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East Coast Environmental Law

**Using Strategic Environmental Assessments
to Guide Oil and Gas Exploration
Decisions in the Beaufort Sea:
Lessons Learned from Atlantic Canada**

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East Coast Environmental Law

East Coast Environmental Law (ECELAW) based in Halifax, NS, is a not-for-profit organization with charitable status, dedicated to encouraging the development and fair application of innovative and effective environmental laws in Atlantic Canada. ECELAW aims to increase access to environmental laws through a legal inquiry service, increases public awareness through workshops and publications, provides the next generation of environmental lawyers with opportunities to get practical experience, and promotes law reform through research, publication and collaboration with public interest groups, lawyers and government to strengthen environmental laws in Atlantic Canada.

Since 2007 ECELAW has presented workshops in Nova Scotia, New Brunswick and Prince Edward Island on issues including topics such as the law of land and sea, private prosecutions, enforcement and environmental assessment. The accompanying Summary Series publications provide an ongoing resource. ECELAW is now launching the ECELAW Occasional Paper Series to provide a forum for research and opinion on Atlantic Canada environmental law topics.

ECELAW is supported by the Nova Scotia Law Foundation, with additional support from the Schulich School of Law, PEI Law Foundation, SAGE Foundation, law firms and other private donors.

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Table of Abbreviations

AAND	Department of Aboriginal Affairs and Northern Development (formerly DIAND)
BREA	Beaufort Regional Environmental Assessment
BSSrPA	Beaufort Sea Strategic Regional Plan of Action
CEAA	<i>Canadian Environmental Assessment Act</i>
CNL	<i>Canada-Newfoundland Atlantic Accord Implementation Act</i>
C-NLOPB	Canada-Newfoundland and Labrador Offshore Petroleum Board
CNS	Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act
C-NSOPB	Canada-Nova Scotia Offshore Petroleum Board
COGOA	<i>Canada Oil and Gas Operations Act</i>
CPRA	<i>Canada Petroleum Resources Act</i>
DIO	Designated Inuit Organization
EL	exploration licence
IFA	Inuvialuit Final Agreement
IGC	Inuvialuit Game Council
NEB	National Energy Board
NLCA	Nunavut Land Claims Agreement
PL	production licence
SARA	<i>Species at Risk Act</i>
SDL	significant discovery licence
SEAs	Strategic Environmental Assessments

Introduction

The 21st century has seen a renewed interest in developing Canadian Arctic oil and gas reserves.¹ Historically, hydrocarbon development efforts focused on land or shallow water hydrocarbon potential. Since 2008 the industry has shifted its attention to the deepwater areas of the Canadian Beaufort Sea — a region that to date has experienced limited exploration and no development.² In the wake of the huge Macondo oil spill in the Gulf of Mexico, Canada's National Energy Board (NEB) initiated a public *Review of Offshore Drilling in the Canadian Arctic* to ensure the regulatory system was prepared to handle the unique challenges of Arctic drilling.³ There was no similar examination of the adequacy and appropriateness of Canada's Arctic oil and gas rights issuance process. In this paper we argue that a key weakness in the current procedure is the failure of the government to apply state of the art Strategic Environmental Assessments (SEAs) as part of deciding where and when to open new areas to potential oil and gas drilling activities.

In the past two decades, SEAs have emerged as an important complement to project-based environmental assessments and other planning tools. The interest in SEAs arises from our understanding of the limitation of project based EA processes which are not well suited to deal with a consideration of alternatives, cumulative effects, and broader policy issues. Furthermore, project EAs occur at a time when important decisions and commitments have already been made. SEAs have been used internationally as part of making decisions on opening new areas to potential oil and gas drilling activities and they have also been used on the East Coast of Canada to inform the first phases of the oil and gas rights issuance process (industry nominations, more formal government calls for nominations and calls for bids). SEAs attempt to outline, integrate, refine, and mitigate regional-scale concerns related to ecologically sensitive areas, multi-sectoral ocean use, and cumulative effects in advance of project based environmental assessments. They also have the potential to consider need, purpose, and the rationale and alternatives to offshore oil and gas exploration and development before specific projects are proposed. This is

¹ Northern Canada is estimated to contain one-third of Canada's remaining potential for conventional oil and natural gas (online: <<http://www.aadnc-aandc.gc.ca/eng/1100100037301>>).

² Aboriginal Affairs and Northern Development Canada, *Northern Oil and Gas Annual Report 2011* (Ottawa: AANDC, 2012) at 9, online: <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/nog_ann2011_pdf_1335968796614_eng.pdf>.

³ NEB, *The past is always present: Review of Offshore Drilling in the Canadian Arctic – Preparing for the Future* (December 2011) at 3: online: <<http://www.neb-one.gc.ca/clf-nsi/rthnb/pplctnsbfirhnb/rctcfffshrdrlngvw/fnlrprt2011/fnlrprt2011-eng.pdf>>.

significant since neither calls for nominations nor the call for bids will trigger an environmental assessment under the *Canadian Environmental Assessment Act (CEAA)*.⁴

SEAs have been used as a key ingredient of the oil and gas rights issuance process for exploration in the waters of Nova Scotia and Newfoundland-Labrador since 2002. Since then, the Canada-Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB) and the Canada-Nova Scotia Offshore Petroleum Board (C-NSOPB) have conducted eight SEAs. As this paper discusses below, the two offshore Boards adopted the SEA to achieve five objectives: (1) to inform decisions related to the issuance of exploration licences in the study area; (2) to understand the interaction between expected exploration activities and the receiving environment, including its current use; (3) to minimize environmental and safety disasters; (4) to identify sensitive environmental areas which require special mitigation protocols; and (5) to identify areas where development should be avoided.⁵

Other jurisdictions also routinely conduct SEAs before opening up new areas for oil and gas activities⁶ including other Arctic states (United States, Norway and Greenland) with offshore hydrocarbon potential. In addition, the Arctic Council's Offshore Oil and Gas Guidelines support the use of SEAs as part of best practice in the development of oil and gas resources.⁷

There are some important legal and jurisdictional differences between Canada's Arctic and east coast which need to be taken into account in developing and applying

⁴ *Canadian Environmental Assessment Act (CEAA)*, SC 1992, c 37. *CEAA* has since been repealed and replaced by the *Canadian Environmental Assessment Act, 2012 (CEAA 2012)* SC 2012, c 19 but the new Act does not change this fundamental point.

⁵ There are, of course, some differences between the SEA processes of the two boards. Most notably, the Nova Scotia Board does not deal with development at all, nor does it explicitly consider whether an area should be avoided for development. Its focus is exclusively on exploration. The Newfoundland Board does give some consideration to development, but it is not clear how this information affects decisions by the Board.

⁶ J Dagg et al, *Comparing the Offshore Drilling Regulatory Regimes of the Canadian Arctic, the U.S., the U.K., Greenland, and Norway* (Drayton Valley, AB: The Pembina Institute, 2011), online: <<http://www.pembina.org/pub/2228>> or <<http://www.pembina.org/pub/2227>>.

⁷ See Arctic Council, *Arctic Offshore Oil and Gas Guidelines 2009*, online: <<http://www.arctic-council.org/index.php/en/about/documents/category/62-pame>>. The Arctic Council recommends the use of SEA "on a regional basis to determine the potential environmental impacts of human activity including opening areas for oil and gas." The Guidelines articulate three key reasons for conducting SEAs. First, since a SEA occurs early in the process it can and should integrate environmental concerns into the first stages of decision-making. Second, a SEA has, by definition, a wide scope and thus sets the stage for the more specific environmental impact assessments that will follow as hydrocarbon development unfolds. Third, individual SEAs form part of an ongoing SEA process, insofar as they continuously update baseline scientific knowledge of the region under investigation.

