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Effective and Efficient Regulation of the
Offshore Oil Industry: The 2001 White
Rose Public Review Process

Section 44(2)(b) of the provincial and federal Canada-Newfoundland Atlantic Accord Implementation Acts provides for a public review of proposed developments of petroleum resources as part of the existing regulatory approval process for the Newfoundland Offshore Area. To date, public reviews have been conducted for three offshore oil developments: Hibernia, Terra Nova and White Rose.

This paper examines the effectiveness and efficiency of the public review process for the White Rose Project. The author concludes that the review process was effective in successfully gathering public input and reporting this information to the CNOBP. Despite CNOBP's failure to accept many of the report's recommendations, the review process' recommendations regarding provincial benefits were tacitly accepted by the project developer. Finally, the author argues that the process was efficient as it was conducted in a timely manner and at a low cost relative to total pre-production costs. Whether these same benefits would accrue to a smaller offshore project, however, remains in doubt.

L'alinéa 44(2)(b) de la Loi de mise en œuvre de l'Accord atlantique Canada-Terre-Neuve provinciale et fédérale prévoit la tenue d'une enquête publique sur la mise en valeur potentielle des ressources en hydrocarbures dans le cadre du processus d'approbation réglementaire existant pour la zone au large de Terre-Neuve. Jusqu'à maintenant, des enquêtes publiques ont été menés pour trois projets extracôtiers de mise en valeur : Hibernia, Terra Nova et White Rose.

L'auteur examine l'efficacité et l'efficience du processus d'examen public dans le cas du projet White Rose. Il conclut que le processus d'examen a été un succès puisqu'il a permis de recueillir des observations du public et d'en faire rapport à l'OCTNHE. Malgré le refus de l'OCTNHE d'accepter beaucoup des recommandations du rapport, les recommandations sur les avantages pour la province ont été acceptées tacitement par le promoteur du projet. Enfin, l'auteur prétend que le processus a été efficient puisque l'examen a été mené en temps opportun et à peu de frais par rapport au total des coûts de pré-production. On peut néanmoins se demander si les mêmes avantages seraient offerts dans le cadre de plus petits projets extracôtiers.

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Introduction

The current regulatory process for the approval of any proposed development of petroleum resources in the Newfoundland offshore area is, not surprisingly, a complex one. Although few will dispute that the existence of such a regulatory process is necessary in the public interest, opinions differ concerning its effectiveness and efficiency, particularly for the future development of smaller fields. In addition, the federal nature of the Canadian state and the unique management and revenue sharing regime established under the Atlantic Accord add complexities to the process and ensure that the debate will continue.

We propose in this paper to examine the effectiveness and efficiency of one important aspect of the existing regulatory approval process for the Newfoundland offshore area, namely the public review of proposed developments carried out under the authority of section 44(2)(b) of both the federal and provincial *Canada-Newfoundland Atlantic Accord Implementation Acts*.¹ The public review process is intended to elicit public input and to produce an independent advisory report for

1. *Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act*, R.S.N.L. 1990, c. C-2 and the *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3 [the *Accord Acts*].

consideration by the regulator, the Canada-Newfoundland Offshore Petroleum Board (CNOBP), when it makes decisions on development plan applications (DPAs). This paper examines the first ever review to be conducted on a stand-alone basis, the public review of the White Rose Development Plan Application in 2001.

This paper is primarily intended to address two issues: firstly, whether the White Rose public review was effective, that is, whether it produced the desired results under the legislation, and secondly, whether it was conducted efficiently from the perspective of timing and cost. This has led us to a consideration of the issue of provincial benefits, a topic that is likely to remain controversial despite the efforts of the CNOBP to clarify the regulatory approach in Decision 2001.01.² We will therefore include some brief observations concerning this issue in the aftermath of the approval of the White Rose DPA and some observations on how the public review process might be improved.

It is noteworthy that the White Rose DPA was the first development application with a Canada-Newfoundland Benefits Plan submitted for approval under the *Accord Acts* solely by the developer without a negotiated benefits agreement with the two levels of government. It was also the first project proposed and approved under the generic royalty regime for the Newfoundland offshore. Finally, it was also the first project in the Newfoundland offshore to have been effectively released from the *Canadian Environmental Assessment Act* (CEAA) process, without referral to a review panel, following consideration of the Comprehensive Study Report (CSR) by the responsible authorities and the federal Minister of Environment. It was clearly an important regulatory application for the Newfoundland offshore and provided a unique opportunity for the regulator to consider a “clean” application. In retrospect, the White Rose project has probably established an important precedent for future DPAs, particularly in the areas of provincial benefits, the mode of development, and the CEAA process.

