

What We Heard Report
First Nations Engagement
Regulatory Enhancement Project

October 12, 2010

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1. EXECUTIVE SUMMARY

1.1. Background

Energizing Investment, the March 2010 report on Alberta's competitiveness in the oil and gas industry pointed to a need for improvement in Alberta's regulatory system. The policy assurance (or regulatory) system currently in place for oil and gas in Alberta has become increasingly complex and is characterized by a lack of integrated policies and delivery mechanisms. The Regulatory Enhancement Project (REP) will deliver recommendations for a renewed and integrated policy assurance system that will contribute to Alberta's overall competitiveness while protecting the environment, ensuring public safety and conserving resources. This project will gather and consider stakeholder input on relevant Government of Alberta (GoA) policies and initiatives as system design recommendations are being developed.

The project will help accelerate a shift to an oil and gas policy assurance system. This will assure provincial policy objectives are met, while enabling developers to use cost-effective and innovative approaches to improve environmental performance and meet required outcomes.

The REP will culminate with a final report with recommendations for:

- Aligning the policy assurance system with government policy direction (policy integration);
- A renewed policy assurance/regulatory system, with a policy assurance performance measures framework; and
- Implementation strategies.

1.2. Key Findings

This What We Heard report records the input and feedback that was received from Alberta First Nations participants at each of two REP meetings held on the morning of August 12 and on September 16 and 17, 2010. Some key findings from the meetings with First Nations participants include:

- First Nations participants stated that the REP project should have a consultation component. It is the opinion of the First Nation participants that REP will impact aboriginal and treaty rights, and as such consultation should be built into the project.
- Consultation should be mandatory in the pre-application stage of a development project and an assessment of treaty rights should be addressed within a proponent's application. If these requirements are not adequately considered, then the regulator should not approve the application.
- The regulator needs to be supplied with clear guidelines on the consultation process and consultation requirements, and should be required to enforce them. The regulator should not accept an application if the consultation process has not been followed or if the assessment of adverse impacts is inaccurate.

- Accommodation measures should be implemented during the project development stage. Accommodation could be addressed either through economic means from the proponent or by measures undertaken by the Crown.
- First Nations should not have to prove direct and adverse impacts in order to receive standing in an application or appeals hearing. The appeals process needs to provide First Nations with the ability to appeal decisions related to aboriginal and treaty rights. The appeals mechanism should allow for the review of constitutional matters.

2. INTRODUCTION

2.1. Background

Energizing Investment, the March 2010 report on Alberta's competitiveness in the oil and gas industry pointed to a need for improvement in Alberta's regulatory system. The Regulatory Enhancement Project (REP) has been undertaken with the belief that Alberta can be more competitive while maintaining a high level of commitment to safety and environmental standards. The REP includes three rounds of engagement sessions with First Nations and stakeholders from the oil and gas industry, government and other broad interest groups. These broad interest groups include: environmental non-government organizations (ENGOS), landowners and municipalities. Over the course of the project First Nations and stakeholders have had opportunities to provide input on a variety of topics pertaining to the design of Alberta's policy assurance (or regulatory) system.

A policy assurance system refers to the systems, processes and capacities government uses to assure that the intended results of public policy are being achieved. Policy assurance may use a variety of tools, including regulation, program evaluation, performance standards, incentives, and cross-compliance mechanisms.

2.2. First Nations Engagement

To date the REP has hosted three meetings with First Nations representatives. For each meeting, invitations were extended to representatives of each of the 48 First Nations and three Treaty Organizations. The first meeting, the REP Briefing, was held in Red Deer on the morning of August 12, 2010. An overview of the REP was provided at the meeting, and much of the discussion focused on issues of concern, as they related to the REP. At the outset of the meeting there were 24 First Nations representatives. However due to concerns related to consultation processes, five participants left the meeting at the morning break. A summary of the issues discussed at this meeting is included in section 3.1 below.

