CANADIAN ENVIRONMENTAL ASSESSMENT ACT FIVE YEAR REVIEW

PROVINCIAL AND TERRITORIAL INPUT

BACKGROUND REPORT

INTERJURISDICTIONAL COOPERATION IN ENVIRONMENTAL ASSESSMENT

APRIL 2000

CEAA FIVE YEAR REVIEW

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Introduction

This discussion paper is one of several papers prepared on behalf of the Environmental Assessment Administrators response to the federal government's review of the *Canadian Environmental Assessment Act* (CEAA). This paper will explore the relationships between the federal and provincial/territorial governments with respect to carrying out environmental assessment (EA). The paper will analyze the level of interjurisdictional cooperation as it pertains to EA across the country.[1]

This paper focuses on the provinces' and territories' issues and concerns and reflects their frustrations with the CEAA process. However, the jurisdictions still believe that CEAA has merit. This paper describes the provinces/territories' existing cooperative processes and identifies areas of concern with the current implementation of CEAA to provincial/territorial undertakings and activities.

(i) Approach

This paper is based on the review of the principles and objectives of the Canada-Wide Accord on Environmental Harmonization and its more specific Sub-Agreement on Environmental Assessment. A comparison of jurisdictions with bilateral agreements on EA cooperation, and those without bilateral agreements was conducted to determine how these instruments facilitated cooperative environmental assessments in the various jurisdictions.

[1] The lead author of this paper was Ms. Joanne McKenna

Canada–Wide Accord on Environmental Harmonization

At the Canadian Council of Ministers of Environment Ministers' Meeting in May 1996, the ministers committed to framing a new multilateral Canada-wide environmental accord that would set the context for ongoing multilateral discussions on environmental harmonization. They also agreed to develop three sub-agreements: Inspections, Standards and Environmental Assessment.

On January 29, 1998, all the ministers, excluding Quebec, signed the Canada-Wide Accord on Environmental Harmonization (Accord) and three sub-agreements. In signing the Accord, the provincial and federal governments agreed that they would use a cooperative approach to develop and implement consistent environmental measures in all jurisdictions, including policies, standards, objectives, legislation and regulations.

The Accord outlines the following objectives of harmonization:

- to enhance environmental protection;
- to promote sustainable development; and
- to achieve greater effectiveness, efficiency, accountability, predictability and clarity of environmental management for issues of Canada-wide interest, by:
    - using a cooperative approach to develop and implement consistent environmental measures in all jurisdictions, including policies, standards, objectives, legislation and regulations;
    - delineating the respective roles and responsibilities of the federal, provincial and territorial governments within an environmental partnership by ensuring that specific roles and responsibilities will generally be undertaken by one order of government only;

- reviewing and adjusting Canada's environmental management regimes to accommodate environmental needs, innovation, expertise and capacities, and addressing gaps and weaknesses in environmental management; and
- preventing overlapping activities and interjurisdictional disputes (Accord, p.1).

The Accord states that implementation will occur through the governments entering into multilateral sub-agreements (Accord, p.3), and that the sub-agreements will be related to specific components of environmental management or environmental issues to be addressed on a Canada-wide partnership basis.

(ii) Purpose of Sub–Agreement on Environmental Harmonization

The sub-agreements are intended to "delineate specific roles and responsibilities to provide a one-window approach to the implementation of environmental measures; in the case of environmental assessment, that means a single assessment and a single review process for projects involving more than one jurisdiction" (Accord, p.3). In effect, this means that projects requiring a review under both federal and provincial legislation will undergo a single cooperative assessment, meeting the legal requirements of both governments while maintaining their respective existing powers and responsibilities.

The purpose of the Sub-Agreement on Environmental Assessment (EA Sub-Agreement) is to:

> *"provide the public, proponents, and governments with greater consistency, predictability, and timely and efficient use of resources where two or more jurisdictions are required by law to assess the same proposed project. This Sub-agreement on Environmental Assessment (Sub-agreement) operates within a framework of legislation and government polices to contribute to the vision of the highest level of environmental quality in Canada, and to a future based on the principles of sustainable development", (p.1 EA Sub-Agreement).*

The EA Sub-Agreement contains a description of the objectives, scope, and principles, as well as the content for EA reports, including information requirements; implementation and accountability, management and administration.

One of the key objectives of harmonization is to delineate "the respective roles and responsibilities of the federal, provincial and territorial governments within an environmental management partnership by ensuring that specific roles and responsibilities will generally be undertaken by one level of government only" (Accord, p.1).

Under the EA Sub-Agreement, certain roles and responsibilities for the assessment will be undertaken by that level of government best situated to effectively implement them. It was agreed that in determining which government is best situated, governments will give due consideration to a series of prescribed criteria (discussed in further detail below).

The following sections focus on the purpose of the EA Sub-Agreement, its components and how the EA Sub-Agreement is intended to achieve a cooperative EA process through the development of bilateral agreements between the federal government and each province and territory. The bilateral agreements were established as the vehicle to implement the objectives of the EA Sub-Agreement because the parties believed that it was the most effective way to develop a harmonized process with the federal government that would maintain and reflect each province/territory's existing EA process. In this way, the federal and provincial/territories' EA processes would complement each other.

