

Anticipating and Avoiding Environmental Protection Disputes during Decommissioning of Oil & Gas Projects Offshore Canada

Daniel Watt*

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*Partner, McInnes Cooper LLP

This paper draws on McInnes Cooper's *Offshore Oil and Gas Decommissioning Best Practices* (2016), which, of course, the author highly commends.

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INTRODUCTION

Decommissioning an offshore oil and gas project involves the risk of adverse effects on the marine environment and those who rely on marine resources. Concerns from stakeholders such as environmental groups, Aboriginal peoples and commercial fisheries are thus inevitable. Operators are therefore well-advised to anticipate and seek to minimize stakeholder concerns over environmental issues.

Canada's regulations on decommissioning, however, are relatively untested. Only one Canadian offshore project has been decommissioned: the Cohasset-Panuke Project ("Cohasset"). Moreover, the Atlantic regulatory regime¹ has been recently amended by the *Energy Safety and Security Act* ("ESSA"),² while Aboriginal law has also evolved. Aside from significant spills, therefore, anticipating what environmental disputes may arise in decommissioning involves a degree of speculation.

The law, Cohasset experience, and current climate of project approvals suggest that the likeliest source of environmental disputes during decommissioning will be interest groups, Aboriginal peoples, and other stakeholders opposing regulatory approval. For context, this paper outlines decommissioning methods and processes. Potential areas of dispute are then examined in light of the regulatory framework, the Cohasset experience and other examples. The paper concludes with some suggestions for how to avoid or minimize disputes

For ease of reference, the Accord Act is referred to throughout.

THE DECOMMISSIONING PROCESS

The optimal decommissioning method will depend on a number of factors, including environmental considerations. Three primary methods are as follows:

1. *Complete removal* – often asserted as the most environmentally sound strategy,³ this requires deconstructing the installation and removing the pieces to onshore sites for disposal, reuse or recycling. The work can be dangerous and intensive. Further, complete removal can, ironically, disrupt marine biotic communities.
2. *Partial removal* – involves removing certain components to shore for disposal, reuse or recycling, while leaving others in place or relocating them to another marine location.
3. *Secondary uses* – platforms are re-purposed in place or at another location, for uses such as: renewable energy; port and harbour infrastructure; search and rescue bases; vessel navigation bases; meteorological stations; and aquaculture.

¹ *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988 c 28 (the "Accord Act"), and *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, SNS 1987, c 3; *Canada –Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3 and *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, RSNL 1990, c C-2.

² SC 2015, c 4 ("ESSA")

³ A. Fowler *et al*, "A multi-criteria decision approach to decommissioning of offshore oil and gas infrastructure" (2014) 87 *Ocean and Coastal Management* 20.

The work required will depend on the method and other considerations. The typical process will involve: planning; cessation of production; well plugging and abandonment; removal of hazardous products and hydrocarbons; platform preparation (or “hook down”); topsides removal; substructure removal; subsea infrastructure removal; site remediation; topsides and substructure reuse and recycling; and monitoring for pollution of any components or material left *in situ*.⁴

The method and process proposed will invariably engage environmental considerations and the risk of opposition.

THE REGULATORY FRAMEWORK

The regulation of decommissioning in Canada involves both international and domestic law.

International Obligations

Canada is party to treaties which address offshore decommissioning. The genesis of the international framework was the 1958 *Geneva Convention on the Continental Shelf*, which confirmed coastal states’ rights to construct installations on the continental shelf and to explore and exploit its natural resources.⁵ It also required that abandoned installations be “entirely removed.”⁶

The 1982 *United Nations Convention on the Law of the Sea* eclipsed the Geneva Convention, giving coastal states the exclusive right to construct, authorize or regulate offshore installations within territorial seas and exclusive economic zones, or on the continental shelf.⁷ UNCLOS also permits partial removal under certain conditions.⁸

The 1972 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*⁹ and 1996 Protocol¹⁰ are also relevant. The 1996 Protocol, in particular, allows for disposal at sea of platforms or structures where the coastal state approves the dumping by issuing a special permit, the conditions and criteria for which are set out in the Protocol.¹¹

Key provisions of these instruments have been enacted in Canadian legislation.¹²

⁴ Decommissioning Work Breakdown Structure provided by Decom North Sea in its *Review of Decommissioning Capacity 2014*; J. Groot, “Engineering Aspects of Decommissioning” in M. Hammerson, ed, *Oil and Gas Decommissioning: Law, Policy and Comparative Practice* (London: Globe Law and Business, 2013).