Approximately 10 First Nations participants also attended an afternoon workshop on August 12 that consisted of representatives from a variety of groups including ENGO's, First Nations, industry, landowners, and municipalities. In the workshop, hosted and attended by the MLA Task Force that is leading the Regulatory Enhancement Project, stakeholders and First Nations were invited to participate in discussions about the future of Alberta's policy assurance system and provide feedback on preliminary system design work. A summary of the input and feedback received by all participant groups at the afternoon workshop is included in a separate report entitled *What We Heard: System Options (September 27, 2010)* and can be found on the REP website at <http://www.energy.alberta.ca/Initiatives/RegulatoryEnhancement.asp>.

At the request of the First Nations participants at the August 12 morning meeting an additional two-day meeting was held for First Nations on September 16 and 17, in Edmonton. At this meeting, the work of the REP team was discussed in more detail. Participants provided feedback specific to the interests of First Nations. Representatives from each of the participating First Nations also made presentations describing day to day issues with the regulatory system to the REP team members that were in attendance. It was recommended by a First Nation participant that the formal position, as it relates to REP, for each of the representatives at the meeting be

forwarded to GoA for consideration. The REP team requested that these submissions be received no later than October 15, 2010. Section 3.2 below summarizes these presentations and identifies additional issues that were raised at the meeting.

It is important to note that although all Alberta First Nations were invited to attend, not all First Nations chose to participate at the September meeting, and of those in attendance, some First Nations sent more participants than others. The intent of the meetings was to receive feedback and input on materials presented by the REP team members. Attempts were not made to seek consensus on a response to REP among the participants.

The First Nations input from the meetings will be provided for consideration by the REP team. While this report contains specific issues that were raised in the meetings regarding the policy assurance system as it relates to First Nations, it is important to note that not all of the issues are in scope for the Regulatory Enhancement Project; or that they may be addressed at a strategic level in the system design work. The high level themes of the input and feedback that was received at the morning session on August 12 was validated with participants at the September 16 and 17 meeting. The additional input and feedback that was received at the September 16 and 17 meeting has not been validated.

3. ISSUES AND CONCERNS FOR FIRST NATIONS

3.1. Meeting Summary – August 12, 2010 (Red Deer, Alberta)

At the August 12, 2010 meeting participants identified several issues of concern for First Nations communities. The issue of consultation in general, and as it relates to REP was raised by participants. There was a discussion on the consultation policy and guidelines review process that is being led by Alberta Aboriginal Relations. Participants asked how the Task Force gave consideration to treaty rights and how it was determined that the REP will not impact treaty rights. It was the opinion of First Nations participants that REP will impact aboriginal and treaty rights, and as such consultation should be built into the project. Participants expressed concern over having only a half day meeting to understand REP and communicate their opinions regarding its impact. Participants requested having an additional, two-day meeting in September which was agreed to by the REP team. A high level overview of the additional issues and concerns discussed on August 12 is included below.

Self Regulation; Self-Monitoring

First Nations expressed concern about monitoring and enforcement of the oil and gas industry. They felt that industry self-monitoring leads to distrust of industry reported results, and by extension, of the GoA. It was felt that the fact that GoA site inspections are communicated to industry prior to their occurring, exemplified their concern with self-monitoring.

The Need for Trust

Participants expressed concern about the amount of influence from industry in GoA decisions. The structure of regulatory groups being comprised primarily of industry and government representatives was provided as an example of this. Initiatives such as RAMP (Regional Aquatics Monitoring Program) and CEMA (Cumulative Environmental Management Association) are not trusted because First Nations perceive an industry bias.

Since First Nations are outnumbered in these groups during decision-making processes, a suggestion for the creation of a regulatory board that has equal representation for parties was made. It was felt that in order to have equal representation on boards, all participants should have an equal voice. It was also identified that it is difficult for participants to build trust with the GoA due to several recurring situations. For example, it was identified that on many occasions reports that have been submitted to the GoA have been lost, information that the GoA compiles for projects that impact First Nations becomes lost and responses to the letters of First Nations do not receive meaningful replies from the GoA.

