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Effective and Efficient Regulation in
Nova Scotia

Effective and efficient regulation of the oil and gas industry on the East Coast of Canada is a top priority of the federal and provincial governments. Ever since oil and gas exploration and development began in this region, stakeholders and others have urged regulators to address and remedy this issue. This paper reviews how governments have responded first in the onshore context, and then in the offshore. Issues that regulators need to address are identified and legislative, regulatory, and administrative changes which have been made and are proposed are reviewed. Finally, the author reflects on possible future developments and the lessons that have already been learned in the Atlantic offshore.

La réglementation efficace et efficiente de l'industrie des hydrocarbures sur la côte est du Canada est l'une des plus hautes priorités des gouvernements fédéral et provinciaux. Depuis le tout début des activités d'exploration et de mise en valeur des hydrocarbures dans la région, divers intervenants pressent les organismes de réglementation d'examiner ce problème et d'y apporter des solutions. Le présent document étudie la réponse des gouvernements, d'abord sur la terre ferme et ensuite dans la zone extracôtière. Dans un premier temps, l'auteur définit les problèmes que doivent solutionner les organismes de réglementation; dans un deuxième temps, il passe en revue les modifications législatives, réglementaires et administratives qui ont été apportées ou proposées. Enfin, il s'interroge sur les éventuels développements et sur les leçons apprises jusqu'à maintenant dans la zone extracôtière atlantique.

* Senior Counsel, Nova Scotia Department of Justice. The views expressed are the author's and do not necessarily represent the views of the Nova Scotia Department of Justice or the Nova Scotia Department of Energy.

Introduction

I. Nova Scotia Onshore

1. Regulators

- a. Department of Energy*
- b. Utility and Review Board*
- c. Others*

2. Onshore Issues

- a. Outdated Legislation*
- b. Oil and Gas Legislation Administered by other Departments*
- c. Unworkable Legislation*
- d. Government Coordination*
- e. Regulatory Overlap*

3. Onshore Changes

- a. Legislative Changes*
- b. Regulatory Changes*
- c. Administrative Changes*

II. Nova Scotia Offshore

1. Regulators

- a. Offshore Boards*
- b. Other Federal Regulators*
- c. Other Provincial Regulators*

2. Legislation and Regulations

3. Offshore Issues

- a. Paramountcy of Accord Legislation*
- b. Offshore Board Authority*
- c. Gaps in the Legislation*
- d. Duplication of Approvals*
- e. Timely, Appropriate Environment Assessments*
- f. Industrial Benefits/Benefits Reporting*
- g. Performance-Based Regulations*
- h. Role of the Certifying Authority*
- i. Process Uncertainty in Development Applications*
- j. Variations from International Standards*
- k. Offshore Boards' Practices*
- l. Other Concerns*

4. *Offshore Changes*
 - a. *Initiatives*
 - b. *Legislative Changes*
 - c. *Regulatory Changes*
 - d. *Administrative Changes*

Conclusion

Introduction

In December, 2001, the Province of Nova Scotia released *Seizing the Opportunity: Nova Scotia's Energy Strategy* (Energy Strategy).¹ Under the action plan dealing with oil and gas, the province committed itself to creating an efficient and effective regulatory environment. The text reads as follows:

The government recognizes that the regulatory system employed in the Nova Scotia offshore area is in its infancy. Government is trying to adapt to an industry that is just beginning to develop and grow. The joint management regime in the offshore area has added substantial complexity to an already complex system. It is not surprising that inefficiencies and overlap have crept into the regulatory processes used by a large number of federal, provincial, and joint regulators.

The Nova Scotia government recognizes that, in partnership with the federal government, it has the responsibility to remove these inefficiencies and overlaps. In doing so, the governments will contribute substantially to improving the competitive position of offshore Nova Scotia.²

Further, the province acknowledged, in a statement of principle, its commitment to a regulatory environment that is as clear, predictable, and efficient as possible.³ To encourage the development of a vibrant and

1. Nova Scotia, *Seizing the Opportunity: Nova Scotia's Energy Strategy*, vol. 1, 2 (Halifax: Communications Nova Scotia, 2001) [*Energy Strategy*].

2. *Ibid.*, vol. 1 at 18.

3. *Ibid.*, vol. 2. Volume 2 consists of a series of background papers on seventeen different topics. Part II, Oil and Gas, contains a paper (Paper No. 7) on "Effective and Efficient Regulation" [Background Papers].

growing oil and gas sector, the province realized the regulatory environment had to be a top priority since the province is competing globally to attract the significant amounts of capital necessary for the growth of the industry. It recognized that an efficient regulatory system decreases investor uncertainty, reduces costs, and improves project cycle times. Thus the province's ability to attract investment capital is enhanced.

On the other hand, the oil and gas sector faces a higher than normal requirement of "public interest" regulation because oil and gas resources are publicly owned and the location of these petroleum resources in the Nova Scotia offshore area involves a complete marine ecosystem. All parties, including government and industry, recognize that regulation is necessary to protect the public interest in petroleum resources. This includes regulation in areas of health and safety, environmental management and protection, efficient extraction and use of a non-renewable resource, and interaction with other users of the marine environment.

The Energy Strategy focuses on outcomes rather than attempting to micromanage the industry. The role of regulation is to determine whether an outcome is realized, not how it comes about.

The four main objectives outlined in the Energy Strategy to achieve effective and efficient regulation are listed as follows:

- to eliminate areas of unnecessary regulation;
- to eliminate areas of regulatory overlap and duplication;
- to create a regulatory system that effectively and efficiently protects the public interest in areas such as health, safety, the environment and efficient resource use; and
- to develop a process through which the Offshore Accord can facilitate an effective and efficient administrative system for oil and gas.⁴

In this paper, I will focus on how the province is proceeding to implement these objectives. I will specifically review oil and gas issues that involve the Nova Scotia onshore and consider how they are being handled. Then I will review issues involving the Nova Scotia offshore and what role the province can play to address these issues. Finally, I will present my conclusions.

4. *Ibid.* at 3, 4.

I. *Nova Scotia Onshore*

1. *Regulators*

a. *Department of Energy*

The Energy Strategy recommended that a new Nova Scotia Department of Energy be established to implement the Strategy's goals and objectives.⁵ This was done in June 2002, when the Nova Scotia Department of Energy was created and a full-time minister appointed.⁶ The Nova Scotia Petroleum Directorate, established in 1997, was abolished.⁷

b. *Utility and Review Board*

The Nova Scotia Utility and Review Board (UARB)⁸ is responsible for the approval of intraprovincial pipeline construction and operation (permits to construct and licences to operate) and for setting pipeline rates, tolls, charges, and terms of service. The UARB is the primary regulatory body for the local gas distribution system network and regulates the electric utility, Nova Scotia Power Inc.

c. *Others*

In addition, other government departments have responsibilities related to the oil and gas sector. For example, the Nova Scotia Department of Environment and Labour addresses environment protection and occupational health and safety matters. Service Nova Scotia and Municipal Relations deals with taxation and municipal matters respecting pipelines and gas plant facilities.

2. *Onshore Issues*

The main issues identified with onshore regulation are listed below.

a. *Outdated Legislation*

The bulk of this legislation was enacted in the early 1980s, when Nova Scotia began asserting its claim to the Nova Scotia offshore. Section 7 of the *Petroleum Resources Act*, for example, states that the legislation applies to all Nova Scotia lands, defined as "the land mass of Nova Scotia including Sable Island, and includes the seabed and subsoil off the shore of the land mass of Nova Scotia, the seabed and the subsoil of the Continental

5. *Ibid.*, vol. 1 at 46.

6. Order in Council 2002-286 (17 June 2002) [NS Department of Energy].

7. Order in Council 97-719 (19 November 1997) (*Government Restructuring (2001) Act*).

8. *Utility and Review Board Act*, S.N.S. 1992, c.11.

shelf and slope, and the seabed and subsoil seaward from the Continental shelf and slope to the limit of exploitability.”⁹

b. *Oil and Gas Legislation Administered by other Departments*

The Nova Scotia Petroleum Directorate replaced the Nova Scotia Petroleum Development Agency in 1997. The mandate of the Directorate covered legislation formerly administered by the Mines and Energy Branch of the Department of Natural Resources and the Nova Scotia Offshore Energy Office established in the early 1980s. Certain legislation was transferred to the Petroleum Directorate in 1997, which as mentioned above, was replaced by the Department of Energy in 2002. Other legislation, such as the legislation pertaining to the underground storage of hydrocarbons,¹⁰ remained with the Department of Natural Resources. Thus key pieces of petroleum-related legislation rest with two different agencies.

c. *Unworkable Legislation*

Some recently enacted oil and gas legislation has been found not to be working as planned. Examples include the *Gas Distribution Act*¹¹ and the *Petroleum Resources Removal Permit Act*.¹²

d. *Government Coordination*

Because several departments and agencies exercise control over the oil and gas sector, many authorizations and approvals are needed. This has frequently led to multiple requests for certain items (e.g., financial security).

e. *Regulatory Overlap*

The province enacted its *Gas Plant Facility Regulations*¹³ in 2000. These regulations require that gas plant facilities, including the one operated at Goldboro, Guysborough County, be licenced by the UARB. The Gold-

9. *Petroleum Resources Act*, R.S.N.S. 1989, c.342, s.7. See also the definition of “Nova Scotia lands” in the *Pipeline Act*, R.S.N.S. 1989, c.345, s.2(2).

10. *Gas Storage Exploration Act*, R.S.N.S. 1989, c.181.

11. S.N.S. 1997, c.4.

12. S.N.S. 1999, c.7. Constitutional issues have been raised on this legislation. See Van Penick, “The New *Petroleum Resources Permit Act*: 99% Unconstitutional,” McInnes Cooper & Robertson newsletter (July 1999) [unpublished].

13. N.S. Reg. 22/2000 as am. by N.S. Reg. 149/2001. See John Kleefeld, “*West Coast Energy Inc. v. N.E.B.*: Revisiting the Division of Powers over Transportation, Communication and Resource Development,” Case Comment (1998) 10 N.J.C.L. 69.

boro plant is also regulated by the federal Crown. Because the *Pipeline Act*¹⁴ applies to the offshore, the subsea pipeline on the Sable Offshore Energy Project coming from Thebaud platform to Goldboro is covered by a provincial authorization as well as ones issued by the National Energy Board (NEB) and the Canada-Nova Scotia Offshore Petroleum Board (CNSOPB).

