The Eviscerating of Federal Environmental Assessment in Canada
by Arlene Kwasniak

Canadian Environmental Assessment Act, S.C. 1992, c. 37
Regulations Amending the Exclusion List Regulations, SOR/2009-88
Infrastructure Projects Environmental Assessment Adaptation Regulations, SOR/2009-89
Regulations and Regulatory Impact Analysis Statement at http://canadagazette.gc.ca/rp-pr/p2/2009/2009-03-19-x2/pdf/g2-143x2.pdf

Introduction

A cornerstone of sustainable development is environmental assessment. Through environmental assessment ("EA") processes regulators identify and assess the environmental, social, and economic consequences of proposed projects to assist them in determining whether they should be approved, and if so, under what conditions. Because of EA, projects are better planned and have reduced environmental impacts and social costs. However, notwithstanding the benefits of EA, recently the federal government has announced its plans to greatly reduce the number of federal EAs in Canada and to limit the application of federal legislation designed to protect our navigable waters and fisheries. The January 27, 2009 federal budget speech reflected this in stating:

> "… the Government will implement administrative changes to streamline application of the Fisheries Act, and regulatory efficiencies will be pursued for projects subject to the Canadian Environmental Assessment Act. For example, for projects requiring a federal environmental assessment decision, regulations could allow one environmental assessment process to meet federal and provincial requirements, by agreement with the provinces and territories."

The budget bill itself (*Budget Implementation Act*, 2009, ss. 317 – 341) contained amendments to the *Navigable Waters Protection Act*, R.S.C. 1985 c. N-22 ("*NWPA*") which would, among other things, give both Cabinet and the Transport Minister the discretion to exempt certain "classes of works" and "classes of waterways" from the approvals requirements under the Act. Since the need for a *NWPA* approval triggers the federal EA provisions under the *Canadian Environmental Assessment Act*, S.C, 1992, c. 37 ("*CEAA*") any exemption means no federal EA.

On March 12, 2009, Cabinet registered an amendment to the *Exclusion List Regulations,* SOR/2007-108; SOR/2009-88 and a new *Infrastructure Projects Environmental Assessment Adaptation Regulations,* SOR/2009-89 ("*Adaptation Regulation*") under the *CEAA*. Both regulations relate to projects funded through the federal government's 2007 *Building Canada: Modern Infrastructure for a Strong Canada* ("Building Canada Plan" or "Plan"). The Building Canada Plan promises $33 billion dollars of federal funds over seven years for public infrastructure projects throughout Canada. The short explanation of these regulations is that the *Exclusion List Regulation* amendment removes the requirement for federal EA for an anticipated 2000 Building Canada Plan projects over the next two years and the *Adaptation Regulation* purports to authorize substitution of provincial environmental assessment processes for federal ones for Building Canada Plan projects that are not excluded under the amendments to the *Exclusion List Regulation.* The Government anticipates reducing federal EA by about 2000

projects over the next two years (see Regulatory Impact Analysis Statement ("RIAS") published with the regulations). There are currently about 7000 federal EAs a year, the vast majority being screenings, the lowest level of assessment. The Canadian Press reported Natural Resources Minister Baird as saying that the new regulations "… should eliminate about 90 per cent of federal [environmental assessments]" for projects funded by the Plan (February 14, 2009, "Ottawa to fast-track environment studies on stimulus projects").

There was no public, and apparently no Aboriginal, consultation prior to these regulations becoming law. This was so notwithstanding that the Canadian Constitution requires governments to consult Aboriginal communities when carrying out government initiatives that could have an adverse impact on Treaty or Aboriginal rights or interests (*Constitution Act, 1982,* s. 35, and see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73). As well, federal regulatory policy as set out in the 2007 Cabinet Directive on Streamlining Regulation (available online at www.regulation.gc.ca/directive/directive01-eng.asp**)** requires government to provide the public and affected parties with time to provide input into policy development. Environmental organizations, even those focusing on federal environmental assessment, were not consulted. Not even the Minister's own multi-stakeholder Regulatory Advisory Committee, (of which the writer is a member) was consulted. The Regulatory Advisory Committee was formed under the *CEAA* for the explicit purpose of advising the Minister on regulatory and policy direction.