SEAs but none of these differences undermine the fundamental point that a state of the art SEA process which meets international standards is a key part of the responsible development of offshore oil and gas resources. Some of these key jurisdictional differences are explored in more detail in Part 1 of the paper but they include the unique constitutional status of the three northern territories (and therefore the role played by the Department of Aboriginal Affairs and Northern Development (AAND) (formerly DIAND)), and the important role played by land claim agreements (including the Inuvialuit Final Agreement (IFA) and the Nunavut Land Claims Agreement (NLCA)), and the institutions of land claim agreements in northern Canada.

The recommendations that we make here have also been articulated by others. For example, oil and gas planning and research is well underway in the Canadian Beaufort Sea and in 2004 the Inuvialuit Game Council (IGC) initiated a joint federal-Inuvialuit-industry oil and gas planning process, which culminated in the Beaufort Sea Strategic Regional Plan of Action (BSStRPA).⁸ The IGC specifically recommended a SEA for the Canadian Beaufort Sea to ensure a coordinated and integrated regional approach towards environmental assessments and cumulative effects associated with future offshore oil and gas developments.⁹

In 2010, the federal government announced the Beaufort Regional Environmental Assessment (BREA).¹⁰ The BREA is a five-year science program designed to fill critical data gaps in support of oil and gas development. But the BREA is not a SEA. It fails to address the majority of principles of good SEA practice outlined in the Canadian Council of Ministers of the Environment's 2009 report, *Regional Strategic Environmental Assessment in Canada: Principles and Guidance* (discussed in Part 2 below). That said, the BREA should yield crucial baseline data which will be an important input into future SEAs.

This paper argues, consistently with the federal Cabinet Directive, the Arctic Council guidelines, and the current practice of the C-NSOPB and C-NLOPB, that the Government of Canada should integrate SEAs into the oil and gas exploration and rights issuance procedures in Nunavut, NWT and related offshore areas in advance of issuing a call for nominations. A well designed SEA is the most effective and efficient tool available to ensure an appropriate policy context for development, the proper consideration of alternatives and to provide the necessary basis for cumulative effects assessments at the project level. SEAs can also be critical tools in engaging those potentially affected by development to work toward a common vision.

⁸ *Beaufort Sea Strategic Regional Plan of Action (BSStRPA)* (April 2008), online: <<http://www.bsstrpa.ca/pdf/bsstrpa/BSSrPA%20RPA%20March2009.pdf>>.

⁹ *Ibid* at 2.

¹⁰ Online: BREA <<http://www.beaufortrea.ca/>>.

The paper proceeds as follows. Part 1 describes how the federal oil and gas leasing regimes operate in three different parts of Canada: (1) Nunavut, the Northwest Territories and associated offshore areas,¹¹ (2) the areas offshore of Newfoundland and Labrador, and (3) the areas offshore of Nova Scotia. This section shows that while the relevant legislation is silent with respect to SEAs the example of the East coast boards demonstrates that it is possible to integrate SEA procedures within the current disposition rules.

The second and third parts of the paper examine the form of SEA that should be put in place for the Canadian Beaufort Sea. To that end, Part two draws on the SEA literature to provide a statement of SEA principles of good practice. Part three of the paper describes the SEA practice of the C-NLOPB and the C-NSOPB and Part 4 critiques that practice in light those principles. The final part of the paper draws on this experience and analysis to outline how an effective SEA process for the Canadian Beaufort Sea might be integrated into the current oil and gas exploration and leasing regime as well as the two land claim agreements which touch on the Beaufort Sea, the IFA and the NLCA. This part of the paper will illustrate how a SEA could build on the oil and gas research initiative, BREA.

Part 1: Oil and Gas Disposition Schemes for Federal Lands in Canada: CPRA and Offshore Accords

The three oil and gas leasing regimes that cover the Northwest Territories, Nunavut the Arctic Offshore and the marine areas offshore of Nova Scotia and Newfoundland and Labrador all have the same starting point which is the disposition scheme described in the *Canada Petroleum Resources Act (CPRA)*.¹² On the east coast the respective Accords¹³ between Canada and the two provincial governments¹⁴ resulted in additional provisions

¹¹ Following devolution of oil and gas rights and legislative responsibility to Yukon in November 1998, Yukon now has its own oil and gas regime. See *Yukon Oil and Gas Act*, RSY 2002, c 162. Note that the Government of Yukon recently decided not to proceed with a disposition following expressions of interest by industry of blocks in the Whitehorse Trough. The government noted that it had been surprised by these expressions of interest and concluded that concerns and questions were raised that required further study: see Yukon Government, News Release, “Government of Yukon announced decision on oil and gas postings” (12 April 2012), online: <<http://www.gov.yk.ca/news/2011/files/12-064.pdf>>.

¹² RSC 1985 (2nd Supp), c 36.

¹³ *The Atlantic Accord: Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resources Management and Revenue Sharing* (11 February 1985), online: <http://www.servicenl.gov.nl.ca/printer/publications/aa_mou.pdf>; *Canada-Nova Scotia Offshore Petroleum Resources Accord* (1986), online: <<http://gov.ns.ca/energy/resources/RA/offshore/1986-Canada-NS-Offshore-Petroleum-Resource-Accord.pdf>>.

being grafted on to the basic scheme described by the *CPRA*, largely to provide a role for joint federal-provincial decision-making through the two offshore boards, the C-NSOPB¹⁵ and the C-NLOPB.¹⁶ The Accords were implemented by mirror legislation adopted by Parliament and the provincial legislature: the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (CNS)*¹⁷ and the *Canada-Newfoundland Atlantic Accord Implementation Act (CNL)*.¹⁸

In what follows we focus on the *CPRA* regime and then describe either in the text or in the footnotes (as appropriate in each case) how the east coast regimes track or differ from that of the *CPRA*.

The *CPRA* provides for three forms of tenure, an exploration licence (EL), a significant discovery licence (SDL), and a production licence (PL). In the normal course a licensee progresses from the EL, to the SDL to the PL.¹⁹ Both the EL and the SDL grant the licensee the exclusive right to drill wells and to obtain a PL.²⁰ An EL has a maximum duration of nine years.²¹ A licensee can only hold on to the lands beyond the term of the EL if it makes a significant or commercial discovery²² during the term of the EL.²³ An SDL has an indefinite duration and is effectively a holding licence which

¹⁴ The Accords were negotiated to allow the provincial governments a co-management role with respect to the offshore areas adjacent to their coasts notwithstanding a series of Supreme Court decisions that confirmed that these offshore areas were all beyond the territory of the respective provinces and therefore subject to federal jurisdiction.

¹⁵ Online: C-NSOPB <<http://www.cnsopb.ns.ca/>>.

¹⁶ Online: C-NLOPB <<http://www.cnlopb.nl.ca/>>.

¹⁷ The federal legislation is SC 1988, c 28; the provincial legislation is SNS 1987, c 3.

¹⁸ The federal legislation is SC 1987, c 3; the provincial legislation is RSNL 1990, c 2.

¹⁹ It is possible for the Crown to issue either an SDL or a PL as part of a call for bids if there is a declaration of significant or commercial discovery in place for those lands.

²⁰ EL for the *CPRA*, see s 22; SDL for the *CPRA*, see s 29.

²¹ *CPRA*, s 26.

²² There is a formal process for making a declaration of significant discovery and a declaration of a commercial discovery. Both are defined terms under the Act. Under the *CPRA* these declarations are made by the National Energy Board (NEB). On the east coast these decision are made by the two Boards. There has been some litigation on the Declaration process. See in particular *Petro-Canada v Canada-Newfoundland Offshore Petroleum Board* (1995), 127 DLR (4th) 483, and *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202. In addition, the two East Coast Board have offered guidance on these issues. See *Joint Guidelines Regarding Applications for Significant or Commercial Discovery Declarations and Amendments* (May 2003), online: <http://www.cnlopb.nl.ca/pdfs/guidelines/sda_0503.pdf> [*Joint Guidelines re Applications for Significant or Commercial Discovery*].