⁵ 29 April 1958, 450 UNTS 11 art 5 (in force 10 June 1964) (“Geneva Convention”).

⁶ *Ibid.*, art 5(5).

⁷ 10 December 1982, 1833 UNTS 3 arts 2, 60, 80 (in force 16 November 1994) (“UNCLOS”).

⁸ *Ibid.* See arts 1(5), 60(3), 194, 210(5) and 216.

⁹ 29 December 1972, 1046 UNTS 120 (in force 30 August 1975) (“London Convention”).

¹⁰ *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 7 November 1997, 36 ILM 1, art 1(4.1) (in force 3 March 2006) (“1996 Protocol”).

¹¹ *Ibid.*, at art 4, Annex I, Annex II, para. 17.

¹² The *Oceans Act*, SC 1996, c 31, incorporates the provisions of UNCLOS that confirm Canada’s sovereignty and sovereign rights in its respective maritime zones. The *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 (“CEPA”) at Division 3 and the associated *Disposal At Sea Regulations*, SOR/2001-275 and *Disposal At Sea*

Accord Act and CNSOPB

The primary regulatory legislation in the Nova Scotia offshore comprises the Accord Act and its provincial mirror legislation, which establish the Canada-Nova Scotia Offshore Petroleum Board (“CNSOPB”).¹³ CNSOPB is responsible for administering the legislation and managing offshore resources.¹⁴ Its responsibilities include environmental protection and licensing offshore exploration and development, among other duties. The Accord Act provisions and other legislation applicable to approval processes are discussed below.

DISPUTES OVER DECOMMISSIONING APPROVALS

The proponent or operator must obtain approvals and authorizations for decommissioning during project development and before decommissioning operations commence. Environmental assessments (“EAs”) and public input are required at both stages. Depending on the project, the public input may involve full hearings. It is at the specific authorization stage, in particular, that the operator is most likely to encounter opposition. Such opposition may result in applications for injunctive or other relief. Even absent litigation, approvals may be delayed, denied, or issued with undesirable conditions. To minimize these risks, the approval process must be deftly managed.

Approval and Authorization Process

Two tiers of approval for decommissioning are required under the Accord Act:

- First, a “Development Plan” containing the basic terms of the proposed project must be submitted and approved.¹⁵
- Second, authorizations to carry out specific works or activities in the context of the project, called “work authorizations,” must be applied for and issued.¹⁶

Approval stages are lightning rods for opposition. Decisions made by the operator at each stage can foment immediate environmental disputes, or lay the groundwork for future opposition.

Development Plan

The Development Plan is the basic document governing reservoir development and is necessary for a production licence.¹⁷ It must include provisions for decommissioning.¹⁸ CNSOPB by policy also requires a “Decommissioning and Abandonment Program” to be in the Development Plan.¹⁹

Application Permit Regulations, SOR/2014/177, incorporate provisions of the London Convention and 1996 Protocol.

¹³ Supra note 3. Decommissioning may also require compliance with a number of other, primarily federal, statutes.

¹⁴ Accord Act, s. 8, 18.

¹⁵ Ibid, s 143

¹⁶ Ibid, ss 140, 142

¹⁷ Ibid, s 143(1)

¹⁸ SOR/95-191, s 42 (“Installation Regulations”);

Development Plans, and their decommissioning programs, must satisfy, among regulatory components, an Environmental Impact Statement (“EIS”), and a public review.²⁰ Both components engage public input into the proposed decommissioning.

Public Reviews

CNSOPB may “conduct a public review in relation to the exercise of any of its powers or the performance of any of its duties where the Board is of the opinion that it is in the public interest to do so.”²¹ Its policy is to require a public review for the approval of major development projects.²² Depending on the scale of the proposed project and the degree of public interest it engages, CNSOPB may either request written public submissions or appoint a commission responsible for conducting a public hearing.

