

Environmental Assessment Crisis in Canada: Reputation versus Reality?

By

Jeffrey L. Barnes¹, Colleen Leeder² and Robert Federico³

Key Words: Environmental Assessment, Canada, Self-assessment, Quality

Canada has a well-deserved, worldwide reputation as a leader in Environmental Assessment (EA). Despite this reputation, EA in Canada is inefficient, frequently of poor quality, failing to meet its basic objective as a key tool of sustainable development. Many inter-related factors are contributing to this situation. The federal legislation (*Canadian Environmental Assessment Act*) is fraught with jurisdictional challenges and uncertainties. Founded on the principles of self-assessment, various federal authorities must, for each of 6,000 plus assessments annually, figure out who is involved and in what capacity. This leads to inconsistent application of the Act and varying standards of quality. There is a lack of emphasis on training and quality. Contributing to these problems is the duplicative nature of overlapping EA processes that are required by various federal, provincial and territorial boards and commissions, Aboriginal territorial governments and municipalities. The resulting disorganization is an impediment to investment in Canada. EA often does not lead to value added from an environmental protection perspective. A number of potential changes and improvements are suggested to get EA in Canada back on the rails. Suggestions include the establishment of a federal EA body to manage all federal EA in Canada, reversing the problematic self-assessment principle and providing an opportunity for consistency and higher quality review and administration. Amendment to legislation needs to include measures that reduce the number of unnecessary project assessments on small projects of little or no environmental consequence and providing for more comprehensive strategic EA (regional and sector) to support consideration of cumulative environmental effects. Recent government reports and dialogue indicate that there may be interest in making some of these recommended substantial changes to the Act.

¹Vice President, Environmental Science and Management Services, Jacques Whitford Limited, 711 Woodstock Road, P.O. Box 1116, Fredericton, New Brunswick, Canada, E3B 5C2, 506-457-3200, jeff.barnes@jacqueswhitford.com

²Principal, and Practice Director, Environmental Assessment, Jacques Whitford Limited, 607 Torbay Road, St. John's, Newfoundland and Labrador, Canada, A1A 4Y6, 709-576-1458, colleen.leeder@jacqueswhitford.com

³Principal, and Practice Leader, Environmental Planning and Permitting, Jacques Whitford Limited, 3 Spectacle Lake Drive, Dartmouth, Nova Scotia, Canada, B3B1W8, 902-468-7777, robert.federico@jacqueswhitford.com

INTRODUCTION

It is perhaps heresy to suggest at the 25th Annual Conference of the International Association for Impact Assessment (IAIA) that all may not be well with environmental assessment (EA) in Canada. Canada has a well-deserved, worldwide reputation as a leader in EA; a virtual icon in the international family of practitioners.

In posing the question “Environmental Assessment Crisis in Canada: Reputation versus Reality?” the authors are hoping to point out that although Canada’s EA practitioners are among the best in the world and some Canadian EAs are of unparalleled quality, there is a



contrary reality. Despite this reputation, the authors would submit that generally, federal EA in Canada is indeed “in crisis” due to inefficiency, inconsistent standards of quality, and duplication. In the context of the theme of this conference, Ethics and Quality, there are aspects of this reality that reflects both issues of quality and ethics.

Many inter-related factors are contributing to this situation. Unfortunately, as examples of these problems become more and more evident, the lack of certainty and inefficiency of the EA process is increasingly becoming an impediment to investment in Canada. That investment loss is not necessarily arising from proponents that wish to avoid EA or sound regulatory review of its projects, but rather, those that cannot justify the business risk posed by the cost and uncertainty that has resulted from this situation.

FEDERAL ENVIRONMENTAL ASSESSMENT IN CANADA

Federal EA in Canada is primarily governed by the *Canadian Environmental Assessment Act* (CEAA) which came into effect in 1995. CEAA replaced the *Environmental Assessment Review Process Guidelines Order*, a cabinet directive that governed federal EA from 1984-1995, which itself replaced an ad hoc process of EA in the preceding years extending back into the 1970’s. This long history of federal EA, coupled with EA under various provincial, municipal, energy board, tribunal, and Aboriginal processes accounts for Canada’s expertise and reputation.