(iii) Key Objectives of the EA Sub–Agreement

The key components of the EA Sub-Agreement that are relevant to the CEAA Five Year Review are found in sections 4 and 5 of the EA Sub-Agreement. These sections deal with information requirements and matters of implementation that have been agreed upon by all jurisdictions, except Quebec. These sections set out a framework for the requirements of a joint assessment, including, but not limited to the following items:

- description of proposed project;
- description of the purpose of the proposed project;
- summary of applicable laws, regulations, policies, management plans, approvals, national and international environmental agreements;
- description of the existing environment, related to the proposed project and the significance of potential environmental effects of the proposed project;
- identification and evaluation of the direct, indirect, cumulative and transboundary environmental effects of the proposed project, including risk of accidents and malfunctions;
- identification and evaluation of alternative means of carrying out the proposed project;
- public sector projects – identification and evaluation of alternatives to the proposed project including not proceeding with the proposed project;
- description of public consultations, the results of those consultations, and the effect of that public input on project planning and on the assessment report;
- other information identified by processes used to solicit concerns from governments or the public about the environmental effects of the proposed project;

- identification and evaluation of measures for mitigation and monitoring of impacts, and those impacts which cannot be mitigated; and
- capacity of renewable resources that are likely to be affected by the proposed project to meet the needs of the present and those of the future.

Section 4 of the EA Sub-Agreement also includes a discussion on the various stages of assessment and how an assessment would be conducted. It defines a process to determine the parties involved in the assessment, the lead party, a schedule or timelines for the assessment, the finalization of terms of reference, completeness of EA information provided by the proponent, determination of the need for an independent public hearing, and the critical evaluation and determination of environmental effects of the proposed project and finalization of recommendations to project decision makers. This section of the EA Sub-Agreement also provides for public participation in environmental assessments consistent with the policies and legislation of each jurisdiction.

Section 5 of the EA Sub-Agreement deals with implementation and reflects the tenet of "one project, one assessment" to be conducted for a proposed project. In addition, it establishes a lead party to administer the joint assessment for the parties involved and a process to determine the lead party to carry out a joint assessment.

One of the criteria to establish a lead party is land ownership. If a project is on provincial land, the province is the lead party; likewise, if the project is undertaken on federal land, the federal government is the lead party. This criterion can be amended depending on other factors. For instance, if the party is not in a position to accept lead responsibility for reasons due to inadequate resources, or due to a lack of or limited interest in the project, the lead party can be changed.

Other criteria used to determine the lead party are:

- scale, scope and nature of the environmental assessment;
- capacity to take on the lead including resources;
- physical proximity of government's infrastructure;
- effectiveness and efficiency;
- scientific and technical expertise;
- ability to address client or local needs;
- interprovincial, interterritorial or international considerations; and
- existing regulatory regime.

Once the lead party is identified, the parties will establish a specific time period in which a potential party will determine if an EA is required, and clarify its environmental responsibilities for the proposed project. Inherent in this is the preparation and approval of a single document that meets both provincial and federal EA legislation when both legislations apply.

Many of the features found in the EA Sub-Agreement have been incorporated into the bilateral agreements, e.g. notification procedures, determination of a lead party, defined roles and responsibilities for all parties, time lines for the assessment and decision making, EA content requirements, and public consultation.

Bilateral Negotiations Update

(i) Negotiated Bilateral Agreements

The parties to the Accord agreed to negotiate separate "bilateral agreements" to implement the EA Sub-Agreement. To date, three jurisdictions have signed and implemented bilateral agreements: British Columbia, Alberta and Saskatchewan. These agreements have been negotiated using the principles laid out in the EA Sub-Agreement. Ontario and Manitoba are in the process of negotiating bilateral agreements. Newfoundland, Nova Scotia, Prince Edward Island, Quebec and the Yukon have established informal working relationships with the federal government in the carrying out of assessments. New Brunswick has indicated an intent to pursue discussions with federal government regarding the development of a bilateral agreement.

- **BRITISH COLUMBIA**

  In April 1997, the Government of British Columbia (BC) and the federal government signed the *Canada/British Columbia Agreement for Environmental Assessment Cooperation*. The bilateral agreement, consistent with the EA Sub-Agreement, states that "the parties recognize that the objectives of their respective environmental assessment processes are consistent in principle and intent (bilateral agreement, p.4). Where both governments have an interest in a project, a cooperative assessment that meets the respective requirements of both their EA legislation will be undertaken. The preamble of the agreement states that Canada and British Columbia wish to ensure that such projects are evaluated according to the spirit and requirements of their respective authorities, by recognizing each other's strengths and capabilities, and avoiding unnecessary duplication, costs, delays and uncertainty that could arise from separate environmental assessments The conduct of screening or comprehensive study reports under CEAA will be undertaken and completed using the process established under the BC *Environmental Assessment Act.*

Decisions by BC and Canada will be made using the results of the cooperative assessment. The bilateral agreement also includes the delegation provisions found in section 17 of CEAA. The intent of this reference is, in cases where the federal responsible authority(ies) and the BC Environmental Assessment Office are in agreement, and where the quality, rigor and timeliness of the assessments to be conducted under both processes will not be compromised, the conduct of the screening or comprehensive study report under CEAA may be delegated on a project specific basis to the Environmental Assessment Office. This clause reflects the "one window" objective stated in the sub-agreement and recognizes existing provincial EA regimes.

