



Environmental Law Centre

December 20, 2016

Expert Panel Review of Environmental Assessment Processes

Submitted electronically

Re: Federal Environmental Assessment: evolving EA law to sustain future generations

The Environmental Law Centre (Alberta) (ELC) champions strong environmental laws, public engagement and education with the goal that Canadians enjoy clean air, clean water and sustainable ecosystems. The ELC supports a strong and robust federal environmental assessment process that is aimed at maintaining environmental quality for future generations. In this regard the ELC has been involved in the deliberations and drafting of *Achieving a Next Generation of Environmental Assessment*¹ and would recommend adoption of the recommendations therein.

The ELC has also previously worked on operationalizing sustainability assessment as well through the publication of an annotated statute which should be built upon to create a new generation of environmental assessment.² This submission summarizes highlights the ELC's primary recommendations arising from these bodies of work.

What is the purpose of federal environmental assessment?

Federal environmental assessment should be focused on ensuring a sustainable approach to resource development and climate change, to maintain the quality of the environment for future generations. First and foremost federal EA, must be a mechanism by which information is gathered to guide federal decisions about projects which have environmental risks. Federal EA must be a decision tool and not merely a check box exercise.

What are the issues that must be overcome to realize a new generation of decision making and trust in the process?

EA difficulties in the past have been driven by a variety of issues, including:

¹ Environmental Planning and Assessment Caucus of the Canadian Environmental Network, Submission to the Expert Review of Federal Environmental Assessment Process (December 14, 2016), online: EA Review http://eareview-examenee.ca/wp-content/uploads/uploaded_files/epa-caucus-submission-to-expert-panel-2016-12-14.docx

² See Brenda Heelan Powell, *A Model Environmental and Sustainability Assessment Law* (Edmonton: Environmental Law Centre, 2013), online: Environmental Law Centre <http://elc.ab.ca/media/98820/Annotated-EA-Model-Laws-FINAL.pdf>

- Lack of baseline or reference state monitoring;
- Lack of regulatory oversight to manage cumulative effects;
- Lack of empirical evaluation of mitigation efforts;
- Overreliance on non-binding mitigation and follow up measures;
- Lack of Indigenous, regional, and local knowledge to understand social values and expectations;
- Lack of measures to mitigate against bias in assessments (and follow up);
- Lack of clarity in policy for the protection of environmental quality; and
- Lack of clarity in decision making (i.e. highly subjective and based on qualitative approaches).

Ideally, federal EA outcomes would confront the past shortfalls (enumerated above). This requires a new and significantly altered approach and broadens the ambit of federal EA discussion to include planning (strategic, regional, and project), assessment, and post assessment compliance assurance and ongoing review and evaluation of mitigation approaches.

Overcoming these issues will require significant capacity within the federal government and the creation of new and accountable assessment approaches in cooperation with other jurisdictions.

A new EA process must provide process certainty while acknowledging the need to be responsive and accountable to uncertainty. Determinations of a project's contribution's net benefits to all aspects of sustainability should be guided by clear criteria that can be integrated at the earliest stages of planning, which in turn will mitigate investment risks.

Federal triggers and planning

Federal triggers for environmental assessment must recognize the scientific realities of the integrated whole of water, land and resource extraction and use. It must be recognized that inclusion lists or project lists for which federal EA are mandated often fail to consider cumulative effects of development and fail to treat the environment as a system. At the same time, it must be acknowledged that, while science may justify an all inclusive assessment of activities, that capacity and knowledge challenges must be overcome. There must be systems of information gathering and decision making in EA process whereby heightened scrutiny of projects and their contributions to cumulative impacts must be assessed.

Federal environmental assessment must be nested in terms of strategic, regional and project based assessment. In this regard, a new assessment regime becomes planning oriented and driven. The scope of assessment becomes tiered in to ensure sustainability outcomes. This requires a clear articulation of desired outcomes.

Scope of considerations

Assessments must be inclusive of relevant criteria/factors and related analysis to be able to ascertain the overall sustainability of a given project or proposal.

For cumulative effects assessment, there should be a working assumption that new activities which undermine regional scientific limits or ecological objectives (which will vary by subject matter) must undergo heightened scrutiny. In addition there should be in place a rebuttable presumption that such projects will be contrary to sustainability.