Approximately 6,000 project EAs are undertaken annually by “responsible authorities”, federal authorities who are triggered to do an EA under CEAA. All project EAs are “screenings” unless they are either described on the *Comprehensive Study List Regulations* and require a comprehensive study, or they are referred to a mediator or independent review panel. Over 99 percent of EAs are screenings. Comprehensive studies number in the tens each year and typically less than five panel reviews are initiated annually.

Mandated in CEAA, the Minister responsible for the Canadian Environmental Assessment Agency (“the Agency”) and administration of the *Act* undertook a 5-year review of the legislation in 1999-2000 and reported to Parliament his findings. The outcome of this 5-year review was a new CEAA that came into effect in November 2003. The amendments to CEAA were all excellent adjustments that contribute to improved certainty in process, quality and transparency. Although improvements were made in the coordination of federal authorities, the notion of self-assessment was precluded from the discussion by the Minister during the 5-year review.

The 5-year review failed to come to terms with this and the fact that plain and simply, 6,000 EAs per year is just too many—Canada cannot deliver the quality of EA demanded by CEAA with current resources. The amended CEAA does not reduce the number of inconsequential assessments, those where the investment of resources fail to yield improved environmental protection.

The exact number per year of EAs that truly deliver better environmental and sustainable development decision-making is difficult to estimate. Based on the experience and knowledge of the authors’ firm, a national EA consultancy of 1400 professionals, it is estimated that

around five percent or about 300 EAs per year under CEAA are of the quality that reflects Canada's reputation as a nation of EA leaders. A large proportion of the remainder is minimalist, "check-box", template screening documents conducted by non EA professionals working within responsible authority departments. Consequently, the multi-disciplinary team of EA practitioners that is required to undertake a thorough EA is not established for most of these screenings, and the exercise itself can become a paper one only.

There is room for improvement in quality and efficiency in the estimated 300 high quality EAs. The authors believe that the elimination of the remaining 5,700 poor quality or meaningless and duplicative EAs will enable Canada to focus its efforts on improving the quality of those EAs that matter from a sustainable development perspective and on the improvement of practice in key areas such as strategic environmental assessment, class environmental assessment, and cumulative effects assessment. To date, there has been little progress made in the elimination of these meaningless EAs.

EA Consolidation

On the surface, it may appear to the reader that the notion of drastically reducing the number of EAs in Canada, and making major structural changes to the Act itself, is extreme. There is no doubt that upon reviewing this paper, some elements of the Canadian EA fraternity will be outraged or astonished by the recommendations presented herein. However, the authors are not alone in this view that major re-structuring of CEAA is required. In parallel with the development of the authors' views, there has been recognition by the Government of Canada, primarily through the "Smart Regulation Committee", that EA is generally inefficient and uncertain, and that CEAA needs to be re-structured.

In the October 2004 Speech from the Throne the government made a commitment to get its own house in order by consolidating federal environmental assessments. The Speech did not elaborate on the meaning of "consolidating" federal EA.

The government's March 2005 *Smart Regulation: Report on Actions and Plans* also identified consolidation of environmental assessment as a priority. In its consultations with Canadians, the External Advisory Committee on the *Smart Regulation* heard complaints about federal EA from a wide range of parties, including industry associations, non-governmental organizations, provincial/territorial government officials, Aboriginal groups, and citizens. Consequently, the Committee's Report to the Government of Canada included a chapter on EA. A selection of the Committee's findings and recommendations related to EA and the subject of this paper are listed below.

- "It should be noted, however, that the recent amendments to the CEAA left some issues untouched where there was not consensus on how to proceed (e.g. enforcement mechanisms, the principle of self-assessment, etc.)."
- "The Committee heard a high degree of frustration from industry, which views environmental assessment as important, but finds the process slow, lacking in clarity, costly and occasionally of uncertain benefit to the environment."

