

June 3, 2014

Directly and Adversely Affected: The Actual Practice of the Alberta Energy Regulator

Written by: Nigel Bankes

Decisions commented on: (1) [AER Letter decision to Beaver Lake Cree First Nation re CNRL's Kirby Expansion Project](#); (2) [AER Letter decision to Cold Lake First Nation re CNRL's Kirby Expansion Project](#); (3) [AER Letter decision to Fort McMurray First Nation re CNRL's Kirby Expansion Project](#); (4) [AER Letter decision to Kehewin Cree Nation re CNRL's Kirby Expansion Project](#); (5) [AER Letter decision to Oil Sands Environmental Coalition re CNRL's Kirby Expansion Project](#); (6) [AER Letter decision to Whitefish Lake Nation re CNRL's Kirby Expansion Project](#); (7) [AER Letter decision to AltaGas Ltd re Keyera Energy Ltd's Rimbey Plant Turbo Expander Project](#); (8) [AER Letter decision to ATCO Energy Solutions re Keyera Energy Ltd's Rimbey Plant Turbo Expander Project](#); (9) [AER Letter decision to NOVA Chemicals Corporation re Keyera Energy Ltd's Rimbey Plant Turbo Expander Project](#)

This post examines the actual practice of the Alberta Energy Regulator (AER) with respect to a number of related matters: (1) decisions by the AER as to whether a person is directly and adversely affected by an application, (2) decisions by the AER as to whether or not to hold a public hearing on an application, and (3) decisions by the AER as to whether it should disregard a statement of concern. The discussion is based on nine letter decisions of the AER in relation to two different project applications: CNRL's Kirby in situ oil sands expansion project, and Keyera Energy's application to enhance the extraction of liquids at its Rimbey Plant. The interested parties who filed statements of concern (SOCs) or requests to participate with respect to the two applications include First Nations, an environmental organization, and industrial competitors. Thus the range of decisions examined here provides valuable guidance as to how the AER will exercise its discretion in relation to standing, hearing and statement of concern matters involving a number of different types of interests.

I became aware of these decisions as a result of a presentation by AER counsel Meighen LaCasse at the annual meeting of the Alberta Regulatory Forum on May 14, 2014 in Calgary. The Forum is sponsored by Alberta's energy regulators including the AER and the Alberta Utilities Commission. Ms. LaCasse kindly provided me with copies of these decisions. My own presentation at the Forum returned to two themes that I have pursued on previous ABlawg posts namely the importance of publishing ERCB/AER letter decisions and questions relating to the AER and aboriginal consultation. This post indirectly speaks to the first of those themes.

There are four parts to this post. The first part summarizes the principal differences between the AER legislation and the previous ERCB legislation in relation to hearings and standing. The second part refers to the provisions of the AER legislation that deal with the power to make subordinate legislation (i.e. regulations and rules) and discusses the relevant rules and regulations pertaining to hearings and standing. Part three summarizes and analyzes the AER's decisions in relation to the two applications referred to above. Part four discusses the AER's duty to publish its decisions.

1. The principal differences between the ERCB legislation and the AER legislation with respect to the related matters of public hearings and standing

The ERCB legislation

The ERCB's principal statute with respect to such matters as standing and hearing was the *Energy Resources Conservation Act*, RSA 2000, c E -10 (ERCA, now repealed). Under s 26 of that Act the Board was required to give a person a hearing "if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person ...".

The AER legislation

The AER's principal statute is the *Responsible Development Act* (REDA), [SA 2012, c R-17.3](#) (REDA). ABlawg has published a good number of posts on the AER and REDA. For a sampling use AER as a search term in [ABlawg's data base](#) or search the [REDA category archives](#).

The following are the relevant steps under REDA.

1. The AER need only consider holding a hearing where a person has filed a statement of concern (SOC): REDA, s 33.
2. A person may only file a SOC if that person believes themselves to be directly and adversely affected by an application: REDA, s 32.
3. The AER shall hold a hearing on an application where required to do so by an energy resource enactment, when required to do so by the rules, or where required by the regulations: REDA, s 34. It is very rare for the energy resource enactments to require a hearing. For example, the AER is only required to hold a hearing under the *Oil and Gas Conservation Act*, RSA 2000, c O - 6 in the rare situation under s 99 of the Act where the Lieutenant Governor in Council requires the AER to hold a hearing on the design of a compensation scheme. Similarly, under the *Oil Sands Conservation Act*, RSA 2000, c O-7 the only time when the AER must hold a hearing is when it is considering ordering adoption of a scheme for enhanced recovery under s 18 of that Act.
4. Where the AER holds a hearing, a person who is directly and adversely affected is entitled to be heard: REDA, s 34(3).
5. Where the AER has made a decision on an application, an "eligible person" may request a regulatory appeal: REDA, s 38. The definition of an eligible person is complex but it includes a person who is directly and adversely affected where the decision in question was made without a hearing: REDA, s 36(b).
6. The AER may make a decision on a regulatory appeal with or without a hearing but if it holds a hearing an eligible person is entitled to be heard: REDA, s 40.

