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Offshore Seismic and Fisheries and Environmental Issues — How can they be Reconciled?: A Case Study on the Public Review on the Effects of Potential Oil and Gas Exploration Offshore Cape Breton

The author describes the review process preceding the 2003 CNSOPB decision which permitted seismic activities offshore of Cape Breton. The process included a public review conducted by Commissioner Dr. Teresa MacNeil and the subsequent establishment of an Ad Hoc Working Group (part of the CNSOPB's existing Fisheries and Environment Advisory Committee (FEAC)) and a Science Working Group reporting to the Ad Hoc Working Group. In the author's view, the Ad Hoc Working Group arrived at the anticipated result; that is, continued disagreement among the opposing parties on the fundamental issues. Consequently CNSOPB was left with the decision on how to proceed. The author briefly examines the CNSOPB's decision. He concludes that the opposing parties did not move closer together during the review process despite the fact that it was by far the widest ranging review in Canada up to that date. The process did, however, highlight the sensitivity of conducting oil and gas exploration in the near-shore environment, the importance of having input into the decision-making process and the need for governments and regulators to provide clear guidelines to all participants in the regulatory review process.

L'auteur décrit le processus d'examen qui a précédé la décision de 2003 de l'OCNEHE qui a autorisé les activités sismiques au large des côtes de l'île du Cap Breton. Le processus comportait notamment un examen public par la commissaire Teresa MacNeil et, par la suite, la mise sur pied d'un groupe de travail spécial (partie du Comité consultatif des pêcheries et de l'environnement (CCPE) de l'OCNEHE et d'un groupe de travail sur les sciences relevant du groupe de travail spécial. De l'avis de l'auteur, le groupe de travail spécial est arrivé au résultat attendu, c'est-à-dire une divergence d'opinion persistante, entre les parties adverses, sur les questions fondamentales. Par conséquent, il revenait à l'OCNEHE de trancher sur la façon de procéder. L'auteur examine brièvement la décision de l'Office. Il arrive à la conclusion que les parties adverses ne se sont pas rapprochées pendant le processus d'examen, malgré le fait que c'était – et de loin – le plus vaste processus d'examen entrepris au Canada jusque là. Cependant, le processus a bien fait ressortir les risques de l'exploration pétrolière dans la zone littorale, l'importance d'obtenir des avis dans le cadre du processus décisionnel et le besoin, pour les gouvernements et les organismes de réglementation, d'énoncer des lignes directrices claires pour tous les participants du processus d'examen réglementaire.

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Introduction

In view of growing public concerns about oil and gas exploration offshore Cape Breton Island, Nova Scotia, the federal Minister of Natural Resources and the Nova Scotia Minister responsible for the then Petroleum Directorate issued a joint directive dated October 20, 2000, to the Canada-Nova Scotia Offshore Petroleum Board (CNSOPB) to conduct a public review of the effects of potential oil and gas exploration and drilling activities within exploration licences 2364, 2365, and 2368 (Public Review).¹ The impetus for the public review was a proposal by each of the licence holders to conduct two-dimensional seismic surveys within their respective licence areas; areas which extended to the shoreline and which contained significant fisheries resources.

1. Dr. Teresa MacNeil, *Commissioner's Report: Results of the Public Review on the Effects of Potential Oil and Gas Exploration Offshore Cape Breton*, (Nova Scotia: March 2002), online: Canada-Nova Scotia Offshore Petroleum Board <<http://www.cnsopb.ns.ca/archives/pdf/Report1upPublicComm.pdf>> [*Commissioners Report*] at 9. Exploration licences 2364 and 2365 were held by Hunt Oil Company of Canada, Inc. (on behalf of itself and its partner, TotalFinaElf E&P Canada Limited) and covered an area along the northeast coast of Cape Breton Island extending into the Cabot Strait known as Sydney Bight, and exploration licence 2368 was held by Corridor Resources Inc. and covered an area in the southern Gulf of St. Lawrence off the west coast of Cape Breton Island.

The CNSOPB issued an order to each of the licence holders prohibiting them from commencing or continuing any work or activity on the licence areas until after the completion of the Public Review. Accordingly, although exploration licences had been issued, the joint directive mandating a Public Review ensured that no exploration or drilling activity would be carried out until such time as the Public Review was completed. Proposed terms of reference for the Public Review were issued for public comment on January 31, 2001; Dr. Teresa MacNeil was appointed as a one-person Commission (Commissioner) to conduct the Public Review and in May 2001, final terms of reference for the Public Review were issued, together with procedures for public meetings (Terms of Reference).²

I. *The Public Review*

1. *Phase One*

The Terms of Reference called for an initial series of identification of issues and information meetings to be held prior to the public review meetings in order to promote an open, fair, and effective review process. The identification of issues and information phase was to provide the Commissioner with an opportunity at a minimum to:

- inform the general public and interested parties about the mandate of the Public Review and provide details about how the general public and interested parties could make presentations and submissions to the Commissioner,
- provide the general public and interested parties with any available relevant background information, including information respecting oil and gas exploration and drilling activities, and
- hear the views of the general public and interested parties on which issues may be relevant to the Commissioner's mandate and which they felt should be considered during the public review process.³

2. *Ibid.* at 37.

