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Alberta's New Energy Regulatory Regime Takes Shape

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On May 29, 2013, Alberta issued three regulations and two rules under the *Responsible Energy Development Act* ("**REDA**"). The new regulations and rules became operational on June 17, 2013, the same day that REDA came into force. With REDA, the regulations and the rules now in place, the new regulatory regime for energy development in Alberta has started to take shape.

The New Regulations and Rules

The new regulations include:

- the *Responsible Energy Development Act General Regulation*, AR 90/2013 (the "**General Regulation**");
- the *Security Management for Critical Upstream Petroleum and Coal Infrastructure Regulation*, AR 91/2013; and
- the *Responsible Energy Development Act Transition Regulation*, AR 92/2013 (the "**Transition Regulation**").

The new rules issued include:

- the *Alberta Energy Regulator Administration Fees* Rules, MO 61/2013; and
- the *Alberta Energy Regulator Rules of Practice*, MO 62/2013 (the "**Rules of Practice**").

In addition, a series of consequential amendments were made to the existing regulations previously governed by the Energy Resources Conservation Board ("**ERCB**"). Interestingly, the *Oil and Gas Conservation Regulations*, the *Oil Sands Conservation Regulation* and the *Pipeline Regulation* have now been re-named as "Rules".

Highlights of all these changes are described below.

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Transition of Existing Proceedings

The Transitional Regulation provides that proceedings commenced by the ERCB will now be governed and completed by the Alberta Energy Regulator ("**AER**") in accordance with REDA. With respect to individual proceedings, the Transitional Regulation attempts to minimize disruption by mandating that the decision makers currently engaged in the process for a specific project will continue under REDA. Specifically, an ERCB member who was engaged in a hearing, inquiry or proceeding has been deemed to be a hearing "commissioner" for the purpose of completing the relevant proceeding.

In addition, the Transitional Regulation clarifies that enforcement actions commenced under the now repealed *Energy Resources Conservation Act* ("**ERCA**") or other energy resource enactment will now be completed in accordance with REDA. With respect to such enforcement actions, it is noteworthy that the General Regulation explicitly requires that the AER publish the particulars of enforcement actions taken under REDA or any other related enactment including:

- the names of the persons, including licensees, approval holders and operators that the enforcement actions are imposed against;
- the particulars of the contravention; and
- the particulars of the enforcement action.

It is not clear what limits, if any, will be placed on the disclosure of sensitive or confidential information that was provided by a proponent under the ERCB's existing process. Early indications suggest that unless information has been specifically granted confidentially status, it will be disclosed by the AER.

Factors to be Considered by the AER

Pursuant to REDA and the new General Regulation, the AER is to consider the following factors when reviewing an energy application:

- the social and economic effects of the energy resource activity,
- the effects of the energy resource activity on the environment, and
- the impacts on a landowner as a result of the use of the land on which the energy resource activity is or will be located.

In the old world, the ERCB evaluated an energy project on the basis of whether the project was in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment pursuant to section 3 of the ERCA. While there is certainly overlap between the previous public interest test and the new factors to be considered, REDA clearly signals a step change – and only time will tell if the new wording will lead to a substantial difference for proposed energy projects.

In a couple of decisions commenced and heard under the previous legislation but released by the AER over the summer[1], the AER appears to be applying both tests for good measure. In applying the public interest test, the AER has relied on section 3 of the ERCA although now repealed, as well as the public interest provisions found in the *Oil and Gas Conservation Act* and *Oil Sands Conservation Act*. Because the public interest wording has not been removed from these two pieces of legislation, it may well be that the public interest test will continue to have relevance going forward.

Intervener Process and Hearings

In large part, the new Rules of Practice are a restatement of the previous ERCB Rules of Practice. However, critical refinements to how a person intervenes in a matter and when a hearing will be held represent significant changes.

As detailed in our earlier newsletter on REDA Energy Newsletter, following the issuance of a notice of application, parties who believe that they may be directly and adversely affected by a project may file a statement of concern with the AER. In accordance with the new Rules of Practice, such statements must be in writing and contain:

- a concise statement of why the person believes they may be directly and adversely affected by the decision of the regulator, the nature of their objections and the disposition of the proceeding that the person is advocating;
- the location of their land, residence or activity in relation to the proposed energy resource activity; and
- contact information.

These statements of concern replace the earlier use of "objections" by the ERCB and bring the new regulatory process in alignment with the statements of concerns currently being utilized under the *Environmental Protection and Enhancement Act*.

Under REDA, the AER has much more discretion as to when it will hold a public hearing. Previously section 26 of the ERCA required the Board to hold a hearing when there was a possibility that its decision on an application directly and adversely impacted the rights of a person. Now, the AER may set an application down for hearing if the AER is required to do so by an energy resource enactment (none to date) or if a statement of concern is filed within the timeframe prescribed in the notice of application. More importantly, the AER can issue a decision without a hearing where the AER is of the opinion that either:

- the person filing a statement of concern has not demonstrated that they are directly and adversely affected by the application;
- the statement of concern is frivolous, vexatious or without merit; or
- the objection raised in a statement of concern has been addressed.

[1] See *Decision 2013 ABAER 011: Report of the Joint Review Panel, Shell Canada Energy Jackpine Mine Expansion Project: Application to Amend Approval 9756* (July 9, 2013)*; Decision 2013 ABAER 013: Kallisto Energy Corp., Application for a Well Licence Crossfield East Field* (July 23, 2013); and *Decision 2013 ABAER 014: Dover Operating Corp., Application for a Bitumen Recovery Scheme Athabasca Oil Sands Area* (August 6, 2013).

With the expanded power to dismiss statements of concern, the new framework affords the AER greater flexibility to determine when it will schedule a public hearing for an energy application.

90 Days to Decisions Reports

Under the new Rules of Practice, the AER is required to render its written decisions in relation to hearings, regulatory appeals and reconsiderations within a 90 day period. This replaces the ERCB's previous commitment to release 90% of its decisions within 90 days. However, we note that the AER, in large part, is the master of its own process and is empowered to abridge any of the time limits specified in the rules or set by the AER.

Conclusion

In summary, the new REDA regulations and rules provide welcomed clarification to the new framework established by REDA and important insight into the AER's process and procedures. Clearly, the wide-sweeping changes herald new practices for proponents and their energy applications.

One aspect of the AER's regulatory regime that has yet to be addressed is transitioning the regulatory functions of the Ministry of Environment and Sustainable Resource Development for the specified enactments (i.e. the *Environmental Protection and Enhancement Act*, *Water Act* and *Public Lands Act*) to the AER for energy resource activities. The Government of Alberta has indicated that this transition will occur in phases. Details are expected this fall.

Please let us know if you would like to receive an invitation to our upcoming in-house seminars on REDA and other significant regulatory changes in Alberta by clicking here.

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