²³ Lands revert to the status of Crown reserve lands if they are not subject to a declaration: *CPRA*, ss 26(6) & 32(4).

allows a licensee to hold on to a discovery pending, for example, the development of appropriate infrastructure (e.g. a pipeline).²⁴ A PL grants the licensee the exclusive right to produce and title to the oil and gas produced. A PL is issued for a 25-year term which is renewable as of right if petroleum is still being produced commercially at the end of the initial term.²⁵

A licensee has a strong interest in the procedure that will take it from an EL to an SDL to a PL since the right to explore without the ultimate right to produce what the licensee finds is not very attractive. The procedure under the *CPRA* and the related provisions of the *National Energy Board Act*²⁶ is designed to be expert, objective and apolitical and offers the licensee a great deal of security that it will be able to realize on its investment.

This paper focuses on the first step in this three-step tenure scheme, the procedure for issuing an EL. The procedure is a two-step procedure that involves: (1) a “call for nominations”, and (2) a “calls for bids”.²⁷ The *CPRA* addresses the subject of calls for bids but it does not expressly refer to calls for nominations.²⁸ The same is true of the two East Coast statutes although C-NSOPB has issued a set of detailed Guidelines on the Issuance of Exploration Licences.²⁹ Samples of calls for nominations are posted on AAND/DIAND’s website.³⁰ A call for nominations is a procedure by which the government assesses whether industry has any interest in bidding on particular lands. It is in effect a call upon industry to nominate particular lands that a company might wish to see listed in a call for bids. Calls for nominations remind industry to be aware of relevant land claim agreements and also draw attention to *SARA (Species at Risk Act*³¹) listed species and any relevant land use plans with which developers may have to conform. Calls for nominations may be geographically targeted. Thus government may only ask for nominations in particular areas (or may exclude other areas).

²⁴ While the Act does not prescribe a term, s 33 does authorize the Minister to issue a drilling order to persons holding an interest in the significant discovery.

²⁵ *CPRA*, s 41.

²⁶ RSC 1985, c N-7, s 28.1.

²⁷ Note that the Nova Scotia Board does not have a formal call for nominations; operators may nominate lands any time, but nominations are reviewed by the Board on a certain date each year.

²⁸ But see s 14(2) which provides that: “Any request received by the Minister to make a call for bids in relation to particular frontier lands shall be considered by the Minister in selecting the frontier lands to be specified in a call for bids.”

²⁹ C-NSOPB, *Guidelines on the Issuance of Exploration Licences: Applies to Call for Bids NS12-1 and Forward* (Revised January 2012), online: <<http://www.cnsopb.ns.ca/pdfs/issuance.pdf>> [*Guidelines on the Issuance of Exploration Licences (C-NSOPB)*].

³⁰ Online: <<http://www.aadnc-aandc.gc.ca/eng/1100100036087>>.

³¹ SC 2002, c 29.

A call for bids is a formal document issued by the Department and posted on its website in which it calls upon industry to bid on particular blocks of land. In most cases these blocks will have been selected and configured following the call for nominations process described above. The Act requires the Minister to use a single bidding variable in selecting the successful bid.³² This is typically a work bid (i.e. the amount of work such as seismic or wells that the company is prepared to commit to). There is no pre-qualification of applicants.

The crucial point for present purposes is that the Call for Nominations and the Call for Bids start a process which, if carried through to completion, will see a developer acquire an EL and perhaps (successively or not) a SDL or a PL. The licences represent the proprietary platform which persuades the developer/licensees to invest risk dollars on running seismic and drilling wells. Neither the call for nominations nor the call for bids triggers an environmental assessment under the terms of the *CEAA*³³ because, at this stage in the process, there is no project activity.³⁴ Similarly, the *CPRA* and the East Coast statutes are completely silent on the need for a strategic environmental assessment (SEA).

Not all oil and gas exploration activities require an exclusive tenure under the *CPRA* or the east coast statutes. In particular, while a party requires an EL, an SDL or a PL in order to drill a well, a party does *not* require one of these forms of licence in order to conduct seismic exploration. Instead, such an activity requires an authorization under the *Canada Oil and Gas Operations Act (COGOA)*.³⁵ Since a seismic operation (unlike the mere issuance of a licence) is a physical activity, a request for an authorization will trigger an environmental assessment under *CEAA*. Seismic activity varies in intensity and purpose. Some seismic is conducted by the Geological Survey of Canada and similar science based institutions to obtain a better understanding of regional geology and structure. Some seismic, so-called speculative or “spec” seismic, is conducted (as the name implies), by companies who run seismic surveys in anticipation of calls for bids or nominations in order to sell the results to oil and gas exploration companies. And finally, the successful bidder on an exploration block will likely both commit to (under the terms of the EL) and want to (i.e. for self-interested reasons) run additional seismic to determine priority drilling locations for any wells it plans or is required to drill.

The legislation is completely silent with respect to consultation with aboriginal peoples although all three statutes contain an aboriginal rights savings clause or non-

³² *CPRA*, s 14(3)(g).

³³ *Supra* note 4.

³⁴ See N Bankes & P Rowbotham, “The Oil and Gas Industry: Some Current Problems in Environmental Law” in Geoffrey Thompson et al, eds, *Environmental Law and Business in Canada* (Aurora: Canada Law Book Inc, 1993) 543-569.

³⁵ RCS 1985, c O-5.

derogation clause.³⁶ Additionally, consultation obligations may be imposed by relevant land claim agreements³⁷ or by the Constitution.³⁸

The principal differences between the *CPRA* and the East Coast statutes are these:

- The East Coast statutes provide for the joint or co-management of offshore lands.³⁹ There is no co-management of lands covered by the *CPRA* within Nunavut and the NWT. Instead, the operating assumption, at least in relation to land areas, is that federal oil and gas management will, at some time in the future, be devolved to the territorial governments.⁴⁰
- In furtherance of the idea of joint management, the two East Coast statutes establish the Offshore Boards and recognize the concept of a “fundamental decision” which is an important decision to be made by the Board which *prima facie* requires the concurrence of both the federal and provincial ministers (subject to some exceptions). There is no equivalent to the offshore Boards under the *CPRA*, although the National Energy Board (NEB) does have a role in assessing significant and commercial discoveries and is also responsible for administering much of the *COGOA*.
- In the case of the lands subject to the *CPRA* there is a clear separation between the property and regulatory functions of government. Thus, the *CPRA* is very much concerned with managing the Crown’s oil and gas property interests while the regulation of oil and gas activities falls under *COGOA*. The East Coast statutes deal with both issues in the same statute. Part II of the East Coast statutes deals with the matters that fall within the *CPRA* whereas Part III of the two statutes deals with the matters that fall under *COGOA*.
- The East Coast statutes, consistent with the two Accords, provide for resource revenue sharing.⁴¹ There are no similar arrangements under the *CPRA* although

³⁶ *CPRA*, s 3; *CNS*, s 50; *CNL*, s 48.

³⁷ For example Art 27.1.2 of the NLCA provides that: “Prior to the initial exercise of rights in respect of exploration, development or production of petroleum on Crown lands in the Nunavut Settlement Area, and in order to prepare a benefits plan for the approval of the appropriate regulatory authority, the proponent shall consult the DIO, and Government shall consult the DIO [Designated Inuit Organization], in respect to those matters listed in Schedule 27-1.”

³⁸ See in particular *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman*] which is authority for the proposition that the terms of a land claim agreement do not exhaust the Crown’s duty to consult.

³⁹ *CNS*, Part 1, Joint Management; *CNF*, Part 1, Joint Management.

