



**Canadian Environmental Law Association**  
**L'Association canadienne du droit de l'environnement**

517 College Street, Suite 401, Toronto, Ontario M6G 4A2  
Telephone (416) 960-2284  
Fax (416) 960-9392

**MOVING CANADIAN GAS TO THE U.S. CONFERENCE**

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**APPLICATION OF THE FEDERAL ENVIRONMENTAL ASSESSMENT  
AND REVIEW PROCESS GUIDELINES ORDER TO NATIONAL ENERGY  
BOARD NATURAL GAS EXPORT LICENSING**

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Presented by:

**MAUREEN TURNER**  
Counsel  
Canadian Environmental Law Association  
Toronto, Ontario



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I INTRODUCTION

I have been asked to discuss the environmental impacts of exporting natural gas in the context of the "greening of the U.S" and the effects of that "greening" on the natural gas market. At the outset, I believe it is necessary to recognize that public awareness and concern for the environment is, of course, not just an "American trend". While Canadian exports of natural gas will be effected by the "greening of the U.S." they will also be affected by initiatives and policies developing in Canada in response to growing national and international concern for the global environment.

In 1987, the World Commission on Environment and Development commonly known as the "Bruntland Commission" popularized the notion of "sustainable development" offering an unprecedented endorsement by the United Nations of the principles of environmental protection and resource conservation.

That same year, the Report of the National Task Force on Environment and Economy undertaken by the Canadian Council for Resource and Environment Ministers, reflecting the principles of the "Bruntland Commission", concluded that environmental and economic planning can

no longer proceed in separate spheres and must therefore be integrated.

The Task Force specifically recommended that;

"All Ministers become directly responsible and accountable for the environmental and economic consequences of their policies, legislation and programs;

- . by ensuring that all government processes for screening, review and evaluation of economic development projects include both socio-economic and environmental criteria,
- . by ensuring that every major report on economic development, and every related cabinet document, demonstrate that the proposal or activity is economically and environmentally sound,
- . by ensuring that all government programs which give funding or loan guarantees to industry are conditional on meeting environmental standards,
- . and by opening environmental, resource and economic development policy making and planning to greater public input".<sup>2</sup>

In 1988, the Government of Canada officially adopted this policy of "sustainable development" committing itself firmly to;

1. Recognizing as a government, the obligation to act as trustees of the resources we will pass onto future generations and to exercise comprehensive and far-sighted leadership in supporting and promoting sustainable economic development, and;
2. In accepting this responsibility, to change their approach to the environment and the economy and to integrate environmental input into decision-making at the highest level.

The question to be asked today is not "will" public environmental concerns affect natural gas markets, but "how" and to "what" extent will environmental concerns affect these markets and I suggest that

governmental commitment and accountability combined with economic development inevitably leads to the process of legislative "environmental assessments".

## II THE ENVIRONMENTAL ASSESSMENT AND REVIEW PROCESS GUIDELINES ORDER

### A: The Environmental Assessment Process

Environmental assessments are procedures intended to ensure that proposed plans and projects are publicly evaluated and developed following clearly stated principles. They are intended to identify potentially significant environmental effects early enough in the developmental stages so that alternative solutions or options and remedial measures are still available and practicable for implementation in the proposal.

Environmental assessments are not new to the oil and gas industry or to the Nation Energy Board. However, until fairly recently, environmental assessments of pipeline facilities were focused solely on the environmental effects of the construction and the operation of the pipeline, and not with the environmental effects of production or consumption.

As you may know, this changed when the Minister of Energy, Mines and Resources in responding to an application from the Canadian Environmental Law Association required that natural gas export

licensing applications under Part VI of the National Energy Board Act be subject to the requirements of the federal environmental assessment process. A decision that has been met with controversy and understandably causing concern to the proponents of these licensing applications.

What I intend on doing today is discussing how the federal assessment process recently became "new law" in Canada, how it is structured, what it requires and how it currently applies to NEB licensing applications. I will conclude by touching on the controversy surrounding it's application and the type of environmental effects that we consider should be examined within this context.