Enhanced Understanding of Treaty Rights

Participants communicated that in their view there appears to be a general lack of understanding of treaty rights among industry proponents and GOA. Building on the earlier comments related to consultation, participants identified that it is important for the GoA to understand how the regulatory process links to treaty rights and that the REP must respect the Protocol Agreement that has been signed by the Premier and Grand Chiefs. It was noted that First Nations have offered to provide Cabinet Ministers a free session on treaty rights and consultation, to which there has been no response.

Building on the information in the previous point, it was identified that there needs to be better integration of treaty rights into the regulatory process. Specifically, project-related Terms of Reference need to have a treaty and rights-based approach and baseline information needs to include treaty and aboriginal rights. Participants felt it was important for the REP team to recognize that there is no “one size fits all” process for projects.

Collection of Information and Cumulative Effects Assessment

First Nations expressed concern over the lack of ongoing tracking and recording of scientific and traditional information in order to support decision making processes. Specifically, concern was expressed over the lack of information related to the cumulative impacts of industrial development. It was recommended that the focus of the GoA should shift from reviewing projects on an individual basis to one that considers the “big picture” of development. Participants felt that cumulative effects assessments must also consider impacts to traditional areas. Further, it was identified that baseline information and tangible coordinates that provide accurate mapping of the land base is required in order to adequately assess impacts and support project-related decision-making processes. It was identified that “conceptual EIA’s” seem to be an acceptable concept, although there is a need for them to contain concrete information that is measureable and testable and can be interpreted.

Current Regulatory Process

Several recommendations were made for changes in the existing process and examples from other jurisdictions were provided. With respect to preliminary information, concern was expressed over the exclusion in the *Energizing Investment* report of how First Nations are affected by the policy assurance system. Further, it was felt that the “people” leg of the triple bottom line focused only on non-aboriginal people. With respect to the regulatory system itself it was felt that it has been developed on the basis of the flawed belief that there is an acceptable level of risk. Participants also identified that the accepted practice that the proponent pays for the collection of information which is then used by the Crown to make informed decisions, needs to change. It was identified that First Nation communities want to see changes in how natural resources are developed in the province and want to be involved in that process.

Examples from British Columbia and Ontario were provided as a means of demonstrating innovative approaches to working with First Nations on resource development issues. The example of the Government of BC undertaking negotiations with each First Nation prior to oil and gas development was provided as one example, as was the shared decision making authority that has resulted from the BC Reconciliation and Recognition Act. It was noted that in order to balance decisions so that traditional uses are considered, a shared decision-making structure would be a preferred solution. It was also noted that within the Ontario Mining Act policy changes have been made in order to address First Nations concerns. It was felt that these policy changes have an added business benefit for BC and Ontario because in addressing First Nations-related issues and concerns it is being made easier for business to function in these provinces.

Timeliness

Participants identified that early contact with First Nations communities is a critical undertaking. First Nations want to be involved in projects from the beginning stages, but feel that they are always last on the list for consultation which often results in it being too late for their meaningful involvement. A recommendation was made to extend the six month timeframe for comments. The timing of engagement also impacts the ability of First Nations to capitalize on employment opportunities or provide input prior to the development of land.

Impact on Traditional Uses of Lands

Participants identified that oil and gas development has had an impact on the majority of what First Nations view as their traditional territories including access to areas and the total land base available for traditional uses. Concern was expressed over the criteria for inclusion of First Nations in consultation. It appears to First Nation communities that they are too often located outside the boundary established for consideration. As the land base is disrupted by oil and gas development the First Nations must travel farther in order to practice traditional uses. First Nations expressed concern over the difficulty that this situation poses to the ability to transfer traditional knowledge to younger generations.

Lack of Resources and Capacity

Participants identified that there is a general lack of financial and human resources within First Nations communities and this has an impact on their ability to respond efficiently and meaningfully to industry and GoA requests. It was identified that there is insufficient funding to allow First Nations to respond to proponents to support the gathering and recording of traditional land use information. It was identified that First Nation communities do not have the financial resources to hire the necessary experts (e.g. lawyers, archaeologists) that would support meaningful participation in the process. Additionally, support in providing training and employment opportunities for community members is required.