3. In September and October 2001 the Commissioner visited eight communities and heard comments and concerns from nearly 200 people. The communities in which issues and information meetings were held were Port Hawkesbury, Inverness, Cheticamp, Ingonish, Sydney Mines, and Glace Bay, all on Cape Breton Island, Antigonish on mainland Nova Scotia, and Montague on Prince Edward Island.

Following the issues identification and information meetings, the Commissioner issued a Report of Concerns, which summarized the concerns expressed at the meetings and which was to serve as a focus for the agenda of the Public Review, which in turn would hear evidence to support, modify or refute the basis of the identified concerns.

The Terms of Reference specifically stated that the Commissioner was required to conduct a public review of the effects of potential oil and gas exploration and drilling activities within the licence areas having regard to socio-economic impacts, the effects on the ecosystem, and the mitigation of impacts. With respect to the issue of effects on the ecosystem, the Commissioner's Report of Concerns broke the identified concerns down into three subject areas — general concerns, concerns with seismic operations, and concerns with exploratory drilling and related operations. With respect to the issue of socio-economic impacts, the Commissioner's Report of Concerns dealt with this subject area under four sub-headings—fisheries concerns (further divided into general concerns, concerns with seismic operations, and concerns with exploratory drilling), tourism concerns, business concerns, and social concerns. The Commissioner's Report of Concerns also had a section dealing with overlapping concerns that dealt with both the subject matter of effects on the ecosystem and socio-economic impacts.

The Terms of Reference also restricted the purview of the Commissioner. Her mandate did not include “an examination of questions of energy policy or legislation, jurisdiction, the fiscal or royalty regime of governments, the division of revenues between the Government of Canada and the Government of Nova Scotia, or matters which [went] beyond consideration of the effects of potential oil and gas exploration and drilling activities within the licence areas.”⁴ Still, the Commissioner included three related topics in her Report of Concerns: petroleum development and production, policy issues, and issues related to the Public Review itself. Although these matters lay outside her authority under the Terms of Reference, the Commissioner concluded that because the Terms of Reference required her to report on “the views of the general public and interested parties,” they should be included as part of the proceedings, although by way of information only.

4. MacNeil, *supra* note 1 at 37.

2. Phase Two

In April 2001, the Commissioner established an office for the Public Review Commission in Sydney, Nova Scotia and retained the services of support staff to form a three-member Secretariat, including one full-time manager and two part-time specialists. The office was responsible for coordinating the Public Review and for acquiring, and making available to the public, as per the Commissioner's Terms of Reference, scientific, technical, and other reports relevant to oil and gas exploration in the affected areas. To that end, a Public Review Commission resources library was established, the contents of which were available to the general public. The Commissioner subsequently issued the procedures for the public hearings that were to constitute the second phase of the Public Review. In accordance with the Terms of Reference, the Public Review was to be conducted "in an open, fair and effective manner, ensuring that the general public and all interested parties [were] provided with a full opportunity to participate in the process and have their views and opinions heard."⁵

The procedures for the public hearings provided that participants could present their views or information in writing, orally or both. Written submissions were required to be filed with the Public Review Commission's office by December 28, 2001. Between January 10, 2002, and February 1, 2002, the Commissioner held fifteen days of public hearings, and received 130 submissions and related references in total.

With the exception of one day of hearings held in Montague, Prince Edward Island, the public hearings took place at the Wagmatcook Culture and Heritage Centre in Wagmatcook, Cape Breton Island. The Public Review received representations from a wide range of participants, including among others: the holders of the exploration licences under consideration, environmental groups,⁶ various fishers' associations,⁷ various municipal units,⁸ petroleum organizations and related industry participants,⁹

5. MacNeil, *supra* note 1 at 37.

6. Participants included the Sierra Club of Canada, the Ecology Action Centre and the World Wildlife Fund.

7. Including the Area 19 Crab Fishermen's Association, the Inverness North Fishermen's Association, the Area 18 Crab Fishermen's Association, the Maritime Fishermen's Union (Local 6), the Gulf Nova Scotia Fisheries Advisory Board and 4Vn Fisheries Management Board, the Atlantic Salmon Federation and the Western Cape Breton Snow Crab Fishermen.

