International Panel on Experiences and Lessons Learned in a Multi-jurisdictional Context - Canada, the United States and Australia

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Overview

Canada, the United States and Australia face similar challenges and opportunities for delivering effective Environmental Impact Assessment on several fronts. In each of these countries, national and state-level jurisdictional responsibilities pose an important dimension to the effective design and delivery of Environmental Impact Assessment (EIA). In addition, in each of these countries, the need to take into account issues related to indigenous populations with traditional knowledge and rights is becoming an increasingly significant aspect of EIA. While addressing similar challenges, each country offers unique perspectives and approaches to EIA. This session will explore approaches to addressing multi-jurisdictional authority, as well as the important role played by indigenous populations in all phases of EIA. Panellists will situate their national approaches within the unique context of each country's legal and historic context.

Canada

Background

In Canada constitutional, responsibility for the environment and environmental assessment is shared between the federal and provincial territorial governments. Over the years, environmental assessment regimes with varying requirements and systems for environmental management and project assessment have been developed by the federal government and by all provinces. Also, Aboriginal groups are taking greater control and management of their environment and resources through constitutionally protected modern treaties, which may include environmental assessment regimes. This context of multi-jurisdictional authority, coupled with an increasing role of Aboriginal peoples in

relation to resource management is shaping Canada's environmental assessment practices and key strategic directions. We will explore how these factors are playing out in the evolution of Canada's environmental assessment regime as proponents embark on a range of large scale, complex resource projects located in traditional territories.

The Federal Framework

Canada's main federal environmental assessment regulatory framework is the Canadian Environmental Assessment Act (the Act), which was brought into force in 1995. The Act succeeds earlier Guidelines and Directives dating back to 1974. In 2003, amendments to the Act were made following a mandatory five-year review of the Act. Moreover, several measures have been implemented to supplement these amendments in an effort to deliver a timely and effective process. The Act applies in a limited way in Canada's three territories, where other EA regimes have been established through land claims agreements and federal legislation implementing them.

The Act employs a self assessment model whereby a federal authority taking a decision with respect to a proposed project is also responsible for the environmental assessment. A federal environmental assessment is triggered when the Government of Canada is the project proponent, provides funding or land to the project, or provides or issues a permit or authorization identified in the Act's *Law List Regulations.* Recent reviews and audits of the Act have been instrumental in identifying opportunities for improvement to the efficiency and effectiveness of the "trigger based" self assessment model. In particular, there has been an emphasis on enhanced federal coordination, and federal-provincial cooperation on environmental assessment processes. Regulatory performance and federal-provincial cooperative models are particularly important in the context of Canada's resource industries, for which a number of large, complex projects require permits from multiple federal and provincial authorities and consultation with many Aboriginal communities.

Regulatory Performance

Important efforts have been made in the past three years to improve the regulatory framework for Canada's major resource industries, with environmental assessment as a key element. In 2007, the federal government established the Major Projects Management Office to work collaboratively with federal departments and agencies on improving the overall performance of the regulatory system for major natural resource projects. Through this initiative, the Canadian Environmental Assessment Agency has assumed new responsibilities and accountabilities for managing the assessment for major projects, and for leading and integrating Aboriginal Crown consultation obligations into impact assessment procedures. More recently, in 2009, regulations were introduced in support of the Canada's Economic Action Plan to better focus the federal EA process and eliminate unnecessary interjuridictional duplication. These changes included an expanded *Exclusion List Regulations* for certain types of infrastructure projects with insignificant adverse environmental effects as well as regulations that allow the federal process to be substituted by a provincial review for certain infrastructure projects.

Federal Provincial Cooperation

To address the challenges inherent in a multi-jurisdictional environmental assessment regime, Canada has established mechanisms for cooperation with provincial jurisdictions. The Canada-wide Accord on Environmental Harmonization and the supporting Sub-agreement on Environmental Assessment was signed by nine provinces and the Government of Canada in 1998. The Sub-agreement aims to achieve greater efficiency and effective use of public and private resources through cooperative EA and review processes. Bilateral cooperative agreements have been developed with six provinces with the goal of achieving a single environmental assessment that meets the needs of both jurisdictions. Other jurisdictions engage in cooperative assessment with the Government of Canada on a project by project basis. While these mechanisms have proven important, there is still room for greater cooperation and harmonization nationally.