EIS and EAs

The Development Plan will also either trigger an EA under the *Canadian Environmental Assessment Act, 2012* (“CEAA”) or an internal EA by the CNSOPB. The following applicable works trigger an EA under CEAA:²³

- 10.** The drilling, testing and abandonment of offshore exploratory wells in the first drilling program in an area set out in one or more exploration licences issued in accordance with the [Accord Act]
- 11.** The construction, installation and operation of a new offshore floating or fixed platform, vessel or artificial island used for the production of oil or gas.
- 12.** The decommissioning and abandonment of an existing offshore floating or fixed platform, vessel or artificial island used for the production of oil or gas that is proposed to be disposed of or abandoned offshore or converted on site to another role.
- 13.** The construction, operation, decommissioning and abandonment of a new offshore oil and gas pipeline, other than a flowline.

Accordingly, development projects and certain required works, such as well abandonments or certain decommissioning activities, trigger a CEAA EA.

¹⁹ CNSOPB, *Guidelines on Plans and Authorizations Required for Development Projects* (August 16, 1995) at para 5.8 (“Guidelines”)

²⁰ *Ibid*, at para 2.

²¹ Accord Act, s 44(1)

²² *Ibid*, s 44(1); Guidelines, at para 2.4

²³ *Regulations Designating Physical Activities*, SOR/2012-147, ss 10 - 13

CEAA provides that the “responsible authority must ensure that the public is provided with an opportunity to participate in the environmental assessment of a designated project.”²⁴ If the Canadian Environmental Assessment Agency (the “Agency”) is the “responsible authority,” a draft report with respect to the EA must be made available to the public, with notice inviting public comment.²⁵

Pursuant to ESSA, effective February 26, 2016²⁶ CNSOPB was given authority to hold public hearings, a precondition to qualify as a “responsible authority” under CEAA for designated projects.²⁷ Other legislative changes ESSA introduced include participant funding programs and timelines for conducting the EA.²⁸ However, regulations designating the projects for which CNSOPB will be responsible under CEAA are not yet enacted.²⁹ Thus, the Agency remains responsible for EAs concerning CEAA designated projects.

Projects that do not trigger CEAA will still be subject to an EA by CNSOPB. The Guidelines specify that EAs for works that do not engage CEAA will mirror the process prescribed by the 1992 *Canadian Environmental Assessment Act*.³⁰ The comprehensive study report required of proponents must consider, among other things, public comments.³¹

Authorizations for Decommissioning Work

Authorization must also be obtained for the work the decommissioning plan entails.³² An EA is required.³³ Among the documents required as part of the application for authorization of decommissioning activities are an EA. As noted above, an EA under CEAA will be triggered by certain activities. Further, depending on the level of public interest, CNSOPB may exercise public review powers.

The EA process and public review discussed above are equally applicable to work authorizations. Work authorizations thus also involve public input and a risk of opposition. Thus, the risk of opposition to the proposed operations exists at both approval stages. However, opposition to decommissioning is more likely to occur at the work authorization stage, when decommissioning stands alone under the regulatory spotlight. Conversely, if all goes as planned, Development Plans are approved decades before decommissioning commences. Opposition during project development is less likely to focus on the decommissioning plan.

The Development Plan remains relevant to avoiding environmental disputes, however. An approved Development Plan cannot be amended without CNSOPB approval.³⁴ If amendment is sought during the decommissioning phase, there may be greater pressure on CNSOPB to conduct

²⁴ CEAA, s 24

²⁵ CEAA, s 25

²⁶ ESSA, s 87, adding Accord Act, s 142.02

²⁷ CEAA, s 15(c)

²⁸ ESSA, s 87

²⁹ CEAA, s 15(c)

³⁰ SC 1992, c 37 (“CEAA 1992”); Guidelines, at para 2.3

³¹ Guidelines, para 2.4

³² Ibid, ss 140, 142;

³³ Ibid, s 142(4)(b)

³⁴ Accord Act, s. 143(5).

a public hearing or to seek more public input. This alone can cause delay and foment opposition. As discussed below, the Cohasset experience bears this out.

Moreover, the public perception of the plan's legitimacy may be undermined, particularly if the proposed method is partial removal or is less costly for the operator. The story will invariably be framed as the operator seeking to cut corners at the expense of the environment – even if partial removal is optimal from an environmental perspective.

