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Reforming the *Canadian Environmental Assessment Act:* A Suggested Framework for an EPA Caucus Submission to the CEAA Seven-year Review

Stephen Hazell, October 31, 2010

Introduction

This document lays out key strategic considerations and issues relating to the reform of the *Canadian Environmental Assessment Act* (CEAA), and outlines a possible framework for an EPA Caucus submission to the House of Commons Environment Committee for the upcoming CEAA Seven-year Review.

The CEAA Seven-Year Review

Section 32 of CEAA 2003 requires that a "comprehensive review of the provisions and operation of the *Canadian Environmental Assessment Act* shall be undertaken by [a Parliamentary committee]"." The committee . . . shall, within a year after review is undertaken . . . submit a report on the review to Parliament." The House of Commons Environment Committee was mandated to undertake the review by the House of Commons in June 2010. The latest information is that the review now not likely to start before February 2011.

While the engagement of the EPA Caucus in the CEAA Seven-year Review is important, it may be optimistic to think that the House of Commons Environment Committee will be able to advance reforms very far.The Committee is evenly split between Conservative Party members (six) and opposition party members (six, with three Liberal, two Bloquistes, and one NDP member) so achieving any consensus on the Committee will be difficult.Note that the Chair doesn't participate in debates and votes only in case of a tie. Majority rule by the Opposition is therefore possible but difficult.

An engagement with Canadian Environmental Assessment Agency officials charged with drafting a government bill concurrent with the CEAA Seven-year review is desirable in my view to explore opportunities for building consensus around the key features of any new legislation. In a meeting on October 18 with myself, Jamie Kneen and Dan Casselman, Elaine Feldman, the new Agency president, agreed to an initial brainstorming meeting with ENGOS and possibly other stakeholders to begin this process.

Strategic Considerations

CEAA is slowly being gutted and is at risk of repeal - The *Canadian Environmental Assessment Act* is at considerable risk of being repealed or being stripped of all significant legal requirements for federal departments and agencies to conduct environmental assessments.

The Conservative government is hostile to environmental assessment law as evidenced by the changes to environmental assessment implemented through the 2009 and 2010 budget implementation laws, and by the government's draft EA bill (leaked in early 2009, neverintroduced into Parliament) which would have removed all legal requirements to conduct any federal environmental assessment.CEAA currently has a much more modest application to projects requiring federal decisions than it did prior to 2009; its future utility to advance sustainability and protect the environment is questionable for that

reason. The funding trigger has largely been eliminated and the Law List trigger requires far fewer assessments than previously (e.g., NWPA trigger eliminated). No new significant Law List triggers have been added in recent years.

The government could eliminate most important remaining CEAA environmental assessments by simply deleting *Fisheries Act* triggers from the Law List Regulations; this could be achieved withouteven tabling of legislation before Parliament.

CEAA has been watered down in other ways. The 2010 budget implementation law reversal of the Supreme Court of Canada's Red Chris decision means than DFO can, at its discretion, scope down any major project to the part of the project that affects fish habitat (e.g., scope a tar sands mine down to a stream crossing). Some federal departments (DFO) continue to limit the scope of screenings as much as possible, while others (Parks Canada) appear to still be committed to carrying out reasonably good screenings.

CEAA has many enemies - Provinces and industry are also hostile to CEAA environmental assessments, occasionally for good reasons. CEAA environmental assessments are often triggered months later than provincial environmental assessments (due to the peculiarities of the antiquated *Fisheries Act* authorizations, and/orinterdepartmental squabbling), which leads to justifiable disquiet among provincial officials and proponents.Severalfederal departments also oppose CEAA internally for various reasons, that include staff workload to address environmental issues not related to the department's mandate (DFO), cost (Finance, Treasury Board), inconvenience to industry (Industry Canada, Natural Resources Canada) and friction with provinces (Privy Council Office Federal-Provincial Relations).

Significant adverse environmental effects test doesn't work for GHG emissions - The focus in CEAA on determining the "significance" of "adverse environmental effects" of a project has meant that GHG emissions are given scant attention, because even the largest Alberta tar sands mines (e.g., Kearl Project) do not produce sufficient emissions to adversely affect global climate significantly, according to determinations made by recent joint review panels.