2. Canada-Newfoundland Offshore Petroleum Board, Decision 2001.01 (26 November 2001) [Decision Report]. Under Section 5 of the CNOBP's Development Application Guidelines (December 1988), “[a]pproval of a Benefits Plan is a pre-condition to the approval of a Development Plan.” Such a Benefits Plan should “describe the proponent's commitment to, and plans concerning, the following:

- the employment of Canadians and, in particular, residents of the Province of Newfoundland and Labrador during the project; and,
- the participation of Canadian and, in particular, Newfoundland businesses in the provision of goods and services for the project.” (*Ibid.*, ch. 5).

I. *The White Rose Project*

The White Rose field, discovered in 1988, is located in the White Rose Significant Discovery Area (SDA) approximately 350 kilometers east of the island portion of the Province of Newfoundland and Labrador. The White Rose SDA forms part of the Jeanne d'Arc Basin and is located near the currently producing Terra Nova and Hibernia oil fields.

The White Rose Development Plan Application was a proposal to exploit only the oil resources of the South Pool of the White Rose field, estimated at approximately 230 million barrels of recoverable oil. The DPA proposed that the oil resources be developed by means of subsea wells and a floating production, storage and operating facility (FPSO) with a peak production capacity of 100,000 barrels per day. The White Rose SDA also contains the largest reserves of natural gas discovered to date in the Newfoundland offshore area, but the DPA sought approval to defer development of those resources.³

The White Rose Project received regulatory approval in December, 2001 and project sanction in March, 2002. At present, capital costs are estimated at CAD 2.35 billion with costs to first oil being close to CAD 2 billion. Full field operating costs will be in the order of CAD 2 billion over the ten to fifteen year production life.⁴

II. *The White Rose Public Review Process*

The public review process under the *Accord Acts* was only one part of the overall regulatory review process for the approval of the White Rose project. The White Rose project was subject to review under both the *Accord Acts* and the *CEAA* process. The entire regulatory process lasted fifteen months, commencing with the filing of the Comprehensive Study Report (CSR) with various responsible authorities under the *CEAA* process on October 10, 2000. It concluded with the acceptance of the CNOPB Decision Report by the responsible ministers under the *Accord Acts* on December 19, 2001. The overall review process ultimately consisted of three distinct paths — an environmental assessment under the *CEAA* in the form of a CSR, an internal review by the regulator, the CNOPB, and a public review of the White Rose DPA by a commissioner appointed under the *Accord Acts*.⁵ We are concerned in this paper with the third aspect of

3. "Report of the Public Review Commissioner for the White Rose Development Application", H.M. Clarke, Commissioner (September 2001) at i, online: CNOPB <<http://www.cnopb.nfnet.com/env/fr.pdf>>[Commissioner's Report].

4. Husky Energy, "White Rose Project – Upstream – East Coast Canada" (April 2003) at 2.

5. Commissioner's Report, *supra* note 3 at 2.

the regulatory process, the public review which took place between March 16, 2001 and September 24, 2001, the date on which the Commissioner's Report was forwarded to the CNOPB and the federal and provincial ministers. The public review of the White Rose DPA was conducted by a single commissioner, Herbert M. Clarke, pursuant to terms of reference established under the provisions of the *Accord Acts*. A chronology of the process follows.

On January 15, 2001 the White Rose DPA was filed with the CNOPB by Husky Oil Operations Limited and Petro-Canada. The DPA, as prescribed by the *Accord Acts*, contained the following:

- Volume I - Canada-Newfoundland Benefits Plan;
- Volume II - Development Plan;
- Volume III - Environment Impact Statement (Comprehensive Study Part I (submitted to Federal Minister of Environment October 10, 2000));
- Social Economic Impact Statement (Comprehensive Study Part II (submitted to Federal Minister of Environment October 10, 2000));
- Safety Plan and Concept Safety.⁶

The DPA was also buttressed by eighty-four Part II supporting documents. The CNOPB initially reviewed the DPA for completeness between January 16 and March 16, 2001. Afterwards, the DPA was referred to the Commissioner.

On January 29, 2001, the CNOPB appointed the Commissioner for the public review process. His terms of reference stipulated that the review cover all relevant aspects of the proposed potential development of the White Rose significant discovery area including: human safety and environmental protection considerations; general development approach; and benefits accruing to the province and to Canada, with particular regard to the requirements for a Canada-Newfoundland Benefits Plan. The relevant terms of reference provided:

2. General

Subject to the requirements of these Terms of Reference and the *Accord Acts*, the Commissioner will conduct a review of the Development Application which will include:

6. *Ibid.* at 3.

