

**CO-ORDINATION OF FEDERAL AND PROVINCIAL ENVIRONMENTAL ASSESSMENT
PROCESSES
FOR THE POINT LEPREAU GENERATING STATION
SOLID RADIOACTIVE WASTE MANAGEMENT FACILITY MODIFICATIONS**

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ABSTRACT

Modification of the Solid Radioactive Waste Management Facility at Point Lepreau Generating Station is required to accommodate waste generated during and after an 18-month maintenance outage during which the station would be Refurbished. The modification of the facility triggered both federal and provincial environmental assessment requirements, and these assessments were conducted in a “co-ordinated” and cooperative fashion.

In this project, the coordinated approach worked well, and provided some significant advantages to the proponent, the public and the regulators. However, there are opportunities for further improvement in future projects, and this paper explores the advantages and disadvantages of this “co-ordinated” approach. As part of this exploration, there is a discussion of administrative and regulatory changes that the province is considering for the environmental assessment process, and a discussion of the need for a formal “harmonization” agreement.

PROJECT BACKGROUND

NB Power is planning to conduct an 18-month maintenance outage of the Point Lepreau Generating Station (PLGS) beginning in April 2008. The major activity would be the replacement of all 380 Fuel Channel & Calandria Tube Assemblies and the connecting feeder pipes. This activity is referred to as Retube. NB Power would also conduct a number of repairs, replacements, inspections & upgrades. These collective activities are referred to as Refurbishment. This would allow the station to operate for an additional 25 to 30 years.

To store the radioactive material being removed from the reactor as part of the Retube activity, additional storage structures would be constructed beginning in the spring of 2006 at the existing licensed onsite solid radioactive waste management facility. In addition to these new structures, additional vaults would be constructed to house the low-level radioactive wastes that would be generated over the extended plant life. Land within the waste management area would also be prepared for additional fuel storage canisters that would be constructed later, on an as needed basis, to house the used fuel generated over the extended operating period.

The modification of the waste facility to accommodate these structures triggered both the federal and provincial environmental assessment processes. An early agreement was reached with the two regulatory agencies to coordinate the two different process to the extent possible, to take advantage of assumed benefits.

The following sections discuss

- the two environmental assessment processes,
- some of the principles that were implicit in the coordination process,
- the advantages and disadvantages of the coordinated process.

The last sections discuss future directions for harmonization in the New Brunswick context, and draw some overall conclusions.

GETTING STARTED

In June 2000, NB Power advised the Canadian Nuclear Safety Commission (CNSC) of its intent to apply for an amendment to the Point Lepreau Solid Radioactive Waste Management Facility (SRWMF) Operating Licence that would allow for the construction and operation of new waste storage structures. The CNSC determined that amendment of the waste facility operating licence to allow construction and operation of these additional radioactive waste management structures “triggered” a screening level environmental assessment (EA) under the Canadian Environmental Assessment Act (CEAA) [1]. At the same time discussions were initiated with the province to understand their expectations.

From June 2000 to August 2000, NB Power worked with the responsible federal and provincial agencies to supply them with the necessary project information and to develop a clear understanding of the steps required for each environmental assessment process. Following these discussions, the same information package that was submitted to the CNSC, was subsequently registered [7] with the New Brunswick Department of Environment and Local Government (DELG), in accordance with the provincial Environmental Impact Assessment (EIA) Regulation of the Clean Environment Act.

This work led to an agreement that the two environmental assessment processes would be “coordinated”. Essentially, the assessment process was harmonized, although there is no formal “harmonization” agreement for environmental assessments between the federal and provincial government.

Past Experience

It is worth noting that the agreement to develop a coordinated approach to the assessment is not a new concept for New Brunswick Power projects in the nuclear field. In the two previous full environmental assessments (for Point Lepreau I (1977) and for Point Lepreau II (1984)), there was close cooperation between the federal and provincial governments. However, this is not always the case in other fields, where there have been quite separate processes, with little or no cooperation. Some of these experiences are explored briefly, later in this paper.

