Keith Wilson

From: Keith Wilson
Sent: November 9, 2012 6:11 PM
To: Keith Wilson
Subject: FW: Bill 2 - Responsible Energy Development Act -- Repeals Landowners' Rights re Energy Projects on Landowners' Own Land and More

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From: Keith Wilson
Sent: November 1, 2012 7:24 PM
To: Keith Wilson
Subject: FW: Bill 2 - Responsible Energy Development Act -- Repeals Landowners' Rights re Energy Projects on Landowners' Own Land and More

This Bill 2 is a train wreck for landowners.

Landowners are the most affected group in our society by energy projects. Remember--these projects (pipelines and well sites) mostly occur on landowner's land, not energy company lands. And landowners can't say no to the energy project. The energy companies can get a right of entry order under the Surface Rights Act and force their way onto your land.

Streamlining energy regulatory processes is a good idea. I strongly support and encourage that. It is important for the future of our economy. There is no value to anyone in having a needlessly complex and convoluted regulatory approval processes.

However, streamlining does not need to—and should not—occur at the expense of landowners, communities, or the environment. Bill 2 is sloppy legal drafting and bad policy insofar as it strips the most affected by energy projects of their legal rights.

It troubles me greatly that landowners appear to be the sacrificial lambs of the government's inept attempt at regulatory streamlining. The government needs to scrap Bill 2 and build a proper new regulatory process for the energy industry. The real and immediate impacts of energy developments on landowners needs to be recognized in any new law.

Here are my comments based on my 20 plus years of experience dealing with energy regulatory processes and after having studied Bill 2.

Stripping Landowners of their Rights

- Remember that almost all energy development in Alberta that occurs outside of Crown lands, occurs on someone's private property . . . on someone's farm or ranch, on their recreational property or rural land. Pipelines, well sites, and related infrastructure mostly occur on someone else's land—not the oil companies' land.
- And remember too that oil companies can force their way onto private land. Even if the landowner does not want the pipeline, the sour gas well, the CBM well, etc, the company can get a Right of Entry Order from the Surface Rights Board. The companies get these entry orders as a matter of right and there is nothing that a landowner can do to stop that order. (Recent Court of Queen's Bench decision affirming same.)
- Today—and ever since Alberta got control of natural resources in 1930—the place that a landowner goes to have his or her concerns about a pipeline, well site or other energy project addressed is the ERCB. Section 26 the Energy Resources Conservation Act is the critical foundation upon which landowners are given rights within the regulatory process for energy projects:

s. 26(2) . . . if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person
(a) notice of the application,
(b) a reasonable opportunity of learning the facts bearing on the application and presented to the Board by the applicant and other parties to the application,
(c) a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application,
(d) if the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application, an opportunity of cross-examination in the presence of the Board or its examiners, and
(e) an adequate opportunity of making representations by way of argument to the Board or its examiners.

- These are not rights conferred by the Board. These are rights that are conferred by statute law—an enactment of the Legislative Assembly. If the Board does not follow this statute law, you can appeal their decision to the Court of Appeal—Alberta's highest court, a superior court under our Constitution.
- You will recall the Court of Appeal rulings in the Kelly cases. That was where the ERCB was trying to exclude landowners from participating in the process. Landowners who the ERCB themselves concluded could be killed by the sour gas wells. The Court of Appeal admonished the Board for reading down sec 26 and ruled that these landowners had standing in the process and that the Board had to reopen the hearing process to hear their concerns. And then there was the Kelly Court of Appeal ruling on Board denying intervener costs and again reading down sec 26 to achieve it. The Court was equally critical of the Board for its treatment of landowners. Because of Bill 2, the Board now gets complete unfettered discretion in deciding whether landowners get any notice or can have any right to a hearing or other participation in the process. There is nothing in Bill 2 that creates any rights for landowners.
- Bill 2 repeals this important section. It replaces it with nothing in the new Act. It only makes reference to the new Regulator making rules about when notice would be given and who will be given rights to hearings etc.
- Landowners are the most affected group in our society by energy projects. Remember--the projects mostly occur on landowner's land, not energy company lands. And landowners can't say no to the energy project. The only balancing feature in our regulatory system has been sec. 26 and now it's gone.
- Side by side comparison reveals how landowners' and communities' rights have been wiped out by Bill 2:

Rights Today	Rights under Bill 2
s. 26(2) . . . if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person (a) notice of the application, (b) a reasonable opportunity of learning the facts bearing on the application and presented	**Notice of application** **31** The Regulator shall on receiving an application ensure that notice of the application is provided in accordance with the rules. **Hearing on application** **34(1)** Subject to subsection (2), the Regulator may make a decision on an application with or without conducting a

to the Board by the applicant and other parties to the application, (c) a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application, (d) if the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application, an opportunity of cross-examination in the presence of the Board or its examiners, and (e) an adequate opportunity of making representations by way of argument to the Board or its examiners.	hearing. **(2)** The Regulator shall conduct a hearing on an application (a) where the Regulator is required to conduct a hearing pursuant to an energy resource enactment, (b) when required to do so under the rules, or (c) under the circumstances prescribed by the regulations. **(3)** A hearing on an application must be conducted in accordance with the rules.

Public Interest

- Bill 2 removes all references to "public interest".
- Currently, sec 3 of the Energy Resources Conservation Act reads:

> **Consideration of public interest**
> 3 Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project or carbon capture and storage project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.
> RSA 2000 cE-10 s3;2010 c14 s1

- Bill 2 repeals sec. 3 public interest provisions. .
- It replaces it with this.

> **Mandate of Regulator**
> **2(1)** The mandate of the Regulator is
> (a) to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta through the Regulator's regulatory activities, and
> (b) in respect of energy resource activities, to regulate
> (i) the disposition and management of public lands,
> (ii) the protection of the environment, and
> (iii) the conservation and management of water, including the wise allocation and use of water,
> in accordance with energy resource enactments and, pursuant to this Act and the regulations, in accordance with specified

- None of the other references to public interest that exist in the existing Energy Resources Conversation Act are being carried forward. They are all being repealed. There is not a single reference to the public interest in Bill 2.
- The government's decision to abandon public interest decision-making for energy projects is truly troubling.

Right to Appeal to the Environmental Appeals Board Removed

- Currently, landowners whose land in contaminated or otherwise environmentally harmed by energy developments, can appeal environmental decisions affecting their own land to the independent Environmental Appeals Board. The Board came into existence in 1993 and has been providing landowners with an appeal of last resort for 19 years.
- Bill 2 brings that to an end. No more independent appeals to the EAB for landowners whose land is contaminated by oil and gas activities.
- The new energy regulator will make all of the environmental decisions relating to landowner's land. If you think the energy regulator missed something, or got something wrong, your only remedy is ask the regulator to review its own decision. No independent review. History shows that regulators almost always decide that they got it right the first time when they are asked to review their own decisions. That is why we have independent appeal processes.
- Interestingly, when a landowner appeals to the EAB a decision of Alberta Environment that the landowner thinks was inadequate, Alberta Environment will take the position at the EAB hearing that Alberta Environment got it right and there is no need to change its own decision. Often, the EAB will rule against Alberta Environment. The EAB will often find that something was missed and that additional steps need to be taken to deal with the environmental concern.

Appeals to the Public Lands Appeal Board

- Right now ranchers, resource companies and other users of Crown lands have the right to appeal energy related decisions to the Public Lands Appeal Board. Bill 2 strips people of that right too.

Bill 2 Won't Work – It Won't Achieve its Laudable Goal

- Streamlining the regulatory process is a good idea but I don't think Bill 2 will deliver.
- The Environmental Law Centre has described the proposed new regulatory process as a "Frankin-child". I agree that a Frankenstein-like creative is being created by Bill 2.
- **Why not start from scratch?** I was surprised that the government decided to try to mush two existing complex and very different regulatory processes together. Doing that does not make things more simple for anyone—oil companies, landowners, communities nor even the regulator. I would have thought they would have started with a clean piece of paper and designed a modern, efficient and effective regulatory process for the energy industry that meets the needs of the industry, landowners, communities, and the environment.
- Keep in mind that the processes administered by Alberta Environment (*Alberta Environmental Protection and Enhancement Act* and *Water Act*) are fundamentally different than the processes administered by the ERCB. It would be like trying to play a CD in an 8track player. And the only guidance that Bill 2 gives for how the music will play is this:

> **Sec. 88 of Bill 2 on page 50 consequentially amends the Environmental Protection and Enhancement Act as follows:**
> **2.1** This Act, to the extent that it applies to energy resource activities as defined in the *Responsible Energy Development Act*, shall be read and applied in conjunction with the *Responsible Energy Development Act.*

- This legal wording does not mean anything. It does not resolve how the two very different regulatory frameworks will be reconciled. It would be like getting instructions for your new CD that reads: 'operate the CD with the 8Track player so that the music plays'. Not much help and very unlikely to play much music.

Regards,

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