

Public Participation in Energy Decisions – CIRL



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What is Public Participation?

“An all-encompassing label to describe any [and] all mechanisms that allow anyone other than government/governmental agencies and project proponents to communicate their views and influence decision making.”

Vlavianos

“One instrument of deliberative democratic systems that seeks to capture the concerns and opinions of the people affected by government’s decisions, or of the citizenry in general.”

Macias

“A subject where comparison is difficult, because the extent, to which there should be public participation, and how it should occur, go straight to the heart of a nation’s political values, its concept of the state and the state’s relationship with its citizens, and its concept of how public business is properly carried out.”

Barton

- **What is Social licence?**

- Not defined in law
- No universally accepted definition
- Various definitions proposed by academics, consultants, politicians ...
- Means different things to different people
- “community acceptance and approval of major development projects”

Corporate definition: social responsibility and building community goodwill to facilitate approval and implementation of a project.

Project opponents perspective: “licence” means consent and therefore a right to veto.

Federal government has proposed to revise the *Canadian Environmental Assessment Act*, (CEAA, 2012) to include a mandatory “social licence” requirement.

Alberta Energy Regulator:

“The single regulator is one part of the province’s commitment to improve integration of its resource system. This integration sets and achieves the environmental, economic and social outcomes Albertans expect from resource development, while maintaining the social licence to develop resources.”

- Rule of law – constitutional principle that all citizens, including government officials, are governed by the same laws.
- Enshrined in the preamble to the Canadian Charter of Rights and Freedoms.
- Allowing public opinion only would be unconstitutional as (in effect) creating an alternative legislative process.

Public Participation



- Legal Right to Procedural Fairness
 - Reasonable notice
 - Right to be heard
 - Impartial decision-maker

- Industry Notification and Consultation Program
 - Directive 056
- Environmental Impact Assessment Processes
- Under REDA and Regulations
 - The Formal Legal Process

- Scenario: Company applies to AER for licence to drill 3 sour gas wells. Opposed by:
 - Landowners 0.5, 3 and 6 Km from the nearest well.
 - AB Environmental Defence League.
 - Regional Municipality of Wildland (in which the wells would be located).
 - Wildland First Nation (claimed traditional lands; reserve 20 km away).

- “Is the claim known to law?”
- Connection between the project and the right asserted. *Dene Tha’ First Nation v. EUB*, 2005 ABCA 68

- **Notice of application**

31 The Regulator shall on receiving an application ensure that public notice of the application is provided in accordance with the rules.

- **Statement of concern**

32 A person who believes that the person may be directly and adversely affected by an application may file a statement of concern with the Regulator in accordance with the rules.

■ Decision of Regulator

33(1) Where a statement of concern is filed in respect of an application, the Regulator shall decide, in accordance with the rules and subject to section 34, whether to conduct a hearing on the application.

(2) If the Regulator makes a decision on an application without conducting a hearing, the Regulator shall publish or otherwise make publicly available the Regulator's decision 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)** If the Regulator conducts a hearing on an application, a person who may be directly and adversely affected by the application is entitled to be heard at the hearing.
- (4)** A hearing on an application must be conducted in accordance with the rules.

Statement of concern on application

5.3 In the case of an application other than one referred to in section 5.2(2), a person wishing to file a statement of concern under section 32 of the Act must do so

- (a) no later than 30 days from the date public notice of the application is provided, or
- (b) within a different time period set out in the notice of application.

Form of statement of concern

6(1) A statement of concern filed by a person under section 32 of the Act or under section 6.1 of these Rules must be in writing and must contain the following:

- (a) a concise statement indicating
 - (i) why the person believes that the person may be directly and adversely affected by a decision of the Regulator on the application,
 - (ii) the nature of the person's objection to the application, and
 - (iii) the outcome of the application that the person advocates;
- (b) the location of the land, residence or activity of the person in relation to the location of the energy resource activity that is the subject of the application;
- (c) the person's contact information.

(2) The person making a statement of concern under subsection (1) shall file it with the Regulator in accordance with section 47.

(3) The Regulator shall on receiving a statement of concern ensure that a copy is provided to the applicant.

(4) A person may withdraw a statement of concern by filing a notice of withdrawal in writing.

Non-consideration of statement of concern

6.2(1) The Regulator may disregard a statement of concern filed with the Regulator if in the Regulator’s opinion any of the following apply:

- (a) the person who filed the statement of concern has not demonstrated that the person may be directly and adversely affected by the application or a special circumstance set out in section 6.1, as the case may be;
- (b) the statement of concern was not filed within the time specified by these Rules;
- (c) a decision was made on an application by the Regulator prior to the statement of concern being filed;
- (d) for any other reason the Regulator considers that the statement of concern is not properly before it.

- (2)** The Regulator may disregard a concern raised in a statement of concern filed with the Regulator if in the Regulator’s opinion 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.

Decision regarding whether to hold a hearing

- 7** The Regulator may consider any of the following factors when deciding whether or not to conduct a hearing on an application:
- (a) whether any of the circumstances described in section 6.2 apply;
 - (b) whether the objection raised in a statement of concern filed in respect of the application has been addressed to the satisfaction of the Regulator;
 - (c) whether the applicant and any persons who have filed statements of concern in respect of the application have made efforts to resolve the issues in dispute directly with each other through a dispute resolution meeting or otherwise;
 - (d) whether the application is one described in section 5.2(2);

- (e) whether the matter to which the application relates has been adequately dealt with or addressed through a hearing or other proceeding under any other enactment or by a decision on another application;
- (f) whether the Crown has requested that a hearing be held for the purpose of assessing impacts to and the means to mitigate the impacts on Aboriginal peoples;
- (g) whether the application will result in minimal or no adverse effect on the environment;
- (j) any other factor the Regulator considers appropriate.

45(1) A decision of the Regulator is appealable to the Court of Appeal, with the permission of the Court of Appeal, on a question of jurisdiction or on a question of law.

Whether question in the appeal raises a “serious arguable point”. Relevant factors:

1. Is the proposed issue a question of law or jurisdiction?
2. Is the issue one of general importance?
3. Is the point raised of significance to the action?
4. Does the appeal have arguable merit?
5. What standard of review is likely to be applied? and
6. What impact an appeal may have on an ongoing action.