STREAMLINING THE REGULATORY PROCESS:
A Review of Alberta’s Regulatory Enhancement Process

Plagued with complaints of inconsistencies and overly complicated and duplicative processes for resource development projects, the current regulatory regime governing Alberta’s oil and gas sector is poised for significant overhaul. With the most recent consultations and studies supporting significant streamlining, and an incumbent Premier who has returned with a strong mandate and majority, it appears almost certain that a single oil and gas regulator, or “superboard”, will materialize. Indeed, the Alberta government has stated publicly that the legislation to create a single regulator will be introduced by the fall of 2012, and that a single regulator will be in place by June 2013.1 Consistent with this movement in Alberta, in April 2012 the federal government introduced Bill C–38 which proposes, among other things, major streamlining reforms to the federal regulatory system and environmental legislation, including the repeal and replacement of the Canadian Environmental Assessment Act.2 A summary of the newly proposed Canadian Environmental Assessment Act and the proposed changes to the federal Fisheries Act may be found at http://www.blg.com/en/home/publications/Documents/publication_3069.pdf.

The focus of this Bulletin is to briefly summarize the provincial streamlining reforms under the Regulatory Enhancement Project, with a focus on the appointment of a single regulator. Among other things, highlights of the Government of Alberta’s December 2010 Report3 and May 2011 Discussion Paper4 will be discussed.

EXECUTIVE SUMMARY
As part of the Regulatory Enhancement Project, the Regulatory Enhancement Task Force has to date delivered 3 reports addressing provincial regulatory streamlining. In its second report, released in December 2010, the Task Force cautioned that realizing the full benefits of Alberta’s oil and gas resources depends on Alberta’s ability to continue attracting significant levels of investment. To that end, the Report made 6 recommendations, including the establishment of a single regulatory body for upstream oil and gas development activities, and a policy management office to act as an interface between the single regulator and the policy development level of the proposed “enhanced system”. Interestingly,

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the Report also recommended that clear public engagement processes be established that enable parties to engage effectively not only at the “policy assurance” stage (i.e., in hearings before the single regulator), but also at the policy development level, which will be comprised of the policy functions of Alberta Energy, Alberta Environment and SRD.

The third report, a Discussion Paper released in May 2011, focuses almost exclusively on the creation of a single regulator. Highlights include the following:

• The single regulator will be built from existing processes and best practices of, and will assume all of the regulatory functions currently administered by, the Energy Resources Conservation Board (ERCB), Alberta Environment and Alberta Sustainable Resource Development (SRD), in respect of oil, natural gas, oil sands and coal, but not mineral tenure nor the functions currently administered by the Surface Rights Board;

• The single regulator will ultimately regulate all mineral activities in Alberta, which will be phased in. Although it will be responsible for ensuring the participation rights of directly affected stakeholders, responsibility for First Nations consultation will remain with the Government of Alberta;

• The application, review and authorization functions of the single regulator will comprise a large portion of its role, and will largely remain the same, except that there will be one process involving one application, one review and one decision;

• Similarly, the current practices and procedures and basic participation rights regarding hearings and participation in hearings, will remain largely unchanged, as will the compliance, enforcement, incident response, and clean-up functions currently performed by the ERCB, Alberta Environment and SRD, except that they will be performed by a single regulator.

Many of the details regarding the implementation of the Regulatory Enhancement Project and the creation of a single regulator have yet to be finalized. It will be interesting to monitor ongoing developments as they unfold.

THE REGULATORY ENHANCEMENT PROJECT AND TASK FORCE

As a precursor to the provincial streamlining reforms, in March 2010 the Government of Alberta released its publication *Energizing Investment: A Framework to Improve Alberta’s Natural Gas and Conventional Oil Competitiveness* (“Energizing Investment”), which was prepared following its year long assessment as to how competitive Alberta’s oil and gas industry was in terms of attracting investment. The review concluded that the regulatory approval process should be streamlined. To this end, the Regulatory Enhancement Project was initiated and the Regulatory Enhancement Task Force (Task Force) was created.

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In accordance with its Terms of Reference, to date the Task Force has delivered 3 reports: a) its First Report in June 2010; b) a second report in December 2010, following 6 months of stakeholder consultations; and c) a third Discussion Paper in May 2011, which focuses on the 2nd of the 6 recommendations made in the December 2010 Report, being the establishment of a single regulatory board for upstream oil and gas development activities.

THE DECEMBER 2010 TASK FORCE REPORT
a) Objective – Attract Investment

The Introduction section of the December 2010 Report states that over the next 25 years, upstream oil and gas development in Alberta has the potential to add $2.5 trillion in new economic activity. However, the Report goes on to state that realizing the full benefits of Alberta’s oil and gas resources depends on Alberta’s ability to continue attracting significant levels of investment. The Report confirmed that the government of Alberta was taking steps to accomplish this objective.

b) Recommendations

A number of concerns with the current regulatory regime were set out in the December 2010 Report, including that parties wanting to undertake upstream oil and gas development are required to interact with several entities, including Alberta Environment, Alberta Sustainable Resource Development (SRD) and the Energy Resources Conservation Board (ERCB), resulting in an overly complicated process potentially fraught with delay. In response to those concerns, the December 2010 Report made the following 6 recommendations:

1. Establish a Policy Management Office to act as an interface between the policy development and policy assurance levels of the new system;
2. Establish a single regulatory body for upstream oil and gas development activities;
3. Provide clear public engagement processes that enable parties to engage effectively at the policy development and policy assurance stages;
4. Ensure a risk assessment and management approach is used;
5. Adopt a performance measurement framework and a public reporting function; and
6. Ensure the development of an effective mechanism to address landowner concerns.