More recently, Ministerial level dialogue has focused on options to improve environmental assessment delivery in Canada by reducing federal-provincial duplication in environmental assessment while ensuring core environmental assessment requirements are met. As a follow up to this dialogue, options such as substitution, delegation will likely be explored in the next review of the Act.

Aboriginal Consultation

The Government of Canada consults with Aboriginal peoples for reasons of good governance, sound policy development and decision-making as well as for legal reasons. With the establishment of modern land claims and self-government agreements, Aboriginal communities are playing an increasingly important role in the environmental assessment process. Currently, Crown consultation is being integrated into the environmental assessment of major resource sector projects to gather information about Aboriginal concerns and potential impacts on established or potential Aboriginal and treaty rights in a coordinated way.

The Crown's approach has been informed by several recent Supreme Court of Canada rulings, clarifying the requirements for consultation and accommodation with Aboriginal groups. Policies and best practices are being enhanced through experience with several large-scale, multi-jurisdictional resource projects underway in Canada for which of several Aboriginal communities could potentially be affected. In this respect, a newly developed Geographic Information System is proving to be an important information management tool to identify potentially affected communities and considerations for consultation approaches.

Conclusion

Rich in natural resources, Canada will continue to embark on many major resource projects with multi-jurisdictional environmental considerations over the next several decades. In this context, the federal and provincial governments will continue to strive toward enhanced cooperation in environmental assessment and Aboriginal consultation. A mandatory Parliamentary Review of the Act is scheduled to no later than June 2010 and could be an opportunity to examine these issues and options in significant detail.

United States

Background

The National Environmental Policy Act (NEPA), enacted 40 years ago this year,[1] is in many ways the grandfather of modern environmental law in the United States. Interestingly, however, it does not follow the formula of most US environmental laws, i.e., the federal government establishes baseline environmental standards and then authorizes States to implement them pursuant to state laws and regulations that are at least as stringent. NEPA is a uniquely federal statute in its application. It requires "agencies of the *federal* government" to prepare Environmental Impact Statements (EIS's) for "proposals of legislation or other major *federal* actions significantly affecting the quality of the human environment" [emphasis added]. [2] It does not require States to adopt their own NEPA-like laws and it does not contain a process for authorizing States to take over the roles and responsibilities of the federal government.[3] However, it does explicitly provide that federal actions involving monetary grants to States can rely on State prepared EIS's as long as certain conditions are met, including federal participation in the preparation and independent federal evaluation prior to "approval and adoption."[4] The federal/state relationship is further defined in regulations promulgated by the Council on Environmental Quality, (CEQ), the entity established by NEPA to coordinate its implementation across the federal government. The CEQ regulations state that "Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements." The regulations state that this cooperation shall include joint planning processes, environmental research and studies, public hearings, and environmental assessments.[5]

An Example of Federal State Cooperation: Highways

The use of State prepared EIS's to meet the requirements of NEPA is common practice for highway projects carried out through grants of federal monies to State transportation departments. This process was further defined in 2005 in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)[6]. The purpose of the environmental streamlining provisions in this Act are to coordinate Federal agency involvement in major highway projects under the NEPA process and to address concerns relating to delays in implementing projects, unnecessary duplication of effort, and to reduce the costs of reviewing and approving surface transportation projects. SAFETEA-LU requires State agency grantees to serve as co-lead with the Federal Highway Administration (FHWA) on the preparation of EIS's. It also permits States to be given the authority to determine categorical exclusions from NEPA for appropriate projects

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[1] NEPA was signed into law on January 1, 1970 by then President Richard M. Nixon
[2] 42 USC Section 4332
[3] It also does not prohibit States from enacting their own NEPA like laws. In fact, approximately 23 States have done so.
[4] 42 USC Section 4332(D)
[5] 43 Federal Register Section 1506.2
[6] 23 USC 327

