



# Trans-boundary transitional waters' conflict resolution by stakeholders – CA/US

## 1. Policy Objective & Theme

- ADAPTATION TO RISK: Integrating coherent strategies covering the risk-dimension (prevention to response) into planning and investment

## 2. Key approaches

- Participation
- Socio-economic

## 3. Experiences that can be exchanged

The main positive experience of the case study is that it is critically important to establish a legal framework obliging the eventual hazard source state of a trans-boundary transitional water body to involve the affected state into the trans-boundary strategic environmental assessment procedure. Another important lesson is that any integrated trans-boundary management plan must cover not only the catchment area of the border river (at least its lower stream), but also the whole area of a transitional water body and its direct drainage basin. Also, it should not be limited to few thematic issues, but rather provide a comprehensive planning and management instrument.

Yet another positive experience is that the key to the successful defending of the local stakeholders' interests in the maintenance of the transitional waters' environmental integrity lies in the capacity of building grass-root alliances comprised of the stakeholders from both, the affected and the hazard source states. It should be kept in mind that defending the local stakeholders' interests might take a rather long time. Therefore, securing sufficient human and financial resources, establishing broad social networks and mobilizing powerful allies is also the must. The positive experience of the Passamaquoddy Bay action also indicates that the most effective action of the local stakeholders in defending their interests is the combination of lobbying, information dissemination and legal action.

Last, but not least, US Federal Energy Regulatory Commission (FERC) decided against the proposal on a technicality - that Quoddy Bay LNG did not complete a proper Draft Environmental Impact Statement for a final permit. Hence, the whole conflict did not get decided in civil court, but in the halls of the U.S. bureaucracy.

## 4. Overview of the case

The tidal Passamaquoddy Bay, which is a transitional water body for the discharge from the St. Croix River catchment basin to the Fundy Bay, is characterized by a great aquatic biodiversity, coastal scenery, rich living resources and attractive nature tourism amenities. In 1993, the St. Croix River was designated as an International Heritage Waterway. A Plan for Long-term Cooperative Management of the St. Croix International Waterway was adopted stressing its importance for the regional cross-border natural and cultural heritage conservation. Yet, the Plan is confined to the St. Croix River catchment area and its inner estuary leaving the better part of the Passamaquoddy Bay out of its scope. Such a limitation in geographical scope cannot prevent conservation and development conflicts threatening the environmental integrity of the Passamaquoddy Bay.

The biggest conflict emerged in 2005 when several liquid natural gas (LNG) import terminals were planned for construction on the Maine coast of the Bay. Local stakeholder groups in Canada and the USA, including the native nation of the Passamaquoddy Tribe, resisted the plans to build the LNG import terminals considering them as a threat to environmental integrity of the Bay. The legal resistance lasted for five years until the construction of the LNG terminals on the tribal land was finally cancelled in 2010.

## 5. Context and Objectives

### a) Context

Passamaquoddy Bay is an estuary of St. Croix River shared by the Province of New Brunswick (Canada) and the State of Maine (USA). Over 80% of the Passamaquoddy Bay area belongs to Canada, including major navigation passages. The Passamaquoddy Bay, being a tidal transitional water body, is characterized by great aquatic biodiversity, coastal scenery, rich living resources and attractive nature tourism amenities. Its unique ecosystem supports over 2,000 species of plants and animals, including humpback whales and other cetaceans. In 1993, the St. Croix River was designated as an International Heritage Waterway. A Plan for Long-term Cooperative Management of the St. Croix International Waterway was adopted stressing its importance for regional cross-border natural and cultural heritage conservation. This Plan was developed by the St. Croix International Waterway Commission in accordance with a Memorandum of Understanding and legislation by the Province of New Brunswick and the State of Maine to jointly manage shared heritage resources along the portion of their common border defined by the St. Croix River system. It establishes goals and policies for management that seek to preserve and celebrate a corridor heritage, maintain environmental integrity and support the region's resource-based economy.