- (a) considerations of human safety and environmental protection incorporated into the proposed design and operation of the Project;
- (b) the general approach to the proposed and potential development and exploitation of the petroleum resources within the White Rose Significant Discovery Area; and
- (c) resulting benefits that are expected to accrue to the Province of Newfoundland and Labrador and to Canada, having particular regard to the requirements for a Canada-Newfoundland benefits plan.

...

4. Limitation

The Commissioner's mandate shall not include an examination of questions of energy policy, jurisdiction, the fiscal or royalty regime of governments, the division of revenues between the Government of Canada and the Government of Newfoundland and Labrador, or matters which go beyond the potential or proposed development of the White Rose Significant Discovery Area.⁷

On March 16, 2001, the DPA was referred to the Commissioner at the conclusion of the completeness review conducted by the CNOPB. The public review process formally commenced on that date.

The public review process provided two separate opportunities for the public to make submissions to the Commissioner. Initially the public was invited to make submissions on whether additional information should be requested of the proponent by the Commissioner. Subsequently, during the public hearing process, individuals and organizations were invited to comment on the merits of the DPA. The first stage of the public review process was completed on April 19, 2001, with five submissions being received. As a result of this public input and the Commissioner's own review of the DPA, the Commissioner requested certain additional information from the developer on April 26, 2001, and received a response on June 8, 2001.

On May 16, 2001, intervenor funding was announced for the purposes of assisting in the provision of meaningful public input into the public review process. On May 28, 2001, intervenor funding applications were approved by a committee established by the provincial Minister of Mines and Energy.⁸

7. CNOPB, Terms of Reference for the Proposed White Rose Project Public Review (29 January 2001) at 2-3 [Commissioner's Terms of Reference].

8. Commissioner's Report, *supra* note 3 at 4.

On June 11, 2001, the federal Minister of Environment completed his review of the Comprehensive Study Report. He referred it back to the CNOPB as the lead responsible authority without referring it to a review panel under section 29 of the *CEAA*.⁹ On the same date, the Commissioner gave a 30 day notice of the commencement of public hearings. The public hearings were to allow individuals, organizations, and the general public to comment on the merits of the information and conclusions contained in the DPA.

From July 11-31, 2001, twelve public hearings were held at three separate locations in the province. In total, thirty-five presentations were received from twenty-nine individuals and organizations, and eighty-six submission documents were received by the Commissioner prior to the close of the public sessions. On September 24, 2001, the Commissioner's Report was completed and submitted to the CNOPB. It comprised the Commissioner's review of the White Rose DPA, the Commissioner's forty recommendations, and all of the presentations made during the public hearings in July, 2001.¹⁰

On November 28, 2001, Lloyd Matthews, Minister of Mines and Energy, rose in the House of Assembly to announce that he, along with the Honourable Ralph Goodale, Minister of Natural Resources, Canada, had received the CNOPB Decision Report on the White Rose DPA filed by Husky Oil in January 2001 and would respond to the Decision Report in the next thirty days.¹¹ On December 19, 2001, the Ministers accepted the report and approved the White Rose DPA, subject to conditions.

III. *What Was the Purpose of the Public Review Process?*

The *Accord Acts* make specific legislative provision for a public review process. Section 44 of the *Accord Acts* provides as follows:

Public review by the board

44. (1) Subject to a directive issued under subsection 42(1), the board shall conduct a public review in relation to a potential development of a pool or field unless the board is of the opinion that the public hearing is not required on a ground the board considers to be in the public interest.

9. Decision Report, *supra* note 2 at 177-78.

10. Commissioner's Report, *supra* note 3 at i, 4.

11. Newfoundland and Labrador Department of Mines and Energy, Press Release (28 November 2001).

44. (2) Where a public review is conducted in relation to a potential development of a pool or field, the board may

- (a) establish terms of reference and a timetable that will permit a comprehensive review of all aspects of the development, including those within the authority of the Parliament of Canada or of the Legislature;
- (b) appoint 1 or more commissioners and, where there is to be more than 1 commissioner, appoint as commissioners persons nominated by each of the governments in recognition of the authority of ministers of the Crown in right of Canada or of the province under an Act of the Parliament of Canada or of the Legislature, other than this Act or the federal Act, in relation to the development;
- (c) where the potential development has been proposed to the board by a person, require that person to submit and make available for public distribution a preliminary development plan, an environmental impact statement, a socioeconomic impact statement, a preliminary Canada-Newfoundland benefits plan and other plans specified by the board; and
- (d) require the commissioners to hold public hearings in appropriate locations in the province or elsewhere in Canada and report on those hearings to the board, the federal minister and the provincial minister.¹²

Pursuant to section 44(1), the current regulatory process applicable to the Newfoundland offshore normally incorporates a public review of a proposed development, at the developer's expense, before any approval is granted. The CNOBP Development Application Guidelines make it clear that the public review will be a comprehensive one and will generally include a public hearing process, with the attendant time and expense of such a process. In order to understand why such an involved process was considered necessary by the legislators and why provincial benefits have remained such an important focus of the process, it is necessary to comment briefly on the modern regulatory approach in Canada and the historical context of the White Rose Project.