The most significant practical difference between the ERCA scheme and the REDA scheme is that under the ERCA scheme a person who is directly and adversely affected was *entitled* to trigger the hearing at the *application* stage. Under the REDA scheme a person who is directly and adversely affected cannot require a hearing at the application stage.

2. The provisions of REDA that deal with the power to make subordinate legislation i.e. regulations and rules

REDA distinguishes between the power to make rules and the power to make regulations. The power to make regulations is reserved to the Lieutenant Governor in Council (LGiC). So far as relevant here the LGiC may make regulations prescribing the circumstances in which a hearing is required in respect of an

application and in respect of an appeal (REDA, s 60(a) and (d)). The AER has the power to make rules. The rules, inter alia, may address the form and content of a SOC (REDA, s 61(c)).

The LGiC addressed the matter of hearings on regulatory appeals in the *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013. Section 4 provides that the AER *shall* conduct a regulatory appeal with a hearing if the concerns of an eligible person have not been addressed through any alternative process or otherwise resolved by the parties: REDA Regulation, s 4. Thus, the regulations supplement the provisions of the Act and in effect confirm that a person who is directly and adversely affected is *entitled* to a hearing *either* on the application itself *or* on the regulatory appeal (but not both).

The AER's Rules of Practice, Alta Reg 99/2013 contain extensive provisions dealing with SOCs as well as decisions to hold a hearing. The Rules confirm the importance of filing a SOC in a timely manner. The AER may disregard a SOC that is filed late or on any number of possible grounds (s 6.2(1)) including on the grounds that the person "has not demonstrated that the person may be directly and adversely affected by the application." Further it may ignore a *concern* (s 6.2(2)) if the AER considers that any of the following apply:

- (a) the concern relates to a matter outside the Regulator's jurisdiction;
- (b) the concern is unrelated to, or relates to a matter beyond the scope of the application;
- (c) the concern has been adequately dealt with or addressed through a hearing or other proceeding under any other enactment or by a decision on another application;
- (d) the concern relates to a policy decision of the Government;
- (e) the concern is frivolous, vexatious, an abuse of process or without merit;
- (f) the concern is so vague that the Regulator is not able to determine the nature of the concern.

The Rules also list a number of factors that the AER may take into account in deciding whether or not to conduct a hearing on an application although they are, as Professor Fluker [points out](#), largely a set of directions as to when the AER should *not* hold a hearing. Thus, the AER should not hold a hearing on an application where the AER is entitled to disregard a SOC or a concern under the circumstances referred to above.

The general tenor of these provisions as Professor Fluker has pointed out in his post on the Rules is to ensure that the AER will only hold a hearing where there is a person whose interests are directly and adversely affected and whose interests or concerns have not been resolved. Where there is no such person there will be no hearing.

3. The actual practice

CNRL's Kirby Application

In the case of the Kirby project the AER made an initial decision to hold a hearing in respect of the project and accordingly issued a notice hearing asking parties wishing to participate to file submissions indicating the nature of their interest. The notice is available [here](#). Submissions were filed by at least the following parties: Cold Lake First Nation (CLFN), Fort McMurray First Nation (FMFN), Beaver Lake Cree Nation (BLCN), Kehewin Cree Nation (KCN), the Whitefish Lake First Nation (WLFN) and the Oil Sands Environmental Coalition (OSEC). Upon review of those submissions however the AER ruled under s 9(3) of its Rules that none of those parties should be permitted to participate in the hearing. Furthermore, since that meant that there was no party left with standing the AER would no longer be holding a hearing and would instead make a decision on the application without a hearing. The hearing panel provided each of the above parties with written reasons in the form of a letter decision for its conclusions. Section 9(3) of the Rules provides that:

The Regulator may refuse to allow a person to participate in the hearing on an application if the Regulator is of the opinion that any of the following circumstances apply:

- (a) the person's request to participate is frivolous, vexatious, an abuse of process or without merit;
- (b) the person has not demonstrated that the decision of the Regulator on the application may directly and adversely affect the person;
- (c) in the case of a group or association, the request to participate does not demonstrate to the satisfaction of the Regulator that a majority of the persons in the group or association may be directly and adversely affected by the decision of the Regulator on the application;
- (d) the person has not demonstrated that
 - (i) the person's participation will materially assist the Regulator in deciding the matter that is the subject of the hearing,
 - (ii) the person has a tangible interest in the subject-matter of the hearing,
 - (iii) the person's participation will not unnecessarily delay the hearing, and
 - (iv) the person will not repeat or duplicate evidence presented by other parties;
- (e) the Regulator considers it appropriate to do so for any other reason.

