

Independent Environmental Assessment

Petroleum Boards

In the 1984 *Hibernia Reference* the Supreme Court of Canada ruled that Newfoundland does not have jurisdiction over the continental shelf. That decision led the federal government and the province of Newfoundland and Labrador to negotiate a legal regime to ensure the province would benefit financially from the development of offshore oil and gas resources. The **Atlantic Accord** was signed in 1985 and formed the basis for the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*.

Less than a year later, the province of Nova Scotia and the federal government reached a similar agreement with the signing of the **Canada-Nova Scotia Accord**, implemented through the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*. These two laws, referred to as the **Accord Acts**, form the basis of the legal framework for petroleum operations in much of the offshore regions of Newfoundland and Labrador, and Nova Scotia. The Accord Acts and associated regulations take precedence over any other statute where there is a conflict.

A **core purpose** of the Accord Acts is to provide for a stable and fair offshore management regime for industry.ⁱ The Canada-Newfoundland Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board (“**the Petroleum Boards**”) are the responsible regulatory bodies. The five members of the Petroleum Boards are not elected, but appointed by the federal and provincial governments. The majority of members have ties to or a background in the oil and gas industry. Responsibilities of the Boards include issuing licences for offshore exploration and development, managing and conserving the offshore petroleum resources and ensuring protection of the environment and safety of workers. Over the years, the courts have interpreted the Accord Acts in the spirit of **joint management** and have supported the Petroleum Boards’ powers.

Today, federal environmental impact assessment (EA) is regulated by the **Canadian Environmental Assessment Act, 2012** (CEAA 2012). The federal EA process only applies to activities listed in the relevant regulations. This list includes certain offshore activities such as exploration drilling.ⁱⁱ

Under CEAA 2012, a Responsible Authority conducts federal EA. For most federal EAs the **Canadian Environmental Assessment Agency** (the “Agency”) is the Responsible Authority. As such, the Agency screens designated projects to determine if an EA is required, conducts the EA, engages with the public and submits a report to the Minister of Environment, who determines whether, and under what conditions, the project will go ahead.

The National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC) are also Responsible Authorities. Like the Agency, the NEB and CNSC conduct EAs. However, these bodies have the authority to make decisions without reporting to the Minister of Environment.ⁱⁱⁱ

The Petroleum Boards are not Responsible Authorities. The Petroleum Boards are **Federal Authorities** under CEAA 2012. Federal Authorities provide information and advice to the Responsible Authority, but do not conduct the EA and do not make decisions in the federal EA process.

The legal structures are in place to change this approach and give the Petroleum Boards the same powers as the NEB and the CNSC. The Governor in Council (Cabinet) can name the Petroleum Boards as Responsible Authorities to conduct an EA and make the final decision, by creating a Regulation under CEAA 2012.^{iv} The authority to do this already exists in CEAA 2012 and in the Accord Acts.^v

In 2015, the Harper government developed the regulations necessary to make the Petroleum Boards Responsible Authorities and to **transfer the responsibility for offshore oil and gas EA from the Agency to the Petroleum Boards**. The stated objective of the proposed Regulations was “...to reduce duplication and streamline the regulatory process for offshore oil and gas projects...”^{vi} Before they passed, the Harper Regulations were **abandoned** and the Trudeau government says they do not intend to pursue the Regulations, although they are still listed in the government’s Regulatory Plan.^{vii}

Rather than completely handing over EA to the Petroleum Boards, the Trudeau government has proposed that the agency and life cycle regulators (the Boards) conduct assessments for oil and gas projects jointly.^{viii} The government has not clarified how these joint assessments will take place, however under CEAA 2012 the Agency can **delegate** any part of the EA process, other than the final decision, to a federal authority including the Petroleum Boards.^{ix}

Whether the government chooses the regulation-making authority or the delegation authority in CEAA 2012, the legal power to transfer some or all of the EA process to the Petroleum Boards already exists. In other words, **an amendment to CEAA 2012 is not required**.

The choice to reduce the independence of federal EA by handing it over to regulatory boards (NEB, CNSC, Petroleum Boards) does not reflect the findings of the government appointed Expert Panel tasked with reviewing EA, and would be considered by many a step backward in EA. The Expert Panel concluded,

“...an authority that does not have concurrent regulatory functions can better be held to account by all interests than can entities that are focused on one industry or area and that operate under their own distinct practices.”^x

Among the concerns expressed by the public and echoed by the Expert Panel are:

1. Petroleum Boards have dual mandates to protect the marine environment and promote resource extraction. Real or perceived conflict of interest undermines effective EA.
2. Petroleum Boards have expertise in the management of oil and gas resources, they do not have expertise in the fundamental planning elements of environmental impact assessment.
3. Petroleum Boards have close relationships with regulatees challenging their neutrality.

A single, independent environmental assessment body (such as the Canadian Environmental Assessment Agency) promotes impartiality, accountability and public trust. After months of public consultation this is what the Expert Panel recommended to the federal government.

Endnotes

ⁱ The Atlantic Accord. Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing at page 1. www.servicenl.gov.nl.ca/printer/publications/aa_mou.pdf

ⁱⁱ Regulations Designating Physical Activities SOR/2012-147, ss. 10-13

ⁱⁱⁱ CEEA 2012, ss. 27, 52, 54.

^{iv} CEEA 2012, Subsection 15(c) and Subsection 83(b).

^v Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act ss. 44.1 and 142.02(1) and Canada-Newfoundland and Labrador Atlantic Accord Implementation Act ss. 44.1 and 138.01.

^{vi} www.gazette.gc.ca/rp-pr/p1/2015/2015-06-27/html/reg5-eng.html

^{vii} www.canada.ca/en/environmental-assessment-agency/corporate/acts-regulations/forward-regulatory-plan/forward-regulatory-plan-2017-2019.html

^{viii} Government of Canada, Environmental and Regulatory Reviews: Discussion paper, June 2017 at www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/share-your-views/proposed-approach/discussion-paper.html

^{ix} CEEA 2012, section 26.

^x Building Common Ground: A New Vision for Impact Assessment in Canada, The Final Report of the Expert Panel for the Review of Environmental Assessment Processes at page 50.