ENGO CONCERNS FOR THE REVIEW OF THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT

Environmental Planning And Assessment Caucus
Canadian Environmental Network
P. Duck
March 2008

TABLE OF CONTENTS

1/ INTRODUCTION

In the coming months the Canadian Environmental Assessment Act (the Act) will undergo a review required by Section 72 of the Act. This paper, sponsored by the Canadian Environmental Assessment Agency (CEAA), is intended to be a summary of concerns that environmental non-government organizations (ENGOs) may wish to have addressed by the review. The concerns represented here are those identified by the Environmental Planning and Assessment Caucus (EPAC) of the Canadian Environmental Network (CEN). The Caucus membership includes significant legal, academic, and environmental assessment practitioner expertise that combines with the experience of citizens from across Canada that are affected by federal environmental assessment. It is believed that the information presented below is representative of ENGO experience. However, it should be noted that no effort has been made to canvas ENGOs across Canada or those working in international settings.

Review of these issues and the supporting references should assist participants in the upcoming review to identify issues that are of common concern to ENGOs. It is hoped that this knowledge will assist ENGOs to establish priorities that facilitate effective participation in the review and lead to improvements in the federal environmental assessment regime.

2/ THE ELEMENTS OF GOOD EA LEGISLATION

In 1988 the Caucus produced a list of eight "core elements" of Environmental Assessment legislation. In order to guide ongoing efforts to improve environmental assessment across Canada, both federal and provincial, the EPAC is guided by these principles for achieving good environmental assessment in Canada. The principles are:

1. Legislation must be utilized to establish a mandatory EA process that is reviewed by an independent agency, and which results in a final and binding decision.

2. The legislation must contain a broad definition of environment, and the EA process must apply universally to a variety of initiatives, including governmental policy-making.

3. The legislation must minimize the amount of discretionary decision-making within the EA process, and must establish clear criteria to guide the planning and review of proposals in order to ensure accountability of decision-makers.

4. The legislation must ensure that proponents justify proposed undertakings by demonstrating:

- That the purpose of the undertaking is legitimate;
- That there is an environmentally acceptable need for the undertaking; and
- That the preferred undertaking is the best of the "alternatives to" and "alternative means" considered by the proponent.

5. The legislation must provide for a significant public role early and often in the planning process, and thus must contain provisions relating to public notice and comment, access to information, participant funding, and related procedural matters.

6. The legislation must establish an environmental assessment process which results in a decision that can be implemented, is enforceable, and is subject to terms and conditions where necessary.

7. The legislation must specifically address monitoring and other post-approval [follow-up] activities, and must ensure that the environmental impacts of abandoning or discontinuing the undertaking in the future are considered as part of the EA process.

8. The legislation must establish an efficient EA process, and must provide for joint federal-provincial reviews where necessary.

3/ THE PREVIOUS REVIEW

ENGOs participated in the first review of the Act through workshops coordinated by the Minister's Regulatory Advisory Committee (RAC), through attendance at public workshops held across Canada and in some cases by making presentations to the Standing Committee on Environment an Sustainable development. Readers are referred to the report of the RAC (RAC 2000) that was submitted to the Minister. During the review the EPAC prepared position papers and support material that was shared with the public and with members of Parliament. Two key documents prepared by the Caucus at that time included an initial summary of important issues going into the review (EPAC 1999) and, towards the end of the review period, a list of important principles by which to assess amendments to the Act (EPAC 2001). These documents are included for reference as Appendices I and II. A critique of the Act as amended at the end of the review period was also prepared by Gibson (2001).

4/ ENGO ISSUES FOR THE NEXT REVIEW

The following presents a summary of issues recently identified by ENGOs as the second review of the Act approaches. A review of Appendices I and II and Gibson (2001) will show that many of the concerns identified during the last review remain as key concerns for the second review of the Act. A number of these concerns such as establishing a legislated strategic environmental assessment regime in Canada are also key elements of the Caucus' strategic plan.

4.1 Scoping/Project Splitting/Application of Section 21

The Act was amended to include Section 21 following the first review of the Act. This section of the Act establishes the process, including public consultation, for the Minister to take an early decision about whether a project should remain on a comprehensive study track or be referred to a panel review or mediation. The defined process involves including the public in consideration of the scope of the project and the factors to be considered in the assessment.