Another key element in the BC bilateral agreement is coordinated timelines. In BC, EA reviews are conducted in accordance with legislated time frames. Under the bilateral agreement, BC and Canada will follow the time lines for completing each stage of the assessment process, as described in the regulations accompanying the BC *Environmental Assessment Act,* except where Canada must make decisions with respect to the acceptability or the need for referral to a public review by a panel or mediator. Upon completion of a cooperative EA, the findings of the assessment are conveyed to the responsible authority and to BC ministers. BC must make a decision within the prescribed time limits of the BC *Environmental Assessment Act*.

The bilateral agreement also includes a discussion on establishing roles and responsibilities for BC and Canada. Under this agreement, Designating Offices and their responsibilities are identified for both parties. The Canadian Environmental Assessment Agency Office, for example will act as the point of contact with BC up to the time that a lead federal responsible authority is identified and where necessary, the Agency Office will assist in the determination of a lead responsible authority. Once a lead federal responsible authority is identified, it becomes the point of contact with BC at all stages of the cooperative EA.

The bilateral agreement contains a provision for the establishment of a Project Committee to review project proposals subject to the BC *Environmental Assessment Act*. This Project Committee comprises representatives from the provincial and federal governments as well as First Nations. This committee coordinates the assessment and provides advice to proponents on content requirements, documentation preparation and consultation. The committee is also responsible for ensuring that time lines are adhered to and decisions with the respect to the project's approval are coordinated.

The bilateral agreement also includes provisions for subsidiary agreements on operating procedures such as: determining the scope of the project and factors to be considered; the operation of public registries; and the coordination of compliance monitoring and follow-up programs. To date, two subsidiary agreements have been completed. A review of the case studies prepared by the BC Environmental Assessment Office will illustrate how in practice, the bilateral agreement has performed on a project specific basis.

- **ALBERTA**

The Government of Alberta and the federal government signed the *Canada-Alberta Agreement for Environmental Assessment Cooperation* in June 1999 after extensive stakeholder consultation. The agreement replaces earlier bilateral agreements signed in 1993 and 1986. The agreement implements the EA Sub-Agreement, including provisions for notification, designated offices, determination of a lead party, one-window assessments, and public consultation.

The Canada-Alberta bilateral agreement includes a provision that if a party is unable to confirm whether it has a legal EA responsibility for a proposed project, that party will participate in the cooperative EA as if it had responsibility until and unless it determines it does not. This serves to keep the federal departments involved in the assessment process and avoids key decisions being made without federal input. In addition, the party will identify and inform the other party as early as possible as to the nature of its potential EA responsibilities and the additional information required.

As mentioned above, the bilateral agreement sets out roles, responsibilities and a designated office for each party. The designated office coordinates the administrative matters of the agreement; facilitates consultation and cooperation between the parties; and provides information about respective EA processes, policies and procedures. The determination of the lead party is based on the approach agreed to in the EA Sub-Agreement.

The bilateral agreement requires the identification of a senior official as the one-window contact for each major phase of the cooperative environmental assessment. Each party's one–window contact is responsible for the following:

- consultation with the other party, the proponent and the public on matters related to the cooperative EA of the project;
- coordination of that party's participation in the assessment, consistent with the terms of the EA Sub-Agreement and the bilateral agreement;
- ensuring consistency with legal requirements;
- ensuring that parties meet the timelines as established under the terms of the bilateral agreement; and
- working with other senior one-window contacts to resolve process and content issues as they arise in the cooperative assessment.

The lead party administers its process to enable the parties to meet their legal requirements. The other party adapts its process, to the extent its legal requirements allow, to follow the lead party process. The lead party establishes and chairs a project specific advisory review team. The provisions to guide the establishment and conduct of advisory review teams are specified. The lead party also issues terms of reference to the project proponent for preparation of the EA report after considering the advice of the project advisory review team. The parties will use the information generated by the cooperative EA as the basis for their decision making.

A review of the case studies prepared by Department of Alberta Environment illustrate Alberta's experience to date both before and after the signing of the bilateral agreement.

- **SASKATCHEWAN**

In November 1999, the Government of Saskatchewan and the federal government signed the *Canada-Saskatchewan Agreement on Environmental Assessment Cooperation*. The bilateral agreement reflects the key objectives of the EA Sub-Agreement, namely:

- to foster cooperation between Canada and Saskatchewan concerning the environmental assessment of proposed projects;
- to achieve greater efficiency and the most effective use of public and private resources where EA processes involving both parties are required by law; and
- to describe the roles and responsibilities for the parties in implementing the bilateral agreement.

The bilateral agreement sets out roles and responsibilities for each designated office to: coordinate the administrative matters of the agreement; facilitate consultation and cooperation between the parties; and provide information about their respective EA processes, policies and procedures.

In terms of notification, where a party learns of a potential project that might be subject to a cooperative EA, it will provide information about that project to the other party's designated office. The notified party will identify in a timely manner the information that will likely be needed by that party to identify its EA responsibilities. Each party will consult and work with each other and potential proponents as early as possible to ensure that the preliminary information needed to identify the parties' responsibilities is included in any subsequent submission. Each party will also include the other party's information requests in the guidance that it provides to potential proponents regarding any subsequent submission.