Compensation

Participants identified that compensation is not adequately addressed by industry. Examples were provided that related to poor levels of compensation for trappers and the loss of their livelihood. There is inadequate compensation for the involvement of Elders in meetings and consultation. Further, it was felt that cultural impacts related to lost artifacts or burial sites are inadequately addressed.

3.2. Meeting Summary – September 16 and 17 (Edmonton, Alberta)

3.2.1. Day One: September 16, 2010

Presentation: Consultation Policy and Guidelines Review Process

In response to the issues raised on August 12 related to consultation, Stan Rutwind, Assistant Deputy Minister, Consultation and Land Claims (Alberta Aboriginal Relations), provided an information session at the meeting. He discussed the First Nations Consultation Policy and Guidelines Review process that is currently underway.

Mr. Rutwind explained that in 2005, when Alberta's Consultation Policy was approved by Cabinet, the GoA committed to a full Policy review in four years time. As such, the GoA is currently reviewing the Consultation Policy and Guidelines which includes engagement with First Nations and industry representatives.

Mr. Rutwind identified that the Grand Chiefs and Vice-Chiefs indicated to the Premier that they would like to be involved in the Consultation Policy and Guidelines Review process, and under the Protocol Agreement, made several recommendations including the creation of a Consultation Sub-Table. The Premier agreed to all recommendations of the Grand Chiefs and agreed to provide \$400,000 to the Treaty Organizations to participate in the review process. The Treaty Organizations agreed to provide GoA with a Position Paper highlighting First Nation perspectives on Alberta's approach by September 30, 2010.

Further, the Minister of Aboriginal Relations provided all First Nations with a letter that provides an update on the review process and invited feedback from individual First Nations. Treaty Organizations, Tribal Councils and industry associations were sent similar letters as well. Mr. Rutwind identified that the GoA is currently waiting to receive the Position Papers from both First Nations and industry and that there will continue to be ongoing meetings with First Nations, municipalities and industry in order to gain an understanding of these perspectives. It is anticipated that Alberta will have a new, revised Consultation Policy by the Spring of 2011.

Presentation Feedback

The feedback from participants on this presentation expressed concern that although the process is being streamlined from a GoA point of view, First Nations view the number of opportunities for consultation as being reduced. Concern was expressed over a perceived outcome of narrowing the scope of issues and projects that require consultation with First Nations. Concern was also expressed over the perception that the process of going to court to resolve consultation issues is being accelerated, and increasingly relied upon.

Review and Update on First Nations Issues Identification

Following this discussion, participants reviewed the listing of issues that were raised during the August 12 meeting in Red Deer. There was general agreement with the listing of issues that were presented. These issues are discussed in section 3.1 above. The group was then provided the opportunity to raise additional issues as they related to the REP. In the ensuing discussion the following additional issues were identified. In some cases the information built upon the points that were raised on August 12.

a) Lack of Detailed and Comprehensive Information

The participants identified that there is a lack of adequate baseline information to inform environmental assessments. It was also noted that there is a lack of tangible data included in the environmental assessments, and that the information is too conceptual and lacks targets. Additionally participants identified that many proponents rely upon out of date information, and do not spend the time or the money to collect current data for their environmental assessments. It was also felt that there is a conflict of interest in the data gathering process because it is industry that pays for the data collection for their reporting purposes. With respect to the current regulatory process, concern was also expressed over its inability to be responsive to policy changes. As an example of this it was noted that the recent changes to the status of grizzly bears as a threatened species is not perceived as being reflected in the regulatory system.

b) Traditional Knowledge

With respect to environmental assessments it was identified that traditional land use information needs to be integrated into the process, however it was noted that there are confidentiality issues that arise with respect to the sharing of traditional knowledge. Concern was expressed over sub-consultants working in communities to document traditional information, without engaging local resources in the process. It was also identified that the social impacts of a project must be included as a consideration in the assessments. The example provided to demonstrate a social impact was the potential negative effect of a project on the ability of a community to pass on traditional knowledge to younger generations. It was also felt that there is a general lack of understanding of the information that is currently contained in maps. It was felt that by employing a collaborative approach to project discussions and decision-making, the environmental assessment process could be more effective for all parties.