Narrowly scoping projects (Section 15(1) of the Act) or treating components of the same project as distinct and independent projects can have the effect of limiting environmental assessment requirements to those prescribed for screening level assessments or lead to a limited evaluation of cumulative environmental effects. Some ENGOs have become very concerned about how unilateral scoping decisions can lead to less comprehensive assessments including limited public involvement in assessments especially early in the assessment process. The use of strategic environmental assessment of Comprehensive Study List projects prior to triggering the Act can have the effect of completing significant environmental assessment work outside of any process prescribed in the Act. The review of the Act should consider how and when scoping decisions are taken and how amendments to the Act might improve the public's ability to have their concerns addressed at this early stage of assessment.

4.2 Harmonization

Project proposals frequently present situations where multiple jurisdictions become involved in the environmental assessment. In these situations the need to implement an efficient and effective EA process is complicated by trying to meet the needs of all parties with jurisdiction related to the project. The terms harmonization, equivalency and substitution each have different meanings when addressing this issue. Readers are referred to Kwasniak (2008) for a clarification of the distinction to be made among these approaches.

Kwasniak (2008) has expressed concerns relating to "harmonization" of EA regimes between the provinces and the federal government. One concern is the federal government delegating its environmental assessment authority to provinces. This approach raises critical constitutional and policy issues that should be clarified and highlighted. For example, the federal government has exclusive legislative jurisdiction over coastal and inland fisheries. If the federal government does not do a good job of carrying out this authority then the fisheries suffer because provinces simply do not have the direct and clear legislative right to regulate for fisheries protection. Due to this jurisdictional separation there cannot be an equivalent provincial EA process that covers the federal responsibility over the fisheries resource. These jurisdictions can agree to cooperate but true harmonization is not possible.

Another concern is the extent to which the efficiency "problem" that supposedly is addressed through harmonization in multi-jurisdiction cases can be addressed in more direct and reasonable ways rather than by delegating the federal EA process to provinces. The federal government maintains that it will retain the decision-making function in more co-operative cases, but that they need to explore ways of relying more on provincial processes so that there is "one project - one assessment". However, the Canadian Environmental Assessment Agency (the Agency) has never been tested in taking on a significant role in joint assessments to ensure federal control over decision-making related to federal jurisdiction. In addition, there is still no new Federal Coordination Regulation promised in the last review of the Act that would make the roles of federal departments clear and go a long way towards making the process more efficient when working with other jurisdictions. This leaves the public and industry alike wondering if the problems of implementing an efficient environmental assessment process lie more with the federal government getting its house in order than with any inefficiencies in how the process prescribed by the Act interacts with provincial processes.

If other EA processes are to be deemed to substitute for the process prescribed in the Act a significant problem for ENGOs is that the substituted process may involve the public in a quasi-legal process. Effective participation in these often intimidating proceedings requires the support of specialized expertise well beyond the capacity of most public participants.

When jurisdictions try to 'harmonize" their EA processes it is important to ensure that an equivalent or higher standard of public involvement is applied when the process defined in the Act is not strictly followed. Unfortunately, ENGOs have experience to indicate that the lower standard of public involvement is often applied when multiple jurisdictions negotiate a common EA process for a proposed project. A key concern of ENGOs in these situations is, therefore, to maintain meaningful public involvement in both the resolution of jurisdictional issues and in the application of the resulting EA process.

Issues related to harmonization, equivalency and substitution are complex and energized by the needs of diverse interests. In this environment an initiative to harmonize environmental assessment processes across Canada with grassroots ENGO participation was nearly successful but was abandoned without explanation (CSA 1999). ENGOs will need to develop a strong multi-faceted effort to face the new harmonization challenges presented by initiatives such as the Canadian Council of Ministers of the Environment's harmonization initiative or the development of the Major Projects Management Office. The review of the Act should consider how the legislation might be amended to ensure public concerns are addressed in these initiatives.

4.3 Streamlining

Environmental assessment seems to be under constant pressure to complete the environmental process in a timelier manner. While recognizing that a timely EA process is appropriate, ENGOs must be constantly vigilant to ensure that efforts to streamline the EA process improve administrative efficiency without diminishing the quality of environmental assessments. In March 2008 the Environmental Planning and Assessment Caucus of the CEN held a workshop to learn about current streamlining initiatives and to discuss issues relating to streamlining of the federal EA process (Duck 2008).

