



November 6, 2012

Our File:

Hon. Ken Hughes  
Minister of Energy  
404 Legislature Building  
10800 – 97 Avenue  
Edmonton, AB T5K 2B6

Dear Minister Hughes:

**RE: Bill 2 – *Responsible Energy Development Act***

The Environmental Law Centre (ELC) is a registered charity, incorporated in 1982 to provide an objective source of information on environmental law and policy in Alberta. Our vision is an Alberta where the environment is a priority, guiding society's choices. Our mission is to ensure that Alberta's laws, policies and legal processes sustain a healthy environment for future generations. Our work aims to achieve these outcomes:

- Alberta will have strong and effective environmental laws, policies and processes.
- Albertans will be actively and meaningfully engaged in decisions and processes that affect the environment.

This brief provides the ELC's comments on Bill 2, the *Responsible Energy Development Act*. While a one-window regulator for energy matters in Alberta could offer benefits for all Albertans if public participation and engagement are made clearer and more accessible, our main focus is that Alberta's environment must benefit from such a move. We are concerned that Bill 2 does not offer such benefits to our environment and steps backwards from the current levels of protection and participation. Our comments below discuss our concerns and offer recommendations for reform. The ELC's chief concerns are:

- Loss of procedural protections for the environment and public engagement;
- Limited transparency, accountability and regulator independence; and
- Lack of an embedded environmental mandate and species at risk considerations.

## **Concerns with Bill 2**

### **1. Loss of procedural protections for the environment and public engagement**

One of the most notable changes that Bill 2 makes is to remove the procedural rights currently available under section 26(2) of the *Energy Resources Conservation Act* to persons directly and adversely affected by energy applications, which effectively give such persons who object to an application the ability to trigger a hearing. These rights include:

- Notice of the application;
- Opportunity to learn the information presented by other parties on the application;
- Opportunity to present evidence relevant to the application;
- Opportunity to carry out cross-examination; and
- Opportunity to present argument.

None of these rights are specifically provided for within Bill 2. At most, the Bill requires that the Regulator give notice of an application in accordance with its rules (section 31) and that a hearing must be conducted in accordance with the rules (section 34(3)).

Bill 2 will also scale back the level of engagement and review provided under the *Environmental Protection and Enhancement Act (EPEA)* and *Water Act (WA)* in relation to energy development. This is significant because the scope of Bill 2 will transfer regulatory decision-making responsibility for a wide range of activities, including downstream processing facilities, from Alberta Environment and Sustainable Resource Development to the Regulator. Under *EPEA* and *WA*, persons who are “directly affected” by a proposed development may comment on applications and appeal application decisions to the Environmental Appeals Board.

However, by application of section 25 of Bill 2, the test for engagement will be narrowed from “directly affected”, which is already restrictively narrow, to “directly and adversely affected”. Meaningful public participation is crucial to a healthy democracy. Even where informal consultation opportunities are provided, meaningful participation requires some opportunities to conduct proceedings with records and reasoned decisions. Restricting regulatory participation to private interests denies any such opportunity in Alberta’s energy development process.

Expanding regulatory participation to those who demonstrate a genuine interest in a matter would promote administrative efficiency and conserve court resources. Genuine interest standing would allow for reasonable representations and deliberations on matters of public concern while preventing frivolous proceedings. Benefits would include better information for decision makers and better oversight of decisions, which in turn would produce better regulatory decisions with greater public acceptance.

Additionally, under Bill 2 the ability to appeal to the Environmental Appeals Board, an arm's-length quasi-judicial tribunal that may recommend any action that the original decision-maker could have taken, will be replaced by two forms of internal review by the Regulator of its own decisions, as well as appeals to the Alberta Court of Appeal on questions of law or jurisdiction. It is unclear whether the internal reviews will offer the same scope of review and scrutiny as has been provided by the Environmental Appeals Board; clearly they will not provide the independent review available from the Environmental Appeals Board. The appeals available to the Alberta Court of Appeal do not offer the same scope of resolution that may be obtained from the Environmental Appeals Board process.