In support of its submissions, the BLCN stated that its members exercised treaty rights and carried out traditional activities "on lands within and adjacent to the Project area." It also noted that part of the project area overlapped with a Fur Management Area registered in the name of a BLCN member. The First Nation filed affidavits in support and a traditional land use (TLU) report. The Panel relied on the Alberta Court of Appeal's decision in *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*, 2003 ABCA 372 and the practice of the Environmental Appeal Board in appearing to adopt CNRL's contentions that in order to meet the directly and adversely affected test it was not enough for BLCN to show that its members had the right (whether based on the relevant treaty or the Natural Resources Transfer Agreement) to use the lands in question, the First Nation must also "demonstrate actual use of land and other natural resources in the Project area by its members and a potential for those to be directly affected by the Project." The First Nation had failed to do that in this case and had failed to take advantage of opportunities offered by CNRL to identify whether the project might directly and adversely affect BLCN or its members.

In its submission FMFN had indicated that it intended to use the hearing to raise two constitutional questions relating to the validity of s 21 of REDA (the section that provides that the AER has no jurisdiction to consider the adequacy of Crown consultation). The Panel concluded (FMFN letter at 5) that these were not matters that should be considered in a public hearing.

The panel's decisions with respect to the other First Nations largely followed the approach taken on BLCN's application indicating that the applications to participate all fell short in detailing how this project would affect the harvesting rights of its members. Plainly the AER was not satisfied with general information or traditional land use reports that showed evidence of use of the area or even the affidavits of members showing some use of the project area; instead the AER is signaling that it requires detailed and site specific information about use of the particular area before it will conclude that an applicant has passed the factual part of the directly and adversely affected test. The Panel's summative comments in response to WLFN's application are representative of the Panel's reasoning (WLFN letter at 4):

In conclusion, the Panel has decided that the information from the WLFN harvesters does not provide the degree of location or connection between the Project and the traditional land uses that are asserted by WLFN to satisfy the directly and adversely affected test for any of the twenty-two harvesters, which WLFN stated was a representative sample of WLFN's membership. The information in the TLU and TLU Update provides only a vague indication of traditional uses in or near the Project area, and it does not locate any WLFN uses within any specific proximity to the Project area.

Thus, concerns about cumulative impacts will perhaps never be enough. The Panel suggested as much (KCN letter at 4) with respect to KCN's concerns "about cumulative impacts" which it dismissed as

“general in nature and not related to the Project or the Project lands.” Any consideration of cumulative impacts must, by the nature of the alleged affect, reach beyond the Project lands.

In a number of the letter decisions the panel also mentioned an additional factor to the effect that industrial activities were already occurring within the project area on the basis of other approvals that had been issued to CNRL. This suggested that (WLFN letter at 4) “much of the land in the Project area has already been approved for development ...”. See also CLFN letter at 6, BLCN letter at 5, and FMFN letter at 6. It is not clear how the Panel believed this to be relevant. Perhaps it was suggesting that this was therefore a concern that already been “adequately dealt with” within the meaning of s 6.2(2)(c) of the Rules but the Panel did not make that point specifically.

OSEC is a coalition of Alberta public interest groups and individuals with a long-standing and documented interest in a range of environmental issues in the oil sands area. Its members include the Alberta Wilderness Association, the Pembina Institute and the Fort McMurray Environmental Association. OSEC’s position was (at least initially) supported by an individual with a Registered Fur Management Area (RFMA) but that person later seems to have withdrawn his support and interest. OSEC sought to present evidence about habitat disturbance in the area of the project which exceeded that prescribed in a federal recovery strategy for caribou. The AER panel gave two reasons (OSEC letter at 4) for concluding that OSEC would not even be given participation rights if a hearing were to be held. First, neither OSEC nor its members “appeared to have a tangible interest in the subject-matter of the Project application.” Second, OSEC’s concerns were “general in nature and ... not related to the Project” and as a result OSEC had failed to demonstrate that its participation would materially assist the AER in its deliberations.

Keyera’s Rimbey Application

Statements of concern with respect to the Rimbey project were filed by at least three parties: NOVA Chemicals, AltaGas, and ATCO Energy Solutions. Both AltaGas and ATCO are part owners of the downstream Edmonton Ethane Extraction Plant (EEEP). They argued that Keyera’s proposal would result in a leaner feedstock entering EEEP which would reduce operational efficiency at EEEP which might in turn render EEEP non-viable. NOVA uses ethane and natural gas liquids as feedstock for its operations and sought to obtain a better understanding of the potential impacts of the project.