In Canada, it is generally accepted that regulation in the public interest is enhanced through the involvement and input of affected groups and individuals, including the general public. On the other hand, the courts have consistently deferred to the expertise of regulators making decisions

12. *Accord Acts*, *supra* note 1, ss. 44(1), (2).

within their core area of expertise and affected parties are routinely denied input into regulatory decision-making through the judicial system. Therefore, numerous federal and provincial regulatory statutes make specific provision for the involvement of the public in the regulatory decision-making process, often in a representative capacity and normally at the expense of the regulated concern. In any case, because of the potentially enormous economic and environmental ramifications of an offshore oil development, it was inevitable that some form of public review process would be deemed necessary. In addition, the technical subject matter of a DPA ensures that such a process has to be comprehensive and detailed in order to make it meaningful.

In the case of the Newfoundland offshore area a number of other factors contribute to the establishment of a review process that is lengthy, comprehensive and, in some senses, political. As a province, Newfoundland and Labrador faces significant economic challenges in comparison to most other regions of Canada. There is a widely held perception among its people, not unlike that shared by many inhabitants of former European colonies, that its history has been one of exploitation of its natural resources for the benefit of outsiders. That perception found fertile ground in the struggle between the federal and provincial governments in the 1970s and 1980s over the ownership and control of the mineral resources of the continental shelf. It is noteworthy that in 1984, the Supreme Court of Canada in the *Newfoundland Offshore Reference* case¹³ confirmed that Canada, not Newfoundland, possessed exclusive jurisdiction over the mineral rights on the continental shelf beyond the territorial sea.

Notwithstanding the *Newfoundland Offshore Reference* ruling, Newfoundland and Canada ultimately negotiated a joint management and revenue sharing arrangement called the Atlantic Accord, signed on February 11, 1985.¹⁴ In 1987 the Atlantic Accord was implemented by the enactment of two pieces of reciprocal legislation: the *Accord Acts*, at both the federal and provincial level.¹⁵ Pursuant to the legislation, the governments jointly established the independent board known as the Canada-Newfoundland Offshore Petroleum Board, which operates as the principal regulator of companies seeking to explore for and develop resources in the

13. *Reference re Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86 [*Newfoundland Offshore Reference*].

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

15. *Accord Acts*, *supra* note 1.

Newfoundland offshore area.

One of the main purposes of the Atlantic Accord is “to recognize the right of Newfoundland and Labrador to be the principal beneficiary of the oil and gas resources off its shores, consistent with the requirement for a strong and united Canada.”¹⁶ While offshore oil and gas developments have undoubtedly had a positive impact on the economy of the province, particularly in the Avalon Peninsula, in 2002-2003 the province’s fiscal capacity per capita was still only 68.5 percent of the all-province national average.¹⁷ Unfortunately, it appears that the promise of the Accord that offshore oil and gas would become the engine of growth for a self-sufficient Newfoundland and Labrador has proved largely illusory. As one commentator recently stated:

Clearly Newfoundland is not the primary or principal beneficiary of the offshore resources, nor of offshore revenues, but is a minor beneficiary when compared to the federal government. The importance of this is that unless the Atlantic Accord is honored and implemented as to its original intent, Newfoundland is unlikely ever to become a self-sufficient province within the Canadian federation.¹⁸

Within this historical context, the public pressure on the governments and the regulator to deliver provincial benefits is significant. It is therefore understandable that in the course of any public review of the White Rose Project the Commissioner would be expected to consider public submissions and make recommendations on whether the proposed development would be likely to realize the policy objectives of the Atlantic Accord, especially the generation of economics benefits for the province. The Commissioner’s terms of reference require that the public review include consideration of “the resulting benefits that are expected to accrue to the province of Newfoundland and Labrador and to Canada, having particular regard to the requirements for a Canada-Newfoundland Benefits Plan.”¹⁹

In conclusion, the White Rose public review process served two purposes: firstly to gather public input on all aspects of the proposed development, including the politically sensitive issue of provincial

16. Atlantic Accord, *supra* note 14 at s. 2(c).

17. John C. Crosbie, “Overview Paper on the 1985 Canada-Newfoundland Atlantic Accord” (Paper presented to the Royal Commission on Strengthening and Renewing Our Place in Canada, March 2003) [unpublished] at 279.