8. Including the Municipality of the County of Inverness, the Municipality of Victoria County, the Municipality of the County of Richmond, and the Cape Breton Regional Municipality.

9. Including the Industrial Cape Breton Board of Trade Petroleum Committee, the Canadian Association of Petroleum Producers, the Maritime Drilling School, the Offshore Technologies Association of Nova Scotia, Rowan Companies and Dillon Consulting.

trades organizations,¹⁰ Aboriginal groups,¹¹ and government departments¹² as well as various interested individuals. Some parties included the evidence of expert witnesses as part of their overall submissions, and the Commission also retained its own expert advisors, who filed reports with the Commission.

The participants could generally be categorized as belonging to one of two camps — parties in favour of exploration for hydrocarbons in the licence areas, and parties opposed to such exploration. The parties in favour of exploration appeared cognizant of the concerns addressed by those in opposition, primarily the potential for environmental harm and impacts on local fisheries. The licence holders proposed various mitigation measures as part of their respective environmental impact assessments (which were filed with the Commission). The parties opposed to exploration activities generally felt that there was insufficient information available to judge the impacts of continued exploration activity in the licence areas in question, and that the mitigation measures proposed by the holders of the exploration licences were inadequate.

The primary concerns of parties opposed to continued exploration in the licence areas were that the licence areas were in the near-shore environment, that they contained lucrative fisheries, in particular crab fisheries, and that they were part of significant traditional migratory pathways for various fish and other aquatic species.

Commissioner MacNeil reflected these concerns in her report issued at the completion of the Public Review as follows:

Concern about the risk of damage to marine resources from exploration in shallow, near shore waters was a common theme, often closely related to suggestions of establishing marine protected areas. While the environmental community generally was not predisposed to entertaining any exploratory activity in the licence areas, representatives from some organizations did indicate they would be prepared to cooperate with other stakeholders to identify key sensitive areas where exploration should be prohibited. Those opposed to exploration also argued that most progressive western countries with offshore oil and gas prospects had

10. Including the Cape Breton Building and Construction Trades Council and UPA Local 682 Plumbers and Pipefitters.

11. Including the Unamaki Institute of Natural Resources, the Union of Nova Scotia Indians, and the Po'tlo'tek Fish and Wildlife Association.

12. Including the federal Department of Fisheries and Oceans (DFO) and Environment Canada.

either banned near shore exploration or had imposed rigorous legislative requirements for “opening up” such areas to exploration.

Those who favoured exploration rebutted those points with their own information including, for example, evidence that there has recently been near shore exploration in Canada at Bay St. George, Newfoundland. They also pointed out that, during the 1970s, numerous wells had been drilled off the shores of Cape Breton as part of an effort to evaluate coal deposits. Further, they argued that many of the locations where exploration was forbidden in other countries were areas that are not good prospects for oil and gas discovery and, in any case, were not set aside for environmental or fishery reasons.¹³

Parties opposed to further hydrocarbon exploration also were concerned with socio-economic impacts. They submitted that the potential benefits from any exploratory program in the region did not warrant the risk to the fishery, or to the tourism industry in Cape Breton. On the other hand, a variety of groups and individuals argued that exploration provided the opportunity to assess the potential of oil and gas to create a new industrial base for the Cape Breton economy. Without exploration there could be no development; without development there could be no petroleum industry; and thus there was the potential loss of a new industrial base for the Cape Breton economy, an economy which was not thriving.

In this context it is interesting to note, as previously discussed, that the Commissioner’s mandate was confined to a review of the effects of potential oil and gas exploration and drilling activities within the exploration licence areas. Thus, the Commissioner was not mandated to deal with potential impacts (positive or negative) arising from any future production stage in the event of successful exploration. Those parties opposed to petroleum exploration in the licence areas compared only the direct economic benefits of seismic and drilling programs with the potential risks to the fishery and tourism sectors. Parties in favour of exploration generally acknowledged that the direct economic benefits of exploration, particularly of a seismic program, were somewhat limited, but countered that without seismic, one could not move to a drilling program; and without seismic and drilling, one could not determine whether there was an oil and gas resource base capable of exploitation. Parties opposed to

13. MacNeil, *supra* note 1 at 20.

continued exploration activities raised the spectre of potentially negative environmental impacts resulting from oil and gas production. Although such impacts were not within the scope of the Commissioner's Terms of Reference, the Commissioner mentioned many of these views in her final report but drew no conclusions.