c) Treaty Rights

First Nations expressed the belief that the fundamental underpinning of the REP is to increase economic development within the province. It was identified that First Nations do not view this economic benefit as flowing to First Nations and as such, there needs to be an adequate account of project impacts on treaty rights. It was felt that within the current system the regulators do not consider these factors and that ultimately there needs to be recognition that disturbances from project development reduce the ability to exercise treaty rights. Concern was expressed over the fact that the REP has deemed there is no impact of this project on treaty rights at this time, when there has been no consultation on the issue.

Participant Presentations

Participants asked for the use of some of the scheduled agenda to discuss issues related to their individual First Nation community in order to provide insight on their day to day responsibilities as they would relate to REP. Approximately three hours was dedicated to this discussion. The major themes that were discussed by participants are summarized below. It was recommended by a First Nation participant that the formal position of each of the representatives at the meeting be forwarded to GoA for consideration. The REP team requested that these submissions be received no later than October 15, 2010.

a) Proponent Applications

Several presenters identified that the extensive number of project applications, and the amount of work that each application requires, makes it difficult to manage and respond to proponents in a timely manner. Compounding the difficulties in responding to the applications is the short turn-around time that is typically provided to communities and a lack of the requisite financial and human resources support. Many presenters identified that their consultation offices consist of only one staff member. Presenters identified that their First Nations' consultation offices have implemented their own formal processes such as application procedures, required presentations to Chief and Council and Elders and use of Compensation Matrices. Many presenters indicated that even with their own formal processes in place, they receive push-back from industry with respect to following them.

b) Assessment-related Information

Several presenters identified the type of information that they felt should be included in assessments. It was felt that traditional knowledge needs to be included, along with western science, in all assessments. It was felt that traditional knowledge could support the development of plans throughout the project lifecycle, and would be beneficial to the development of reclamation plans in order to allow for traditional land uses to be better accommodated post-project. It was identified that it is important that the collection of traditional knowledge be completed by local resources as opposed to sub-consultants in order to build capacity within communities.

It was also communicated that pre-disturbance baseline information should be required within environmental impact assessments, in order to support the understanding of cumulative effects in a given area. Socio-economic considerations also need to be included, since the current assessments do not adequately capture cultural impacts such as how communities are located with respect to their traditional lands.

c) Consultation

Presenters also discussed the importance of the government's duty to consult with First Nations with respect to their treaty rights. Concern was expressed that streamlining the regulatory process through REP will result in even less opportunity for consultation in the future. Presenters identified that consultation efforts should not take on a generalized approach and should occur with individual First Nations. Concern was expressed over past consultation processes that have occurred only with the Treaty organizations or collectively with the Four Nations of Hobbema. With respect to the effectiveness of past consultation processes, frustration was expressed that typically the input of First Nations is not addressed. The example of the Land Use Framework was provided, in which the participants involved in that process felt that none of their stated concerns had been addressed. It was also identified that consultation should be viewed as two different stages: *assessment* on the impact to treaty and aboriginal rights and *accommodation* of the identified impacts.

d) Traditional Territories

Presenters identified that as industry grows within the province, access to what First Nations view as their traditional territories is diminishing. This impacts the ability of members to practice traditional lifestyles and to transfer traditional knowledge from Elders to community youth. Although it was identified that there is a desire to create maps that document traditional territories, it was also noted that Elders, Chiefs and Councils often do not wish for the territories to be mapped.

e) Collaboration

A presenter also suggested that increasing the understanding of each other (First Nations, government and industry) would be an effective way to move forward on many of the issues that had been raised. It was suggested that a First Nations representative should be employed within each government ministry in order to assist with each party understanding the needs and requirements of the other. Having a mandatory First Nations Environmental Monitor included

on a project team for the duration of a project would not only assist in creating understanding between industry and First Nations, but would also support the assessment of cumulative effects.

3.2.2. Day Two: September 17, 2010

The second day of the meeting was dedicated to a discussion on two system-related items that had been raised on the previous day: *System Structure* and *the Appeals Process*.

