Ecojustice Submission to the Expert Panel on the Review of Environmental Assessment Processes

A. Introduction

This is the third in a series of Ecojustice submissions to the Expert Panel. This submission deals with projects subject to environmental assessment ("EA") requirements and scoping of those projects for EA purposes. Our next two submissions to the Expert Panel will be made in Calgary on November 21, 2016 and in Vancouver on December 12, 2016 dealing with decision-making and judicial review in environmental assessment processes, and climate change, respectively. Ecojustice intends to provide the Panel with a full written submission that will capture the issues presented in a comprehensive manner.

As in our previous submissions, we confirm that Ecojustice's overarching position is that EA processes in Canada are broken and require significant re-visioning of the purposes and processes of environmental assessment. In particular, we must shift from EA for the purpose of mitigating adverse impacts of proposed projects to a sustainability assessment of policies, plans, and projects that fosters the strongest feasible positive contributions to lasting wellbeing while avoiding significant adverse effects.[1] To that end, Ecojustice recommends to the Expert Panel the proceedings of the Federal Environmental Assessment Reform Summit and the various writings of Robert Gibson and others.[2]

B. Projects Subject to Environmental Assessment and Scoping

Ecojustice's submissions on projects subject to federal EA requirements and scoping are made with a view to ensuring meaningful, comprehensive EAs with clear requirements for proponents and with early and meaningful opportunities for public engagement. Consistent with our vision of EAs as sustainability assessments, our submissions are intended to underscore the need for meaningful consideration of cumulative impacts of projects on the environment and communities. Ignoring cumulative effects and the characteristics of communities that stand to be impacted by a given project allows the current pattern of inequitable distribution of environmental burdens and benefits to persist.

1. Projects Subject to Environmental Assessment

The best way to ensure that projects that could have significant environmental impacts are subject to EA requirements, while also providing clarity for proponents and members of the public, is to adopt a hybrid approach whereby the legislation includes a list of designated projects but is also triggered by key legislative authorizations, such as those pertaining to fisheries and navigable waters. That said, in theory a designated projects approach to EAs could be sufficient

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[1] Robert B. Gibson, Meinhard Doelle & A. John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016) 29 J Envtl L & Prac 252 at 255.

[2] Anna Johnston, ed, *Federal Environmental Assessment Reform Summit: Proceedings* (Vancouver: West Coast Environmental Law, August 2016); Gibson, *supra* note 1; Robert B Gibson et al, *Sustainability Assessment: Criteria and Processes*, (Routledge, 2005).

on its own, so long as the list of projects subject to EA is broad and precautionary, and the reviews conducted are strengthened. As compared to a triggers-based approach, such as that contained in CEAA 1992, a designated projects approach provides greater clarity both for proponents and interested members of the public.

The existing list of designated projects in CEAA 2012 is fundamentally inadequate and fails to capture many major projects that can be expected to have serious impacts on the environment and communities. These include fracking, oil and gas development, rail transportation of hazardous products, oil by rail facilities, and most in-situ oil sands projects.

In addition to a list of designated projects, it is also important that there be a provision by which the Minister can subject a non-designated proposal to an EA similar to s. 14(2) in CEAA 2012. The provision should establish that discretion can be exercised at the Minister's own initiative or where a person submits a request. There should be a clear test for the exercise of this discretion so that it is exercised where warranted based on the likely impacts of a given project. The test should capture undertakings that are not designated, but which fall under federal jurisdiction by virtue of location on federal lands, being proposed or by the federal government, or being subject to federal permitting, has the potential to have adverse environmental effects. If the project falls under federal jurisdiction and a preliminary screening suggests that the undertaking may cause adverse environmental effects, an EA should be required.

Furthermore, there should be a requirement for the Minister to provide reasons as to why a project is not likely to cause adverse environmental effects in situations where the Minister decides to reject a request. To be clear, a provision such as s. 14(2) should not be relied upon to capture projects of general concern or to justify a narrow designated projects list given that, in practice, requests to designate projects under EA laws are rarely successful.

Ecojustice's position is that all designated projects should be subject to an EA. In the event that the government decides to retain a screening step, then initial screening for a particular undertaking should be a largely administrative step aimed at determining whether or not an EA is required. It should not involve a substantive examination of an undertaking's potential environmental effects. If a screening step is retained in the new EA law, the test should be similar to that included in s. 10 of CEAA 2012 being incorporated into the new law, whereby a designated project requires an EA if it may cause adverse environmental effects.

2. Projects should be Broadly Scoped for Assessment

EAs are most effective when they are comprehensive in scope. EAs should be scoped so as to examine the overall impact of a project on economic, social, and environmental sustainability, and should include consideration of project impacts on local communities. This includes cumulative effects on the environment but also on communities, in light of growing evidence suggesting that low income populations, Indigenous communities, and other historically

disadvantaged groups in Canadian society are disproportionately exposed to environmentally damaging activities, the benefits of which are often borne by other segments of society.

Given the fundamental importance of the "scope" of the EA with respect to its process and outcomes, it is important that the public have the opportunity to meaningfully participate in scoping decisions rather than being included after the fact and after a decision may have already been made to exclude matters of interest to the local community from the scope of an EA without public input.

Canada's EA law should have broad application and not be limited to a narrow set of federal interests. It should apply to projects that may impact aspects of shared jurisdiction and federal jurisdiction over matters of "national concern". The federal interest in the environment is broad and a new CEAA should reflect that reality by looking comprehensively at potential environmental and social impacts and mandating broad scoping of proposed projects.

Artificially narrowing the scope based on constitutional heads of power can lead to EAs that fail to consider the effects of projects in a comprehensive manner reflective of cumulative effects. A statutory requirement to include certain factors in an environmental assessment would help ensure comprehensive assessments. This should include statutory guidance on when various degrees of assessment are required and a mandated requirement that the Agency should include all relevant factors and, if they are unsure of a factor's relevance, include it in an assessment consistent with the precautionary principle.

The list of factors presently identified at s. 19(1) of CEAA 2012 should be expanded and amended so as to provide greater clarity. Among the mandatory factors to be considered should be potential alternatives to achieving the purposes of a given proposed undertaking that would decrease its associated adverse social, cultural, and environmental effects. A new CEAA should also limit project splitting to ensure projects are considered in a holistic manner so as to truly advance the objective of sustainable development. The present s. 19(2), which grants excessively broad discretion to the Minister to determine the scope of the factors to be considered, should be removed. The responsible authority should determine the scope of the factors to be considered based on the precautionary principle, guidance from the CEA Agency, and with an opportunity for public input.

A particularly important consideration in any EA is the "cumulative effects" of a given project, defined in terms of social, cultural, economic, and environmental changes caused by a given project in light of existing background conditions and other reasonably foreseeable future human activities. EAs should be scoped so as to examine the overall impact of a project on economic and environmental sustainability, and should include consideration of project impacts on local communities.

Examination of community impacts (as well as the related question of meaningful engagement of community members in the decision-making process) should of necessity include consideration of the characteristics of the impacted community similar to the approach taken under the US NEPA. In Canada, this would mean EAs that include environmental justice analyses to determine any disproportionately high and adverse human health or environmental effects to low-income, Indigenous, or other socially vulnerable populations.