The Commissioner also highlighted concerns raised by the fishing industry representatives regarding exploration rights issuance, as well as questions concerning aboriginal title to the three licence areas. These two concerns were beyond the Commissioner's Terms of Reference; however, they were, in her view, important to resolve if her recommendations were to be helpful. The Commissioner advised government agencies, and in particular the CNSOPB, to establish effective arrangements to keep fishery interests informed, particularly about impending actions associated with rights issuance, and that there be early and full consultation by the Crowns, as well as private developers, with the Mi'kmaq to pursue the implications of aboriginal title.

It is noteworthy that the Nova Scotia Government released its Energy Strategy¹⁴ while the Public Review Process was ongoing. In the section entitled "Energy and the Fishery and the Marine Environment," the government committed to establishing a provincial policy that before issuance of exploration rights within sight of land on Cape Breton and mainland Nova Scotia (approximately 18 kilometres), there would be special consultation with the fishing industry and coastal communities.

The Nova Scotia Energy Strategy states in the section entitled "Aboriginals and the Energy Sector" that one of the province's objectives is to provide opportunities for the views and interests of all stakeholders, including those involved in the energy sector, to be taken into account during the process of addressing treaty rights and related issues with Nova Scotia Mi'kmaq.

3. *The Commissioner's Report*

In her covering letter which accompanied her final report on the results of the Public Review to the federal Minister of Natural Resources, the Nova Scotia Minister responsible for the then Petroleum Directorate, and the CEO of the CNSOPB, the Commissioner stated:

Finally, as a conclusion of my experience with this Review, I see the need

14. Nova Scotia, *Seizing the Opportunity: Nova Scotia Energy Strategy*, vols. 1, 2 (2001).

for the Canada-Nova Scotia Offshore Petroleum Board to move along with the next step of its regulatory process in relation to the proposals of Hunt Oil and Corridor Resources. My report includes suggestions for making that process more responsive to the concerns of the public. It is my view that with attention to what science and experience have shown, along with the findings of this Review, and the collaborative advice of informed interest group representatives, you will have a solid basis for deciding whether the proposed activities should proceed.¹⁵

In essence, the Commissioner concluded that the CNSOPB's process for the review of any specific exploration activity to be conducted on the licence areas should continue. She did not make a finding of whether the exploration activity or the seismic programs should take place in the licence areas.

In the Executive Summary of the Commissioner's Report, she provided her views on her role:

The Inquiry was to hear public views on those proposals [of Hunt Oil and Corridor Resources to conduct seismic surveys] and examine the assumptions behind those views. The Terms of Reference...required the Commissioner to prepare a summary of the public concerns and to prepare findings on the probable socio-economic and ecosystem effects of these activities. But it was not part of the mandate of the Commissioner to advise on whether the exploratory programs proposed by Corridor and Hunt should proceed. Nor was it within the Commissioner's mandate to recommend whether a moratorium should be placed on exploration of the Licence areas and their surrounding environments. And she wasn't to conduct a scientific inquiry into the merits of the proposals or deal with any other matter 'beyond consideration of the effects of potential oil and gas exploration and drilling activities within the licence areas.'¹⁶

Section 11 of the final Terms of Reference specifically stated that:

The Commissioner will prepare and submit to the Board and the Ministers a report on the results of the Public Review, including a summary of the views of the general public and interested parties, and the Commissioner's findings on the effects of potential oil and gas Exploration and Drilling Activities within the Licence Areas, having particular regard to the

15. MacNeil, *supra* note 1 at 2.

16. MacNeil, *supra* note 1 at 5.

matters in Clause 2a), b) and c) of [the] Terms of Reference.¹⁷

The Commissioner further indicated that, in her view, there was no expectation that she include recommendations in her report. However, in view of public uncertainty regarding the effects of the proposed exploratory activities, and DFO references to many knowledge gaps regarding the nature of the marine environment,¹⁸ particularly with respect to commercial fish and shellfish in the southern Gulf of St. Lawrence, she recommended:

1. that the necessary scientific, technical and experiential resources be convened to assess the existing base of knowledge in relation to the DFO [Habitat Status Report] review, the Hunt and Corridor proposals [which she concluded should be updated as a result of additional information received during the Public Review], and the Public Review Commission's Findings,
2. that the Ministers [federal and provincial] and the CNSOPB broaden the consultative system to apply to the next stage of the decision-making process for the three Licence Areas, to include a cross-section of interests for the purpose of gaining advice about whether or not the proposed activities should proceed, and the specific measures to be taken in the event their decision is to proceed with exploration and drilling activities.¹⁹

The Commissioner proposed the creation of a working group made up of a broad spectrum of interests, the existence of which would be limited to the time required to complete the next stage of the regulatory process.