⁴⁰ The model here is Yukon, see *supra* note 11. Yukon also obtained jurisdiction over the so-called adjoining area, the immediate inshore area close to the Yukon coast.

⁴¹ *CNL*, Part IV.

revenue sharing arrangements may be put in place as part of the devolution arrangements⁴² and may also be prescribed by the terms of land claim agreements.⁴³

There are also differences in practice between the rights issuance processes of AAND and those of the two Offshore Boards. Some of the more significant differences include the following:

- The East Coast Boards have been much more active in issuing guidelines to industry than has Northern Oil and Gas Canada or the NEB.⁴⁴
- The *CPRA* covers a much broader variety of lands than the East Coast statutes. All wells on the East Coast that fall under the jurisdiction of the Board are offshore wells. By contrast, the *CPRA* covers both land and marine areas and thus some of the activities carried out under the *CPRA* would look very similar to conventional oil and gas operations in Northern Alberta or British Columbia.
- The East Coast Boards have, as discussed in Part 3 of the paper, followed the practice of conducting SEAs before calling for bids in a new area. There is no similar consistent practice for lands subject to the *CPRA* although in some cases the Government of Canada has experimented with integrated planning processes such as the BStRPA⁴⁵ and BREA.

Part 2: SEA Principles of Good Practice

SEAs in Canada are not new. There have been federal Cabinet Directives on SEAs in place for over two decades. Some provinces also allow for environmental assessments of policies, plans and programs. A number of SEAs have been carried out in Canada without any specific legal authorization or requirement.⁴⁶

⁴² For Yukon see Yukon Government, News Release, “Yukon welcomes PM’s commitment to improve resource revenue sharing agreement” (29 August 2011), online: <<http://www.gov.yk.ca/news/2011/files/11-132.pdf>>.

⁴³ See, for example, Nunavut Final Agreement, Art 25.

⁴⁴ Examples of Guidelines include the *Joint Guidelines re Applications for Significant or Commercial Discovery*, *supra* note 22, and the *Guidelines on the Issuance of Exploration Licences (C-NSOPB)*, *supra* note 29.

⁴⁵ Fisheries and Oceans Canada, News Release, “Announcement of the Integrated Oceans Management Plan for the Beaufort Sea”(27 August 2010), online: <<http://www.dfo-mpo.gc.ca/media/back-fiche/2010/hq-ac43-a-eng.htm>>.

⁴⁶ Because most jurisdictions do not require SEAs to be carried out, when SEAs are identified as useful in a particular context, SEAs are often designed on an *ad hoc* basis. For examples, see BF Noble & J Bronson,

The term SEA means different things to different people and is practiced very differently across jurisdictions. Some definitions, such as the one in the current federal Cabinet Directive, use the term primarily in the context of major Cabinet decisions. Other authors view SEA as an overriding concept that covers all environmental assessments that go beyond individual projects.⁴⁷

Perhaps the most familiar form of SEA is the assessment of a proposed government policy, plan and program. This form of SEA is a reactive process that seeks to identify potential environmental concerns associated with proposed government action before Cabinet approval is granted. However, SEAs can take many other forms. Some have focused on specific industry sectors (e.g. offshore wind or tidal power production) or a particular type of activity (e.g. energy, aquaculture, fishing). Others have focused on a range of activities in a given region. SEAs can also be used to develop a new policy, plan or program, or assess existing policies.

SEA Literature

Dalal-Clayton and Sadler consider a number of definitions of SEA in their 2005 book on international experience with SEAs.⁴⁸ These authors note that early definitions of SEA were closely linked to project assessments. More recent definitions have tended to take a broader perspective by including environmental, economic and social considerations. Furthermore, SEA is increasingly seen as a tool for the proactive development of policies, plans and programs, rather than a reactive review.

SEA can be used in a variety of contexts, with different needs and outcomes. Nevertheless, there appears to be general agreement on the basic steps and principles that should guide SEA processes. The process steps proposed for SEAs tend to be similar to project EAs and include the following:

- Process selection or design

Models of Strategic Environmental Assessment in Canada, Report prepared for the Minister of Environment's Regional Advisory Committee, Sub-committee on Strategic Environmental Assessment (2007). See also H Benevides et al, *Law and Policy Options for Strategic Environmental Assessment in Canada*, Report submitted to Canadian Environmental Assessment Agency (October 2009), online: <<http://www.cen-rce.org/eng/caucuses/assessment/>>, and R Gibson et al, "Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options" (2010) 20 J Envtl L & Prac 175.

⁴⁷ For an assessment of the federal cabinet directive on SEA, see S Hazel & H Benevides. "Federal Strategic Environmental Assessment: Toward a Legal Framework" (1997) 7 J Envtl L & Prac 349. See also FB Nobel, "Strategic Environmental Assessment" in KS Hanna, ed, *Environmental Impact Assessment: Practice and Participation* (Oxford: Oxford University Press, 2005) 93.

⁴⁸ B Dalal-Clayton & B Sadler, *Strategic Environmental Assessment* (London: Earthscan, 2005).

- Public engagement effort throughout
- Broad scoping
- Information gathering
- Review and analysis
- Documentation of results
- Decision making
- Follow-up

Dalal-Clayton and Sadler, for example, offer a mix of general and SEA specific principles to guide the development of SEA.⁴⁹ Nobel similarly draws on EA literature when he concludes that SEA should: focus on basic objectives and how to achieve them; identify desired future outcomes and consider fully alternative ways of achieving these outcomes; focus on objectives; be proactive; be integrated; take a broad approach; and be tiered.⁵⁰ These are all principles utilized in literature on project EA.⁵¹

A 2009 report commissioned by the Canadian Environmental Assessment Agency identifies key elements of an effective SEA process. The following nine principles of good SEA practice draw on that report with some elaboration to explore their relevance in the offshore oil and gas exploration context:

1) The SEA should be applied early and proactively:

- A SEA should be triggered before important policy and project decisions are made, and no such decisions should be made during the course of the SEA.
- There should be clear rules as to when a SEA should be applied.
- There should be a clear statement of the purpose of a SEA, including the decisions it is intended to inform.

2) The SEA should be integrated at a substantive level, by incorporating biophysical (or “ecological”), social and economic aspects:

⁴⁹ Dalal-Clayton & Sadler, *ibid*, Box 2.4 at 15

⁵⁰ See Nobel, *supra* note 47.

⁵¹ See M Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, ON: LexisNexis-Butterworths, 2008) at 29.

- The process should pay particular attention to issues that have been difficult to deal with at the project level, such as broader policy considerations, cumulative effects, alternative means of achieving societal objectives and intergenerational considerations.

3) *The SEA should take into account its place within the other “tiers” or levels of assessment:*

- For example, a policy decision on whether, when, and under what conditions, to grant exploration licences in a given area would be expected to directly influence future decisions in relation to particular project activities.
- Assessments of lower tier initiatives may influence improvements in a higher tier. For example, a previous project EA on exploratory seismic activity may provide useful information for a SEA on exploratory drilling. A SEA on exploratory drilling may in turn inform integrated management planning.
- Improved assessments at all levels, as well as the practical benefit that the overall assessment process is “streamlined”, are among the benefits of tiering.
- The process or terms of reference should establish a clear link between the SEA outcomes and future higher and lower tier decisions.

4) *The process should be guided by a legislative, regulatory, or policy context. Such a legal context has the following elements and benefits:*

- The legal context should confirm the need for consistency in legislation and regulations while providing opportunities for improvement through ongoing strengthening and clarification of the guidance.
- It should establish the standard of assessment that must be met in legislation.
- It should include clear delineation of assessment roles and responsibilities in legislation, with mechanisms to ensure credible independence of assessment review, impartial administration and adequate time and resources in legislation, regulations, and guidance as appropriate.
- By including these elements, the legal context improves transparency, opportunity, and motivation to participate.

