The New *Canadian Environmental Assessment Act*[1]

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The International Association for Impact Assessment has described environmental assessment (EA) as a "process for identifying, predicting, evaluating, and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made."[2] Based on the previous legislation, the International Association for Impact Assessment (IAIA) described the Canadian federal EA as a process that provides information to regulators allowing them to determine whether the "environmental harms of a project do not outweigh its benefits. It is not restricted to environmental impacts on nature but also considers "relevant socio-economic factors, including health, culture, gender, lifestyle, age, and cumulative effects consistent with the concept and principles of sustainable development."[3] The Environmental Planning and Assessment Caucus (EPAC) in Canada concluded that a "good" EA framework includes measures that establish "a mandatory EA process that is reviewed by an independent agency, and which results in a final and binding decision"; moreover, the framework should "minimize the amount of discretionary decision-making within the EA process, and must establish clear criteria to guide the planning and review of proposals in order to ensure accountability of decision-makers."[4] EPAC has noted:

- that an effective EA framework "must ensure that proponents justify proposed undertakings by demonstrating that the purpose of the undertaking is legitimate;
- [t]hat there is an environmentally acceptable need for the undertaking;
- [t]hat the preferred undertaking is the best of the 'alternatives to' and 'alternative means' considered by the proponent."[5];
- the process should be "efficient", provide "a significant public role" and provide for "follow-up" measures.[6]

Changes to the Canadian EA System in 2012

A report of the Commissioner of the Environment and Sustainable Development released in the Fall of 2009 highlighted problems with the *Canadian Environmental Assessment Act, 1992*,[7] based on a review of environmental assessments conducted between 1995 and 2008. The report

[1] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [CEAA 2012].
[2] International Association for Impact Assessment & Institute of Environmental Assessment, UK, "Principles of Environmental Impact Assessment Best Practice" (1999) at 2.1, online: International Association for Impact Assessment <http://www.iaia.org>.
[3] International Association for Impact Assessment, *ibid* at 2.3.
[4] P Duck, "ENGO Concerns for the Review of the Canadian Environmental Assessment Act" (2008) at 1, online: Environmental Planning and Assessment Caucus: Canadian Environmental Network <http://rcen.ca/home>.
[5] *Ibid.*
[6] *Ibid* at 1-2.
[7] *Canadian Environmental Assessment Act, 1992*, SC 1992, c 37 [CEAA 1992].

identified long-standing issues with the coordination of federal government departments and agencies and stated that screenings were problematic.[8] Scoping decisions by responsible authorities had been challenged in court causing delays in the EA process. Moreover, disagreements relating to scoping often resulted in multiple assessments. The report noted that assessing cumulative effects[9] represented a challenge and that the Canadian Environmental Assessment Agency (CEA) had not fully established and undertaken a quality assurance program as required by amendments to the Act in 2003.

In November 2011, the Honourable Joe Oliver, Canada's Natural Resources Minister announced that "Canada must streamline the environmental review process to avoid delaying major energy and mining projects."[10] The minister reported that approximately $500-billion worth of energy and mining projects in Canada were planned over the next decade, and that government needs to create the right conditions for those investments to occur, including an efficient regulatory regime.[11] The minister noted delays in the EA process due to "the involvement of a multitude of government agencies and departments – overseeing dozens of laws and regulations – that are involved in reviewing almost every major construction project in the country, as well as minor ones."[12] Government concern about delays in the approval of major infrastructure projects prompted the creation of a new federal EA regime. After limited public consultation,[13] the *Canadian Environmental Assessment Act 2012* (CEAA 2012) came into force on July 6, 2012. CEAA 2012 and three new regulations[14] have prompted significant changes to the federal EA process.The federal EA process adopted under the *Jobs, Growth & Long-term Prosperity Act* was created to: (i) promote investment in the energy and mining sectors by increasing efficiency in the federal EA process; (ii) promote increased cooperation and coordinated EAs between the federal and provincial governments (s. 4(1)); and (iii) ensure that EAs are completed in timely manner (s. 4(1)(f)).

