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Ecojustice Submission to the Expert Panel on the Review of Environmental Assessment Processes
Clarity and Dealing with Uncertainty
November 8, 2016

A. Overview

This is the second in a series of Ecojustice submissions to the Expert Panel. This submission deals with clarity in the environmental assessment process. A third submission will be made in Toronto on November 8 dealing with scoping and screening; a fourth submission will be made in Calgary on November 21 dealing with judicial review and transparent decision making; and a fifth and final submission will be made in Vancouver on December 12 dealing with the consideration of climate change issues in environmental assessments.

Ecojustice's overarching position is that environmental assessment processes in Canada are broken and require a significant re-visioning of the purposes and processes of environmental assessment. In particular, we must shift from environmental assessment 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]

The new Act should provide clear direction about what must be included in an environmental assessment with specific and measurable standards against which to measure sustainability, and those requirements should have the force of law. The legislation should include:

1. Binding standards for meeting the sustainability threshold;
2. A requirement to substantively consider all evidence relevant to the sustainability analysis; and
3. Rules for addressing any ongoing uncertainty about potential adverse effects of a project.

B. The Clarity Problem

The current *Canadian Environmental Assessment Act, 2012*[3] gives the body preparing the environmental assessment report[4] nearly untrammeled discretion to determine the content of the report and findings on what constitute "significant adverse environmental impacts". While the Canadian Environmental Assessment Agency (the "Agency") has provided some guidance,[5] those policies do not have the force of

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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).
[3] SC 2012, c 19, s 52.
[4] Which could be the Agency, the NEB, the CNSC or a Panel.
[5] For instance the Policy "Determining Whether a Designated Project is Likely to Cause Significant Adverse Environmental Effects under the Canadian Environmental Assessment Act, 2012", Nov 2015, online http://www.ceaa.gc.ca/default.asp?lang=En&n=363DF0E1-1

law. Without clear and binding standards, reports too often give insufficient consideration to important issues and insufficient weight to relevant evidence.

The current Act requires the assessment to "take into account" the "significance" of "environmental effects".[6] These terms do not provide a clear standard. The terms "take into account" and "significance" are undefined and highly subjective, meaning that different reports could reasonably reach radically different conclusions. While "environmental effects" is defined, it is defined in a narrow and convoluted manner: it includes only fish, aquatic species at risk, migratory birds and federal lands, except where the project in question "requires a federal authority to exercise a power or perform a duty or function…"in which case other undefined environmental effects can be taken into account, so long as they are "directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of the physical activity, the designated project or the project."[7] This definition provides little clarity on what environmental effects can be considered, and contrasts with the far more inclusive and straightforward definition under the previous CEAA, 1992.[8] The current language is insufficient to ensure that all impacts reasonably associated with a project are meaningfully evaluated, and precludes consideration of a project's overall sustainability.

The problems arising from lack of clarity in the CEAA are illustrated by the example of *Ontario Power Generation Inc v Greenpeace Canada (AG),*[9] in which a project was found to have no significant adverse environmental effects even though the Panel did not take into account evidence of potentially serious environmental harm:

- Ontario Power Generation (OPG) applied to the Canadian Nuclear Safety Commission for a site preparation license for several new reactors at its Darlington nuclear plant. The former CEAA, 1992 was triggered[10], and the project was referred to a joint review panel (JRP).
- The review was challenged on the ground the JRP did not consider, and indeed did not have before it, any evidence concerning the effects of the release of hazardous substances (liquid effluent and stormwater) from the reactors into Lake Ontario. Instead, the JRP relied upon various regulatory controls that OPG asserted would ensure the Project would not have significant adverse effects.
- On review, the application judge (and later one member of the Federal Court of Appeal) held the JRP's failure to assess the effects of hazardous substance releases, except by a vague reference to regulatory regimes, violated the requirement in the CEAA to evaluate the significance of potential environmental effects.

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[6] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, s. 19.

[7] Ibid, ss.5(1) and 5(2).

[8] Under the previous Act, "environmental effects" was defined as:

> **a)** any change that the project may cause in the environment including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*,
> **b)** any effect of any change referred to in paragraph (a) on
> **i)** health and socio-economic conditions,
> **ii)** physical and cultural heritage,
> **iii)** the current use of lands and resources for traditional purposes by aboriginal persons, or
> **iv)** any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or
> **c)** any change to the project that may be caused by the environment, whether any such change or effect occurs within or outside Canada.

[9] 2015 FCA 186, leave to appeal to the SCC refused, 2015 CarswellNat 6377 ("*Greenpeace*")

[10] The former CEAA contained provisions similar to the current s. 19.

- A majority of the Federal Court of Appeal disagreed, finding that a failure of the Panel to consider environmental effects can only be established if the Panel gave no consideration *at all* to those environmental effects. Rather, the Court concluded that "some consideration" of an effect is adequate to meet the statutory requirement. Under that standard, the OPG's reference to regulatory controls was sufficient to satisfy the criteria in the Act, notwithstanding a lack of evidence about effects of the hazardous substances.