The AER concluded that the SOCs or the concerns could all be disregarded on several grounds. First, and in respect of both ATCO and AltaGas, under the heading of “Direct and Adverse Effect”, the AER ruled (AltaGas letter at 3) that any impact on either of them would be the direct result of the decisions of producers to have their gas removed at the Keyera facility in the field rather than leaving it in the common stream and not the result of any decision by the AER to approve the application. “At most (AltaGas at 3) the Application might have an indirect impact on EEEP as a result of reduced receipts.” Additionally under this heading the AER noted that neither company had provided adequate information to determine what impacts either might suffer. And finally under this heading it noted that since the basis of the complaints of these two parties was effectively a complaint about competition for feedstock this was not a matter on which the AER was able to make a decision. All of this led the AER to conclude that any impact on ATCO and AltaGas was remote and thus there was no direct and adverse effect on either.

The AER also put the competition point to work in concluding that it was entitled to ignore the concern on the basis that it was outside the AER’s jurisdiction and outside the scope of the application (s 6.2(2)(a) and (b) of the Rules). This was because (AltaGas at 3): “While the AER has the jurisdiction to consider whether the project is consistent with the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta, it does not have the jurisdiction to compel gas producers to have their gas processed as EEEP and to protect EEEP from market forces and the competition arising therefrom. It is not within the scope of the AER’s authority in the context of this application for the AER to interfere with market competition.”

Finally, the AER took the view under s 6.2(c) of its Rules that the matter had already been decided in a *previous* application. This serves to draw attention to the scope of paragraph (c). Thus it applies not only with respect to the *current* application but to previous applications in which the same issue had been addressed. The AER in this case (AltaGas letter at 4) reasoned as follows:

Implicit in the Energy Resources Conservation Board's approval of Keyera's 2007 application is the determination that recovery of ethane and propane plus from the existing raw gas inlet stream from the field to the Rimbey Plant is, subject to such extraction meeting the applicable technical requirements and regulations, in the public interest. In its consideration of the Keyera 2007 application, the Board noted that "producers have the right to extract NGL in the field." While each application before the AER must be considered on its own facts and meet the AER's requirements, in this matter the public benefit of filed extraction of NGLs, particularly at Keyera's Rimbey Plant, has already been determined.

This provides one more reason why the AER must make its letter decisions systematically available since the previous decision that the AER relies on is indeed a letter decision of March 13, 2008.

Observations

First, "direct and adverse affect" may be relevant at multiple points in proceedings before the AER. It is an important factor in establishing whether or not to hold a hearing, it is important in establishing the right to participate in a hearing, and it is important in assessing whether or not the AER needs to take account of a SOC.

In the case of First Nations the AER has established a very high threshold that a First Nation must meet before it can establish that it is directly affected. It is not enough for it to establish that it has rights in the area and that the proposed activity might interfere with those rights, it must also establish that it exercises its rights in that particular area. The third factor has the potential to be discriminatory. It seems unlikely that the AER would ask whether a fee simple owner actually used her land as part of determining whether that person was directly and adversely affected. Furthermore, the Supreme Court's decision in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 surely establishes that if a First Nation has a treaty right (or an NRTA right) to hunt in an area any authorization by the Crown that results in a taking up of lands causes legal prejudice to the First Nation insofar as the taking up causes land to move categories (i.e. from hunting allowed to hunting not allowed) (and see also *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 13). In the case of a First Nation this prejudice is both particular and cumulative; that is to say the change of category affects both the particular lands and potentially the meaningful exercise of hunting rights within the treaty (or NRTA) area. The demanding nature of the tests suggests that a First Nation will never be able to establish direct and adverse effect based on a cumulative effects argument (either with respect to ecological concerns or with respect to its legal rights). Such a conclusion is inconsistent with the statutory mandate of the AER (inter alia to protect the environment and to ensure environmentally responsible development of the environment, REDA, s 2(1) and s 3 of the AER's General Regulation) and Canada's obligations under Article 27 of the *International Covenant on Civil and Political Rights* (see, for example, [Poma Poma v Peru](#) (2009)).

4. The AER's duty to publish its decisions

Section 33 of REDA requires the AER to publish its decisions in accordance with the Rules. Sections 38 and 7.1 of the Rules requires the AER to post its decisions on its website. The AER's decision on Keyera's application is not available on the AER's website so far as I can determine. The AER's publication of [decision tool](#) indicated that the AER rendered its decision on April 1, 2014 but a reader that clicks on the "view the decision" button is taken to the AER's Integrated Application Registry (IAR) where, in conformity with the announced practice, all relevant documents will have been removed 30 days following the disposition.