18. *Ibid.* at 277.

19. Commissioner’s Terms of Reference, *supra* note 7 at s. 2 (c).

benefits, and secondly to prepare an independent advisory report on the proposed development for consideration by the CNOPB and the responsible ministers in deciding whether or not to approve any development.

IV. Was the White Rose Public Review Process Effective?

The public review process served two main purposes: gathering public input regarding the White Rose DPA and providing advice to the CNOPB by means of a Commissioner's Report. How effective was the process in carrying out these duties? We have concluded that the public review process was clearly effective in gathering input from the public and in reporting on that input to the CNOPB and the ministers. It was quite ineffective in generating an independent advisory report which directly impacted the area of provincial benefits. Ultimately, however, the process itself resulted in an adequate response by the proponent.

1. Public Input

There was a significant level of public involvement in the White Rose public review process. The public hearings were generally well attended and there was a high level of media interest in the process. In total, twenty-nine intervenors participated in the public hearing stage and thirty-five presentations were made during the public review, most of which were well-researched and balanced. The Commissioner received and reviewed a total of eighty-six submissions, including many prepared spontaneously by the developer in response to the needs of the process. Public input was gathered on a wide range of issues, including the mode of development, the potential impacts on the environment, and concerns about icebergs and the fishery. Submissions were received from many important provincial and national organizations including the Canadian Association of Petroleum Producers, the Fisheries Association of Newfoundland and Labrador, the Newfoundland Offshore Industries Association, the Friends of Gas Onshore, and the Fish, Food and Allied Workers Union.

Most submissions focused on the Canada-Newfoundland Benefits Plan, as twenty-four of the thirty-five presentations considered by the Commissioner were either wholly or partially concerned with the issue of provincial benefits. The key single issue for the public was the disconnect between its understanding of the Accord and the delivery of benefits resulting from the previous offshore oil and gas developments. The Commissioner summed up the essence of the public input this way:

People want the White Rose project to go ahead under the right conditions. However, they are frustrated with the level of benefits being realized, in relation to the potential, and by the lack of a clear and acceptable interpretation of the Atlantic Accord and the *Accord Acts*. They feel the spirit and intent of the Atlantic Accord has been gradually eroding.

...

It appears to the Commissioner that, in a general sense, many of these detailed concerns are really symptomatic of structural and administrative problems with the current benefits system and that no one, including the public, the supply and service organizations, trade unions, municipalities, proponents or the regulator are particularly satisfied with the current circumstances. Changes in procedure and approach are required for White Rose, for future projects, and for the industry generally.²⁰

Clearly, the Commissioner understood the public input to represent a call for significant changes in the approach to provincial benefits. As a result, many of the Commissioner's detailed recommendations were directed to the benefits issue.

2. *The Result of the Process*

Following a comprehensive and costly public review process, an advisory document was prepared by the Commissioner for consideration by the CNOPB and the ministers. As the report stated:

The Commissioner's recommendations are designed to ensure that the Project is developed in a safe and environmentally responsible manner and with an acceptable level of benefits. The Commissioner's recommendations in this report also provide certainty for investment and development consistent with the competitive global environment in which the oil industry operates, and more.²¹

The Commissioner made eleven recommendations regarding the general development approach, fourteen recommendations regarding benefits and the Canada-Newfoundland Benefits Plan, and fifteen recommendations regarding human safety and environmental protection.²² In total, of the forty recommendations made by the Commissioner, thirty-nine were made

20. Commissioner's Report, *supra* note 3 at vii.

21. *Ibid.*

22. *Ibid.* at 93-107.

to the CNOBP. Of those, and allowing for some language differences between the recommendations and the CNOBP responses, only fifteen were partially or wholly adopted in the CNOBP's Decision Report, and the remaining twenty-four were either ignored or specifically rejected.

The area in which the CNOBP most clearly rejected the recommendations of the Commissioner was on the topic of benefits and the Canada-Newfoundland Benefits Plan. In the past, the CNOBP had approved benefits plans that were in essence framework documents, prepared in the context of negotiated benefits agreements. Unlike Hibernia or Terra Nova, however, the White Rose DPA was "reviewed under [the] CNOBP mandate and generic royalty regime with no pre-negotiated positions."²³ The Commissioner was not prepared to recommend approval of the proposed Canada-Newfoundland Benefits Plan, characterizing it as an over-qualified, general document with no firm goals or quantifiable objectives for employment or for goods and services. He recommended that, rather than approving a general, framework document, the CNOBP "require specific and measurable objectives for benefits, and [to] thereafter monitor the project to ensure compliance with those general commitments."²⁴ The CNOBP completely rejected this approach, taking the position that the Board had no duty to "maximize" provincial benefits and that in fact requiring "objectives" of the type recommended by the Commissioner in a benefits plan was essentially *ultra vires* the *Accord Acts*.

