

*The Newsletter of the Canadian Institute of Resources Law*

## THE ERCB'S WHALEBACK DECISION: ALL CLEAR ON THE EASTERN SLOPES?

by Steven A. Kennett\*

### Introduction

Alberta's Energy Resources Conservation Board (ERCB) surprised many observers with its recent decision<sup>1</sup> rejecting Amoco's application to drill an exploratory well in the Whaleback area of the Eastern Slopes.<sup>2</sup> Environmentalists saw the decision as a rare — and unexpected — victory before the ERCB, and perhaps as the dawning of a new age in the environmental regulation of oil and gas development in Alberta.<sup>3</sup> The industry reaction was, predictably, somewhat different. An editorial in *Oilweek*, an oil-patch magazine, was titled "Amoco's Betrayal." The author noted "the amount of time and effort and cost that went into Amoco's Whaleback plans" and concluded that the company had been "betrayed by a quasi-judicial arm of a government which had previously given it every reason to believe it was pro-business."<sup>4</sup>

This article argues that the Whaleback decision raises important questions regarding the ERCB's evolving approach to development

in the Eastern Slopes, its public interest test, and the broader regime of natural resources management in Alberta. Before addressing these issues, the ERCB's mandate and the Whaleback decision are briefly described.

### The ERCB's Mandate

The ERCB is a quasi-judicial tribunal that is responsible, among other things, for reviewing proposed energy developments in Alberta.<sup>5</sup> The Board's enabling legislation requires it to include environmental considerations as part of project review.<sup>6</sup> In 1993, its environmental jurisdiction was reinforced and clarified by an amendment to the *Energy Resources Conservation Act*. The ERCB is now required, when conducting a hearing on a proposed energy resource project, to "give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment."<sup>7</sup> Applications that are the subject of hearings must therefore be evaluated using a broad public interest test.

### The Decision

The ERCB held public hearings lasting two weeks on the Whaleback application in May 1994.

### Résumé

L'Energy Resources Conservation Board (la commission) a surpris beaucoup d'observateurs en rejetant la demande de forage d'un puits d'exploration, soumise par Amoco, dans la région écologiquement fragile du Whaleback dans les Eastern Slopes. Cet article décrit brièvement le mandat de la commission en matière d'environnement et le raisonnement suivi dans la décision du Whaleback. L'auteur estime que cette décision soulève des questions importantes quant à l'angle sous lequel la commission aborde les demandes d'exploitation dans la région des Eastern Slopes, à l'influence des politiques gouvernementales sur l'application du test de l'intérêt public, et à la façon dont le régime d'aménagement des ressources naturelles de l'Alberta peut résoudre les problèmes régionaux et provinciaux d'utilisation des terres.

Amoco argued that an exploratory well was necessary to evaluate the hydrocarbon potential of its mineral leases, and that an eventual discovery would produce significant economic benefits for the province. Opposing interveners identified potential impacts on wildlife and on the rural lifestyles, agricultural operations and safety<sup>8</sup> of local residents. Broader issues of appropriate land use and ecosystem conservation were also raised. The application was particularly controversial because the Whaleback was said to be the largest remaining area of relatively undisturbed montane ecosystem<sup>9</sup> in Alberta<sup>10</sup>. In addition to its scenic beauty, it is important wildlife habitat.

The Whaleback decision was released in September 1994. The ERCB's refusal to grant Amoco a well licence was based on two lines of reasoning. First, Amoco's application contained several deficiencies, notably a failure to justify adequately the proposed well location.<sup>11</sup> These deficiencies, combined with the Board's dissatisfaction with Amoco's public consultation process, were probably sufficient grounds to reject the application. Had this been the extent of the decision, it would have little general significance.

The ERCB's second line of reasoning concerned broader land-use issues. It found Amoco's application to be inconsistent with the sub-regional Integrated Resource Plan<sup>12</sup> (IRP). It also noted that the Whaleback Ridge is a likely candidate for designation under Special Places 2000,<sup>13</sup> the Government of Alberta's proposed process for completing the protection of representative examples of Alberta's ecosystems by the year 2000. The Board therefore concluded that no energy

development in the area should be approved at this time. The Board's discussion of land-use issues highlights important questions regarding the review of applications for Eastern Slopes development, the ERCB's decision-making process, and the current approach to natural resources management in Alberta.

