

# **SUBMISSION TO THE B.C. ENERGY COUNCIL ON LONG TERM FIRM ELECTRICITY EXPORTS**



## **Part 1**

by

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## **INTRODUCTION**

Since 1974, the West Coast Environmental Law Association (WCELA) has provided legal services to members of the public who are concerned about threats to the environment. WCELA and the West Coast Environmental Law Research Foundation provide legal representation, promote law reform, provide legal education, conduct research and maintain a library of environmental legal materials.

West Coast Environmental Law Association has long promoted integrated environmental and energy planning in B.C. In 1986, WCELA represented the Peace Valley Environmental Association in a submission on federal regulation of electricity exports.

## **SUMMARY**

The decision on electricity exports should be deferred for the following reasons.

1. The B.C. Energy Council should first develop a comprehensive provincial energy plan which will provide a framework for decisions on individual issues such as electricity export.
2. Other laws and policies currently being developed by the provincial government will affect resolution of the question of whether new electricity projects should be developed for export. These policies include: a land use

strategy; settlement of native land claims; and reform of some key provincial environmental laws. A decision on electricity export should be delayed until these laws and policies are in operation.

3. New federal and provincial environmental assessment laws should be fully operational before any new electricity export projects are approved. These assessment processes should be used to assess the full cumulative environmental impact of proposed, long term firm electricity exports.

4. Trade treaties have the potential to dramatically affect environmental regulation of dedicated energy projects. A decision should not be made until we are assured that the trade treaties will not compromise our ability to protect the environment.

## **KEY ISSUES**

The B.C. Energy Council was directed by the provincial government in August 1992 to report on whether the provincial government should allow either independent power producers or B.C. Hydro to construct new generation and/or transmission facilities dedicated to the export market. The key issue in our view, and the issue the Council was directed to consider in the Terms of Reference for this study, is whether the net benefits of long term firm electricity exports outweigh the net costs to British Columbians. Net costs and benefits must be assessed using the principles of full cost accounting and taking into account all environmental, social and economic factors.

The Council's *Interim Report* dated December 18, 1992, instead identifies the key issue as the role of the B.C. integrated reservoir system and transmission grid in supporting or implementing any long term firm exports. While these two key issues cannot be separated, the more important question relates to costs and benefits to British Columbians, using full cost accounting and including the long term environmental and social costs and benefits. The *Interim Report* leaves the impression that the government must decide only whether private producers, public producers or some combination of the two be allowed to build new dedicated facilities. WCELA recommends that the Council recommend to Cabinet that it defer this decision until other relevant policies are completed.

Our submission is divided into two parts. This first part addresses the environmental regulatory framework surrounding the question of electricity export, focussing on three issues:

1. the provincial regulatory framework;
2. the federal regulatory framework; and
3. the international regulatory framework.

The second part ("Part 2") is a commissioned report on the likely environmental impacts of allowing long term firm electricity exports titled *An Analysis of the Environmental and Socioeconomic Impacts of Long Term, Firm Electricity Exports* by David Sims, MNRM.

## **PROVINCIAL FRAMEWORK**

### **Need for a Comprehensive Energy Plan**

We recommend that the Council develop a full energy plan for B.C. and that the provincial government implement the policies recommended in that plan before deciding whether to allow long term firm electricity exports. At a minimum, the energy plan should be completed. [(1) -- 1. . The Energy Council Act, s. 6, directs the Council to submit a provincial energy plan. The Council has estimated this plan will be complete in two years. Also see Part 2, 6.1.] Ideally, other relevant provincial policies should also be finalized before the bar on long term firm export projects is lifted.

Proposed comprehensive provincial policies for land use; settlement of native land claims; and reform of the provincial environmental laws will also affect the development of plans to export electricity. Ongoing processes such as the B.C. Commission on Resources and the Environment (CORE) and the Protected Areas Strategy (PAS) should be completed before the export question is resolved.