- “Virtually all parties agree that, as a whole, environmental assessment processes are overly complicated.”
- “One of the most consistent concerns expressed to the Committee about the environmental assessment process was the lack of effective coordination — both within the federal government and among orders of government.”
- “...several stakeholders have raised the issue of environmental assessment procedures being applied unevenly within departments at the regional level. Specifically, the same regulation can be inconsistently interpreted and applied, resulting in similar types of projects receiving markedly different treatment from regional office to regional office within the same federal department.”
- “...the Committee heard from industry representatives, particularly those in the oil and gas and electricity-generation industries that problems remain in coordinating timing, information requirements and public participation.”
- “In addition to having many departments involved in environmental assessments, some departments' requirements are not triggered at the outset of the environmental assessment process, leading to sequential assessments on a single project. This situation adds to the uncertainty of the business environment and delays decisions by regulators, without necessarily adding benefits to the protection of the environment.”
- “In addition, the government should establish a single federal agency responsible for carrying out environmental assessments under federal jurisdiction. As a single window for the federal government on environmental assessments, this agency would provide a more effective and simpler process for project proponents and other interested parties. It would also better support the development of expertise within the federal government in this area. A single federal agency would also be better positioned to work with multiple jurisdictions (e.g. provincial/territorial governments) and stakeholders (e.g. Aboriginal peoples, citizens and conservation groups) to deliver high-quality assessments that reflect the public interest in a timely manner.”

The Committee made the following recommendations.

- Recommendation 56: The federal government should begin discussions with the provincial and territorial governments to develop a nationally integrated environmental assessment process for Canada in which the different jurisdictions would collaborate as partners.
- Recommendation 57: The federal government should create a single environmental assessment agency in order to carry out assessments under federal jurisdiction and collaborate with other orders of government.
- Recommendation 58: Multiple environmental assessments on the same project conducted by different authorities should be conducted concurrently, not sequentially.

- Recommendation 59: The Canadian Environmental Assessment Agency and potential substitute authorities, such as the National Energy Board, should negotiate an agreement to enable substitution when an environmental assessment by a review panel and other project approval processes are both required.

The Agency is currently working on the options for a new framework for EA in Canada, emerging from this “consolidation” initiative. There has been little disclosed but what little is known would seem to indicate that the government is at least considering some major changes along the lines of those recommended in this paper. It remains to be seen if changes to CEAA are on the horizon.

ELEMENTS FOR CONSIDERATION

In light of the impending debate, this paper examines four elements of CEAA and current EA practice that the authors propose, be amended for the more efficient application of federal EA and the more effective realization of sustainable development objectives for projects subject to CEAA:

- the self-assessment principle;
- the role of federal agencies;
- duplicative jurisdictional requirements; and
- multiple concurrent projects within a geographical area.

The Self-Assessment Principle and the Role of Federal Agencies

CEAA is a self-assessment process. Federal authorities undertake an EA for a project as a decision-maker, even when they are the proponent. An assessment of a project can be triggered in one of four ways, where the federal authority:

- is the proponent;
- provides funding;
- sells or transfers land; and/or
- exercises authority under legislation as specified under the *Law List Regulations*.

While the authors would not suggest that federal authorities are deliberately sacrificing the quality of EA by expediting decisions in a self-interested or inappropriate way, it remains that for a multitude of reasons, there is reasonable basis for the apprehension of bias. Consistent with the theme of this conference, the authors submit that self-assessment presents questions of both ethics and quality where the responsible authority is the proponent, providing funding or transferring land to facilitate the project.

When a project description is filed with a federal authority or the Agency, the recipient is obliged to coordinate the process of determining if an EA is required, and which agency or agencies are or may be responsible authorities, or federal authorities that are or may be in possession of specialist or expert information or knowledge with respect to the project. The

process is governed by the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements* or “Federal Coordination Regulations.” These were brought into effect in 1997 when it was realized early in the implementation of CEAA that some process authority and control was needed over this complex process. Although there were regulated timelines for federal coordination, they were not always met. There were no consequences of failing to meet these timelines. Generally this process would take a few days to a few weeks; for larger projects the effort could be months. The complex nature of the triggering of CEAA could cause this process to bog down and/or become adversarial—interagency rivalry and jurisdictional squabbles could and did arise.

The new CEAA (2003) has included a new role called the Federal Environmental Assessment Coordinator (FEAC). The FEAC is charged to coordinate the participation of federal authorities in the environmental assessment process for a project where a screening or comprehensive study is or might be required, and to facilitate communication among federal authorities and other provinces, persons or bodies. The Agency serves as the FEAC for comprehensive studies, inter-jurisdictional EAs, and with the agreement of the RAs, other EAs as required. It is hoped that this authority and the role of the FEAC will expedite the EA process as compared to the situation that existed prior to the amendments to CEAA.