LEGISLATIVE FRAMEWORK

Canadian Environmental Assessment Act

Canadian Environmental Assessment Act (CEAA) establishes some minimum requirements that must be met for a screening level assessment. Specifically the Responsible Authority (RA), in this case the

CNSC, must define the scope of the project (Section 15. (1)), and ensure consideration of (section 16. (1))

- (a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
- (b) the significance of the effects referred to in paragraph (a);
- (c) comments from the public that are received in accordance with this Act and the regulations;
- (d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project;

In addition, the CEAA allows the RA some latitude with regard to some other requirements. In particular, under section 16.(1) e) the RA has the option to require consideration of any other matter relevant to the screening panel, such as the need for the project and alternatives to the project, that the responsible authority may require to be considered.

In addition, under Section 16.1 the RA may require that community knowledge and aboriginal traditional knowledge be considered in conducting an environmental assessment, and under section (16.2) the RA may require that the results of a study of the environmental effects of possible future projects in a region may be taken into account in considering any cumulative environmental effects that are likely to result from the project

With regard to how the assessment is undertaken (as opposed to what the assessment covers), the RA may delegate part of the screening or the preparation of the screening report, and may delegate any part of the design and implementation of a follow-up program (section 17).

Lastly, the RA may require that there be opportunities for public input to the project and process, over and above the placement of the project description on the internet site (Section 18 (3) and 18 (4)).

NB Environmental Impact Assessment Regulation

Under the NB Clean Environment Act – Environmental Impact Assessment Regulation, project proponents are required to submit a package of information (“registration”) to the Department of Environment and Local Government (DELG), about the project. This information is then reviewed and the Minister of Environment and Local Government then decides whether the project may proceed (with or without conditions) or whether it requires a more comprehensive assessment with increased public involvementⁱ.

At the time that the SRWMF project was assessed, this initial decision was referred to as “screening”, and if a project is allowed to proceed at this stage, it is referred to as being “screened out”. There was no requirement for any public involvement in the screening process, and the project did not have to be “advertised” in any way. However, this process involved review of the registration information by both federal and provincial agencies on behalf of the Minister, through a provincially coordinated technical review committee.

If the project is “screened in” to a “full EIA”, there are legislated requirements for public involvement as part of setting study guidelines, an legislated opportunity to review the draft study report, and a requirement for a Public Hearing. The technical review committee is heavily involved in the review of the documentation generated through this process., Finally, the decision is made by the NB Lieutenant Governor in Council, on the recommendation of the Minister.

ⁱ This section describes the process that was in place at the time of the project. NB DELG recently implemented administrative changes which have led to different terminology, different information requirements, and some additional public involvement. NB DELG also intends to amend the regulation in the near future.

The screening decision is supposed to occur within 30 days of the project being registered with the Department (implicit on the registration being “complete”), whereas a full EIA typically takes 12 – 18 months.

However it is worth noting that the province has, over the past several years, been trying to increase the public input opportunities in the screening phase of the process. This and other provincial initiatives are discussed later in this paper.

WHAT ACTUALLY HAPPENED

Following the submission of information to the CNSC and the NB DELG, the CNSC determined that amending the waste facility operating licence “triggered” a screening level environmental assessment (EA) under the Canadian Environmental Assessment Act (CEAA). They then entered the project into the public registry with the Canadian Environmental Assessment Agency and on the Federal Environmental Assessment Index (FEAI) - “Modification to Point Lepreau SRWMF” Project # 27931.

The DELG did not make any screening decision at this time: they chose to let the CNSC take the lead in the coordinated process and use the resultant documentation and information as the basis for a later screening decision - effectively the DELG worked through the CNSC / CEAA process to ensure that all the provincial interests were addressed. In addition, using the CEAA process as the lead, the CNSC (and thus the DELG) made use of all the options available to them for the review of the project. Specifically [5], [6]:

- the public had the opportunity to
 - review and provide written comment on the draft assessment guidelines
 - review and provide written comment on the draft screening report
 - participate in two public hearings (one into the draft guidelines and one into the screening report)
- the assessment included consideration of
 - need and alternatives
 - use of traditional resources
 - cumulative impacts
 - traditional knowledge
- and the scope of the assessment included
 - the incremental environmental effects of continued operation of PLGS, and
 - activities that would generate the waste both during the project and during future operations of the station
 - the impact of the construction of the new structures at the waste facility.