For example, a provincial land use plan could remove a significant area of land from the potential resource base for wilderness preservation and conservation of biodiversity, prohibiting any new power project development in that area. Such a plan could include components equivalent to the U.S. *Wild and Scenic Rivers Act*. [(2) -- 2. . An Act to provide for a National Wild and Scenic Rivers System, Public Law 90-542, 90th Congress of the United States, 1968.] This federal law preserves undeveloped rivers of national significance. The *Act* eliminates about 40% of the U.S.'s remaining undeveloped river resources. [(3) -- 3. . Brower, Michael, *Cool Energy Renewable Solutions to Environmental Problems* (Cambridge, Mass: The MIT Press, 1992), 113. ] Environmentalists have long advocated the adoption of similar legislation in B.C. [(4) -- 4. . B.C. Wildlife Federation, *Wild Rivers - A Proposal for Wild, Scenic and Recreation Rivers in British Columbia*, (Vancouver, B.C.: 1971).] The proposed mine near the Tatshenshini River illustrates the controversy of proceeding with any development on wild and scenic rivers before these issues are settled. Completing CORE's provincial land use plan including PAS will remove much of the uncertainty about energy project development.

The province's plan to combat climate change is another example of an incomplete policy that will affect the export issue. For example, in B.C., operating the Burrard Thermal Plant at full capacity could have serious consequences for global warming by increasing CO<sub>2</sub>. [(5) -- 5. . See Part 2 of WCELA submission, s. 2.1.5 and 2.1.8. The Province has not yet adopted a plan to address global warming.] Increased use of this facility is one possible outcome of allowing long term firm electricity exports, yet a new

provincial clean air strategy might suggest restricting increased operations. We need to look at climate change issues at the provincial, national and international level to decide how best to cut emissions. But in the short term, we need to prevent increases of emissions and promote energy efficiency. The Burrard Thermal Plant example shows how energy issues should be evaluated on an integrated, rather than isolated basis.

In addition, important defects in the current provincial regulatory framework may be cured in proposed provincial environmental assessment legislation, which is expected to apply to all major projects in B.C., including energy projects. A key deficiency with the current energy project review process is that it is the proponent's responsibility to fund and commission all studies, rather than an independent body. Also, there is no legislative duty to consider alternatives to the proposed project. Nor is there a duty similar to that found in the *Northwest Power Act* to give priority to conservation and renewables when considering applications for energy project approvals. The new law should improve the state of environmental assessment in B.C., subjecting any energy export proposal to a rigorous examination. The public consultation report stated that new legislation should, among other things, "assess its contribution to the cumulative impact in the effected region". [(6) -- 6. . Reforming Environmental Assessment in British Columbia, A Report on the Consultation Process, 1991, 15. ]

Delaying a decision would help Cabinet to reach a more informed and integrated conclusion on the likely environmental impacts of allowing this type of electricity export. The options could be weighed against the energy plan, the land use strategy and the new environmental laws and policies. CORE's recent report on the Tatshenshini dispute outlines why a deferred decision in that case would assist decisionmakers: delay would permit completion of further baseline data, provincial land use objectives and regional plans clarifying the scope of mineral development areas. [(7) -- 7. . Interim Report on Tatshenshini/Alsek Land Use, 1993, CORE, 89.] Allowing independent power producers to proceed with projects dedicated to long term firm export contracts could needlessly tie the hands of the government in its development of these other important laws and policies. The Kemano Completion Project has demonstrated the difficulties of proceeding with projects in isolation.

We ask the Council to recommend to Cabinet delaying a decision on this individual issue until

(a) an energy plan is developed and implemented that has conservation and efficiency as its cornerstones, and

(b) provincial policies which will affect development of export projects are completed. [(8) -- 8. . Also see Part 2, s. 2.2 and 6.2.]

## **FEDERAL REGULATORY FRAMEWORK**

### **Role of Federal Environmental Law and Regulation**

The federal role in regulating electricity exports has substantially diminished in recent years. [(9) -- 9. . Saunders, Owen J. "Energy, Natural Resources and the Canada-United States Free Trade Agreement" (1990) 8 J.E.R.L. 3, 7.] There are important reasons why federal involvement should be maintained.

Both federal and provincial areas of jurisdiction are affected by electricity exports. Assessment conducted by both levels of government is required to determine the full cumulative environmental impact of proposed long term firm electricity exports. Yet the *Interim Report* is largely silent on the issue of federal involvement. Clearly, there are many areas of federal jurisdiction which will be affected if this type of export is allowed, such as Aboriginal peoples, fisheries, navigation and migratory birds. In addition, since the issue of pollution is of particular significance to environmental impact, the federal government's pollution control powers should also be used to regulate this type of project. [(10) -- 10. . The case of R. v. Crown Zellerbach [1988] 1 S.C.R. 401 established that marine pollution control was a federal area of responsibility under the federal government's Peace, Order and Good Government powers. Some have argued that the federal government's powers in this area should be more broadly applied. Transboundary pollution is an additional area of federal jurisdiction.]