The Commissioner also commented in her final report on the review process itself. She described her perception of what had generally occurred between the various parties during the course of the Public Review. She stated:

What struck me as instructive about their [the participants] collective role in the hearings was that a noticeable shift in view points occurred over the three-week period.... I will not pretend that this resulted in new alliances. The unemployed construction worker did not abandon his determination

17. MacNeil, *supra* note 1 at 37.

18. In the DFO's *Habitat Status Report* dealing with the southern Gulf of St. Lawrence and Sydney Bight marine ecosystems (which was filed as part of the Public Review).

19. MacNeil, *supra* note 1 at 35.

to seize the opportunity to benefit from a resource beneath the sea in favour of protecting crab fishing grounds. And the fishermen remained convinced the known value of the fishery, which has provided their livelihood for hundreds of years, should not be sacrificed to the uncertain value of gas and oil, with a lifetime of only a couple of decades. Nor did representatives of the gas and oil companies offer to postpone their proposed exploration activity until more research could be conducted, as some were demanding.

The shift was more subtle than that, but no less significant. I noticed gradual adjustments in seating arrangements, for example. A group of construction workers, who had occupied a block of seats at the back of the room each day for several days, moved one morning to seats beside fishermen, environmentalists and oil company representatives. Through their questions and comments, they also made clear that their wish to understand was nearly as strong as their desire to be understood. That was not uncommon. I noted an increasing openness to hear, understand and sometimes acknowledge merit in a competing argument from other participants as well. Participants increasingly exchanged jovial remarks and I even noticed representatives of competing interests having lunch together.²⁰

These observations seem to this author to have guided the Commissioner, at least in part, in her recommendations. Unfortunately, in the author's opinion, their implication may have been overstated. Although it is clear that throughout the process parties began to know each other, deal with each other less formally, and obtain more information on each other's views (aspects of many lengthy, multi-party proceedings), there did not appear to be any change in the participants' primary positions. Further, it is likely that many of the participants anticipated that the Commissioner would make more specific findings regarding the effects of potential oil and gas exploration and drilling activities within the licence areas, and possibly whether exploration and drilling activity in general (and the proposed seismic programs in particular) should proceed. They likely had not anticipated a decision which recommended a further layer of review, whether by way of working group or otherwise. The Commissioner was the individual who heard all of the submissions (including expert opinions on the licence holders' pre-filed environment assessments and competing

20. MacNeil, *supra* note 1 at 10-11.

views on environmental concerns), questioned the numerous oral presenters, heard the final oral arguments of the participants, and who was thus likely in the best position to judge the merits of the information put forward in the Public Review. Nonetheless, it is clear from the Terms of Reference that the role of the Commissioner was to be advisory only, and that the public meetings were not intended to be governed by the strict rules that prevail in a court of law. The Commissioner clearly felt that further review was warranted before any more specific findings should be made by the CNSOPB.

II. *The Working Group(s)*

Whether the Commissioner's Report and its recommendations were what was anticipated by the participants, the CNSOPB and the Department of Energy supported the Ad Hoc Working Group recommendation. The group was established as part of the CNSOPB's existing Fisheries and Environment Advisory Committee (FEAC).²¹ The CNSOPB then concluded that in order to move the process forward to determine if exploration activities should proceed offshore Cape Breton, it would:

- continue the prohibition of activities on the licences until a determination is made as to whether exploration activities can proceed and, if so, on what terms and conditions;
- establish and invite appropriate groups to participate in the FEAC Ad Hoc Working Group;
- request the proponents [licence holders] to submit updated applications for work activity incorporating the knowledge gained from the public review process; and

21. See a *Statement Regarding the Commissioner's Report on the Effects of Potential Oil and Gas Exploration Offshore Cape Breton*, (Nova Scotia: the CNSOPB, May 2002), cited in *Ad Hoc Working Group Report: Report to the Canada-Nova Scotia Offshore Petroleum Board*, (Nova Scotia: February, 2003) online: Government of Nova Scotia, Department of Energy, Document Library <<http://www.gov.ns.ca/energy/documents/CapeBretonAdHocDecision.pdf>> at 5 [*Ad Hoc Working Group Report*]. See also Minister of Energy, *Nova Scotia Energy Strategy: Progress Report Summary*, (Nova Scotia: February 2003), online: Government of Nova Scotia, Department of Energy, Document Library <<http://www.gov.ns.ca/energy/documents/EStrategyProgressReportSummary.pdf>> at 3.

