



# Transboundary SEA

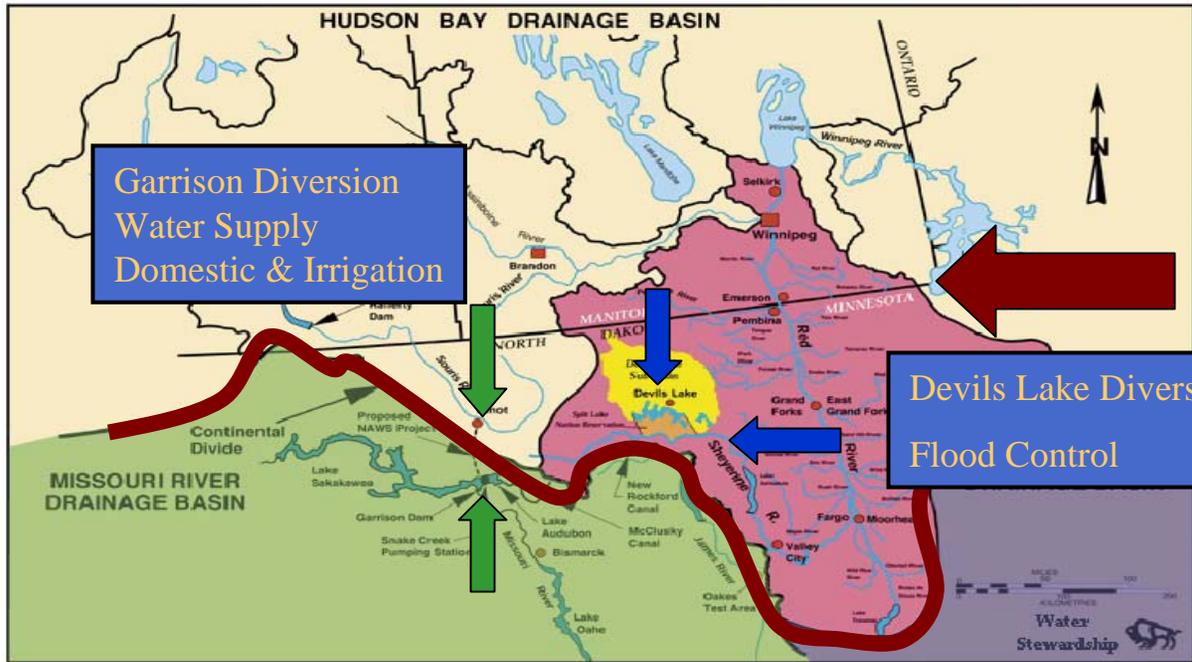
A Forensic Review of Two U.S. Water Projects that  
will Impact the Canadian Hudson Bay Watershed

Merrell-Ann S. Phare, B.A., LL.B., LL.M.  
J. Michael McKernan, M.E.S., M.Sc.





# Map of Program Theatre



CENTRE FOR INDIGENOUS  
ENVIRONMENTAL RESOURCES



# Review Premise

- Two water-management situations
  - No SEA applied, both projects approved
  - Existing transboundary water treaty, institutions ignored
    - *Boundary Waters Treaty, 1909*
    - International Joint Commission
  - Breakdown in relationships
  - Legal action undertaken to force negotiations
- Given what we know now, would SEA have led to different result?



# Which Decisions Were Critical?

- Numerous “upstream” (policy) decisions before downstream plan and project decisions
  - Prevented effective bilateral cooperation
    - Denying opportunities for joint impact mitigation
  - Ensuring potential for environmental impacts to occur
- These upstream policy decisions were critical to both projects, but are not now typically the subject of SEA
  - Can SEA take these fundamental decisions into account?