The environmental issues involved in electricity exports are currently before the Supreme Court of Canada. [(11) -- 11. . Attorney General of Quebec v. National Energy Board [1991] 3 F.C. 443 (FCA).] The Federal Court of Appeal restricted the National Energy Board's environmental assessment of the Great Whale hydroelectric project in Quebec to the environmental consequences of the actual export of power. As a coalition of environmental groups who have been granted intervenor status in the case have argued, this form of assessment ignores the cumulative environmental effects from production and transmission facilities that are a necessary antecedent and are directly linked to the export. [(12) -- 12. . Affidavit of Gregory McDade, filed in support of application for Leave to Intervene in the case of the Grand Council of the Crees of Quebec and the Cree Regional Authority and the Attorney General of Quebec, Hydro Quebec and the National Energy Board and the Attorney General of Canada, October 28, 1992, paragraph 8(b)(i). ]

The Federal Court of Appeal struck down a condition of the export licences requiring Hydro Quebec not to contravene federal environmental standards, such as the Thermal Power Generation Emissions National Guidelines for New Stationary Sources. [(13) -- 13. . P.C. 1990-333, February 2, 1990 Can. Gaz. Part 1, p. 850.] The Grand Council of the Crees of Quebec and the Cree Regional Authority argued in their application for Leave to Appeal that these atmospheric pollution standards are federal areas of responsibility. [(14) -- 14. . Memorandum of Argument, paragraph 47-48, October 28, 1991. ] Maintenance of national air quality standards is just one example of why federal regulation is required in addition to provincial regulation for energy exports. Climate change dictates strong measures which combine environmental and energy concerns from all levels of government. [(15) -- 15. . Scientists say that the current predicted rise of between 2.5 and 4.5 degrees C. by the end of the next century will have profound, irreversible and very likely adverse consequences; Brower, Michael, Cool Energy, op.

cit., fn 3, p. 9. Mr. Brower is the Research Director of the Union of Concerned Scientists.]

The arguments made by the National Energy Board in its 1987 *Report of an Inquiry into the Regulation of Electricity Exports* remain valid. The panel stated that regulation may be justified in cases where projects could impose costs not borne by the investors, such as the costs of environmental damage. If these costs were substantial, the project may be economically undesirable from the national public interest perspective. Flooding a large area of land is one example because of loss of agricultural land, loss of wildlife habitat and biodiversity, and potential land contamination. Another example of divergence between the national and provincial interest is pollution arising from coal generated electricity, which could impose costs on Canadians beyond the boundaries of the exporting province.

...Regulation may also be warranted in cases where exploitation of a resource in the short run would cause future generations to pay higher prices than otherwise (user costs), and where there is a potential divergence between the interests of the utility and those of the public. This divergence would occur if the utility does not provide for these longer term cost implications in its current development programs. [(16) -- 16. . Report of an Inquiry Into the Regulation of Electricity Exports, by a Panel of the National Energy Board Following a Hearing in November and December 1986, National Energy Board, June 1987, 10-11.]

Environmental problems transcend boundaries. Any recommendations made by the Energy Council to Cabinet must take into account the largely unexplored issue of federal involvement in the export issue due to its environmental and trade powers. Asking Cabinet to defer a decision until these broader policies have been settled in a manner that ensures that environmental protection remains paramount will lead to a better decision.

## **INTERNATIONAL REGULATORY FRAMEWORK**

Any discussion of exports necessarily involves consideration of trade law. As the *Interim Report* of the Energy Council notes, no one can predict how the Free Trade Agreement (FTA) (or the North American Free Trade Agreement, NAFTA, if it is approved) will affect long term firm electricity exports. [(17) -- 17. . A thorough discussion of the relationship between environmental protection, market incentives and trade law is beyond the scope of this paper.] The potential for dispute is great. The intensely competitive market in the U.S. for energy suppliers, [(18) -- 18. . The Council's Interim Report cites one example of this competitive market at page 16.] and the rising tide of American protectionism are two trends increasing the likelihood of trade disputes in this area.

### **Trade Law Constraints on Canadian Action**

The ability of both the federal and provincial governments to regulate the environment is constrained by the FTA. The FTA obligates the federal government to take all necessary steps to give effect to the FTA by provincial and local governments. This could oblige the federal government to press for an export to proceed or face a complaint by the U.S. if the B.C. government decided to withhold approval of a dedicated export project unless certain environmental conditions were met.