5) *The process should be sufficiently flexible to fit the particular circumstances of individual SEAs and be carried out in an effective, efficient and fair manner:*

- The process should be adjustable to fit the needs of a particular SEA.

- The process design should consider the overall context, including the subject matter of the SEA, the scope, the decisions to be informed, the existing decision making context, and should identify who is in charge of the process.
 - The process needs to have the combination of flexibility and guidance necessary to identify the appropriate scope of the SEA in light of the decision that is to be informed.
 - In turn, the party in charge of the process must be carefully selected to be impartial in light of the purpose and scope of the SEA and the decisions to be informed.
- 6) *The process should be transparent and include opportunities for active public involvement throughout:*
- Transparency is a necessary but not a sufficient condition for public engagement.
 - SEAs require enhanced efforts to encourage public participation.
 - SEAs are only as useful as they are successful in engaging those with a stake in the outcome. The success of public engagement therefore ultimately has to be measured in terms of the result, not just the effort to engage.
 - Given their longer term impact on decision-making compared to project EAs, there needs to be a clear statement as to how the SEA will inform future decisions and for how long.
- 7) *The SEA process should include effective incentives to ensure it is adhered to, that government, industry and public participants are motivated to learn from the results of the process, and that decision makers allow the results to inform future decisions:*
- One of the lessons from project EA is that it is possible to mandate government decision makers to follow an EA process, but it is difficult to force an unmotivated, unwilling decision maker to implement the process so as to maximize its influence on future decisions and to actually make better decisions based on the results of the process.
 - This means that an SEA should be designed to motivate decision makers to learn from the process and to use the results to make better decisions.
- 8) *The assessment must be followed up in terms of actual performance, as well as actual effects:*

- The SEA should require that actual performance be compared with predictions, and that appropriate steps be taken in response to the results of the follow up in terms of improving:
 - future decision making under the particular SEA,
 - the development of future SEAs and resulting policy decisions,
 - the SEA process itself.

9) *There must be political commitment to put in place and implement a SEA regime and to use its results:*

- Much of the momentum for implementing an effective SEA process will only be realized when decision-makers are shown the benefits of such a regime.
- Key decision-makers should be participants in the design, establishment and implementation of the regime. By participating in the process, decision makers are more likely to see the benefits of following the recommendations, to understand the subtleties of the conclusions reached, and to appreciate the risk of deviating from the results in terms of community and stakeholder support for future government decisions.⁵²

These nine principles of good SEA practice are all drawn from the 2009 report on SEA commissioned by CEEA. We add one additional principle here which is to the effect that any SEA process that is adopted for offshore oil and gas issues in the Arctic must reflect and be consistent with not only the terms of relevant land claim agreements but also with their overall intent. We return to this point in Part 5 of the paper.

The next part of the paper discusses the emerging SEA practice of the C-NSOPB and C-NLOPB.

Part 3: Application of SEA by the NS and NL Offshore Petroleum Boards

SEAs have been used in the offshore oil and gas context of the east coast of Canada since 2002. They have also been used in the UK and in Norway.⁵³ We start with a brief

⁵² Benevides et al, *supra* note 46.

⁵³ For an overview of SEA in the offshore oil and gas context, see Courtney Fidler & Bram Noble, “Advancing strategic environmental assessment in the offshore oil and gas sector: Lessons from Norway, Canada, and the United Kingdom” (2012) 34 *Environmental Impact Assessment Review* 12-21. See also,

overview of the SEA process used by each of the offshore petroleum boards. This is followed by an assessment of how they measure up against the principles of good SEA from the previous section.

Part one of this paper described the procedure by which companies acquire oil and gas rights in the offshore through ELs. It also noted that in some cases spec seismic may occur before any EL is issued. The decision to issue an EL does not trigger CEAA although seismic activities and drilling operations will. There is no requirement under the Offshore Board legislation for a SEA to inform exploration licence decisions.⁵⁴ However, both the C-NSOPB and C-NLOPB began using SEAs before opening up new areas under a call for bids in the new millennium, around the same time that stakeholders debated whether exploration activities should be subject to a screening or comprehensive study under CEAA.⁵⁵

In 2005, the C-NSOPB sought policy advice from both levels of government on the need to conduct SEAs prior to a call for bids in an area. In response, the federal Minister directed the Board to undertake SEAs prior to issuing licences, unless the area in question had previously been studied in the context of a comprehensive review. The province gave similar direction. The conclusion reached was that decisions on exploration are covered by the federal Cabinet Directive on SEA.⁵⁶ At the project level, federal regulators settled on requiring only a screening level assessment for seismic projects and exploration wells. The provincial governments were reportedly supportive of this approach.⁵⁷

The mandate of both boards is to regulate offshore oil and gas development in a manner consistent with statutory obligations dealing with issues such as environmental protection and safety. This is important context. Neither board has a mandate to consider broader policy issues, such as how to resolve potentially competing visions for the future of the offshore area under their jurisdiction.

Anne Muecke & Lesley Griffiths, *Regional Environmental Assessment Stakeholder Consultation: Context and Issues*, Report submitted to C-NSOPB (December 2009).

⁵⁴ See Part 1.

⁵⁵ The end result of this process was a change to the comprehensive study regulation that exempted exploration activity from a comprehensive study under the CEAA (Canadian Environmental Assessment Agency). See CEAA, News Release, “Federal Minister Stéphane Dion Announces Changes to the Environmental Assessment of Offshore Oil and Gas Exploratory Drilling Projects” (17 November 2005), online: CEAA <<http://www.ceaa-acee.gc.ca/default.asp?lang=En&xml=06DF5879-EEB1-4C21-BDB1-480BC47C038E>>.

⁵⁶ See Fidler & Noble, *supra* note 53.

⁵⁷ Personal communications with Eric Theriault at C-NSOPB.

Exploration SEAs in Nova Scotia

The C-NSOPB first started carrying out SEAs to inform decisions on exploration licences in 2003 with a SEA for an area immediately surrounding the Gully east of Sable Island.⁵⁸ In addition, it participated in a joint SEA with the C-NLOPB for the Laurentian Sub-basin, an area that was partly within the jurisdiction of each of the two Boards. Since these two early experiments with SEAs, the C-NSOPB has carried out two more exploration assessments, one for the Misaine Bank area east off Cape Breton in 2005, and one for the Southwestern Scotian Slope off mainland Nova Scotia in 2011.⁵⁹

The focus of all exploration SEAs carried out by the C-NSOPB has been on potential interactions between expected exploration activity and the receiving environment, including its current uses. All four SEAs were intended to inform decisions related to the issuance of exploration licences in the study area, rather than broader policy issues, such as whether oil and gas production is an appropriate activity in the study area, or whether the resources should be explored now or saved for future use.⁶⁰

The scope of all four SEAs is also similar. In line with the objective of informing decisions about issuing exploration licences, SEAs focus on the biophysical environment, existing human activities in the area, activities expected to be involved in exploration, possible interactions with the biophysical environment and existing activities, “special risks and sensitivities” identified, special mitigation needs or areas to be avoided identified.

The process has varied somewhat, but the basic elements have been the same. First, C-NSOPB chooses the area for the SEA based on potential interest in exploration activities and production potential of the area. Typically, the trigger for the SEA appears to be a call for bids in a given offshore area. Areas that have been previously studied in the context of a comprehensive study or panel review under a project EA have so far been excluded from SEAs. Boundaries for the study area generally coincide with parcels generated for the bidding process. The main variant in the process has been the time taken and the level of public engagement.