### **Eastern Slopes Development**

In December, 1993, the ERCB issued Informational Letter<sup>14</sup> IL 93-9,<sup>15</sup> setting out supplementary application requirements for developments in the southern portion of the Eastern Slopes. This directive was, in the Board's words, intended in part to advise industry of "a shift in public values which has resulted in a greater emphasis by the public on the protection of wildlands and of ecological integrity" in this area.<sup>16</sup> It outlined the Board's expectations regarding public consultation, information on overall development plans, environmental assessment at each stage of development, and consolidation of plans and activities among operators.

A major issue raised in IL 93-9 is the extent to which the potential for related future development should be addressed by the applicant at the exploration, delineation, and production stages. For example, what information regarding the environmental consequences of full-field development should be included in an application for an exploratory well, and how should this information influence the Board's decision-making?

IL 93-9 proposes a step-wise approach for evaluating environmental effects. Initial well-licence applications are "to be submitted as a part of a 'development plan' rather than on a piece-meal or single-well

approach."<sup>17</sup> Broad guidelines for plans are provided, and the level of detail required increases in subsequent applications as the project moves towards full-field development. In a related provision, IL 93-9 states that the "environmental assessment" portion of applications should include "a description and analysis of the significance of environmental, economic, and cultural impacts including regional, temporal, and cumulative effects."<sup>18</sup>

These requirements represent an ambitious initiative by the ERCB to address the complex issues raised by its project review mandate in the environmentally (and politically) sensitive Eastern Slopes. The policy direction established by IL 93-9 requires, however, elaboration and practical application before a clear and predictable approach will emerge.<sup>19</sup> On the issue of cumulative effects assessment, for example, the ERCB has indicated that additional work is needed to design and implement an appropriate review process. In the 1994 Moose Mountain decision, the first Eastern Slopes decision following the release of IL 93-9, the Board stated that "the methodology and standards for such [cumulative effects] studies remain poorly defined" and "the Board is also unclear as to how or by whom such assessments should be conducted".<sup>20</sup>

The Whaleback decision provided an opportunity to address the issue of related future development. The Board reviewed three scenarios for full-field development prepared by Amoco. While it found the proposal "highly speculative" at best, the Board affirmed "that the exercise has provided value in assessing the costs and benefits associated with approval of the initial exploratory well."<sup>21</sup> In addition, the Board stated

that: "The discussion, even at this very early stage, of the range of development scenarios, allows the Board to determine if there are aspects of future development which would clearly make the proposal unacceptable."<sup>22</sup>

The Whaleback decision does not, however, discuss in detail the development scenarios or their specific implications. The Board simply stated that Amoco's impact-minimizing scenario was "at the outer bounds of current technology" and that "there is a reasonable probability" that development would require more well pads than this preferred scenario.<sup>23</sup> In its view: "This raises the possibility of different, and possibly more severe, environmental effects which would need to be balanced at a later stage against the claimed economic benefits from full-field development."<sup>24</sup> Finally, when reviewing habitat loss resulting from the proposed well, the Board noted that "This effect would be magnified significantly under the various development scenarios."<sup>25</sup>

This treatment of related future development leaves important questions unanswered. What arguments and evidence regarding full-field development might lead to a finding, during the review of the initial well-licence application, that the proposal is "unacceptable"? How were these matters considered in reaching the Whaleback decision? What weight, if any, did the Board give to the interveners' argument that the application should be denied because full-field development would entail the extension of roads, pipelines and other facilities into Alberta's largest relatively intact area of montane ecosystem? While the Board's rationale for refusing Amoco's application did not require it to answer these questions in the

Whaleback decision, they foreshadow issues likely to arise in future Eastern Slopes applications.

The extent to which future development should be taken into account in applications for exploratory wells is undoubtedly a difficult issue. Like cumulative effects assessment, consideration of future development raises the problem of how to address regional land-use concerns at the project review stage, a subject returned to below. The Whaleback decision provides initial indications of the Board's approach to this aspect of IL 93-9. In order to provide greater certainty, however, the ERCB may wish to discuss specific full-field scenarios and their implications in more detail in future applications than it did in the Whaleback decision.