**B: EARP and the Federal Court of Canada**

The Environmental Assessment and Review Process Guidelines Order, referred to as the "EARP Guidelines Order" was introduced by the Federal government in 1984 in response to a 1977 Cabinet directive, to provide guidance to federal ministries. It was originally intended to clarify roles and responsibilities for assessing federal projects and as such, was considered to be just a "guideline" of some "persuasive" force. Consequently, the NEB along with other federal ministries followed their own guidelines and procedures for environmental assessment.

Meanwhile, Canadian environmental policies developing in 1987 and

responding to the then perceived void in the federal environmental process identified the need for improved environmental assessment procedures. After numerous public consultations and a green paper, the Federal Minister of the Environment in a speech from the throne in April 1989 promised new federal environmental assessment legislation which received first reading in the House of Commons on June 18, 1990.

However, the Federal Court of Canada responding to applications from environmental and citizen's groups in Saskatchewan and Alberta took a long, hard look at the EARP guidelines order and decided that this was not just a description of policy but that it was a regulation that created binding and enforceable rights to be strictly applied by federal and provincial Ministers.

It began in 1989 when the Canadian Wildlife Federation filed an application in Federal Court objecting to the federal Ministry of the Environment granting a licence to the Saskatchewan Water Corporation for construction of the Rafferty and Alameda Dams on the Souris River Systems without first complying with the EARP Guidelines Order.

However, the Saskatchewan Water Corporation and other defendants argued that EARP did not apply in this situation because this was not a project undertaken by a federal minister and because an environmental impact statement had already been submitted to, and approved by, the provincial ministry of the environment. Further,

even if EARP applied, a federal environmental assessment would result in unnecessary duplication.

However, as we know, the Federal Court did not agree and revoked the federal licence. The Court reasoned that EARP did apply because a federal Minister was required to issue a license under Federal Legislation, and because the project resulted in environmental impacts on matters of federal responsibility including international relations, the Boundary Water Treaty, migratory birds, interprovincial affairs and fisheries. Further, the provincial environmental impact statement had failed to adequately address all of the environmental impacts on matters of federal responsibility.

By not following the procedures set out in the EARP Guidelines Order, the Minister had failed to comply with his statutory duty and consequently, had acted without jurisdiction.

Shortly afterwards, the federal Minister had a draft environmental evaluation document prepared. Public meetings on the draft document were held in 7 communities and the public were provided with opportunities to make representations and or to submit briefs outlining their concerns. The federal Minister then released the final document and again approved the licence for the Rafferty and Alameda dams, again the Canadian Wildlife Federation stepped in and objected and again the Federal Court of Canada revoked the license.



This time the Court said that the Minister had failed to strictly follow the exact wording of the EARP Guidelines Order. Although the public made submissions on the draft document, the final document was not made available for public comment as required by section 15. Further, the final document did not contain the specific wording found in section 12 (for example it referred to "moderate" instead of "significant" environmental effects). The court also found that the document did not adequately address the proposed "mitigating technologies" to be used in the project and consequently the Minister did not refer the proposal for public review by an Environmental Assessment Panel.

The Federal Court ordered that the license be revoked unless the Minister appoint an Environmental Assessment Panel within one month to conduct a public review with respect to the significant environmental effects of the project although by that time, over \$38 million dollars had been spent on the project, \$10.2 million had been spent on land purchases and some projects were up to 95% complete.

Meanwhile in Alberta, that province was in the process of constructing a dam on the Oldman River, a project that had been the subject of provincial environmental and other studies involving public hearings, representations and public information meetings. The province required and obtained approval from the federal Minister of Transport under the Navigable Waters Protection Act (Canada).

In March of 1990, a citizen's group called the "Friends of the Oldman River Society", succeeded in convincing the Federal Court of Appeal to revoke the federal approval and to require that all involved federal and provincial Ministries comply with EARP<sup>5</sup> although over 40% of the 353 million dollar project was completed. Again the Court determined that once the province was required to seek approval under federal legislation and since the project would create environmental impacts on areas of federal responsibilities, both the federal and provincial Ministers involved were obliged to strictly comply with the requirements in EARP.

### **C: The "Guidelines Order"**

#### **Scope**

The EARP Guidelines Order is federal legislation creating a "self assessment" process to ensure that environmental implications of proposals affecting areas of federal jurisdiction are fully considered as early in the planning process as possible and before irrevocable decisions are taken. When the environmental implications are significant, the proposal will be referred to the Minister of the Environment for public review by an environmental assessment panel.