⁵⁸ See C-NSOPB *Strategic Environmental Assessment of Potential Exploration Rights Issuance for the Eastern Sable Island Bank, Western Banquereau Bank, the Gully Trough and the Eastern Scotian Slope* (June 2003) online: <<http://0-fs01.cito.gov.ns.ca.legcat.gov.ns.ca/deposit/b10098392.pdf>>.

⁵⁹ See “Misaine Bank Strategic Environmental Assessment” and “Southwestern Scotian Slope SEA”, online: <<http://www.cnsopb.ns.ca/environment/environmental-assessments/sea-public-registry>>. In addition, the Board has recently started a series of new SEAs to be carried out over a three-year period.

⁶⁰ This narrow focus is in line with the role the C-NSOPB played in these SEAs. The boards are not sufficiently impartial to be in charge of an SEA that looks at the broader policy issues. A decision to broaden the scope of the SEA would have to be matched with a re-alignment of responsibilities to ensure the credibility and effectiveness of the resulting SEA process.

The first public step in the SEA process has been the preparation of a draft-scoping document by an outside consultant who carries out the major components of the SEA. C-NSOPB staff take responsibility for the process, while outside consultants assume responsibility for drafting and finalizing the major documents required for the process, particularly the scoping document and the SEA report.

The draft scoping document is prepared by a consultant with input from expert federal authorities. It is then made available for public comment, usually for about a month. Key stakeholders with an established interest in offshore oil and gas issues are contacted directly. Once all comments have been reviewed, a final scoping document is prepared and released. A similar process is used for the SEA report. The consultant prepares a draft, which is released for public comment. The report is finalized once the comments received have been reviewed.⁶¹

The release of the SEA report is the final step in the SEA process. There is no Board or governmental response to the report, even though the report is prepared by an outside consultant rather than by the Board. This means that there is no clear decision from the board or the two levels of government at the conclusion of the SEA. Rather, the results of the SEA process are available to decision-makers faced with whether and under what conditions to grant exploration licences in the area.⁶²

In summary, the following are the key steps in the SEA process applied by the C-NSOPB:

- Identify study area.
- Retain outside consultant to prepare major reports.
- Release draft scoping document for public comment.
- Finalize scoping document.
- Release draft SEA report for public comment.

⁶¹ The most significant deviation from this process involved the Misaine Bank SEA. In this case, C-NSOPB scheduled hearings in Cape Breton to hear more directly from stakeholders concerned about exploration activities. The Misaine Bank SEA involved the most vocal opposition to exploration activities, both from aboriginal groups and from the fishing industry, concerned about the impact on the lucrative snow crab fishery in the area. The concerns were reflected in the final report and serve as a caution to developers and regulators, but no decision was made at the time of the SEA as to whether the concerns warranted excluding this area from exploration activity.

⁶² The 2011 SEA on the SW Slope, *supra* note 58, includes a disclaimer whereby the C-NSOPB disclaims any responsibility for the accuracy of the content. This is further evidence that the SEA process is exclusively an information gathering process. It does not currently include a transparent decision-making component.

- Finalize SEA report.

The main results of the SEAs carried out by the C-NSOPB have been the following:

- The SEAs have generally confirmed that our understanding of the receiving environment is incomplete. Specific gaps are identified, but no specific recommendations are made on whether and how to fill these gaps, or whether the gaps should be filled before making decisions about ELs, exploration projects, or production.
- The SEAs have identified certain ecosystems that are either considered to be particularly valuable or sensitive to impacts from exploration activities. Examples include the area identified for the Gully MPA and the snow crab fishing grounds in the Misaine Bank Area.
- The SEAs have identified specific mitigation measures to protect species vulnerable to the effects of exploration activities. Examples include the impacts of noise on the endangered blue whale and the leatherback turtle.
- Cumulative effects, alternatives, worst-case scenarios, and broader policy issues are sometimes referenced, but no detailed analysis is carried out. The ability of exploration activity to co-exist with existing uses, particularly fishing, is included.
- The conclusion reached in all SEAs is that standard mitigation is generally adequate to address any concerns about the interaction of exploration activities with the receiving environment including existing uses documented in the area, but that special mitigation identified is required in specified circumstances.
- No firm decisions or recommendations are included in the SEA reports on whether, where and under what circumstances to permit exploration activity in the study area. The intent is to leave flexibility for decision-makers to make regulatory decisions in light of the information provided.

In 2009, the C-NSOPB commissioned Griffiths Muecke to consider stakeholder consultation issues in the context of a possible REA for the NS offshore area. The resulting report was based in part on a detailed review of the first three SEAs carried out and interviews of participants and stakeholders. The Griffiths Muecke report made the following recommendations:

- An improved process for early identification of issues;
- Clarification of how the Cabinet Directive for strategic assessments is being applied;
- A clear future-oriented perspective;

- Identification and application of environmental protection objectives;
- Presentation of scenarios or alternatives;
- A clear rationale for limiting the study to exploration and excluding consideration of development;
- Discussion of risk and risk management;
- A process for risk communication;
- Clarification of terms used to describe relative impact;
- Clarification of the process for identifying cumulative effects;
- Clarification of how the precautionary principle is being applied; and
- Criteria for declaring restricted, special management, or ‘no-go’ areas for exploration.

In addition to these specific recommendations, the Griffiths Muecke report also concluded that the SEAs could have added value if they could be used:

- As a decision-making and planning tool for the industry, government and C-NSOPB;
- As a management tool for government and C-NSOPB; and
- As a communication tool for C-NSOPB.⁶³

Exploration SEAs: Newfoundland and Labrador

The joint SEA with Nova Scotia covering the Laurentian Sub-basin in 2003 was the C-NLOPB’s first exploration SEA. As was the case in Nova Scotia, the C-NLOPB carried out a second SEA for the Orphan Basin on its own around the same time as the joint assessment. Since then, the C-NLOPB has been more active than its counterpart, conducting SEAs on Western Newfoundland and Labrador in 2005, the Sydney Basin in 2006, and the Labrador Shelf in 2008. In 2010, the C-NLOPB carried out its first update

⁶³ See Griffiths Muecke, “Regional Environmental Assessment Stakeholder Consultation: Context and Issues” (December 2009), on file with authors.

of an SEA in the form of a consolidated SEA for the southern Newfoundland offshore area.⁶⁴

The process followed in Newfoundland was initially identical to the Nova Scotia process described above. Over time, however, the C-NLOPB has adjusted its process in a few notable ways. Key among these changes are efforts to improve public engagement, and to broaden the scope of its SEAs to include some consideration of future production scenarios.⁶⁵

With respect to public engagement, the C-NLOPB has started to utilize multi-stakeholder organizing committees to broaden input into the SEA process. Notably, the 2008 assessment of the Labrador Shelf, involved considerable efforts through a range of mechanisms to gather the views of those potentially affected by exploration and production. In particular, the Nunatsiavut government (established under the terms of the Labrador Inuit land claim agreement) engaged its citizens in the process and fed the results into the SEA process. This allowed the Nunatsiavut government to utilize means of engagement that were culturally appropriate to its Inuit population. The Labrador Shelf SEA took the longest time, spanning close to a year.

With respect to scope, a number of SEAs carried out by the C-NLOPB provide basic information about the environmental impacts of production, suggesting that impacts from production may be taken into account when deciding whether to issue exploration licences. In spite of the inclusion of this information, the cumulative effects analysis does not include an assessment of the interaction between the effects of exploration and those from production.⁶⁶ Most notably, the cumulative effects assessment has not included the development and consideration of a range of future scenarios based on different levels of oil and gas activities or other human activities in the study area.

Part 4 considers how this SEA process measures up against the principles of good SEA practice outlined in Part 2 and offers some thoughts on what this experience suggests for an effective and efficient SEA process for the Canadian Beaufort Sea.

⁶⁴ For information about SEAs carried out by the C-NLOPB, see online: <http://www.cnlopb.nl.ca/env_strategic.shtml>.