#### **The ERCB's Public Interest Test**

The provincial government's land-use policies were central to the ERCB's application of the public interest test in the Whaleback decision. In determining whether the proposed development "can be carried out in a manner which does not reduce the existing land-use values so significantly that the overall public interest is compromised,"<sup>26</sup> the Board referred to the Integrated Resource Plan (IRP) for the Whaleback area and to Special Places 2000, Alberta's proposed protected areas strategy. This approach raises an important issue for the Board's decision-making process. How should reliance on these policies be reconciled with the ERCB's statutory obligation to determine on an energy resources conservation basis whether or not proposed developments are in the public interest?

The area IRP contains land-use guidelines administered by the Alberta Ministry of Environmental Protection and created under the rubric of *A Policy for Resource Management of the Eastern Slopes*,<sup>27</sup> a general land-use strategy developed in the 1970s and revised in 1984. A major factor in the Whaleback decision was the ERCB's interpretation of the IRP as specifying "no net loss of habitat".<sup>28</sup> The Board found that this requirement would not be met in the proposed well location, and that the road extension required to service the well was "totally inconsistent with the intent of the IRP."<sup>29</sup> The Board was particularly concerned with the potential impact on wildlife of the increased public access permitted by the road, and it concluded that "a sound access control plan, consistent with the Integrated Resource Plan for the area, should be developed before any disturbance is allowed to take place."<sup>30</sup>

The Whaleback decision shows that IRPs can have a major influence on ERCB decision-making, although the Board quite correctly refused to fetter its discretion by treating them as binding.<sup>31</sup> In the Board's view, IRPs provide "valuable insights and direction into the Provincial Government's land-use goals".<sup>32</sup>

What remains to be seen, however, is the extent to which the ERCB is prepared to consider fundamental land-use values, and override IRPs, when assessing the public interest. Alberta's Natural Resources Conservation Board (NRCB), which operates under the same statutory public interest test as the ERCB,<sup>33</sup> clearly indicated its willingness to look critically at IRPs in its West Castle decision.<sup>34</sup> It stated that "the concept of integrated resource

management set out in the *Eastern Slopes Policy* and other public lands planning and policy documents may create unrealistic expectations by the public that we can 'have it all,' particularly where relatively small geographic areas are concerned.<sup>35</sup> The NRCB then added that "sustainable development may not be achievable unless integrated resource management is understood to mean that uses may be permitted, but in more discrete areas than have been available in the past".<sup>36</sup> While the inconsistency between Amoco's proposal and the IRP arguably relieved the ERCB of the need to probe beyond the basic IRP requirements in the Whaleback decision, this approach may not always be available.

An analogous question is raised by the discussion of Special Places 2000. The ERCB noted the government's public commitment to proceed with this initiative in a timely fashion, and agreed with interveners that the Whaleback "would likely be a prime candidate for consideration by the Special Places 2000 program."<sup>37</sup> Until that evaluation has been performed, the ERCB concluded, it would not be in the public interest to approve a development that could compromise the area's ecological values. The Board also provided the following guidance for the future:

"Once a decision has been made under the Special Places 2000 program for the region, the Board would be willing to reconsider an application by Amoco under the terms defined for the area. ... The Board would still need to be convinced that gas development could be carried out in a manner which did not unacceptably compromise the integrity of the Whaleback

ecosystem or the surface values of the region."<sup>38</sup>

The Board appears to be suggesting that the outcome of Special Places 2000 would be a major determinant of its approach to future applications to drill in the Whaleback, while reserving for itself the final word on whether any such development would be acceptable.

The ERCB's refusal to approve Amoco's application is understandable given that Special Places 2000 has been proposed but not yet adopted as government policy. The Board recognized that to approve development having long-term environmental consequences may, in some cases, pre-empt the Special Places 2000 program. However, this cautious approach creates a degree of uncertainty regarding the ERCB's application of its public interest mandate.

As with its consideration of the IRP, the Board must strike a delicate balance between giving due weight to the government's land-use planning policies, and surrendering in practice a part of its statutory mandate to determine whether proposed projects are in the public interest. As a matter of law, the Board cannot fetter its discretion. However, the extent to which its independent decision-making function should be influenced by government policies, either existing (e.g., IRPs) or proposed (e.g., Special Places 2000), is clearly a debatable issue. Finally, from the perspective of applicants and interveners, the Whaleback decision raises a very practical question: Will the ERCB treat policy statements such as IRPs as *de facto* binding standards, or will it develop its own approach to land-

use issues when determining the public interest? Decisions on future applications will likely be required to answer this question definitively.