Conduct, continuity and learning

An EA body or agency must have sufficient capacity and independence to garner trust from those involved in the EA process. The EA agency should be accompanied by measures to avoid regulatory capture including an independent statutory mandate, high levels of autonomy to direct and manage EA processes, and the inclusion of statutory mechanisms to be reviewed to ensure accountability to legal processes and scientific rigour. While funding for EA could still be derived from proponents oversight and conduct of EA related work should be conducted through a third party (administered in a manner that ensure transparency and minimizes the likelihood of bias).

EA agency capacity is also essential to maintain continuity in EA process and to integrate learning into EA processes, strategic and regional assessments, and into follow up programs. The EA Agency should have sufficient capacity to undertake independent research, review and analysis of assessment materials. Statistical analysis of research conducted in support of a project application include power analysis (with related assumptions) or through Bayesian analysis should become standard practice to ensure undue reliance on qualitative opinion is probably understood..

Indigenous and community based monitoring and knowledge should be included in the assessment process. This information may augment the understanding of existing research or raise questions as to the certainty with which information should be evaluated.

Public participation in EA processes

Participation in the EA process should not be unduly curtailed by narrow standing tests. Community interests must be properly represented in the EA process to ensure sustainability is understood. Participatory rights should include rights to cross-examine information that is supporting project assessments. Costs of effective participation and the ability to undertake expert review and analysis of the project related information and analysis.

Opportunities for participation should be available at all levels of EA, project, regional and strategic.

Tracking, reporting and compliance assurance

As noted in *“Achieving a Next Generation of Environmental Assessment*

Building public trust in EA processes is only possibly if the commitments and obligations arising from the EA process result in meaningful tracking, reporting and compliance assurance. Through the EA decision making process, there are typically commitments made by the proponent and the need identified for work to be conducted by either the proponent, the federal government, or other parties (such as provincial/territorial governments or other non-government entities), including the need to verify predictions and confirm mitigation effectiveness. There must be assurance that the obligations and commitments made during hearing processes yield the expected results following the EA decision. To ensure this occurs it is recommended that new EA legislation set out a more prescribed approach to implement the various follow-up obligations made in the EA process.³

Commitments made during the course of EA reviews should be deemed to be binding conditions of the subject party. For this to occur it is important for the reviewing agency (EA agency or JRP) to ensure commitments are expressed in a clear and enforceable manner, and are specifically tracked in the EA decision-making process.

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Recommendations directed at federal departments should be framed in a clear and concise manner and should, once accepted by the relevant Minister, result in public reporting to track and assess compliance with the recommendation.

Tracking of Predictions, Mitigation and Adaptive Management Plans

Project based EA relies heavily on future predictions and mitigation performance to minimize environmental impacts. Mitigation effectiveness and addressing uncertainty through the ability to adapt through time (i.e. adaptive management and continuous improvement) are central components to “follow-up” programs. The new EA law must create a system where this follow-up is transparent and accountable as set out in *Achieving a Next Generation of Environmental Assessment* with clear and robust monitoring, tracking, evaluating, learning and altering mitigation conditions on EA related approvals.⁴

³ It should be noted that CEAA 2012 included some provisions for enforcement and compliance however gaps in the follow up system remain.

⁴ Supra note 1 at Theme 4.

Harmonized and cooperative assessments

The ELC recommends removing substitution and equivalency provisions of *CEAA 2012*. These provisions amount to an abrogation of federal control over procedures, EA content, and decision making authority. Once federal jurisdiction is triggered it must be recognized that cooperative environmental assessment and sustainability assessment are likely to lead to the best information and decision, relying on core department competencies.

Conclusion

A new generation of federal environmental assessment can provide a foundation for planning, decision making and development that sustains environmental quality for future generations. Cooperation, engagement, and monitoring will all be essential to the success of the next generation of federal environmental assessment. New EA legislation provides a significant opportunity for the federal government to set the ground work for renewed commitment to environmental sustainability.

It is recognized that a significant amount of work is required to further delineate how next generation assessment will be implemented but it is essential that the fundamental pillars of sustainability be a driving force.

The ELC would welcome any questions that the panel may have in this regard.

Sincerely,

A handwritten signature in black ink, appearing to be 'J. Unger', with a long horizontal stroke extending to the right.

per

Jason Unger

Acting Executive Director
Environmental Law Centre