Current approaches to streamlining the EA process include, for small projects, expanding the Exclusion List Regulation to remove the EA requirement in project planning and developing class assessments for routine screening projects. The Department of Fisheries and Oceans applies letters of advice and a Risk Management Framework that attempts to reduce the number of small projects that require screening under the Act. Duck (2006) provides a discussion of the Risk Management Framework and points to reason's why it is not well suited to providing effective environmental protection and public involvement in projects.

Administrative practices such as DFO's Risk Management Framework may increase administrative efficiency by reducing the number of statutory assessments undertaken. However, these practices may not be related to an unacceptable amount of time being taken to conduct any individual statutory assessment that would provide public process guarantees under the Act. In fact, the first report of the Agency's quality assurance programme indicates "that most screenings do not take an unacceptably long time to complete" (CEAA 2007). In addition, it is doubtful that soliciting public involvement in screenings is consuming the time responsible authorities devote to environmental assessments. The initial quality assurance report indicates that of the18,056 screenings that commenced between 2004 and 2006 only 60 had notices of public participation posted on the Canadian Environmental Assessment Registry Internet Site.

For larger projects streamlining initiatives take form in efforts such as the establishment of the Major Projects Management Office to serve as a single coordinator of critical stages in the planning and EA process. The MPMO is a major concern for ENGOs since it has potential to move the role of EA from the Agency, with expertise and a mandate for supporting good environmental assessment, to an administrative body that does not necessarily have good environmental assessment as its primary goal.

Caution is required when considering streamlining initiatives but it should be recognized that streamlining is not all bad from an ENGO perspective. For example, streamlining could improve the public process through providing more timely release of intervenor funding. A quicker decision on who is the lead responsible authority could also been seen as a benefit of a streamlined EA process and perhaps provide an opportunity for some saved time to go towards a more robust public participation process. ENGOs should be willing to consider ways to streamline the EA process during the review of the Act but they should also recognize that current streamlining initiatives should be closely scrutinized for the manner in which they alter public process and lead to less diligence in examining environmental effects.

4.4 Major Projects Management Office

One of the major streamlining initiatives under way is the establishment of the Major Projects Management Office. A presentation of the rationale and developing structure of this office is provided in the MPMO launch presentation (Natural Resources Canada 2008). This presentation was delivered to the EPAC of the CEN in March of 2008 along with an opportunity to discuss the newly formed office with its staff (Duck 2008). It appears that the office will attempt to address streamlining issues related to reducing the time taken to conduct administrative duties in the planning and environmental assessment process. However, it should be emphasized that the Office and its role are new. ENGOs are cautioned to stay involved with the development of the MPMO to ensure that the integrity of the environmental

planning and assessment process for large projects is not compromised by the strong mandate to reduce timelines for major project planning.

4.5 Defending The Value Of Screening Level Assessments

Many criticisms of federal environmental assessment are motivated by the perception that screening many small projects is unnecessary. There is no doubt that a large number of projects are being proposed and the Agency's quality assurance programme data show that many screenings are being conducted. If the number of federal screenings needs to be reduced there are mechanisms available to achieve this such as diligent public review and amendment of the Exclusion List Regulation for projects that can demonstrate no environmental effects. More effective use of the class screening provisions of the Act can also reduce the effort required to provide assessment of routine projects with predictable effects that can be mitigated through established best practices and known standard mitigative measures.

The number of assessments being undertaken does not immediately suggest that the assessments are not providing some added value to project planning. A perspective on these large numbers is that there is a great deal of project activity going on. Consequently, there is a heightened need for diligence in ensuring that these projects are undertaken in the most environmentally sustainable manner and in ensuring that cumulative effects of these projects are not degrading Canada's environment.

Information provided by environmental screening often creates documentation of specific environmental management provisions that can be included as specifications in project permits and contracts.

The cost of screening is usually small relative to overall project costs. In many cases the identification of mitigative measures can lead to cost savings through improved design or the prevention of environmental effects that otherwise would have lead to increased costs related to clean-up, legal liability or additional infrastructure required to manage unanticipated effects.

Used properly, environmental screening provides a basic planning mechanism for identifying project specific mitigative measures that serve to protect the environment and control the cumulative effects of many projects. The key issue for ENGOs is to strive for consistent and coherent environmental screening across the country in order to achieve this goal. To that end, ENGOs participated in a multi-sector process to develop a nationally acceptable approach to environmental screening of projects in the late 1990s (CSA 1999). While this approach received support from a majority of those asked to voice their rejection or support it was never developed further by the federal government. It is recommended that during the coming review of the Act that ENGOs re-emphasize the value consistent and credible environmental screening provides to improving projects and protecting the environment. Rather than reduce the number of federal screenings conducted it will be important to ensure that the process for federal screenings continues to serve as an example of careful environmental planning for all projects.