The parties agree to determine their EA responsibilities as soon as is practicable and within the time frames set out in legislation, regulation or policy. If either party believes it may require an EA by law, but lacks sufficient information in the project proposal or description documentation to make a final determination, that party will participate in the EA and will:

- document its responsibilities that may require an assessment and the additional information required; and
- submit this documentation to the other party, who will ensure, to the extent permitted by the relevant legislation, that the information needed to make a determination is generated.

The bilateral agreement incorporates the same approach for determining lead party as the EA Sub-Agreement. In addition, each party will identify a single contact able to carry out the responsibilities for conducting the cooperative assessment. The single contact will coordinate that party's participation in the cooperative assessment; contact relevant departments and agencies in their respective governments to confirm the lead and participation; work with the other contact to resolve process and content issues that may arise during the cooperative assessment; and endeavor to ensure that the party meets the timelines established for the cooperative assessment.

For each cooperative review a project administration team will be established and will comprise representatives from Saskatchewan and each of the federal responsible authorities for the EA. The project administration team will manage the cooperative assessment and establish a mutually agreed upon schedule. This team also works together to consolidate the information requirements of both parties into the terms of reference and distributes them to the proponent. This step addresses the issue of duplication and increases the clarity for the proponent in their preparation of documents for the assessment.

(ii) Bilateral Agreements under Negotiation

- **MANITOBA**

The Government of Manitoba and the federal government have negotiated a new bilateral agreement. The December 1999 version of the draft bilateral agreement was reviewed for the purposes of this exercise. The objectives of this draft agreement were found to be consistent with the objectives set out in the EA Sub-Agreement and were entered into under the spirit and intent of the EA Sub-Agreement. In the interim, harmonization of EA is achieved pursuant to Manitoba's 1994 agreement with Canada (now expired).

The section on designated offices sets out the following responsibilities for each party: coordinating the administrative matters pertaining to the agreement; facilitating consultation and cooperation between parties in relation to projects under EA review; coordinating and facilitating federal-provincial contact; and communication with potential proponents, other government departments and agencies, the public and First Nations. In Manitoba, the provincial designated office is the Environmental Approvals Branch and the federal office is the Regional Canadian Environmental Assessment Agency Office in Winnipeg.

The draft bilateral agreement discusses preliminary consultation and identifies the steps necessary when a potential project is proposed. Once a project is proposed, each party will identify information necessary to meet their legislation requirements in a timely manner. Each party will also include the other party's information needs in the advice it provides to proponents regarding any subsequent submission. A unique feature in this draft agreement is a clause that enables the parties to specify certain types of projects, or categories of projects for which exchanging information may not be required.

In terms of notification, the parties agree to determine as soon as is practicable and within the time frames set out in legislation, regulation, or policy, whether they have an EA responsibility in relation to

the project. If a party believes it may have responsibility but lacks sufficient information on the project proposal or description documentation to make a final determination, that party will:

- document the additional information required;
- provide this to the other party which will ensure that the information needed in order to make a determination is generated; and
- participate in the EA until it has made a determination.

A one-window contact within each designated office is also incorporated into the draft agreement. In Manitoba, the single contact is the Director, Environmental Approvals Branch, and the federal contact is the Regional Canadian Environmental Assessment Agency's office in Winnipeg, until such time as a lead responsible authority has been identified.

Each one window contact will:

- coordinate that party's participation in the cooperative assessment;
- work with the other contact to resolve process and content issues that may arise during the cooperative assessment;
- ensure effective consultation with the other party, the proponent, and the public; and
- ensure that the timelines established for the cooperative assessment are met.

Determination of a lead party follows the approach as set out in the EA Sub-Agreement.

The Manitoba draft agreement includes a provision for the creation of a Project Administration Team responsible for managing the cooperative assessment including: coordinating public participation; coordinating consultation between the parties, the proponent and the public; establishing a mutually

agreeable schedule for the cooperative assessment; and setting information requirements for assessing the environmental impacts of the project.

The Project Administration Team will also be responsible for consolidating the information requirements of both parties into a single request for information intended to guide the proponent in preparing the information required for the cooperative assessment. Both parties will use the information generated by the cooperative assessment for the purpose of their respective decision making.

These measures enhance the ability to streamline and clarify the information requirements that are forwarded to the proponent and facilitate a harmonized EA process in a timely manner.

- **ONTARIO**

The Government of Ontario and the federal government are currently negotiating a bilateral agreement. The March 1999 version of the draft agreement, which is currently being revised, was reviewed for the purposes of this exercise.

The objectives of the draft agreement are consistent with the objectives set out in the EA Sub-Agreement. The draft agreement sets out the designated provincial office as the Environmental Assessment and Approvals Branch in Toronto and the federal office as the Regional Canadian Environmental Assessment Agency office, also in Toronto.

The section on designated offices sets out responsibilities for Ontario and Canada such as coordinating the administrative matters pertaining to the agreement; facilitating consultation and cooperation between parties in relation to projects under EA review; and coordinating and facilitating federal-provincial contact and communication with potential proponents, other government departments and agencies, the public and First Nations communities.