System Structure

With respect to *System Structure* much of the discussion focused upon the importance of integrating consultation into the process. It was felt that the undertaking of consultation should be mandatory prior to a proponent submitting an application for review. Once consultation is complete the proponent should then have the obligation to report the results of the consultation, including the impact of the project on treaty rights, to the regulator. The Crown should then have the obligation to validate, with the affected First Nations, that the results of the proponent's consultation report are accurate through completion of its own consultation process. It was also identified that the regulator needs to be supplied with clear guidelines on the consultation process and consultation requirements, and should be required to enforce them. It was felt that the regulator should not be accepting an application if the consultation process has not been undertaken or if the assessment of impacts is inaccurate.

Further discussion identified that the objective of consultation should be viewed in two stages: *the assessment stage* and *the accommodation stage*. As discussed above, it was identified that the assessment of impact to treaty rights should be completed at the pre-application stage by the proponent and by the Crown. Accommodation measures should be determined after this point in time, during the project development stage. It was felt that accommodation could be addressed either through economic means from the proponent or through measures enacted by the GoA.

Expectations of System

There were additional issues discussed that related to expectations of the *System Structure*. These included the following items:

- Environmental considerations should weigh more heavily in trade-off discussions. Participants understood the need for trade-offs within the approvals process, however expressed concern that decisions related to trade-offs most commonly have a negative impact on the environment.
- The implementation of compliance and monitoring efforts at the site level should be more effective. It was felt that the GoA should employ a variety of enforcement tools and that the number of site visits by GoA inspectors should be increased.
- The system should be more attuned to treaty rights. As discussed above, consultation requirements should be clearly articulated to, and enforced by, the regulator. With respect to potential modifications to the existing application forms, a suggestion was made to include a question that asks if there is a potential impact to treaty rights, and if so, provide the opportunity for the proponent to explain the impacts.

- Policies that are developed should be translated efficiently and effectively into regulations, on an on-going basis.
- The nature of the relationship between the regulator and First Nations should be collaborative.

Appeals Process

It was identified that currently First Nations do not receive standing based on treaty rights. In order to receive standing, the onus is on First Nations to prove direct and adverse impacts. As such, with respect to the *Appeals Process* it was identified that First Nations need to have the ability to appeal decisions related to aboriginal and treaty rights. It was felt that the appeals mechanism should allow for the review of constitutional matters and that the resultant Board should have the mandate to address constitutional rights. It was also felt that the Board should include a First Nations member.

4. CONCLUSIONS

This What We Heard report records the input and feedback that was received from First Nations participants at each of two REP meetings held on the morning of August 12 and on September 16 and 17, 2010. The key findings from these meetings that have been articulated in this report, include:

- First Nations participants stated that the REP project should have a consultation component. It is the opinion of the First Nation participants that REP will impact aboriginal and treaty rights, and as such consultation should be built into the project.
- Consultation should be mandatory in the pre-application stage of a development project and an assessment of treaty rights should be addressed within a proponent’s application. If these requirements are not adequately considered, then the regulator should not approve the application.
- The regulator needs to be supplied with clear guidelines on the consultation process and consultation requirements, and should be required to enforce them. The regulator should not accept an application if the consultation process has not been followed or if the assessment of adverse impacts is inaccurate.
- Accommodation measures should be implemented during the project development stage. Accommodation could be addressed either through economic means from the proponent or by measures undertaken by the Crown.
- First Nations should not have to prove direct and adverse impacts in order to receive standing in an application or appeals hearing. The appeals process needs to provide First Nations with the ability to appeal decisions related to aboriginal and treaty rights. The appeals mechanism should allow for the review of constitutional matters.

4.1. Next Steps

The input from First Nations has been heard directly by members of the MLA Task Force, the REP project team and the Design Team. First Nation participants have been asked to submit any formal positions related to the REP no later than October 15. All participants at the September meeting have been invited to the October 1 Forum, which will include representatives from ENGO’s, First Nations, industry, landowners, and municipalities in order to review the further work of the REP team.