

# A Practical Perspective on APEGGA's Guideline for Ethical Use of Geophysical Data

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## GeoConvention 2012: Vision

### Summary

APEGGA (the Association of Professional Engineers, Geologists and Geophysicists of Alberta) published its *Guideline for Ethical Use of Geophysical Data v1.0* in May of 2010 in response to industry feedback. The Guideline speaks for APEGGA. As members of the Canadian Society of Exploration Geophysicists (CSEG), we take a practical look at the guideline from a CSEG perspective. APEGGA developed the Guideline in response to issues concerning the business use of licensed geophysical data in the oil and gas industry, with the intent of clarifying the responsibilities of professional members when dealing with various ownership classifications of such data. The most difficult of these issues were found to centre on what parties can or cannot do with licensed data. We discuss some of the more important or contentious issues addressed in the Guideline, the Guideline's positions on those issues and their ramifications. As members of the CSEG, we also offer what we feel are practical suggestions relative to APEGGA's Guideline, one of which is a proposed re-examination by the CSEG of its 2001 Master License Agreement (MLA).

### Introduction: history and motivation

Geophysical Data (Data) has many uses. Resource companies use the Data in a variety of ways, particularly for exploration, development, and value assessment of petroleum or mineralogical assets. Such Data may also be acquired by companies who are interested in the Data itself as an asset. Data may be sold, traded, or licensed as a property, and is often considered to be an element of confidential information, as well as intellectual property. The CSEG has a mandate to promote cooperation among persons involved in geophysical prospecting (CSEG website), and that mandate has historically included consideration of the handling of Data.

In 2001, the CSEG published an MLA which was put forward as a resource for its members. This MLA was a detailed license agreement that could be used as is or modified as needed. It was hoped that the MLA would raise awareness of Data licensing issues by example, but also provide a potential avenue for the simplification of Data licensing within industry. Some companies have adopted the MLA in whole or in part, although it has not achieved widespread or dominant use. Part of the reason for this failure may be the wide gulf in licensing aims between resource companies and companies whose primary business is licensing the Data itself. Despite these differences, and the lack of a single, common type of Data license in industry (or perhaps because of it), the CSEG continued to try to help members understand how Data could be used in business.

These efforts led to a Chief Geophysicists Forum (CGF) publication of a document entitled "Practice Standard For Use Of Geophysical Data" (CSEG, 2006) which was meant to help add clarity to industry use of Data, especially relative to resource company to resource company business. This effort addressed Data rooms, farm-out or partner activities, asset or corporate sales, and related activities. Subsequent to this publication, the CSEG asked APEGGA to work on either a Guideline or a practice standard regarding the use of Data. As a result of this request, APEGGA struck a committee (the committee) comprised of industry professionals, as well as a lawyer knowledgeable in the resource industry, to examine the use of Data by its professionals. The committee worked for three years, and

produced the Guideline. The Guideline was quite different from the CGF document, and is not a practice standard.

### **Some key elements of the APEGGA Guideline**

The Guideline is meant to help educate its members. It provides cautionary advice to protect both its members as well as the public interest. It is crucial to understand that the Guideline does not create law or constitute a license agreement. The Guideline is not meant to settle disputes, or to direct how business should be done. The Guideline *does* unequivocally state that its members have a duty to the law and to the public.

The most fundamental elements of the Guideline may be found in section 1, the overview, and are:

1. Whatever is not granted by a license or agreement is prohibited.
2. APEGGA members who fail to consider, or who disregard, the rights and obligations of Data owners or licensees could place themselves in a position where their actions might constitute unprofessional conduct or could result in legal liability.

The first point is a heuristic whose origins will be described in the next section. The second point really addresses us as professionals: we must seek to do the right thing, to obey the law, and never to seek to be willfully ignorant. Much of the rest of the Guideline follows from these two ideas.

### **Legal approach to the Guideline**

The Guideline was written to conform with all applicable Provincial and Federal laws. The APEGGA committee had considered the CGF's approach to the problem, which came from a perspective of common practice, or perhaps idealized common practice. There was some debate regarding the role of common industry practices as opposed to the legal approach we did take and if or how those common practices should or could affect this document. The problem with an approach based upon common practice is twofold:

1. It is difficult to determine what the common practice is. The committee argued over its perception of common practice, and could not achieve unanimity. The committee recognized that any such a determination of common practice is likely to be subjective.
2. Even if universally agreed upon, the common practice may not be lawful. Neither the CSEG nor APEGGA, nor anyone on the committee, are going to knowingly advise anyone to break the law regardless of how "common" such an occurrence might be in practice. Further, the committee could not suggest a license agreement, adjudicate disputes, or create rules.

Ultimately, the committee viewed the debate over common practice to be a blind alley; analogous to observing the behaviour of traffic rather than reading the Motor Vehicle Act when trying to understand traffic law. Ultimately, many of the confusing and contentious points of debate among the committee were resolved through a better understanding of the law. That is, the Guideline does not create rules or the law, but seeks to communicate some aspects of the law relevant to the use of Data.

The most important thing to understand in the Guideline and in dealing with licensed Data is that Data is a kind of property. Data is also intellectual property. Of further consequence is the fact that Data is commonly considered to be confidential information, often by explicit identification as such. Lastly, licenses follow contract law.