⁶⁵ One notable difference in the conclusions of recent C-NLOPB SEAs are fairly detailed recommendations on how information gaps should be addressed, and how findings may influence future planning and decision making.

⁶⁶ A good starting point, for example, could be the consideration of these interactions on particularly sensitive ecosystems and on endangered species.

Part 4: An Assessment of the Offshore Boards SEA Process

This part of the paper assesses the east coast SEAs against the nine principles set out in Part 2.

The first principle is that SEAs should be carried out early and proactively, and that it should operate under clear rules. The SEAs carried out by the Offshore Boards on the east coast are completed before any exploration projects are considered. They are initiated in conjunction with the call for bids process for the study area. Hence, SEAs follow the call for nominations process and the original decision to open an area for bids for ELs. While the EL is issued after the SEA is completed, the linkage between the two processes is not clear.

This means that, while there are no project decisions made before the SEA is completed, important policy decisions do precede the SEA. The information gathered in these SEAs contains relevant context for those earlier policy decisions. Conducting SEAs before the call for nominations would significantly enhance the efficacy of the overall decision-making process. It would also alleviate some of the time constraints under which some of the SEAs had to be carried out. Clear rules on the role of the SEA in future decision-making will also be critical to the success of a Beaufort SEA.

The second principle is that SEAs should fully integrate ecological, social and economic issues relevant to offshore oil and gas exploration. There is limited evidence that the SEAs carried out by the Boards have been integrated substantively in this manner. There has been some effort to incorporate social and economic aspects related to current uses in the study areas, particularly with respect to commercial fishing and aboriginal practices. The SEAs fall particularly short in addressing broader policy issues, cumulative effects and alternative future development scenarios.

It is here that more effort to identify ecological, social and economic implications of choices to be made should be explored, particularly to inform the fundamental policy decision whether an area should be opened up for exploration. The main challenge is that broadening the scope of the SEA would make it necessary to place the process in the hands of an independent third party, as the Offshore Boards may not be perceived as sufficiently impartial given their focus on the oil and gas industry. Careful thought will therefore have to be given to the appropriate combination of scope and responsible party for the Beaufort SEA process. A broad scope with an independent panel would be the most effective combination.

The third principle relates to the place of SEAs among the various decision making tiers and levels of assessment. The place of the Boards' SEAs among existing information gathering, public engagement and decision making processes would benefit

from further clarity. There should be a clear link to early policy decisions, such as the call for nomination and the call for bids. The relationship to the issuance of the EL, the approval of individual exploration activities, and the expectation of oil and gas production should also be clearly identified.

The final SEA reports generally provide guidance to the board and proponent on mitigation measures for exploration activities and areas that may be particularly sensitive to the impacts of exploration. In the process, the SEAs hint at, but do not clearly identify, areas that should be avoided. There is no formal decision at the conclusion of the SEA process. This makes it much more difficult to track the role these SEAs play in the overall decision making at other tiers and levels of assessment.

There has been some effort to fill information gaps identified in the SEAs, but little indication of applying a precautionary approach until the information gap has been filled. This is critically important when dealing with the exploration for oil and gas resources. The choice to explore in spite of critical information gaps increases risk and uncertainty.

Careful thought will have to be given to the place of a Beaufort SEA in the overall decision making process for offshore oil and gas exploration and development in the study area. It will be important to be clear about its role before the start of the SEA process.

The fourth principle relates to the legal context within which SEAs are carried out. SEAs are not required by the legislation which establishes either of the two Boards. The purpose, terms of reference, and scope of process is not set out in laws, regulations or policy guidance. There is no opportunity for appeal where SEA principles or prescribed requirements seem not to have been satisfied, and there are no procedures for monitoring, review, iterative learning and identification of needs for corrective action and implementation. The responsibilities of the board, governments, industry and other stakeholders are also not clearly defined through legal or policy documents.

In short, both boards have proactively made a decision to conduct SEAs, but these decisions have not yet been supported by legislative change, regulations or even formal policy guidance. Two things have happened to provide some legal context. First, the SEAs have been brought under the federal cabinet directive on SEA.⁶⁷ Second, SEA reports in Newfoundland have started to make a link to the legislative mandate of the board by pointing out the role of the board in ensuring oil and gas activities are carried out in an environmentally responsible manner.

In theory, the lack of legal context should make the process very flexible. The benefit of this flexibility is that there is room for learning by doing before the process is enshrined in law. In practice, however, the adjustments to the processes in Nova Scotia

⁶⁷ Fidler & Nobel, *supra* note 53.

and Newfoundland-Labrador have been modest to date. The only discernible trend is SEAs executed in Newfoundland-Labrador have made more of an effort to engage interested parties and the general public.⁶⁸

Ideally, the context for a Beaufort SEA process would be enshrined in appropriate legislation, regulations and policies. At an experimental stage, a clear policy statement can at times be an adequate substitute so long as there is a clear political commitment to the process, and provided that the policy is enshrined in law as it moves on from its experimental beginnings.

The sixth principle relates to public engagement and transparency. Public participation has generally been low in SEAs carried out by the C-NSOPB. The SEA process has focused on engaging a few organizations proactively. Key stakeholders and broader interested public interest are invited to comment on the scoping document and the final SEA report, but not enough proactive steps are taken to encourage their direct participation in the process.⁶⁹

Access to information has been limited to draft and final reports and to submissions from other participants. Opportunities to submit views were in many cases limited to written submissions with short timelines. No resources were made available to those potentially affected to understand the issues and participate, but there are preliminary signs that opportunities for increased input have been matched with cultural preferences.⁷⁰

Public engagement is one of the most critical areas to build on when looking at the experience on the east coast. More time and resources will have to be made available, but careful consideration also needs to be given to other factors, such as the credibility of the process, and a clear understanding of its role in decision making on offshore oil and gas activity in the Beaufort Sea.

The seventh principle refers to the motivation of participants to learn from the SEA process and use it as a basis for decision-making. The SEAs carried out by the boards have so far been information gathering, without any clear recommendations in the SEA, and without direct decisions based on the SEA.⁷¹ As a result, it is difficult to comment on

⁶⁸ See Labrador Shelf SEA, in particular, online: <http://www.cnlopb.nl.ca/env_strategic.shtml>.

⁶⁹ Among the factors that influence public participation are awareness, adequate time and resources, easy access to information, familiarity with SEA and a clear understanding of its role in the overall governance process, and trust in the process.

⁷⁰ See Misaine Bank SEA in NS, Labrador Shelf SEA in NL. In the Labrador Shelf SEA, in particular, the public engagement process was placed in the hands of the local aboriginal government, allowing it to utilize engagement processes that were in line with Inuit cultural preferences.

⁷¹ Of course, the Boards would be expected to consider the information in deciding whether or not to issue ELs.

whether there are effective incentives in place, or whether participants are motivated to learn from the results of the process. Similarly, without clear recommendations on what should happen as a result of the SEAs carried out, it is difficult to track performance. This issue requires careful consideration in the design of a Beaufort SEA process, and the east coast experience offers little guidance in this regard.

The eighth principle relates to follow-up. It is not surprising, given the lack of recommendations and decisions, that there are no requirements for follow-up and monitoring of the implementation of the SEA, as there are no clear decisions or recommendations to implement. The decision-making takes place at the exploration project level. Neither of the two Boards has used SEAs to make broad policy decisions. Both boards have made an informal commitment to update SEAs if there is any activity in the area more than five years after the initial SEA. Any Beaufort SEA process will have to give careful consideration to the allocation of responsibility to ensure effective monitoring and follow-up, including full transparency and effective response as problems are identified. The experience on the east coast offers no guidance on this issue.