In addition, SAFETEA-LU establishes a pilot program to allow up to five States specifically identified in the statute (Alaska, California, Ohio, Oklahoma, and Texas) to assume the federal responsibilities under NEPA for one or more highway projects. When a State takes on this program, they become solely responsible and liable[7] for carrying it out in lieu of FHWA. California is the only State currently participating in the Pilot Program, pursuant to a Memorandum of Understanding (MOU) between FHWA and California Department of Transportation (Caltrans) that became effective July 1, 2007.

The Tribal Role

Tribal governments have a unique role in the NEPA process, established by a number of legal mechanisms[8]. Within the United States, tribes are recognized as sovereigns, per the US Constitution.[9] Thus when a federal agency consults with a tribe, it is a "government to government" consultation.[10] CEQ regulations require federal agencies to invite the participation of "any affected Indian tribe" during the initial process of scoping an EIS.[11] Tribes may also participate in the NEPA process as a "cooperating Agency" [12]

Tribes bring a unique perspective to the environmental assessment process because of their spiritual, cultural, and historic relationship with the land, which goes far beyond federal and state legal concepts of ownership, possession, or other legal rights. Therefore their input is invaluable to creating the most robust analysis possible. However, with over 562 federally recognized Tribes in the U.S., the consultation process can be challenging to implement. Geographic Information System tools may be helpful in the early identification of potentially affected tribes, however the mapping of tribal lands in the U.S. is complicated by many factors including the patchwork of different tribal land ownership and use rights and on-going disputes over the physical boundaries of these rights.

A "best practice" in the U.S. is to have written Tribal/Agency agreements to define roles and responsibilities. For example, the Haudenosaunee Nations,[13] located in New York State have jointly signed agreements with federal agencies identifying who to consult with, how to consult, important geographic areas of special concern and resources of special interest. The Animal and Plant Health Inspection Service of the U.S. Department of Agriculture has had success in forging agreements with federally recognized tribes using a "model" agreement initially reached with one tribe, tailored to other individual tribes. The agreement focuses on mutual respect and protection of natural resources, communication, and information sharing.

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[7] For example, the State must waive its sovereign immunity and agree to allow citizens to sue them to the extent allowed under NEPA.

[8] These legal mechanisms include the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions.

[9] US Constitution, Article 1, Section 8

[10] Executive Order 13175, November 6, 2000

[11] 40 CFR Section 1501.7(a)(1)

[12] CEQ policy on "Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of NEPA," July 1999

[13] The Haudenosaunee are made up of six nations, the Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora.

Conclusion

Cooperation among multiple jurisdictions – federal, State and tribal – is essential to achieving a truly successful environmental impact assessment. Each level of government brings unique perspectives, information, and context to the analysis. Work must continue to streamline the integration of multijurisdictional processes so that important projects are not seen as being delayed by "paperwork exercises." This view of environmental assessment threatens to erode its important role in government decision making. Efforts must continue to use conflict resolution procedures to successfully resolve differences in a timely manner.

Australia

Background

In Australia, as in Canada and the USA, responsibility for the environment is shared between the federal and state levels of government. Federal environmental responsibilities derive principally from a capacity to make domestic law to give effect to international agreements. Of course, international agreements on the environment, such as the *Convention on Biological Diversity* (CBD), are almost all less than 40 years old and so the federal role in Australia is one that is both relatively recent and still evolving.

Australia's current federal EIA law is the *Environment Protection and Biodiversity Conservation Act 1999*. A formal 10 year independent statutory review ("the Hawke Review") has just been completed and is being considered by the federal government. At the same time, bilateral agreements on EIA with State governments under the EPBC Act were falling short of their goal of combining State and Federal assessment processes into a single seamless and efficient process. In one state, New South Wales, the CEOs of the relevant Federal and State agencies commissioned a consultant to work with agency staff to conduct a review of operations ("the Gilligan Review"). This review led to practical recommendations for better cooperation that are now being implemented.