Coordination responsibilities stipulate that, for cooperative EAs, the Ontario office and the Agency office will act as the point of contact. The Agency office will assist in the determination of a lead federal responsible authority where appropriate, while continuing to act as the point of contact until a responsible authority is identified. Once identified, the responsible authority will assume the lead role and work with the Ontario office to conduct a cooperative assessment.

The Ontario office and the Agency office (the parties) agree to notify each other as early as possible through their designated offices of projects potentially subject to their respective EA processes and ensure timely disclosure and access to relevant information about the proposed project. The parties also agree to consult and work with potential proponents as early as possible to ensure that the preliminary information requirements needed to identify their EA responsibilities or interests are satisfied in future documentation.

The parties, once notified, are to confirm in writing whether an EA responsibility or interest exists in relation to the proposed project and are to confirm their level of participation. The agreement includes a provision under which a federal responsible authority will participate in the assessment until it is determined that there is no requirement for an assessment under CEAA. Determination of a lead party follows the approach outlined in the EA Sub-Agreement.

The lead party will establish and chair a Project Review Team made up of participants with an EA responsibility or interest in the proposed project. The Project Review Team will provide advice and guidance to proponents on their legislative or mandated requirements and review documents about the proposed project as submitted by the proponent and will agree to the information requirements. Where a cooperative assessment is undertaken, the lead party will establish with the other involved party a schedule of timelines for the completion of each stage of the assessment in accordance with legislated timelines.

In cases where the approval of a project is subject to certain conditions, the parties will coordinate their respective responsibilities for compliance monitoring and follow-up. The announcement of project decisions will be coordinated to the extent possible, and neither party will communicate its decision directly to the proponent or the public without prior notification to the other party.

The Ontario bilateral agreement includes a provision to deal with Class Environmental Assessments (Class EA). In Ontario, the majority of assessments are conducted under the Class EA process. Ontario's Class EA document (often referred to as the Parent Class EA) sets out the types of class of projects to be assessed, the process to be followed, information requirements and prescribed points of consultation with provincial and federal agencies, affected First Nations and the public.

The provisions in the agreement allow for the Agency and the relevant federal departments to participate early in the review of the parent Class EA document. It is anticipated that this early participation will streamline the involvement of federal departments in the review of Class EA projects.

These measures will assist the parties in conducting a streamlined environmental assessment process that focuses on relevant environmental issues, while providing clarity to the proponent on meeting the requirements of both provincial and federal EA legislation in a coordinated manner.

(iii) Informal Arrangements

- **NEWFOUNDLAND**

The Newfoundland Department of Environment and Lands does not have a bilateral agreement in place, but enjoys a good working relationship with the Department of Fisheries and Oceans and Environment Canada. In the case of the Voisey's Bay project, the Government of Newfoundland and Labrador entered into a four party Memorandum of Understanding signed by Newfoundland, Canada, the Labrador Inuit Association and the Innu Nation to set out a process for the panel review.

- **NEW BRUNSWICK**

In New Brunswick, there are two stages of environmental review: the "registration" of projects and a full-blown Environmental Impact Assessment. The majority of registrations include federal government participation and approval. The Environmental Impact Assessment Office has made arrangements with Department of Fisheries and Oceans, Environment Canada and Public Works and Government Services Canada for their participation in provincial reviews. These departments routinely sit on advisory teams that review the project registration file and identify if a trigger is likely under the CEAA. If a trigger is identified, the proponent is notified that it must complete an assessment under CEAA. While the project is not the subject of a harmonized or cooperative assessment, the federal departments are committed under this informal arrangement to utilize the information and documentation provided in the provincial registration process in their subsequent CEAA process.

- **NOVA SCOTIA**

In Nova Scotia, an arrangement was developed to deal with the Maritime and Northeast Pipeline project. The Nova Scotia Department of the Environment entered into several multi-party agreements with the Canadian Environmental Assessment Agency, the National Energy Board, Nova Scotia Natural Resources, the Canada–Nova Scotia Offshore Petroleum Board and Natural Resources Canada to set out a general process to assess the Maritime and Northeast Pipeline Project and establish a joint panel.

The agreement set out that the Maritime and Northeast Pipeline project would follow CEAA and the National Energy Board processes.

- **PRINCE EDWARD ISLAND**

Prince Edward Island is not formally engaged in negotiations with the federal government to develop a bilateral agreement, however, a good working relationship has been developed with the federal departments on projects which trigger an assessment under CEAA.

- **QUEBEC**

The province of Quebec has also made arrangements with the federal government to conduct reviews of projects that require assessment under both provincial and federal EA legislation.

In 1987, and up until 1995, when CEAA was enacted, Quebec and Environment Canada had an agreement referred to as the "5 Scenarios Agreement". The agreement provided for mutual notification and cooperation of impact assessment of projects. The "5 Scenarios Agreement" varied depending on the degree of involvement of each party:

1- federal EA process only

2- federal with permit required from Quebec

3- federal and Quebec EA process

4- Quebec EA process with some federal involvement

5- Quebec EA process only

Under this agreement, Environment Canada acted as an "entry window" responsible for contacting other federal departments to obtain their comments and then provide any concerns/issues to Quebec, and the province informed Environment Canada on every project subject to its EA process.