Following the public Hearing and acceptance of the final Screening Report by the CNSC (i.e. completion of the CEAA requirements), the Minister of Environment and Local Government then “screened out” the project. Both levels of government issued their separate decisions on August 25th, 2003, allowing the project to proceed [2], [10].

In effect, there was a well defined effort to establish and use a coordinated approach to the assessment, and the advantages, and limitations, are discussed in the following sections.

PRINCIPLES OF THE COORDINATED PROCESS

During the period June to August 2000, there were several meetings and discussions concerning the assessment process that was to be followed. During those meetings, a series of unofficial “principles” were identified that had to be respected. These were

1. Each level of government (the CNSC and the Minister of Environment and Local Government) had to retain their separate legislative authority. Neither could “delegate” the decision making

authority that their separate legislation requiredⁱⁱ. Effectively, this meant that the process had to include all the requirements of both regulatory processes.

2. The assessment would be based on a single set of documentation. Thus any correspondence or reports would be made available to both regulatory bodies, and there would be no “separation” of issues between jurisdictions.
3. There would be single points of contact with each regulatory body. Both the CNSC and the DELG use a “team” of experts to ensure issues are assessed appropriately (in total this would involve approximately 35 – 40 people). Using a designated point of contact meant that there was a single “clearing” house for all the information.
4. Lastly, it was agreed that although the CNSC and the Minister of Environment and Local Government would retain their separate legislative authority, every effort would be made to coordinate the announcement of key decisions. Thus the separate and individual decisions were announced by the separate governments on the same day.

ADVANTAGES AND DISADVANTAGES OF THE COORDINATED PROCESS

Scope of Process

As a result of the need by both levels of government to maintain their legislated authority intact, the ‘coordinated’ process means that the two jurisdictions were conducting their processes simultaneously, with a single set of documentation (discussed separately under “Information Management”, below). This allowed the provincial department to take advantage of the more rigorous federal process, while still maintaining its authority.

In effect, “coordination” in this case meant including all aspects of both processes – it was not an exercise in trying to create an optimized or streamline process. In this instance, since the DELG process was kept at the screening level and the CNSC chose to use its flexibility under CEAA with regard to public involvement, the process did not grow beyond what either level of government could have required. However, it is clear that the DELG benefited from the fact that CNSC used its flexibility under CEAA, and in effect DELG received all the benefits of a “full EIA”.

Scope of Assessment

Under both CEAA and the DELG processes, the scope of the assessment is somewhat flexible. As discussed above there is some regulatory guidance under CEAA, and even after receiving a detailed registration package, DELG regularly requires additional details before the Minister makes a “screening” decision. In both instances, this effectively allows each regulators to “increase” the scope of an assessment to include issues that might not obviously be related to the project.

Coordination in this project did not directly lead to any additional scope for the assessment. However, the final guidelines that were used for the assessment clearly expand the scope into areas that typically are not required by a DELG screening. Specifically, screenings of modifications to other waste management facilities do not typically include any requirement for discussion of the source of the waste, or the incremental effect of continued operation of the source.

In this respect, the province again benefited from the coordinated process, without having to go to the extent of a full EIA.

Information Management

One of the principles of the coordinated process was the use of a single set of documentation, and use of single (joint) meetings to address both technical and public input. For the proponent and the regulators, this simplified the management of documentation and meetings – any issue that was raised from any source was automatically addressed for both jurisdictions simultaneously, and there was explicit “sign off” on any disposition by both jurisdictions.

ⁱⁱ This is different to the National Energy Board legislation that does allow delegation of decision making authority for certain activities.

From a public point of view, having a single set of (all be it extensive) documentation certainly simplifies the review and comment process, and having meetings with both levels of regulator ensured a single issue could be addressed directly. In this respect, coordination appears to have provided a significant benefit to all parties.