4.6 Ministerial Involvement In Preparation Of Panel Impact Statement Guidelines

EPAC caucus members have expressed concern that the Minister seems to be becoming directly involved in the creation of guidelines for the preparation of environmental impact statements being prepared for panel reviews. While this is within the powers of the Minister, Caucus members expressed concern that this involvement leads to erosion of the independence of the panel process. During the review it should be emphasized that the public sees the environmental assessment process as an objective and accountable mechanism for examining the environmental effects of proposed projects. Any effort to weaken the independence of panels directly or through development of guidelines for the conduct of the environmental assessment should be resisted.

4.7 Meaningful Public Participation

Much ENGO effort has been placed on ensuring federal environmental assessment provides an opportunity for meaningful public participation. This was a government commitment during the last review of the Act and has resulted in improvements such the provision of participant funding for the comprehensive study level of assessments and the Ministerial Guideline for public involvement in screenings (CEAA 2006). However, key concerns that existed at the commencement of the previous review (Lloyd 1999) remain. These include the fact that many Canadians remain illiterate with respect to the federal EA process. This severely hampers their opportunities for participation in a meaningful way before an assessment is well advanced. Participant funding also remains inadequate and there is no obligation for responsible authorities to attempt to involve the public in screenings. On top of these deficiencies there is concern that further steps may be taken towards eroding public involvement in the planning of projects that affect them.

During the review it will be important to ensure that opportunities for meaningful public participation are further entrenched in the legislated process. For example, it would be advantageous to have the Ministerial Guidelines referred to in the legislation. Quality assurance mechanisms should also be required to document the extent to which the public has an opportunity to be consistently involved in a meaningful way in projects that concern them.

4.8 Participant Funding

Participant funding is viewed as an essential tool to ensure that the public is empowered to bring their concerns into the environmental planning process. Funding makes it possible for the public to overcome logistical barriers such as travel as well as facilitate the use of specialists to articulate their concerns on their behalf. The review of the Act should be used as an opportunity to take a serious look at the practical restrictions to meaningful participation created by a funding programme that does not reflect the need for the public to participate on the same level as governments and proponents. Key concerns with current participant funding that should be raised during the review include:

a) Levels of funding awards are not sufficient for the costs participants incur. For example, one group asked for $36,000 dollars. They did not add any frills but were awarded only $13,000. This was supposed to support a small volunteer group in a remote area scrambling to participate. The limited funding required the group to "beg" for places for their experts' accommodation. They also had to ask for gift certificates for meals. Gas money came from the already strapped volunteers. Donations for meeting space were required and the group was required to request that specialists lowered or disregard their normal fees. This was required for a major project in which the proponents and government participants were fully funded.

b) Key aspects of the rules and procedures are not readily discernable to participants (e.g. 25% holdbacks).

c) Funds are released too late to help groups with limited resources available to undertake initial expenses.

d) Many potential applicants are unaware of funding opportunities for comprehensive study and little effort is made by responsible authorities to raise awareness of this potential early in the process.

e) In joint processes with other jurisdictions funding is either not provided or is awkward to obtain.

f) Funding is not available for lawyers in a process that is essentially a legislated process that requires professional legal representation to participate in the process effectively. If a substitute process or joint hearing process leads to a quasi-legal process lawyers are essential to meaningful public

participation. It has been suggested that a mechanism for pro bono council should be provided or an environmental legal aid system should be established for EAs.

g) Levels of funding awards need to better reflect the project scale or the nature of the issues presented by the project in which the public wishes to be involved.

h) Government funding may be limited but there is not a shortage of projects being proposed that concern the public. A system of assessing whether the proponent should pay pubic participant costs needs to be considered in order to meet the public involvement objectives of the Act.

i) If direct funding for specific projects is difficult perhaps it is time for the federal government to provide funding for environmental law centres or other organizations to do the work they are now doing related to environmental assessments.

4.9 Strategic Environmental Assessment

The term Strategic Environmental Assessment (SEA) is used to refer to the assessment of the potential environmental implications that might arise from the various policies, plans, or programmes that might be adopted or advanced by government. Strategic Environmental Assessment is standard international environmental assessment practice.