Yet, the Plan addresses only the issues of joint management of shared heritage resources and maintenance of environmental integrity along the St. Croix River system. Its transitional water area is confined to the inner estuary leaving the better part of the Passamaquoddy Bay out of its scope. Such limitation in issues and geographical scope cannot prevent conservation and development conflicts threatening the environmental integrity of the Passamaquoddy Bay. The biggest conflict emerged in 2005 when liquid natural gas (LNG) import terminals were planned for construction on the Maine coast of the Bay threatening a billion-dollar worth local resource-based economy, which employs thousands of local inhabitants on both sides of the border, particularly in the sectors of lobster fishery and nature tourism.

As the Passamaquoddy Bay is a trans-boundary water body, there was a significant degree of asymmetry in the distribution of benefits and detriments that underlies LNG terminal controversy since the risk of harm was borne by the Canadian coastal residents of the Bay and by the users of the Head Harbour Passage waters, while the benefits largely accrued to the United States through economic development and enhanced energy supply (Craik, 2008). Such a misbalanced situation, naturally, raised a rather wide resistance against the construction of the LNG terminals among both, Canadian and American coastal stakeholders of the Bay.

### b) Objectives

1. To resolve the development conflict between the traditional use of local natural resources and LNG terminal development in the trans-boundary transitional waters of the Passamaquoddy Bay.
2. To learn lessons considering the cross-border participation and capacity building of local stakeholders in the process of decision-taking on controversial mega-projects threatening the environmental integrity of the transitional waters.

## 6. Implementation of the ICZM Approach (i.e. management, tools, resources)

### a) Management

Three location sites have been considered for LNG terminals in the Passamaquoddy Bay. The companies planning the LNG terminal development filed their applications to the US Federal Energy Regulatory Commission which made the primary oversight of LNG projects. Then LNG terminal applications have been filed with the Maine Board of Environmental Protection. A comprehensive Environmental Impact Statement (EIS) was done. An Emergency Response Plan was prepared to address safety and security issues identified in the Coast Guard's Waterway Suitability Report (WSR). At this stage, the project, EIS and WSR have been filed to the Canadian authorities for their appraisal. The Canadian authorities conducted their own survey in parallel. The Canadian government's main concerns included navigational challenges of the proposed transit route; safety and security zones associated with LNG tankers; and the impacts of accidents such as spills from the terminal facilities or LNG vessels (LNG World News, 2010).

Facing the threat of the LNG terminal development along the Maine coast of the Passamaquoddy Bay, three local stakeholder groups have been founded in 2006 comprised of the activists from the three nations sharing the Bay (Canadians, Americans, and the Passamaquoddy Tribe). They joined their efforts in preventing the implementation of the controversial LNG terminal projects. The main efforts focused on lobbying, information dissemination and legal action. Several dedicated web portals were created providing access to all relevant information. Activists also established a panel to prepare formal testimony about potential impacts. The panel has been reviewing thousands of pages of material and setting a formal testimony from 100 witnesses in official public hearings. The study was commissioned by the stakeholders' alliance in 2006, which made a comprehensive assessment of costs, benefits and impacts from the LNG terminals on local economy and communities. The study found that any of the communities that hosted a LNG import terminal would face increased costs of local emergency planning, police protection, fire protection and emergency medical services.

## **b) ICZM tool**

The Canadian government takes the position that the Head Harbour Passage is internal Canadian waters allowing the Canadian government to control shipping through the passage. The USA maintains that the Head Harbour Passage is subject to the right of innocent passage, which allows foreign ships to traverse it so long as those ships are not engaged in an activity that is prejudicial to the peace, good order or security of Canada. To the extent that the transport of LNG through the Head Harbour Passage is a potential source of trans-boundary harm, this proposed activity will be subject to the restrictions imposed by the rules regarding innocent passage. The rules respecting trans-boundary environmental harm are anchored by two related general principles: the harm principle and the duty to cooperate. The harm principle, codified in Principle 21 of the Stockholm Declaration (1972), imposes a duty on states "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states." The duty to cooperate requires the source state to notify the affected state of the activity in question, to provide sufficient information to the affected state of the potential environmental impacts and to enter into consultations with the affected state where the affected state is concerned about the environmental impacts of the activity. The preferred approach to implement these obligations is by conducting an EIA and by providing rights of participation to the affected state within that process (Craik, 2008).