- undertake expert review of the science, technical and experience utilizing the existing review mechanisms to determine if additional information is necessary to make informed decisions.²²

The CNSOPB also established a Science Review Working Group to conduct a review of the science and experiential information pertaining to the proposed exploration activities. The Science Review Working Group reported to the Ad Hoc Working Group prior to the issuance of the Science Review Group's final report.

The members of the Science Review Working Group reached a consensus on the contents and conclusions of their report which was finalized on November 29, 2002.²³ They concluded that the most critical issues were uncertainties regarding impacts on snow crab, risks to finfish, and effects to the ecosystem, such as the additional effect of seismic activity on the existing natural and human-induced factors impacting cod populations. Regarding the proposed seismic activity they stated:

Generally, the effects of seismic activities are considered to be small, however, given the context of the environment, the risk of a problem that may otherwise be considered insignificant may now become a concern. Concerns over the effects of the proposed seismic activities are heightened because of the concentration of stocks in the survey areas, the fragility of some of the stocks, the location of the migration routes and overwintering grounds, and the commercial and conservation values of the stocks.²⁴

The Science Review Working Group concluded that if the proposed seismic activities were to proceed, various mitigation measures indicated in their report would have to be implemented, and that minimal levels of sound output be used to obtain the required geological data. They further concluded that although environmental effects monitoring is not normally required for seismic programs, given the inshore nature of the projects and the apparent lack of effective environmental effects monitoring relating to seismic, such monitoring should be required if the projects were allowed to proceed.

22. *Ad Hoc Working Group Report*, *ibid.* at 6.

23. *Science Review Report – Results of Analysis and Discussion – Report to the Ad Hoc Working Group of the Cape Breton Public Review* (Nova Scotia: Science Review Working Group, 2002) [*Science Review Report*].

24. *Ibid.* at 27.

Following receipt of the Science Review Report, the Ad Hoc Working Group issued its report to the CNSOPB in February 2003.²⁵ Notwithstanding the extensive Public Review, the results of the Science Review Working Group, and numerous meetings amongst the members of the Ad Hoc Working Group, the Ad Hoc Working Group could not reach full agreement. Although the Executive Summary of the Ad Hoc Working Group Report states that “the process succeeded in significantly raising the level of mutual understanding of the deeply felt concerns of all participants,” at the end of the day the Ad Hoc Working Group Report was not signed by three of the four fisheries representatives. The Ad Hoc Working Group Report stated:

A critical difference of opinion eventually emerged on whether the level of potential risk was acceptable when it was balanced against the potential benefit that could come from possible future oil and gas discoveries and development. In general terms, when it came to areas where scientific advice suggested there was a risk but that judgment needed to be made on whether the risk was acceptable, the differences among working group members led them to differing conclusions.

...

Some members felt the risk of negative effects from seismic activities on species already facing significant stresses and challenges from other human and environmental factors was too great. As a result they believed a prohibition on oil and gas exploration in the three licence areas off the coast of Cape Breton should be continued. Other members believed that the available scientific information indicated that the effects of seismic are likely to be minimal given the proposed mitigation measures. They viewed the risks to be acceptable in relation to the potential benefits of petroleum development to Cape Breton as a whole. These members were confident that the responsible regulatory authorities, including the Canada-Nova Scotia Offshore Petroleum Board, Department of Fisheries and Oceans and Environment Canada, would diligently exercise their responsibilities and expertise in approving the final plans for exploration by the proponents.

...

25. *Ad Hoc Working Group Report*, *supra* note 21. The Ad Hoc Working Group was composed of members of the following organizations: Federal Government, Provincial Government, Municipal Government, First Nations, fishing organizations (four representatives), environmental organizations, business organizations, trade union organizations, licence holders (two representatives).

As a result, the Ad Hoc Working Group could not provide a unanimous recommendation about whether or not the Canada-Nova Scotia Offshore Petroleum Board should allow seismic testing as proposed by Hunt Oil Company and Corridor Resources Inc.²⁶

The report then went on to state:

As a result of the risks and benefits impacting different sectors and individuals, the members of the Ad Hoc Working Group have come to the following overarching conclusions:

- Some believe the risks are relatively small compared to the potential future economic benefits which, depending upon the outcome of exploration activities could be very significant for Cape Breton; and that the regulatory system is capable of authorizing activities under appropriate terms and conditions for mitigation and monitoring.
- Some believe the risks from seismic testing in the three licence areas are unacceptable and thus the prohibition on exploration activities should be continued.
- Some believe the risks are so unacceptable as to require the cancellation of the licences and a moratorium be declared on all oil and gas activities in the inshore area of Cape Breton Island until such time as adequate science has been conducted and adequate mitigation measures have been developed for these activities.²⁷

In the author's view, the Ad Hoc Working Group Report arrived at the anticipated result; that is, continued disagreement among the opposing parties on the fundamental issues. Consequently, the CNSOPB was left with the decision on how to proceed with no specific findings from the Commissioner on the proposed activities, and an Ad Hoc Working Group Report which concluded that despite the extensive review there were significant remaining differences of opinion.