Other tools are available to potentially replace EA - Other legislated tools such as the *Auditor General Act*(and now the *Federal Sustainable Development Act*) could be usedto push federal departments towards considering the environmental effects of their projects and activities in their sustainable development strategies, albeit without any legal requirement to do so.Departmental sustainable development strategies could be employed to ensure that environmental effects of projects and activities are considered in decision-making in an open and transparent manner.

Public participation is threatened - Public participation in CEAA panel reviews is threatened, first by the delegations to the National Energy Board (NEB) and Canadian Nuclear Safety Commission (CNSC), but also by the gradual erosion of public participation in joint panel reviews that are required to adopt the procedural rules of provincial quasi-judicial bodies such as the Alberta Energy Resources Conservation Board.Joint panel reviews are increasingly legalistic and dominated by lawyers for the proponents.Increasingly, members of the public seeking to participate in joint panel reviews cannot do so effectively without a lawyer to assist them in navigating rules of procedure and evidence.

Information chaos - Preparing and mobilizing the huge amounts of information needed for an environmental impact statement for a panel review is tremendously onerous for proponents; reading and understanding environmental impact statements and follow-up responses to information requests

is also burdensome for participants and intervenors. The Agency's public registry is reasonably useful as a means to access documents provided for an environmental assessment. But the federal government provides little assistance to proponents or participantsin gaining access to relevant scientific and technical information relevant to the environmental assessment of the project.The federal government could play a tremendously important role by organizing and integrating the numerous data bases relevant to a CEAA environmental assessment of a project.

Strategic EA still going nowhere - Assessment of proposed government policies, programs and plans (aka strategic environmental assessment) under the so-called Cabinet Directive remains as opaque and ineffective as ever. Regional strategic environmental assessment is being more actively considered as a way to get at larger-scale environmental issues in regions such as Alberta's oil sands region and the Mackenzie Valley, but has not actually been used as yet.

The CEAA Five-year Review

The so-called CEAA Five-year Review conducted between 2000 and 2003 led to amendments (e.g., public participation funding for comprehensive studies, more powers to the Agency, requirements for EA follow-up programs) but not fundamental reform.The environmental community played an active role in the consultations that preceded a bill (Bill C-9) being introduced into the House of Commons, as well as in the parliamentary deliberations themselves.CEAA mandated the Minister of Environment to conduct the Five-year Review (rather than Parliament as for the Seven-year Review.)

The House of Commons Environment Committee completed a report in 2003 entitled: "Beyond Bill C-9" which raised a number of fundamental questions not addressed by Bill C-9 such as:

- Is EA leading to tangible benefits to ecosystems?
- Are departments/proponents in compliance?
- Is EA helping proponents improve projects?
- Is EA helping federal government achieve environmental commitments and goals?
- Are Canadian taxpayers benefiting from their investment in EA?
- Is the public being adequately engaged?
- Are aboriginal rights/perspectives being respected?
- Are government policies, programs, plans being assessed for environmental effects?

This report will likely provide context and a foundation for the Environment Committee's work in the Seven-year Review.

Core Elements of a Federal Environmental Assessment Process

The environmental community has actively advocated federal environmental assessment law reforms since the mid-1980s, to a large extent though the Environmental Planning and Assessment (EPA) Caucus of the Canadian Environmental Network.I was a co-chair of the EPA Caucus in the late 1980s and early 1990s at the time that CEAA was first enacted.In 1988, the EPA Caucus agreed upon the following core elements (or principles) for a federal environmental assessment process:

- Environmental assessment must take place within a comprehensive environmental framework
- The process must be legislated
- The process must be mandatory and universal in application

- The scope of the process must be broad
- There must be effective public participation throughout the process
- The process must ensure accountability
- The process must avoid unnecessary duplication and
- The process must require monitoring of approved programs and projects

These core elements still apply today, in my view.Legally mandated federal environmental assessments of projects are still needed to support environmentally sound decision making and achieve sustainable development. As well, public participation in EAs must be legally required and reporting on EAs into a public registry must also continue to be legally required.

Strategic Issues and Themes for Reforming CEAA

Issue 1:Roll back CEAA amendments or seek a fundamental recasting of federal EA?

The most fundamental issuefor ENGOsis to decide whether to support the basic existing model of CEAA and focus on rolling back the 2009 and 2010 statutory and regulatory changesor to propose some fundamental reforms.My view is that fundamental reforms based on the issues discussed below are needed on policy as well as political grounds.

