CANADA

National Energy Board

Reasons for Decision

Brooklyn Navy Yard Cogeneration Partners, L.P.

Husky Oil Operations Ltd.

ProGas Limited

Shell Canada Limited

Western Gas Marketing Limited

GH-5-93 Review

June 1994

Gas Exports

National Energy Board

Reasons for Decision

In the Matter of

Review of the Applications for Gas Export Licences from

Brooklyn Navy Yard Cogeneration Partners, L.P.

Husky Oil Operations Ltd.

ProGas Limited

Shell Canada Limited

Western Gas Marketing Limited

An application dated 7 March 1994 from Rocky Mountain Ecosystem Coalition for a review of the GH-5-93 decision made by the National Energy Board in February 1994

GH-5-93 Review

June 1994

Cat. No. NE22-1/1994-2-1E
ISBN 0-662-22392-6

This report is published separately in both official languages.

Copies are available on request from:
Regulatory Support Office
National Energy Board
311 Sixth Avenue S.W.
Calgary, Alberta
T2P 3H2
(403) 292-4800

For pick-up at the NEB office:
Library
Ground Floor

Printed in Canada

Nº de cat. NE22-1/1994-2-1F
ISBN 0-662-99297-0

Ce rapport est publié séparément dans les deux langues officielles.

Exemplaires disponibles sur demande auprès du:
Bureau du soutien à la réglementation
Office national de l'énergie
311, sixième avenue s.-o.
Calgary (Alberta)
T2P 3H2
(403) 292-4800

En personne, au bureau de l'Office:
Bibliothèque
Rez-de-chaussée

Imprimé au Canada

Table of Contents

List of Appendices

Abbreviations

Act	*National Energy Board Act*
ANR	ANR Pipeline Company
APMC	Alberta Petroleum Marketing Commission
BCEC	B.C. Energy Coalition
Bcf	billion cubic feet
Board	National Energy Board
BNYP	Brooklyn Navy Yard Cogeneration Partners, L.P.
CELA	Canadian Environmental Law Association
Crestar	Crestar Energy
DOE/FE	(United States) Department of Energy, Office of Fossil Energy
EARP Guidelines Order	*Environmental Assessment Review Process Guidelines Order*
EMPR	British Columbia Ministry of Energy, Mines and Petroleum Resources
Enserch	Enserch Development Corporation
ERCB	(Alberta) Energy Resources Conservation Board
Exclusion List	List of automatic exclusions pursuant to the EARP Guidelines Order
FERC	(United States) Federal Energy Regulatory Commission
Husky	Husky Oil Operations Ltd.
Hydro-Québec decision	*The Grand Council of the Crees (of Québec) and the Cree Regional Authority* v. *The Attorney General of Canada et al*, [1994] 1 S.C.R. 159
Intercontinental	Intercontinental Energy Corporation
LDC	local distribution company
Lilco	Long Island Lighting Company
MW	megawatt (1000 kilowatts)
NCAC	Northwest Conservation Act Coalition

Oldman River Dam decision	*Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 2 W.W.R. 193
PanCanadian	PanCanadian Petroleum Limited
Part VI Regulations	*National Energy Board Part VI Regulations*
ProGas	ProGas Limited
RMEC	Rocky Mountain Ecosystem Coalition
Shell	Shell Canada Limited
Tcf	trillion cubic feet
Tenaska	Tenaska Washington Partners
Tenaska Gas	Tenaska Gas Corporation
TransCanada	TransCanada PipeLines Limited
United States	United States of America
WCSB	Western Canada Sedimentary Basin
Westcoast	Westcoast Energy Inc.
WGML	Western Gas Marketing Limited

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* and the regulations made thereunder;

AND IN THE MATTER OF an application dated 7 March 1994 from Rocky Mountain Ecosystem Coalition for a review of the GH-5-93 decision with respect to the upstream environmental effects associated with the applied-for natural gas export licences;

AND IN THE MATTER OF the Board's letter communicating its decision to conduct a review dated 15 March 1994, as amended.

BEFORE:

R. Priddle	Chairman
J.-G. Fredette	Vice-Chairman
A. Côté-Verhaaf	Member
C. Bélanger	Member
R. Illing	Member
K.W. Vollman	Member
R.L. Andrew, Q.C.	Member

SUBMITTERS:

Rocky Mountain Ecosystem Coalition

Brooklyn Navy Yard Cogeneration Partners, L.P.
Husky Oil Operations Ltd.
ProGas Limited
Shell Canada Limited
Western Gas Marketing Limited

Frank Abramonte
Alberta Greens
Alberta Natural Gas Company Ltd
Alberta Petroleum Marketing Commission
Alberta Ratepayers Association
Alberta Wilderness Association
Atlin Naturalists Society
B.C. Energy Coalition
Ken J. Beitel
Bow Valley Energy Inc.
Bow Valley Naturalists
British Columbia Alberta Wilderness Association
Canada Greens
Canadian Association of Petroleum Producers
Canadian Environmental Law Association
Canadian Environmental Patriots Society
Canadian Occidental Petroleum Ltd.

Canadian Parks & Wilderness Society
Chetwynd Environmental Society
Citizens Concerned About Free Trade
Diamond Hitch Outfitters
Enserch Development Corporation
Douglas Geier
Grand Council of Treaty 8 First Nations
Greenhouse Action
Greenpeace Canada
Home Oil Company Limited
William Kreuter
Little Red River Cree Nation
Morrison Petroleums Ltd.
Northern Light Environmental Coalition
Northwest Conservation Act Coalition
Old Sarcee - Uterus Clan
PanCanadian Petroleum Limited
Peace Country Agricultural Protection Society
The Pembina Institute
Province of British Columbia
Province of Saskatchewan
Riel Policy Institute
Speak Up for Wildlife Foundation
St. Lawrence Gas Company, Inc.
Tenaska Gas Corporation
TransCanada PipeLines Limited
Westcoast Energy Inc.

Chapter 1

Background

This review was undertaken to consider whether the National Energy Board's (the "Board") decisions about the scope of its obligations under the *Environmental Assessment Review Process Guidelines Order* (the "EARP Guidelines Order") and the *National Energy Board Act* (the "Act") to undertake an assessment of the environmental effects and directly-related social effects of seven gas export licence applications were correct. Five companies, Brooklyn Navy Yard Cogeneration Partners, L.P. ("BNYP"), Husky Oil Operations Ltd. ("Husky"), ProGas Limited ("ProGas"), Shell Canada Limited ("Shell") and Western Gas Marketing Limited ("WGML") applied to the Board under section 117 of the Act for a total of sixteen gas export licences. ProGas also requested amendments pursuant to section 21(2) of the Act to existing Licences GL-129 and GL-98. The proposed amendments were to increase the authorized export volumes and extend the term of GL-129, and to reduce the authorized export volumes under GL-98. As a result of these seven applications, the Board issued Hearing Order GH-5-93.

The applications subject to this review are briefly summarized below.

1.1 Brooklyn Navy Yard Cogeneration Partners, L.P.

BNYP sought a licence to export a maximum of 4110 $10^6 m^3$ (145 Bcf) of gas over a period of 15 years. The gas would be used to supply its proposed 286 MW gas-fired cogeneration facility to be built within its existing powerhouse in Brooklyn, New York. It had also entered into a fuel management agreement with Long Island Lighting Company ("Lilco") pursuant to which Lilco agreed to purchase any gas which BNYP did not use.

Crestar Energy ("Crestar") and PanCanadian Petroleum Limited ("PanCanadian") would provide the gas from their Alberta supply pools. These pools consist of proven reserves and no specific pools have been contractually dedicated by Crestar or PanCanadian to the proposed sale. Both Crestar's and PanCanadian's estimates of reserves and projections of productive capacity show that they have adequate gas supply over the proposed export term.

Crestar and PanCanadian have filed applications for energy removal permits from the Alberta Energy Resources Conservation Board ("ERCB") and at the time of the application, decisions were pending. BNYP had applied to the United States Department of Energy, Office of Fossil Energy ("DOE/FE") for a long-term import authorization.

It is expected that new facilities would be required on the TransCanada PipeLines Limited ("TransCanada") pipeline system to deliver the proposed export. Furthermore, a 60-metre pipeline connecting with the cogeneration facility will be required.

1.2 Husky Oil Operations Ltd.

Husky sought to export a maximum of 2179 10^6m^3 (76.9 Bcf) of gas over 15 years to supply the Tenaska Washington Partners' ("Tenaska") 248 MW gas-fired combined-cycle, independent-power production facility to be located near Tacoma, Washington.

Husky would provide the gas from its corporate supply pool in British Columbia, with no specific pools contractually dedicated to the proposed export. Husky stated that reserves would be added to its gas supply as a result of drilling conducted on its submitted fields during 1994. One additional well had already been drilled and two additional wells were being drilled. The Board did not include the additional supply in its quantitative assessment since the data remain confidential. Husky further submitted that it had access to its surplus Alberta corporate supply to mitigate, if necessary, any shortfalls in its British Columbia supplies. Husky had sufficient reserves for the life of the proposed export licence and sufficient productive capacity for the majority of the licence term.

Husky expected to file an application in February 1994 for a gas removal permit with the British Columbia Ministry of Energy, Mines and Petroleum Resources ("EMPR"). Tenaska received DOE/FE authorization in early 1994. Various other United States federal, state and local regulatory approvals, including the *National Environmental Protection Act* approval of the cogeneration facility, were expected before May 1994.

New facilities would be required on the pipeline system of Westcoast Energy Inc. ("Westcoast") and it was expected that a 610 metre connecting pipeline would be needed to connect with the recipient cogeneration facilities.

1.3 ProGas Limited

1.3.1 Application and First Amendment to GL-98

ProGas applied for six natural gas export licences of varying quantities and terms and for an amendment to Licence GL-98 to reduce the amount of gas to be exported pursuant to that licence. Gas exports under Licence GL-98, as amended, are destined for the markets of several interstate pipelines including ANR Pipeline Company ("ANR"). The gas to be exported under the applied-for licences would be used by six local distribution companies ("LDCs") in Michigan and Wisconsin. These are ANR's traditional customers and these sales will replace most of the gas previously authorized for export to ANR pursuant to Licence GL-98. This was a result of the elections of customers undertaken pursuant to the Federal Energy Regulatory Commission (the "FERC") Order 636. The six LDCs service thousands of residential, commercial and industrial customers.

ProGas would provide the gas for the proposed exports from its contracted supply pool. This supply pool consists of approximately 600 gas purchase contracts with about 160 producers and encompasses, in the Board's estimate, some 1,000 pools. Approximately 87 percent of ProGas' contracted supply is in Alberta and the remainder is in British Columbia. The Board's estimate of reserves exceeded ProGas' total requirements by approximately 600 Bcf and its projection of productive capacity indicated adequate gas supply throughout the proposed export term.

ProGas was to apply to the ERCB for an amendment to its existing removal permit. Some of the customers had received, and others were seeking, their DOE/FE import authorizations.

ProGas advised that no new facilities were required for the proposed exports.

1.3.2 Amendment to GL-129

This amendment sought to extend the term of the existing licence for seven years and to increase the total quantity of gas that may be exported by 5211 10^6m^3 (184 Bcf). The gas to be exported would be used by two 300 MW gas-fired cogeneration facilities which were already in operation and managed by Intercontinental Energy Corporation ("Intercontinental"). One is located in Bellingham, Massachusetts and the other is in Sayneville, New Jersey. The gas would be supplied from ProGas' contracted supply pool, described in section 1.3.1.

ProGas was to apply to the ERCB for an amendment to its existing removal permit and Intercontinental was to apply to the DOE/FE for additional import authorization.

No new facilities were required for this export.

1.3.3 Application and Second Amendment to GL-98

ProGas applied for two natural gas export licences for a total maximum quantity of 946 10^6m^3 (33.4 Bcf) and also for a reduction in the quantity of gas to be exported under Licence GL-98. The gas was to be sold to two LDCs in the state of Wisconsin to provide gas to a wide variety of customers. ProGas would supply the gas for the proposed exports from its contracted supply pool as set out in section 1.3.1. The proposed exports would, in part, displace exports previously authorized under Licence GL-98.

ProGas was to apply to the ERCB for an amendment to its existing removal permit. The customers had received DOE/FE import authorizations.

No new facilities were required for this export.

1.4 Shell Canada Limited

Shell applied for a gas export licence to enable it to deliver 3002 10^6m^3 (106 Bcf) of gas over 15 years to an independent power production facility to be located near Tacoma, Washington which has not yet been constructed. This facility is the Tenaska project described in section 1.2.