The ninth principle refers to the political commitment to implement an effective SEA process and to utilize its results. Given the somewhat tentative nature of the SEA process on the east coast to date, and limited time and resources allocated to them, it is difficult to escape the conclusion that there is no significant political commitment to the process. It appears to be a process held together by staff at the boards, mainly because it takes limited resources and time to complete, it simplifies project EAs, and it does little to constrain decision-makers.

It is clear from the east coast experience that political commitment is critical for the effectiveness of any SEA. The Beaufort SEA process therefore cannot be designed and implemented in isolation from the effort to gain political commitment. On the one hand, there is no point in gaining political commitment for an SEA process that is ineffective, inefficient or unfair. On the other hand, there is no point in designing an effective, efficient and fair process in line with the first eight principles if there is no political commitment to follow through. A big part of this will be a shared understanding of the value of an effective SEA process in improving the quality and efficiency of future decisions regarding offshore oil and gas exploration and development in the region.

Part 5: Application of SEA to the Beaufort Sea

This part of the paper offers some concluding thoughts on why and how to integrate a SEA process into decisions about oil and gas exploration in offshore areas in Northern Canada including the Beaufort Sea.⁷² As indicated at the outset, it is our position that

⁷² Indeed, the scheme described here should apply to all lands covered by the *CPRA* but the focus of this paper is the Beaufort Sea.

SEAs are critical for efficient and effective consideration of broader policy implications of proposed development, for the consideration of various alternative scenarios, for the consideration of cumulative effects and for the early and active engagement of those affected. Ultimately it is important that governments take informed decisions as to whether to grant oil and gas rights in a particular area rather than simply following industry's lead. And governments should make those decisions on an informed basis.

The current legislation is flexible enough to allow the Minister to require that a SEA be conducted. We propose that the SEA be conducted before a call for nominations and a call for bids. This proposed timing addresses Principle 1 to the effect that the SEA should be applied early and proactively. The Minister might also retain the discretion to conduct additional SEAs outside the rights issuance process to address scientific or 'spec' seismic operations. We envisage that this would be a rare situation but in some cases seismic operations may pose strategic questions as well as the project specific questions that would be addressed through a *CEAA* screening or other review.

There are several possible ways in which to address Principles 2, 3, 4 and 5 above including amendments to the *CPRA* and possibly regulations but neither approach is necessary. Instead, just as the offshore boards have developed guidance notes and similar documents including one relating to declarations of significant discovery, we think that it should be possible to follow a similar approach here and develop a guidance document for "exploration SEAs". This document would address a number of matters including the scope of the SEA (incorporating ecological, biophysical and socio-economic issues), the questions that the SEA should address including identification of information deficiencies, and the linkages with other tiers of assessment. The document would be sufficiently open-ended to provide the flexibility to tailor the SEA to the particular circumstances of the case. As noted in the previous section, as parties obtained experience with SEAs it might then be appropriate to provide a more formal legal foundation for the SEA process in oil and gas dispositions.

We anticipate that the Minister would have to take the lead in developing this document (as the responsible party under the *CPRA*), but in doing so the Minister would need to draw on the expertise of others (including the NEB and the Canadian Environmental Assessment Agency) and closely consult with the relevant institutions established by the land claim agreements. These institutions would include relevant bodies established by the IFA and NLCA. Including these institutions at the outset would help to establish the relevant linkages between the SEA and other tiers of assessment including not only project specific EAs but also land use planning procedures.

The Exploration SEA Guidance document would also need to identify the entity that should be responsible for the conduct of the SEA. We have noted that there are some problems associated with having a body (like the offshore boards) with the responsibility for regulating oil and gas exploration also assume responsibility for the SEA. In the Beaufort Sea, the possible lead agencies would include: the Minister, the NEB or

possibly a relevant entity established by a land claim agreement. The selection of an entity other than the Minister or Department would help establish the credibility and integrity of the process. It will also be important to identify those parties who will use the resulting SEAs and for what purpose. This might include the following:

- The Minister may use the SEA to decide whether to issue a call for nominations and to inform the configuration of bidding blocks and the minimum terms and conditions to be included in the bidding documents.
- The NEB may use the SEA in issuing authorizations under *COGOA* and establishing appropriate terms and conditions for those authorizations.
- Institutions established by land claim agreements, including those bodies with responsibilities for land use planning, and screening and project assessment may also use the SEA report in discharging their responsibilities under the terms of the land claim agreement and any implementing legislation.

These issues are clearly related to and overlap with Principle 3 dealing with tiers of assessments.

Principle 6 addresses the importance of transparency and public involvement in the process. Our assessment of the experience with the offshore boards suggests that this has been a weak area in the practice of the Boards and that the party responsible for the SEA will need to be proactive. It is typically more difficult to engage the public in a strategic assessment than in a project specific assessment. This issue also needs to be covered in the proposed guidance document. The timing issues might be resolved by decoupling the SEA from the timelines established by the call for bids process but it will be important that the guidance document address funding for informed community involvement in any SEA.

Principles 7 through 9 deal with incentives, follow-up and political commitment. The principal incentive for engaging in high quality SEAs might be stated in several ways. First, adoption of SEAs as standard practice is consistent with the recommendations of the Arctic Council of which Canada is a member. It is also consistent with the requirements of the federal Cabinet directive. Indeed it is not clear to us how the Minister has managed to avoid conducting SEAs.⁷³ Second, the SEA procedure is consistent with the Crown's obligations under the terms of relevant land claim agreements as well as any free standing constitutional obligation to consult (and accommodate) aboriginal peoples in relation to proposed decisions that may affect their rights and interests.⁷⁴ Establishing

⁷³ It is important to emphasise that we are not suggesting that compliance with the federal Cabinet Directive is adequate since we base our evaluation of the adequacy of an SEA process on the nine principles distilled from the literature rather than the formal requirements of the Directive.

⁷⁴ See *Beckman*, *supra* note 38.

clear procedures for when and how SEAs will be implemented will provide a degree of legal certainty for all parties including government and industry and help meet the Crown's constitutional obligations.

Requirements for follow up might also be prescribed in the proposed SEA Guidance notes discussed above. These guidance notes will need to identify the parties responsible for drawing up the list of those whose decisions will be informed by the SEA. The principal evidence of political commitment to the SEA process will be the development of the Guidance document (or amendments to the *CPRA* or new regulations) as well as the actual use of the resulting SEAs in decision-making. Other evidence will be a commitment to involve local communities in the process. This will demonstrate that SEAs are not being conducted simply to tick a box but to inform subsequent decision-making.⁷⁵

The current procedure of the east coast boards is ad hoc in the sense that it is not enshrined in legislation or regulations. The *ad hoc* nature of the process leads directly to some of the shortcoming that we have identified. We think that a key step in addressing many of these issues lies in the development of an appropriate guidance document. Such a document would have to be developed collaboratively with the relevant institutions of the relevant land claim agreements if it were to have any credibility and legitimacy and to allow SEAs to contribute to appropriate tiered decision-making.

In conclusion, we reiterate that the SEA process proposed here would draw on much of the valuable work that has been ongoing in the Beaufort Sea over the last number of years under the auspices of the BSSrPA, a joint federal-Inuvialuit-industry oil and gas planning process, and the proposed BREa which will be launched in 2012 for a five-year term. This project will contribute to the quality of the SEAs anticipated by this paper since it will, inter alia, identify and address data gaps and “generate regional scale scientific and socio-economic information”⁷⁶ that can be fed into a SEA.

⁷⁵ We might here borrow the phrase “demonstrably integrated” which comes from some of the aboriginal consultation cases. See *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 and *West Moberly First Nations v British Columbia*, 2011 BCCA 247. Using this as a test it will be up to government through policy statements, press releases and specific decisions, to demonstrate how it is taking into account and using the results of the SEA.

⁷⁶ *Supra* note 10 at 2.

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