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VIA EMAIL & FAX

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Dear Sirs and Madam:

Re: Bill 2 – *Responsible Energy Development Act* – Breach of the Social Contract, Elimination of the Public Interest and Appeal Rights Impacts on Landowners and Energy Industry Relationship

Ever since Alberta began regulating energy production in the 1930s, there has been a social contract between landowners, energy companies, and the Alberta government.

An often overlooked but important fact is that the vast majority of energy activities in Alberta occur on private lands. Oil and gas wells, pipelines, processing plants, etc., are not constructed and operated on lands owned by energy companies. These high-impact developments are put on people's own farms and ranches, their recreational property, their homesteads—*their land*.

The social contract that has maintained a relative peaceful and cooperative relationship between landowners and energy companies has been enshrined in Alberta's laws.

On the one hand, government has given energy companies right of entry powers to force their way onto private lands for building well sites, pipelines, and other energy projects through the *Surface Rights Act*—that Act gives energy companies much broader rights than existed at common law for entry.

On the other hand, the government has always had laws that gave landowners who are directly and adversely affected by energy developments the right to bring any concerns about a proposed energy project before the energy regulator prior to issuance of approvals.

Bill 2 breaches that social contract. It will frustrate landowners and result in increased conflict between landowners and energy companies. This is not in anyone's interest. It is avoidable. Bill 2 is grossly defective and needs to be fixed.

Landowners' Right to Participate

Section 26 of the *Energy Resources Conservation Act* is the legal foundation in Alberta law that recognizes that energy projects impact landowners. It creates a positive legal duty on the regulator (the ERCB) to give that landowner an opportunity to be heard and other important substantive rights. Because sec. 26 is founded in statute law, the ERCB can't ignore the landowner. The Board is required by law to listen and consider landowners' concerns. If the Board fails to do so, it commits an error of law or jurisdiction. The Board can be held accountable by the Alberta Court of Appeal.

This social contract has worked fairly well over the decades. If a landowner feels that an energy company is not being responsive to reasonable concerns or requests with respect to the location of the well or pipeline on the landowner's property; or if the landowner feels what is being proposed is just too dangerous for his or her family and their children; or if there are serious environmental or community impact concerns, sec. 26 of the *Energy Resources Conservation Act* has provided landowners with a mechanism to have these concerns addressed.

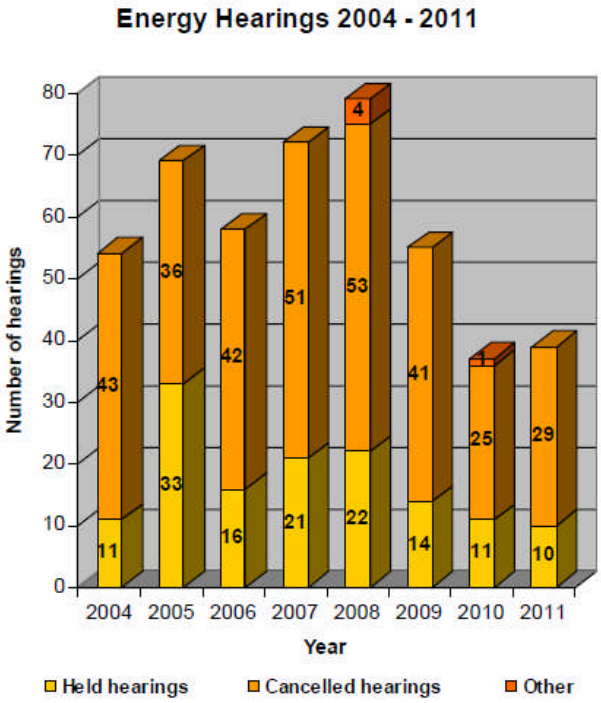
Surprisingly, Bill 2 repeals these important rights in their entirety. And Bill 2 does not replace these rights with anything substantive. A side-by-side comparison of the rights under existing law and that proposed under Bill 2 illustrates the problem:

Landowner Rights Today	Landowner 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 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.	**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 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.

It is and has always been fundamentally important that the foundational rights of landowners *vis-à-vis* energy projects be set out in statute and not merely left to regulations nor undefined 'rules' made by the regulator.

Removing these foundational rights from the statute is a breach of the social contract. These rights must be restored. The contract needs to be honoured.