Shell would supply the proposed export from its West Bullmoose Baldonnel pool in northeast B.C. although the pool is not contractually dedicated to the Tenaska sale. Shell stated that, since this supply would be sufficient to satisfy only a portion of the proposed export, additional supply would have to be developed in northeast B.C. Shell chose to provide information regarding only the West Bullmoose pool. It stated it would rely on its Alberta corporate supply if the northeast B.C. supply were not developed sufficiently. At present, the West Bullmoose pool has one well and Shell plans to drill a second well to enhance its deliverability. It is expected the existing well will produce to short term sales until the start up of the export project. By that date, it is expected that Shell will have only 60 percent of the reserves required for its applied-for export licence. It was estimated by the Board that the applicant would only be able to meet the applied-for volumes for three years of the proposed fifteen year term. Shell did not have transportation in place to move its Alberta reserves to this market and did not provide information on its exploration program that could result in gas to

supplement its B.C. supply. As the Board was not satisfied with the adequacy of Shell's gas supply and because it did not have sufficient information on Shell's northeast British Columbia exploration and development program, it decided to reduce the applied-for term volume by one third.

Shell was to file an application for a long-term energy removal certificate with EMPR. A description of the status of the United States authorizations is set out in the summary of the Husky application.

A 610 metre interconnecting pipeline would be required to connect with the cogeneration facility. No new Westcoast transportation facilities were required.

1.5 Western Gas Marketing Limited

The company sought five export licences to enable it to deliver different maximum quantities of gas until 31 October 2003 to five Wisconsin LDCs which are also to be supplied by ProGas. The gas would be provided from the company's contracted supply pool in Alberta. No specific pools were contractually dedicated to the sale. The Board's estimate of reserves exceeded by over 60 percent the applicant's total contracted requirements and its analysis of productive capacity indicated there would be adequate gas supply throughout the proposed export term.

DOE/FE authorized the import of the applied-for export volumes and the ERCB removal permit had been granted.

No new facilities would be required for the transportation of the gas.

1.6 Environmental Screening of Applications

An environmental screening pursuant to the EARP Guidelines Order was performed for each application. ProGas, Shell and WGML stated that the development of new gas transmission facilities under the Board's jurisdiction would not be required to accommodate their applied-for exports. Therefore, they submitted, their applications fell within the automatic Exclusion List pursuant to the EARP Guidelines Order and required no further screening. The export proposals by BNYP and Husky[1] would require new facilities on the pipeline systems of TransCanada and Westcoast respectively. BNYP and Husky stated that the environmental effects of these facilities would be considered, among other things, when the Board examined the applications for pipeline facilities by TransCanada and Westcoast under Part III of the Act.

By letter dated 22 December 1993, Rocky Mountain Ecosystem Coalition ("RMEC") applied for intervenor status in the GH-5-93 hearing. It wished to cross-examine and present evidence on three aspects related to the export applications, including:

(1) the causal relationship between export applications and upstream environmental effects which impair ecosystem integrity and biodiversity;

[1]In its submission in this Review, Husky advised it no longer required new Westcoast facilities and that its application also fell within the Exclusion List.

(2) any uncertainty and risk to Canadian gas consumers having regard for energy security, sovereignty, social, health and economic implications of the applications; and

(3) the public interest.

RMEC was advised that the first aspect did not fall within the bounds of the Board's jurisdiction, as the Board could not consider upstream environmental effects and it would not hear evidence on that point. The Board was of this view as a result of the Federal Court of Appeal decision in *Quebec (Attorney General)* v. *Canada (National Energy Board)*[2]. The Federal Court of Appeal held that the Board's environmental assessment was limited to a consideration of the environmental effects of the sending of electricity from Canada by line of wire or other conductor. In response, RMEC submitted that the aforementioned aspects needed to be examined to reflect the spirit of the EARP Guidelines Order. It stated that it would be presenting arguments based on questions of law and jurisdiction in support of its position. By letter dated 19 January 1994, the Board reiterated its position and its refusal to consider evidence which related to the causal relationship between export applications and upstream environmental effects.

The Board made a finding that the ProGas, Shell and WGML applications were on the Exclusion List under the EARP Guidelines Order and no further assessment was required. Concerning the BNYP and Husky applications, the Board determined that they were not excluded from the EARP Guidelines Order process as new transportation facilities were required on TransCanada and Westcoast respectively. The Board found, pursuant to section 12 of the EARP Guidelines Order, that none of subsections 12(a) to (f) were applicable as there were no potentially adverse environmental effects associated with the sending of gas from Canada. The Board was of the view that the upstream environmental matters raised by RMEC were dealt with in other forums. Furthermore, there was not the necessary level of public concern to refer the export proposals to the Minister of the Environment for a public review by a panel pursuant to the EARP Guidelines Order.

In February 1994 the Board rendered its decision on the applications. Following the Board's decision on these applications, the Supreme Court of Canada released its decision on the appeal from the Federal Court of Appeal in the same case, now called *The Grand Council of the Crees (of Québec) and the Cree Regional Authority* v. *The Attorney General of Canada et al*[3] (the "*Hydro-Québec* decision"). It upheld conditions 10 and 11 appended to the electricity export licences granted to Hydro-Québec in the EH-3-89 Reasons for Decision dated August 1990. Those conditions stated:

> 10. This licence remains valid to the extent that
>
> (a) any production facility required by Hydro-Québec to supply the exports authorized herein, for which construction had not yet been authorized pursuant to the evidence presented to the Board at the EH-3-89 hearing that ended on 5 March 1990, will have been subjected, prior to its construction, to the appropriate environmental assessment and review procedures as well as to the applicable environmental

[2][1991] 3 F.C.R. 443.

[3][1994] 1 S.C.R. 159.

standards and guidelines in accordance with federal government laws and regulations;

(b) Hydro-Québec, following any of the environmental assessment and review procedures mentioned in subcondition (a), will have filed with the Board:

i) a summary of all environmental impact assessments and reports on the conclusions and recommendations arising from the said assessment and review procedures;
ii) governmental authorizations received; and
iii) a statement of the measures that Hydro-Québec intends to take to minimize the negative environmental impacts.

11. The generation of thermal energy to be exported hereunder shall not contravene relevant federal environmental standards or guidelines.

In the prior decision in that case[4], the Federal Court of Appeal had found these conditions invalid and struck them from the licences. The Federal Court of Appeal held that the Board was restricted to a consideration of the environmental consequences of the sending from Canada, by line of wire or other conductor, power produced in Canada. The Board had no jurisdiction to consider the environmental effects of the production of the electricity.

After the release of the Supreme Court of Canada decision overturning the ruling of the Federal Court of Appeal, by letter dated 7 March 1994, RMEC requested that the Board rescind the approved licences and review its decision with respect to upstream environmental effects.

As a result of the RMEC application, the Board, by letter dated 15 March 1994, found that the RMEC application raised a question as to the correctness of its decision. The Board decided to conduct a review, pursuant to section 21 of the Act, of its decision insofar as it related to the scope of the potential environmental effects and directly-related social effects of the exports. The parties were asked to address the following questions:

1. Are the decisions made by the Board, in respect of the scope of its obligations under the EARP Guidelines Order and the Act to consider the environmental effects and directly related social effects of the proposals, correct?

2. If the decisions are incorrect, would evidence submitted by the Applicants in response to:

(a) the questions set out in Appendix "B"; or

(b) the matters raised in the letter of RMEC dated 10 January 1994, a copy of which is attached as Appendix "C";

[4]*Supra*, note 2.

be necessary and sufficient to allow the Board to meet its obligations under the EARP Guidelines Order and under the Act to consider the environmental effects and directly related social effects of the proposals?

3. If the decisions are incorrect, is there any evidence, not referred to in question 2 above, that is necessary to allow the Board to meet its obligations?

A copy of the Board's letter communicating its decision to conduct a review and related appendices can be found in Appendix I of these Reasons for Decision.

Chapter 2

Summary of Submissions and Replies

As 46 Submissions and 33 Replies were filed and some of the submissions duplicated others, the Board has chosen to outline here what it regards as characteristic views presented by Interested Parties on the primary issues. Many parties chose to deal with the issues in a generic fashion, rather than as they related to each particular export application.

2.1 Submission of the Applicant: Rocky Mountain Ecosystem Coalition

The Applicant's submission was also made on behalf of the intervenors Diamond Hitch Outfitters, Northern Light Environmental Coalition[5] and the Old Sarcee-Uterus Clan. RMEC takes the position that the Board has jurisdiction to consider upstream environmental effects when deciding a gas export licence application. Paragraph 118(a) of the Act requires the Board to satisfy itself as to the existence of an exportable surplus and to have regard to "trends in the discovery of oil or gas in Canada". The *National Energy Board Part VI Regulations* (the "Part VI Regulations") provide for information to be filed in relation to pools, fields and areas from which the gas is to be produced. RMEC argued that since Parliament has directed the Board to consider upstream gas supply, the gas export provisions, when considered in light of the Act, regulations and rules as a whole, create the same broad environmental jurisdiction for the Board in relation to gas export licence applications as it has with respect to electricity exports. Furthermore, it submitted, the Board has a duty to regulate in the public interest and the integrity of the environment is undeniably a matter of great public interest and therefore relevant.

If the Act does not require the Board to take upstream environmental effects into account, then the EARP Guidelines Order does. The EARP Guidelines Order applies to the upstream environmental effects of a licence application if the Board has some jurisdiction over upstream matters and those environmental effects are relevant to the Board's consideration of the application. The EARP Guidelines Order, read together with the Act, makes those environmental issues relevant considerations under section 118 of the Act and also imposes additional duties on the Board. This approach is in line with the fact that a broad interpretation of the application of the EARP Guidelines Order should be taken. Furthermore, as noted in *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*[6] (the "*Oldman River Dam* decision"), once the initiating department has been given authority to embark on an assessment, that review must consider the environmental effects of the proposal on all areas of federal jurisdiction.

RMEC set out a list of upstream environmental effects that should be considered by the Board in its assessment, including base line environmental conditions in gas supply areas supporting the applications, regional, temporal and cumulative effects associated with the applications, and the environmental effects of greenhouse gas emissions and their impacts on Canadian international

[5]Northern Light Environmental Coalition also filed a submission on its own behalf.

[6][1992] 2 W.W.R. 193.

commitments with regard to global warming. RMEC submitted that the licences should be rescinded and, when all the required environmental information is filed, a new Hearing Order should be issued. A public hearing should be held with a minimum of 90 days' preparation time allowed to facilitate public involvement. It submitted that the Board will be compelled to conclude that the impacts of the proposals are unknown or significant and the proposals should either be referred for further study or to a public panel review. In light of the degree of public concern about the proposals, RMEC submitted that the Board should refer the applications under the EARP Guidelines Order to the Minister of the Environment for a public panel review.

In Reply, RMEC argued that exploratory activity should not be excluded from the Board's environmental assessment just because it is not facilities-related. The real issue is whether or not the exploration is occurring in part for export purposes. If so, the Board is required to examine the environmental implications of this activity. Furthermore, although there may be no new facilities constructed as a result of a proposal, there may be incremental facility development which occurs over the production life of the export-dedicated reserves. This development should also be subject to environmental assessment by the Board.

Case law suggests that, although the avoidance of duplication is a legitimate policy objective, it is rare that duplication alone will preclude the rigorous application of the EARP Guidelines Order since the pre-existing provincial reviews will often have missing elements, or will fail to take into account matters of federal concern. Moreover, the majority of provincial facilities undergo no environmental assessment because of the number and breadth of the statutory and regulatory exemptions at the provincial level.

2.2 Submissions of the Respondents

2.2.1 Brooklyn Navy Yard Cogeneration Partners, L.P.

BNYP provided its submission on the basis that it was without prejudice to its right to challenge the applicability of the EARP Guidelines Order to its gas export licence application. It argued that the Board erred in restricting the scope of its obligations under the EARP Guidelines Order. However, the Board's finding that BNYP's proposal is on the Exclusion List is valid because its proposal will require no new facilities.

The Supreme Court of Canada, in the *Hydro-Québec* decision, ruled that the Board has upstream environmental jurisdiction but stopped short of directing the Board as to how it ought to fulfil its environmental mandate. It confirmed that the Board has full jurisdiction to determine the process by which it discharges its environmental obligations. BNYP is of the view that evidence submitted by the Applicant in response to Appendix "B" of the Board's letter of 15 March 1994 could be sufficient to allow the Board to meet its obligations under the EARP Guidelines Order and the Act. However, such evidence is not necessary as the Board has a wide discretion to determine how it meets its EARP Guidelines Order obligations.

BNYP questioned the necessity for information with respect to new or modified facilities in the importing country or in relation to the end-use of the exported gas. It is of the view that the Board can only assess transboundary effects, and not those effects occurring wholly within the importing jurisdiction.