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6 The review also concluded that Alberta’s royalty structure should revert to something similar to what was in place prior to the 20% royalty boost in October 2007.
7 The stated objective of the REP is to:
   ...examine ways of ensuring Alberta’s regulatory system for upstream oil and gas is modern, efficient, performance-based and competitive, while maintaining Alberta’s strong commitment to environmental management, public safety and responsible resource development. Consistent with the objectives of the Regulatory Enhancement Project. In July 2010, the Alberta Competitiveness Act was proclaimed in force. Under that Act, the Lieutenant Governor in Council was empowered to establish a committee or other body for the purposes of the Act, including to increase Alberta’s competitiveness by, among other things, creating effective regulatory systems that provide clarity, predictability, certainty and efficiency.
8 The mandate of the provincially-appointed Task Force is: “to implement a comprehensive review of Alberta’s regulatory system for natural resource development, with a focus on upstream oil and gas.”
9 Enhancing Assurance: The first 90 days (Alberta 2010), available online: http://www.energy.alberta.ca/Org/pdfs/EnhancingAssurance.pdf.
10 Supra, FN 3.
11 Supra, FN 4.
c) Enhanced System – Policy Development and Policy Assurance

The December 2010 Report characterizes the proposed regulatory regime as an “enhanced system”, comprised of policy assurance and policy development. The single regulator is to be part of the “policy assurance” component, which will be a “single window of contact” which will assume the consolidated regulatory functions of the ERCB, Alberta Environment and SRD, and which will conduct all regulatory decision-making and carry out the policies mandated at the policy development level. The “policy development” component will be comprised of the policy functions of Alberta Energy, Alberta Environment and SRD. The Policy Management Office will act as an interface between the policy development and policy assurance functions and will support a coordinated approach to public engagement, not only at the policy assurance level with respect to “private interest issues”, but also at the policy development stage, with respect to “common interest issues”.

THE MAY 2011 DISCUSSION PAPER

a) Introduction

The May 2011 Discussion Paper, which focuses almost exclusively on the creation of a single regulator, provides considerable detail in the context of 5 specific topics: a) Scope and Governance of the Regulator; b) Application, Review and Authorization of Energy Activities; c) Hearings and Participation in Hearings; d) Compliance, Enforcement and Incident Response and Clean Up; and e) Shut Down and Closure of Facilities. In the Discussion Paper, each of these topics concludes with summaries entitled “How it Will Work”, “Proposed Legislative Approach”, and “Issues to Consider”.

b) Scope and Governance

It is proposed that the single regulator: a) will be established by legislation; b) will be a corporation to maintain an arm’s-length relationship with the government; c) will have a Board whose members will be appointed by Cabinet; d) will be built from existing processes and best practices of the ERCB, Alberta Environment and SRD; and e) will assume all of the regulatory functions currently administered by the ERCB, Alberta Environment and SRD, in respect of oil, natural gas, oil sands and coal. The single regulator will not, however, assume responsibility for mineral tenure, which will remain the responsibility of the Department of Energy. Nor will it assume the functions of the Surface Rights Board.

The single regulator will ultimately regulate all mineral activities in Alberta, although the mineral sector will only be phased in once the other sectors have been fully integrated into the new system. Although the single regulator will be responsible for ensuring the participation rights of directly affected stakeholders, responsibility for First Nations consultation will remain with the Government of Alberta.
c) Application, Review and Authorization

The application, review and authorization functions of the single regulator will comprise a large portion of its role. These functions will largely remain the same, except that rather than multiple applications being filed with different entities, there will be one integrated, consistent process involving: a) one application; b) one review; and c) one decision. As a result: a) parties wishing to develop new energy projects will have a single access point and will only need to prepare a common set of documents which will be used for all approvals; b) individual authorizations will be sequenced to ensure efficiency and effectiveness; and c) landowners and other stakeholders will have a single access point for obtaining information and participating in the process. Among other things, the single regulator will be responsible for the environmental impact assessment process.