There are currently almost 40 federal authorities that can be required to conduct an EA under CEAA. Some of these authorities have centralized EA coordination and others have decentralized coordination. Many of these authorities have few if any experienced EA practitioners on staff. Commencing in 2006, more than 70 Crown corporations will be coming under CEAA, adding EA and new participants to the process. Port Authorities have their own regulation (*Canada Port Authority Environmental Assessment Regulations*) governing EA under CEAA and Airport Authorities are expected to have their own regulation in 2006, as well. The magnitude of effort expended at federal coordination has been and appears to continue to be monumental.

Current statistics on the number of multi-responsible authority EAs are not available, but we understand it to be substantial and in the thousands annually. Regardless, the Federal Coordination Regulations require interagency consultation to determine if federal authorities are responsible authorities and therefore are required to conduct an EA, or if the federal authorities are in possession of specialist or expert information or knowledge. Consequently, most EAs under CEAA involve federal coordination even where there is only one responsible authority. Once “who’s in or out” is established, these sometimes unlikely partners in EA must jointly conduct the EA and exercise their authority under CEAA in a coordinated way.

After the decision is made on who is doing the EA, a coordinated EA must be undertaken under the leadership of the FEAC and participant RAs and/or federal authorities. This exercise involves an extensive process requiring multilateral decision-making on the scope of the project, the factors to be considered and the scope of the factors to be assessed, and the nature and extent of public consultation. This process is prone to delays and inefficiencies.

If one accepts the authors' earlier contention that a majority of EA conducted under CEAA results in little benefit from an environmental protection perspective for 95 percent of EAs, this process can be considered nothing less than excessively wasteful and bureaucratic.

Overall, the self-assessment principle and the role of federal authorities under CEAA have resulted in inter-related issues that affect the timeliness, quality and certainty of EA:

- the self-assessment principle has resulted in different agencies applying CEAA in different ways, which has subsequently resulted in reduced quality, and different standards;
- the self-assessment principle may have the potential for conflict of interest or at least an apprehension of bias for those federal agencies that are assessing their own projects;
- the self-assessment principle has resulted in CEAA being applied to projects that are generally environmentally benign, leading to unnecessary diversion of limited resources from projects that benefit most from EA;
- high turn-over within the different federal authorities has led to a lack of institutional memory and lack of continuity, the inconsistent application of CEAA, and an apparent lack of quality objectives/standards;
- a diffuse or ephemeral knowledge of EA among responsible and federal authorities, an impeded the advancement of quality of EA; and
- the absence of a centralized EA body has resulted in a lack of trained, qualified practitioners.

Duplicative Jurisdictional Requirements

There are a number of issues that arise as a result of duplication in process. Some of these issues may be an artifact of the complex jurisdictional issues between Canada, its provinces and territories, Aboriginal government, Aboriginal people, municipalities and other jurisdictions. CEAA does allow for substitution for other processes, but this is seldom if ever implemented. There are some fundamental issues with CEAA and duplication.

One way in which there is duplication in EA arises from the regulatory trigger for CEAA. Where a federal authority issues a license or makes a decision under legislation specified in the *Law List Regulations*, an EA is triggered. These *Law List Regulations* triggers are predominant triggers of CEAA. They are in the opinion of the authors, the single biggest source of duplication in EA in Canada. In particular, triggers under the *Fisheries Act* and the *Navigable Waters Protection Act* are responsible for this.

The *Fisheries Act* is administered by Fisheries and Oceans Canada (DFO). Several sections of the *Fisheries Act* trigger CEAA. For example, Section 35(2) of the *Fisheries Act* requires that the Minister of DFO issue an authorization for the harmful alteration, disruption, or destruction (HADD) of fish habitat. This requirement is frequently triggered by projects in waters that are inhabited by fish. It is the understanding of the authors that such authorization is required in Canada in the order of 500 to 1,000 times annually, triggering the need for an EA under CEAA with DFO acting as a responsible authority. However, DFO has a very strict national policy that there shall be "no net loss" of fish habitat as a result of a project, even where HADD is authorized under Section 35(2). A compensation program (involving habitat

enhancement or replacement for example) must be implemented to satisfy this policy. The process of obtaining this authorization necessarily involves an application with detailed project description information, a description of the existing environment (fish and fish habitat characteristics) environmental effects analysis, mitigation strategies, and compensation plans. No HADD can escape this process. The logical question then becomes, why too does DFO need to do an EA under CEAA? It is entirely duplicative.