BNYP argued, in Reply, that the licences should not be rescinded. The public interest is not well served by delay and uncertainty, particularly when this threatens the continuing viability of Canadian gas supplies in export markets. As well, a panel review would be premature at this time as an initial EARP Guidelines Order determination is required before a panel review is initiated.

The auxiliary nature of the EARP Guidelines Order requires that the scope of its application be determined within the context of the federal legislation which establishes the decisions to be made. Some of the environmental effects suggested by other parties for consideration are too far down the causal chain to be relevant. The impacts which should be considered in an EARP Guidelines Order assessment must have a clear connection or nexus to the export of gas and should be impacts which are caused by approving the export.

2.2.2 Husky Oil Operations Ltd.

Husky argued that the reasoning in the *Hydro-Québec* decision does not apply to applications for licences to export natural gas. Absent the detailed and elaborate process of the statutes and regulations regarding electric power, it is doubtful that the Supreme Court of Canada would have concluded that the scope of the Board's jurisdiction over the export of electricity should include consideration of the environmental impact of new generation facilities. As there is no corresponding and equivalent process for gas export licence applications, the Board can only review the environmental consequences relating to the sending or taking of natural gas by means of a high pressure underground pipeline from Canada to the United States.

As to its own application, Husky will be serving its export requirements from its total Canadian pool of supply. The Board did not include in its analysis any reserves that might be proven by additional development. Therefore, the existing reserves and production facilities are sufficient. The Board had concluded that Husky required additional facilities on the Westcoast transmission system, but this is no longer the case as Husky has now taken an assignment of existing capacity. Consequently, Husky takes the view that its proposal qualifies for automatic exclusion under the EARP Guidelines Order.

If the *Hydro-Québec* decision does apply to gas exports, Husky is of the view that the questions in Appendix "B" would be appropriate if applied with due regard for both the minimization of duplication of environmental reviews and the avoidance of assessment beyond matters of federal concern. However, the Appendix "B" requests for information pertaining to end-use facilities represent an improper extension of the Board's screening process well beyond the scope contemplated by the EARP Guidelines Order.

In reply, Husky argued that the entitlement of the Board to consider, in a specific and limited context, upstream issues such as reserves, deliverability and surplus matters, does not mean that it can consider the environmental impacts of natural gas production and transportation facilities. The two are not connected. Furthermore, regulation by the Board in the public interest cannot inflate the jurisdiction of the Board to include matters not contemplated by the enabling legislation, and matters that are clearly within the jurisdiction of the provinces. Otherwise, Parliament would not have needed to include the provisions dealing with an environmental review of upstream electrical generation capacity in the Act and Regulations. Unlike the situation with electricity exports, a consideration of upstream impacts in a gas export context is not referable to any particular provision in either the Act or the

Regulations. This is the crucial distinction from which it follows that, correctly interpreted, the *Hydro-Québec* decision is rightly confined to exports of electric power.

To argue that, pursuant to the EARP Guidelines Order, an export proposal gives the Board jurisdiction to consider upstream impacts is to augment the application of the EARP Guidelines Order beyond any rational limits. There is no connection between the potential upstream impacts and the Board's decision making authority. As to the wholesale review of environmental effects requested by RMEC, this is precisely what the Supreme Court of Canada in the *Hydro-Québec* decision said should not occur.

Certain intervenors raised concerns about the depletion of Canadian gas reserves due to exports to the United States. This flies in the face of findings made by the Board based on the evidence before it. Moreover, since the Board issued the GH-5-93 Reasons for Decision, there has been no change in circumstances surrounding the Board's surplus determination or other public interest findings.

2.2.3 ProGas Limited

ProGas submitted that its applications were for a seven-year extension of the export licence granted to enable it to sell gas to Intercontinental, for two amendments to Licence GL-98 to reflect the replacement of exports to interstate pipeline customers and for eight individual export licences for direct exports to customers of the interstate pipelines (the "pipeline replacement sale applications"). All three applications involved amendments to export licences previously authorized by the Board. ProGas submitted that the Board found that it will continue to provide the gas for its applications from its existing contracted supply pool and the Board's projections of productive capacity demonstrated that ProGas currently has adequate gas supply to meet its total requirements to the year 2012.

No new facilities are required as a result of the proposed licences. Therefore, ProGas submitted, the Board was correct in finding that its applications fell within the Exclusion List. The question of whether the Board should or should not conduct an environmental assessment of upstream facilities is not an issue if the Board determines that new facilities will not be required.

Alternatively, the Board's original decision to limit the scope of its obligations was correct. The provisions in the Act relating to gas exports are different than those relating to electrical exports. Furthermore, the proposed Hydro-Québec facilities were substantial and located on and affecting areas of federal responsibility, with the result that federal departments would be initiating departments not just at the export licence stage, but also prior to upstream facility construction. Gas production and processing facilities, on the other hand, tend to be small and discrete and do not otherwise impact on areas of federal responsibility. Generally, a federal department would not be an initiating department under the EARP Guidelines Order prior to the construction of gas production facilities. Consequently, ProGas argued that the *Hydro-Québec* decision should not be relied upon to determine the scope of the Board's environmental assessments relative to gas exports.

The Supreme Court of Canada in the *Hydro-Québec* decision did not mandate the scope of the Board's environmental assessments under the EARP Guidelines Order but, in the particular circumstances of that case, concluded that the Board had jurisdiction to consider upstream environmental effects if it felt they were relevant. Therefore, ProGas argued, it is open for the Board to interpret and define the scope of its environmental assessment obligations in the particular circumstances of gas export applications. It has correctly done so in GH-5-93. Furthermore, the Supreme Court of Canada noted

that the Board's authority should be limited to matters of federal concern and that duplication should be avoided. Gas production facilities are more likely to be under exclusive provincial jurisdiction and upstream environmental matters are consequently more appropriately dealt with in provincial fora.

If the *Hydro-Québec* decision does apply to gas exports, ProGas takes the position that the questions set out in Appendix "B" are more than sufficient. To require an applicant to furnish information regarding any new or modified facilities for production, gathering, processing, transmission or distribution when the Government of Canada has no decision making responsibility exceeds the informational requirements of the EARP Guidelines Order. ProGas is of the view that, contrary to section 8 of the EARP Guidelines Order, duplication will result from the application of the EARP Guidelines Order to facilities located in Alberta, British Columbia and the United States of America ("United States"). Likewise, the requirement to furnish information regarding any effects external to Canadian territory, facilities in the importing country and end-use, when there is no direct transboundary environmental effect, is in excess of the information required to conduct a screening as defined in paragraph 4(1)(a) of the EARP Guidelines Order. Such a requirement is both onerous and inappropriate and may be contrary to international agreements currently in place.

ProGas argued that the Board should be entitled to rely on its previous findings where there has been no significant change in circumstances. In ProGas' case, there have been no changes in circumstances since these earlier findings, as applied generally to the pipeline replacement sale applications, and particularly to the Intercontinental project. ProGas should not be required to resubmit the information contained in Appendix "B" for the Intercontinental extension application as this project requires no new facilities. ProGas urged the Board to expedite the submission of the requested amendments to the Governor in Council. Similarly, for the pipeline replacement sale applications, no further information should be filed and no further assessment should be required. These licences are not new licences, but rather more in the nature of an amendment to a licence.

In Reply, ProGas noted that there is no logical or necessary correlation between issues of quantity and how the gas is discovered and developed.

2.2.4 Shell Canada Limited

Shell's position is that the decisions made by the Board are correct. The *Hydro-Québec* decision does not apply to exports of natural gas because that decision is based upon the procedural framework created by the Act for electricity exports. The Supreme Court of Canada held that the environmental impact of power generation facilities was relevant to the Board's decision because the Act specifically says it is. As the scope of the environmental enquiry was decided under the Act, it was unnecessary for the Supreme Court of Canada to deal specifically with the scope of the environmental assessment under the EARP Guidelines Order. In the event that the Board determines that the *Hydro-Québec* decision is applicable to natural gas exports, the questions set out in Appendix "B" are sufficient as they comply with paragraphs 4(1)(a) and (b) of the EARP Guidelines Order.

In Reply, Shell argued that RMEC makes an inexplicable leap from the alleged nexus between the requirement that the Board consider adequacies of supply and a consideration of upstream environmental effects to conclude that the Board has upstream environmental jurisdiction. This is not supportable, either expressly or by implication, when section 118 is read in context. If Parliament intended the Board to consider upstream matters when considering natural gas exports, it could have

used the same language as it did with respect to exports of electric power. It did not. Moreover, the Supreme Court of Canada, in the *Hydro-Québec* decision, consonant with the *Oldman River Dam* decision, indicated that there is nothing in the EARP Guidelines Order which limits or expands the scope of the environmental enquiry to be made by the Board beyond that authorized by the Board's enabling legislation. It is the enabling legislation which defines the parameters of the environmental enquiry.

Further, Shell argued that there is a distinction between statutory validity and constitutional validity and it is inappropriate to infer from the *Hydro-Québec* decision any constitutional implications respecting the Board's jurisdiction, unless there are parallel or equivalent regulatory regimes between electricity exports and gas exports.

In Shell's view, those applications requiring no new facilities and which fall within the ambit of the Board's Exclusion List, should be allowed to proceed unhindered. Shell noted that RMEC itself took the position that the Board is only required to consider new or modified facilities, not existing facilities

2.2.5 Western Gas Marketing Limited

WGML stated in its submission that its export proposals would require no new facilities. The exports are a continuation of long-term exports to ANR which have been unbundled under the FERC Order 636. Consequently, WGML submitted that in its case the Board's decision on the scope of the EARP Guidelines Order assessment was correct, because the Board's Exclusion List was properly applied to its application. Therefore, the WGML application should automatically proceed pursuant to subsection 12(a) of the EARP Guidelines Order.

More generally, WGML argued that the *Hydro-Québec* decision is grounded in a different and more exhaustive statutory regime than that which exists for gas exports. Therefore, it is not clear that the decision entitles the Board to consider upstream environmental effects for a gas export application.

Assuming the decision does entitle the Board to include upstream effects, the Supreme Court of Canada, in the *Oldman River Dam* decision, pointed out that "the necessary element of proximity ... must exist between the impact assessment process and the subject matter of federal jurisdiction involved". Therefore, the statute and procedure involved must be scrutinized to determine the subject matter at which they are aimed. In the case of an application to export gas, there are few factors suggesting proximity between the decision to grant a licence and the potential environmental effects of upstream development.

Unlike the Part VI Regulations for the export of electricity, there is no mention in the regulatory scheme for gas export applications of upstream environmental effects, nor any suggestion that the physical nature of the upstream facilities is an issue. This regulatory distinction rightly recognizes the substantial differences in the gas and electricity producing industries. For example, the Canadian gas industry is made up of hundreds of players in a competitive marketplace, whereas the electric power industry is composed of a few large regulated monopolies that control most aspects of the production, transmission, distribution, export and sale of electrical power. In the gas industry, it is not possible to trace actual or potential environmental effects in the producing areas resulting from a particular proposed gas export transaction. Many exports have no connection to production, other than contractual. A given export can rarely be traced to a particular well. This commercial and physical

reality indicates that it is not appropriate to assess upstream environmental effects under the EARP Guidelines Order.

In Reply, WGML notes, *inter alia*, that there should be no referral under the EARP Guidelines Order to the Minister of Environment for a public panel review and that there is no fiduciary duty owed by the Board to the Treaty 8 First Nations.

2.3 Submissions of the Intervenors

The intervenors fall broadly into three categories: those who argued directly or by implication that the Board's ability to consider upstream environmental effects established in the *Hydro-Québec* decision extends to gas exports; those who argued that the ability to consider these effects does not extend to gas exports; and those who are either of the view that the Board's ability to consider upstream environmental effects may extend to gas exports, or who have no opinion. In addition to the broad proposition regarding the application of the *Hydro-Québec* decision, the intervenors in each category often hold a number of common views that are not usually shared by intervenors in the other two categories. Lastly, some intervenors presented distinctive arguments that were submitted by them alone. It should be noted that a number of intervenors who are of the view that the *Hydro-Québec* decision applies to gas exports tendered identical submissions. Where intervenors sought to file submissions in the guise of Reply argument, the Board has not considered those submissions.

2.3.1 The *Hydro-Québec* Decision Applies to Gas Export Licence Applications

The intervenors who are of the view that the upstream environmental jurisdiction established by the Supreme Court of Canada in the *Hydro-Québec* decision applies to gas export licence applications, generally also argued that there is no difference between gas exports and electricity exports, either functionally, or in respect of their statutory and regulatory regimes. As to the question of duplication, many submitted that a consideration of upstream environmental effects with a gas export licence application would not be unnecessary duplication as provincial environmental assessment processes are ineffective or inadequate.

