October 19, 2011

The Fading Federal Presence in Environmental Assessment and the Muting of the Public Interest Voice

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Topic: Federal environmental assessment and effective public participation

Good environmental assessment followed by well crafted permits, regulation, monitoring and follow-up responsive to the assessment, results in better planned projects, fewer environmental impacts, and often net environmental and social sustainability gains. The legislative authority for the federal government to carry out the assessment is found in the *Canadian Environmental Assessment Act* (SC 1992, c 37) ("*CEAA*") and regulations. The federal government may assess a project when it has constitutional jurisdiction over an area that may be impacted by a project, and, generally, where the federal government has permitting authority over the project or an aspect of it, all as set out in the *CEAA* and regulations. These areas include fisheries, navigation, migratory birds, federal lands, Aboriginal interests, nuclear facilities, interprovincial and international matters. Having the exclusive right to regulate in these and other areas, only the federal government can do a fully responsive job in assessing impacts. This is because only the federal government is in a position to know what information it needs in the environmental assessment process in order to determine whether it should provide the permit for the project when taking into account likely environmental impacts. If the project does go ahead (like most projects do) only the federal government is in a position to know what it needs during the assessment process in order to properly mitigate and regulate impacts, especially on areas within its jurisdiction. Such mitigation and alteration could include project alterations, monitoring, follow up conditions, and adaptive management measures that may require the proponent to change environmental management because of unexpected impacts. As well, as the responsible protector of the public interest with respect to matters under its jurisdiction, only the federal government can wholly take into account the public and national interest during the environmental assessment and following regulatory processes.

In my 2009 ABlawg The Eviscerating of Environmental Assessment in Canada I documented and commented on some of the ways that the federal government was diminishing and downgrading the role of federal environmental assessment in Canada. At that time these largely were owing to implementation of the January 27, 2009 federal budget's Building Canada stimulus package which resulted in exempting numerous projects from environmental assessment and streamlining the process for others. I would like to be able to update that piece by showing how the federal government has ramped up its environmental assessment approaches since the stimulus heat has cooled, but I cannot. The federal government presence in federal environmental assessment continues to recede as time proceeds.

This update considers only a few matters relevant to the fading federal presence. These are (1) impacts of the 2010 federal budget on environmental assessment, (2) the upcoming seven year review of the *CEAA*, (3) overlap, duplication, and substitution claims countered by assessment of the Prosperity Gold-Copper Mine, and (4) federal government funding and budget cuts and the consequent muting the voice of the public interest.

The 2010 federal *Budget Implementation Bill*

Bill C-9 (2010) (3rd Sess, 40th Parl) contained nearly 900 pages of changes to about 50 pieces of legislation. Numerous of these were substantive changes that were not of a budgetary financial matter. The Harper government was criticized for burying substantive changes in a budget bill. There was much discussion outside of and within Parliament about splitting up the controversial bill so that Parliament could properly consider non-budget substantive matters, but in the end the bill passed (see Conservatives push through omnibus budget bill in Senate).

One of the most objectionable of the bill's amendments to the *CEAA* was a provision that gives the Environment Minister the right to slice and dice projects so that only one or more component is assessed (s 2155, adding s 15.1 to the *CEAA*). This new *CEAA* provision empowers the Environment Minister to limit the scope of the project to be assessed by restricting the environmental assessment to only certain components of the overall project. The amendment contains no criteria to guide the Minister's discretion (save conditions that the Minister him or herself sets), and the Minister may delegate this power to responsible authorities under the Act. Under section 15.1, for example, the Minister or delegate could determine that an oil sands mining project be assessed as, say, a stream destruction project. Accordingly, instead of identifying and assessing the environmental effects of an oil sands project, the *CEAA* assessment need only identify and assess the environmental effects of destroying a stream. With the sliced and diced assessment scope go national public interest consideration of considerable likely environmental effects of a project. Take climate change, for example What are the likely effects on climate change of a stream destruction project, in comparison to the likely effects on climate change of an oil sands mine project?