As well, the Government did not comply with federal regulatory policy regarding pre-publication of regulations. The 2007 Cabinet Directive requires departments and agencies to publish regulatory proposals in the Canada Gazette Part I to allow for a public comment period of at least 30 days. The Government provided no public comment period whatever and published the regulations directly into Canada Gazette II, where regulations that have already been registered and made law are published. Although the Cabinet Directive allows a more "expedited process" where there are "[e]mergency situations- when there is an immediate and serious risk to the health and safety of Canadians, their security, the economy, or the environment" (at 3.1) it is hard to see how denying the public an opportunity to comment on these regulations can be justified on the basis of an "emergency." However, the Cabinet Directive is only policy, and does not impose binding legal obligations on government.

Government explanation for changes and critique

The regulations are the result of Government claims regarding overlap and duplication. For example, the Globe and Mail (January 13, 2009) reported Natural Resources Canada Minister John Baird to have said "There's a real hodge-podge of environmental assessment requirements - of overlap and duplication." Baird's suggestion that overlap is a bad thing is open to criticism. Overlap is not bad in and of itself, and there are better ways of dealing with duplication. In the Canadian federation it is no surprise that there is some overlap – meaning that the interests of both the federal government and the provincial government are the same in some areas with respect to a proposed project. An example of this would be where the federal government needs to conduct an EA prior to determining whether to issue a permit under the *Fisheries Act* (R.S.C. 1985, c. F-14) in respect of a project that will destroy fish habitat, which is under exclusive federal constitutional jurisdiction, and a provincial government needs to conduct an EA of the project prior to determining whether to authorize a destruction of a bed and bank of a river,

which are owned by the province. Both governments may be interested in obtaining some of the same information from the proponent. There is nothing wrong with such overlap. It is perfectly understandable, given our constitutional division of powers.

Overlapping requirements may also occur within a single level of government. Using the example just given, both the federal Minister of Transport, who administers the *Navigable Waters Protection Act*, and the Minister of Fisheries and Oceans, who administer the *Fisheries Act*, may have to approve the project if it is to proceed, and both ministries may require similar information. This type of federal/federal or provincial/provincial overlap also is not bad or necessarily inefficient. It is just what would be expected in a level of government complex ministries and mandates.

Duplication may be contrasted with overlap. Duplication arises when a proponent, often because of overlap, is asked to provide the same information to both levels of government, or different ministries, departments, or agencies, within one level of government. This may or may not be onerous depending on the situation, including the timing of the requests, and the required formats. There may be inefficiencies relating to duplication, but the way to address any such inefficiencies is to reduce the duplication – not the overlap.

In the past few years the federal government has taken several legitimate steps to minimize duplicative requirements on proponents, and, as much as possible, to ensure that, where an EA is required by both a province and the federal government, that the proponent need only undergo one EA, which meets the needs of both levels of government. No doubt much more progress could be made, and more quickly, but the fact that the situation is not perfect from the perspective of industry and provincial governments does not mean that we should throw the baby out with the bathwater.

Consider the following:

- Federal/provincial (or territorial) EA harmonization is meant to ensure that there is only one EA in respect of a project where more than one jurisdiction requires an EA, but both jurisdictions participate in the EA to ensure all legislative mandates are met. There are only seven harmonization agreements between the federal government and provinces/territories. If all provinces and territories would negotiate a harmonization agreement with the federal government there would be less duplication.
- Regarding the federal family, the federal government has not yet revised the *Federal Coordination Regulation* (S.O.R. 97/181) since the 2003 amendments to the CEAA. This regulation sets timelines for federal authorities to determine whether they likely will require an EA, and timelines for matters related to an assessment such as notifying the proponent that more information is required, making a determination as to whether an assessment will be required after obtaining information, and reporting on the determination. If this regulation were revised and given some teeth, then there would be fewer alleged inefficiencies within the federal family where more than one federal authority is involved in an EA.
- The role of the federal environment assessment coordinator in the CEAA (ss. 12.1-12.5) has not been fully developed or put into motion. This role includes assisting in a more

efficient EA processes, especially where an EA is required by more than one jurisdiction.

