("REDA"). If enacted, REDA will establish a single energy regulator and create a new regulatory framework for energy resource projects in Alberta.

The new Alberta Energy Regulator ("AER") will supersede the Energy Resources Conservation Board ("ERCB") as the provincial energy resource regulator and will be responsible for the existing regulatory functions of the ERCB, as well as certain functions of Alberta Environment and Sustainable Resource Development ("ESRD").

The "One-Window" Approach

The establishment of the AER is intended to more efficiently regulate upstream oil sands, conventional oil and natural gas and coal activities for the life cycle of a project (initial application to reclamation) by centralizing the management of air, water, land, facility and mine authorizations. The new simplified approach will create "one window" for proponents to obtain energy project authorizations, replacing the existing process that requires authorizations from multiple regulators.

Under REDA, the AER will be responsible for administering "energy resource enactments" and "specified enactments" for all energy resource activities.

- Energy resource enactments - are those pieces of legislation currently administered by the ERCB, including the *Oil and Gas Conservation Act* and the *Oil Sands Conservations Act*.
- Specified enactments - are the statutes currently administered by ESRD, which include the *Environmental Protection and Enhancement Act* ("EPEA"), the *Water Act*, the *Public Lands Act* and Part 8 of the *Mines and Minerals Act*.



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Under the specified enactments, the AER will be responsible for exercising the “powers, duties and functions” of certain statutorily appointed government officials as they relate to energy resource activities. The AER’s functions will be expanded beyond those currently held by the ERCB to include:

- considering and deciding applications and other matters under the specified enactments, including the EPEA, the *Water Act* and the *Public Lands Act*;
- monitoring and enforcing compliance with the specified enactments; and
- regulating remediation and reclamation in accordance with EPEA.

REDA contemplates that the Minister of ESRD will retain all of his or her functions under the specified enactments, unless Cabinet subsequently delegates additional functions to the AER in regulations enacted pursuant to REDA. This means that some of the Minister’s powers under the specified enactments, such as the power to require an environmental assessment (“EA”) of a project, or to prohibit the approval of a project or vary the terms of an approval, may co-exist with the AER’s jurisdiction to approve energy resource activities.

REDA specifically grants to Cabinet the authority to make regulations authorizing the AER to carry out ministerial functions, as well as regulations authorizing the joint carrying out of certain functions, in respect of energy resource projects. This provides a mechanism to clarify the relationship between the jurisdictions of the AER and the Minister in the future.

Because REDA only affects the role of ESRD with respect to energy resource projects, for other non-energy projects the ESRD will continue to function as it does today.

The Application, Notification and Public Participation Processes

Under REDA, all applications for energy resource projects are to be made to the AER, including those under EPEA, the *Water Act* and the *Public Lands Act*. Upon receiving an application, the AER must ensure that public notice is provided in accordance with the rules (yet to be released). The rules will specify content and manner for providing the notices of application.

Those parties who believe that their rights may be “directly and adversely affected” may file a statement of concern, also in accordance with the rules. Where a statement of concern is filed, the AER makes a decision on whether or not to conduct a hearing in accordance with the rules and sections 33 and 34 of REDA.

The test for determining whether a hearing needs to be conducted under section 34 of REDA has been changed considerably from the ERCB’s current test, and requires the AER to conduct a hearing:

- where it is required to conduct a hearing pursuant to an energy resource enactment;
- when required to do so under the rules; or
- under the circumstances prescribed by the regulations (yet to be released).



Hearings will be conducted by “hearing commissioners” appointed by Cabinet, and not by Board members, as is currently the practice today. In recent amendments to Bill 2, the Government has clarified that if a hearing is held, persons who are directly and adversely affected by an application will be entitled to participate.

The Environmental Assessment Process for Energy Projects

REDA does not directly address the AER’s responsibilities in relation to the provincial EA process. However, it appears that the EA process for energy resources projects will fall under the AER’s jurisdiction unless exempted, in whole or in part, by new regulations.

Currently, under EPEA the Director is charged with making decisions and managing the EA process. Under REDA, the AER will be responsible for all of the functions of officials, including “directors”, which will allow the EA process for energy projects to be administered by the AER. EAs for all non-energy projects will continue to be managed by the Director under EPEA.

The Alberta Land Stewardship Act and Regional Plans

The *Alberta Land Stewardship Act* (“ALSA”) is addressed in REDA very similarly to the way it is addressed currently in the *Energy Resources Conservation Act* (“ERCA”). REDA requires that the AER act in accordance with applicable ALSA regional plans in exercising its functions and allows the AER to order and enforce compliance with the specific provisions of a regional plan when issuing approvals. See for example the *Lower Athabasca Regional Plan* [[see Energy Bulletin](#)].

Jurisdiction to Consider the Adequacy of Aboriginal Consultation

Recently, the jurisdiction of the ERCB to consider the adequacy of aboriginal consultation has been a highly contested issue. See for example, the ERCB’s letter decision in the *Osum Oil Sands Corp. Taiga Project* (August 24, 2012), and the Joint Review Panel’s decision in the *Shell Canada Limited Jackpine Mine Expansion Project* (October 26, 2012).

REDA squarely addresses this issue by expressly stating that the AER “has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*.” This limitation on the AER’s jurisdiction means that First Nations and Métis groups will need to resort to the courts for any claims that the Crown’s duty to consult and accommodate has not been fulfilled in relation to decisions of the AER under REDA.

Voluntary Landowner Registry

Another new feature of REDA will be the creation and maintenance of a registry for private surface agreements. Eligible land owners and occupants will be permitted to register private surface agreements with the AER, after which, if a dispute arises with industry, the AER may order compliance with registered agreements. Depending on the nature of the rules (yet to be developed), this new feature could potentially streamline the process for land owners and industry to settle disputes related to energy resource activities.



The Transition Period

Part 7 of REDA provides the framework for the transition between the ERCB and the AER. The provisions of REDA will come into force on a yet to be declared date (anticipated to be June 2013), with one exception. Section 84, which empowers Cabinet to appoint a transition committee, will come into force immediately upon royal assent.

The transition committee's responsibilities will include directing and overseeing the orderly transition from the ERCA to REDA, including the transfer of duties from the ERCB to the AER. The committee's work is intended to ensure a smooth transition from the old regime to the new one on the day REDA comes into force, particularly at the working level.

In anticipation of the transitional matters that are sure to arise with such a huge shift in the regulatory framework, Cabinet is authorized under REDA to make regulations respecting the transition to REDA, including regulations relating to applications, hearings and other proceedings that have not been completed before the coming into force of REDA, as well as remedying any confusion or inconsistencies resulting from the transition.

Conclusion

It is clear REDA is intended to unify the regulatory functions of the ERCB and ESRD for energy resource projects in Alberta under a single regulator. This new regulator will be responsible for administering authorizations for energy projects from the initial project approval to the completion of remediation.

These changes promise to simplify and consolidate the application process. Whether the promise holds true will depend in large part on the efficiency created by the detailed regulations and rules yet to be released.

For more information about this piece of legislation, please contact [JoAnn P. Jamieson](#) at 403.218.7514 or [John Olynyk](#) at 403.781.9472.

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