Interestingly, this amendment to the *CEAA* followed on the heels of the ENGO victory at the Supreme Court of Canada in *Mining Watch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2. That case confirmed that a *CEAA* environmental assessment must be based on the actual project that the proponent proposes and not on some component of it. The Court found this in connection with its ruling that the federal government cannot reduce the scope of a project so that it falls into a less intensive assessment track (e.g. from a comprehensive study to a screening level assessment.) Public interest advocates hailed the decision as it meant that where a project falls under the *Comprehensive Study List Regulation* (SOR/94-638, Sch 3, s 11(c)) the project cannot be downscoped to fall off the list. For example, if a proponent's project is an oil sands mine falling under the *Comprehensive Study Regulation*, then the *CEAA* scoping and assessment of the project must be of an oil sands mine project and not some aspect of it, like the destruction of a stream. This public interest victory was short lived. The Bill C-9 amendment of the *CEAA* to add 15.1 critically, if not fatally, undermined this SCC decision. Although the amendment does not alter the SCC ruling that the *CEAA* requires that the project as proposed by the proponent determines the assessment track, the amendment permits the Minister to scope the project down for the purpose of what environmental impacts will be assessed. So, for example, if a proposed oil sands mine project triggers a federal environmental assessment and given its size the *Comprehensive Study List Regulation* prescribes that the project be assessed as a comprehensive study, although the *CEAA* would require that the project be assessed within the

comprehensive study track, under *CEAA* section 15.1 the Minister could declare that only the destruction of a stream be subject to the environmental assessment. So the destruction of stream would be assessed as a comprehensive study.

Seven-year review

An *Act to Amend the Canadian Environmental Assessment Act* (SC 2003, c 9) states "Within seven years after this Act receives royal assent, a comprehensive review of the provisions and operation of the *Canadian Environmental Assessment Act* shall be undertaken by such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose" (s.32(1)). The *Act to Amend* the *CEAA* received royal assent on June 11, 2003 and so that means seven year review was due to be undertaken by June 11, 2010. Although there have been fits and starts over the couple of years at commencing a review, finally it looks to be actually commencing. The September 29, 2011 Minutes 2 and 5 of the Parliamentary Standing Committee on Environment and Sustainable Development record the Committee's decision to commence to undertake the seven year review on October 18th, 2011 by discussing the scope, schedule and potential witnesses.

Seven year review (like five year review of the Act resulting in *CEAA* 2003 amendments) should provide all interested Canadians and institutions, including governments, the public, Aboriginal interests, and stakeholders, with reasonable opportunity to provide input into the effectiveness of the *CEAA*, including regarding its attaining its own goals and purposes, and including whether its goals, purposes, and operation, reflect ideal federal environmental assessment law, policy, and practice. Seven year review should provide Parliament with appropriate broad based evidence and information for it to reflectively determine how the Act should be changed in order to attain environmental sustainability in the Canadian federation. In my view it is unfortunate that the federal Executive pushed through amendments to the *CEAA* in the 2010 budget bill by making more substantive changes to the *CEAA* without the value of Parliamentary comprehensive review and multi-level governmental, public, Aboriginal, and stakeholder input, or even focused Parliamentary debate. Hopefully no further substantive changes to the *CEAA* will be introduced or made unless they are a result of a thorough comprehensive review.

Overlap, duplication, and substitution countered by Prosperity Gold-Copper Mine project

2009 to the present has shown no let up on the claim, made mainly by industry and provinces, that there is unnecessary overlap and duplication between provincial and federal environmental assessment processes and that when both processes apply to a project the provincial process should be *substituted* for the federal processes (and the federal process eliminated). In my "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward" (20 JELP 1-35 (2009)) I critique this claim and argue that because of constitutional division of powers and responsibilities provincial environmental assessment cannot – legally, logically, and morally -- be effectively substituted for federal environmental assessment.