Another concern is that Bill 2 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. This creates significant uncertainty for all parties with an interest in energy development and environmental protection, including industry, landowners and other stakeholders, and leaves the processes open to significant discretion on the part of the government and the Regulator.

**Recommendations** – The ELC recommends:

- a. Bill 2 should be amended to set out more details of the regulatory decision-making processes. At a minimum, provisions should be included that specify in greater detail who may participate in decision-making processes, the circumstances in which a hearing will be required, and the substantive details of all review processes.
- b. The standard for participation in decision-making processes under Bill 2 should be changed from persons “directly and adversely affected” by an application to parties that demonstrate a “genuine interest” in the substantive subject matter of the application. This standard should set out factors to apply in determining those parties with a genuine interest, including experience with the subject matter, a record of involvement in the relevant issues and a responsible approach to participation in the proceedings. This standard should be used within Bill 2, as well as in all relevant regulations and rules made under the Bill.

- c. Section 34(3) of Bill 2 should be amended to retain the rights related to hearings that are currently set out in section 26(2) of the *Energy Resources Conservation Act*.

## 2. Limited transparency, accountability and regulator independence

Energy development has been one of the most impactful activities in Alberta for nearly a century, and the bodies that have regulated it over that time have carried significant responsibility to Albertans. It is troubling, therefore, to see the minimal amount of transparency and public accountability that Bill 2 would impose upon the new Regulator. The Regulator will be regulating the development of public resources and the consequent impacts on Albertans, private and public lands, and the environment: a public good for all Albertans. The public must have meaningful access to clear, timely information on these activities and the regulatory system.

Under the Bill, the Regulator is stated explicitly not to be a Crown agent (s. 4). 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. The purported arm's-length nature of the Regulator as proposed in Bill 2 gives a strong impression of a black box with limited scrutiny and access to information.

A hallmark of any strong, credible regulatory system is the availability of checks and balances to enable impartial review of the system's fairness and effectiveness. A major flaw in Bill 2 is the exclusion of judicial review of the Regulator's decisions and proceedings; this was also one of our major concerns in relation to the *Alberta Land Stewardship Act*.

Judicial review is an important tool because it allows the courts to review decisions made by government and regulatory bodies to determine whether they were made fairly in accordance with required procedures and authority. This makes judicial review a key check and balance to review and limit the powers held and exercised by government. While many matters may be dealt with by internal reviews such as those proposed in Bill 2, 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.

Bill 2 has been touted as creating an independent, arm's-length regulatory body to deal with energy development and related environmental aspects in Alberta. However, there are

provisions in the Bill which open the door to the possibility of political interference in the Regulator's operations and decision-making. These include:

- Section 16, which would oblige the Regulator to provide “any report, record or other information” to the Minister upon request. 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.
- Section 22, which 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 beyond the authority given to the Regulator to make rules under Bill 2.
- Section 67, which 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.

While we recognize that the government may wish to ensure that energy development takes place in a manner consistent with a broad vision for Alberta and its future, it is not appropriate to ensure that this occurs by allowing for political interference in the decision-making processes of an independent regulator. Such guidance and direction can be ensured by placing limitations around the Regulator in Bill 2, as can be seen in section 20 of the Bill requiring the Regulator to act in accordance with regional plans made under the *Alberta Land Stewardship Act*.

**Recommendations** – The ELC recommends:

- a. Bill 2 must have clearer reporting and public disclosure requirements. It should be amended to require the Regulator to file a report annually with the Legislature, addressing its activities and decision-making under all statutes it administers. The Bill should also be amended to impose positive obligations on the Regulator to publicly disclose information, using section 35 of the *Environmental Protection and Enhancement Act* as a model.
- b. Section 56 must be removed, to enable judicial review to be applied to the Regulator's activities and decisions.
- c. Amendments must be made to remove the possibility of political interference in the Regulator's activities and decisions. Section 22 should be changed to provide for prior public notice of planned rules by the Regulator, rather than notice to the Minister.