Of course, as the regulator, the CNOBP was entitled to accept or reject the Commissioner's advice and to adopt the approach it saw fit to the relevant provisions of the *Accord Acts*. Indeed, most knowledgeable observers would concede that it is possible to derive competing interpretations from the language of the *Accord* and the *Accord Acts*. Unfortunately, however, in the course of giving its interpretation, the CNOBP in its Decision Report suggested that the Commissioner was recommending that the CNOBP impose benefit "targets" on the developer and make the achievement of such "targets" a condition of project approval. The following passage of the Decision Report summarizes the manner in which the CNOBP understood the Commissioner's recommendations on provincial benefits:

The Commissioner has made some recommendations in his report suggesting the Board make certain benefit achievements a condition of approval

23. W. Roach, A. MacDonald & D. Black, White Rose Development Application, "Lessons Learned from the White Rose Regulatory Proceedings" (2002) at 12, ["Lessons Learned"].

24. Commissioner's Report, *supra* note 3 at 45-46, 99.

of the White Rose Benefits Plan. The Board has not done so. This should not be interpreted as either disagreement or agreement on the Board's part with these recommendations made by the Commissioner. The Board has no authority to implement such recommendations. Therefore, this Benefits Plan Decision has not addressed these recommendations; other than to indicate where and how they fall outside the Legislation.²⁵

This summary oversimplifies and effectively misunderstands the entire approach to benefits recommended in the Commissioner's Report. In fact, the Commissioner's Report stated as follows:

Both the Proponent and the Canadian Association of Petroleum Producers (CAPP) argued strenuously against specified goals or targets because they believed such a system implies preference. The Proponent further believes that prescriptive targets suggest that local business cannot be competitive, are counter to building a local competitive industry and may result in artificially high prices. The Commissioner would understand the Proponent's concern if the targets were to be imposed in an arbitrary manner by the regulator. Since this is not the intent nor has it ever been suggested, it is difficult to see merit in these arguments. The targets are not quotas as some observers immediately categorize them (perhaps for their own purposes) but rather management tools to help all parties improve performance in keeping with the intent of the Accord. The Proponent has accepted the utility of targets in the area of safety. In the case of benefits, their purpose is to increase Canada-Newfoundland benefits without compromising the basic interests of the Proponent.

The proponent should come up with its best specific estimates of what it thinks it can achieve in terms of Canada-Newfoundland benefits "taking everything into account", including industry capabilities and labour availability, the Proponent's own pro-active programs, and its discussions with industry, labour and the regulator. The regulator, CNOPB, as part of the Benefits Plan evaluation, would consider these targets and if approved they would be used for monitoring purposes and to measure performance. Targets can be adjusted up or down by the Proponent in consultation with the CNOPB. For example, over the life of a project, target levels of employment might increase as capabilities of local labour and business increase. Conversely, when unforeseen barriers are identified, targets might be lowered or measures put in place to address these barriers. All participants would know the rules of the game as opposed to trying to second guess a very generally worded and over qualified Benefits Plan.

25. Decision Report, *supra* note 2 at 13-14.

Finally, a very important feature of such a system is that the Proponent would retain flexibility and discretion on individual decisions (including contracts) but would be responsible for achieving the overall aggregate quantifiable objective in that particular area. It is on this basis that performance will be monitored and reported by the CNOBP.²⁶

This misunderstanding by the CNOBP is symptomatic of the most obvious weakness of the existing system, the lack of any direct participation in the review process by the regulator. The CNOBP has taken the position that it should not participate in the public review process, presumably in order that the Commissioner's independence not be jeopardized. Realistically, however, the regulatory process does not otherwise allow for the public to formally engage with the regulator on any issue, including the issue of provincial benefits. Indeed, there were a number of occasions during the review process when members of the public directed specific criticisms towards the absent CNOBP. As one commentator stated:

... it is vitally important for effective regulation that there be an on-going dialogue between regulatory agencies, regulated companies and the public. This is essential to the success of economic regulation which has to be constantly evolving and adapting to new circumstances.²⁷