# Upstream Plan Decisions

1. Supply-Side Management Decisions	Devils Lake	Garrison Diversion
<ul style="list-style-type: none"> <li>•Future water-supply needs will not be “managed” but rather will be met in any way possible</li> </ul>		√
<ul style="list-style-type: none"> <li>•Implicit rejection of Precautionary Principle               <ul style="list-style-type: none"> <li>–To award groundwater use permits without persuasive evidence of sustainable aquifer yields, and without decision re: fraction of aquifer they will not allocate (i.e. level of long-term water reserves needed to be protected)</li> </ul> </li> </ul>	√	√
<ul style="list-style-type: none"> <li>•Implicit rejection of Full-Cost Accounting               <ul style="list-style-type: none"> <li>–water as a free good</li> </ul> </li> </ul>	√	√





# Upstream Plan Decisions

1. Supply-Side Management Decisions (cont...)	Devils Lake	Garrison Diversion
<ul style="list-style-type: none"> <li>•Policy not to require optimum water-use efficiency               <ul style="list-style-type: none"> <li>–Once-through cooling at coal-fired power plants</li> <li>–Centre-pivot and “travelling gun” irrigation systems</li> </ul> </li> </ul>	√	√
<ul style="list-style-type: none"> <li>•Wetlands have less value than agriculture               <ul style="list-style-type: none"> <li>–Promote drainage of wetlands and “potholes” by farmers</li> </ul> </li> </ul>	√	
<ul style="list-style-type: none"> <li>•Promotion of “wet” industries and water-intensive agricultural activities in an arid and water-limited region</li> </ul>		√



# Upstream Plan Decisions

2. Crisis-Management Decisions	Devils Lake	Garrison Diversion
<ul style="list-style-type: none"> <li>•Focus on engineering flooding solutions rather than preventing flooding of community assets                             <ul style="list-style-type: none"> <li>–e.g. by changing behaviour or upstream drainage decisions</li> </ul> </li> </ul>	√	
<ul style="list-style-type: none"> <li>•Don't manage causes of flooding (i.e. headland and wetland drainage)                             <ul style="list-style-type: none"> <li>–Just limit lake flooding to current maximum level</li> </ul> </li> </ul>	√	
<ul style="list-style-type: none"> <li>•Project scoping decisions                             <ul style="list-style-type: none"> <li>–Break-up water supply mega-projects into “smaller” projects (i.e. <i>Garrison Diversion Unit Reformulation Act of 1986</i>) to avoid transboundary impact determinations</li> </ul> </li> </ul>		√





# Upstream Plan Decisions

2. Crisis-Management Decisions (cont...)	Devils Lake	Garrison Diversion
<ul style="list-style-type: none"> <li>•Not adhere to applicable bi-national, international treaties or institutions               <ul style="list-style-type: none"> <li>–Boundary Waters Treaty, 1909 and International Joint Commission</li> <li>–2 international agreements regarding prevention of transboundary impacts</li> </ul> </li> </ul>	√	√
<ul style="list-style-type: none"> <li>•Avoid using state-of-art technology to prevent transboundary impacts               <ul style="list-style-type: none"> <li>–Gravel filter substituted for state-of-art sand filter</li> <li>–Relied on obsolete standard for disinfection effectiveness</li> </ul> </li> </ul>	√	√
<ul style="list-style-type: none"> <li>•If necessary, ignore, change, or eliminate rules:               <ul style="list-style-type: none"> <li>–2 Presidential Orders re: preventing species invasions</li> <li>–North Dakota Public Law 103-377 and Energy and Water Development Act 2001 re: economic feasibility</li> </ul> </li> </ul>	√	√





# Conclusion

- SEA must occur much further upstream in the decision-making processes to succeed in preventing transboundary impacts
- Underlying plan assumptions must be articulated
  - Especially in cases where:
    - There are unequal power relationships, or equity, between countries
    - Countries tend to make hidden policy decisions, rather than more transparent downstream “program or plan” decisions
    - Countries do not fulfill due process requirements because there are powerful domestic political forces at play
      - e.g. key public involvement requirements
- So...?