26. *Ad Hoc Working Group Report*, *supra* note 21 at 3-4.

27. *Ad Hoc Working Group Report*, *supra* note 21 at 5.

III. *The CNSOPB's Decision*

Following receipt of the Ad Hoc Working Group Report, the CNSOPB decided that it would adopt many of the measures identified in the Report including the following:

1. The Board will consider the results of a snow crab study taking place off Newfoundland before finalizing an authorization for the proposed seismic programs off Cape Breton
2. The proposed seismic acquisition may only be conducted between November 1, 2003 and February 28, 2004.
3. Operators must follow a 30-minute incremental ramp-up procedure to encourage marine animals to leave the operating area.
4. A fisheries representative must be on board the seismic vessel.
5. A trained biological observer must be on board the seismic vessel to assist the operator with marine mammal observations.
6. Seismic acquisition will be suspended whenever whales are observed within one kilometre of the vessel and shall not resume until the whales have left the area.
7. Prior to authorization, the operators must consult with the CNSOPB and the Department of Fisheries and Oceans to address mitigative measures to minimize any potential risk to cod.
8. Prior to authorization, the operators must provide to the CNSOPB an acceptable financial compensation program for possible damage to fishing gear.
9. Prior to authorization, the operator must develop an appropriate Environmental Effects Monitoring (EEM) program.²⁸

The CNSOPB also decided that no seismic acquisition would be allowed on the licence blocks within 10 kilometres of the shoreline, measured from the low water mark, and that prior to conducting any seismic activity the

28. Canadian-Nova Scotia Offshore Petroleum Board, News Release, "Board Acts on Ad Hoc Working Group Report" (6 March 2003).

licence holders would have to file complete applications for work authorizations which comply with the conditions identified by the CNSOPB.

IV. *Success or Failure?*

The question of whether or not the Public Review process was a success or failure is difficult to answer. Certainly it provided the widest ranging review by far in Canada to date regarding near-shore exploration activities, in particular offshore seismic programs, and it undoubtedly provided an open forum for public input.

But was the public satisfied? It appears that those parties opposed to the proposed seismic activities were not. As previously noted, three of the four fisheries members of the Ad Hoc Working Group were unwilling to sign its Report and, following the CNSOPB's decision, many groups continue to publicly express their opposition to exploration activities off Cape Breton Island.

Throughout the Public Review, fisheries, environmental and other groups and individuals opposed to the proposed exploration activities clearly indicated that they were concerned with the CNSOPB being the final arbiter of whether such activities should proceed. It was oft stated by these parties that in their view the CNSOPB's mandate is to promote oil and gas exploration and as such they were not comfortable with the CNSOPB as the ultimate authorizing authority.

Certainly concerns about the issuance of licence rights without fuller consideration of the impacts of future activity on the areas licensed, particularly with respect to inshore activity, were brought to the forefront for consideration by the CNSOPB and the relevant ministers. The Nova Scotia Government's Energy Policy pronouncement in this regard is noteworthy.

What of proponents of continued exploration activity? The process undoubtedly added a significant level of regulatory review not previously contemplated for offshore seismic activity, which delayed (by a number of years) the date on which acquisition of the proposed seismic could proceed. Added regulatory burdens, and related or resulting costs and delays, are certainly a concern of the oil and gas exploration industry in the offshore. In contrast to the views of parties opposed to exploration, the oil and gas exploration industry thinks that it faces extensive regulation, and it does not view the CNSOPB as a rubber stamp for its activities.

V. *What Have We Learned?*

First and foremost, it is clear that the near-shore environment, particularly where it is home to significant aquatic resources, is viewed as particularly sensitive. As such, all parties who anticipate conducting oil and gas exploration activities in such areas need to be particularly cognizant of this sensitivity and open to appropriate mitigation measures.

Environmental, fisheries, aboriginal, and local groups have the knowledge and ability to firmly advance their agendas in both political and regulatory forums, particularly where they may share a common interest. An understanding of their concerns, particularly in the near-shore or other sensitive marine areas, needs to be at the forefront of any party's proposal of exploration activity in or around such areas. Further, those parties must be made cognizant of the fact that oil and gas exploration activities have the potential to bring significant benefits to the wider community, and that through co-operative efforts mitigative measures should be able to be adopted to allow the co-existence of oil and gas exploration with other uses of the near-shore environment.