The reality is that CEAA is broken.CEAA fails to properly assess projects with critically important environmental effects (such as the GHG emissions of oil sands projects) but also legally requires assessment of hundreds if not thousands of tiny projects (suchas for scientific permits to study birds) whose effects either are absent or are well-understood and can be entirely mitigated. Idoubt that even a new government interested in protecting Canadian ecosystems could put the toothpaste back in the CEAAtube, let alone stuff in other useful reforms such as a legislative framework for strategic environmental assessment.

My suggestion is that we try to change the channel, and seek to build a new consensus for new legislation that would address the issues that follow.

Issue 2. Environmental or Sustainability Assessment?

CEAA currently focuses on assessment of biophysical effects and other directly related effects, using the legal test of determining the significance of adverse environmental effects and identifying mitigation measures that reduce the effects below the significance level.This significance test is widely abused, and everyone knows that the game in EA for proponents is to ensure that no effect, not matter how persistent or egregious is determined to be significant.

Further, identification and significance determination of adverse environmental effects are not useful for assessing greenhouse gas emissions as demonstrated by recent panel reviews such as those for the Kearl Oil Sands Project, Mackenzie Gas Project, and Romaine River Hydroelectric Dam Project. Sustainability assessment seems to be overtaking EA in many joint panel reviews anyway (e.g., Mackenzie Gas Project).Sustainability assessment theory has been well-articulated by Dr. Robert

Gibson[1] and applied by several recent joint panel reviews (most notably for the Mackenzie Gas Project) and embedded at least partially in federal laws implementing northern aboriginal claims agreements (most notably the *Yukon Environmental and Socio-economic Assessment Act* or YESAA)[2].

Sustainability assessment focuses on the economic, social and environmental sustainability of a project, rather than merely determining the significance of adverse, mainly biophysical, environmental effects.Sustainability assessment is a much better approach that conventional EA for addressing and mitigating greenhouse gas emissions from a project. Sustainability assessment emphasizes intergenerational equity as well as intragenerational equity.Politically, sustainability assessment provides a broader foundation for generating support than environmental assessment, in my view, because it encompasses the longer-term needs of communities.

Issue 3. Comprehensive or Focused Process?

The original intention for CEAA was that it would be more or less comprehensive of federal decisions having adverse environmental effects, requiring EAs of most projects requiring such a decision, unless excluded.Prior to the 2009 and 2010 budget bills, 5000 or more CEAA assessments (mainly screenings) were conducted annually. Thousands of these EAs were rubber stamping of ticked –off forms that contributed little if anything to environmental protection or sustainable development.All of these rubber-stamping EAs needed tobe documented and recorded in the public registry and thus occupied bureaucratic resources that, at least in theory, could have been deployed more usefully in assessing projects that do have adverse environmental effects.

Unfortunately, the gutting of CEAA in 2009 and 2010 has led to elimination of environmental assessments for many projects that do have adverse environmental effects as well as many that don't.A careful multistakeholder review of the Law List regulations would be one way of figuring out which regulatory or statutory provisions could be eliminated from the Law List regulations without causing environmental harm and which new triggers should be added to the Law List regulations.

My view is that ENGOs do not advance the cause of EA by insisting on legally mandated EAs of projects that are truly insignificant.The federal EA process would be well-served by requiring that a better job be done assessing bigger projects, and leaving assessment of smaller projects to departmental processes (such as sustainable development strategies).By better job, I mean better-funded public participation, better cumulative effects assessment, and better follow-up and monitoring, among other improvements.

An exception to this approach is environmental assessments of projects located in national parks, national wildlife areas and other federal protected areas.For example, Parks Canada should continue to be authorized to legally require screenings of even very small projects in National Parks because protecting ecological integrity is the leading management priority in National Parks.

Issue 4.Self-Assessment or Centralized Approach?

CEAA continues to be based on the self-assessment approach by responsible authorities (RAs)at least for screenings, with the Agency managing comprehensive studies and panel reviews.The self-assessment

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[1] Gibson, R. et al. *Sustainability Assessment: Criteria and Processes* 2005 Earthscan

[2] SeeCherkewich, T. *Getting to "No" through YESAA: A Look at an Alternative Federal Assessment Model Based upon the Principle of Independence"* 2010 Journal of Environmental Law and Policy Special Issue.

approach may continue to work for some departments (e.g., Parks Canada), but certainly not for most (e.g., DFO).Should all federal EAs be conducted by the Agency?Could a more centralized approach promote consistency, timeliness, improved public participation, and efficiency?In general, I tend to agree with the Agency officials who have been arguing for a more centralized approach to federal EA.