A related problem to the *Law List Regulations* trigger is the way in which minimal federal involvement can result in duplicative EA of a project that is primarily in the jurisdiction of a provincial government. For example, a mine in a province may not trigger a federal EA as mining is a provincial jurisdiction. There may be no federal funding or land trigger, and the federal government may not be the proponent. However, there may be a stream crossing on the access road leading to the mine. The construction of that stream crossing may constitute a HADD and therefore an authorization under Section 35(2) of the *Fisheries Act* would be required. Thus, an EA would also be required under CEAA. Great discretion is afforded to responsible authorities to set the scope of the project that is being assessed pursuant to Section 15(1) of CEAA. DFO might set the scope of the project narrowly as the installation of the stream crossing (e.g., the road and culvert), minimizing federal duplication of an otherwise provincially regulated project. DFO or other responsible authorities have the discretion to expand the scope of the project to include a larger part or all, of the project in the EA. This creates a great deal of uncertainty and clearly results in redundancy of process. It is the experience of the authors that such situations arise hundreds of times per year in Canada.

Regional Geographies with Concurrent Multiple Projects

CEAA requires consideration of cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out (Section 16(1)). This requirement, without limitation can be very onerous to satisfy. CEAA does afford the opportunity for responsible authorities to limit the scope of these cumulative environmental effects under the authority of Section 16(3). However, cumulative environmental effects are often seen as an intimidating or daunting aspect of EA and responsible authorities are often paralyzed by the subject. Consequently, proponents of projects often end up with the impossible task of trying to consider all potential cumulative environmental effects resulting from other projects over which they have no control and limited knowledge. RAs frequently fail to exercise their authority to limit the scope of the cumulative environmental effects assessment in this condition of uncertainty. It is the experience of the authors that failure to exercise this discretion is the rule, not the exception. This contributes to inefficiency due to uncertainty about requirements and iterative regulatory review.

The new CEAA (2003) facilitates consideration of the results of regional strategic environmental assessment conducted outside the scope of CEAA (Section 16.2). The intention of this amendment was to support cumulative environmental effects assessment required under CEAA. There is little evidence, however, that this is resulting in serious effort to undertake such strategic environmental assessments or aid in cumulative environmental effects assessment under CEAA.

RECOMMENDATIONS AND CONCLUSIONS

In the spirit of re-aligning EA in Canada towards improved quality and efficiency, the authors offer the following recommendations.

The principle of self-assessment should be eliminated and the roles of federal authorities should be re-defined by the following actions.

- Replace the CEAA “triggers” with a listing of projects and/or activities that are subject to the Act. The list would include thresholds for the level of EA required (e.g., screening vs. comprehensive study vs. Panel). The projects to be included should be those where there is reasonable anticipation that without the benefit of EA, there is potential for significant adverse environmental effects.
- Introduce a federal body to coordinate federal EA, to replace self-assessment.
- Re-define federal authorities to limit their authority to a review and advisor capacity (*i.e.*, eliminate decision-making authority under CEAA).

These changes would result in:

- a trend toward national consistency in EA application;
- improved quality and perhaps the introduction of quality standards;
- improved efficiency in process, including the elimination of many unnecessary EAs; and
- a higher level of independence and accountability in decision-making.

Canada has a deserved good reputation in EA. Recent amendments to CEAA have been helpful from a quality and efficiency perspective. However, there is considerable scope for improvement in the quality, efficiency and ethics of EA under CEAA. The federal government needs to take action to renovate federal EA. Otherwise the reputation will continue to no longer match the reality.

ACKNOWLEDGEMENT

This paper was peer reviewed by Gordon Yamazaki, M.Sc., Scientist, Jacques Whitford.