3. Onshore Changes

a. Legislative Changes

i. New Energy Act¹⁵

The province announced in its Energy Strategy that it would streamline its provincial legislation and regulations by preparing a new *Energy Act*. A Legislative Review Committee, chaired by myself, has been formed by the Nova Scotia Department of Energy. Its first task (Phase I) is to prepare a comprehensive *Energy Act* which includes all of the existing petroleum legislation and will also address renewable energy and the regulation of electricity.

Once an internal draft of the legislation is completed it is expected to be reviewed with other government departments and made available for consultation with stakeholders and the public at large.

ii. New Underground Hydrocarbons Storage Act¹⁶

In 2001, the *Underground Hydrocarbons Storage Act* was passed to replace the *Gas Storage Exploration Act*. When the regulations were approved by the Governor in Council, the legislation was proclaimed law.¹⁷ The Department of Energy issues the “rights” to develop underground hydrocarbons storage reservoirs. The UARB regulates the construction and operation (i.e., permits to construct and licences to operate) of the storage reservoirs. This legislation provides for the development of codes of practice respecting the construction and operation of storage reservoirs. A contractor was retained by the Department of Energy to prepare a code of practice for the underground storage of hydrocarbons.¹⁸ The technical details regarding how to locate, construct, and operate storage reservoirs

14. *Pipeline Act*, *supra* note 9.

15. *Energy Strategy*, *supra* note 1 at 18.

16. S.N.S. 2001, c.37 (Act proclaimed law on December 6, 2002, O.I.C. 2002-543, N.S. Reg. 147/2002).

17. *Underground Hydrocarbons Storage Regulations*, O.I.C. 2002-544, N.S. Reg. 148/2002.

18. Nova Scotia Department of Energy, “Code of Practice for Underground Storage of Hydrocarbons” (December 2002).

are found in the code of practice, not in the regulations. This is one example of the Department of Energy's attempt to emphasize outcomes over micromanagement of the industry. The practice of using codes or guidance notes will be more fully examined in the offshore context.

iii. *Amendments to the Gas Distribution Act*¹⁹ and Regulations²⁰

The 1997 legislation and 1998 regulations mandated that "all" counties in Nova Scotia were included in any province-wide distribution franchise awarded by the UARB. A minimum number of residential households ("access targets") had to be served. Sempra Atlantic Gas Limited (Sempra), a subsidiary of a major U.S. energy company, was granted the province-wide franchise on November 16, 1999.²¹ For a number of reasons, including the unprecedented closure of the gap between natural gas and oil prices, Sempra was unable to establish a viable business model. On February 26, 2002, the UARB approved the surrender of its franchise.²²

The province had to go back to the drawing board to recreate a legislative scheme that would work in a greenfield area like Nova Scotia.²³ A market-based approach, as opposed to the prescriptive approach in the 1997 legislation, was undertaken to overhaul the legislation in 2002.²⁴ Access targets were removed. The province also removed restrictions which prohibited the local distribution company (LDC) from providing the sale of gas and other associated products and services ("bundling") along with its distribution services. Utility companies could apply for a franchise.

The Energy Strategy, in addition to legislative changes, adopted other means of promoting the industry.²⁵ Gas consumers in Nova Scotia were given the ability to bypass gas transmission and distribution systems (the "bypass issue") franchised by the UARB by locating in the vicinity of gas

19. *Gas Distribution Act*, *supra* note 11.

20. *Gas Distribution Regulations*, O.I.C. 1998-576 N.S. Reg. 86/98 as am. by N.S. Reg. 31/99, N.S. Reg. 183/2000.

21. NSUARB-NG-98 (16 November 1999), online: UARB <<http://www.gov.ns.ca/govt/foi/utility.htm>>

22. NSUARB, NSUARB-SEM-01-07-2002, NSUARB6 (26 February 2002).

23. See Elizabeth L. Bhar & Mark E. MacDonald, "A Comparative Overview of the Unbundling of Gas Distribution Services in North America - Lessons for Nova Scotia and New Brunswick" (1999) 38 *Alta. L. Rev.* 1.

24. *Gas Distribution Act*, *supra* note 11, as am. by S.N.S. 2002, c.18.

25. Background Papers, *supra* note 3, Part II, Oil and Gas, Paper No. 5, "Using Nova Scotia Resources" at 14-16.

production facilities or obtaining a franchise to hook up directly to the interprovincial pipeline (the “lateral policy”). The provincial Department of Energy continues to work with the Union of Nova Scotia Municipalities (UNSM) on a common approach to gas distribution taxation. The Department of Energy is also working with UNSM to develop common municipal operating agreements that address items like where and how pipelines are to be laid in the various municipalities.

The Energy Strategy specifically addressed the issue of regulatory efficiency in gas distribution systems to be constructed in the province:

The gas distributor and the province will work together to identify and implement solutions that preserve regulatory objectives while allowing the development and operation of an economic and efficient gas distribution system. Safety, reliability, and the public interest cannot be compromised, but excessive regulation is in no one’s interest. The province will work with the gas distributor and the regulator to make the regulatory system efficient and effective. It will also work to establish standard practices for dealing with water crossings, bedrock, vegetation clearance and disposal, and protection of archaeological resources.²⁶

With these new rules in place, in June, 2002, the UARB invited new applications for full registration class franchises to construct and operate a gas delivery system covering multiple areas of the province. Hearings were held in October, 2002, on two new franchise applications. On February 7, 2003 the UARB awarded²⁷ a 25-year franchise to Heritage Gas Limited for the counties of Cumberland, Colchester, Pictou, and Halifax, the municipality of the District of East Hants, and the Goldboro area of Guysborough County. A “grant in principle” of a full regulation class franchise was awarded to Strait Area Gas Corporation covering the counties of Inverness, Antigonish, Richmond, and Guysborough (excluding Goldboro).

iv. *Amendments to the Pipeline Act*

The recommendations of the Report of the Westray Mine Public Inquiry²⁸ emphasized the importance of defining the roles and responsibilities of the

26. *Ibid.* at 16.

27. NSUARB, NSUARB-NG-2, 2003 NSUARB 8. Governor in Council approval was given by Order in Council 2003-64 (21 February 2003).

28. Nova Scotia, Report of the Westray Mine Public Inquiry, *The Westray Story: A Predictable Path to Disaster* (November 1997). Four volumes. Online: Nova Scotia Department of Environment & Labour <<http://www.gov.ns.ca/enla/pubs/westray/execsumm.htm>>.

various regulators in a regulated industry. Matters of public safety with respect to the construction and operation of pipelines and gas distribution systems are addressed by the UARB. Matters of employee occupational health and safety fall under the *Occupational Health and Safety Act*,²⁹ which is administered by the Nova Scotia Department of Environment and Labour. Environmental matters are addressed by the same department under the *Environment Act*.³⁰ For this reason, the *Pipeline Act*³¹ was amended in 2000 to remove responsibilities for occupational health and safety and environmental matters from the pipeline legislation administered by the Department of Energy and the UARB.

b. *Regulatory Changes*

i. *New Energy Act*

Once a new *Energy Act* (Phase I) is enacted, the Legislative Review Committee at the Department of Energy has been mandated (Phase II) to prepare new regulations under the legislation. This exercise will allow the Department of Energy to review the existing regulations and look at them in terms of regulatory efficiency. Before any new regulations are approved by Cabinet, a red tape review checklist will need to be prepared to justify the enactment of these new regulations.³²

The issues addressed in the red tape review checklists are similar to those raised in the Regulatory Impact Analysis Statements (RIAS) prepared for proposed new federal regulations. These include a background paper, review of alternatives, comparisons with other jurisdictions, benefits and costs analysis, the consultation process invoked, and how compliance and enforcement will be addressed.

ii. *Performance-Based Regulations versus Prescriptive Regulations*

The term “smart regulations” is one that has become very popular with government and industry. The focus of smart regulations or regulatory streamlining is not about deregulation but a smarter, more efficient way of achieving outcomes or collective goals.

In 2000, Natural Resources Canada, Nova Scotia, and Newfoundland and Labrador, in conjunction with the two offshore petroleum boards, initiated a multi-stakeholder forum in St. John’s to discuss performance-

29. S.N.S. 1996, c.7.

30. S.N.S. 1994-5, c.1.

31. *Supra* note 9, as am. by S.N.S. 2000, c.12.

32. Province of Nova Scotia, “Report of the Task Force on Licence, Permits and Approvals, Spring 1997.” This new policy was implemented in May 2002.

based versus prescriptive regulations.³³ Unlike prescriptive regulations, which are based on specific requirements of a government regulator, the performance-based approach places emphasis on setting objectives to be achieved by industry and efficient plans to meet these goals. This approach has been used by other jurisdictions such as the United Kingdom, Norway, and Australia. Results have shown that performance-based approaches promote innovation and situation-specific solutions. They have been found to be most effective where new technologies and operations are being introduced at a rapid rate, especially in the deep water.

Industry argues that all along it has been adapting “best practices” and “lessons learned.” Lessons learned help it to improve safety, environmental, and performance standards in subsequent operations. The role of the regulator in performance-based systems is redefined. Time and resources spent on the monitoring and enforcement of prescriptive regulations can be redirected. Adopting this approach, a comprehensive set of amendments to the *Pipeline Regulations*³⁴ was enacted in 2002 to remove the need for the approval of the UARB on each and every document filed by the applicant with it.

More will be said on this topic later in the offshore context. The following excerpt is taken from the Energy Strategy concerning the province’s commitment to adopting performance-based regulations:

Another area of competitive differences among jurisdictions is the degree to which the regulator is prescriptive about how to achieve the overall goals of occupational health and safety, public safety, and environmental protection. To the extent that such direction is detailed and enshrined in legislation it may inhibit the introduction of new technology or improved work practices. Attempting to comply with or gain permission to work around outdated or outmoded regulations is time consuming and unproductive. A more flexible approach is to specify outcomes and require the business enterprises to develop acceptable solutions.³⁵

iii. *Intergovernmental Coordination*

Industry has informed government of the extra costs it incurs when it crosses provincial boundaries to conduct an operation. Cognizant of this fact, in 2002 the Nova Scotia Department of Energy attended stakeholder/

33. Conference Transcripts, Fall 2000, St. John’s, Newfoundland & Labrador [unpublished] [Conference Transcripts].

34. *Pipeline Regulations*, N.S. Reg. 66/98, as am. by N.S. Reg. 184/2000, N.S. Reg. 67/2002.

