EA in Canada: Out of the Frying Pan, Into the Fire

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Introduction

In July 2012, the Canadian government enacted the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), replacing the previous federal environmental assessment (EA) legislation (the original *Canadian Environmental Assessment Act* (CEAA)) that had been in effect since 1995. CEAA 2012 attempts to improve the efficiency and effectiveness of federal EA in Canada, in part by providing for greater reliance on provincial and other EA processes that are deemed to be appropriate and by focusing federal EA on areas of federal jurisdiction. However, early experience has demonstrated that there remain issues of duplication and overlap between federal and provincial EA processes for "designated projects"[3] that CEAA 2012 was intended to minimize. The issues also include procedural uncertainty and duplication among federal departments for non-designated projects on federal lands. This paper acknowledges the improvements offered by the new Act, examines the new challenges that have arisen, and makes recommendations for legislative amendments, changes in implementation practice, and/or procedural guidance to address them.

Out of the Frying Pan – the Improvements

CEAA 2012 does promise to address some of the challenges associated with the superseded CEAA, particularly the following.

- CEAA 2012 changes the mechanism for triggering federal EA, eliminating EAs of relatively benign projects (*i.e.*, projects with low or no likelihood of significant adverse environmental effects) and increasing the focus of federal EA on larger projects with greater potential for significant adverse environmental effects (and/or unknown environmental effects).
- CEAA 2012 improves the focus of federal EA on matters of federal jurisdiction, thus reducing jurisdictional overlap with provincial EA and other regulatory processes.
- CEAA 2012 improves the opportunity for achieving "one project, one assessment," a long-standing goal of EA practitioners, governments, and industry proponents in Canada, through increased reliance on robust provincial and other EA processes.

Into the Fire – the Challenges

Unfortunately, early experience with CEAA 2012 has revealed new challenges, including scoping, inter-departmental and inter-jurisdictional coordination, and a lack of procedural predictability, that are reminiscent of problems related not only to the original CEAA but also to its predecessor, the *Environmental Assessment Review Process Guidelines Order* (EARPGO) (1984). Each of these challenges is discussed below.

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[3] A "designated project" pursuant to CEAA 2012 is a project prescribed by regulation or by Ministerial order that requires a screening to determine if a standard federal EA is required.

Scoping[4]

Section 19 of CEAA 2012 lists the factors that must be considered in a federal EA. These factors remain very similar to the factors that were listed in the previous CEAA. The scope of those factors is to be determined by the responsible authority (RA). For most standard EAs, the RA will be the Canadian Environmental Assessment Agency (the Agency). In EAs to date under the new Act, the Agency has chosen to establish the scope of assessment through generic Environmental Impact Statement (EIS) Guidelines.

The generic Guidelines template currently used by the Agency contains language that creates significant uncertainty regarding the scope of assessment, and essentially defers the confirmation of scope until after the EIS is submitted. In particular, the generic Guidelines specify minimum information requirements but then suggest the proponent may omit any information it considers irrelevant to the assessment. If the Agency later disagrees with the proponent's rationale for omission, it can require the proponent to provide the additional information during the EIS review stage. This is likely to extend the overall timeline of EA (although not necessarily the Agency's own mandatory timeline), and creates more process uncertainty and even legal risk arising from challenge to proponent omissions. The legal risk arises where an opponent to the project challenges either the Agency's acceptance of an EIS that does not comply with the minimum information requirements specified in the Guidelines or the Agency's acceptance of the proponent's rationale for omitting certain required information.

Inter-jurisdictional Coordination

Perhaps of even greater concern, however, is that the use of a generic Guidelines template and indeed the Agency's insistence on establishing stand-alone federal Guidelines at all undermines the ability to coordinate the federal EA process with the provincial EA process, when both apply to a single project. In the past, it was feasible to develop an integrated terms of reference (TOR) for the EIS that incorporated both federal and provincial information requirements. Under the practice emerging under the new Act, separate Guidelines and terms of reference will make it more difficult to prepare a single EIS that meets the needs of both jurisdictions, and will likely increase consultation fatigue and confusion among the public and Aboriginal groups.

CEAA 2012 includes provisions for delegation (section 26) and substitution (section 32) that are consistent with the goal of a single EA by the best-placed regulator. In theory, these provisions should improve coordination when both a federal and a provincial EA are required for a single project.

In practice to date, however, achieving inter-jurisdictional process coordination in the case of joint federal-provincial EAs appears out of reach. At the time of writing, only British Columbia (BC) has achieved a Memorandum of Understanding with the Agency regarding the use of the substitution provisions. Other agreements are slow in coming, apparently due to differences not in the method or scope of evaluation of environmental effects but in relation to procedural aspects, such as how the federal and provincial governments define their respective duties for the Crown to consult Aboriginal groups, differences in approaches to participant funding, and

[4] Additional issues pertaining to scoping under the new CEAA 2012 are discussed in a contemporary paper by Barnes *et al.* (2013).

differences in approaches to the timing and frequency of public consultation. These barriers have made it difficult to achieve substitution so far, particularly for projects outside BC.

More concerning is the continuing failure to leverage the delegation provisions in CEAA 2012, which were also under-used in the previous CEAA, even when there is a clear advantage to delegating some portion of the EA to another party or jurisdiction. The preparation of EIS Guidelines or terms of reference is a perfect example of how the delegation provisions might be put to better use in making the EA process more efficient and effective for all parties.