Many of these intervenors stated that the assessment of upstream environmental effects resulting from the gas export licences considered by the Board in this case ought to be submitted pursuant to the EARP Guidelines Order to the Minister of the Environment for a full panel review. They are of the view that the questions outlined in Appendix "B" are insufficient if the Board is to properly consider upstream environmental effects. Most intervenors in this category adopted RMEC's suggestions for additional considerations. Some had additional suggestions or no suggestions of other matters that should be taken into consideration. The most commonly suggested addition to the list in Appendix "B" was a consideration of the environmental effects of exploration. Additionally, a number of intervenors in this category also argued that, whether or not the *Hydro-Québec* decision applies to gas exports, the EARP Guidelines Order independently requires the Board to take upstream environmental effects into consideration when granting a gas export licence.

Agreeing with the RMEC, the **Canadian Environmental Law Association** ("CELA") argued that the Board exceeded its jurisdiction by purporting to approve export licences without considering upstream environmental effects. The list of questions in Appendix "B" does not go far enough and the Board should require applicants to assess all potential environmental effects, whether local, regional, or

global. Furthermore, the Board should consider, as part of its obligations under the EARP Guidelines Order, the prospective impact of the energy exports on efforts to encourage the development of efficiency, conservation and renewable energy options both in Canada and in the United States.

Because the Act requires the Board to have regard to all considerations that appear to it to be relevant, the differences in the nature of the gas and electrical industries are insufficient to justify a restriction in the scope of environmental considerations with respect to gas exports. Indeed, even where a gas export appears not to require any new facilities, because natural gas is non-renewable any export will inevitably require the future development of facilities.

CELA also submitted that the *Hydro-Québec* decision allows the Board to consider downstream impacts. Furthermore, a downstream assessment is an explicit obligation under paragraph 4(1)(a) of the EARP Guidelines Order. It requires the Board to consider not only the transboundary environmental impacts, but also the downstream environmental impacts in the end-use market.

Frank Abramonte, a United States lawyer, submitted that a decision to grant an export permit cannot be made in a vacuum. Considering the environmental effects of related parts of a larger project in a piecemeal fashion raises the stakes at each stage of the project so that the denial of a permit or licence becomes more difficult, and consequently less likely, the further a project progresses.

The **Alberta Greens** submitted that the *Hydro-Québec* decision clearly applies to gas exports. Functionally, there is no difference between exports of electricity and gas: the regimes governing both are equivalent. Moreover, it does not matter whether or not new facilities are required to facilitate the export, because the export will cause a depletion in the gas reserves and a consequential acceleration in the development of new reserves.

The **B.C. Energy Coalition** ("BCEC") rejected the suggestion that a consideration of upstream environmental effects is unnecessary where no new facilities are required. It argued that, even where no new facilities are required, the social effects of export at prices far below long term average values, acid rain and greenhouse gas emissions should still trigger a review. The BCEC drew an analogy between the natural gas industry and the cod fishery, arguing that exports of cod at low prices caused an accelerated depletion of the cod stocks. Speaking to the issue of duplication, the BCEC is of the view that the mere fact that the provinces have some jurisdiction in the area of environmental assessment does not mean that the Board can abdicate its responsibility.

The **Northern Light Environmental Coalition** is primarily concerned with the consideration of greenhouse gas emissions. Although it recognized the statutory differences between the regulation of gas and electric power exports, it argues that because the Board must satisfy itself as to the existence of an exportable surplus of gas, having regard to trends in the discovery of oil or gas in Canada, Parliament has recognized a clear nexus between the export of gas and upstream exploration and production activities.

The Grand Council of Treaty 8 Nations submitted that during the signing of Treaty 8 in 1899, the Crown promised the First Nations that the environment in which they live would be kept in a state that would allow for the continuation of their lifestyles in perpetuity. The First Nations still retain an interest in the lands which make up their traditional use areas, and they argued that there is no adequate rationale to separate the export of natural gas from the impacts which that export exerts on the environment and people in the course of its collection. The Board, as a Crown agent, owes a

fiduciary duty to First Nation Peoples. Consequently, the Board must take a comprehensive and reasoned approach in reviewing the full implications of natural gas exports, including all upstream environmental effects.

An American organization, the **Northwest Conservation Act Coalition** ("NCAC") wrote that to hold that the *Hydro-Québec* decision does not apply to gas exports would be contrary to the public interest. Moreover, a consideration of upstream environmental effects by the Board would not result in duplication, NCAC argued, because there is no effective provincial environmental assessment process.

The **Riel Policy Institute** argued that because provincial reviews assess and focus on different matters, use different standards and have different objectives, it would be wrong for the Board to jurisdictionally narrow its scope of review by only reviewing environmental impacts clearly within the federal sphere. Likewise, it would be wrong for the Board to physically narrow the scope of the environmental effects it will review to include only new or future facilities.

Speak Up for Wildlife Foundation submitted that the *Hydro-Québec* decision clearly applies to gas exports, and that in light of the decision, all gas export applications since GH-5-89 should be opened up to public review, and there should be a moratorium on all further export licences.

Enserch Development Corporation ("Enserch") is opposed to Speak Up For Wildlife Foundation's submission that all export permit applications since GH-5-89 be opened to public review. Enserch argued that although the Board was incorrect in taking the position that upstream environmental effects did not fall within its jurisdiction, the decision in GH-5-93 should stand, since the Board clearly indicated that it was satisfied that the upstream environmental effects were adequately addressed in other fora. Where no new facilities are required, the EARP Guidelines Order Exclusion List should still be valid.

2.3.2 The *Hydro-Québec* Decision Does Not Apply to Gas Export Licence Applications

The primary rationale given by intervenors arguing that the upstream environmental jurisdiction established in the *Hydro-Québec* decision does not apply to gas exports, is based on the differences between the statutory and regulatory regimes governing exports of gas and electricity. Specifically, the Act and Regulations contemplate the consideration of environmental effects with respect to licences to export electricity, but not with respect to licences to export gas.

Another common theme among this category of intervenors is the importance of recognizing the fundamental differences between the gas and electricity producing industries. The gas production industry is populated by a large number of producers, while the electricity production industry is typically monolithic and is dominated by a very small number of monopolistic producers. Likewise, while gas for export can rarely be traced to a particular well and comes out of existing pools, this is not so for exports of electrical power. Electricity cannot be stored, and it is easier to identify the source of exported electrical power.

The majority of intervenors in this category are of the view that an application for a gas export licence is an inappropriate forum for a consideration of the upstream environmental effects associated with the exploration for, and development of, gas. The proper time for this, they argued, is at the time of exploration and drilling, and is best done provincially. The environmental assessment process does not belong at the end of the gas supply process, but at the beginning.

It is common ground for this group of intervenors that the EARP Guidelines Order in no way compels the Board to consider the upstream environmental effects of gas exports. As the Board has the sole discretion to decide what is a relevant consideration under the Act, it would be incongruous if the effect of the EARP Guidelines Order were to fetter this exercise of discretion. Moreover, to allow the Board to take account of upstream environmental effects where such effects are already assessed provincially would be an unnecessary duplication and in contravention of section 5 of the EARP Guidelines Order.

While a few of the intervenors in this category, such as **Tenaska Gas Corporation** ("Tenaska Gas"), are of the view that if the Board were to consider the upstream environmental effects of gas exports, the list of questions in Appendix "B" is excessive, the remainder of the intervenors in this category submitted that the list of questions in Appendix "B" is sufficient and no additions are necessary. All intervenors in this category are opposed to referring the proposals to the Minister of Environment for a public panel review pursuant to the EARP Guidelines Order. On this point, Tenaska Gas noted that a well-orchestrated effort by a select group of individuals recycling a single theme does not constitute the significant public concern necessary for a reference to a panel review.

Alberta Natural Gas Company Ltd argued that, while the EARP Guidelines Order creates a superadded duty, it carves out no new jurisdiction or authority for the Board, nor ought it to be interpreted as interfering with the Board's broad discretion to determine what considerations are relevant. With gas, there is usually no nexus, either in time or ownership, between the development of the resource and its export. Additionally, in an application for a gas export licence, the Board requires a demonstration that the applicant has sufficient dedicated reserves under contract for the full term of the licence. Consequently, when an exporter applies to the Board for a licence, any potential environmental effects associated with the development of gas reserves will have already occurred.

The common submissions of **Home Oil Company Limited, Bow Valley Energy Inc., Canadian Occidental Petroleum Ltd. and Morrison Petroleums Ltd.** argued that the Board need not consider the upstream environmental effects of gas exports. The *Hydro-Québec* decision, they submitted, does not hold that the Board must or even should consider upstream environmental effects, but merely that it can. These intervenors pointed to the differences between the gas and electrical industries, noting that the linkage between a given well and a given export is usually non-existent. Furthermore, if the Board were to consider upstream environmental effects, the Board ought to investigate those effects on a generic as opposed to a specific basis, and set general standards. The Board should not require specific direct evidence of environmental effects as suggested by RMEC.

TransCanada interpreted the *Hydro-Québec* decision as only applying to extend the scope of the Board's review upstream if the project could have adverse environmental impacts on an area of federal responsibility or, in the context of electric power exports, where the project is so intertwined with a proposal falling within an area of federal responsibility that it is, in effect, the same undertaking. TransCanada argued that in GH-5-93, there is no head of federal power upon which a federal initiating department could find the necessary jurisdiction to warrant a consideration of upstream environmental effects. Contrary to the assertions of RMEC and some intervenors, the obligation of the Board to consider trends in exploration does not compel it to consider upstream environmental effects.

2.3.3 The *Hydro-Québec* Decision May Apply to Gas Export Licence Applications

Intervenors who fall into this category stated no clear opinion on whether the upstream environmental jurisdiction established in the *Hydro-Québec* decision applies to gas exports and, in some cases, are focused on a concern which might particularly affect them.

The **Alberta Petroleum Marketing Commission** ("APMC") argued that the *Hydro-Québec* decision does not change the scope of the Board's inquiry where no new facilities are required. Indeed, if the decision is interpreted as being grounded on the specific statutory and regulatory scheme for electrical exports, it may not affect gas export licence applications at all. However, if the decision is interpreted to apply to energy exports generally, the Board's decision in GH-5-93 would be incorrect, at least where new facilities would be required. The automatic exclusion of all export projects not requiring new facilities from the EARP Guidelines Order screening process is still justified, argued the APMC, since the *Hydro-Québec* decision has not altered the basis upon which the Board developed the original Exclusion List. If this is so, no new evidence need be submitted by the applicants for export licences.

A requirement for the submission of specific environmental evidence, as suggested by RMEC and some intervenors, would contravene section 5 of the EARP Guidelines Order as an unwarranted duplication. The admonition against duplication of processes in the *Hydro-Québec* decision and in the EARP Guidelines Order precludes the Board from conducting a far-ranging review of the environmental effects within provincial legislation and control. If the Board knows that provincial reviews are conducted, understands their nature and scope, and is satisfied that they cover all areas of federal concern, the Board is in no way constrained from finding that potentially adverse effects are insignificant or mitigable solely on the basis of the provincial environmental assessments.

In response to other intervenors' comments calling for a public panel review under the EARP Guidelines Order, the APMC argued that an environmental assessment of the upstream impacts should not be referred to a panel review because there has not been a sufficient degree of public concern demonstrated. Moreover, because of the differences in the statutory and regulatory schemes between gas and electrical exports, the APMC submitted that it is reasonable that the breadth of the enquiry under the EARP Guidelines Order be delineated having regard to the statutory framework in place for the environmental obligations of an initiating department. In cases where an investigation of upstream environmental effects is warranted, the questions in Appendix "B" are sufficient.

Even where there are new facilities directly under the Board's jurisdiction, **Westcoast** is of the opinion that the proper time to consider environmental effects is under Part III of the Act, which deals with the construction and operation of pipelines, not under Part VI which deals with exports.

The primary concern of the **British Columbia Ministry of Energy, Mines and Petroleum Resources** is that of duplication. Although it has no opinion on whether the *Hydro-Québec* decision extends to gas exports, it submitted that the questions in Appendix "B" are too broad and would result in unnecessary duplication. The Ministry urged the adoption of a collaborative effort between the provinces and the Board in order to avoid duplication. Likewise, the **Province of Saskatchewan Ministry of Energy and Mines** is of the view that the Board should rely upon the environmental safeguards provided by the provinces in regulating the production of oil and gas.

St. Lawrence Gas Company, Inc. is opposed to the suggestion by some intervenors that downstream effects may be considered as a result of the *Hydro-Québec* decision and argued that paragraph 4(a) of the EARP Guidelines Order in no way requires the consideration of effects that may arise in the importing country as a result of construction and operation wholly situated in the importing country.