Clearly the Cape Breton Public Review has highlighted the sensitivity of conducting oil and gas exploration in the near-shore environment, the importance of having input into the decision-making process, and the need for governments and regulators to provide clear guidance to all interested parties and participants in the regulatory review process on the nature and timing of required regulatory decisions.

VI. *Post Script: Recent Developments in Seismic and Fisheries and Environmental Issues*

Subsequent to the Cape Breton Public Review, various developments in the area of seismic programs and fisheries and environmental concerns have taken place. Although those developments did not necessarily arise out of the Public Review itself, the Cape Breton Public Review undoubtedly heightened the interest and awareness level regarding the issue of seismic programs and fisheries and environmental concerns, particularly in sensitive areas. Some recent developments of note are as follows:

1. The Environmental Studies Research Fund (ESRF)²⁹ Crab Study—the study on offshore Newfoundland which the CNSOPB decided it would consider before finalizing authorizations for proposed seismic programs off Cape Breton, has been completed and is currently being peer-reviewed. It is expected to be released publicly in the fall of 2003.
2. The DFO has created the Centre for Offshore Oil and Gas Environmental Research (COOGER), which is a national research centre situated at the Bedford Institute of Oceanography in Dartmouth, Nova Scotia, and which will support the DFO's role in recommending environmentally sound guidelines for oil and gas exploration and production in Canadian waters. One of COOGER's first key projects has been a monitoring program of seismic testing by Marathon Canada Limited and EnCana Corporation to determine, in particular, the impact on marine mammals. The data from the program has been collected and COOGER is currently analysing the data before releasing its findings.
3. The Eastern Scotian Shelf Integrated Management Initiative — a pilot project of DFO, which covers an area including Sydney Bight, part of the Cabot Strait and the Laurentian channel, offshore waters, Sable Island and Sable Gully, and various major fishing banks, conducted a two-day conference and workshop which included representatives from government, the oil and gas industry, fisheries, and academic and environmental groups to work on continued development of an integrated strategy for the Eastern Scotia Shelf.
4. The Law List Regulations³⁰ and the Inclusion List Regulations³¹ made under the *Canadian Environmental Assessment Act*³² have been amended³³ to include marine seismic surveys as being subject to the environmental assessment requirements of CEAA. The above-noted amendments, together with amendments to the CEAA Com-

29. ESRF is a research program designed to assist in the decision-making process related to oil and gas exploration and development on Canada's frontier lands. It is administered by a secretariat which resides in the National Energy Board office in Calgary, Alberta.

30. S.O.R./1994-636.

31. S.O.R./1994-637.

32. S.C. 1992, c. 37 [CEAA].

33. S.O.R./2003-280 with respect to the Inclusion List Regulations and S.O.R./2003-281 with respect to the Law List Regulations.

prehensive Study List Regulations,³⁴ also impact the required level of assessment for exploratory drilling.³⁵

5. The CNSOPB, in acknowledging the sensitivity of Browns Bank southeast of Yarmouth, Nova Scotia, refused to grant approval, for the time being, to proposed seismic programs, determining that the area required further consideration.
6. The CNSOPB conducted a Strategic Environmental Assessment (SEA) of Eastern Sable Island Bank, Western Banquereau Bank, the Gully Trough, and the Eastern Scotian Slope³⁶ even though no call for bids for exploration licences had been issued for those areas. The application of a SEA prior to issuing a call for bids was an acknowledgment of the sensitivity of the areas in question.
7. In Newfoundland, Canning & Pitt Associates Inc.³⁷ and the Fish, Food and Allied Workers Union (FFAWU) agreed to a Fisheries Liaison Officer program where FFAWU supplies qualified fisheries liaison officers as observers on seismic vessels. The aims of the program include building and maintaining trust between the petroleum and fisheries industries, and providing the fishing industry and seismic survey operators with feedback about environmental and fisheries issues.

34. S.O.R./2003-282.

35. The Regulatory Impact Analysis Statement for all of the above noted amendments can be found following S.O.R./2003-280 in the *Canada Gazette* Part II, Vol. 137, No. 17.

36. See Environmental Reports, online: Canada-Nova Scotia Offshore Petroleum Board <www.cnsopb.ns.ca/Environmental/reports.html>.

37. Canning & Pitt Associates Inc. is the single point of contact to facilitate communication between the petroleum industry and the fisheries during seismic survey operations. Such single point of contact is contemplated by Section 3.1.4 (Environmental Protection) of the Canada-Newfoundland Offshore Petroleum Board's "Geophysical, Geological, Environmental and Geotechnical Program Guidelines" (CNOBP: November, 2001).