It is generally recognized that SEA constitutes a higher level of environmental assessment than the typical reviews of individual projects. As such SEA can contribute to sustainable development (and the purpose of CEAA) by considering the environmental aspects of policy decisions along with potential social and economic benefits. Over time, SEA can contribute to better and more efficient and effective decision-making, and would make project-specific environmental assessments more effective and efficient. For example, SEA could provide a mechanism to streamline the assessment of groups of disparate small projects (for example, the management plan for a national park or several similar projects within defined areas such as a specific reach of coastline. SEA can also provide a mechanism for better addressing cumulative effects issues and to provide a forum for policy debate which, in the absence of such a forum, currently takes place in the assessment of specific physical works.

There is no consistent manner in which SEA is applied in Canada (Noble and Bronson 2007). The Act allows for consideration of the results of regional studies, but does not provide for such assessments to be carried out under the Act, and makes no mention of programme or policy assessment. Thus, the motivation for conducting SEA currently relies on inconsistent application of a Cabinet Directive (CEAA 2004). In the upcoming review consideration should be given to including SEA within the provisions of the Act. The potential benefits of enabling assessment of policies, programmes, and regions under the Act would be to:

- provide a transparent framework for how such an assessment would be conducted,
- clarify what should be considered SEA and what is considered project EA,
- specify what information must be made public,
- identify what factors should be considered, and
- specify how the public would participate.

The concerns about bringing such assessments under the Act would be:

- the practical challenge of defining what constitutes a "policy" or a "program" for the purposes of assessment,
- defining when such an assessment should be initiated,
- the challenge of ensuring consistency of application; and
- adding enormously to the complexity of an already complex Act.

It is a complex issue to determine whether assessment of policies, programmes, or regions should be mandatory under CEAA. However, as a next step beyond the recognition of regional planning in assessments that was included during the previous review enabling strategic assessments under the Act would be beneficial.

4.10 Sustainability Of Projects

There is a need to include a sustainability test in the legislated process to truly move EA beyond an administrative to process to one that promotes sustainable development.

4.11 All In Unless Out

The original perspective of the EPAC was to include require that all projects undergo environmental assessment rather than having a complex set of regulations that define which projects require assessment and which ones are exempt. With several years of experience in the application of the Act it may be time to re-evaluate whether this is still a valid position. An advantage is that an "all in" approach may simplify the regulations associated with the Act.

4.12 The value of Comprehensive studies

The review of the Act also presents an opportunity to reconsider the value of the comprehensive study level of assessment. One reason for this reconsideration is the lack of distinction between some screenings and comprehensive studies. Extreme examples include major projects like the twinning of significant and sensitive sections the Trans-Canada Highway in National Parks or the construction of the Confederation Bridge have been assessed as screenings without the public process guarantees provided by the comprehensive study track which has applied to smaller projects.

4.13 Self Assessment

The review of the Act also presents an opportunity to reconsider whether the self-assessment approach is the best way to provide consistent, objective and accountable environmental assessment. ENGOs have reported that they find there is that too much conflict in mandates within and between responsible authorities to have confidence in the assessment process. In some cases there may even be financial conflict for responsible authorities that derive direct or indirect revenue from projects they are required to assess.

4.14 Length Of Time an EA Is Valid If the Project Does Not Proceed

A concern has been expressed that projects undergo environmental assessment but that the project or some of its components do not proceed within a reasonable amount of time. Over that time there can be

significant changes in the environment (e.g. rapidly changing environmental conditions and responses due to unpredictable effects of climate change), in community values or in the technology available with which to undertake or operate the project. These changes lead to a desire to have the project reassessed after a certain amount of time has passed. The review of the Act should consider whether it is appropriate to include a specific time frame or criteria according to which the need to re-assess a project is required.

4.15 Follow-Up/Monitoring

One of the values of environmental assessment is that it can provide a record of approaches to developing a project that can be evaluated and adjusted over time to benefit the current project or future projects. The advantage of follow-up and monitoring programmes is that they provide a mechanism for ensuring that this learning from environmental assessment occurs. Yet, for the vast majority of projects there is no requirement for following up on the implementation or the success or failure of mitigative measures.