Chapter 3

Views of the Board

The National Energy Board is given the authority to regulate the export of gas pursuant to the federal trade and commerce power found in section 91(2) of the *Constitution Act 1867*. Sections 116 to 119.01 of the Act confer this authority on the Board and include the ability to grant, suspend and revoke a gas export licence. These sections are set out in full in Appendix II attached to these Reasons.

Unlike the statutory provisions established for the export of electricity,[7] there is no specific environmental mandate given to the Board by the Act or the regulations for the export of gas. Nevertheless, despite the absence of a specific environmental statutory provision for gas export applications, parties have argued that the Board has a similar mandate under the Act to consider the upstream environmental effects of gas exports. Some parties base these arguments on the breadth of the Board's ability to regulate in the public interest. Others argue that since the Board can examine the adequacy of the supply of gas, it can also examine upstream environmental effects.

It has been established by the Courts that an ability to consider the environmental effects of an export can be tied to the federal trade and commerce power without offending constitutional principles, if the ultimate decision made is within the scope of the enabling federal power. As Justice La Forest pointed out in the *Oldman River Dam* decision[8] "...it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting." The Board recognizes that it is a decision making authority as defined in the EARP Guidelines Order. As a result, and because of its general ability to consider the environmental effects of an export proposal, it has undertaken screenings of the potential environmental effects and directly related social effects of proposals for licences to export gas since the decision of the Federal Court in *Canadian Wildlife Federation Inc.* v. *Canada (Minister of the Environment)*[9]. Therefore, the Board finds that the place to start its analysis is with a consideration of the scope of the assessment to be undertaken pursuant to the EARP Guidelines Order.

None of the parties argued that the EARP Guidelines Order did not apply to the Board. Similarly, in the *Hydro-Québec* decision, it was accepted by all parties that the Board was an "initiating department", meaning "any department that is, on behalf of the Government of Canada, the decision making authority for a proposal."[10] In section 2, the EARP Guidelines Order defines "proposal" to include, "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility." As an initiating department with a proposal before it, section 3 of the EARP

---

[7]The Act, s. 119.02 to s. 119.094, Part VI Regulations, C.R.C. 1978, c. 1056, s. 6(2)(y), (z)(i), (aa) and 15 (m). The relevant sections of the Act and Regulations are set out in Appendix III attached to these Reasons.

[8]*Supra*, note 6 at 238.

[9][1989] 4 W.W.R. 526, affirmed by [1990] 2 W.W.R. 69.

[10]EARP Guidelines Order, s. 2.

Guidelines Order requires the Board to "ensure the environmental implications" of the proposal are "fully considered, as early in the planning process as possible and before irrevocable decisions are taken." To trigger an assessment, section 6 of the EARP Guidelines Order requires that the proposal must be undertaken directly by an initiating department, have the potential to have an environmental effect on an area of federal responsibility, involve a financial commitment by the Government of Canada, or be on lands, including the offshore, that are administered by the Government of Canada. Given that gas exports have the potential to have an environmental effect on an area of federal responsibility, the Board undertook an assessment of the gas export licence applications before it in GH-5-93.

The Board is of the view that what is at issue in this instance, is the scope of the environmental assessment to be undertaken of gas export licence applications. More particularly, do the environmental implications of a gas export proposal to be considered under the EARP Guidelines Order include the environmental effects of related activities or projects, such as upstream production, processing and transportation facilities or downstream facilities?

Although Justice La Forest in the *Oldman River Dam* decision did not address the issue of when the environmental effects of related activities should be included in an assessment, he noted that there must be the "necessary element of proximity"[11] between the environmental impact assessment process and the subject matter of federal jurisdiction involved. He found that the impact assessment can affect only matters that are "truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction".[12] In the *Hydro-Québec* decision, Justice Iacobucci, of the Supreme Court of Canada, found that when assessing a proposal to export electricity, the scope of the Board's inquiry was not limited "to the environmental ramifications of the transmission of power by a line of wire, [nor did it] permit a wholesale review of the entire operational plan of Hydro-Québec."[13] In the Board's view these statements by the Supreme Court of Canada indicate that there must be a necessary connection or proximity between the environmental impacts to be assessed and the federal decision making power being exercised.

In this case, the federal decision making power exercised by the Board which triggers the operation of the EARP Guidelines Order is the ability to grant a licence to export gas. Licences are permissive and allow commercial transactions to occur that result in the sending of gas from Canada. They are not instruments which authorize specific exploration activity, or the construction and operation of specific facilities for gathering, processing and transportation, and they are not irrevocable. Furthermore, the denial of a particular licence would not necessarily result in certain facilities not being built or certain activities not being undertaken.

In examining the nature of the connection between this decision making power and the environmental effects of upstream facilities and activities, the Board considers it important to note the characteristics of the gas industry. An understanding of the structure of the industry in North America is necessary to fully comprehend the movement of natural gas from the supply basin to the marketplace. The

---

[11] *Supra*, note 6 at 243.

[12] *Ibid*.

[13] *Supra*, note 3 at 195.

Canadian natural gas industry is concentrated in the Western Canada Sedimentary Basin ("WCSB") which spreads some 1 152 000 square km (450,000 square miles) over, primarily, Alberta, British Columbia and Saskatchewan. It is a mature industry with a developed infrastructure including more than 40,000 producing gas wells, approximately 650 gas processing plants and more than 224 000 km (140,000 miles) of pipeline to gather, transport and distribute the gas to market. In 1993, in excess of 3,000 new gas wells were added to the infrastructure.

Total natural gas sales in 1993 amounted to approximately 127 10^9m^3 (4.5 Tcf). Some 64 10^9m^3 (2.3 Tcf) was consumed domestically, 40 10^9m^3 (1.4 Tcf) was exported under long-term licence arrangements, and another 23 10^9m^3 (0.8 Tcf) was exported under short-term arrangements. In the same period, 1 103 10^6m^3 (39 Bcf) of natural gas was imported into Canada. Since 1985, the North American natural gas marketplace has been progressively deregulated and as a result, the volume of gas exported from Canada and imported into Canada has increased significantly.

The natural gas industry is comprised of producers, supply aggregators, transporters, distributers, marketers, brokers and end-users all acting independently in a free North American natural gas market. Their activities range from geological and geophysical investigation, through drilling, production, processing, marketing, transportation and storage, to retail distribution and consumption. The time that passes between the initiation of gas exploration and the marketing of any gas found can vary from several years to several decades. During that time there may be many complex intervening activities and natural gas may change ownership several times: at the wellhead; at the processing plant inlet or outlet; at the interconnections between different natural gas pipelines; at the city gate or at the location of the end-user. Since natural gas is a fungible commodity, and because of the integrated nature of the North American natural gas pipeline network, gas can be injected into this network at any one of thousands of pipeline receipt points and removed from the network at any one of thousands of pipeline delivery points.

The above enumerated activities can involve a number of jurisdictions. In general, upstream activities such as exploration, production, gathering and processing are regulated by the provinces which have resource management responsibilities under the Constitution. Interprovincial and international transportation is regulated by the Board and distribution within exclusive franchise areas is regulated by provincial authorities. Interstate transportation and storage within the United States are regulated by the FERC, while distribution is generally regulated by the individual states.

When examining a gas export licence application, the Board takes into account a number of public interest considerations including the appropriate length of the term of an export licence having regard to, among other things, the adequacy of the gas supplies available to the export licence applicant to support the applied-for volumes over the requested licence term.[14] The gas supplied to meet the requirements of the export is usually provided in one of four ways: dedicated supply, non-dedicated supply, corporate supply and aggregator supply. With a dedicated supply portfolio, specific gas pools, lands or wells which will provide the gas to be exported, are identified in the gas sales contract. With non-dedicated supply, an applicant chooses to rely on an identified list of pools to supply its gas export proposal, but notes that the pools are identified to satisfy regulatory filing requirements and may not, ultimately, be the pools relied upon for the export sale. A corporate supply portfolio is

[14]As is described by the Board in the "Proposed Changes to the Application of the Market Based Procedure" GHW-1-91, May 1992.

comprised of a listing of pools from which the applicant intends to serve all of its contractual commitments including export, and may contain some or all of the gas supply controlled by a producer. The final type of supply portfolio, aggregator supply, is similar to a corporate supply portfolio, with the difference that it is usually comprised of a large collection of individual gas pools operated by many different producers.

As earlier noted, the Board is of the view that to include a consideration of the environmental effects of upstream projects or activities in the assessment of the environmental implications of a gas export licence application, a necessary connection or proximity must be found between the proposal to export gas and the projects or activities occurring upstream of the international border. The above-described characteristics of the natural gas industry indicate a number of elements can be examined to help the Board determine if this necessary connection exists. Some of these elements can be considered in a generic fashion, while others must be examined carefully in light of the facts of each application.

If the gas that is transported across the international boundary, pursuant to an export licence, could be traced to specific facilities, that fact would be determinative of the issue and the necessary connection between the export proposal and the upstream facilities would be established. Due to the fungible nature of the commodity, such instances are rare. The Board recognizes that in most cases it is virtually impossible to trace a molecule of gas back from its consumption in a particular domestic or export market to a specific exploration, production, processing, marketing, transportation, storage or distribution activity. Therefore, with few exceptions, it is not a determinative element for the establishment of a connection that the actual gas exported be traceable from the international border to any related facility.

The fact that the upstream facilities are generally within provincial jurisdiction is not, in itself, determinative in establishing the necessary connection. As was pointed out by the Supreme Court of Canada in the *Hydro-Québec* decision, there is room for both federal and provincial environmental assessments of upstream facilities to occur. The Board notes that the jurisdictional element is of importance as a prerequisite to the applicability of the EARP Guidelines Order. To be within the scope of an environmental assessment under the EARP Guidelines Order, any upstream facilities or activities must have the potential to have an environmental effect on an area of federal responsibility. If this potential does not exist, there is no ability to include in the scope of the assessment the upstream facilities or activities.

The time at which an activity takes place is an element which is determinative to the establishment of the necessary connection between the export proposal and the upstream facilities and activities. One of the goals of the EARP Guidelines Order, as described in section 3, is to ensure that an environmental assessment occurs "as early in the planning process as possible" and "before irrevocable decisions are taken". For many export licence applications, this fundamental goal cannot be met as they are underpinned by development that has occurred, in some cases, years if not decades earlier. Often, the Board's activity under the EARP Guidelines Order as a decision making authority in respect of a gas export licence takes place long after any planning process involving the related upstream facilities or activities. Many of the activities which underlie the gas export business sector will have already occurred prior to the filing of an application for a licence to export gas. Indeed, in many instances, including some in this case, the planning process required for the construction or undertaking of related upstream facilities or activities, was in all respects complete at the time of the application. In these circumstances, there is little or no practical utility in attempting an initial

assessment, much less a panel review, at the licensing stage. As a result, only facilities not yet constructed, or activities not yet undertaken can generally be subject to environmental assessment when the Board considers an export licence application.

Some parties have suggested that the Board should consider the environmental effects of all upstream exploration and development in any way related to the proposal to export gas, on the basis that an increase in the export of gas by the proponent is a driving force behind these upstream activities. The Board recognizes that there are broad and varied environmental consequences of the exploration, development, production, processing, transportation and use of natural gas in Canadian domestic or export markets. However, the Board cannot use its authority under the EARP Guidelines Order and Part VI of the Act to carry out a wholesale review of those environmental consequences. To do so, would, in the Board's view, ignore the decision of the Supreme Court of Canada in the *Hydro-Québec* case where Justice Iacobucci stated that the Board's ability to inquire into the environmental effects of a proposal does not permit "a wholesale review of the entire operational plan"[15] of the proponent. If the Board were to undertake the exercise proposed by some of the intervenors, it would be undertaking the very thing advised against by the Court. In some instances the Board would review not only the entire operational plan of the proponent, but that of numerous other participants in the natural gas sector. The Board is of the view that this cannot be the intent or purpose of the EARP Guidelines Order.

Whether upstream facilities or activities are so closely tied to the export proposal as to fall within the scope of the Board's assessment will require the exercise of judgment based on the facts in each case. In general, however, the Board is of the view, based on its knowledge of the gas industry, that the necessary connection or proximity will usually not exist to include upstream production facilities or activities in the scope of an environmental assessment when the applicant intends to draw on supply from some of a number of possible sources within the WCSB. In that situation a direct connection between the upstream production facilities or activities and the requirements of the export proposal cannot normally be established. ProGas, for example, by the Board's estimate, currently draws on some 3,000 wells in 1,000 pools in various stages of development for its total gas supply requirements. WGML's supply portfolio involves over 8,500 pools and approximately 20,000 wells. Over time, these two aggregators, like others, will be modifying their supply arrangements by decontracting some pools, adding new ones and adjusting contract levels, among other activities.