Ultimately, it is noteworthy that Husky Energy did finally provide information regarding "quantifiable objectives" prior to completion of the Decision Report. On November 20, 2001, Husky wrote the federal and provincial ministers to provide detailed tables containing "our most current plans for employment and expenditures for the development phase of the project" and "our best estimates and objectives for employment levels" for the operations phase of the project.²⁸ On November 23, 2001, the provincial Minister of Mines and Energy requested that the CNOBP "treat the plans, estimates and objectives provided therein as benchmarks, recognizing that benchmarks are not ceilings."²⁹ He asked that the CNOBP "incorporate as a condition of the Benefits Plan approval that it will monitor the benchmarks against actual performance in assessing the success of the Proponent's efforts to maximize achievements...."³⁰ The CNOBP agreed subject to the following:

26. Commissioner's Report, *supra* note 3 at 53.

27. Hudson N. Janisch, Case Comment on *Nfld. Light & Power Co. v. P.U.C. (Bd.)* (1987) 25 Admin. L.R. 196 at 200-201.

28. Decision Report, *supra* note 2 at 160.

29. *Ibid.* at 158.

30. *Ibid.*

It is a condition of this Benefits Plan approval that the Proponent submit on a quarterly basis during the construction and operations phases of the Development a report describing its actual performance against the estimates provided in its correspondence contained in Appendix D of this Report. Any deviation between the benchmarks of estimates, plans and objectives and actual performance should be accompanied by explanatory notes in sufficient detail to allow assessment of the reasons for the deviation.³¹

If one accepts that, in principle, the effective advisor is one whose advice is followed, the number of recommendations ignored or rejected appears to suggest that the report of the Public Review Commissioner for the White Rose DPA was largely ineffective. In the final analysis, however, the CNOBP appears to have tacitly accepted the establishment of “quantifiable objectives” along the lines suggested by the Commissioner and to have made monitoring of those “objectives” a condition of approval of the DPA.

In conclusion, the White Rose public review process appears to have been very effective in gathering public input and, despite the disconnect between the Commissioner’s Report and the Decision Report, was effective in influencing the decision-making process. Unfortunately, the public review process provided no opportunity for the regulator and the public to have a full and frank debate concerning the manner in which the CNOBP interprets the Accord and the *Accord Acts*. It is suggested that the public review process could be improved by giving the public an opportunity to engage with the CNOBP on issues arising from proposed oil and gas developments, particularly because there is no satisfactory alternative forum in which this debate can take place. This type of dialogue would have probably improved the effectiveness of the public review process.

V. *Was the White Rose Public Review Process Efficient?*

The efficiency of the public review process can be objectively measured in two ways, that is, in terms of time and in terms of cost. Was it too long? Was it too expensive? From both perspectives, it is submitted that the proper conclusion is that public review process was, overall, an efficient one.

31. *Ibid.* at 36, Condition 11.

1. *Time Frame*

The DPA was formally referred to the Commissioner for a public review on March 16, 2001. On that date the Board issued the following statement:

This marks the formal commencement of the Commissioner's activity in providing the public an opportunity to examine the Development Application and to comment on it through written submissions and oral presentations in public hearings. This activity is expected to be completed within six months. In accordance with the Commissioner's terms of reference, the Commissioner will operate independently from the Board in this process, and will establish the schedule, locations and guidelines for public hearings.

Meanwhile, the CNOPB will undertake its internal review of the Application under the Accord Acts, and work will continue under the environmental assessment under the Canadian Environmental Assessment Act.³²

The Commissioner immediately released a notice to the public advising of the approximate dates during which the public sessions were expected to take place and the procedures for participation in the public review process. The time frames established with respect to requests for additional information and the commencement and completion of sessions were met.

Overall, the Commissioner's terms of reference required that the report be submitted at the earliest possible date but in no event later than 180 days following receipt of the DPA. Ultimately, the report was submitted on September 24, 2001, 192 days from receipt of the information referred to in paragraph 8 of the Terms of Reference. The primary reason for the brief delay was probably related to the timing of the release of the White Rose Project from the environmental review process under the *Canadian Environmental Assessment Act*. As noted by the developer, the overlap between CEAA and the *Accord Acts* process created a "significant timing uncertainty."³³

In terms of overall project timing, at the time of the filing of the White Rose DPA, on January 15, 2001, the owners were reported as having stated that project sanction was expected in the fourth quarter of 2001 and first

32. CNOPB, News Release, "White Rose Development Application Referred to Commissioner for Public Review" (16 March 2001).