35. Background Papers, *supra* note 3 at 10.

public consultations in New Brunswick on proposed draft regulations under its *Oil and Natural Gas Act*.³⁶ Included in the review were draft *Oil and Natural Gas Onshore Drilling and Petroleum Regulations*, *Geophysical Exploration Regulations*, and a discussion paper on a royalty regime for onshore operations.

The draft New Brunswick regulations are far less prescriptive than the ones they replace. The New Brunswick Department of Natural Resources and Energy (DNRE) has stated that the use of performance-based regulations reflect a philosophically different approach to regulation that will minimize the administrative burden on the DNRE without compromising conservation or safety objectives.³⁷ Light-handed, transparent and performance-based regulations are needed for a competitive energy market. With the New Brunswick regulations as precedents, the Nova Scotia Department of Energy expects to follow the same format and has retained the same consultants used by New Brunswick to help prepare its new legislation and regulations respecting oil and gas exploration and development.

c. *Administrative Changes*

i. *Intergovernmental Coordination*

To address the concern of dealing with multiple departments and agencies regulating the oil and gas sector, a Memorandum of Understanding (MOU) was negotiated and signed on April 12, 2002 by various government departments and entities.³⁸ The purpose of the MOU was to clarify the roles and working relationships among the various government actors involved and to ensure necessary information was exchanged in a timely manner. The Department of Energy agreed to establish and chair a One Window Standing Committee. This standing committee meets on a regular basis to update the other departments and agencies on upcoming activities taking place in the oil and gas sector. There has been no delegation of authority among the departments and agencies — each remains responsible for its legislative mandate. However, the standing committee has helped to better coordinate the regulatory process in the province.

36. R.S.N.B. 1976, c.O-2.1, as am. by S.N.B. 2001, c.20.

37. Province of New Brunswick, "N.B. Energy Policy" (December 2000).

38. MOU of 12 April 2002, signed by the Nova Scotia Departments of Environment, Labour, and Natural Resources, and the Nova Scotia Petroleum Directorate (now the Department of Energy) and the Energy and Mineral Resources Conservation Board (since abolished).

ii. *Codes of Practice*

Mention has already been made of the use of codes of practice to address technical details respecting the construction and operation of underground hydrocarbons storage reservoirs.³⁹ In the future, details respecting the construction and operation of pipelines and gas distribution systems are expected to be covered by codes of practice.

iii. *Policies, Standards and Guidelines*

Phase III of the new *Energy Act* Project will develop policies, standards and guidelines under current legislation and regulations and revise existing documents. Each set of regulations assigns a minister-appointed administrator to oversee the daily operations of the regulations. If interpretation bulletins are needed to clarify certain administrative aspects of the regulations, the administrator is assigned this responsibility. Care has been taken not to fetter or delegate the minister's responsibilities under the legislation.⁴⁰

Another initiative is now underway to consolidate the financial security requirements for the various seismic, drilling and underground storage activities undertaken in the province. Bonding requirements for reclamation are required by the Department of Natural Resources when Crown lands are involved. The Department of Environment and Labour requires reclamation bonding, and the Department of Transportation and Public Works requires bonding when highways are involved. Finally, the Department of Energy has its own bonding requirements when petroleum rights are issued⁴¹ and activities take place under these petroleum rights respecting drilling,⁴² seismic work,⁴³ and underground hydrocarbon storage activities.⁴⁴ The UARB also requires financial security for activities which it regulates.⁴⁵

The Department of Energy has recently drafted a Guideline for Determination of Financial Security.⁴⁶ This will soon be reviewed by other

39. *Underground Hydrocarbons Storage Regulations*, *supra* note 17.

40. *Dalhousie University v. Aylward*, [2001] N.S.J. No. 140 (N.S.(T.D.)) (QL).

41. *Petroleum Resources Regulations*, N.S. Reg. 178/85, ss.46, 47.

42. *Onshore Petroleum Drilling Regulations*, N.S. Reg. 29/2001, s.16.

43. *Onshore Petroleum Geophysical Exploration Regulations*, N.S. Reg. 24/2000, s.8.

44. *Underground Hydrocarbons Storage Regulations*, *supra* note 17, s. 24.

45. *Gas Plant Facility Regulations*, N.S. Reg. 22/2000, s.15(4); *Gas Distribution Act*, S.N.S. 1997, c.4, s.41; *Underground Hydrocarbons Storage Act*, S.N.S. 2001, c.37, s.33(1)(r); *Pipeline Act*, R.S.N.S. 1989, c.345 as am., s.34.

46. Nova Scotia Department of Energy, Draft "Guideline for Determination of Financial Security". This draft guideline had not been released for stakeholder/public comment as of June 2003.

government departments, and then released for stakeholder and public comments before being signed off by the minister. This initiative represents a determined effort by the Department of Energy to address a regulatory efficiency issue that has frequently been raised by industry.

II. *Nova Scotia Offshore*

1. *Regulators*

a. *Offshore Boards*

Nova Scotia's rights to the offshore have not been determined judicially.⁴⁷ An agreement was signed in 1982 between the governments of Canada and Nova Scotia respecting the joint management of the Nova Scotia offshore.⁴⁸ The 1982 Nova Scotia Accord had a "most favoured province" right in the event that the Government of Canada entered into a similar agreement with another coastal province. The Atlantic Accord was signed between the Government of Canada and Newfoundland on February 11, 1985.⁴⁹

Nova Scotia exercised its rights respecting a "most favoured province" and signed a revised Canada-Nova Scotia Offshore Petroleum Resources Accord on August 26, 1986.⁵⁰ Legislation was subsequently enacted to implement the 1986 Nova Scotia Accord.⁵¹ The joint operation of the federal *Canada-Newfoundland Atlantic Accord Implementation Act* and the almost mirror-image provincial *Canada-Newfoundland Atlantic*

47. Van Penick, "Legal Framework in the Canadian Offshore" (2001) 24 Dal. L. J. 1.

48. *Canada-Nova Scotia Offshore Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing* (March 1, 1982) [1982 Nova Scotia Accord]. Legislation followed to implement the 1982 Nova Scotia Accord. See *Canada-Nova Scotia Oil and Gas Agreement Nova Scotia Act*, S.C. 1984, c.29 and the *Canada-Nova Scotia Oil and Gas (Nova Scotia) Agreement Act*, S.N.S. 1984, c.2, the *Offshore Oil and Gas Act*, S.N.S. 1984, c.8, and the *Oil and Gas Production and Conservation (Nova Scotia) Act*, S.N.S. 1984, c.9.

49. *The Atlantic Accord: Memorandum of Agreement Between the Government of Canada and the Government of Newfoundland Labrador on Offshore Oil and Gas Resources Management and Revenue Sharing*, (11 February 1985) [Atlantic Accord].

50. *Canada-Nova Scotia Offshore Petroleum Resources Accord* (26 August 1986) [1986 Nova Scotia Accord].

51. *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c.28 [*Nova Scotia Accord Act (Canada)*] in joint operation with the provincial *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c.3 [*Nova Scotia Accord Act (Nova Scotia)*]. Similar legislation was enacted federally and provincially in regards to Newfoundland. See *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c.3 [*Newfoundland Accord Act (Canada)*] and *Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act*, R.S.N. 1990, c. C-2 [*Newfoundland Accord Act (Newfoundland)*]. Collectively, the *Accord Acts*.

Accord Implementation (Newfoundland) Act established the Canada-Newfoundland Offshore Petroleum Board (CNOPB). Similarly, the joint operation of the federal *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* and the provincial *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act* established the Canada-Nova Scotia Offshore Petroleum Board (CNSOPB). The federal and provincial Acts will be referred to collectively as the *Nova Scotia Accord Acts*. The Boards have the authority and power to administer the regime within their respective offshore areas.⁵² The Boards' primary regulatory functions include ensuring safe working conditions, awarding exploration rights, permitting and licensing of offshore activities, environmental protection, and monitoring offshore industrial benefits and employment.

b. *Other Federal Regulators*

Other federal departments and agencies involved in the regulation of the Nova Scotia offshore include the National Energy Board (NEB) (interprovincial or international pipelines), the Canada Customs and Revenue Agency (CCRA), the Canadian Environmental Assessment Agency (CEAA), the Canadian Transport Agency (CTA), Environment Canada (EC) including the Coast Guard, the Department of Fisheries and Oceans (DFO), Human Resources Development Canada (HRDC), Industry Canada (IC), National Defense (ND), Natural Resources Canada (NRCan), Transport Canada-Marine Safety, and Transportation Safety Board of Canada (TSB).

c. *Other Provincial Regulators*

Other Nova Scotia provincial departments and agencies involved in the regulation of the offshore include the Department of Environment and Labour, Department of Fisheries and Agriculture, Department of Natural Resources, Nova Scotia Museum, Office of Aboriginal Affairs, Department of Energy, and the Utility and Review Board.

2. *Legislation and Regulations*

In 2001, the Atlantic Canada Petroleum Institute (ACPI) finished its Regulatory Road Map Project⁵³ and produced two volumes covering the legis-

52. Angus Taylor and Jim Dickey, "Regulatory Regime: Canada-Newfoundland/Nova Scotia Offshore Petroleum Board Issues" (2001) 24 Dal. L. J. 51.

53. Atlantic Canada Petroleum Institute, "Oil and Gas Approvals in Atlantic Canada" (June 2001) [Regulatory Road Map Project].

lation and regulations applying in the offshore area administered by the two offshore boards. The Regulatory Road Map Project indicates that the oil and gas sector is one of the most heavily regulated industries in Nova Scotia. Over 21 federal and provincial regulatory agencies, 24 separate sets of regulations, and 18 sets of guidelines administered by the regulators are identified.

Work authorizations in the Nova Scotia offshore cover, *inter alia*, the following activities⁵⁴:

1. drilling programs,
2. approval of wells,
3. approval of diving programs,
4. exploration licenses,
5. declaration of significant discoveries,
6. declaration of commercial discoveries,
7. production licenses,
8. development plans,
9. authorization of development programs,
10. authorization of production,
11. authorization of well operations,
12. decommissioning approval,
13. environmental assessment prior to exploration and development,
14. authorization to conduct activities under the *Fisheries Act* and the *Navigable Waters Protection Act*,
15. approval to dispose at sea,
16. pipeline approvals,
17. inspection and approval of vessels,
18. authorization of foreign vessels,
19. authorization of foreign workers, and
20. benefits plan approvals.