Relying on this general examination of the elements that can be considered to establish the necessary connection or proximity, the Board has examined the specific facts underpinning each of the applications under review. It has done so to assess the nature of the connection between the gas export licence application and upstream facilities and activities and to decide if the scope of the environmental assessment should be expanded to include the environmental effects of those upstream activities or facilities. The results of this examination are described below.

Brooklyn Navy Yard Cogeneration Partners, L.P.

The gas to be exported under the proposal by BNYP will be supplied from the Alberta supply pools of Crestar and PanCanadian. These pools consist of proven reserves and no pools are dedicated to the export licence. The estimates of reserves and projections of productive capacity indicated that there

[15] *Supra*, note 3 at 194-95.

would be adequate gas supply over the proposed export term. The gas supply in this case is not identifiable and could come from any number of sources at any given time.

BNYP submitted that new transportation facilities will be required on the TransCanada system to transport the gas to the international boundary for export. As the TransCanada system is under the Board's jurisdiction, the Board is required by the EARP Guidelines Order and its own regulatory filing requirements,[16] to undertake an environmental assessment of those facilities as part of TransCanada's application for their construction and operation. In light of the underlying principle of the EARP Guidelines Order as found in sections 5 and 8, that duplication in assessments is to be avoided, the Board will consider the environmental effects of those facilities as part of the proceedings in GH-2-94.[17] In the result, with the exception of the aforementioned TransCanada facilities, the Board finds that the necessary connection or proximity between the proposal to export gas and any upstream gas facilities and activities is insufficient to expand the scope of the environmental assessment to include upstream facilities or activities. As a result, no further environmental assessment of the BNYP application is necessary.

Husky Oil Operations Ltd.

Husky submitted that the gas required to meet its export requirements will be supplied from its British Columbia corporate supply pool. No specific pools are contractually dedicated to the export requirements. Husky stated that reserves would be added to its gas supply as a result of drilling conducted on its submitted fields during 1994. One additional well had been drilled and two more were then being drilled. The Board acknowledged this drilling but did not include it in its quantitative assessment since the data remain confidential. Husky demonstrated that it had sufficient reserves in B.C. to meet its requirements and sufficient productive capacity for the majority of the proposed licence term. Husky has access to, and the ability to move, gas from its Alberta corporate supply, if required, through its Boundary Lake gas plant. Husky had originally required new facilities on Westcoast to transport the export. In its submission in this review it advised that those facilities were no longer required.

The Board finds that in this case there are insufficient facts for it to decide if the necessary connection or proximity exists between the application and upstream facilities or activities. Therefore, the applicant will be required to file evidence to enable the Board to decide the scope of its assessment under the EARP Guidelines Order. Husky shall do so by documenting whether there is a direct connection between any new upstream facilities or activities and the requirements of the export proposal. If so, Husky shall describe the facilities or activities related to its export proposal. Where these upstream facilities or activities may have an environmental effect on areas of federal jurisdiction, sufficient information should be filed to enable the Board to undertake an assessment of the environmental effects of the upstream facilities or activities on areas of federal jurisdiction and their directly related social effects.

[16]Part VI of the Schedule to the Rules of Practice and Procedure as found in SOR/78-926, 8 December 1978.

[17]The hearing of the application for these facilities is set to commence in Calgary, Alberta on 5 July 1994.

ProGas Limited

All of the applications of ProGas rely on gas from the company's contracted supply pool which consists of approximately 600 gas purchase contracts with about 160 producers in both Alberta and British Columbia and covers approximately 1,000 pools. The Board's estimate of reserves exceeded ProGas' total requirements by approximately 17.4 10^9m^3 (600 Bcf) and its projection of productive capacity indicated adequate gas supply throughout the proposed export term. No new transportation facilities were required. In the result, the Board finds that the source of the gas to be exported cannot be identified and the necessary connection does not exist to include a consideration of the environmental effects of upstream facilities and activities in the scope of the assessment of the export proposal. As a result, no further environmental assessment is necessary.

Shell Canada Limited

In its application, Shell relied on gas from its West Bullmoose Baldonnel pool in northeast British Columbia to supply a portion of its export requirements. This pool has one well and Shell indicated its intention to drill a second well to enhance the pool's deliverability. The existing well is currently producing to short term sales and is expected to do so until the start up of the export project. By that date, Shell is expected to have only 60 percent of the reserves required for its applied-for export licence. As well, the Board estimated that Shell would only be able to meet the applied-for volumes for three years of the proposed fifteen year term. Shell sought to rely on future exploration and development in northeastern British Columbia and its Alberta corporate reserves as sources of supply for the export volumes. Shell does not have transportation in place to enable it to rely on Alberta reserves and it did not provide any information on its B.C. exploration program. The Board did not include these potential sources in its analysis and reduced the applied-for term volume of gas by one third. No new Westcoast transportation facilities were required.

Given the identification of a new well and related facilities needed to meet the requirements of the export proposal, the Board therefore finds that there is the necessary connection between the upstream facilities or activities that may be constructed or undertaken by the proponent and the gas export proposal so that the scope of the Board's environmental assessment should be expanded to include an assessment of these facilities or activities. As these facilities or activities may be constructed or undertaken at some time in the future, the assessment cannot be conducted at this time. Therefore, the Board will require, as a condition of the licence, where new upstream facilities or activities may have environmental effects on areas of federal jurisdiction, that Shell file with the Board prior to construction, sufficient information about the environmental effects on federal areas of jurisdiction and the directly related social effects of these facilities or activities for the Board to reach a finding under section 12 of the EARP Guidelines Order.

Western Gas Marketing Limited

The gas to be exported by WGML to fulfil its export requirements would be provided from its contracted supply pool and contracted reserves in Alberta, which encompass 8,500 pools and approximately 20,000 wells. The Board's estimate of reserves exceeded the applicant's total contracted requirements by over 60 percent. The Board's projection of productive capacity indicated adequate gas supply throughout the proposed export term. No additional transportation facilities were required to move the gas to the international boundary. The Board finds in this case that the necessary

connection between the upstream facilities or activities and the gas export proposal has not been established. As a result, no further environmental assessment is necessary.

The foregoing deals with the fact situations in the present proceeding. The Board will not attempt to outline possible additional and different fact situations in regard to upstream supply, processing and transportation arrangements or indicate how it would otherwise discharge its responsibilities under the EARP Guidelines Order. Applicants in future proceedings should file evidence to enable the Board to decide the scope of its assessment under the EARP Guidelines Order, having regard to the above decisions. Applicants shall do so by documenting whether there is a direct connection between any new upstream facilities or activities and the requirements of the export proposal. If so, the applicant shall describe the new upstream facilities or activities related to the export proposal. Where these upstream facilities or activities may have an environmental effect on areas of federal jurisdiction, sufficient information should be filed to enable the Board to undertake an assessment of the environmental effects of the upstream facilities or activities on areas of federal jurisdiction and their directly related social effects. Information on the manner in which provinces exercise their jurisdiction over natural gas development and the effects of this activity on the environment can be useful to the Board in considering the environmental effects of an export proposal and applicants may rely on this information in their filings. However, in considering the environmental effects on areas of federal jurisdiction, the Board must reach its own conclusions.

A number of parties submitted that the Board should also assess the environmental effects of the use of the gas in the recipient American states. The Board notes that section 4(1)(a) of the EARP Guidelines Order requires an initiating department to include in its consideration of a proposal "the potential environmental effects of the proposal and the social effects directly related to those environmental effects, including any effects that are external to Canadian territory." In the Board's view this does not give the Board jurisdiction to consider the environmental effects of the end-use of the gas. Principles of international comity have led to a rule of interpretation that Canadian statutes do not have extraterritorial effect unless such an extension can be found expressly or implicitly in the wording of the legislation. In this case, the enabling legislation, the *Department of the Environment Act*[18], does not expressly or impliedly extend the applicability of the EARP Guidelines Order to require an assessment of environmental effects occurring in another jurisdiction. Similarly, the language of section 4(1)(a) is also insufficient to do so. The reasonable interpretation of section 4(1)(a) of the EARP Guidelines Order, in the Board's view, is the requirement for an assessment of transboundary effects of upstream facilities located in Canada.

A number of Interested Parties have asked that the Board submit these gas export licence applications to the Minister of the Environment for referral to a public panel review under the EARP Guidelines Order. Much of the nature of the concerns of these Interested Parties relates to matters outside the mandate of the Board under the EARP Guidelines Order. The Board has determined, at this time, that the proposal by Shell is the only one subject to an assessment of upstream environmental effects and that it is not necessary to refer this proposal to the Minister of Environment. It has attached a condition to the licence that will enable the Board to undertake an environmental assessment when the necessary information is available. As the Board does not yet know if any further environmental assessment of the Husky proposal is necessary, it is premature to consider whether its proposal should be referred to the Minister of Environment for a public panel review.

[18]R.S.C. 1985, c. E-10.

The Grand Council of Treaty 8 Nations has argued that the Board has a fiduciary duty toward the Treaty 8 Nations and an obligation to safeguard their traditional lands. The Board notes that the Supreme Court of Canada, in the *Hydro-Québec* decision, dismissed a similar argument made on behalf of the Grand Council of the Crees (of Québec) and the Cree Regional Authority.

Chapter 4

Decision

The Board would answer the questions posed in this review as follows:

1. Are the decisions made by the Board, in respect of the scope of its obligations under the EARP Guidelines Order and the Act to consider the environmental effects and directly related social effects of the proposals, correct?

The decisions made by the Board in respect of the scope of its obligations under the EARP Guidelines Order and the Act to consider the environmental effects and directly related social effects of the proposals were not correct to the extent that the Board's considerations were limited to the transportation of gas from Canada by a pipeline. The Board has jurisdiction to consider the environmental effects and directly related social effects of upstream facilities and activities but only where, in specific applications, there is the necessary connection between those upstream matters and the proposal to export gas. The application before the Board where this relationship could occur is that of Shell because it is possible that new facilities or activities could be developed or undertaken to meet the requirements of the export licence. Therefore, a condition will be appended to the Shell licence requiring Shell to file with the Board, prior to construction, sufficient information about the environmental effects on areas of federal jurisdiction and the directly-related social effects of new identifiable upstream production and related facilities or activities for the Board to reach a finding under section 12 of the EARP Guidelines Order. The full text of this condition is attached as Appendix IV.

The decisions of the Board in relation to the applications of BNYP, ProGas and WGML are upheld as originally approved by the Board.

The decision of the Board in relation to the Husky application is vacated and the application is held in abeyance pending the receipt of information from Husky sufficient for the Board to determine if there will be any new upstream facilities that will be constructed or activities that will be undertaken to meet the requirements of its export proposal. Should there be facilities or activities which are determined to be subject to assessment, Husky is required to provide sufficient information about the environmental effects on federal areas of jurisdiction and the directly-related social effects

of those facilities or activities to enable the Board to reach a determination under section 12 of the EARP Guidelines Order.

2. If the decisions are incorrect, would evidence submitted by the Applicants in response to:

   (a) the questions set out in Appendix "B"; or

   (b) the matters raised in the letter of RMEC dated 10 January 1994, a copy of which is attached as Appendix "C";

   be necessary and sufficient to allow the Board to meet its obligations under the EARP Guidelines Order and under the Act to consider the environmental effects and directly related social effects of the proposals?

   In light of the Board's determinations in this matter, some of the information set out in Appendices B or C to the Board's letter dated 15 March 1994 may be appropriate. In cases where a necessary connection or proximity exists between the export proposal and new upstream facilities or activities, the Board will require an applicant to file sufficient information about the environmental effects of the upstream facilities or activities on federal areas of jurisdiction and their directly related social effects to enable the Board to reach a determination under section 12 of the EARP Guidelines Order.

3. If the decisions are incorrect, is there any evidence, not referred to in question 2 above, that is necessary to allow the Board to meet its obligations?

   Other than the information required in the answer to question 2, in all future cases the Board will require applicants to file evidence to enable the Board to decide the scope of its assessment of an export proposal under the EARP Guidelines Order, having regard to the above decisions. Applicants shall do so by documenting the nature of the connection between the requirements of the export proposal and new, identifiable upstream facilities or activities.

Chapter 5

Disposition

The foregoing chapters constitute our Decision and the Reasons for Decision in this review.