Inter-departmental Coordination and Procedural Predictability

In addition to the inter-jurisdictional coordination issues noted above, CEAA 2012 has given rise to potential inter-departmental coordination and procedural predictability challenges among federal departments.

CEAA 2012 applies to all projects on federal lands, not just the larger designated projects prescribed in regulation or by order. Before a federal authority can carry out a project on federal lands, or permit a project to be carried out on federal lands, it must determine (pursuant to section 67 of the Act) whether the project is likely to cause significant adverse environmental effects. CEAA 2012 fails to establish any kind of process for the section 67 determination and also fails to provide for any kind of coordination among federal authorities when more than one federal authority must make a section 67 determination. This means that a non-designated project on federal lands might unfortunately be subject to multiple evaluations by multiple federal authorities, with overlapping or conflicting information and procedural requirements. The Canadian Environmental Assessment Agency plays no coordinating role in section 67 determinations[5]. While it is our understanding that some federal authorities may be collaborating on developing procedures for section 67 determinations, to date there is very little procedural clarity or certainty available to proponents of projects on federal land.

In our view, this is one of the weakest aspects of the new CEAA 2012. While in principle we agree with the need for the federal government to consider the environmental effects of their decisions regarding activities on federal lands, the manner in which this responsibility is addressed in the new Act actually reverts back to practice that existed pursuant to the EARPGO, prior to 1995. The lack of consistent practice and application under EARPGO led to a series of Court challenges that ultimately led to the enactment of the original CEAA in 1995. It is feared that section 67 will lead to similar dissatisfaction with how the environmental effects of projects on federal land are evaluated, with attendant legal challenge and the associated cost and uncertainty.

Another problem is that the quality of evaluation that supports any section 67 determination may potentially be undermined, because CEAA 2012 does not place any obligation on other federal authorities to provide specialist or expert information to the authority making the determination, as they are required to do for an EA of a designated project. Given the budgetary constraints so many federal departments are under, it will be no surprise if they decline to support the section 67 evaluations undertaken by other departments. All of this amplifies the potential for challenge

[5] The role and function of the Federal Environmental Assessment Coordinator, established in the previous CEAA, no longer exists in CEAA 2012.

and intervention by the public and other stakeholders, including particularly Aboriginal people where there are constitutionally protected rights.

Recommendations

It's important to note that many of the new challenges associated with CEAA 2012 appear to arise from policy and practices around implementation of the Act, not necessarily from the language of the Act itself. This is an important distinction, as it bears on how these challenges might be overcome. In particular, changes in practice are often easier to achieve than legislative or regulatory amendments. Therefore, the following recommendations emphasize changes in implementation practice and procedural guidance, although some legislative amendments are warranted.

1. The Agency should make greater use of the delegation provision to improve efficiency and coordination with provincial jurisdictions in cases when substitution is considered inappropriate. Procedural aspects of the EA process, including preparation of Guidelines and of the EIS, could be delegated to the proponent or other jurisdictions.

    - The Agency should delegate the preparation of draft EIS Guidelines to the proponent, who can more efficiently integrate project-specific information that supports the timely confirmation of the scope of assessment.

    - For joint federal-provincial EAs, the Agency should delegate the proponent to prepare integrated EIS Guidelines/TOR that meet the requirements of both jurisdictions for review and approval by both jurisdictions. This approach is used in some provincial jurisdictions already. For example, in BC, proponents prepare the draft Application Information Requirements, which include federal information requirements, when both processes apply.

    - The Agency could also delegate the preparation of the EA report to the Province or the proponent, as was at one time done with Comprehensive Study Reports.

2. Whether the preparation of the EIS Guidelines is undertaken by the Agency or delegated, the use of generic templates should be limited to generic content that applies to all EAs. The articulation of the scope of the factors, especially the information requirements pertaining to the environment, environmental effects, and Valued Components, should be project-specific, drawing on the Project Description and other information made available by the proponent, based on preliminary design, consultation, and field work to date.

3. In the worst case, if adoption of provincial TOR or incorporation of federal requirements into a single integrated Guideline/TOR is not feasible, and two stand-alone scoping documents must be issued by the respective jurisdictions, the jurisdictions should coordinate their consultation activities with the public and Aboriginal groups to minimize confusion and consultation fatigue.

4. While we expect that, in time, more clarity will emerge as each department establishes its own process for making section 67 determinations, we believe that both federal authorities and proponents alike will be well served with the development of guidance and tools to support those determinations. Unfortunately, the omission from CEAA 2012 of a

coordinating role or mandate for the Agency will make this difficult to achieve. It should be a priority then, to establish legislative provisions for both coordination among federal authorities conducting section 67 determinations and for supporting roles by the Agency and other departments in the provision of specialist and expert information and development of appropriate guidance and tools.

We believe these recommendations will help to strengthen the new federal EA process by focusing EA on key issues related to specific projects, eliminating overlap and duplication, increasing process predictability, and reducing procedural and legal risk.

References

Barnes, Jeffrey L., Sandra Webster, Neil Cory, and Mary Murdoch. 2013. Scoping under New Federal EA Regime in Canada. Paper and presentation at the 33rd Annual Conference of the International Association for Impact Assessment, May 13-16, Calgary, Alberta.