Importantly, restoring these rights will not cause delays in energy project approvals. The ERCB's own hearing statistics for 2011 show that despite issuing tens of thousands of approvals, only 39 hearings were scheduled and only 10 hearings actually went ahead.



2011 Hearings		
Hearings held	10	26%
Cancelled	29	74%
Total	39	100%

2011 Hearing Statistics
10 hearings held
8 oral and 2 written hearings
7 Applications Branch hearings
1 Oil Sands and Coal Branch hearing
2 Law Branch hearings

It's in no one's interest for a regulatory process to be long and complex.

Landowners don't want the process delayed anymore than energy companies or the government do. But the notion that the process will be more speedy by removing landowners from it—by stripping landowners of their rights—is wrong. It undermines a continued peaceful relationship between the energy industry and landowners.

Elimination of "Public Interest"

Another aspect of the long-standing social contract is the mandate of the regulator as the overseer of what the energy industry is allowed to do on people's private lands.

The legal provisions that set out this mandate of the regulator are found in sec. 3 of the *Energy Resources Conservation Act*:

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.

Bill 2 repeals this critical section. But Bill 2 it goes much further. Bill 2 removes every reference that exists in the current statutory framework relating to public interest. It carries none of the public interest provisions forward into the Bill.

Bill 2 effectively declares that the public interest no longer applies when it comes to energy industry development in Alberta.

The public interest provisions in the current law—the ones being repealed by Bill 2—are the legal provisions that direct that the regulator is to exercise wisdom and judgment in its overall decision-making. A public interest mandate is a hallmark of substantive regulatory boards and commissions in modern democratic countries.

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 is contaminated or otherwise environmentally harmed or threatened by energy developments, can appeal environmental decisions affecting their own land to the independent Environmental Appeals Board (EAB). 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.

Bill 2 proposes that the new energy regulator will make all of the environmental decisions relating to a landowner's land. Under Bill 2, if a landowner thinks the energy regulator missed something, or got something wrong, his or her only remedy is to ask the regulator to review its own decision. There will be 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 in modern democratic countries.

Interestingly, under the current system, 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. There have been cases where the EAB finds that something was missed and that additional steps need to be taken to deal with the environmental concerns. The system works. It should be restored.

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. These rights need to be restored.

Neither appeals to the EAB or the Public Lands Appeal Board delay any energy projects. These appeals only occur after the energy project has been approved. The appeals do not act as a stay. Again, having a fair process that recognizes the importance of fairness and oversight does not need to cause delay to energy companies.

It is imperative that Alberta's MLAs work together to avoid this pending breach of the social contract that Bill 2 represents.

Will Bill 2 Achieve its Goal of a More Efficient Process for Energy Companies?

Streamlining energy regulatory processes is a good idea. I strongly support and encourage that goal as do most landowners. 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.

Despite being a good idea, I don't think Bill 2 will deliver that goal.

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.

There are numerous advantages in starting from with a clean piece of paper and designing 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 approval processes currently administered by Alberta Environment (*Alberta Environmental Protection and Enhancement Act* and the *Water Act*) are fundamentally different than the processes administered by the ERCB. There are completely different consultation, notice, hearing, appeal and related processes. The triggers, the linkages, and the processes are very different. They are so different that they cannot be easily merged or reconciled. It would be like trying to play a CD in an 8track player. 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 any music.

When Alberta first set up a regulatory process for the energy industry in the 1930s it was hailed as a model approach for regulating energy development. However, the methods of energy production, the nature of the resource, the needs of society and communities, and environmental concerns have fundamentally changed.

Why then are we simply merging the exiting ERCB system that was designed in the 1930s with Alberta Environment's regulatory processes that were designed in the late 20th century?

Why not build a truly streamlined regulatory process—one that embraces the unique issues around coal bed methane production, hydro-fracking, oil sands production, etc.—one that will meet the needs of the 21st century?

* * * * *

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

Streamlining energy regulatory processes makes sense. However, streamlining does not need to—and should not—occur at the expense of landowners, communities, or the environment. Bill 2 as currently drafted strips those most affected by energy projects of their legal rights, abandons public interest decision-making, and removes existing environment appeal rights.

Under Bill 2, landowners appear to be the sacrificial lambs of the government's attempt at regulatory streamlining. The real and immediate impacts of energy developments on landowners must be recognized in any new statute law and not left merely to the whims of the Board's new 'rules'. The long-standing social contract needs to be respected.

Thank you for your consideration of these concerns.

Yours truly,

KEITH WILSON
IKW/sc