

ENVIRONMENTAL ASSESSMENTS AND GREENHOUSE GAS EMISSIONS

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Introduction

In what can only be interpreted as a wake-up call to companies involved in projects that may emit significant greenhouse gas emissions, on March 5, 2008, the Federal Court released its judgment involving the Kearl Oil Sands (Kearl Project). The decision involved the judicial review of an environmental assessment conducted by a Joint Review Panel established by the Alberta Energy and Utilities Board and the Government of Canada (Panel). The judicial review was initiated by various non-profit organizations and encompassed several issues, including the assertion that the final report prepared by the Panel did not comply with the mandatory steps as set out in the *Canadian Environmental Assessment Act* (CEAA). The concern of the applicants was that the Panel did not provide any rationale in its report for its recommendations regarding greenhouse gas emissions. In agreeing with the applicants, the Federal Court held that a Panel must provide informed and reasoned bases for its conclusions "nourished by a robust understanding of Project effects". Given the heightened awareness surrounding greenhouse gas emissions and well-funded environmental lobby groups, the decision is a stark message to the industry that major project applications will be reviewed with increasing scrutiny.

Background

Imperial Oil proposes to construct and operate the Kearl Project, an oil sands mine, to be located north of Fort McMurray. The Kearl Project includes the design, construction, operation and reclamation of four open pit truck and shovel mines, three trains of ore preparation and bitumen extraction facilities together with tailings management facilities and other infrastructure.

The environmental impact assessment filed in support of the Kearl Project confirms that it will result in average annual greenhouse gas emissions equivalent to 800,000 passenger vehicles and will contribute 1.7% of Alberta's annual greenhouse gas emissions (based on 2002 data).

Panel Hearings and Report

The Panel held 16 days of public hearings in November 2006 and heard submissions from approximately 20 parties.

On February 27, 2007, the Panel issued its report, which included a review of various stakeholder groups and summarized issues relating to social and economic effects, mine plan and resource conservation, tailings management, reclamation, air emissions, surface water, aquatic resources, traditional land use and traditional ecological knowledge, the need for follow-up and human health. The Panel report constituted the decision for the Alberta authorities and set out recommendations to the Department of Fisheries and Oceans (DFO) regarding project

approval. Provided that the proposed mitigation measures and recommendations were implemented, the Panel was of the view that the Kearn Project was not likely to cause significant adverse environmental effects. It therefore recommended that DFO approve the Kearn Project. The decision of the Panel was challenged in the Federal Court by means of a judicial review application.

Legislative Context

The Court reviewed the legislative context involving environmental assessments, including the applicable provisions of the CEAA. It held that the CEAA establishes a two-step decision-making process. The first step requires an environmental assessment where potentially adverse environmental effects of a project are analysed. The second step involves decision-making and follow-up to determine if a particular project should be authorized and what follow-up measures, if any, are required to verify the accuracy of the assessment.

Step One: Environmental Assessment

Regarding the first step, the Court confirmed that there are three levels of environmental assessment under the CEAA: screenings; comprehensive reviews; and mediation and panel reviews. If a panel is constituted, section 34 of CEAA requires that the panel fulfill four general duties. First, the information required for an assessment must be obtained and made available to the public. Second, the panel must hold hearings in a manner that offers the public an opportunity to participate in the assessment. Third, a report must be prepared that sets out the rationale, conclusions and recommendations of the panel including any mitigation measures and follow-up program and a summary of any comments received from the public. Finally, the report must be submitted to the Minister and the responsible authority. In considering these general duties, the Court acknowledged that an assessment of the significance of environmental effects is not a wholly objective exercise but one that encompasses a significant measure of opinion and judgment. It further acknowledged that reasonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and the significance of such results. Moreover, the Court noted that the adequacy and completeness of the evidence must be evaluated in the context of the preliminary nature of an assessment. In that regard, it recognized that an assessment of environmental significance "does not extend to the elimination of uncertainty surrounding project effects".