3. *Offshore Issues*

The main issues which have been identified in the offshore legislation are listed below.

a. *Paramountcy of Accord Legislation*

When the *Accord Acts* were implemented in the 1980s, a paramountcy clause was added. Section 4 of the *Nova Scotia Accord Act (Canada)*⁵⁵ reads as follows:

54. Background Papers, *supra* note 3.

55. *Nova Scotia Accord Act (Canada)*, *supra* note 51, s. 4.

Precedence over other Acts of Parliament.

4. In case of any inconsistency or conflict between

(a) this Act or any regulations made thereunder, and

(b) any other Act of Parliament that applies to the offshore area or any regulations made under such an Act,

this Act and the regulations made thereunder take precedence.

In *Secunda Marine Services Limited v. Canada (Transport, Marine Transport, Atlantic Region)*,⁵⁶ the Court examined the joint management regime set up by the 1986 Nova Scotia Accord and *Nova Scotia Accord Act (Canada)* and considered inconsistencies between the *Nova Scotia Accord Act (Canada)* and the *Federal Court Act*. Justice Moir made the following comments on section 4 of the *Nova Scotia Accord Act (Canada)*:

I agree with the argument made by Mr. Charney that section 4 of the *Canada Accord Act* precludes the operation of the *Federal Court Act*. Section 4 provides that an inconsistency or conflict between the *Canada Accord Act* or regulations under it, on the one hand, and any other statute or regulation is to be resolved in favor of the *Canada Accord Act* or regulations. Having concluded that article 39.06 of the *Accord* has not been incorporated into the *Canada Accord Act*, I cannot point to one specific provision which is inconsistent with s.18 of the *Federal Court Act*. Rather, it is inconsistent with a host of provisions. More accurately, it conflicts with an important aspect of the scheme, a joint regulatory regime. In light of Parliament's purpose in enacting the *Canada Accord Act*, I conclude that s.4 should be broadly interpreted as excluding laws of general application that would separate acts of those empowered under the legislation according to federal or provincial source of power. If the definition under the *Federal Court Act* applies broadly to those who exercise federally derived and provincially derived powers at the same time, then s.18 of *Federal Court Act* is inconsistent with the *Canada Accord Act* and, by virtue of s.4, s.18 does not apply.⁵⁷

Since the *Nova Scotia Accord Act (Canada)* was enacted, new federal legislation has been introduced which raises paramountcy issues.⁵⁸ This legislation includes the *Canada National Marine Conservation Areas*

56. [2003] N.S.J. No. 19 (S.C.(T.D.)) (QL).

57. *Ibid.* at 29.

58. Ruth Sullivan, *Dreidger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994).

Act,⁵⁹ the *Canadian Environmental Assessment Act (CEA Act)*,⁶⁰ the *Oceans Act*,⁶¹ and the *Species At Risk Act (SARA)*.⁶² The fit between the *Nova Scotia Accord Act (Canada)* and this legislation has yet to be judicially considered. Justice Moir's comments in the *Secunda* case, however, provide a useful insight.

Article 25 of the 1986 Nova Scotia Accord is also significant regarding the provincial federal interface. It provides:

Article 25 - Government Consultations

25.01 The Government of Canada recognizes Nova Scotia as one of the producing provinces. The Province of Nova Scotia, therefore, will be a full participant in the negotiation and consultations with the Government of Canada regarding national policies in all matters affecting Petroleum Resources in the Offshore Area. Such matters include the establishment of the price of oil and gas, and the monitoring of petroleum industry reinvestment.⁶³

b. *Offshore Board Authority*

The offshore boards were established to be the single regulator of several offshore project facility approvals. Over time, the requirement of other federal (e.g., NEB) and provincial regulators (e.g., UARB) have had an impact on the "one window approach." The question arises, who is in charge?

c. *Gaps in the Legislation*

When a worker onboard the oil tanker *Nordic Apollo* was fatally injured on April 15, 1999, a serious gap in offshore occupational health and safety left by the *Nova Scotia Accord Act (Nova Scotia)* was revealed. The province was unable to prosecute when the Public Prosecution Office ruled the facts of the accident were outside its jurisdiction. The file was turned over to the CNSOPB which did not prosecute. The reason lay in the word-

59. S.C. 2002, c.18 (assented to June 13, 2002).

60. S.C. 1992, c.37 [*CEA Act*]. Note, however, that section 59(i)(v) of the regulations provides for varying or excluding, in the prescribed circumstances, any procedure or requirement of the environmental assessment process set out in the Act or the regulations for the purpose of adapting the process in respect of projects in which the two Offshore Boards and other similar boards exercise a power or perform a function referred to in section 5 [Projects to be Assessed].

61. S.C. 1996, c.31.

62. S.C. 2002, c.29 (assented to December 12, 2002).

63. 1986 Nova Scotia Accord, *supra* note 50.

ing of Section 157 of the *Nova Scotia Accord Act (Canada)*, which deals with the application of provincial occupational health and safety regulations on “marine installation and structures” and the authority to enact regulations.⁶⁴ No regulations on this matter had ever been enacted under the *Nova Scotia Accord Act (Canada)*.

The CNSOPB has identified other gaps in the *Nova Scotia Accord Acts* and made recommendations to the two governments to address them.⁶⁵ As an interim measure the offshore boards have attached “Occupational Health & Safety Requirements” as a term and condition of authorizations issued under the act. These requirements are less flexible than guidelines. Enforcement remedies such as prosecution are restricted by this stop gap measure and will not be fixed until the legislation is amended.

d. *Duplication of Approvals*

To ensure effective coordination and avoid duplication of work and activities, section 46 of the *Nova Scotia Accord Act (Canada)* provides legislative authority for the CNSOPB to conclude MOUs with other federal and provincial departments and agencies.

Section 46 of the *Nova Scotia Accord Act (Canada)* provides:

46. Coordination.-

- (1) The Board shall, to ensure effective coordination and avoid duplication of work and activities, conclude with the appropriate Departments and agencies of the Government of Canada and of the Government of the Province memoranda of understanding in relation to
- a. environmental regulation;
 - b. emergency measures;
 - c. coast guard and other marine regulation;
 - d. employment and industrial benefits for Canadians in general and the people of the Province in particular and the review and evaluation procedures to be followed by both governments and the Board in relation to such benefits;
 - e. occupation health and safety;
 - f. a Nova Scotia trunkline within the meaning of section 40; and
 - g. such other matters as are appropriate.

64. *Nova Scotia Accord Act (Canada)*, *supra* note 51, see also s.149 of the *Nova Scotia Accord Act (Nova Scotia)*, *supra* note 51.

65. *Ibid.*, s. 18(2). The Board is mandated to make recommendations to the federal and provincial governments regarding regulations made under the *Accord Acts* and “any other legislation relating to petroleum resource activities in the offshore area.”

(2) *Idem.* - The Federal Minister and the Provincial Minister shall be parties to any memorandum of understanding concluded in relation to a matter referred to in paragraph (1)(d).⁶⁶

To date, the CNSOPB has concluded more than a dozen MOUs. Although the MOUs acknowledge the respective roles of the different parties, they do not clearly delineate whether the authority is to be delegated or how it is to be applied. The result is that various multiple documentation and approvals still get issued for the same activity.

Examples include:

- (i) Offshore Worker Authorizations. HRDC and IC have legal requirements to process work authorizations for any foreign workers (not under NAFTA or GATT) entering Canada. The CNSOPB administers section 45 of the *Nova Scotia Accord Acts* in a manner that results in duplication. Parallel paperwork streams for both operators and contractors exist to process these workers.
- (ii) Subsea Pipelines. Triplicate approvals were issued by the UARB, CNSOPB and NEB on the subsea pipeline from Thebaud to Goldboro in the Sable Offshore Energy Project.
- (iii) Environmental Assessments. The NEB and CNSOPB review environmental issues following approval of a comprehensive study report done under the *CEA Act*. There has been no attempt to integrate or remove existing processes.
- (iv) Potential overlap of the *Oceans Act* and the creation of marine protected areas (e.g., Sable Gully).
- (v) Project applications consider issues already dealt with in previous projects.

Industry argues that these duplicated efforts result in unacceptable regulatory risks if the approvals differ, extend cycle times, and increase costs for the operator. Regulators also spend valuable time and human resources on these duplicated activities.

66. *Nova Scotia Accord Act (Canada)*, *supra* note 51.

e. *Timely, Appropriate Environmental Assessments*

In 1999, the Nova Scotia minister responsible for the *Nova Scotia Accord Act (Nova Scotia)* and the minister's federal counterpart issued a directive to have CNSOPB become a federal authority under the *CEA Act*.⁶⁷ The *Federal Authorities Regulations*⁶⁸ were amended on January 18, 2001 to make this change. At the time the directive was issued, it was anticipated by the province that section 15 of the schedule attached to the *Comprehensive Study List Regulations*⁶⁹ would be amended to do two things:

- (a) remove offshore exploratory drilling projects from the schedule before applying this measure to the East Coast of Canada; and
- (b) clearly define the words "an area for assessment" in such a manner as to recognize the widespread exploration activity that has already taken place on the East Coast of Canada and thus require most drilling projects to be conducted at a screening level, not as a comprehensive study review (CSR).

Industry and the province have both argued that comprehensive studies are appropriate and have been required for large, long term projects such as open pit mines and dams. To date, only 27 CSRs have been completed under the 1992 legislation.

The Canadian Environmental Assessment Agency (CEA Agency) has recently gazetted draft regulations to expand the coverage of the *CEA Act* to include East Coast offshore oil and gas exploration activities.⁷⁰ The CEA Agency states that this will ensure that exploration as well as production projects will be subject to the same federal environmental assessment process in all parts of Canada (including the North and East Coasts) where oil and gas activity is permitted.

The *Inclusion List Regulations*⁷¹ are to be amended. These regulations specify "physical activities" that may have significant environmental effects and that are projects under the *CEA Act*. The proposed amendments will add to the *CEA Act* process, physical activities relating to marine and freshwater seismic surveys, any exploration drilling programs or the production of offshore oil and gas.