A centralized approach would directly address one of the key irritants for provinces and proponents about CEAA, and that is that there are often multiple federal authorities involved in the environmental assessment of bigger projects, and they often disagree about who should be the lead responsible authority for the environmental assessment as well on other process issues.Several regulations have been promulgated and Agency guidance documents issued to expedite coordination of CEAA environmental assessments within the federal government to address this irritant with little apparent success.A single federal agency responsible for CEAA assessments would allow easy 'one-stop shopping" for proponents, provinces and participants.The authority of such an agency would be cemented if CEAA required that an EA permit be issued by the agency before any federaldepartmentor agency could proceed with any project subject to the EA process.

Issue 5. Require CEAA assessments for Projects with "Federal Priority" or "Nationally Significant" Environmental Effects?

CEAA assessments are generally required only in relation to a federal decision (e.g., Law-listed licence, funding decision, land disposition).As discussed in a recent paper I published[3], CEAA has not been used effectively to address federal environmental priorities such as climate change.In large measure, CEAA does not sweat the big stuff. The paper concludes that there are several policy options (including amendments to CEAA) to require environmental assessments for proposed projects identified to be of national environmental significance (e.g., Australia), or that address federal environmental priorities such as climate change(e.g., requiring a federal panel review for any proposed project with emissions exceeding certain levels (e.g., tonnes C02eq).The triggering of "federal priority" or "nationally significant" projects raises constitutional and legal issues if decoupled from existing CEAA triggers that would need to be worked through.

Issue6.Public Participation

As suggested above, public participation in CEAA assessments is in decline; increasingly only regional and national organizations have the resources to participate effectively, which increasingly means engaging legal counsel.Ecojustice and other public environmental law groups play very important roles in supporting environmental and community groups in their interventions in panel reviews but the current CEAA Participant Fund usually does not cover costs of engaging legal representation in panel reviews or comprehensive studies.New legislation needs to recognize that intervenor funding is essential to support legal representation at hearings if important evidence is to be adduced properly for the consideration of the Panel and decision-makers.

Issue 7. Strategic EAs and Regional Strategic EAs

Strategic environmental assessment has been largely a failure at the federal level despite two decades of having a Cabinet Directive in place that requires federal departments, as a matter of administrative

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[3]Hazell, S. *Improving the Effectiveness of Environment Assessment in Addressing Federal Environmental Priorities* 2010 Journal of Environmental Law and Policy, V. 3 No. 20.

policy, to prepare them before memoranda to Cabinet are submitted. Part of the problem is the lack of public reporting and accountability for the preparation of strategic environmental assessments as proposed policies, programs and plans are brought for consideration by the federal Cabinet. It may be time to press for legislative entrenchment of strategic environmental assessments with public reporting requirements.

Related issues arise with respect to so-called regional strategic environmental assessments, which are intended to examine cumulative environmental effects of multiple developments within a region such as the Mackenzie Valley, northeastern Alberta or the Bay of Fundy.An advantage of this approach is that RSEAs should relieve pressure on individual environmental assessments with respect to cumulative effects assessment. The EPA Caucus could argue for entrenchment of provisions that would allow or require use of regional strategic environmental assessments for regions that are subject to multiple, and intense development pressures.

Conclusions

By way of conclusions, here are some suggestions for key elements of a package to reform the *Canadian Environmental Assessment Act* for discussion.A reformed law should:

1. Assess the *sustainability* of projects and not just their adverse environmental effects, possibly using the model of another federal law, the *Yukon Environmental and Socio-economic Assessment Act* (YESAA)
2. Focus federal legal requirements to ensure better environmental assessment ofa smaller number of bigger projects
3. Eliminate self-assessment of projects by federal authorities in favour of assessments conducted centrally by an independent special-purpose agency (with the possible exception of agencies such as Parks Canada Agency that have a legal obligation to ensure the ecological integrity of the lands they manage)
4. Include a “federal priority” or “nationally significant” projects trigger that requires federal assessments for projects that have significant impacts in important areas such as climate change, biodiversity, and toxics pollution
5. Enhance public participation by recognizing that legal representation is needed for intervenors and that such legal representation should be funded through a better-funded Participant Fund.
6. Establish a legislative framework for the conduct of strategic environmental assessments and regional strategic environmental assessments.