Step Two: Decision and Follow-Up

Once the Panel report is completed, subsection 37(1.1) of the CEAA requires that the federal authority responsible for the decision consider the report and, with the approval of the governor-in-council, respond to the report. If the federal authority decides to authorize a project following a Panel report, it must undertake a follow-up program for the project to ensure its implementation and those results may be used to implement adaptive management measures or to improve the quality of future environmental assessments.

Based upon the general mandate of the CEAA, the powers of a panel must be exercised "in a manner that protects the environment and human health and applies the precautionary principle". The CEAA represents complex legislation for addressing the uncertainty surrounding environmental effects. Consequently, it requires early assessment of adverse environmental consequences, as well as mitigation measures, together with follow-up processes capable of adapting to new information and changed circumstances. It was in the context of this background that the Court addressed the concerns of the applicants.

Issue: Greenhouse Gas Emissions

The applicants alleged, among other things, that the Panel erred in law by failing to comply with the requirement "to provide a rationale for its recommendations [regarding greenhouse gas emissions] pursuant to section 34(c)(i) of the CEAA".

The Court noted the distinction between intensity-based emissions targets versus absolute greenhouse gas emissions. It referred to the evidence before the Panel concerning intensity-based mitigation and confirmed that the absolute amount of greenhouse gas pollution from oil sands development would continue to rise under intensity-based targets given the planned increase in bitumen production. The Court reviewed the Panel decision and held that the Panel erred by dismissing as insignificant the greenhouse gas emissions associated with the Kearl Project without "clear and cogent articulation" as to why intensity-based mitigation would be effective in reducing absolute emissions (accounting for 1.75% of Alberta's annual emissions) to a level of insignificance. By failing to provide a sufficient explanation in its report, the Court held that the Panel failed to provide a reasonable basis for its conclusions and violated section 34(c)(i) of the CEAA.

The Court held that the Panel, while not mandated to engage in policy recommendations, was mandated to conduct a science and fact-based assessment of the potential adverse environmental effects of a proposed project. The Court further stated that while the Panel was not required to provide an in-depth explanation of the scientific data for all of its conclusions and recommendations, it was required to explain, at least in a general way, why the potential environmental effects, either with or without the implementation of mitigation measures, would be insignificant. The Court recognized that, in the normal course, deference should be given to expertise possessed by the Panel. However, such deference was only triggered when the conclusions and rationale for the findings provided were articulated.

While the Court held that the Panel erred in law, because the error was confined to one specific issue, it considered it inappropriate and ineffective for the Panel to conduct an entirely new review. As a result, it remitted the matter back to the same Panel with a direction that it provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the Project's greenhouse gas emissions to a level of insignificance.

Summary

A simple explanation of the decision is that a panel must adequately justify its conclusions in its final report. Failure to do so may result in a successful legal challenge. However, the decision warrants greater consideration than this simple explanation. As mentioned in the introduction, it is clearly a wake-up call to proponents involved in major projects that may emit greenhouse gases. No longer will proponents be able to rely upon the process followed for past approvals for other similar projects, where greenhouse gas emissions were not a prominent factor. Furthermore, it will be insufficient for proponents to assert that they will minimize emissions through the use of the most energy efficient, commercially proven and economic technology.

Once greenhouse gas emissions are known or estimated, project proponents must now provide evidence of mitigating those emissions and reducing them to insignificant levels on an absolute emissions basis. Such an approach can only be problematic in a province such as Alberta, which has adopted emissions intensity targets as opposed to absolute emissions targets for large greenhouse gas emitters.

Finally, although the decision refers to mitigation, it provides no assistance or guidance as to what constitutes such measures. For example, it does not address the thorny issue of whether or not mitigation efforts will be satisfactory if they occur elsewhere in Canada or the world. Alternatively, it does not confirm whether or not mitigation efforts will be restricted to the province in which the project is situate (as is the case in Alberta when considering emissions intensity reductions pursuant to the *Specified Gas Emitters Regulation*). It remains to be seen whether or not future decisions will provide clarification in that regard.

If the decision does nothing else, it confirms that greenhouse gas emissions and accounting for those emissions have now permeated all aspects of the business cycle.

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