33. "Lessons Learned", *supra* note 23 at 13.

oil in the fourth quarter of 2004, “if the regulatory review process proceeds as expected.”³⁴ The owners had established a project team in St. John’s, Newfoundland from 1998 to pursue a significant pre-contracting initiative to meet this schedule. While this target for first oil will probably not be achieved, there is no indication that the delay is related in any way to the regulatory review process, and is probably related to construction delays in, for example, the excavation of the glory holes. Finally, the fifteen-month overall regulatory timing was not dissimilar to Hibernia (thirteen months), Terra Nova or Sable (both seventeen months). It must therefore be concluded, based on the close proximity between the proposed schedule and the actual completion date, and considering the technical and “political” nature of the subject matter, that the public review process was conducted in an efficient manner from a timing standpoint.

2. Cost

The proponent estimated the costs of the regulatory process, including the CEAA submission, at direct costs of CAD 2.9 million and total costs of CAD 15-20 million.³⁵ Of the direct costs, roughly 25 per cent has been estimated to be the costs of the Commissioner in conducting the public review process. In carrying out that review, the Commissioner retained the services of the following consultants:

- (1) Bevin R. LeDrew, AMEC Earth and Environmental (Environmental Protection Section of the Commissioner’s Report);
- (2) John G. Fitzgerald, P.Eng (Request for additional information stage);
- (3) Patricia R. Jackson (Communications Planning; Media Relations during public sessions);
- (4) T.G. Whalen, P.Eng (Review of benefits issues);
- (5) Richard G. De Wolf and G. Gordon Clarke, Ziff Energy Group (Review of development plan issues);
- (6) Patrick Martin, DRAY Inc. (Website design and maintenance).³⁶

34. Newfoundland Department of Mines and Energy, News Release, “Minister welcomes White Rose Development Plan Application” (16 January 2001).

35. “Lessons Learned”, *supra* note 23 at 7.

36. Commissioner’s Report, *supra* note 3 at A-2.

In addition, the public review commission secretariat consisted of a full-time manager and an administrative assistant, as well as part-time commission counsel, who were employed from approximately January 16, 2001, to September 24, 2001.

There is no question that the public review process was costly. The costs must, however, be viewed in relation to pre-production costs of CAD 2.8 billion for Terra Nova and CAD 2 billion for White Rose.³⁷ There are no comparative regulatory costs from Hibernia, Terra Nova, and Sable. The direct and indirect costs of the regulatory process do not, in context, seem excessive. In fact, while overall costs of the public review were significant, the actual budget for the single Commissioner for White Rose seems very reasonable. Whether such a process is justifiable for smaller developments is an open question, particularly because the mode of production will almost certainly employ floating technology.

The position of the developer regarding the cost of the process was summarized by Dr. William Roach, the General Manager, East Coast Development, for Husky Oil, who observed:

The White Rose regulatory process required significant effort in terms of time, money and resources (and) is potentially onerous for smaller fields particularly the future "tie backs."³⁸

Overall, the process was probably efficient in terms of cost in relation to a 200-300 million barrel field. The same might hold true for a field even half that size. It is not difficult to imagine, however, that there will be considerable pressure brought to bear on the regulator to scale back or eliminate public reviews altogether for smaller projects or "tie backs" on the ground that they would not be "in the public interest."³⁹

Conclusion

For the last word about the White Rose public review process one must return to the issue of provincial benefits. The provincial Minister of Industry, Trade and Rural Development, the Honourable Beaton Tulk, issued the following statement on December 19, 2001, in response to his federal colleague's acceptance of a Decision Report in which the CNOPB denied

37. Husky Energy, "East Coast Canada Upstream" (April 2003).

38. "Lessons Learned", *supra* note 23 at 14.

39. *Accord Acts*, *supra* note 1, s. 44(1).

any duty to “maximize” benefits and claimed that requiring firm plans or objectives to be contained in a benefits plan was *ultra vires* the *Accord Acts*:

Government has been working closely with the project proponent for more than a year to ensure that provincial benefits from the development of White Rose are maximized where we have the capability to participate on a reasonable commercial basis. This was a common theme heard throughout the public consultations on White Rose, and was echoed in the Public Review Commissioner’s report.

I am pleased to announce that we have gone a long way toward achieving that goal, with firm plans by the proponent to undertake within Newfoundland and Labrador in excess of 80 per cent of the development phase work we can reasonably do in this province, and in excess of 80 per cent of all production phase employment. ...

The proponent has also committed to make every effort to improve upon these levels of provincial participation, in keeping with the spirit and intent of the Atlantic Accord which provides that Newfoundland and Labrador shall be the principal beneficiary of the development of its offshore oil and gas resources.⁴⁰

Based on this statement, and regardless of the way the regulatory landscape may appear at first blush, it appears that the issue of provincial benefits will continue to play a crucial role in project economics for the foreseeable future in the Newfoundland offshore area.

40. Newfoundland Department of Mines and Energy, News Release, “Province Gives Go Ahead to White Rose Development” (19 December 2001).