



What is Greenpeace Canada and what is our mandate?

Greenpeace Canada is an independent environmental organization part of the larger Greenpeace network that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace by creating an energy revolution to address climate change, protecting the world's ancient forests, defending our oceans from pollution and destructive fishing, campaigning for sustainable agriculture and creating a toxic free future.

Greenpeace Canada has been actively involved with bringing public attention to environmental issues surrounding projects subject to the Federal Environmental Assessment (EA) process. For example, Greenpeace Canada challenged the adequacy of the environmental assessment pertaining to the Darlington nuclear plant and continues to challenge the long-term sustainability and climate change implications of non-renewable resource developments. Such discourse is necessary when developing and approving large-scale projects that have enduring environmental implications.

Why is the EA process important?

Ideally, the EA process will aim to achieve sustainable development that conserves environmental quality by integrating environmental factors into planning and the decision-making process.¹ The EA process should be a multi party inclusive process that fosters public participation, and applies to any and all projects that alter the environment. As the current EA stands, it has a narrow application and is focused on a timely assessment as opposed to a focus on environmental sustainability. In a time where the Canadian government has adopted the Paris Agreement, has acknowledged climate change and appears to care about Canada's environmental future, it is important that the legislation reflect this.

Public Participation

The current EA process restricts public participation to interested parties. Interested parties are those deemed by the panel if, in its opinion, the person is directly affected by the carrying out of a designated project, or has relevant information or expertise. The panel may take a liberal or restrictive approach to interested parties but that seems to be a decision left to the panel of the day. The statute as it stands does not foster an inclusive approach to public participation. The EA process should encourage public participation. An inclusive approach to public involvement is manageable if the panel or respective review board considers different forms of involvement such as written submission, expert witness statements or live oral statements. Public participation

¹ Much like what was captured in the preamble of CEAA 1992

should be encouraged and welcomed throughout the EA process including at the early planning stages of the project.

Recommendation: The Act should broaden the scope of who can participate and the ways they can participate.

EAs should be reviewed by the Canadian Environmental Assessment Agency

Modernized environmental assessment legislation should create a single agency responsible for environmental assessment.

Such a centralized agency is needed to ensure credible and trustworthy environmental reviews in light of the evidence of regulatory capture within both the National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC). Professor Meinhard Doelle has observed there are "...legitimate concerns that some regulators may be captured by their industry, making it difficult for them to consider whether the industry sector they regulate offers the most sustainable long-term solution to the need or purpose being pursued with the proposed project. Furthermore, the perception of capture tends to undermine the credibility of the EA process to the general public."²

The CNSC and the NEB are case studies in such conflict of interest. The impartiality of the CNSC, for example, has been increasingly questioned over the past decade.³ In Greenpeace's experience, the NEB and CNSC view environmental assessment as little more than a regulatory hurdle for project approval. The institutional mindset problem could be most effectively addressed through a single regulatory agency mandated to advance Canada's commitment to sustainable development.

Furthermore, industry-specific regulatory agencies are more focused on technical issues, and less so in the big picture planning issues that are fundamental to an EA process.⁶ Indeed, such agencies may actually lack the technical expertise to carry out credible sustainability assessments. CNSC staff, for example, has acknowledged the Commission lacks the institutional capacity to carry out sustainability assessment and relies on other federal and provincial agencies.⁷

Recommendation: A single agency should be responsible for environmental assessment under modernized environmental assessment legislation.

Projects to be Reviewed and Scoping

Currently, the only projects that require review under the EA process are those on the Designated Project List or the Minister may decide that a project not listed should be

² Doelle, Meinhard, CEAA 2012: The End of Federal EA as We Know It? (July 10, 2012). (2012) 24 Journal of Environmental Law and Practice 1

³ Tyler Hamilton, "Nuclear regulator's impartiality questioned," the Toronto Star, December 1, 2009.; Gloria Galloway, "Critics accuse nuclear safety official of acting as industry cheerleader," the Globe and Mail, October 12, 2016; Shawn McCarthy, "Impartiality of federal panel reviewing nuclear-waste plan under scrutiny," the Globe and Mail, Sep. 23, 2013

⁶ Doelle, Meinhard, CEAA 2012: The End of Federal EA as We Know It? (July 10, 2012). (2012) 24 Journal of Environmental Law and Practice 1

⁷ Canadian Environmental Assessment Agency, Deep Geological Repository for low and intermediate level radioactive waste project, Joint Review Panel, Transcripts, Thursday, October 3, 2013, Volume 15, pgs 182 - 185.

subject to an EA. The “excluded until included” model is not an environmentally precautionary model. The scope of projects assessed is too narrow. The current Designated Project List excludes activities such as fracking, oil sand processing facilities, pipelines (other than offshore) or offshore drilling that could benefit from a comprehensive federal environmental assessment. As it stands, the discretionary triggering creates uncertainty and politicises the process.⁸

The new Act should have a legally clear test that, when applied, would trigger the EA process for a wider scope of projects. The trigger should not be discretionary. In the alternative the model should be “included until excluded” thereby allowing for a precautionary process in which projects that could cause environmental harm are not overlooked. Understandably, there will be different levels of evaluation of the projects that are commensurate to the size, potential impacts and other similar factors.

Furthermore, when assessing projects, a comprehensive study of the entire project should be assessed as opposed to minute or parcelled parts of the project. By only focusing on specific pieces of the project as opposed to the whole, serious environmental impacts may be overlooked.