Section 16, dealing with information requests from the Minister, and section 67, dealing with directions from the Minister to the Regulator, should be eliminated. To strengthen provisions that would bind the Regulator to comply with provincial legislation and policy, section 26(b), which would give Cabinet the power to vary environmental legislation in relation to the Regulator, should also be eliminated.

### 3. Lack of an embedded environmental mandate and species at risk considerations

The mandate outlined in section 2 of the Bill is inadequate to ensure environmental protection is a core value of the new Regulator. It identifies “environmentally responsible development of energy resources” and regulating the “protection of the environment” in respect to energy activities. This must be augmented to place appropriate limits on the Regulator’s discretion. Similarly, since the purpose of Bill 2 is to integrate environmental concerns into a single window approach there is a need for specific reference to the needs of species at risk.

**Recommendations** –The ELC recommends:

- a. Adding s.2(3): “The Regulator, in administering this Act, shall not make a decision regarding an energy resource activity that may result in a significant adverse effect on the environment.”
- b. Adding s.2(3)(a): “The Regulator shall publish rules as to what constitutes a significant adverse effect on the environment within 1 year of proclamation of this Act.”
- c. Adding s.30(4): “An application to the Regulator that is likely to have an effect on an endangered species, as defined pursuant to the *Wildlife Act*, or is likely to have a significant adverse effect on the environment as set out in s.2(3)(a), must include details regarding the potential impacts of the energy resource activity.”
- d. Renumber s.15 as section 15(1) and add s.15(2): “Where the Regulator is to consider an application or to conduct a regulatory review, reconsideration or inquiry, it shall, in addition to any other factor it may or must consider in considering the application or conducting the regulatory review, reconsideration or inquiry, whether the application is likely to have a significant adverse effect on the environment or is likely to have an effect on an endangered species, as defined pursuant to the *Wildlife Act*.”

### **Private surface agreements**

The ELC commends the provincial government for taking steps in Bill 2 to assist landowners affected by energy development through the inclusion of Part 3, providing for the enforcement of private surface agreements. This process, which enables landowners to register private surface agreements and seek enforcement through the Regulator, will help to level an uneven playing field and divert disputes from Alberta's courts. However, it seems significantly unfair to apply this process only to private surface agreements entered into after Part 3 comes into effect. This will have the effect of maintaining the existing imbalance of power and resources between energy developers and many landowners and will do nothing to assist landowners with agreements that predate Part 3.

**Recommendations** – The ELC recommends that section 62(2) should be removed from Bill 2 to effectively enable any landowner with a private surface agreement to make use of Part 3, regardless of the date of their agreement.

### **Conclusion**

The provincial government has frequently stated that it views energy and environment as two sides of the same coin. Bill 2 continues Alberta's status quo of flipping that coin in favour of energy. As Keith Wilson has ably pointed out in his letter to you dated November 4, 2012, a simplistic merger of two regulatory systems for energy and environment, one originally designed in the 1930s and the other developed over a half-century later, makes little sense and creates more questions than it appears to answer. At the very least, the provincial government should publicly release the draft regulations currently under development to support Bill 2, to give Albertans a clearer picture of the government's intent and ultimate regulatory system.

Bill 2 fails to address or acknowledge long-standing concerns and problems related to energy development and environmental protection in Alberta, including the separation of the mineral rights licensing process from the balance of energy, environmental and land use decision-making and continued use of standing tests badly out of step with Canadian and Alberta jurisprudence, including the recent trilogy of *Kelly* decisions from the Alberta Court of Appeal involving the Energy Resources Conservation Board.

As clearly indicated in the report of the provincial government's Property Rights Task Force earlier this year, Albertans expect to be involved in decision-making that affects them, their property and the public good. Bill 2 falls far short of meeting these expectations and benefiting Alberta's environment. Creation of a regulatory system that will address Alberta's needs for environmental protection, citizen engagement and responsible energy development demands



more detail and disclosure than Bill 2 offers, as well as significantly improved consultation and engagement than that which was carried out during the Regulatory Enhancement Project.

The ELC believes that steps can be taken to meet these needs and looks forward to the opportunity to work with the government to do so. We would be pleased to meet with you and your officials to discuss this further.

Yours truly,

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