## **Environmental Subsidies**

As three world experts on the environment/economy question note, the existing framework of incentives and subsidies for energy exploration, development and consumption promote the opposite of what is needed for a sustainable energy future. [(19) -- 19. . MacNeill, J., Winsemius, P. and Yakushiji, T. *Beyond Interdependence - The Meshing of the World's Economy and the Earth's Ecology*, Oxford University Press, N.Y. 1991: 33-38. ] Environmental taxes on goods such as electricity may be necessary to promote efficiency and conservation, which are required to conserve natural resources, reduce greenhouse gas emissions, and reduce adverse impacts on wildlife, air, water and land. [(20) -- 20. . See Part 2, s.3.1.] However, trade negotiators chose not to make special provisions for electricity subsidies in the FTA and NAFTA while oil and gas exploration subsidies were exempted from challenge as trade barriers.

A provincial energy plan could incorporate taxes, a pricing policy or some other economic incentives favouring environmental protection which may be attacked as restraints on trade. Even if B.C. or Canada could justify a particular pricing policy for electricity exports as necessary to protect the environment, whatever law adopted to meet those ends must be "the least trade restrictive" possible. This "least trade restrictive" rule has been adopted in many recent General Agreement on Trade and Tariffs (GATT) cases. [(21) -- 21. . The Thai cigarette case; the Tuna/Dolphin Case and the Canada Salmon/Herring Case: GATT, BISD 37S-200; GATT, BISD 29S/91; GATT, BISD, 35S/98; cited in Thomas, J.C. and Tereposky, G.A. "International Trade in the Environment", unpublished paper, February 1993, 13.] The U.S. could challenge any environmental "adders" [(22) -- 22. . See Part 2, s 5.1.] as a subsidy and impose a countervailing duty if it argued that the "subsidized" electricity imports into the U.S. caused material injury to the domestic U.S. industry. [(23) -- 23. . Thomas, J.C. and Tereposky, G.A., op. cit. J. Owen Saunders "The Mexico Factor in North American Free Trade: A Canadian Perspective" (1991) 9 J.E.R.L. 239, 252. ]

Allowing long term firm electricity exports may also allow Canadian power producers to challenge U.S. laws favouring energy conservation over other forms of energy purchase. The Canadian sellers could argue that such laws discriminated against their product. [(24) -- 24. . Wathen, Thomas A Guide to Trade and the Environment, Environmental Grantmakers Association, N.Y., 1992, 59. ] The possibility of either Canadian or American challenges would have serious environmental consequences, leading to unsustainable energy policy in both countries.

## **Production and Process Methods**

If the current round of GATT negotiations succeeds, the Agreement on Technical Barriers to Trade negotiated as a code to GATT will include processes and production methods in the definition of technical regulations, further raising the potential for trade disputes over electricity exports. Article 903 of NAFTA affirms Canada's commitment to GATT's Technical Barriers to Trade Agreement. Consequently, controls on emissions which affect production methods could be viewed as trade barriers. [(25) -- 25. . O'Connor, Bernard "GATT and the Environment" 1 RICIEL 6, 10.]

Under the present trade law regime, these possibilities seriously affect provincial plans for energy and environmental protection. If the problems are not resolved, the ban on exports should be maintained. Trade treaties must not compromise any government's ability to protect the environment. The treaties must incorporate measures to further environmental protection. If we proceed with exports at any time, we need to ensure that these trade issues are settled to our satisfaction first. The Province must be free to enact whatever measures it decides are necessary to protect the environment without challenge from our trading partners.

## **CONCLUSION**

While decisions must always be made without full knowledge and in less than ideal conditions, the Province does seem to be putting the cart before the horse in this instance by asking the Council for advice on this issue before the provincial energy plan is developed. The Province should wait to finish at least the broad brush outline of more comprehensive energy/environment policies before settling the discrete issue of long term firm electricity exports. Formulating an overall provincial energy plan that fully integrates environmental considerations, completing CORE's task of preparing a provincial land use strategy, and proceeding with the long awaited reform of environmental legislation should be the government's first priorities. Only then can the full costs and benefits to British Columbians of allowing dedicated electricity exports be weighed.

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End of Submission To The B.C. Energy Council On Long Term Firm Electricity Exports