### **Natural Resources Management in Alberta**

The controversy surrounding Amoco's Whaleback application illustrates clearly that individual projects can raise important regional and provincial land-use issues. The fundamental question for resource management in Alberta is whether these issues should be addressed through project-specific review, through a broader process of land-use zoning, or through a combination of the two approaches.

The ERCB addressed this issue directly, stating that "the Special Places 2000 initiative has been designed to specifically identify and evaluate unique lands such as the Whaleback within a broader provincial context" and that this process "is the logical forum in which to debate the overall public value of the Whaleback from the provincial perspective."<sup>39</sup> There are two principal arguments for this approach.

The first argument is that a process to establish greater certainty regarding land-use priorities can save time and money. This argument is supported by the sequence of events in the Whaleback application. Amoco paid \$1.6 million for mineral rights in the Whaleback area. It then conducted extensive public consultations, prepared its application, and participated in a contested public hearing. The hearing, it should be noted, also required a considerable expenditure of resources by interveners and the ERCB. In the end, the application was rejected in part

because of its inconsistency with the area IRP and the uncertain status of Special Places 2000. Arguably, prior resolution of broad land-use issues could have avoided this outcome.

The second argument is that the project review process is an inefficient way to address broader land-use issues. This problem is illustrated by the Whaleback. It may be unreasonable to expect the applicant (and the interveners) to address the condition and importance of montane ecosystems throughout Alberta, and the relative ecological, social, and economic value of the Whaleback Ridge, in the context of a single well-lit licence application. It may also be difficult to put the full range of relevant evidence before the Board in this context. Furthermore, the same issues and evidence may have to be considered once again by the Board should Amoco re-apply to drill in the Whaleback. Finally, there is a risk that project-specific review will result in incremental decision-making that will increasingly disturb natural ecosystems, create growing uncertainty for the resource sector, and lead to project-by-project confrontations.

If these concerns are justified, they undeniably lend support to the Board's conclusion that broader land-use issues are best addressed through Special Places 2000. The need to consider a wide range of possible land uses and resource sectors, and the restriction of the ERCB's mandate to energy projects, also suggest the need for a more comprehensive process. Even if Special Places 2000 does not meet these expectations, an independent and open process could be created to make fundamental land-use choices, thereby

leading to more rational resource management decisions and simplifying the task of project-specific reviews. Perhaps British Columbia's Commission on Resources and Environment (CORE) is a useful model?

At the present time, however, it is uncertain whether broader land-use issues will, in fact, be satisfactorily resolved through such a process in Alberta. Existing land-use planning, notably the IRPs, has not been notably successful. Special Places 2000 has not yet been endorsed by Cabinet, and the proposal for this initiative does not clearly set out a mechanism for determining land-use priorities and designating "special" places. It is possible that an improved process for establishing land-use priorities (and effective zoning) will not be created in Alberta, or that the process that does emerge may lack the elements of independence and openness that are the hallmark of decision-making by the ERCB. In either case, the argument for addressing broader land-use issues at the project review stage would be considerably strengthened. The ERCB would then have to consider whether (and how) to address regional land-use values.<sup>40</sup>

The Whaleback decision thus raises a fundamental issue for natural resources management. In an environmentally sensitive area like the Eastern Slopes, individual applications and incremental project review will inevitably raise land-use issues of regional, provincial and even broader significance. How these issues are to be addressed remains an open question at this time. Whatever unfolds, the Board's solution in the Whaleback decision is only an interim measure.

### **Conclusion**

The Whaleback application presented the ERCB with a particularly challenging set of circumstances in

which to undertake a project review. The Board's decision contains a convincing rationale for rejecting the proposed development, pointing both to deficiencies in the application and to broader land-use concerns that made approval inappropriate at the time. Not surprisingly, however, the Whaleback decision leaves a number of important issues unresolved.

While IL 93-9 is an important acknowledgement by the ERCB that applications in the Eastern Slopes require enhanced scrutiny, work remains to be done in defining the Board's approach to related future development and to the assessment of cumulative effects. In addition, the ERCB's public interest test requires it to tread carefully when taking provincial policy directions into account so as not to fetter its own discretion. The Board's view of IRPs, for example, will undoubtedly be clarified in future decisions. Finally, the broader land-use issues that are integral to natural resources management in the Eastern Slopes have yet to be adequately addressed. These issues were raised directly in the Whaleback hearings. Until they are resolved, the future for both the oil and gas industry, and for the protection of environmental values, is far from clear in Alberta's Eastern Slopes.