Authorizations granted by the CNSOPB under section 142(1)(b) (for

67. *Supra* note 60.

68. S.O.R./2001-44.

69. S.O.R./94-638, as am. by S.O.R./99-439.

70. C. Gaz. 2003. I.1133. P.C. 2003-1144 S.O.R./2003-282 (24 July 2003).

71. S.O.R./94-637, as am. by S.O.R./99-436.

physical activities relating to marine or freshwater seismic, any exploratory drilling program or the production of oil and gas) and section 143(4)(a) of the *Nova Scotia Accord Act (Canada)* (for physical activities relating to a development plan establishing the general approach for developing a pool or field of oil or natural gas) are to be added to the *Law List Regulations*.⁷² These regulations prescribe project-licensing approvals that trigger an environmental assessment before the project can proceed.

Industry and the provincial governments have agreed that *CEA Act* screening, rather than comprehensive studies, is an appropriate level of environmental assessment for exploration wells in the East Coast offshore area. More detailed screening, industry argues, will materially slow down exploration in Atlantic Canada due to the duration of these studies (nine to eighteen months) and the reduced ability of operators to contract rigs because of the lack of a definite study completion schedule.

Section 15 of Part IV (Oil and Gas Projects) of the schedule attached to the existing *Comprehensive Study List Regulations* of the *CEA Act* reads as follows:

15. A proposed offshore exploratory drilling project that is located outside the limits of a study area delineated in

(a) an environmental assessment of a project for the exploratory drilling for, or production of, oil or gas in an offshore location that was conducted by a review panel or as a comprehensive study under the Canadian *Environmental Assessment Act*; or

(b) an environmental assessment of a proposal for the exploratory drilling for, or production of, oil or gas in an offshore location that was conducted by a Panel under the *Environmental Assessment Review Process Guidelines Order*.⁷³

Industry fears this interpretation of “an area” covered by a comprehensive study could be limited to the size of an offshore licence or even more narrowly to the area immediately surrounding each exploration well.

The CEA Agency, in April, 2003, released a draft document to provide guidance on a new undefined term referred to as “study area”⁷⁴ used in the

72. S.O.R./94-636, as am. by S.O.R./99-330, 99-438, 2000-308, 309, and 2001-257.

73. *Comprehensive Study List Regulations*, *supra* note 69.

74. CEA Agency Guidance Document, “The Definition of Spatial Boundaries of a Study Area for an Environmental Assessment of an Offshore Exploratory Well” (April 2003).

proposed amendments to the *Comprehensive Study List Regulations*. The new section adds to the list of projects or classes of projects considered to have adverse environmental effects and provides:

The schedule to the Regulations is amended by adding the following after section 11:

11.1 The proposed construction or installation of a facility for the production of oil or gas, if the facility is located offshore and

- (a) is outside the limits of a study area delineated in
 - (i) an environmental assessment of a project for the offshore production of oil or gas that was conducted by a review panel or as a comprehensive study under the *Canadian Environmental Assessment Act*, or
 - (ii) an environmental assessment of a proposal for the offshore production of oil or gas that was conducted by a Panel under the *Environmental Assessment Review Process Guidelines Order*; or
- (b) is inside the limits of a study area delineated in an environmental assessment described in subparagraphs(a)(i) or (ii) and is not connected by an offshore oil and gas pipeline to a previously assessed facility in the study area.

The interpretation of “study area” provided in the guidance document still presents problems. Nova Scotia argues the concept of two or more wells in a common ecological area should be used rather than wells in close proximity to each other.⁷⁵

The CEA Agency has established an offshore oil and gas subcommittee under its Regulatory Advisory Committee (RAC). A major part of this subcommittee’s mandate is determining the level of assessment required and the potential for reducing the level once a comprehensive or regional study is completed. Industry and the provincial governments have asked for a delay in passage of these proposed regulations. Fishery and most environmental groups support the changes. It is also noted in the Regulatory Impact Analysis Statement on these regulations that a number of environmental groups want all seismic exploratory drilling projects to be subject to comprehensive studies. A decision is awaited.

Duplication problems also arise because the environmental review

75. Nova Scotia, Submission on *CSR Regulations* (16 May 2003) [unpublished].

processes under the *Accord Acts* and the *CEA Act* are not well integrated for development applications. Environmental issues were well handled in the Deep Panuke CSR. However, it is not clear whether they can or will be raised again in the development hearings. An environmental assessment was included in the terms of reference for the project's public review. Industry would like the environmental and development processes to be conducted concurrently.

f. Industrial Benefits/Benefits Reporting

Article 31 of the 1986 Nova Scotia Accord and section 45 of the *Nova Scotia Accord Act (Nova Scotia)* state that first consideration should be given to goods and services provided from within Nova Scotia provided that such "services and goods are competitive in terms of fair market price, quality and delivery."⁷⁶ Article 31 also states a priority "shall be to encourage the hiring and training of individuals from Nova Scotia who are qualified."⁷⁷

Industry argues that "benefit targets" are not required by legislation; they assert that there seems to be a disconnect between the public and political expectations of work to be done and the capability of local firms to work competitively. Clarity and consistency are required in the government expectations. Industry is also concerned with the offshore boards' interpretation of "benefit targets" and its consequential impact on the design, public perception, and economics of projects. Finally, operators are setting up more global procurement procedures to reduce costs and improve competitiveness. How this move fits in with the "full and fair opportunity" concept has yet to be determined.

The reporting requirements imposed by the offshore boards, industry argues, are inconsistent with those in most other jurisdictions and in other industries. No other industries are required to report in such detail on Canadian and local content and economic benefits. Industry also questions the need to always tender on local contract awards, which adds almost a year to the regulatory cycle time of each and every well, and the need to establish "benefits estimates" in advance of awards to major contractors. The different approaches to benefits and varied outcomes among projects are cited as justifying the need for a "transparent, standardized reporting process." Industry argues the use of a cash flow model is a better tracking mechanism.

76. *Nova Scotia Accord Act (Nova Scotia)*, *supra* note 51, s. 45. See Taylor & Dickey, *supra* note 52.

77. 1986 Nova Scotia Accord, *supra* note 50.

On the other hand, oil and gas is a publicly owned resource and the government and the offshore boards are mandated to demonstrate that economic rents and other opportunities arising from development of public resources are being fairly maximized. Benefits measurement and monitoring are important issues for governments. They provide a means by which governments can learn where and why the local supply industry has or has not been successful, a process crucial to the formulation and focusing of government industrial development policy. Nevertheless, reporting requirements need to be balanced against placing excessive information demands on operators and contractors.

Other specific concerns for industry include:

- (i) Province-specific requirements for crewing for short-term single well projects as well as projects in multiple provinces. Industry argues this presents safety concerns for workers and the ship or rig;
- (ii) the provision of funds for research and development in the province through Offshore Strategic Energy Agreements (OSEAs)⁷⁸ is questioned as this discourages, *inter alia*, the ability to develop regional centers of excellence;
- (iii) the elimination of benefits plans for exploration wells.

g. *Performance-Based Regulations*

Under section 6 of the *Nova Scotia Accord Acts*,⁷⁹ the amendment of regulations requires ministerial consent from both the federal and provincial ministers. Mirror regulations then need to be approved by the federal and provincial cabinets. Considering the various consultation procedures established to process regulations (e.g., RIAS), this is a time-consuming undertaking.

Identifying performance-based regulations has already been discussed in the onshore context.⁸⁰ In the offshore context, new technologies and approaches are quickly evolving in areas such as wire line logging and logging well drilling (LWD logs). As more deep water drilling is taking place, certain aspects of the existing regulations are becoming dated and inappropriate. As a result, industry is forced to undertake unnecessary or inappropriate procedures at high costs. Examples of these include subsea wellhead abandonment, drill stem testing, coring and logging, and use of

78. *Energy Strategy*, *supra* note 1 at 17. The Nova Scotia Offshore Board requested that \$5 million be paid by the operators of the Sable Offshore Energy Project for research and development.

79. *Nova Scotia Accord Acts*, *supra* note 51, s.6.

80. Conference Transcripts, *supra* note 33.

burner booms during drilling operations.

Section 143.1 of the *Nova Scotia Accord Act (Canada)*⁸¹ provides a mechanism (the submission of a Regulatory Query Form (RQF)) to seek a deviation from a specific regulatory requirement. In many instances, the codes and standards referenced in the regulations are not current or appropriate, which requires a large number of deviations.⁸² The process is time-consuming and costly for all parties. As there is no process in place to share the results of the RQF process with other operators, many applications are repeated for the same exemption.

The existing regulations did not foresee deep water drilling and specialized requirements. Industry also argues the existing prescriptive regulations preclude adoption of more current international standards. This results in mandatory upgrades to machinery and ships globally that are not required in other international jurisdictions.

h. *Role of the Certifying Authority*

Section 143.2 of the *Nova Scotia Accord Act (Canada)*⁸³ provides that no authorization can be issued by the CNSOPB with respect to any prescribed equipment or installation unless a certificate issued by a “certifying authority” (CA) is provided. Certifying authorities are designated by the governments in the *Certificate of Fitness Regulations*.⁸⁴ Four types of installations require certificates: diving, drilling, production and accommodation installations.

Industry’s concern is that the role of the CA is uncertain and is inconsistent between the Nova Scotia and Newfoundland Accord areas. There is significant duplication to satisfy the CA and then the offshore board. Industry believes the offshore boards do not fully endorse the concept of a certifying authority and do not make maximum use of this entity. They question the offshore boards’ practice of adding conditions to the CA’s approval. When this is done, they argue there is inappropriate transfer of risk to the offshore boards.

Rig recertification by the CA’s jurisdictions increases both costs

81. *Nova Scotia Accord Act (Canada)*, *supra* note 51, s.143.1.

82. CAPP Submission to the Atlantic Energy Roundtable (November 2002) [unpublished] [CAPP Submission]. It is noted that 200 deviations were requested for the Hibernia Project and fewer than 200 for each of the Terra Nova and Sable Offshore Energy Projects.

83. *Nova Scotia Accord Act (Canada)*, *supra* note 51, s.143.2.

84. S.O.R./95-187. They include American Bureau of Shipping, Bureau Veritas, Det norske Veritas Classification A/S and Lloyd’s Register of Shipping. Germanischer Lloyd was recently added.

and time delays. Industry asks why many of the rigs that are classified as “harsh environment” in the United Kingdom and Norway need to be upgraded in Nova Scotia at a high cost. Additionally, harsh environment rigs are not needed for summer drilling.