Sources of Disputes

Probable sources of dispute are suggested by the environmental effects that will be assessed in the EA process. For instance, the effects on the following must be considered under CEAA: fish and fish habitat; aquatic species; migratory birds; changes to the environment on federal lands, including the seabed and subsoil of the Canadian continental shelf; changes to the environment outside of Canada; and, in relation to Aboriginal peoples, changes that result in effects to health and socio-economic conditions or the current use of lands or resources for traditional purposes.³⁵

Aside from the obvious likelihood of challenges from environmental groups, the Cohasset experience suggests that decommissioning operations may also conflict with fish and fish habitat and, depending on the area, the current use of resources by Aboriginal peoples.

Environmental Groups

Environmental groups are an obvious source of challenge to decommissioning. The European reaction to Shell's decommissioning of the *Brent Spar*, an oil storage facility, was extreme, but illustrative. The *Brent Spar* was redundant. In 1991, Shell commissioned independent studies and, after three years of consultations, endorsed deepwater disposal in the remote North Atlantic. The method was deemed superior in the areas of safety, environmental impact and cost. International, regional and UK regulations then permitted the proposed dumping.

Despite its legality, the 1995 UK approval of Shell's proposal triggered an immediate, dramatic and occasionally violent public backlash. Greenpeace activists occupied the *Brent Spar* as it was being towed to the disposal site. Protestors boycotted, vandalized and shot at Shell service stations in Germany. Germany's chancellor and other heads of state argued against Shell's plan at the June 1995 G7 summit in Halifax.

Shell eventually abandoned the operation. It re-initiated consultation and engaged governments, consultants, scientists and public input. Ten years and £60,000,000 later, Shell cut up the *Brent Spar*. Large parts of it were used to construct a ferry terminal in Stavanger, Norway.

The *Brent Spar* decommissioning illustrates the politically volatile character of offshore oil and gas operations. It also underlines the importance of operators looking beyond mere compliance with existing regulations when navigating the decommissioning process – and the potentially costly effects of failing to do so.³⁶ Shell had a regulatory green light, but an insufficient degree of stakeholder consensus regarding its plan ultimately doomed the plan.

³⁵ CEAA, s 5.

³⁶ Shell International Limited, "Brent Spar Dossier" (2008).

Aboriginal Peoples

The Crown has a constitutional duty to consult with, and where appropriate to accommodate, Aboriginal peoples in relation to conduct that may adversely impact claimed or established Aboriginal or treaty rights.³⁷ Decommissioning activities may adversely affect Aboriginal or treaty rights, such as those relating to fishing. In such cases, government agencies responsible will be subject to a duty to consult.

The consultative process adds a layer of complexity to project approvals and increases the risk of dispute and litigation. Damages, injunctive relief, or orders to complete consultation prior to the activity taking place are some of the remedies available for breach of the duty to consult.³⁸

Cohasset is again instructive. In 1990, 9 years before decommissioning, the proponent's Development Plan stated:

When the Cohasset and Panuke fields have been depleted, the production facilities will be removed. Wells will be abandoned in accordance with all regulations, and well jackets removed to a level below the seabed. Residual hydrocarbons in the flowlines will be flushed out to the Cohasset facility, and the flowlines recovered for possible future use [...]³⁹

The proponent thus committed to complete removal. This reflected the requirement of the Geneva Convention, rather than UNCLOS and London Convention provisions, which permitted partial removal.

In 2003, the subsequent operator, EnCana, proposed to disconnect the subsea flow lines, cables and manifold ends and leave them on the seabed. It applied to amend the Development Plan. This triggered an EA under CEAA 1992 and a 45-day consultation involving written public comment. During this process, Aboriginal groups expressed concern that the EA and consultation process failed to address impacts on Aboriginal rights to access fisheries resources. The Native Council of Nova Scotia wrote that: "the EA was devoid of information as to our [...] issues, concerns, interests and needs, and our current use of resources and future uses."⁴⁰ At the time, Mi'kmaq peoples participated in the commercial fishery as an Aboriginal right following *R v Marshall*.⁴¹ The Council complained that there was a failure to discharge the duty to consult.