### **Acknowledgement**

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## Notes

1. F.J. Mink, D.F. Bietz & R.G. Evans, *Application for an Exploratory Well Amoco Canada Petroleum Company Limited Whaleback Ridge Area* ERCB Decision D 94-8, 6 September 1994 (hereinafter Whaleback decision).
2. The Eastern Slopes is a region of foothills and mountains extending from the prairies to the continental divide.
3. See, Vicki Barnett, "Environmentalists Cheer" *The Calgary Herald*, 9 September 1994, p. A2; Canadian Parks and Wilderness Society, Media Release, 8 September 1994.
4. David Coll, "Amoco's Betrayal" *Oil week* (September 19, 1994) p. 4.
5. The ERCB is described in detail in Steven A. Kennett, ed., *Canada Energy Law Service — Alberta* (Calgary: Carswell).
6. For example, it is required "to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of the energy resources and energy" (*Energy Resources Conservation Act*, R.S.A. 1980, c. E-11, s. 2(d)) and "to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta" (*Oil and Gas Conservation Act*, R.S.A. 1980, c. O-5, s. 4(c)).
7. *Energy Resources Conservation Act*, s. 2.1. This test is identical to that established in the *Natural Resources Conservation Board Act*, S.A. 1990, c. N-5.5, s. 2.
8. The high probability that any hydrocarbons encountered would contain sour gas (H<sub>2</sub>S) led to safety concerns.
9. The montane region consists of grasslands and open forests. It is subject to warming chinook winds during the winter and therefore has relatively little snow cover.
10. This argument was explicitly accepted by the ERCB in the Whaleback decision, p. 34.
11. Other deficiencies related to emergency response procedures.
12. The proposed well location is within the *Livingstone-Porcupine Hills Sub-Regional Integrated Resource Plan*.
13. See, Report of the Advisory Committee, *Special Places 2000: Alberta's Natural Heritage* (November 15, 1993).
14. Informational Letters (ILs) are issued by the ERCB to outline Board policies. ILs do not have the legal force of legislative or regulatory requirements, and their application may be subject to the Board's discretion and interpretation.
15. ERCB, *Oil and Gas Developments Eastern Slopes (Southern Portion)*, Informational Letter IL 93-9, 13 December 1993.
16. B.F. Bietz, R.G. Evans & N.G. Berndtsson, *Applications for Well Licences Moose Mountain Area Husky Oil Operations Ltd.* ERCB Decision D 94-2, 11 March 1994, p. 13 (hereinafter Moose Mountain decision).
17. IL 93-9, p. 3.
18. *Ibid.*, p. 4.
19. The Board states that IL 93-9 presents a broad regulatory approach that is still evolving, and that it is an interim document that will be revised as circumstances warrant. See, IL 93-9, p. 2.
20. Moose Mountain decision, p.10.
21. Whaleback decision, p.16.
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*, p.33.
26. Whaleback decision, p.32.
27. Government of Alberta, *A Policy for Resource Management of the Eastern Slopes Revised 1984* (Edmonton: 1984).
28. Whaleback decision, p. 33.
29. *Ibid.*
30. Whaleback decision, p.35.
31. Whaleback decision, p. 32. IRPs have no legal status and constitute simply statements of government policy. See, Alberta Forestry, Lands and Wildlife, Resource Planning Branch, *Integrated Resource Planning in Alberta* (Edmonton: September, 1991), pp. 1, 5.
32. *Ibid.*, p. 32.
33. It should be noted that the ERCB's enabling legislation contains a number of purposes, whereas the NRCB's mandate is only to apply the public interest test quoted above, *supra*, note 7.
34. K.R. Smith, G.A. Yarranton, C.H. Weir & C. Dahl Rees, *Application to Construct Recreational and Tourism Facilities in the West Castle Valley, near Pincher Creek Alberta*, NRCB Decision Report #9201, December, 1993 (hereinafter West Castle decision).
35. West Castle Decision, p. 10-11.
36. *Ibid.*
37. Whaleback decision, p.34.
38. *Ibid.*
39. *Ibid.*
40. The explicit consideration of these values in a project review is illustrated by the NRCB's West Castle decision.

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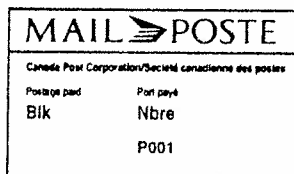
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