#### **Application**

The EARP Guidelines Order applies in four situations:

1. to any proposal undertaken by a federal department,
2. to proposals that have environmental effects on areas of federal responsibility,
3. where the federal government makes a financial contribution to the proposal, or
4. where the proposal is located on lands that are administered by the federal government.

Natural gas licensing applications are "proposals that have environmental effects on areas of federal responsibility". A "proposal" includes any initiative, undertaking, or activity for which the government of Canada has a decision making responsibility. Further, the EARP Guidelines Order requires that all federal-provincial, territorial and international agreements reflect the principles of the assessment process and that the department include forecasts and annual estimates of the resources necessary to carry out the process.

### **Initial Assessment**

The first stage consists of a "Initial Assessment". Every federal department that has decision making authority for a proposal (the "Initiating Department") which in this case is the National Energy Board, must ensure that the proposal is subjected to an environmental screening or initial assessment to determine if there will be any

adverse environmental effects.

The Federal Environmental Assessment Review Office (or FEARO) provides departments with procedural guidelines for the screening of proposals and general assistance, and assists in the provision of information on, and the solicitation of public response to the proposal.

In its consideration of a proposal, the department must include any potential environmental effects, any social effects directly related to those environmental effects including any effects that are external to Canadian territory and the concerns of the public regarding the proposal and its potential environmental effects. Subject to Ministerial approval, the department may consider such matters as the general socio-economic effects of the proposal and the technological assessment of, and need for, the proposal.

Every proposal must be individually screened or assessed to determine which of four categories under section 12 the proposal falls into.

A public review is not required where the proposal will not produce any adverse environmental effects or where the "potentially adverse environmental effects" can be mitigated with known technologies. If the environmental effects are either "unknown" or "unacceptable", then the proposal will either be rescreened, reassessed, modified, referred for public review, restudied or abandoned. A public review is required where the potentially adverse environmental effects caused

by the proposal are "significant".

Despite all of the above, if public concern about the proposal is such that a public review is desirable, then the department must refer the proposal for public review by the panel.

Once the determination has been made, the public must have access to the information and an opportunity to respond to the proposal before any mitigation or compensation measures are implemented.

Under the EARP Guidelines Order, the department is entitled to prepare two lists under which types of proposals can be pre-classified. Proposals under the first classification are automatically excluded from the process because they will not produce any adverse environmental effects. Proposals under the second classification are automatically referred to the Minister for public review because they will produce significant adverse environmental effects.

#### **Public Review by the EA Panel**

The public review is carried out by an Environmental Assessment Panel whose members are appointed by the Minister of the Environment. The Panel members must be unbiased and free of any potential conflict of interest (relative to the proposal), free of any political influence and have special knowledge and experience relevant to the anticipated technical, environmental and social effects of the proposal. Their

role is to conduct the review and a public information program and ensure that the public have access to all of the relevant documentation.

As with the initial assessment, the public review must include an examination of the environmental effects of the proposal and the directly related social impact of those effects. It may also include the general socio-economic effects of the proposal and the technological assessment of, and need for, the proposal.

It is the responsibility of the proponent in a public review to prepare an Environmental Impact Statement as outlined by the Panel, implement a public information program to explain the proposal and its potential environmental impacts and ensure that senior officials and expert staff are present at public hearings conducted by the EA Panel.

After the review, the Environmental Assessment Panel prepares a report with their conclusions and recommendations which is made available to the public and to the various Ministers who ultimately have the discretion to approve or reject the proposal.

### **Duplication**

To avoid duplication, where a proposal is subject to environmental regulation independently of the process, the public review is to be used as a planning tool at the earliest stages of development of the

proposal rather than as a regulatory mechanism so that the results of the public review can be available for use in the regulatory process.

Where a board has a regulatory function in respect of a proposal, then EARP applies only to the extent that there is no duplication from applying the EARP process.

### **Conclusion**

The EARP process requests an accounting from the proponent on the potential environmental effects of proposals. It is clear that most proposals will not be subjected to the public review process, but they will be subjected to the initial screening and identification process to ensure that proposals requiring federal approval are consistent with federal environmental protection legislation and policies.