Integration of Regulatory and Technical Expertise

Coordination has the potential to allow integration of different regulatory and technical regimes. Particularly in the nuclear field there is a very well defined federal regulatory process, and in projects of this nature, there are also a number of potential provincial requirements. Having a coordinated process, with meetings that included both regulatory parties, allowed each regulator to concentrate on their own area of expertise, while being directly assured that areas outside their expertise were being addressed.

For example, if the province did not have the technical expertise in a certain area, they had access to the CNSC expertise to ensure an issue was addressed. In addition, the CNSC was able to ensure that local knowledge was brought forward through the provincial experts. This assisted in minimizing the number of iterations required to ensure that an issue was adequately addressed.

The use of experts from both levels of government does raise issues of jurisdiction or “turf” protection. There are areas where experts from different departments or levels of government have overlapping jurisdiction, and do not agree on an issue. This can be difficult for a process administrator to “manage”, or for the proponent to address: there is a danger that an expert who feels that an issue is not being addressed adequately is able to essentially undermine the overall assessment.

Double Jeopardy

Although there were a number of advantages to the coordinated process, the fact is that there were still two regulatory processes, with separate decisions for each. In effect, this meant that even after completion of the CEAA screening process (which included significant public involvement, and an extensive scope), the DELG could have still screened the project into a full EIA.

This double jeopardy is often seen as a benefit by people who oppose projects – essentially, by maintaining either entirely separate processes or, as in this case two separate decisions, opponents to a project get two opportunities to influence the outcome, either during the processes, or through appeals based on either process.

Although a low risk, this is an instance where the coordinated approach did not go far enough to ensure a predictable process or to eliminate a potentially significant business risk.

EXPERIENCE WITH OTHER PROJECTS

Before looking to the future, it is worth noting some recent examples where either a coordinated approach has not been employed, or where the coordinated approach has not been as successful. Three examples are provided.

First, in the nuclear field, it is note worthy that Hydro-Quebec Production is in the middle of an assessment of a project at Gently-2 where there is no formal federal provincial coordination. The project triggers the CEAA requirements, with the CNSC as the Responsible Authority, and there is an entirely separate provincial process (under the Bureau d'Audience Publique sur l'Environnement). Although there has been involvement of technical CNSC experts in the provincial process, and ongoing discussions between the regulators and the proponent, it appears that the overall coordination is not as good as with the NB Power situation, since there are two distinct and separate opportunities for the public to speak on the same project, and Hydro-Quebec is exposed to a regulatory “double jeopardy” situation. At a separate level, the Quebec Government has also initiated a separate public consultation process on energy security and the future of energy in Québec, which effectively raises a third opportunity to review the project.

Second, NB Power recently proposed an international power line (IPL) into Maine. This project required a Comprehensive Study Report (CSR) under CEAA with the National Energy Board as the RA. In addition, the project required a registration with DELG. Although there was coordination of some aspects of the process, there was room for improvement, and in particular there was no coordination of the CEAA and DELG environmental assessment decisions. Specifically, although the CSR was accepted in December 2002, allowing the NEB to proceed with the process for considering NB Power's request for a "Certificate of Public Convenience", the DELG waited until after the NEB issued its Certificate before issuing its screening decision in June 2003. In effect, this left significant business uncertainty about what the complete set of environmental terms and conditions might be for the project, and provided various parties, including the regulators, an opportunity to "ratchet up" the environmental requirements between the two decision dates. This uncertainty was at a time that commercial discussions were on going to try and finalize an agreement on the project execution.

Third, in a recent project in northern New Brunswick, Bennett Environmental registered a project with the province who took the lead and conducted the assessment to the provincial Minister's satisfaction (a number of federal agencies acted as resources in the assessment since there did not appear to be any separate federal trigger under CEAA). However, following considerable lobbying following what some saw as an unfavorable decision by DELG, the federal Minister subsequently used transboundary air emissions and potential health impacts as the basis for initiating a federal review, even in the absence of a "law list trigger". A court case followed, and this issue is not resolved. The lack of a clear single process exposed the proponent to significant business risk, and regulatory uncertainty.