- The Canadian Environmental Assessment Agency's Quality Assurance Program that, amongst other things, is meant to identify inefficiencies, has not been given a chance to complete its work.
- Industry itself could better coordinate and exercise its role in EA.
- If the problem is late EA triggering by some federal authorities responsible authorities, then we should address this problem by getting them to trigger earlier, rather than eliminating the trigger.
- The onus is on the party alleging inefficient overlap to substantiate it. In my view, this onus includes substantiation of precisely what the problem is and a determination that limiting the federal role in EA will solve the problem. As well it includes the need to demonstrate that any limitation of the federal role in EA does not inappropriately compromise consideration of the national interest, of matters within federal constitutional authority, or consideration of cumulative effects.

An analysis of the March 12, 2009 regulatory changes

Amendment to the Exclusion List Regulation

The amendment to the *Exclusion List Regulation* excludes many projects contemplated by the Plan from federal EA under the *CEAA*. The criterion for exclusion from federal EA in the *CEAA* is that Cabinet has determined that the "projects or classes of projects" … "have insignificant environmental effects" (*CEAA*, s. 59(c) (ii). In other words, in order for a project or class of project to be placed on the *Exclusion List*, Cabinet must make a finding that such project or class of project has only insignificant environmental effects.

Reading the *Exclusion List Regulation* prior to the March 12, 2009 amendment shows that in the past Cabinet took this requirement fairly seriously. The pre-March 12, 2009 *Exclusion List Regulation* pertains only to matters such as repairs and maintenance, decommisionings, and minor expansions and constructions (limited by size or output). The pre-March 12, 2009 exclusions usually do not apply to listed projects (that is there is no exclusion from federal EA) if the projects take place with in 30 metres of a water body, and might release pollutants into it. The March 12, 2009 amendments do not reflect that same regard for meeting the statutory criterion of "insignificant environmental effects."

According to the Regulatory Analysis Statement ("RIAS") statement published along with the March 12, 2009 *Exclusion List Regulations* amendment, the amendment is meant to reduce the number of federal environmental assessments up to 2000 over the next two years (2009/03/19, Canada Gazette Part II, Vol. 143, Extra). The projects excluded by this regulation from federal environmental assessment are listed on Schedule 4 to the *Regulation* and include, among many others:

- the installation of "intelligent transportation systems" (a system that uses technologies to increase efficiencies and the like of a transportation network);
- construction, modification, etc. of a building to be used for residential, institutional, or other accommodations; providing office space, meeting room or facilities; educational

financial, or informational facilities; cultural, recreational, heritage, artistic, tourism, sporting, or other community events; or municipal parking;

- the construction etc. of rapid transit systems, public or railway systems;
- the construction etc. of roads and public highways under certain conditions; the widening of bridges; and
- the construction etc. of certain facilities for treatment or distribution of potable water and for wastewater and stormwater management.

Some of the above are limited to developments either not within 250 metres of an "environmentally sensitive area," or within 250 metres of an "environmentally sensitive area" designated by the federal government, where the project cost is under $10 million dollars, and there is compliance with management rules for the area. The amendment defines "environmentally sensitive area" narrowly as an area protected for environmental reasons in "regional or local land use plans, or by a local, regional, provincial or federal government body." This definition may be compared the usual limitation on developments listed in the *Exclusion List Regulation,* that developments not occur within 30 metres of a body of water and might pollute the water body. "Environmentally sensitive area" is much narrower than the water body limitation as it only applies to areas that have actually been designated to be protected by a government. It is safe to say that the great majority of water bodies (which would include rivers and stretches of rivers) are not designated for protection or within designated protected areas in Canada. Also, even if a project falls within an environmental sensitive area, it may be immune from federal environmental assessment in any event because of the application of the *Adaptation Regulation*. As well, as mentioned, if a project is within an "environmentally sensitive area" (and complies with management plans etc. for the area) and has a total cost, other than the cost of land, below $10 million dollar threshold, it also is exempt from federal environmental assessment. One might anticipate that to fit under the $10 million dollar threshold, project-splitting techniques could be used.