The offshore boards’ position⁸⁵ is that the CA process focuses on equipment while the offshore boards are mandated to also address procedures and personnel. The offshore boards maintain, as part of their “due diligence,” that they have a “monitoring and auditing role” of the work of the CA.

i. Process Uncertainty in Development Applications

Most jurisdictions in other places around the world have enacted time frames for application reviews. On the East Coast, there are no stated time frames for regulatory approvals other than the 270 days for the environmental review panel. Although reviews may be completed within twelve months, they are more likely to take eighteen to twenty-four months.

Each project on the East Coast has led to a complex set of negotiations to establish a “joint review process”; it is a process which takes a considerable amount of time. No template procedure appears to be evolving. The trend also appears to be that time frames are longer rather than shorter.⁸⁶

Industry argues there is a need to adopt less cumbersome procedure to develop “marginal” fields. Unless this issue is addressed, these marginal or small projects will probably not be developed on the East Coast. Lengthy Drilling Program Authorization (DPA) processes also are having a negative impact on cycle time.

j. Variations from International Standards

Industry raises a more general issue regarding when Canadian standards should replace international standards. For example, Basic Survival Training (BST) is required every three years in the Atlantic Canada offshore areas versus every four years in international jurisdictions (North Sea and Gulf of Mexico). They question why the Canadian standard is

85. See Taylor & Dickey, *supra* note 52 at 73-77.

86. CAPP Submission, *supra* note 82. Time frames for the East Coast review processes include Cohasset-Panuke Development Application Review (8 months); Hibernia Development Application Review/EAR Review (13 months); Terra Nova Development Application Review/CEAA Joint Panel (18 months); Sable Development Application; CNSOPB/NE/CEAA Joint Review (18 months); White Rose CEAA/Development Application Review (15 months); Deep Panuke CEAA/CSR Development Application (NEB/CNSOPB) - began 1 March 2002 and has now been put on hold.

different. International, and often superior European standards, are not recognized by the offshore boards.

k. *Offshore Boards' Practices*

Comments about how the Nova Scotia and Newfoundland offshore boards conduct their operations on certain matters have been brought to the attention of governments. Examples of this conduct are discussed below.

i. *Internally Inconsistent Applications*

It is noteworthy that the CNSOPB has inconsistently applied regulatory requirements and processes. The interpretation and weight given to the same application by different operators varies. Different processes, including enforcement options, are used for different operators. Examples of inconsistency include the certification of vessels and equipment and different responses to RQFs.

ii. *Inconsistencies Between the Two Offshore Boards*

The two offshore boards act independently, which results in inconsistencies in the East Coast region. Examples of such inconsistencies include:

- process inconsistencies (drilling program authorization process/RQF process);
- differences in foreign worker authorizations;
- BOP stack and casing pressure tests;
- inconsistent audit approaches; and
- cost recovery application by the two offshore boards.

iii. *Data Application and Reporting*

Industry states these requirements are overly prescriptive. They increase costs up to \$100 per log and do not reflect "best practices." The offshore boards use the data acquisition guidelines to gather information which is of little or no value for conservation purposes and is of little scientific value.

iv. *Standards for Measurement Guidelines*

CNOPB has used standards based in the United Kingdom (North Sea model) for fluid measurements, whereas CNSOPB uses the Alberta model (AEUB). The use by the Boards of two different standards imposes an administrative burden on industry.

v. *Data Release Policy and Practice*

Section 122 of the *Nova Scotia Accord Act (Canada)*⁸⁷ provides for the confidentiality of information and documentation provided to the offshore Board. Once the prescribed confidentiality periods have elapsed, the offshore boards put the information and documentation (digital data except raw data) into the public domain. Industry argues the offshore boards are releasing interpreted and raw digital data to third parties without the owner's consent. This prevents the data owner from selling its data to third parties and thus represents a loss of revenue.

In the recent case of *Geophysical Services Inc. v. CNOP Board*, Justice Gibson commented on this matter as follows:

75. I am satisfied that it is beyond doubt that the seismic data provided by the Applicant to the Canada-Newfoundland Board was information or documentation provided for the purposes of Part II or Part III and thus fell within the ambit of the privilege provided by subsection 119(2) of the Act. I am equally satisfied that, by virtue of paragraph 119(5)(d), and in particular subparagraph (ii) of paragraph (d), that privilege expired five (5) years following the date of completion of the seismic work to which the information or documentation related. Thus, on the expiration of that five (5) year period, it was entirely open to the Canada-Newfoundland Board to make such information or documentation available to a requester.⁸⁸

vi. *Additional Safety Assessments*

Additional requirements are frequently requested by the Chief Safety Office (CSO) before well flow testing is allowed. Industry argues this is unnecessary and should be eliminated.

vii. *Mandatory Well Testing*

The offshore boards require every well that meets a minimum pay thickness to be tested so as to give the resource owner access to geological information. Similarly, drill stem testing ensures a discovery is significant enough to result in a permanent licence. Industry argues that other technologies (e.g., rotary sidewell core to test rock samples) exist which could provide the same information. Dropping mandatory testing could reduce the time spent drilling and the cost of a well.

87. *Nova Scotia Accord Act (Canada)*, *supra* note 51. See Taylor & Dickey, *supra* note 52 at 66-73.

88. T.D. (25 April 2003), F.C. (T.D.) [unreported].

viii. *Removal of Subsea Well Head Equipment*

The current requirement to remove subsea well head equipment is designed to avoid leaving permanent subsea hazards. Industry argues the rationale for this in deep water may be less justified. The time spent to do this is significant and costly.

I. *Other Concerns*

i. *Duty Uncertainty Resulting from NAFTA*

North American-built Modular Offshore Drilling Units (MODUs) could lose their NAFTA duty status if they have been engaged in commercial activities outside of North American waters. Rigs owned and operated by North American drilling companies that were built outside of North America have to pay a substantial temporary import duty to enter Canada. This import duty has not achieved its purpose of encouraging building of large modern drilling units in Canada and there is little likelihood of such construction within the near future.

ii. *Foreign Workers*

Personnel on non-Canadian vessels and MODUs must arrive with proper work permits. Applications must be made at consulates and embassies overseas. These applications are costly and cause potential delays at a critical and expensive time for industry.

iii. *Property Tax Assessment Issues*

The application of provincial tax assessment to oil and gas facilities and pipelines⁸⁹ has been an ongoing issue. Machinery and equipment specific to oil and gas facilities is subject to provincial tax assessment. Industry argues the oil and gas industry and the pipeline industry are singled out from other industries.

iv. *Application of Large Corporation Tax to MODUs*

This tax, which was to be withdrawn in March 2002, has now been extended until 2006. Rigs remaining in provincial waters over thirty days are considered to be “permanent” structures and are taxed as if present for a year, a significant cost burden to their operators.

89. *Assessment Act*, R.S.N.S. 1989, c.23, as am. by the *Municipal Law Amendment (2000) Act*, S.N.S. 2000, c.9, s.5.

v. *Application of the Coasting Trade Act*⁹⁰

This statute came into effect in 1992. The act is generally intended to reserve the “coasting trade” of Canada to Canadian registered ships, whether or not they are duty paid. If a suitable Canadian ship is not available, a foreign ship may be licenced to temporarily engage in the coasting trade provided Canadian safety standards are met. Before licences can be issued to a foreign vessel, duties and taxes need to be paid. Subject to NAFTA, the duty is generally 25 percent of the vessel’s appraised value. Under the *Vessel Duties Reduction or Removal Regulations*,⁹¹ a partial remission of duty is available (1/120 of the full amount of duty, minimum one month duty).

Industry is concerned about how the application process is being handled by CCRA and the CTA.⁹² The interpretation of the words “suitable” and “available” are two main issues. The onus is on the applicant to prove that a Canadian ship is not suitable or will not be available. The question of suitability applies not only to the vessel itself, but also to the technical equipment onboard the vessel. It does not matter if a Canadian vessel does not have all the equipment, and cost increases from using a Canadian ship are not relevant considerations.

vi. *Duty to Consult with Aboriginal Peoples*

The roles and responsibilities of governments and licence holders on this matter have yet to be clarified.

4. *Offshore Changes*

a. *Initiatives*

The administrative set-up of the Nova Scotia offshore makes change complex. Nevertheless, if there is a will to change it can be done.

A number of initiatives have taken place in the past allowing governments to create a policy and regulatory framework that ensures resource conservation and environmental management while also generating reasonable economic and social benefits.

i. *Oil and Gas Administration Advisory Council (OGAAC)*

Section 139.1 of the *Nova Scotia Accord Act (Canada)*⁹³ provides that the

90. S.C. 1992, c.31.

91. S.O.R./90-304, 91-277, 94-234 and 98-28.

92. Boris de Jonge, “Application of the *Coasting Trade Act* to Oil and Gas Operations” (2002) McInnes Cooper & Robertson [unpublished].

93. *Nova Scotia Accord Act (Canada)*, *supra* note 51, s.139.1.

Provincial Minister (i.e., the Minister of Energy) may designate one of the members of OGAAC established by the *Canada Oil and Gas Operations Act*.⁹⁴ The Council consists of six members, namely the chairpersons of CNOBPB, CNSOPB, and NEB, a person designated by the federal Minister of Natural Resources Canada, and a person designated by each of the provincial ministers. The mandate of OGAAC is to promote consistency and improvement in the administration of the regulatory regimes under the *Canada Oil and Gas Operations Act* and the *Nova Scotia Accord Act (Canada)* and provide advice respecting those matters to the federal ministers, the provincial ministers and the Boards. This group meets regularly to discuss issues under the legislation and regulations. Following the 2000 workshop on performance-based versus prescriptive regulations, OGAAC continues to review the policies and implications of the different approvals.

ii. *CAPP Matrix*

In 2000, the Canadian Association of Petroleum Producers (CAPP) developed a matrix (CAPP Matrix) of regulatory issues specific to oil and gas exploration, development, and production activities. Most of the issues listed in Part II (3) of this paper were raised by industry in the CAPP Matrix.

iii. *Regulatory Working Group (RWG)*

In January, 2001, Atlantic Canada stakeholders created the RWG, which was made up of OGAAC members and industry representatives to address issues identified by industry and government regulators.

iv. *Atlantic Energy Roundtable*

On November 22, 2002, the Atlantic Energy Roundtable was convened to identify challenges facing the oil and gas industry in Atlantic Canada. Four federal ministers and three provincial ministers attended. The chair of this roundtable was Elizabeth Beal, CEO of the Atlantic Provinces Economic Council (APEC). As a result of this meeting two steering committees were established.