### **III APPLICATION OF THE GUIDELINES TO THE NATIONAL ENERGY BOARD'S NATURAL GAS EXPORT LICENSING PROCESS**

#### **A: EARP Guidelines Order and the NEB**

In August 1989, the National Energy Board approved applications from Esso, Shell and Gulf for licences under Part VI of the Energy Board Act for long term exportation of natural gas from the Mackenzie Delta in the Northwest Territories to the United States. In considering

matters relevant to the "public interest" as required by s. 118 of that Act, the Board did not include a consideration of the potential environmental effects of the projects.

On application to the Governor in Council, the Canadian Environmental Law Association (CELA) requested that the Governor in Council refuse to approve the export licences. CELA asserted that the National Energy Board did not have authority to grant the licences until they complied with EARP and unless they included environmental impacts as part of their consideration of the "public interest". Further, CELA claimed that the Board failed to consider the likelihood that such exports would increase emissions of CO<sub>2</sub> and other gases that contribute to global warming and failed to consider the contribution natural gas resources might play in achieving Canadian CO<sub>2</sub> reductions before approving long-term commitments of those resources to export markets.

In February 1990, the Minister of Energy, Mines and Resources referred to CELA's application and asked the NEB for information regarding the Board's compliance with EARP. Shortly thereafter, the Board advised the Minister that, as regards to natural gas export applications, they would be conducting environmental screenings for potential environmental effects in compliance with EARP.

Since then, the National Energy Board has informed the applicants under GHW-2-90 that the NEB will be conducting an environmental



screening or initial assessment of the applications by Esso, Gulf and Shell and will hold a hearing by way of written submissions to obtain parties' views. The NEB has directed that the applicants provide the Board with submissions regarding the construction and operation of facilities in Canada and the U.S. which will be required to give effect to the proposed export transaction and to provide the Board with submissions regarding the end use of the natural gas.

In their submissions, the applicants have been instructed to provide the Board with information on evidence as to the nature and significance of any potential environmental effects and of any social effects directly related to those environmental effects; evidence as to the extent to which the environmental and social effects can be mitigated and evidence that all required governmental environmental authorizations have been or are likely to be obtained; and finally, to provide a rationale for the conclusions reached.

Public information programs required by the NEB and requested under their memorandum of guidance issued June 28, 1990, do not apply to oil and gas export license applications under Division I of Part 6 of the National Energy Board Act unless the application is for export of specific oil grades by marine vessel.

## B: The Application of EARP Challenged

Two examples illustrate responses to the NEB's request under the EARP Guidelines Order. Esso, Gulf and Shell have responded by stating that EARP does not apply to licensing applications since environmental screenings and reviews will be conducted when applications for construction and operation of facilities for the production and transportation of gas are submitted to the NEB. Their rationale is that licensing applications alone are nothing more than requests for regulatory confirmation that the United States market will be eligible to receive a fixed volume of future natural gas production. "Conceptual" access for a certain volume of gas to the U.S. market, they state, does not constitute a physical act capable of affecting the natural environment.

Their submission includes a response in the alternative, meaning of course, that if the NEB doesn't agree with this argument, the applicant provides submissions answering the NEB's requests under EARP.

In answering part one of the NEB's request concerning the construction and operation of facilities in Canada and the U.S. which will be required to give effect to the proposed export transaction, the applicants assured the NEB that all environmental impacts will be considered in detail and any significant environmental effects will be mitigated with known technologies.

In answering part two of the NEB's request concerning the end use of natural gas, the applicants stated that environmental and social impacts will be mitigated with known technologies by compliance with all relevant legislation, policies and standards. And further, that since natural gas combustion is the cleanest of fossil fuels, the use of natural gas will result in "significant environmental benefits".

In another example, in the "TransCanada Pipeline" licensing application, the NEB in their "Environmental Screening Document" of Direct Energy Marketing Limited concluded that the existing legislative regimes have demonstrated that environmental protection is possible and that any potentially adverse environmental or social effects are either insignificant or mitigable. Although recognising that methane emissions resulting from the processing and transmission of natural gas "can be harmful to the environment", the NEB concluded that "total methane emissions from global natural gas operations represent less than 2% of the total world wide releases of methane and that carbon dioxide emissions resulting from natural gas combustion were less than that of other fossil fuels.