To simplify the federal process, section 15 of CEAA 2012 provides three key federal agencies the National Energy Board (NEB), the Canadian Nuclear Safety Commission (CNSC) and the CEA with the responsibility to manage the EA process. Projects automatically subject to an EA include designated projects involving activities that are regulated by the NEB, CNSC (s. 13) and CEA. The other designated projects may require an EA based on the outcome of the screening procedure. Some activities that are subject to a screening process include those in the electricity sector (ss. 2-8), oil and gas activities not subject to an automatic EA by the NEB, (ss. 9-14) and mining activities (ss. 15-17). Additionally, under section 14(2), the Minister has the discretion to require an EA.

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[8] Screenings were problematic as their determination of environmental effects was weak and responsible authorities conducted little public participation.

[9] Assessing cumulative effects requires identifying the incremental effects on the environment that may occur as a result of the combined influences of various actions.

[10] Shawn Mccarthy, "Ottawa wants to streamline environmental reviews" *The Globe and Mail* (28 November 2011) at 1, online: <www.theglobeandmail.com>.

[11] *Ibid* at 2.

[12] *Ibid*.

[13] The federal government engaged in limited consultation on these regulations and sought feedback from proponents of projects and industry associations, in discordance with the longstanding practice to consult broadly with the public on regulations and changes to the CEAA.

[14] *Regulations Designating Physical Activities*, SOR/2012-147, *Prescribed Information for the Description of a Designated Project Regulations*, SOR/2012-148, and *Cost Recovery Regulations*, SOR/2012-146.

The Government has created a variety of new time deadlines in the process including the following timelines for screening projects:

- section 8(2) – the CEA may require additional information from the proponent within 10 days after receiving the project description;

- section 9(c) – the CEA invites the public to provide comments within 20 days after posting the project description on the Internet site;

- section 10 – within 45 days after online posting, the CEA must conduct the screening and post its decision on the Internet.

Another important timeline is that within 365 days after the day on which the notice of the commencement is posted on the Internet, a decision has to be made with respect to the designated project (s. 27(2)). That time limit does not include the interval needed to collect information or undertake a study (s. 27(6)). The Minister may refer an assessment to a Review Panel if is in the public interest. Under section 38(1), within 60 days after posting the notice of commencement of the EA, the Minister must terminate an EA by a review panel if the panel fails to submit its report within the prescribed time limit. Under section 38(3), within 24 months after referring an EA to a Review Panel, the Minister must issue a decision regarding the designated project. The time limit for an EA conducted by the NEB is no longer than 15 months after the day on which the applicant has, in the Board's opinion, provided a complete application.

Section 19 of CEAA 2012 lists the factors to be considered in an environmental assessment that include the following:

- Purpose of the proposed project;

- Environmental effects (including malfunctions and accidents scenarios) and their significance;

- Public comments;

- Mitigation measures;

- Requirements for the follow-up program;

- Alternative means of carrying out the project; and

- Results of relevant studies and any other relevant matters.

In regard to public participation, section 24 provides that the responsible authority must ensure the public has an opportunity to participate in the EA process. The Act restricts the "environmental effects" to be considered in EAs. Section 5 limits environmental effects to a change that may be caused to fish and fish habitat, aquatic species or migratory birds as defined more restrictively in certain federal legislation (ex. *Fisheries Act*), than in the previous CEAA.

Historically the *Fisheries Act* (FA) has frequently been relied on to protect the environment in Canada. Noteworthy changes to the FA should limit the number of environmental prosecutions because of changes to section 35 (protection of fish habitat against harmful alteration or disruption, or the destruction, of fish habitat (HADD)) and amendments to section 36 (deposits of deleterious substances in waters frequented by fish).There are new ministerial regulations under the FA that authorize deposits by class or type or quantity of substance, type or class of waters or places, or deposits resulting from prescribed works, undertakings or activities. In regard to proposed amendments (not yet in force), section 35(1) will change from fish habitat protection to fisheries protection. Specifically under the new section 35(1) provision: "No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery."

Under section 35 second phase amendments, "serious harm" will be defined as "the death of fish or any permanent alteration to, or destruction, of fish habitat". The Minister may make regulations prescribing exempted works, undertakings and activities for purposes of section 35(2)(a) and the Cabinet may make regulations excluding fisheries from the definitions of "Aboriginal", "commercial", and "recreational".