The review of the Act should consider improved mechanisms to ensure that the identified mitigative measures are applied and that their success is monitored. Mechanisms could include a requirement for the assessment to identify persons responsible for environmental surveillance of the project including implementation and success of the mitigative measures or the adherence to implementing the project as proposed and assessed. The Act could also be more specific in requiring that recommendations of the assessment report be incorporated in enforceable permits, contracts, purchasing orders or other enforceable instruments. The quality assurance programme should be required to monitor the extent to which responsible authorities are paying attention to ensuring EA recommendations are implemented. The affected public may be the first to discover or feel the effects when things go wrong. Another improvement to the follow-up provisions of the Act should be to provide the public with a legislated mechanism for taking action related to unanticipated environmental effects or failed mitigative measures.

5.0 Conclusion

The upcoming review of the Act will provide an opportunity to build on improvements to the Act that were achieved during the last review. It will also present a new opportunity move the Act closer to being an instrument to achieve environmentally sustainable development and to ensure more meaningful public involvement in projects that affect environments and communities. The above information has provided an opportunity for readers familiarize themselves with current issues related to achieving those goals. It is hoped that review of these issues combined with personal experiences can be used as a foundation to establish an effective approach to furthering ENGO interests in the review.

6.0 REFERENCES

CSA 1999. Preliminary Draft Standard - Draft #14: Environmental Assessment. Produced for the Working Group of the EIA Technical Committee, Canadian Standards Association. Toronto.

CEAA 2004. The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals: Guidelines for Implementing the Cabinet Directive. Published jointly by the Privy Council Office and the Canadian Environmental Assessment Agency. Ottawa.

CEAA 2006. Ministerial Guideline on Assessing the Need for and Level of Public Participation in Screenings under the Canadian Environmental Assessment Act. Ottawa.

CEAA 2007 Federal Screenings: An Analysis Based on Information from the Canadian Environmental Assessment Registry Internet Site. Government of Canada, Quality Assurance Program for Environmental Assessments Under the Canadian Environmental Assessment Act. Ottawa.

Duck, P. 2006. An ENGO Perspective on the Department of Fisheries and Oceans' Risk Management Framework. Prepared For The Canadian Environmental Network. Ottawa.

Duck, P. 2008. Streamlining Federal Environmental Assessment - Ottawa Workshop Report. Canadian Environmental Network, Environmental Planning and Assessment Caucus. Ottawa.

EPAC 1999. Canadian Environmental Network Environmental Planning and Assessment Caucus Issues for 5 the Year Review of The Canadian Environmental Assessment Act.

EPAC 2001. Principles To Guide Revisions To The Canadian Environmental Assessment Act. Prepared by the Canadian Environmental Network, Environmental Planning and Assessment Caucus. Ottawa.

Gibson, R. 2001. The major deficiencies remain: a review of the provisions and limitations of Bill C-19, an Act to amend the Canadian Environmental Assessment Act," Journal of Environmental Law and Practice 11 (2001), pp.83-103.

Kwasniak, A. 2008. Harmonization in Environmental Assessment in Canada: The Good, the Bad, and the Ugly. Prepared for the Canadian Environmental Assessment Agency on behalf of the Environmental Planning and Assessment Caucus of the Canadian Environmental Network. Ottawa.

Lloyd B. 1999. Public Participation in Comprehensive Studies and Screenings and Participant Funding at the Screening Level of Federal Environmental Assessment. Prepared for the Canadian Environmental Assessment Agency on behalf of the Environmental Planning and Assessment Caucus, Canadian Environmental Network

Natural Resources Canada 2008. Major Projects Management Office Launch and Implementation. Presentation Slides. Ottawa.

Noble B. and Bronson J. 2007. Models of Strategic Environmental Assessment in Canada. Report Prepared for the Minister of Environment's Regional Advisory Committee, Sub-Committee on Strategic Environmental Assessment. Environment Canada Contract K4320-06-0052.

RAC 2000. Report to the Minister of Environment from the Regulatory Advisory Committee (RAC) on the Five-Year Review of the Canadian Environmental Assessment Act.

APPENDIX I

Issues To Be Considered In The Initial Review Of The Canadian Environmental Assessment Act

Environmental Planning and Assessment Caucus
Canadian Environmental Network
1999

Regarding the application of Act and definitions, the Review must consider:

1. The application of the Act beyond projects. The Act must broadly apply to programmes, plans, and policies, as well as to projects.