TCPL in its preliminary argument asserted that the NEB has the authority to consider only the environmental impact on the pipeline itself, and not the environmental impact of the gas it will carry.

### C: Environmental Impacts

It is difficult at this point to predict just how the debate about the EARP Guidelines Order will be resolved, and I recognise that this is certainly not the forum within which to engage in a detailed legal discussion about these issues. However, it is important to note that the EARP Guidelines Order requires that when planning a project or, in this case, considering an export application for natural gas resources, that potential environmental consequences be taken into consideration and addressed early enough in the process to enable the implementation of satisfactory remedies.

The types of environmental and social impacts that energy mega projects can create include the effects of pipelines on the various ecosystems, animal migration, northern community development and national energy requirements. However, we believe that licensing applications also impact on global warming and national alternative energy conservation programs, matters not traditionally evaluated in environmental assessments for the construction and operation of pipelines. Therefore, if the federal environmental process does not address these issues before long term and binding commitments for gas exportation are approved, then significant decisions will be made without considering these global environmental implications.

On June 1988, the Government of Canada hosted an international conference on global warming. The consensus of the views of the "300

world experts" was presented in a Conference Statement which began as follows:

"Humanity is conducting an unintended, uncontrolled, globally pervasive experiment whose ultimate consequences could be second only to global nuclear war. The Earth's atmosphere is being changed at an unprecedented rate by pollutants resulting from human activities, inefficient and wasteful fossil fuel use and the effects of rapid population growth in many regions." <sup>7</sup>

The conference called on governments to set energy policies to reduce CO<sub>2</sub> emissions and other trace gases in order to reduce the risks of future global warming. They stated that stabilizing the atmospheric concentrations of CO<sub>2</sub> was an imperative goal...requiring reductions currently estimated of more than 50% from present emission levels."<sup>8</sup>

The Conference Statement recommended that we reduce CO<sub>2</sub> emissions by approximately 20% of 1988 levels by the year 2005 as an initial global goal and went on to state that;

"Clearly, the industrialized nations have a responsibility to lead the way, both through their national energy policies and their bilateral and multilateral assistance arrangements. About one-half of this reduction would be sought from energy efficiency and other conservation measures. The other half should be effected by modifications in supplies."<sup>9</sup>

Canada's economy is the most energy-intensive in the world. The United States, which represents approximately 5% of the world's population, consumes 30% of global fossil fuels and produces approximately 25% of fossil fuel derived CO<sub>2</sub>. If the pattern of global warming is to be abated, both Canada and the United States have

major roles to play.

Canada is now in the process of developing a strategy for achieving a reduction of "greenhouse gas" emissions. Presently, we simply do not know what contributions Canadian natural gas resources will be called on to achieve CO<sub>2</sub> reduction objectives. However, considering the information we have today, we believe that we must consider these and other potential environmental consequences of natural gas exportation before committing these resources to long term contractual marketing schemes.

## END NOTES

1. Environmental Assessment and Review Process Guidelines Order SOR/84-467
2. Report of the National Task Force on Environment and Economy Submitted to the Canadian Council of Resource and Environment Ministers. September 24, 1987 (at page 8)
3. Canadian Wildlife Federation Inc. et al v Canada (Minister of the Environment) (1989), 3 C.E.L.R. (N.S.) 287 (F.C.T.D.).
4. Canadian Wildlife Federation Inc. et al v Canada (Minister of the Environment) (1989), 4 C.E.L.R. (N.S.) 201 (F.C.T.D.).
5. Friends of the Old Man River Society v Canada (Minister of Transport) (1990), 68 D.L.R. (4th) 375 (F.C.A.).
6. National Energy Board Reasons for Decision August 1989. Esso Resources Canada Limited, Shell Canada Limited and Gulf Canada Resources Limited # GH-10-88.
7. The Changing Atmosphere: Implications for Global Security Conference Statement. Environment Canada. June 27-30, 1988. Toronto, Ontario (at page 1).
8. Ibid at page 5.
9. Ibid.