After 1995, Quebec decided to continue to consult federal departments on each project; however, the difference is that now Quebec no longer cooperates in the public examination (hearing) of a project. Quebec used to invite the federal government to designate a member to sit on the Bureau d'audiences publiques sur l'environnement, but this is no longer the case because the provisions of CEAA are considered by the province to be too stringent and not reflective of a cooperative process.

- **YUKON**

The process for establishing a formal EA process with the Yukon is ongoing. The first major step in this process was the signing of the Council for Yukon Indian's (now called the Council for Yukon First Nations) Umbrella Final Agreement on May 29, 1993. This agreement sets out basic objectives for a new Development Assessment Process for the Yukon (federal DAP legislation implements the Umbrella Agreement). The Government of Canada is to enact new EA legislation and the governments of both Canada and Yukon are to amend existing laws, where necessary to facilitate this process. The *Yukon Environmental Assessment Act* will be used as an interim measure to cover off the period between devolution of the Indian and Northern Affairs Program responsibilities to the Government of the Yukon and prior to implementation of Development Assessment Process.

Once the Development Assessment Process is completed and in place, the Yukon may enter into bilateral arrangements with other jurisdictions. Environmental harmonization between BC and the Yukon has occurred on a project by project basis, and once the *Yukon Environmental Assessment Act* or Development Assessment Process is in place, a harmonization agreement will be pursued by these parties.

In the interim, BC and the Yukon have extended their Intergovernmental Relations Accord from January 27, 2000 to September 30, 2003. The Intergovernmental Relations Accord recognizes common interests and concerns shared by the Yukon and BC and sets up a mechanism for joint action on a number of priority issues.

Provincial- Federal EA Cooperation Case Studies

The spirit and intent of the Accord and the EA Sub-Agreement paved the way for provincial and federal governments to enter into bilateral arrangements to reduce confusion about EA processes and to reduce requirements resulting in duplication and overlap. They are also intended to achieve greater effectiveness, efficiency, accountability, predictability and clarity for environmental assessments within the framework of existing legislation.

The tone set in the Accord and EA Sub-Agreement reflects a willingness on behalf of all parties to cooperate in cases where both levels of government have EA obligations so that duplication and overlap are reduced. The BC bilateral agreement contains a clause allowing the federal government to delegate, in accordance with section 17 of CEAA, aspects of the carrying out of an assessment to the province. To date, this clause has never been used.

The next section of this theme paper reviews various case studies provided by the provinces illustrating their experiences and highlighting areas of concern regarding harmonization with the federal government.

(i) Case Study Analysis

- **BRITISH COLUMBIA**

  In BC, while there have been both positive and negative experiences in cooperative environmental assessments, there have been incidences of departure from the original intent of the harmonization agreement due to federal agency interpretations of their legal or policy obligations.

  The concepts of true cooperation and adherence to time lines have been compromised in several joint reviews, and cooperative reviews have increased administrative process, at times with no measurable value added.

The following screenings and comprehensive studies have departed from the agreement in terms of either content, public consultation, or format of the reports required:

- Keenleyside Hydroelectric (screening)
- Southern Crossing Pipeline (screening)
- Prosperity Gold Mine (comprehensive study)
- Greenville-Kincolith (comprehensive study)

In the case of Keenleyside and the Southern Crossing Pipeline, the federal approval of the CEAA screening report was not completed until after the BC *Environmental Assessment Act* review had been completed and the province had made a decision. While there is agreement that, in a cooperative review, one common set of documents will be used, there was no obvious document to use as a basis for the public consultation.

For these two projects, the lead responsible authority invited public comment on the BC Project Committee's "Project Recommendations Report", which is written and signed off by the Project Committee at the conclusion of the provincial review, after the province has completed its public consultation process. The appropriateness of using this document (designed for advice to ministers) for public consultation instead of a purely technical document is questionable.

For the Prosperity Gold project, the Department of Fisheries and Oceans decided to conduct an independent review and report on the issue of fisheries compensation separate from the provincial process. The cooperative review of this project was stalled for several months as a result of the Department of Fisheries and Ocean's position and information requirements on the project.

In the case of the Greenville-Kincolith Project, the lead responsible authority was slow to indicate its decision as to whether the report met the requirements of a Comprehensive Study Report. It was after

the pre-screening of the Project Report had been completed and after the proponent had made changes to make the Project Report acceptable to provincial reviewers as required under BC *Environmental Assessment Act* that the lead responsible authority formally declared that the project report did not meet the requirements of a comprehensive study report. This determination by the lead responsible authority, late in the review process, led to a decision by the province and the federal government to deharmonize and conduct two separate processes to complete the review.

These examples highlight a departure from the principles set out in the bilateral agreement that undermine the credibility of the provincial EA process and the integrity of the bilateral agreement.

- **ALBERTA**

Alberta has had an agreement with Canada relating to EA cooperation since 1986. Both parties have worked hard to deliver the review of proposals where each party had a legal responsibility or interest in EA. Several approaches have been tried, with the 1999 bilateral agreement reflecting experience to date.