2. What is captured under the Act. The Act must use the all in unless out approach.

3. The continuing erosion of triggers under the Act.

4. The scope of assessments under the Act.

5. Crown Corporations and the Act. All Crown Corporations must be brought under the Act.

6. The application of the Act to foreign projects, i.e., the Projects Outside of Canada (POC) regulation.

7. Transboundary assessment provisions. Provisions for transboundary assessments must be strengthened under the Act, and discretion should be removed.

8. Definitions under the Act. Definitions must be systematically revisited and revised, including the definition of environment, project, effects, emergency and significant effect.

9. Use of discretion in the Act. The overall use of discretion in the Act should be examined.

Regarding the implementation of the Act, criteria for approval, and follow-up, the Review must consider:

1. Cumulative impacts. The Act must have the capacity to consider cumulative impacts of multiple projects or class of projects (for example, the oilsands in AB and gold mines in NWT).

2. Need/alternatives. It must be obligatory to consider needs and alternatives under the Act. There also needs to be the obligation to look for "least impact" solution(s).

3. Mitigations under the Act. The Act needs to recognize that mitigations have effects and that the effects of mitigations need to be considered in an EA.

4. Approvals granted under the Act. Criteria for approval under the Act must reflect the objective and spirit of Act. The Act claims devotion to sustainability but the approval criterion is, essentially, "no significant adverse environmental effects, unless justified in the circumstances. Approval criterion should, instead, be based on the net positive long term contribution to sustainability, defined and assessed in light of tests of lowered resource and environmental sink use, improvement in protection/integrity of ecosystem function, greater social justice and equity, etc.

Regarding monitoring, enforcement, and compliance, the Review must consider:

1. The status of the final decision coming from the Act. There must be an enforceable decision under the Act.

2. Penalty provisions within the Act. There must be penalties in place for non-compliance.

3. Resources within government. There must be resources put into departments for monitoring, enforcement, and implementation. Recent cutbacks in line departments means monitoring and implementation are nonexistent.

Regarding public involvement, the Review must consider:

1. Involving the public in scoping and screenings in a timely, transparent, and fair manner. This must be obligatory. There must be mandatory public notification of screenings.

2. Participant Funding. Consideration of the different mechanisms available for participant funding for comprehensive studies and screenings much take place.

3. Clarity of decisions made under the Act. The Act must specify how a decision statement will be issued and what information such a statement should contain. For example, a decision should refer to public comments and how they were addressed, or why discretion in selecting mitigation allowed for the in the Act was exercised.

4. Social Impact Assessment. The requirements surrounding social impact assessment must be strengthened and clarified.

5. The public registry. Registration on the FEAI must be obligatory; ambiguity surrounding the registry must be clarified.

Regarding Enabling Conditions, the following must be considered during the five-year review:

1. The harmonization of EA throughout Canada must bring standard of assessment up rather than erode it.

2. Government must have the authority to consider effects beyond those directly related to the head of power that gave it jurisdiction over the matter. For example, the federal government might have the right to assess a bridge over a stream because of the NWPA, but it must look at the effects beyond those relevant to navigation, i.e. the effects of the bridge and the road on wildlife.

APPENDIX II

PRINCIPLES TO GUIDE CONSIDERATION OF PROPOSED REVISIONS TO THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT

Environmental Planning and Assessment Caucus
Canadian Environmental Network
(November 2001)

1. There must be a strong legislated federal role in environmental assessments in Canada.

2. Environmental assessment must be more than a regulatory instrument. Environmental assessment must be a planning tool and, therefore, the CEAA must address federal programmes, plans and policies.

3. There must be early application of the CEAA to known projects.

4. There must be effective enforcement of the process required by the Act.

5. There must be effective implementation and enforcement of the project requirements arising from environmental assessments.

6. There must be effective public participation, beginning early and continuing throughout the EA process.

7. Those responsible for ensuring that the CEAA is implemented must be accountable to the public.

8. Decisions taken within, and based on the results of, the environmental assessment process must be based on clear and consistent decision criteria.

9. Sufficient funding, education, and enforcement are crucial to the effective implementation and administration of any environmental assessment process.

10. Environmental assessment must contribute to sustainable development and result in protection of the environment.

11. Federally funded projects outside Canada undertaken by Canadian companies must be subject to the Canadian Environmental Assessment Act.

12. While upholding the principles of good EA, the application of EA to projects outside Canada and to projects which affect aboriginal rights must be sensitive to the special contexts in which those environmental assessments are undertaken.