The Regulatory Issues Steering Committee is co-chaired by the Deputy Minister of NRC (Ric Cameron) and the Deputy Minister of the Nova Scotia Department of Energy (Dan McFadyen). It was established to bring together senior decision makers from governments, agencies,

94. R.S.C. 1985, c. O-7, s.5.

boards, and industry. The objective was to identify policies and regulatory practices which enhance the competitiveness of the offshore oil and gas industry and to prepare for consideration by government recommendations for change.

Working groups are appointed by this steering committee to carry out specific tasks. Work plan items being undertaken by working groups of this committee include:

- (i) A “Lessons Learned Workshop” held June 3-4, 2003 in Halifax for stakeholders to comment on their experiences with East Coast projects;
- (ii) A “Regulatory Cycle Benchmark Study” to be undertaken to compare time cycles of the five East Coast projects with other jurisdictions (Norway, United Kingdom, Gulf of Mexico, and Australia);
- (iii) Review and assessment of performance versus prescriptive regulations;
- (iv) Review of *CEA Act* Exploration Well Issue;
- (v) Duplication and Overlap Issue. This working group will first update the Regulatory Road Map Project of June, 2001.⁹⁵

The Steering Committee on Industrial Opportunities is chaired by Leslie Galway of Newfoundland. Working committees have also been established.

In a paper⁹⁶ presented to the Atlantic Energy Roundtable in November, 2002, APEC President Elizabeth Beal identified the following consequences of overlap and duplication of regulations and regulatory review:

- Time day, lost opportunity, and cost of compliance;
- Risk of regulatory compliance - time, timing, and cost;
- Cycle times - years not months;
- Absence of predictability and consistency in the application of regulations; and
- Complexity of the regulatory environment for clarity.

The Nova Scotia Department of Energy⁹⁷ has identified other issues, namely:

- A lack of federal funding for federal departments’ areas of responsibility. For example, DFO research on ocean environment and

95. Regulatory Road Map Project, *supra* note 53.

96. APEC, Briefing Note for the Atlantic Energy Roundtable (22 November 2002).

97. Nova Scotia Department of Energy, Streamlining Regulatory Approvals Process (12 December 2002).

fishing industry impacts;

- The information request process during environmental reviews is beginning to take on aspects of basic scientific research. The growth of the Environmental Studies and Research Fund,⁹⁸ an oil and gas-funded effort, reflects the legislated requirements for research in frontier areas. This is the appropriate area for scientists to focus their research requests;
- opportunities for environmental research should be a priority for the Atlantic Innovation Fund;⁹⁹ and
- increased extension of federal agencies outside of CNSOPB resulting in more overlap.

Both steering committees have met on a number of occasions. The Atlantic Energy Roundtable is expected to meet in the Fall of 2003 to review the work accomplished by the two steering committees.

b. *Legislative Changes*

i. *Amending Gaps in the Accord Acts*

To address the gap in the legislation respecting occupational health and safety which came to light after the *Nordic Apollo* incident in 1999, the Governments of Canada, Nova Scotia, and Newfoundland and Labrador have prepared a package to amend the existing legislation. A Discussion Paper was posted on the East Coast Offshore Occupational Health & Safety website¹⁰⁰ on the draft legislation with the expectation that it would be introduced into Parliament and the Nova Scotia Legislative Assembly in the Fall of 2003.

The legislation will provide authority for regulations to be enacted under the amended *Accord Acts*. In the interim, the *Oil and Gas Occupational Safety and Health Regulations*¹⁰¹ made under Part II of the *Canada Labour Code*¹⁰² will apply until they are revoked or replaced by regulations made under the amended *Nova Scotia Accord Act (Nova Scotia)*. It is expected to take many years to finalize the regulations.

98. *Nova Scotia Accord Act (Nova Scotia)*, *supra* note 51, Division VII, ss. 103-105. This Division of the Act states that Part VII of the *Canada Petroleum Resources Act* applies, with such modifications as the circumstances require, within the offshore area. The budget for 2003 is approximately \$1 million.

99. Online: Atlantic Canada Opportunities Agency <<http://www.acoa.ca/innovations5/index.shtml>>.

100. Online: Nova Scotia Department of Energy <<http://www.offshoreoahs.ca/default.asp?cm PageID=92>> .

101. S.O.R./87-612; S.O.R./94-165.

102. R.S.C. 1985, c. L-2.

Section 7 of the *Nova Scotia Accord Act (Nova Scotia)*¹⁰³ establishes the procedure to amend the legislation. With three jurisdictions involved in the occupational health and safety legislative amendments, a significant time period has passed and the package is not finalized yet.

ii. *Review of the Accord Acts*

Article 1.03 of the Nova Scotia Accord provides for a periodic review of the 1986 Nova Scotia Accord. It reads:

1.03 The Parties shall review the objectives at the end of every five year period, or at any other time upon the request of either Party. The objectives may be amended at any time, by agreement of both Parties.¹⁰⁴

In 2002, Nova Scotia began a two phase review of the 1986 Nova Scotia Accord. Phase I focuses on a review of two objectives set out in the 1986 Nova Scotia Accord, namely:¹⁰⁵

Objective (c) to recognize the right of Nova Scotia to be the principal beneficiary of the Petroleum Resources in the Offshore Area, consistent with the requirement for a strong and united Canada;

Objective (g) to ensure that Nova Scotia will receive financial benefits equivalent to those it would have achieved had it exercised its Crown Share option.¹⁰⁶

There has been much publicity in the local press regarding the Accord review, which has been labeled as the “Campaign of Fairness.”

The second phase of the Accord review is and will be addressing the administrative and operational aspect of the 1986 Nova Scotia Accord and legislation. In Nova Scotia this review is being led by the Department of Intergovernmental Affairs. The impact that new arrangements being

103. *Nova Scotia Accord Act (Nova Scotia)*, *supra* note 51.

104. 1986 Nova Scotia Accord, *supra* note 50.

105. *Ibid.*

106. *Nova Scotia Accord Act (Canada)*, *supra* note 51, Part VII, Crown Share Adjustment Payments, ss. 246-249. Under the *Canada Oil and Gas Act (COG Act)*, R.S.C. 1985, c. O-6, Canada reserved a 25% interest in the natural gas and oil fields on Canada lands. The 1982 Nova Scotia Accord, *supra* note 48, granted Nova Scotia the right to acquire 50% of Canada’s interest (12.5%) in a natural gas field and 25% of Canada’s interest (6.257%) in an oil field. The *COG Act* was repealed by Parliament in the late 1980s and early 1990s (S.C. 1994, c.10, s.30) as part of the dismantling of the National Energy Program. The 1986 Nova Scotia Accord agreed to compensate Nova Scotia for the loss of its rights to the Crown Share resulting from Canada’s decision to eliminate the 25% interest reserved to the Federal Crown.

negotiated with Ottawa by Quebec, New Brunswick, Prince Edward Island, and British Columbia regarding their offshore areas will have on the 1986 Nova Scotia Accord and the federal and provincial *Accord Acts* has yet to be seen.

iii. *One Window Regulation*

In the Energy Strategy, Nova Scotia made the following comments regarding the concept of one window regulation of the Nova Scotia offshore area:

The federal and Nova Scotia governments already have in place a body in which joint interests are reflected, the CNSOPB. The board brings the perspective of dealing with the industry and its issues on a daily basis. It has developed considerable expertise on what works and what doesn't in the offshore regulatory environment. It is also in an ideal position to provide a neutral assessment of the issues brought forward. Accordingly, the province supports instructing the board to review the effectiveness of the current regulatory environment and make recommendations to both levels of government on appropriate changes. Such a review should be a positive contribution to the review of issues in the CAPP regulatory matrix.¹⁰⁷

To avoid duplication, the province signed a MOU with the federal regulators¹⁰⁸ to coordinate the province's role in environmental approvals related to the Deep Panuke Project.

Nova Scotia also made this statement in its Energy Strategy concerning the adoption of a one window regulatory approach: "When the Province is able to simplify the approval process by adopting the permits of other regulators, it will do so."¹⁰⁹ When the Sable Offshore Energy Project was approved for development, an Order in Council¹¹⁰ was passed to

107. *Energy Strategy*, *supra* note 1.

108. MOU of Environmental Assessment Process for the Deep Panuke Project between CNSOPB, NEB, DFO, EC, IC, CEA Agency, and the Province of Nova Scotia (December 2001).

109. *Energy Strategy*, *supra* note 1 at 13.

110. Nova Scotia, O.I.C. 97-755 dated (9 December 1997). This order (i) exempted all pipelines required for the Sable Offshore Energy Project except the requirements to obtain a permit to construct and licence to operate from the UARB; (ii) ordered that certain NEB regulations (except certificates of Public Convenience and Necessity, leave to open and abandon and the approval of traffic, tolls and tariff) not inconsistent with regulation under the *Pipeline Act*, were deemed to apply as if enacted by the Legislature; (iii) ordered that the Energy Board under the *Energy and the Mineral Conservation Act*, (R.S.N.S., c. 147, s. 1), deem the Certificate of Public Convenience and Necessity, a leave to open/abandon, an order on traffic, tolls and tariff of the NEB, to be a permit/order of the Energy Board; and (iv) approve the delegation by the Energy and Mineral Resources Conservation Board of any of its powers, duties and authorities conferred or imposed on the Board by any enactment to such persons as may be designated by the Board. See also S.O.R./84-592 for a federal order on this matter.

exempt certain requirements on the subsea pipelines (e.g., hearings) and adopt the orders and reports of other regulators. Section 4 (Withdrawal or Exemption) and Section 40 (Delegation) of the *Pipeline Act*¹¹¹ and Section 5 (Withdrawal of Lands) and Section 12 (Delegation) of the *Energy Resources Conservation Act*¹¹² provide legislative authority to make such delegations.¹¹³

c. *Regulatory Changes*

i. *Review of Accord Regulations*

OGAAC¹¹⁴ has been undertaking a review of the frontier regulations and the regulations made under the *Accord Acts*, and a priority-based system for revising these regulations has been established. A “high” priority has been assigned to developing new OSH regulations. A “medium” priority has been assigned to reviewing the *Nova Scotia Offshore Area Petroleum Diving Regulations*,¹¹⁵ the *Nova Scotia Offshore Area Petroleum Drilling Regulations*,¹¹⁶ and the *Nova Scotia Offshore Area Petroleum Production and Conservation Regulations*¹¹⁷ (the latter two regulations are proposed to be combined).