Key Findings of the Two Reviews

Positive findings of the Hawke Review included broad support for EIA, substantial opportunities for public participation and significant benefits arising from the Environment Minister being decision-maker as well as assessor. The review also recommended wide-ranging reforms, including:

- An independent Environment Commission to conduct EIA
- Investing in better information to support assessments through "national environmental accounts" and acquiring regional spatial information
- Accelerating existing moves to strategic approaches including and defining the federal jurisdiction more specifically in terms of impacts at a landscape scale
- Streamlining processes through earlier engagement and greater cooperation with State governments (including joint assessment panels); also by producing more guidelines and increasing transparency and public access to appeals;
- Strengthening the involvement of Indigenous peoples by working more directly with Indigenous bodies including through early engagement at a strategic level
- "Foresight reports" to help government manage emerging environmental threats.

The Gilligan Review recommended

- Closer cooperation between federal and state agencies, including through training in each other's systems; shared access to a website containing guidance documents; and ongoing engagement of CEOs in creating a culture of partnership
- Joint work on strategic assessments as a way of engaging with issues before they arose
- Alignment of policies on listing of threatened species and ecological communities ("ECs") and environmental offsets.

What do the Two Reviews Reveal about Working Together in a Federal System?
Although not mentioned directly, the significant number of recommendations about increased cooperation point to a fundamental but underlying issue of lack of trust. One reason for this is historical – environment was traditionally a state responsibility and the federal role has grown indirectly out of other responsibilities. So there has been a strong tendency for agencies to rub up against each other as the federal government role has grown.

Another reason is political – even with the best will and even if political interests align (which of course often they do not), when responsibilities are shared there will naturally be jockeying over the sharing of credit for positives and blame for negatives. One of Hawke's key recommendations for dealing with this, inspired by the Canadian approach, is for joint federal-state assessment panels. Hawke's related recommendation for an independent Environment Commission should also be helpful by partly separating EIA from the political sphere.

Another key issue has been overcoming the inefficiency inherent in a federal system. Hawke recommended establishing national environmental accounts, including harmonising data collection and reporting between levels of government. While this may seem like common sense, data cooperation has been tried before, without success. This is probably because the costs are high and the benefits mostly long term. With the ever-growing importance of the environment in the public discourse, this recommendation has much better prospects than on earlier occasions.

The most common triggers for federal involvement in EIA in Australia are threatened species or ecological communities ("ECs"). Threatened species and ECs are protected by all Australian jurisdictions, but in different ways. This can lead to anomalies. Both Hawke and the Gilligan recommended an alignment of federal and state threatened species lists. This would be a major step in simplifying EIA.

Both reviews also supported more use of strategic approaches. The EPBC Act already encourages SEA[14] but changes and more resources would be needed. In a continental sized federation such as Australia, accelerating existing moves to strategic approaches make good *practical* sense as well as good *environmental* sense in focusing the efforts of the national-level government on large-scale impacts and the efforts of regional-level governments on more confined impacts.

What about enhancing Indigenous consultation?
The implication of the Hawke Review is that although Indigenous people have been able to have their traditional land rights recognised through native title laws and although there is a general advisory body covering EIA, neither is enough. The EIA process itself needs to provide directly for Indigenous consultation and negotiation.

[14] One of these, in the Kimberley Region of north-west Australia will be the subject of a separate presentation to this conference.

Conclusion

While one review was focused on policy and the other on practice, both converge in supporting practical, common sense approaches to working together through EIA and SEA in a country that has both a federal system and Indigenous peoples.

Early engagement helps to deal with issues before they become a problem. Sharing information and moving to more truly joint EIA processes and even common policies help with efficiency. Indigenous people need to be engaged more directly.

Both reviews imply the need to build trust. All of the recommendations will help to improve EIA in a federal context and EIA is again close to the top of the sustainable development agenda in Australia. The ultimate challenge however is to build trust between bodies that have not always had good reason to trust each other in the past.