Recommendation: A broader scope of projects should be assessed, the assessment should be of the entire project, and be conducted proportionately to the type of project it is.

Make the Sustainability and Climate Tests Compulsory

Modernized environmental assessment legislation should make a “sustainability test” for projects compulsory.

An objective of the current Canadian Environmental Assessment Act (CEAA) is to encourage the federal government to take actions that promote sustainable development. This requires an assessment of a project’s contribution to sustainability.

In contrast to environmental assessment, sustainability assessment goes beyond merely identifying and mitigating the negative impacts of an undertaking. Sustainability assessment answers the following question: does the proposed project create momentum towards a more sustainable society? Sustainability assessment is desirable because it discourages decisions that will result in the transfer of adverse effects or risks to future generations.⁹

Since CEAA 1992 came into force, sustainability assessment has evolved as a planning tool resulted in decisions to significantly modify projects or reject projects. The Whites Point Quarry and Marine Terminal projects were rejected thanks to sustainability

⁸ *Ibid*

⁹ Gibson, R.B. (2006). Sustainability assessment: Basic components of a practical approach. *Impact Assessment and Project Appraisal* 24(3): 170-182.

assessment¹⁰ while the Mackenzie Valley and Voisey's Bay were significantly modified to ensure net benefits to society.¹¹

However, despite sustainable development being listed as an objective of the *Act*, there is no obligation for responsible authorities to subject projects to a sustainability test. For example, the Joint Review Panel that assessed Ontario Power Generation's (OPG) proposal to build up to four new nuclear reactors at the Darlington nuclear station did not undertake a sustainability assessment. The panel acknowledged that such an assessment would put "...greater emphasis on the legacy in terms of waste legacy and nuclear liability."¹² It goes without saying that a more meaningful consideration of long-lived radioactive waste and the transfer of accident liability to Canadians would have impacted the conclusions and recommendations of the Darlington environmental assessment.

In Greenpeace's view, it is unacceptable that Canada's current environmental assessment legislation permits responsible authorities to arbitrarily apply a sustainability tests to major projects.

Recommendation: Sustainability and climate tests should be compulsory under any new environmental assessment legislation.

Require Worst-Case Accident Assessment

Accidents, malfunctions or terrorist attacks at hazardous facilities, such as nuclear plants, pipelines and offshore oil and gas extraction facilities, all come with the potential to cause catastrophic and irreversible harm to Canadian society and the environment.

Given Section 4(2) of CEEA requires projects be assessed in a "precautionary manner" the effects of such worst-case accidents, malfunctions and terrorist attacks should be publicly assessed during an environmental assessment, but responsible authorities have confidently avoided considering such events. In Greenpeace's view, this weakness in CEEA should be remedied in modernized environmental assessment legislation.

For example, while section 16(1) of the CEEA requires accidents to be included in environmental assessments, the CNSC has a policy against assessing the consequences of major accidents in environmental assessments. Following the Fukushima disaster, the CNSC's Fukushima Task Force's observed that, "it may be useful for the environmental assessment process to include consideration of severe accidents, should this be regarded as responsive to public concerns".¹³ The Commission, however, continued to dismiss public requests for effects of major nuclear

¹⁰ Fonesca, A., & Gibson, R. Application denied: BC's Kemess North and Nova Scotia's Whites Point projects promised jobs and revenue, but the communities were looking for overall sustainability. *Alternatives Journal* 34 (4): 9-11.

¹¹ Gibson, R. (2002). EA in Canada: From wreck cove to Voisey's Bay: The evolution of federal environmental assessment in Canada. *Impact Assessment and Project Appraisal* 20 (3): 151-159; Gibson, R.B. (2006). Sustainability-based assessment criteria and associated frameworks for evaluations and decisions: theory, practice and implications for the Mackenzie Gas Project review.; Gibson, R.B. (2006). Sustainability assessment and conflict resolution: Reaching agreement to proceed to the Voisey's Bay nickel mine. *Journal of Cleaner Production* 14: 334-348.

¹² Joint Review Panel Environmental Assessment Report: Darlington New Nuclear Power Plant Project, June 2011, Pg. 140.

¹³ CNSC, Fukushima Task Force Report Draft (October 2011) p. 56.

accidents to be considered during environmental reviews.

In Greenpeace's view, the CNSC's policy is contrary to the legislative intent and requirements of the CEEA, ignores public concern, and encourages risky behavior by distorting public and institutional understanding of the risk posed by nuclear power stations in Canada.

Recommendation: Require an assessment worst-case accident, malfunctions and terrorist events be required under modernized environmental assessment legislation.

Reviewability of Decisions Made

To ensure a transparent and accountable decision-making process not only should there be full public disclosure of the projects' environmental consequences, the Panel should provide reasons when making their recommendation. This gives all parties an understanding of why and how the panel came to the decision they did.

Furthermore, there is a lot of discretion afforded to the Minister in the *Act*. The *Act* politicizes the process by deferring decision making to the discretion to the Minister or Governor in Council. This should be revised so the Agency or an independent body makes the decisions. The process shouldn't be used as a political tool but a legitimate analysis into the environmental effects the project could and will have.

Recommendation: Reasons should be provided throughout the entire EA decision-making process.

Conclusion

The federal EA process should serve as an avenue for public discourse, information gathering, planning, and sustainable development. Analysis of projects should be evidence based and transparent. Furthermore, the federal EA should promote early disclosure of information and should foster consensus building between the project proponents, public and other stakeholders.