R. Priddle
Chairman

J.-G. Fredette
Vice-Chairman

A. Côté-Verhaaf
Member

C. Bélanger
Member

R. Illing
Member

K.W. Vollman
Member

R.L. Andrew, Q.C.
Member

Calgary, Alberta
June 1994

Appendix I

Board Letter of 15 March 1994

File No. 7205-M093-15

15 March 1994

TO: Brooklyn Navy Yard Cogeneration Partners, L.P.
Husky Oil Operations Ltd.
ProGas Limited
Shell Canada Limited
Western Gas Marketing Limited
All Intervenors in GH-5-93

Re: Review of National Energy Board Reasons for Decision in GH-5-93

The Board received the attached application (Appendix "A") dated 7 March 1994 from the Rocky Mountain Ecosystem Coalition ("RMEC"), an intervenor in the GH-5-93 proceeding, requesting that the Board review its decisions taken in the GH-5-93 proceeding. RMEC submits that the Supreme Court of Canada decision, dated 24 February 1994, in *The Grand Council of the Crees (of Quebec) et al* v. *Attorney General of Canada et al*, unreported, constitutes a change in circumstance which warrants a review of the Board's decisions on the gas export licence applications before it in GH-5-93. Specifically, RMEC argues that the Board should "hear submissions with regard to the upstream environmental effects associated with the applied-for natural gas export applications".

On 31 January 1994, the Board made its findings as required under the Environmental Assessment Review Process Guidelines Order (the "EARP Guidelines Order"). On 31 January 1994, the Board delivered decisions from the Bench approving, with reasons to follow, the applications of Brooklyn Navy Yard Cogeneration Partners, L.P., ProGas Limited and Western Gas Marketing Limited. Decisions for Husky Oil Operations Ltd. and Shell Canada Limited were deferred. The Board subsequently made the decisions approving the deferred applications. The Reasons for Decision were signed on 16 February 1994. A copy of the Reasons for Decision, which contains the Board's findings with respect to the EARP Guidelines Order, and a copy of the Board's Resource Category Checklists, upon which its findings were based, are enclosed.

The Board is of the view that the RMEC application raises a question as to the correctness of the Board's decisions. Accordingly, the Board has decided to conduct a review, pursuant to Section 21 of the *National Energy Board Act* (the "Act"), of its decisions, insofar as they relate to the scope of

the potential environmental effects and directly related social effects of the exports. In conducting this review, the Board requests that parties address the following questions:

1. Are the decisions made by the Board, in respect of the scope of its obligations under the EARP Guidelines Order and the Act to consider the environmental effects and directly related social effects of the proposals, correct?

2 If the decisions are incorrect, would evidence submitted by the Applicants in response to:

(a) the questions set out in Appendix "B"; or

(b) the matters raised in the letter of RMEC dated 10 January 1994, a copy of which is attached as Appendix "C";

be necessary and sufficient to allow the Board to meet its obligations under the EARP Guidelines Order and under the Act to consider the environmental effects and directly related social effects of the proposals?

3. If the decisions are incorrect, is there any evidence, not referred to in question 2 above, that is necessary to allow the Board to meet its obligations?

The procedure to be followed for this review will be as follows:

1. The Applicants and all Intervenors to GH-5-93 may file submissions responding to the questions set out above no later than 15 April 1994.

2. All Parties may file replies in response to the submissions no later than 29 April 1994.

Any person who is not an Intervenor in the GH-5-93 proceeding and who wishes to make submissions in this review may file with the Secretary by 31 March 1994 a request to be included as an Intervenor in the review. Such request should:

a) set out the name, mailing address, address for personal service, telephone number and/or other telecommunications numbers, if any, of the person or authorized representative of the person;

b) describe the nature of the person’s interest in the review; and

c) be served on all of the Applicants and Intervenors in the GH-5-93 proceeding.

The Secretary will issue a List of Parties to this review shortly after 31 March 1994.

All submissions and replies shall be filed with the Board and served on all parties named in the List of Parties.

Yours truly,

J.S. Richardson
Secretary

cc: Attorney-General of Canada
cc: Attorneys-General for the Provinces of Canada

For the purpose of reproduction quality, this letter has been retyped from a faxed copy received by the National Energy Board.

Rocky Mountain Ecosystem Coalition
Suite 206, 110 - 11th Avenue S.W.
Calgary, Alberta. T2R 0B6

File: 7205-M093-15
March 7, 1994

VIA FAX

Mr. J.S. Richardson, Secretary
National Energy Board
311 - 6th Avenue S.W.
Calgary, Alberta. T2P 3H2

Dear Mr. Richardson

Re: Hearing Order GH-5-93

As you are aware, the Rocky Mountain Ecosystem Coalition (RMEC) was granted intervenor status in the above referenced proceeding. It was our intent, as is demonstrated in our correspondence to the National Energy Board (the Board), to present evidence regarding the causal relationship between export applications and upstream environmental effects on ecosystem integrity and biodiversity. However, the Board refused to allow this information to be either presented or considered at the hearing. The Board's position in this matter was based on the Quebec Court of Appeal decision (National Energy Board v. Quebec Hydro) where it was ruled that the Board did not have the jurisdiction to consider the upstream environmental effects of producing electricity when considering an export application. The RMEC has long disagreed with this ruling and has maintained that the Board must consider the upstream environmental effects of producing petroleum products when considering natural gas export permits. As of February 24, 1994 the Supreme Court of Canada agrees with us.

With the Supreme Court decision, the premise of the Board's argument is null and void, and therefore not applicable. It now appears conclusively that it is within the Board's jurisdiction to consider the upstream effects associated with an application to export natural gas.

In light of the change in circumstance, the RMEC formally requests that the National Energy Board, as per the provisions of s. 21 of the National Energy Board Act, rescind all licences granted and refrain from granting additional licences arising from the above referenced hearing order. Additionally, the RMEC formally requests that the Board, as per the provisions of s. 24 of the National Energy Board Act, reconvene a public hearing to hear submissions with regard to the upstream environmental effects associated with the applied for natural gas export applications. To not grant our requests would be, in our opinion, a breach of the rule of natural justice and fairness.

The Board is referred to our letter to the Board dated 01/10/94 in which the RMEC outlined the material which would be required to adequately address the question of upstream environmental effects. None of the current applications reviewed in GH-5-93 has even superficially addressed these information requirements and are therefore deficient. In order to reconvene a public hearing as requested, the applications must be updated to meet the new requirements. In fairness to the applicants, adequate time must be provided so that they may prepare the necessary information. Subsequently, intervenors must be given adequate time to review the materials submitted by the applicants. A minimum of 30 days is suggested.

We look forward to your timely response.

Yours truly,

ROCKY MOUNTAIN ECOSYSTEM COALITION

Michael D. Sawyer
Executive Director

cc. Applicants

APPENDIX B

Preamble: The Board requests information related to the conduct of an environmental assessment of the application to export natural gas from Canada under licence. The Board requests sufficient information to allow it to consider:

(a) the potential environmental effects of the proposal and the social effects directly related to those environmental effects, including any effects that are external to Canadian territory;

and

(b) the concerns of the public regarding the proposal and its potential environmental effects.

In its response to the request which follows, the Applicant may refer to existing information; to information previously filed with the Board; or use information submitted to other agencies or governments. The level of detail of the information to be submitted to the Board shall correspond to the nature and magnitude of the potential environmental effects of the proposed project.

In light of the foregoing, the Applicant is directed to provide the following information:

Request 1: With respect to the construction and operation of any new or modified facilities in Canada and in the importing country for:

(i) production;
(ii) gathering;
(iii) processing;
(iv) transmission;
(v) distribution; or
(vi) other purposes,

required to give effect to the proposed export transaction, please provide the following information:

(a) evidence as to the nature and significance of any potential environmental effects;

(b) evidence as to the nature and significance of any social effects directly related to the environmental effects identified in (a) above;

(c) evidence as to the extent to which the environmental and social effects identified in (a) and (b) above can be mitigated; and

(d) evidence that all required governmental environmental authorizations have been or are likely to be obtained.

In providing this information please set out the rationale for any conclusions you have reached.

Request 2: With respect to the end use of the natural gas proposed to be exported, please provide the following information:

(a) evidence as to the nature and significance of any potential environmental effects;

(b) evidence as to the nature and significance of any social effects directly related to the environmental effects identified in (a) above;

(c) evidence as to the extent to which the environmental and social effects identified in (a) and (b) above can be mitigated; and

(d) evidence that all required governmental environmental authorizations have been or are likely to be obtained.

In providing this information please set out the rationale for any conclusions you have reached.

File: 7205-M093-15
January 10, 1994

Mr. J. S. Richardson, Secretary
National Energy Board
311 - 6th Avenue S.W.
Calgary, Alberta. T2P 3H2

Dear Mr. Richardson

Re: Hearing Order GH-4-93 Comments for the Purpose of the Board's EARP Initial Agreement

Notwithstanding that the Board believes that is beyond its jurisdiction to consider evidence regarding the causal relationship between export applications and upstream environmental effects on ecosystem integrity and biodiversity, the RMEC takes the following positions with regard to the scope of the anticipated EARP Initial Assessment.

l. There are cause and effect relationships between the applications before the Board and upstream environmental effects, and these environmental effects must be fully considered in the Board's Initial Assessment.

2. In considering the upstream environmental effects causally related to the Applications, the Board's Initial Assessment should provide sufficient environmental information so that the overall benefit/cost of these Applications can be determined, and should include the following;

   a) An analysis of upstream operating procedures and their effects on the local, regional and global environment,

   b) An analysis of the upstream legislative and regulatory environment and the adequacy of these regimes in ensuring environmental sustainability;

   c) An analysis of baseline environmental conditions in gas supply areas supporting the Applications; and

   d) A description and analysis of the significance of environmental, economic, and cultural effects including regional, temporal and cumulative effects associated with the Applications; and

   e) An analysis of the environmental effects of upstream green house gas emissions and how these emissions will impact on Canada's international commitments with regard to global warming.

Any Initial Assessment which does not address the above questions would, in our opinion, be inadequate and would not reflect the spirit of the EARP Guideline Order. In the absence of information about upstream environmental effects the Board cannot truly determine if the Applications are in the public interest.

The RMEC hereby puts the Board on notice that it will put forward arguments based on questions of law and jurisdiction in support of its position that the Board must have regard for upstream environmental effects in determining whether the Applications are in the public interest. Additionally, RMEC will make representations with regard to upstream environmental effects and identity deficiencies within,the Applications having regard for the upstream environmental effects.

Yours truly,

ROCKY MOUNTAIN ECOSYSTEM COALITION

Micheal D. Sawyer
Executive Director

cc. Applicants

Date: 28 January 1994 Working File

RESOURCE CATEGORY CHECKLIST

Applicants	**Application Date**
Brooklyn Navy Yard Cogenertion Partners, L.P. ("Brooklyn Navy Yard")	21 October 1993
Husky Oil Operations Ltd. ("Husky")	24 November 1993

File No: 7205-M093G-745
Document: a:\gh593.mem

Description:

During the GH-5-93 proceeding, the National Energy Board ("the Board") examined the subject gas export licence applications.

Anticipated Effects Levels:

The Brooklyn Navy Yard and Husky gas exports will require the construction of additional facilities by TransCanada and Westcoast respectively and are therefore, not subject to the Exclusion List. The new facilities will be subject to environmental assessment by the Board's staff in the course of the Board's Part III facilities review. The Directorate has determined, pursuant to section 12 of the *Environmental Assessment and Review Process Guidelines Order*, that none of the subsections (a) to (f) set out therein are applicable as the proposed Brooklyn Navy Yard and Husky exports have no potentially adverse environmental effects *per se* and may proceed without further environmental assessment.

Public Concern:

By letter dated 22 December 1993, the Rocky Mountain Ecosystem Coalition ("RMEC") applied for intervenor status in GH-5-93. That letter indicated that the RMEC was interested in examining three aspects related to the export applications: (1) the causal relationship between export applications and upstream environmental effects which impair ecosystem integrity and biodiversity; (2) any uncertainty and risk to Canadian gas consumers having regard for energy security, sovereignty, social, health and economic implications of the applications, and; (3) the public interest. By letter dated 3 January 1994, RMEC was granted late intervenor status in GH-5-93. RMEC was advised that aspect (l) did not fall within the bounds of the Board's jurisdiction and therefore, the Board was not prepared to hear evidence on this aspect. RMEC replied by letter dated 10 January that the above listed aspects needed to be examined in this context to reflect the spirit of the EARP Guidelines Order and would be presenting arguments based on questions of law and jurisdiction in support of its position. By letter dated 19 January 1994, the Board reiterated it's position and it's refusal to consider evidence which related to the causal relationship between export applications and upstream environmental effects.