In 2011 the environmental assessment of the Prosperity Gold-Copper Mine project proposed by Taseko Mines Limited bore this out, and exhibited how there were many shortcomings in the provincial process as compared to the federal process. The Prosperity project would destroy Fish Lake (Teztan Biny) which is habitat for about 85,000 trout and is of great cultural importance to the Tsilhquot'in First Nation. The BC government approved the proposed mine in January 2010

following BC Environmental Assessment Office (EAO) review. The EAO found only one significant adverse effect – loss of fish and fish habitat at Fish Lake and Little Fish Lake -- and that it was limited to those discrete locations. The EAO recommended that the project nevertheless be approved because it found that these effects were justified by employment and economic benefits, and that the proponent's fish habitat compensation plan would significantly address impacts. In November 2010 the federal government through an independent *CEAA* panel review assessed the proposed project. The panel found significant adverse effects in nine areas, namely on fish habitat, grizzly bears, navigation, local tourism, grazing, a First Nation's trapline, First Nation's traditional land use and cultural heritage, Aboriginal rights, and future generations. The federal panel concluded that the proponent's fish habitat compensation plan was not viable. Based on the panel report then federal Environment Minister Jim Prentice rejected the project. Mike Haddock's (Northwest Institute) detailed report comparing the assessments of this project demonstrates that even though it may not be perfect, the federal assessment overall was more rigorous, broad based and inclusive than the provincial process. See *Comparison of the British Columbia and Federal Environmental Assessments for the Prosperity Mine* . Reading the report makes it evident that the federal panel took a closer and harder look at impacts falling within federal jurisdiction than the EAO.

Government funding and budget cuts

Severe budget cuts to Environment Canada and the Canadian Environmental Assessment Agency further lessen the federal government presence in federal environmental assessment. The Agency's role is "to provide Canadians with high-quality environmental assessments that contribute to informed decision making, in support of sustainable development" (see here). But for the Agency to oversee and carry out high-quality environmental assessment, including its role in public participation and Aboriginal consultation, monitoring and follow-up, as well as running the Environmental Assessment Registry and environmental assessment research programs, the Agency needs sufficient funds. Unfortunately the Agency's budget has been severely cut. The Agency is facing a 43.1 per cent cut in spending, dropping from $30 million in 2011-12 to $17.1 million in 2012-13. This follows a nearly 7% or $2.2 million drop in government funds in 2010-11. As well, the Agency is facing a reduction of 1/3 of its full time staff (see The Greenmarket Report). This can only mean less federal presence and involvement in effective federal environmental assessment in Canada. It will mean the continued burying of the larger picture, the national public interest perspective that federal environmental assessment offers on what development is environmentally sustainable in Canada.

These consequences will be exacerbated by federal cuts to or elimination of financial support to the environmental public interest. Significantly, Environment Canada recently has advised the Canadian Environmental Network (RCEN) that it will not be renewing its funding for 2011-12. The RCEN was established in 1977 and has over 645 member groups from throughout Canada. Funding cuts severely limit the RCEN's ability to carry out its mandate of "enabling and enhancing our members' work of protecting, conserving, restoring and promoting a clean, healthy, sustainable environment" (see here). For over 34 years the RCEN has been the mechanism though which large and small environmentally concerned groups from throughout Canada have contributed to environmental policy development and, more concretely, the sustaining of ecological values, and the protection or improvement of human health and environmental quality in Canada. Regarding environmental assessment, the RCEN Planning and Environmental Caucus since 1980 has been consistently acted to realize its members' common vision of effective environmental assessment. Caucus members represent a number of public interest non-profit organizations from throughout Canada, which together constitute a non-self-

interested, non-profit motivated voice for public education and participation in environmental assessment processes. The caucus supports strong environmental assessment laws, policies, and practices to achieve environmental and ecological sustainability for both present and future generations. The caucus used to be very active in environmental assessment public education, in participating in numerous stakeholder processes, in carrying out strategic environmental research, in meeting and helping each other throughout Canada with respect to assessment issues, and generally in raising public awareness of the importance of environmental assessment to achieve sustainable communities. It used to liaise frequently with the Canadian Environmental Assessment Agency, which provided funding for the caucus to carry out its work. That funding was cut off in 2010. That has all but crippled the caucus. This is a tragedy as the caucus' public interest, not for profit, voice needs to be heard, and its environmental assessment public education mandate needs exercized, during seven year review.

* This ABlawg is partly based on my article The Fading Federal Presence in Environmental Assessment *in press* with the Wild Lands Advocate (10-2011))