Although the plan ultimately received regulatory approval, the Council's concerns exposed the project to possible delay, claims for damages, or injunctive relief. Since 2004, jurisprudence has confirmed and strengthened the duty to consult. Today, it is more likely that litigation, rather than public complaint, would result.

³⁷ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 ("*Haida*")

³⁸ *Haida*, at paras 13-14; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 37.

³⁹ LASMO, "Cohasset Panuke Development Plan" (March 7 1990) at 5.8.2

⁴⁰ Letter from the Native Council of Nova Scotia to CNSOPB (November 18, 2004)

⁴¹ [1999] 3 SCR 456 ("*Marshall*")

An inquiry from an Aboriginal association about EnCana's liability post-decommissioning⁴² also resulted in CNSOPB requiring EnCana to submit an adequate plan addressing post-abandonment ongoing liability as a condition of its approval.⁴³

The Crown cannot delegate its duty to project proponents, but it may require proponents to consult with Aboriginal groups a precondition to approval. Whether the consultative work is borne by the Crown or operators, the Cohasset experience confirms the value of incorporating Aboriginal consultation into the approvals process.

Commercial Fisheries

The third potential source of discord is commercial fisheries. Indeed, commercial fishing interests articulated strong reservations about Encana's Cohasset proposal, citing potential harm to biomass (quahog), hazards to gear, and obstruction of fisheries.⁴⁴

The EA was in favour of the proposal, noting the partial removal option would be less disruptive for the environment than complete removal,⁴⁵ and the Board ultimately approved the plan. However, CNSOPB's approval was subject to the conditions that EnCana undertake mitigation and follow-up measures, remove the topsides of the subsea installation, and submit an adequate plan addressing post-abandonment ongoing liability.⁴⁶

CONCLUSION

Risk of opposition to decommissioning over environmental issues exists at the approvals required during project development and, in particular, during decommissioning operations. Even if litigation does not erupt, the costs of project delays – particularly if the installation is no longer be earning its keep – are reason enough to try to anticipate, address and minimize other stakeholders' concerns over environmental issues.

The examples examined above suggest that operators should consider the following when planning for and seeking approvals of decommissioning operations.

- EnCana's proposal for partial removal may have been opposed by commercial fisheries and Aboriginal groups even that plan was contained in the originally approved Development Plan. However, the amendment itself, and the public consultation it triggered, might have been avoided by more flexible drafting of decommissioning program in the Development Plan. Moreover, had the possibility of partial removal been included in the original Development Plan, the proposal would perhaps have been subjected to less scrutiny.

⁴² Letter to the CNSOPB by the Netukuliemkewe'l Commission (July 21, 2004)

⁴³ CNSOPB, "Application to amend the Cohasset Development Plan: Decision Report" at para 7.8 ("Decision Report")

⁴⁴ Letter to the CNSOPB by Clearwater Seafoods (June 22, 2004); Letter to the CNSOPB by Seafood Producers Association of Nova Scotia (June 23, 2004).

⁴⁵ Jacques Whitford Environmental Limited, "CEAA Screening Level Environmental Assessment Cohasset Panuke Phase II Decommissioning", prepared for EnCana Corporation in April 2004.

⁴⁶ Decision Report, at para 7.8

- Operators should consult with, anticipate and address the interests of other commercial and non-commercial stakeholders in proposed decommissioning operations. The *Brent Spar* incident suggests that this should include efforts to gauge and manage public perception of the proposed operations.
- Where decommissioning operations have the potential to impact Aboriginal or treaty rights, direct consultation with Aboriginal groups by the operator may be an effective method of achieving consensus and Aboriginal support for the selected operations. Operators might also foster the support of affected Aboriginal groups through the use of impact benefits agreements or provisions in statutorily-required Benefits Plans.
- Where proposed operations may impact fishery interests, anticipating and addressing those impacts through the EA process might help achieve consensus in selecting operations. Monitoring environmental changes, as well as changes in fishing technology, will enhance the extent to which the operations respond to the fishery's interests.
- The Cohasset experience suggests that where partial removal is contemplated, anticipating and establishing terms of continuing liability and financial responsibility early on may help achieve consensus with relevant stakeholders.