The Anticipated Effects Were Rated As:

N	=	None	UK	=	Unknown
I	=	Insignificant	S	=	Significant
M	=	Mitigable with known technology	UA	=	Unacceptable

Resources Category	**Potential Effect**		**Resources Category**	**Potential Effect**	
Ground Water		N	Archaeolo./Hertiage		N
Surface Water		N	Recreation		N
Marine Environment		N	Public Concern		Y
Wetlands		N	Land Use		N
Soils		N	Community/Social Serv.		N
Permafrost		N	Health & Safety		N
Geolog./Geophys.		N	Municipal Services		N
Air Quality		N	Native Lands		N
Weather/Climate		N	Navigation		N
Vegetation		N	Economics		N
Wildlife/Wildlife Habitat		N	Local/Region. Planning		N
Aquatic resources/Habitat		N	Others		N
Noise		N			

Automatic Exclusion: Yes ( ) No (X) 2

Decision:

The Resources Category Checklist was reviewed and approved by the Panel on 31 January 1994.

Date: 28 January 1994 Working File

RESOURCE CATEGORY CHECKLIST

Applicants	**Application Date**
ProGas Limited ("ProGas")	16 September 1993
ProGas Limited ("ProGas") (X6)	16 September 1993
ProGas Limited ("ProGas") (X2)	20 October 1993
Shell Canada Limited ("Shell")	22 October 1993
Western Gas Marketing Limited ("WGML") (X5)	22 October 1993

File No: 7205-M093G-745
Document: a:\gh593.mem

Description:

During the GH-5-93 proceeding, the National Energy Board ("the Board") examined the subject gas export licence applications.

Anticipated Effects Levels:

The proposed Progas, Shell and WGML gas exports are of types identified by the Board's Environmental Assessment and Review Process Guidelines Order Exclusion List ("Exclusion List") and may be automatically excluded from further environmental assessment[19].

Public Concern:

By letter dated 22 December 1993, the Rocky Mountain Ecosystem Coalition ("RMEC") applied for intervenor status in GH-3-93. That letter indicated that the RMEC was interested in examining three aspects related to the export applications: (l) the causal relationship between export applications and upstream environmental effects which impair ecosystem integrity and biodiversity; (2) any uncertainty and risk to Canadian gas consumers having regard for energy security, sovereignty, social, health and economic implications of the applications and; (3) the public interest. By letter dated 5 January 1994, RMEC was granted late intervenor status in GH-5-93. RMEC was advised that aspect (1) did not fall within the bounds of the Board's jurisdiction and therefore, the Board was not prepared to hear evidence on this aspect. RMEC replied by letter dated 10 January that the above listed aspects needed to be examined in this context to reflect the spirit of the EARP Guidelines Order and would be presenting arguments based on questions of law and jurisdiction in support of its position. By letter dated 19 January 1994. the Board reiterated it's position and it's refusal to consider evidence which related to the causal relationship between export applications and upstream environmental effects.

---

[19] Note 3 provides for the automatic exclusion of "...applications of natural gas exports, imports, exports for subsequent import and imports for subsequent export authorized:

(ii) by licence where development of new facilities for production, processing, storage or transmission would not be required".

The Anticipated Effects were Rated As:

N	=	None	UK	=	Unknown
I	=	Insignificant	S	=	Significant
M	=	Mitigable with known technology	UA	=	Unacceptable

Resources Category	**Potential Effect**	**Resources Category**	**Potential Effect**
Ground Water	N	Archaeolo./Hertiage	N
Surface Water	N	Recreation	N
Marine Environment	N	Public Concern	Y
Wetlands	N	Land Use	N
Soils	N	Community/Social Serv.	N
Permafrost	N	Health & Safety	N
Geolog./Geophys.	N	Municipal Services	N
Air Quality	N	Native Lands	N
Weather/Climate	N	Navigation	N
Vegetation	N	Economics	N
Wildlife/Wildlife Habitat	N	Local/Region. Planning	N
Aquatic resources/Habita	N	Others	N
Noise	N		

Automatic Exclusion: Yes ( ) No (X) 2

Decision:

The Resources Category Checklist was reviewed and approved by the Panel on 31 January 1994.

Appendix II

Sections 116 to 119.01 of the Act

National Energy Board Act

116. Except as otherwise authorized by or under the regulations, no person shall export or import any oil or gas except under and in accordance with a licence issued under this Part.

117. (1) Subject to the regulations, the Board may, on such terms and conditions as it may impose, issue licences for the exportation or importation of oil or gas.

(2) Every licence is subject to the condition that the provisions of this Act and the regulations in force at the date of issue of the licence and as subsequently enacted, made or amended, as well as every order made under the authority of this Act, will be complied with.

118. On an application for a licence, the Board shall have regard to all considerations that appear to it to be relevant and shall

(a) satisfy itself that the quantity of oil or gas to be exported does not exceed the surplus remaining after due allowance has been made for the reasonably foreseeable requirements for use in Canada having regard to the trends in the discovery of oil or gas in Canada; and

(b) [Repealed, 1990, c. 7, s. 32]

(c) where oil or gas is to be exported and subsequently imported or where oil or gas is to be imported, have regard to the equitable distribution of oil or gas, as the case may be, in Canada.

119. (1) Subject to subsection (2) and the regulations, the Board may, by order, with the approval of the Governor in Council, revoke or suspend a licence if

(a) any term or condition of the licence has not been complied with or has been contravened; or

(b) the Board is of the opinion that the public convenience and necessity so require.

(2) No order shall be made under subsection (1) unless the Board has, in a notice sent to the holder of the licence, advised the holder of the term or condition of the licence that it is alleged has not been complied with or has been contravened, or of the reasons on which the opinion of the Board referred to in paragraph (1)(b) is based, as the case may be, and the Board has afforded the holder a reasonable opportunity to be heard.

(3) Notwithstanding subsections (1) and (2), the Board may, by order, revoke or suspend a licence on the application or with the consent of the holder thereof.

119.01 (1) The Governor in Council may make regulations for carrying into effect the purposes and provisions of this Division, including regulations respecting

(a) the information to be furnished by applicants for licences and the procedure to be followed in applying for licences and in issuing licences;

(b) the duration of licences, not exceeding twenty-five years, from a date to be fixed in the licence, the approval required in respect of the issue of licences, the quantities that may be exported or imported under licences and any other terms and conditions to which licences may be subject;

(c) units of measurement and measuring instruments or devices to be used in connection with the exportation or importation of oil or gas;

(d) the inspection of any instruments, devices, plant, equipment, books, records or accounts or any other thing used for or in connection with the exportation or importation of oil or gas;

(e) the immediate disposition of oil or gas seized by an officer referred to in section 122; and

(f) the circumstances in which the Board may make orders authorizing the exportation or importation of oil or gas and the terms and conditions that may be included in those orders.

(2) The Governor in Council may make regulations

(a) prescribing, in respect of oil or gas the export of which is authorized under this Part, or any quality, kind or class of that oil or gas or type of service in relation thereto, the price at which or the range of prices within which that oil or gas shall be sold; and

(b) exempting oil or gas that is exported to the United States, or any quality, kind or class of that oil or gas or type of service in relation thereto, from the application of regulations made under paragraph (a).

(3) Regulations made under subsection (2) may prescribe different prices or ranges of prices in respect of different countries.

Appendix III

Sections 119.02 to 119.094 of the Act and Sections 6(2)(y), (z)(i), (aa) and 15(m) of the Part VI Regulations

National Energy Board Act

119.02 No person shall export any electricity except under and in accordance with a permit issued under section 119.03 or a licence issued under section 119.08.

119.03 (1) Except in the case of an application designated by order of the Governor in Council under section 119.07, the Board shall, on application to it and without holding a public hearing, issue a permit authorizing the exportation of electricity.

(2) The application must be accompanied by the information that under the regulations is to be furnished in connection with the application.

119.04 The applicant shall publish a notice of the application in the *Canada Gazette* and such other publications as the Board considers appropriate.

119.05 The Board may, within a reasonable time after the publication of the notice, require the applicant to furnish such information, in addition to that required to accompany the application, as the Board considers necessary to determine whether to make a recommendation pursuant to section 119.06.

119.06 (1) The Board may make a recommendation to the Minister, which it shall make public, that an application for exportation of electricity be designated by order of the Governor in Council under section 119.07, and may delay issuing a permit during such period as is necessary for the purpose of making such an order.

(2) In determining whether to make a recommendation, the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to all considerations that appear to it to be relevant, including

(a) the effect of the exportation of the electricity on provinces other than that from which the electricity is to be exported;

(b) the impact of the exportation on the environment;

(c) whether the applicant has

(i) informed those who have declared an interest in buying electricity for consumption in Canada of the quantities and classes of service available for sale, and

(ii) given an opportunity to purchase electricity on terms and conditions as favourable as the terms and conditions specified in the application to those who, within a reasonable time after being so informed, demonstrate an intention to buy electricity for consumption in Canada; and

(d) such considerations as may be specified in the regulations.

119.07 (1) The Governor in Council may make orders

(a) designating an application for exportation of electricity as an application in respect of which section 119.08 applies; and

(b) revoking any permit issued in respect of the exportation.

(2) No order may be made under subsection (1) more than forty-five days after the issuance of a permit in respect of the application.

(3) Where an order is made under subsection (1),

(a) no permit shall be issued in respect of the application; and

(b) any application in respect of the exportation shall be dealt with as an application for a licence.

119.08 (1) The Board may, subject to section 24 and to the approval of the Governor in Council, issue a licence for the exportation of electricity in relation to which an order made under section 119.07 is in force.

(2) In deciding whether to issue a licence, the Board shall have regard to all considerations that appear to it to be relevant.

(3) Any permit issued in respect of an application for a permit for the exportation of electricity in relation to which an order made under section 119.07 is in force and that is not revoked by the order is revoked on the Board's deciding not to issue a licence for that exportation.

119.09 (1) The Board may, on the issuance of a permit, make the permit subject to such terms and conditions respecting the matters prescribed by the regulations as the Board considers necessary or desirable in the public interest.

(2) The Board may, on the issuance of a licence, make the licence subject to such terms and conditions as the Board may impose.

119.091 Every permit and licence is subject to the condition that the provisions of this Act and the regulations in force on the date of the issuance of the permit or licence and as subsequently enacted, made or amended, as well as every order made under the authority of this Act, will be complied with.

119.092 The term of a permit or licence is thirty years or such lesser term as is specified in the permit or licence.

119.093 (1) The Board may revoke or suspend a permit or licence issued in respect of the exportation of electricity

(a) on the application or with the consent of the holder of the permit or licence; or

(b) where a holder of the permit or licence has contravened or failed to comply with a term or condition of the permit or licence.

(2) The Board shall not revoke or suspend a permit or licence under paragraph (1)(b) unless the Board has

(a) sent a notice to the holder of the permit or licence specifying the term or condition that is alleged to have been contravened or not complied with; and

(b) given the holder of the permit or licence a reasonable opportunity to be heard.

119.094 The Governor in Council may make regulations for carrying into effect the purposes and provisions of this Division, including regulations

(a) prescribing matters in respect of which terms and conditions of permits may be imposed;

(b) respecting

(i) the information to be furnished in connection with applications for permits,

(ii) units of measurement and measuring instruments or devices to be used in connection with the exportation of electricity, and

(iii) the inspection of any instruments, devices, plant, equipment, books, records or accounts or any other thing used for or in connection with the exportation of electricity; and

(c) specifying considerations to which the Board shall have regard in deciding whether to recommend to the Minister that an application for

a permit for the exportation of electricity be designated by order of the Governor in Council under section 119.07.

National Energy Board Part VI Regulations

6. (2) Without restricting the generality of subsection (1), the information required to be furnished by any applicant described in subsection (1) shall, unless otherwise authorized by the Board, include

(y) evidence that the applicant has obtained any licence, permit or other form of approval required under any law of Canada or a province respecting the electric power proposed to be exported;

(z) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price

(i) would recover its appropriate share of the costs incurred in Canada,

(aa) evidence on any environmental impact that would result from the generation of the power for export.

15. Every licence for the export of electric power and energy is subject to such terms and conditions as the Board may prescribe and, without restricting the generality of the foregoing, is subject to every statement set out by the Board in the licence respecting

(m) the requirements for environmental protection.

Appendix IV

Shell Canada Limited - Condition

1. This licence remains valid to the extent that for any new identifiable facility to be constructed and operated or any new identifiable activity to be undertaken to supply the gas for export, which construction, operation or activity could have an environmental effect on areas of federal jurisdiction, Shell Canada Ltd. will file the information required by the Board to arrive at a finding under section 12 of the Environmental Assessment Review Process Guidelines Order. This information is to address the environmental effects of the proposal on areas of federal jurisdiction and the directly related social effects. If applicable, this requirement may be met by filing:

(i) a description of the environmental aspects of the regulatory regime applicable to the facility or activity in question;

(ii) all government authorizations received;

(iii) environmental assessments submitted in seeking these government authorizations; and

(iv) a description of any environmental mitigative measures to which Shell is committed.