Finally, US Federal Energy Regulatory Commission (FERC) decided against the proposal on a technicality - that Quoddy Bay LNG did not complete a proper Draft Environmental Impact Statement for a final permit. FERC's technical questions arising from the Draft Environmental Impact Statement (DEIS) required an answer by July 6, 2009. That information was required in order for FERC to issue a Final Environmental Impact Statement (FEIS). When Quoddy Bay LNG failed to answer FERC's questions for almost one year, FERC dismissed them from the permitting process, requiring them to reapply as an entirely new project if they desired a permit.

## **7. Cost and resources**

Complete costing is not available

## **8. Effectiveness (i.e. were the foreseen goals/objectives of the work reached?)**

The effectiveness of the conflict resolution by the Passamaquoddy Bay stakeholders relied on the concerted and determined efforts of the activists from the three nations sharing the Bay assisted by experienced and dedicated lawyers and consultants. Also, the key to success was that the Governments of Canada and New Brunswick have taken strong stands against the LNG terminals. Finally, although the Passamaquoddy Tribe had leased its tribal land for the LNG terminal construction in 2004, but in 2009 the tribe changed its position and decided to terminate the lease, advocated and consulted by the Vermont Law School's Environmental and Natural Resources Law Clinic. In the lawsuit, the tribal activists contended that the federal Bureau of Indian Affairs approved the lease authorizing the construction of the LNG terminal without complying with the National Environmental Policy Act and other federal environmental and historic protection laws. Besides the FERC decision to dismiss Quoddy Bay LNG from the permitting process, requiring them to reapply as an entirely new project. Thus all the lawyers, lobbyists and activists may have influenced FERC but it was their final decision to halt the process by on an Environmental Impact statement. They may have been dissatisfied about the LNG project without the presence of the activists, but it may have focused their attention on the inadequacy of the DEIS. Finally, the Federal Bureau of Indian Affairs (FBIA) has also cancelled the developer's lease of Passamaquoddy tribal land in Maine in 2010.

## 9. Success and Fail factors

### a) Success factors

1. Strong and well-organized local stakeholders capable of defending their interests.
2. The Passamaquoddy Tribe has the granted right to its ancestral land and supreme authority of decision-taking over its use.
3. The navigation passage from the Fundy Bay to the Maine coast across the Passamaquoddy Bay lies exceptionally within the jurisdiction of Canada, which, being the potentially affected state, could decide on the LNG transportation.
4. U.S. net imports of natural gas decline as domestic production rises (EIA, 2010), which reduces the investors' interest in the development of the LNG terminals on the Maine coast.
5. FERC decision to dismiss Quoddy Bay LNG from the permitting process, requiring them to reapply as an entirely new project.

### b) Fail factors

1. Neither USA, nor Canada is a party to the Kiev Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Trans-boundary Context (2003).
2. Although the United States helped shape the UN Convention on the Law of the Sea (1982) and its subsequent revisions, and though it signed the 1994 Agreement on Implementation, it has not ratified the Convention itself.
3. When the interests of the large business are at stake in a trans-boundary transitional water body, interests of local stakeholders and those of a potentially affected state are often played down by a potential hazard source state, which tends to apply the minimal possible environmental impact assessment procedures.

## 10. Unforeseen outcomes

None as yet

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## 13. Sources

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## 14. Relevance for cross-border management of transitional waters

The tidal Passamaquoddy Bay is a transitional water body for the discharge from the St. Croix River catchment basin to the Fundy Bay. It is characterized by a great aquatic biodiversity, coastal scenery, rich living resources and attractive nature tourism amenities. The case study shows how concerted trans-boundary efforts of non-governmental stakeholders and governmental regulatory bodies can stop controversial development projects posing a trans-boundary threat to the environmental integrity of a transitional water body. Therefore, this study is of high relevance for the cross-border management of transitional waters.