# Equity Solutions

- To be successful in avoiding transboundary impact where there are unequal power relationships, or inequity, between countries, countries using SEA must
  - Honour transboundary bilateral agreements, where they exist
- Ensure equivalent knowledge is available on both sides of border
  - Foster joint research and monitoring to ensure information is both comparable, sufficient, and available to address the issue



CENTRE FOR INDIGENOUS  
ENVIRONMENTAL RESOURCES



# Transparency Solutions

- Countries committed to SEA must not make hidden, or disjointed, policy decisions
  - Rather should make more transparent “program or plan” decisions
    - Identify assumptions upon which plan is based
- Governments are in an inherent conflict of interest when engaging in SEA
  - If politicisation of decisions unavoidable, then exercise extreme diligence in ensuring transparency of these decisions and ensure earlier examination of decision consequences



# Transparency Solutions

- Much relevant information in a country is hidden from other countries (and public) who need capacity to access both hardcopy and internet information archives
  - **Countries must establish**
    - Joint communications and information-sharing protocols
    - Permanent bi-lateral structures to accomplish protocol goals



CENTRE FOR INDIGENOUS  
ENVIRONMENTAL RESOURCES



# Transparency Solutions

- Information registries can make a difference if comprehensive, and contain critical information (even if “confidential”)
  - Risk assessments
  - Internal policy-review results
  - Pertinent correspondence
  - Consulting reports and legal opinions, even if in draft form (usually used to prevent release)
  - “Need and alternatives” evaluations



CENTRE FOR INDIGENOUS  
ENVIRONMENTAL RESOURCES



# Transparency Solutions

- Ensure equivalent knowledge is available on both sides of border
  - **Ensure data is available early enough**
    - Two years in advance of a plan decision, in order to have meaningful public consultation programs
      - 2 chances for public to comment, and then develop and propose mitigation measures
      - Including comment regarding plan assumption
    - Also, countries budget on cycles that may not overlap, so must be considered at least a year prior to budget requests deadlines



CENTRE FOR INDIGENOUS  
ENVIRONMENTAL RESOURCES



# Due Process Solutions

- To achieve due process countries using SEA must:
  - Willingness by countries to cooperate or honour relevant bilateral agreements and domestic requirements
  - Have a common goal to actively avoid litigation
    - Ensures process is cooperative, information-based
  - Actively encourage development of NGO linkages so information exchange and coordination of participation is ensured



CENTRE FOR INDIGENOUS  
ENVIRONMENTAL RESOURCES



# Due Process Solutions

- Adopt common standard of environmental care and stewardship
  - Definition of “impact”
  - Agreement on threshold for impact
  - Assessment of value of possible impacts
  - Adoption of precautionary principal
  - Definition of “meaningful”, i.e.. in public participation
  - Definition of “scientific certainty”, and statement of level of uncertainty of predictions
  - Agreement on need for and scope of a joint country public review of decision (follow-up) within 3 years of policy decision



CENTRE FOR INDIGENOUS  
ENVIRONMENTAL RESOURCES



# Public Participation Solutions

- Ensure that bilateral arrangements to prevent transboundary impacts provide formal, science-based mechanisms for challenge of policy/plan decisions by individual private citizens of the other country
  - e.g. NAFTA NAAEC Art. 14, 15 process



CENTRE FOR INDIGENOUS  
ENVIRONMENTAL RESOURCES



# Public Participation Solutions

- Government should support ENGO's to “de-bottleneck” their communications capacities
  - E.g. especially graphics
    - Similar and high capacities for data transmission
    - Common graphics software packages
    - Competent GIS systems
    - Abilities to archive large quantities of archival information in a searchable way
    - Automated file searching, or data source searching



CENTRE FOR INDIGENOUS  
ENVIRONMENTAL RESOURCES



# Closure

- SEA can succeed in a transboundary context if both governments aggressively address their inherent conflicts of interest
  - Place long-term bilateral and environmental interests at higher priority than short-term domestic interests
- SEA can succeed if all policy and plan decisions by each government are “on the table” for discussion
  - E.g. both agree to abide by a common definition and application of the Precautionary Principle





# Thank You

Centre for Indigenous Environmental  
Resources

3rd floor - 245 McDermot Avenue

Winnipeg, MB. R2M 1X5

204.956.0660

[www.cier.ca](http://www.cier.ca)

[maphare@cier.ca](mailto:maphare@cier.ca)

or

[mmckernan@tetres.ca](mailto:mmckernan@tetres.ca)



CENTRE FOR INDIGENOUS  
ENVIRONMENTAL RESOURCES