While the single regulator will have the authority to: a) grant, refuse, defer or dispose of any application; and b) amend, suspend or cancel a disposition or license, Cabinet authorization will be required in the case of “complex projects”, which is undefined in the Discussion Paper.

d) Hearings and Participation in Hearings

With respect to hearings and participation in hearings, the current practices and procedures and basic participation rights will remain largely unchanged. In addition, there will be provision for the use of cooperative proceedings with other regulatory agencies and governmental bodies. One of the listed “issues to consider” is how public engagement at the policy development stage may be made more robust, while another is how to provide clarity on the test for standing.

e) Compliance, Enforcement, Incident Response and Clean-up

Similarly, the compliance, enforcement, incident response, and clean-up functions currently performed by the ERCB, Alberta Environment and SRD, will largely remain unchanged, except that they will be performed by a single regulator. Powers related to inspecting and investigating non-compliance will be the same as those of the Director under the Alberta Environmental Protection and Enhancement Act. In carrying out its compliance and enforcement duties, the single regulator will employ a risk-management based approach. The choice of enforcement tools will be commensurate with the risk posed to environmental management, public health and safety, and resource conservation. As set out in the May 2011 Discussion Paper, these compliance tools will be utilized with a “preventative and curative philosophy” with a view to “helping operators remain compliant.”

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12 It is unclear as to what form the single regulator will ultimately take. The December 2010 Report provides little discussion on this point. Realistically, there appear to be two potential options: a) an “enhanced” ERCB; and b) the creation of a new, separate “Superboard”. The first possibility, an “enhanced” ERCB, would involve broadening the ERCB’s current mandate to encompass all of the powers contemplated for the single regulator. Legislatively, the statutory authority for all activities within the scope of the single regulator (which, in addition to the ERCB, currently reside with Alberta Environment and SRD) would be reassigned to the ERCB. Organizing the single regulator in this fashion makes some degree of practical sense, since the ERCB currently plays a significant role in regulating the oil and gas industry. Under the second possibility, the statutory jurisdiction of the three regulators would be transferred to the new body. The existing regulatory agencies would continue to exist, albeit with reduced mandates. The ERCB in particular would have little to no regulatory jurisdiction remaining.

13 These functions will include: a) project review and authorization; b) compliance monitoring; c) enforcement; d) facility abandonment; and e) site reclamation and remediation.
f) Shut Down and Closure of Facilities

At the end of a project’s lifecycle, the single regulator will coordinate the project’s shut-down, closure and abandonment.\textsuperscript{15} Currently the regulatory processes at project end are distributed unevenly among the ERCB, Alberta Environment and SRD.

**STAKEHOLDER REACTION**

While industry’s reaction to the REP and creation of a single regulator has been generally favourable, some concerns have been raised by others. For example, it has been questioned whether a single regulator: a) will be more effective than the current regime;\textsuperscript{16} b) will favour industry;\textsuperscript{17} and c) will be able to maintain an arm’s length relationship with the government.\textsuperscript{18}

**CONCLUSION**

Many details regarding the implementation of the Regulatory Enhancement Project and the creation of a single regulator have yet to be finalized, including the questions identified in the “Issues to Consider” sections of the May 2011 Discussion Paper. Despite the ambitious timeline set forth by the government of Alberta, Albertans will have to remain patient. As stated a number of times in the Discussion Paper and elsewhere, “[t]he implementation of a single regulator for the energy sector can not happen overnight”. It will be interesting to monitor ongoing developments to ultimately assess how effective the regulatory initiatives will be at accomplishing the goal of enhancing Alberta’s competitiveness to attract investment while not compromising its attention to the environment, public safety and resource conservation, and how much more effective, efficient, adaptable, predictable, fair and transparent a single regulator will be, relative to the current regulatory regime.

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\textsuperscript{14} Alberta Environmental Protection and Enhancement Act, RSA 2000, c E–12. While not entirely clear, it appears that appeals from these decisions will be to the Court of Appeal and not to the Environmental Appeals Board. On page 15 of the December 2010 Report, it states “A single process would also be established for appeals of decisions [by the single regulator], since these previously differ amongst the current regulatory entities.” On page 18 of the May 2011 Discussion Paper, under “Proposed Legislative Approach” and in the context of public interest decisions, it is stated that “The regulator’s decisions are final and conclusive. Parties may appeal to the Court of Appeal on matters of jurisdiction and law.” Similarly, on page 19, under “How it Will Work”, it is stated that “A further right of appeal to the courts will exist on matters of law and jurisdiction. If a court finds error, the decision can be vacated and returned to the single regulator for re-hearing.”

\textsuperscript{15} Regulatory processes that will be integrated into the single regulator include: a) the reclamation certification process (currently administered by SRD and Alberta Environment); b) suspension and abandonment of well and facilities (currently administered by the ERCB); c) management and administration of the orphan fund (currently administered by the ERCB); and d) management and administration of the Mine Financial Security Program (currently administered by Alberta Environment).

\textsuperscript{16} Some have suggested that unless the root causes of the delays and ‘regulatory jam’ are addressed, changes to the current system may not provide the desired outcomes. It has been suggested that government should instead start by removing the duplicative provisions in the enabling legislation of the ERCB, Alberta Environment and SRD.

\textsuperscript{17} Some critics suggest that shifting to the proposed system may remove some of the current checks and balances and shift the role of the regulator to one of simply facilitating the permitting of energy projects.

\textsuperscript{18} The extent of interaction between the policy development and policy assurance functions could threaten the single regulator’s ability to render independent quasi-judicial decisions free from government influence. Independence is a key factor in Alberta’s current regulatory system and if this is lost it may impact its ultimate goal of becoming more competitive so as to attract investment.
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