The notion behind a license is that the Data (property) is owned entirely by the Data owner. The license defines which elements of the Data are being granted to the licensee, and under what conditions. Only the rights specifically granted in the license agreement are bestowed upon the licensee: nothing further may be assumed. This is the fundamental reason for the first point we made in the key elements section above, which is also explicitly written in Point 4.4 in APEGGA's Guideline, which states:

#### **4.4 Situations Where the License May be Unclear**

If a license is silent with respect to a specific right, the professional member should not assume that such a right and/or privilege is granted under that license. It is prudent that the professional member seek clarification from the licensor or legal counsel.

This is contrary to some of the previously held assumptions of some of the committee members who had assumed that where a license was silent that rights may or may not be granted, and that the determination of such might depend on reasonable argument, common practice, or other documents such as the CGF document we referred to earlier. Those assumptions were incorrect for several reasons, the first being that they improperly describe the aspects of property law described above, and the second being that they fail a tenet of contract law called the Parol Evidence Rule, which is a principal of the common law that prohibits extrinsic evidence from destroying the integrity of the contract. That is, outside information (such as someone's opinion of what common practice is) does not alter a contractual agreement. Many Data licenses go a step further than depending upon the Parol Evidence Rule by also including clauses that explicitly state that the license represents the complete and final agreement between the parties. Such clauses commonly have names such as "Entire Agreement". It is for this reason that the Guideline was clear in pointing out that unless a right is not specifically granted in the license, it should not be assumed. These elements of the law and the Parol Evidence Rule also form the best example of why arguments constructed around common practice are not useful in defining the ethics of Data handling. Our presentation will describe these elements of the law in greater detail.

#### **Practical business challenges of the Guideline**

Even though we read the Motor Vehicle Act first when learning to drive, we still had to eventually drive on the road with other people in the real world. In the same way, while we must follow the law, it is also important to understand some of the real challenges of business. There is some constructive opportunity within the understanding of the two. One of the common business situations relevant to this discussion is that of the Data room. The Guideline clearly points out that licensed Data should only be shown in a Data room if all the licenses have been reviewed, and if the licenses specifically allow the Data be used according to the rules of the Data room. The obligation is on the licensee to have reviewed all the licenses associated with the licensed Data. Moreover, persons coming in to the Data room are advised in the Guideline to enquire as to whether the Data can be viewed in this way. These obligations require an understanding of each license agreement. A similar burden of understanding may be present in other uses of licensed Data such as in farm-out presentations and other dealings with third parties.

The other approach to handling this burden of knowledge relative to the license agreements is simply not to use licensed Data in Data rooms, farm-out or partner presentations, etc.

#### **Constructive consequences of the Guideline**

CSEG members generally want to act in a professional and lawful manner. There are several possible constructive consequences of the Guideline and the practical business challenges we have mentioned:

1. Encourages more widespread Data management.
2. Encourages greater uniformity of understanding and practice, including with CAPL.
3. Data management experts could implement fields in their reports that efficiently address legal requirements relative to Data rooms, and a variety of other situations. A CSEG subcommittee could be formed that would help advise on a standard set of fields.
4. We reduce the number and type of licenses in common use.

#### **A proposal to re-examine the CSEG MLA (constructive consequence #4)**

It might be possible to reduce the burden of checking all the licenses by using a re-written MLA to collapse or reduce the amount of licenses to be reviewed. This could be done through a CSEG sub-

committee tasked to determine if they can create a common license for industry that would better address the ethical issues as we now understand them. This effort might end up producing two documents, one of which is especially for companies whose primary business is licensing the Data itself. If enough companies agree upon such a set of documents, it could greatly simplify the research obligation the Guideline has pointed out relative to license agreements and certain business situations. It might even be possible to have signers to the MLA agree to a superseding clause wherein all previous licenses they have granted are folded into the MLA. These ideas are bold, and may or may not succeed. Some of the early steps in this process are:

1. Achieve consensus that making this attempt is worth the effort.
2. Research changes to the MLA that would be required relative to the law.
3. Research MLA details and whether common agreement can be achieved.
4. Determine how many versions of the MLA would be needed to include enough industry parties.

This proposal comes back to the notion of common practice in a roundabout way. We again do not try to define the ever elusive common practice; instead, we try to reduce the variety of the legal responsibilities and obligations defined by our license agreements. If we then follow these (now less varied) obligations and responsibilities, practice may eventually be affected. Our presentation will describe this proposal in greater detail, and solicit opinion from the audience.

## **Conclusions**

That the resource industry should follow the laws of Canada goes without saying, however, the process of creating the Guideline has illustrated that we may not have all had a perfect understanding of the law relative to Data. The Guideline helps make some of these legal issues clear, but also unequivocally states that professionals must actively work to ensure they understand and follow those laws. The multitude of licensing agreements in existence creates a practical challenge in easily handling elements of the Data in certain business arrangements. It is for this reason that we have made several comments and proposals to the CSEG, including a potential re-examination of the MLA.

These ideas are proposals only, and have some very real challenges associated with them. Any ideas for improvement in the ease of this element of our business can only succeed if industry chooses to be proactive as well as cooperative.

## **Acknowledgements**

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