The *Canada Alberta Agreement for Environmental Assessment Cooperation* is designed to improve effectiveness and predictability of EA, to provide more certainty to proponents and other participants involved in a cooperative assessment and to make better use of public and private resources. The results of the agreement are being monitored. Under the previous bilateral agreement, projects experienced delays related to a number of factors associated with the federal process that are outlined in the case studies.

Experience with the current agreement is limited because no projects have yet advanced beyond the notification stage in the agreement and many existing projects are "caught in transition". Projects already under review are experiencing some uncertainty. Progress has been made in notification and

determination of the parties participating in an EA but the agreement does not change the difficulty federal authorities have in determining the type of federal assessment that is required.

- **SASKATCHEWAN**

Saskatchewan signed a bilateral agreement in November 1999. Although the case studies analyzed were conducted prior to the bilateral agreement being in place, Saskatchewan has cooperated informally with the federal agencies and departments since CEAA came into force. Even though the spirit of harmonization was followed in conducting the joint assessments, many challenges persisted.

In the Cigar Lake Uranium project, parties experienced delays in the determination of a lead responsible authority and in sorting out the requirements of CEAA. The Cigar Lake Mine Waste Rock project was approved in 1998. The project triggered the law list under CEAA and was subject to an environmental impact assessment under Saskatchewan's legislation, as well as a screening under CEAA. In this case, comments received from responsible authorities were specific and knowledgeable. Conversely, comments received from other federal authorities reflected a lack of understanding and working knowledge of CEAA and the project. This lack of understanding resulted in delays in drafting project specific guidelines because federal comments were unavailable or irrelevant. These delays accumulated increased cost to the proponent, government, and the public. The joint process also slowed the progress of national and provincial economic activity.

- **MANITOBA**

Manitoba's experience with cooperative assessments has been mixed. In the example of the Asessippi Ski Hill project, the funding trigger was not in place when the provincial process was completed. This resulted in delays for the overall approval of the project. The lateness of this trigger made it impossible to conduct a cooperative EA process and created uncertainty for the proponent.

The Rock Lake Regulation project also resulted in lengthy delays due to the implementation of CEAA and the late notification to the proponent of CEAA's requirements. In this instance, the provincial review was accepted, but the federal review process issued a deficiency statement. The federal review undertook a very broad review of the project including studies related to other proposals, while the provincial review focused on the current proposal. As a result of the extent of additional information requested for the federal review, the project stalled.

- **ONTARIO**

While Ontario does not have a signed bilateral agreement, the spirit of the draft agreement is followed. Recently, Ontario has experienced a lack of cooperation and coordination with respect to projects requiring joint assessments. In particular, the Red Hill Creek Expressway project represents a dangerous precedent for Ontario. The project was the subject of extensive study under the provincial EA process and 15 years after its approval, triggered CEAA through a Department of Fisheries and Oceans permit requirement. This resulted in the duplication of studies and public consultation. In addition, the project was referred to the most stringent level of assessment - a Panel Review. The apparent retroactive nature of this assessment undermines the credibility of the provincial environmental approvals process and creates great uncertainty for proponents.

The Port Union Waterfront Development project also triggered CEAA through a federal *Fisheries Act* authorization. The proposal involves 16 hectares of shoreline filling and is expected to have significant environmental effects. According to Department of Fisheries and Oceans, mitigation of these effects is not straightforward from a technical perspective. The Province of Ontario and the Department of Fisheries and Oceans are continuing to work together to ensure that the federal issues have been addressed. The issue with this project centers on the delays in getting Department of Fisheries and Oceans to confirm that a trigger existed and to notify the proponent as to the information requirements necessary to meet the federal Act. In addition, the EA report was not published according to legislated timelines.

The Windsor Marina project was also problematic and was characterized by a lack of, or inability of, federal departments to determine the presence of a trigger and identify a lead responsible authority. The lateness of the Canadian Coast Guard's participation in the assessment not only caused delays, but also nearly derailed the entire project because a central issue of navigable safety was not identified early in the planning stages of the project.

- **NEW BRUNSWICK**

New Brunswick has experienced a number of problems, and in one case, was not notified that a project initially triggered an assessment under CEAA. The Eel Ground First Nation Wastewater Treatment Facility, which involved a discharge of effluent to provincial waters, was funded by Department of Indian and Northern Development, and was initially examined under CEAA by an EA specialist from the federal Department of Public Works and Government Services. Although the review resulted in a CEAA exclusion, the province was never notified of the federal review. The ensuing provincial EA review resulted in stricter effluent limits being applied to the Northwest Miramichi effluent discharge, and the requirement to implement an appropriate environmental protection system during construction.

In another case, a CEAA review of the Fredericton to Moncton Upgrade of the Trans Canada Highway was triggered initially by the Canadian Coast Guard under the *Navigable Waters Protection Act* and later by DFO's because of HADD (harmful alteration, disruption or destruction of fish habitat) requirements. The parties experienced conflicts during the CEAA review regarding the scope of the assessment. The Canadian Coast Guard had stated their view that a re-examination of the entire highway might be appropriate, even though their trigger involved a number of major bridge crossings, and the province had previously completed a comprehensive provincial EA. The HADD trigger was, and continues to be, exercised in relation to project design changes as the project proceeds.