The *Adaptation Regulation*

The *Adaptation Regulation* applies to projects funded by the Canada Building Plan that are not excluded from federal environmental assessment under the March 12, 2009 amendment to the *Exclusion List Regulation.* The *Adaptation Regulation* applies to the funding trigger in the *CEAA*. The funding trigger triggers a *CEAA* EA because the federal government contributes or lends money to enable a project to proceed. Authority for the regulation is based on subparagraph 59(i)(iv) of the *CEAA* which enables the "varying" of the provisions of the *CEAA* in respect of projects which trigger a federal EA by the federal money trigger (s. 5(1)(b)). The regulation is meant to alter certain provisions of the *CEAA* insofar as they apply to projects funded by the Canada Building Plan and are not excluded under the new amendment to the *Exclusion List Regulation.*

The *Adaptation Regulation* has a number of impacts. The first set of "adaptations" or varying of the application of the *CEAA* apply to projects by the Plan that need to be assessed that commence as a screening, which is the lowest level of federal environmental assessment under the CEAA, and those that commence as a comprehensive study. An EA must be commenced by way of comprehensive study if the project is described in a regulation under the *CEAA* called the *Comprehensive Study List Regulation* (S.O.R./94-638). These are projects that are likely to have

significant adverse environmental effects, such as large-scale industrial developments. The *CEAA* imposes more regulatory requirements (such as mandatory public participation opportunities (*CEAA* s. 21)) with respect to comprehensive studies than with respect to screenings.

Here are the changes:

- The regulation removes the potential to bump up a screening to a mediation or panel review that otherwise applies to screenings where "public concerns warrant a reference to a mediator or a panel review" or it is "uncertain whether the project … is likely to cause significant environmental effects" (*CEAA* s. 20(c) (iii)). A panel review is potentially the most intensive and comprehensive level of federal EA. Under the regulation, if a project assessment pursuant to the regulation proceeds as a screening it will stay as a screening, notwithstanding public concerns, or uncertainty regarding its impacts.
- The regulation removes public consultation requirements regarding the scope of comprehensive studies, and the potential for a bump up from a comprehensive study to a panel review. It does this by stating that sections 21-23 of the *CEAA* do not apply (*Adaptation Regulation*, s. 2(2) (b).). Sections 21-23 of the *CEAA* enable the Minister to bump up an EA proceeding by way of comprehensive study to a panel review.
- The regulation makes it possible for a responsible authority to determine that a project may proceed even if it likely will have significant environmental effects, if the responsible authority determines that the effects can be justified in the circumstances, and Cabinet gives approval. This is not possible for projects not subject to the regulation. For projects not subject to the regulation, the Act requires that where the responsible authority determines that a project likely will have significant environmental effects the responsible authority must either not exercize authority to enable the project to go ahead, or the project must be bumped up to a mediation or panel review (*CEAA*, s. 29(i)(c)).

The second set of "adaptations" or varying the application of the *CEAA* concerns substituting provincial environmental assessment processes for federal environmental assessment under the *CEAA* for screenings and comprehensive studies. These provisions do not apply to panel reviews, but since the bump up from a screening or a comprehensive study to a panel review has been removed for projects falling under the regulation, it is hard to imagine that there could be a panel review where the Minister authorizes a substitution under the regulation. (A panel review potentially is the most intensive and comprehensive level of federal EA under the *CEAA*).