The standard of "some consideration" evidently prevailing under the current Act allows a project to pass through an environmental assessment with only cursory mentions of important factors. In *Greenpeace,* a lack of attention to missing evidence led to an incomplete assessment that ultimately was not rectified on judicial review. A well-functioning environmental assessment regime would avoid such omissions. Under the new Act, assessors should consider *all* potential environmental effects, according to pre-determined standards and a clear evidentiary threshold. Further, assessments can and should do more than avoid acute harm: they can evaluate the extent to which a project contributes to or derogates from broader sustainability goals.

C. Towards Clearer Requirements

Next-generation Sustainability Assessments will require a legislated set of generic criteria for evaluating the significance of effects. Those criteria can be particularized in legally binding and measurable standards at the project or regional assessment level and tested against a clear evidentiary threshold. The standards and generic criteria informing them will need to be carefully considered, debated in Parliament, and elaborated by regulation.[11] While we do not intend to set out an exhaustive list of criteria and standards here, the following are some examples of the type of generic criteria the statute ought to contain:

- Whether a proposal undermines or supports biological diversity and ecological integrity (as those terms are defined in the statute).
- Whether and how far the greenhouse gas emissions of a proposal will move Canada towards or away from its climate goals and its international commitments.
- Whether a proposal promotes human health.
- Whether the distribution of effects is likely to be equitable.

Each generic criterion would be accompanied by specific indicators, developed with public input, relevant to the particular assessment or class of assessments. For example, indicators may provide that "total greenhouse gas emissions will not increase as a result of the project" or "there will be no net habitat loss". These indicators will preferably form part of the statute or its regulations, but might in some cases be further elaborated as part of a screening decision (i.e., the authority determining whether an assessment is required could also be required to set indicators for the assessment, based on the legislative requirements).

Once indicators have been established, they must be measured against a legal standard of proof that demands a full evidentiary record. For example, the statute might specify that the Minister (or whoever has ultimate authority) shall not approve the assessment report unless there are probable grounds, based on clear and convincing evidence considered in a precautionary manner, that each indicator has been

[11] For a list of potential generic sustainability-based criteria, see Robert B Gibson et al, *Sustainability Assessment: Criteria and Processes*, (Routledge, 2005), p. 173.

satisfied. Legislation that sets out criteria, indicators and a defined evidentiary threshold will add more certainty to the assessment process and ensure that all participants understand the test to be met.

D. Addressing Uncertainty

Even with clear standards applied in a precautionary manner, scientific uncertainty may still be a factor in environmental and sustainability assessment. "Adaptive management" is often invoked when confronting uncertainty about a project's environmental effects or about measures that could mitigate those effects. However, it is a term that is susceptible to varying interpretations. As a result, it is a concept that has been "misinterpreted, misused, and abused".[12] It is important that the new Act set limitations on its use.[13]

Adaptive management can be useful in improving processes over time in the context of highly unpredictable uncertainties. However, a commitment to adaptive management should not be used as a substitute for proposing specific, technically and economically feasible mitigation measures in an environmental assessment. Nor should adaptive management be used to "set off" or counter the precautionary principle, which applies to all areas of an environmental assessment.[14] It should not be used as a means of addressing ongoing uncertainty about whether a project is likely to cause significant adverse environmental effects.

Adaptive management and its role in environmental assessments should be clearly defined[15] and limited to effects that are unforeseeable, using objective standards. It should also be primarily applied in follow-up, not as a tool for the initial assessment. If it is used, it should be clear what the adaptive management tool is, and how it is to be implemented.

E. Conclusion

Substantive and procedural clarity are keys to next-generation EA. To effectively foster lasting wellbeing while avoiding adverse effects, an assessment must ask clear questions and answer them with reference to all of the relevant evidence. In order to ensure consistency in the law and clarity for the parties involved, the questions asked should spring from set legislative criteria and be subject to a known and rigorous standard of proof. Clear, precautionary rules are equally important in situations of scientific uncertainty.

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[12] See Martin Z.P. Olszynski, Adaptive Management in Canadian Environmental Assessment Law: Exploring Uses and Limitations, 21 J. Env. L. & Prac. 1, 2010.

[13] The Agency provided some guidance on the appropriate use of adaptive management under the former CEAA, 1992, but these guidelines do not have the force of law: see the Policy "Adaptive Management Measures under the Canadian Environmental Assessment Act" 2009 online http://www.ceaa.gc.ca/default.asp?lang=En&n=50139251-1

[14] See Arlene J. Kwasniak, "Use and Abuse of Adaptive Management in Environmental Assessment Law and Practice: A Canadian example and general lessons," (2010) 12 JEAPM 4 at 425.

[15] See Brenda Heelan-Powell, "A Model Environmental and Sustainability Assessment Law: Annotated Version," (2013) Environmental Law Centre, for a proposed definition of and approach to adaptive management.