A “low” priority has been assigned to the review of the *Nova Scotia Offshore Certificate of Fitness Regulations*,¹¹⁸ the *Nova Scotia Offshore Area Petroleum Geophysical Operation Regulations*,¹¹⁹ the *Nova Scotia Offshore Petroleum Installations Regulations*,¹²⁰ and the *Canada-Nova Scotia Offshore Area Oil and Gas Spills and Debris Liability Regulations*.¹²¹

ii. *Performance-Based versus Prescriptive Regulations*

An example of the use of performance-based regulations is the proposed new *Diving Regulations*. The existing *Nova Scotia Offshore Area Petro-*

111. *Supra* note 9.

112. *Supra* note 110.

113. For an interesting discussion on the concepts of “administrative inter-delegation” between levels of government and “referential incorporation” as acceptable forms of inter-delegation see Alan Pettie, “Are Royalty Agreements Required for Canada East Coast Offshore Oil and Gas?” (2001) 24 Dal L. J. 150.

114. *Canada Oil and Gas Operations Act*, *supra* note 94.

115. S.O.R./1995-189.

116. S.O.R./1992-676.

117. S.O.R./1995-190.

118. S.O.R./1995-187.

119. S.O.R./1995-144.

120. S.O.R./1995-191.

121. S.O.R./1995-123.

*leum Diving Regulations*¹²² consist of seventy-two sections. The proposed new performance-based regulations will be ten to twelve sections long. Guidance notes have been prepared to accompany these regulations. These regulations are expected to soon be released for comments.

The proposed regulations are goal-based, allowing companies to adopt best practices and emerging technologies. The responsibility for safe diving operations is placed on the operator. The guidance notes are intended to provide assistance to interested parties on how the requirements of the new regulations could be met. The notes are examples of acceptable practices and should be considered when developing specifications and procedures. The operator has the flexibility to determine the actual methods used to meet the specific requirements while ensuring an equal or greater level of safety than illustrated in the guidance notes.

iii. *Cooperation with Newfoundland and Labrador*

The provinces of Nova Scotia and Newfoundland and Labrador have worked very closely on amendments to the *Accord Acts* respecting occupational health and safety. There are some differences (e.g., appeal process for reprisal actions), but they are limited. It is expected that this cooperative approach will be followed in preparing the new regulations. This same approach, we all hope, will be followed in the review of the existing regulations and the drafting of any new ones.

iv. *Other Non-Accord Regulations*

Federal changes to the existing *CEA Act* regulations¹²³ present challenges to Nova Scotia and the petroleum industry. The Regulatory Impact Analysis Statement (RIAS)¹²⁴ on these regulations states that a different approach on the East Coast would mean that exploratory processes there would not be subject to the EA process under the *CEA Act* as they are elsewhere in the country (e.g., the Arctic). A consistent federal system would not be established. The two types of federal environmental assessments would differ in terms of transparency and legal matters. The RIAS concludes:

A national federal EA system for offshore oil and gas projects can only be established if the two regulations [*Inclusion List Regulations/Law List Regulations*] are amended in the proposed manner.¹²⁵

122. S.O.R./88-600.

123. *CEA Act* Draft Regulations, *supra* note 70.

124. *Ibid.*

125. *Ibid.* at 1139.

Nova Scotia and the oil and gas industry argue these regulations were originally developed for the Arctic and are not necessarily transferable to, or suitable for, the East Coast. The *CEA Act* regulations need to reflect the different requirements in an offshore area where approximately 400 wells have been drilled and detailed modern-standard environmental assessments have already been carried out. The drafters of the *CEA Act* recognized the differences between the two offshore areas. In accordance with clause 59(i)(v) of the *CEA Act*,¹²⁶ the Governor in Council has the authority to vary or exclude, in prescribed circumstances, any procedure or requirement of the environmental assessment processes set out in the *CEA Act* or regulations. The time is now right for the federal regulators to give full meaning and scope to this legislative provision.

d. *Administrative Changes*

Discussions have raised the pros and cons of having a single offshore board regulate the East Coast offshore areas. Whether this will ever take place is beyond the scope of this paper. The *Nova Scotia Accord Act (Nova Scotia)*¹²⁷ makes it clear that either existing board may only be dissolved by the joint operation of an act of Parliament and an act of the legislature of the province.

The functions of CNSOPB are established in section 18 of the *Nova Scotia Accord Act (Nova Scotia)*.¹²⁸ Although the Board operates independently of government, the federal and provincial ministers do have powers to jointly issue directives to perform certain tasks.¹²⁹ Some of the Board's duties and functions under the 1986 Nova Scotia Accord¹³⁰ are not dealt with explicitly under the *Nova Scotia Accord Act (Nova Scotia)*. One example is the requirement to keep both governments informed of Board decisions.

On their own initiative, the Boards have made changes over the years to address issues raised by the governments and industry. Some examples are as follows:

i. *Financial Responsibility Requirements*¹³¹

In May, 1999, following two years of consultations with industry, the two

126. *Supra* note 60.

127. *Nova Scotia Accord Act (Canada)*, *supra* note 51, s.9(4).

128. *Ibid.* at s.18.

129. *Ibid.* at s.41.

130. 1986 Nova Scotia Accord, *supra* note 50.

131. Boris de Jonge, "Financial Responsibility Requirements for Oil and Gas Activities Offshore Nova Scotia and Newfoundland" (2001) 24 Dal L. J. 109.

offshore boards jointly released revised guidelines intended to address financial responsibility¹³² for all work and activities instead of just drilling operations.

ii. *Data Acquisition and Reporting Guidelines*

Draft joint guidelines were issued by the two offshore boards in July, 2002.¹³³ These guidelines were reviewed by industry, governments and other regulatory agencies before being released.

iii. *Offshore Waste Treatment Guidelines*

These guidelines¹³⁴ were issued jointly by the NEB, CNSOPB, and CNOPB in August, 2002 with the assistance of a committee consisting of government, industry, and public representation. A formal review is to be undertaken every five years to ensure these guidelines continue to reflect significant gains in scientific and technical knowledge.

iv. *Compensation Guidelines Respecting Damages Relating to Offshore Petroleum Activity*

These guidelines were issued jointly by the two Offshore Boards in March, 2002.¹³⁵

v. *Draft Certificate of Fitness Guidelines*

To address industry concerns about the offshore boards' use of certifying authorities, draft guidelines were released by the two offshore boards in October, 2001.¹³⁶ The responsibility of the certifying authorities are outlined. Audits of the certifying authority are provided to address, *inter alia*, conformance to the approved scope of work, the CA's quality system, technical audits of particular reviews undertaken by the CA or other matters relevant to the certification process. The offshore boards maintain they will always have a monitoring and audit role.¹³⁷ These guidelines

132. CNOPB/CNSOPB, "Guidelines Respecting Financial Responsibility Requirements for Work in the Newfoundland and Nova Scotia Offshore Areas" (May 1995 - revised December 2000), online: CNOSPB <<http://www.cnsopb.ca>>.

133. CNOPB/CNSOPB, "Joint Guidelines Respecting Data Acquisition and Reporting for well Pool and Field Evaluation in the Newfoundland and Nova Scotia Areas" (July 2002).

134. CNOPB/CNSOPB, "Offshore Waste Treatment Guidelines" (August 2002).

135. CNOPB/CNSOPB, "Compensation Guidelines Respecting Damages Relating to Offshore Petroleum Activity" (March 2002).

136. CNOPB/CNSOPB, "Draft Certificate of Fitness Guidelines" (October 2001).

137. Atlantic Petroleum Institute, *supra* note 52.

are an enhanced effort by the CAs to provide higher quality work. This is expected to provide a higher level of their confidence in the offshore boards and reduce the level of intervention by the regulator in the long term.

vi. *Standards for Measurement Guidelines*

To address concerns raised by CAPP on this topic in the CAPP Matrix, new draft guidelines were issued by the offshore boards in November, 2002. The guidelines are based on the United Kingdom Department of Trade and Industry, Oil and Gas Office Guidance Notes for Standards for Petroleum Measurement Under Petroleum (Production) Regulations.¹³⁸ The guidance notes that accompany the guidelines are not to be viewed as prescriptive. Alternative specifications to those given will be considered provided that they can be shown to give a similar or greater level of fidelity, accuracy and reliability.

vii. *Data Release Confidential Agreements*

The two offshore boards are currently drafting confidential agreements on the release of data. This is expected to be released soon for stakeholder comments.

Conclusion

The Nova Scotia Energy Strategy provides a clear indication of the provincial stand on effective and efficient regulation in Nova Scotia. Industry and other stakeholders have made a strong case for change in the province. The province is now ready to respond to this challenge.

The province is directly in control of any legislative or regulatory changes in the Nova Scotia onshore. The *Energy Act* (Phase I) will provide an opportunity for comprehensive review of the existing legislation. Phase II (drafting new regulations) and Phase III (preparing new policies, standards, and guidelines) will flow from the legislation. Creating “smart” new regulations will be high on the province’s agenda. A balance will have to be struck between the concerns of the petroleum industry and the public ownership of the petroleum resource.

138. CNOBP/CNSOPB, Draft “Standards for Measurement and Measurement Guidelines, Use for NF&L and NS Offshore Areas: *Petroleum Production and Conservation Regulations*” (November 2002).

Initiatives have been undertaken, most notably the Atlantic Energy Roundtable, to identify with stakeholders issues and concerns under the existing legislation. Both the Federal government and the Nova Scotia government understand the need for change. Coordination of activities between the two offshore boards is taking place. Time will tell what progress is made on this initiative.

One lesson that has been learned is that there needs to be a constant review of the legislation and regulations involved. This can be mandated in the legislation through sunset clauses. Even if the legislation does not address this matter, all governments, stakeholders and other interested parties need to meet on a regular and periodic basis to address their concerns and come forward with creative solutions if the East Coast petroleum industry is to succeed and compete on a global basis.