The second set of adaptations allow the Environment Minister, where "appropriate," to approve of the substitution of a provincial EA process for one under the *CEAA*. In other words, the Minister may determine that no federal EA of a project is necessary at all, where a provincial EA is conducted in respect of a project. After a provincial assessment is completed the regulation purports to require the provincial entity to submit a report to the responsible authority. The responsible authority then makes a regulatory decision, presumably, a decision as to whether to fund the project.

The substitution "adaptation" greatly departs from the *CEAA* as written and "unadapted." The *CEAA* only allows substitution for panel review, and then only to other federal entities, such as the National Energy Board, or a body established under a land claim agreement (*CEAA*, s. 43). It does not permit substitutions to provinces.

Legal and Policy Concerns

To close, I wish to point out that even on a cursory review there are numerous substantive and procedural legal and policy concerns and questions regarding the amendment to the *Exclusion List Regulation,* and the new *Adaptation Regulation.* Here are but a few:

1. *CEAA*'s criterion for a project or class of project to be added to the *Exclusion List Regulations* is that a project or a class of project has only "insignificant environmental effects" (*CEAA* s. 59(c) (ii)). The amendments to the Exclusion List made on March 12, include such things the construction of certain facilities for treatment or distribution of potable water and for wastewater and stormwater management, rapid transit systems, buildings for cultural, recreational, heritage, artistic, tourism, sporting, or other community events, municipal parking lots, roads and public highways and limited widening of bridges. As mentioned earlier some of the above are limited to developments within certain distance of utility rights of way, or where the projects either not within 250 metres of an "environmentally sensitive area, " or within 250 metres of an "environmentally sensitive area" designated by the federal government, where the project cost is under $10 million dollars. The amendment defines "environmentally sensitive area" narrowly as an area protected for environmental reasons in "regional or local land use plans, or by a local, regional, provincial or federal government body." One might question how Cabinet could rationally determine that such projects, no matter where they occur in Canada, no matter how much they cost (since money spent on a project is not an indicator of environmental impact) have only "insignificant environmental impacts?" How can it be justified, for example, that the construction of any the excluded buildings, roads, transit systems, wastewater or potable water systems, will have only insignificant environmental effects? The RIAS suggests that the insignificance is asserted because "[c]ompleted environmental assessments on over 1 000 projects have demonstrated that these types of infrastructure projects have insignificant environmental effects …." This "explanation" lacks plausibility. How could it be said, for example, that since in the past the construction of sporting facilities have had only insignificant environmental impacts that all future ones will (other than in "environmentally sensitive areas")? Sporting facilities can be tiny, medium sized, large, or huge and can have an enormous variety and range of environmental impacts. Such facilities range from small community parks to major stadiums. There is no single type of 'sporting facility' and environmental impacts depend on location, size, proximity to water bodies, construction design and so on.

2. Related to the preceding point, subsection 4(2) of the *CEAA* states:

   > Duties of the Government of Canada
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   > In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

This duty extends to Cabinet in promulgating regulations under the Act. Did Cabinet carry out this legislative directive in allowing such extensive ranges and types of projects to be excluded from federal EA on the basis of their having "insignificant environmental effects?"

3. The RIAS contains no information on potential short and long term environmental and health costs of not conducting a federal environmental assessment for what in many cases will be major projects, or for relying on provincial processes to base decisions that must be made federally. Nor does it contain any information on the effect of taking the national interest out of the EA process when a provincial substitution is authorized.

4. As mentioned, the *CEAA* allows substitution of EA processes only in respect of panel reviews, and only to other federal entities, such as the National Energy Board, or to a body formed under an Aboriginal Land Claims agreement. The *Adaptation Regulation* authorizes substitutions with respect to Canada Building Plan projects to provinces, notwithstanding that provinces cannot regulate matters under federal constitutional authority and so the EA process might well be lacking information regarding such matters. As well, provincial processes vary from province to province leaving the public with no guarantees for a coherent and consistent process. Also, provincial processes necessarily will lack a national perspective and may not adequately account for cumulative effects.