FUTURE DIRECTIONS

As outlined above, there appear to be a number of useful benefits, as well as some limitations, to an assessment process that is coordinated "informally" as occurred in the case of the SRWMF modifications. Consideration of these benefits and limitations should be kept in mind as a both levels of government move forward on efforts to formalize the coordination through harmonization agreements.

For about 18 months, the federal government has been discussing a number of "Smart Regulation" policy initiatives. Recently, the concept has been discussed in such situations as:

- the most recent throne speech,
- the Environment Minister's first official speech [4],
- Natural Resource Canada's recent meetings to discuss smart regulations, and
- Fisheries and Oceans Canada recent discussions with industry groups (including the Canadian Electricity Association) concerning the application of CEAA, the Fisheries Act, and the Navigable Waters Protection Act.

All of these "smarter regulation" initiatives are built on the recognition that while there is need to protect the environment, it should not be at the cost of jeopardizing the competitiveness of industry. Hence there is a need to address recognized issues of duplication, complexity, ineffectiveness of some regulations, and the inconsistent application of some regulations by different departmentsⁱⁱⁱ. It is noted that many of the same concerns that are leveled at the federal CEAA are also leveled at provincial EIA process. These problems and the need for improvements are reflected in the results of a Treasury Board initiated study [8]. When the results of the study were presented by the Committee Chair, a number of key recommendations were identified including [9]:

"Federal government should begin discussions with provincial-territorial governments on development of single, nationally-integrated approach to EAs.

- *Key step is to establish single agency to carry-out EAs under federal jurisdiction."*

ⁱⁱⁱ One example includes the fact that some CEAA screenings by CNSC take longer and are more onerous than Comprehensive Studies or full Panel assessments by other Departments.

Although these appear to be “new” initiatives, there has in fact been an on-going effort since 1998 to develop bilateral (federal –provincial) harmonization agreements that specifically address environmental assessment requirements [3]. To date, there are 6 such agreements, but there is not yet one between New Brunswick and the federal government.

At the same time, the DELG has initiated efforts to revamp its EIA Regulation. DELG hosted a series of workshops to identify ways to improve the way it administers the EIA Regulation, and ultimately to identify specific amendments to the actual Regulation. It is not yet clear whether these changes will lead to better assessments, or that they will address some of the same concerns that have been leveled at the federal CEAA, although some will definitely increase the public process involved in “screenings”. One of the specific items identified by the province is to try and increase the harmonization of assessments that that involve both levels of government.

RECOMMENDATIONS

As the federal and provincial governments move forward with efforts to regulate smarter, and specifically to address duplication and overlap of environmental assessments, the experiences gained through the coordinated assessment of the SRWMF modifications can be used to generate some useful recommendations.

1. Harmonization should not be a cover word for running two separate assessments under one set of documentation. To be truly effective a harmonized process should be a single process with well defined steps, leading to a single decision. This may mean that a project that is 80% within provincial jurisdiction should only go through a provincial process. Although potentially this raises the challenge of delegating legislative authority, it should be a critical objective for any harmonization effort.
2. The single process should reflect the nature and location of the project – it should not just be the “sum” of two individual federal and provincial processes. Rather it should draw upon, or use, only those steps and tools that make sense to support a robust decision.
3. The process should include defining timelines for all parties, which may vary from project to project, to introduce predictability to a project.
4. The use of a single set of documentation for a process is essential.
5. The use of technical experts from both levels of governments simultaneously is essential, and who ever is leading the process needs to have the ability to “adjudicate” technical or jurisdictional disagreements, in such a way that the process is not exposed to delays due to technical opinion differences or subsequent legal challenge.

CONCLUSIONS

The environmental assessment of the SRWMF Modifications and related activities required a CEAA screening, and a decision by the Minister of Environment and Local Government. The two regulatory agencies employed a “coordinated” approach to the environmental assessment, which provided some tangible benefits to all parties, but also created (or did not address) some significant business risk associated with conducting two simultaneous and duplicative assessments. Lessons from this experience have value for both the federal and provincial governments as they pursue the objective of more effective and smarter regulation.

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