With respect to aboriginal residents, an effect that occurs in Canada of any change that may be caused to the environment on health, socio-economic conditions, heritage, and current use of lands/resources for traditional purposes are to be considered. Our review of the *Prescribed Information for the Description of a Designated Project Regulations* reveals that there is no requirement to describe changes that may be caused to non-aquatic species at risk under the federal *Species at Risk Act*. In addition CEAA 2012 has removed the requirement to consider the effects on terrestrial species, and the requirement to include in the description of designated projects some information relating to the terrain, water bodies, air, and vegetation that may be impacted by an activity.

The definition of an interested party is provided by section 2(2) and the responsible authority (NEB, CNSC, CEA or a review panel) determines who might have such standing. An interested party is limited to "a person directly affected by carrying out the designated project and a person who has relevant information or expertise."

In regard to the substitution of provincial EA processes for the federal process, section 32 provides that the federal minister may decide if a provincial process would be an appropriate substitute. The provincial process must be carried out by the government of a province, or any agency or body established under a provincial act. However under section 33, the Minister must not approve a substitution if:

1. "the project activity is regulated under the *National Energy Board Act* or the *Nuclear Safety and Control Act* and is under the responsible authority of either the NEB or the CNSC;

2. The project includes activities that are linked to the federal authority;

3. The Minister has referred the EA to a review panel."

The Government has created several new summary conviction offences for non-compliance with CEAA 2012. Section 99 (1) provides that contravention of section 6 of CEAA 2012 can result in a fine of up to $200,000 for a first offence for "doing anything in relation to a designated project if that act causes environmental effects and for breaching an order issued under the Act" and up to $400,000 for subsequent offences. Section 99(2) provides for a fine up to $200,000 for a first offence for not complying with an order given by a person designated to verify compliance with the Act and up to $400,000 for subsequent offences. Under section 99(4), the two previous offences are considered to be daily offences. For noncompliance with section 97, section 99(3) provides for fines up to $100,000 for a first offence and up to $300,000 for a subsequent offence for obstructing or hindering a designated person exercising their duties under the Act. A fine of up to $300,000 can be imposed under section 100 for knowingly making false or misleading statements or providing false or misleading information in relation to any matter under the Act. Section 99(5) provides that due diligence is available as a defence with regard to the contravention of section 99(1), (2) or (3).

During April 2012, the government released proposed changes to the *Regulations Designating Physical Activities* under CEAA 2012.[15] These changes will remove several types of industrial projects from federal EA scrutiny including heavy oil and oil sands processing facilities, pipelines and electrical transmission lines not regulated by the NEB, potash mines and some other industrial mines, ground water extraction projects and a variety of other industrial facilities. [16] The federal government invited public comments for a period of 30 days, after the proposed changes were announced. If the changes are adopted, there will be a smaller number of projects to be evaluated in the federal EA process.

Conclusion

In July 2012 a new federal environmental assessment act came into force and three new regulations have been adopted. CEAA 2012 restricts the number of projects subject to an EA to those described in the *Regulations Designating Physical Activities*. The information that must be provided by the proponent is contained in the *Prescribed Information for the Description of a Designated Project Regulations*. CEAA 2012 creates specific timelines for decisions to be made in the EA process to minimize delays. The Act creates responsibilities for three main federal regulators, the NEB, CNSC and the CEA to manage the process. Changes to the federal environmental assessment process include considerably more discretion in the EA process, reduced scope of EAs, shortened timelines for decisions, fewer agencies and federal departments involved in the EA process, and fewer persons or groups that may have "interested party" status. We expect fewer federal EAs with a much narrower scope of assessment and shorter timelines. Recent and proposed amendments to the *Fisheries Act* will similarly significantly reduce the applicability of key provisions of that Act. Government approvals under the FA are also no longer triggers under CEAA 2012. The extent to which the increased emphasis on process

[15] B H Powell, "More Changes to Federal Environmental Assessment Laws on the Horizon", Environmental Law Centre (Alberta), online: <http://environmentallawcentre.wordpress.com/2013/05/02/more-changes-to-federal-environmental-assessment-laws-on-the-horizon-2/>.

[16] *Ibid*. Other industrial facilities include pulp and paper mills, steel mills, metal smelters, leather tanneries, textile mills and facilities for the manufacture of chemicals, pharmaceuticals, pressure-treated wood, particle board and plywood, chemical explosives, lead acid batteries and respirable mineral fibres.

efficiency may undermine the effectiveness of federal environmental assessments in mitigating environmental, social and cultural impacts remains to be seen.

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