- **NOVA SCOTIA**

The Maritimes and Northeast Pipeline Project was the subject of a joint assessment. Nova Scotia reported that the process was effective, especially given the complexity of the project. Although lengthy, the review was comprehensive and provided sufficient opportunity for intervenors and stakeholders to participate in the review. The interjurisdictional overlap did create some confusion and added to the complexity of the project but did not compromise the quality of the review. While the arrangement worked well during the assessment stages of the project, the decisions were not effectively coordinated. The panel's complete decision (including terms and conditions) was not shared with the Nova Scotia Department of Environment and as a result, there was no effective coordination of the decision.

Nova Scotia also reviewed the Point Tupper Lateral Pipeline Project that followed CEAA's screening process and the National Energy Board process. This process was less complicated and resulted in a shorter panel review led by the National Energy Board. The Halifax Lateral Pipeline Project was reviewed by Nova Scotia through the CEAA comprehensive study and NEB process. The coordination of the CEAA comprehensive study process and the National Energy Board process was unnecessarily complicated and resulted in project delays. The Agency has been working to resolve the complications of coordinating comprehensive studies and the National Energy Board process.

- **PRINCE EDWARD ISLAND**[2]

In the Hillsborough River Bridge Upgrade project, there were problems associated with a federal department's inability to determine if there was a trigger for this project. The decision to identify a trigger appeared to be used by the federal department as a lever against the provincial department which was the proponent of the proposed project. The issue was not rectified until the regional Canadian Environmental Assessment Agency office was called in to provide advice and guidance to

[2] This information was provided by Prince Edward Island. Specific case studies on these projects were not developed.

the federal department on whether or not a trigger existed. In the end, the project was not subject to a review under CEAA.

In another case, the Crowbush Cove Resort project was subject to a screening under CEAA. A federal department was, in the opinion of the provincial government, demanding exceptional mitigation measures to the lead responsible authority. Appropriate mitigation is necessary to address environmental issues. However, demanding that a proponent agree to mitigation measures beyond what is necessary for a regulatory approval through EA, is an inappropriate use of the EA process.

- **NEWFOUNDLAND**

Newfoundland has had generally positive experiences with the CEAA process, although improvements in the timeliness of federal input to the provincial EA process and greater certainty of the scope of the CEAA review are needed. The Voisey's Bay project was reported to have no complications with respect to the carrying out of a joint assessment. This was due to the mandate for an independent public review panel provided in a four party Memorandum of Understanding, in addition to good cooperation by provincial and federal technical committees.

Case Study Summary Conclusions

(i) General Observations

After reviewing the case studies, a number of recurring concerns can be identified regardless of whether a bilateral agreement is in place, under negotiation, or other informal arrangements existed. Most jurisdictions have experienced one or more of the following concerns which can be separated into several categories:

- **Procedural** - capacity of federal departments to understand and apply CEAA; delays; increased costs; lack of coordination; and duplication and overlap of resources.
- **Jurisdiction** - legal uncertainty; lack of harmonization.
- **Application of CEAA** - level of detail for law list triggers required is inappropriate in the planning process; and federal scoping often extends beyond the mandate of the responsible authority.

These concerns can be linked to a lack of a coordinating role for the Agency, and the federal departments' inexperience and lack of consistency regarding the application of CEAA. In addition, there is also a lack of policy direction and guidance from the Agency.

However, these concerns also reflect systemic problems with the way in which CEAA has been drafted and applied. The liberal interpretation by responsible authorities in the absence of clear policy or guidance has resulted in arbitration with respect to the determination of the scope of assessment and scope of project and has caused inconsistency in whether or not to apply CEAA to certain projects and activities within the provincial domain. The resolution of these concerns is fundamental to promoting improved cooperation between the federal and provincial governments.

(ii) Issues Addressed through Negotiated Bilateral Agreements

BC's experience indicates that bilateral agreements can assist in clarifying roles and responsibilities. However, there are also issues regarding the application of the bilateral agreement in BC that need to be addressed, such as meeting timelines for reviews, matters of public consultation, and the equivalency of documentation used in a cooperative review. The absence of problem solving or dispute resolution provisions in the agreement has proven to be a significant omission. For each project where a problem

with achieving the objectives of the agreement has been experienced, the federal government has had to design a mechanism or procedure to address the problem and reach a solution. It is often difficult to design such a mechanism to address an issue within the provincially regulated time limits for project review. Accordingly, in certain cases, the provincial and federal reviews have followed separate processes.

At times, federal delays in providing assessment comments have impacted provincial legislated timelines. There has also been occasion for concern over the quality of federal input to a cooperative review. Most of the administrative and financial burden for implementing the cooperation agreement falls to the BC Environmental Assessment Office.

For some projects the lead responsible authority has chosen to conduct public consultations after extensive consultation has been undertaken by the province and after approval of a project by provincial ministers. This can lead to uncertainty and confusion. The BC *Environmental Assessment Act* has legislated provisions for transparency, accountability and effective participation of interested parties. As members of the Project Committee in a cooperative review, federal departments use the provincial public comment process to gauge the range of public issues associated with the project, and to observe that these issues are analyzed and addressed.

However, the additional consultation undertaken by the lead responsible authority has focused on the same stakeholders or First Nations who were consulted and/or invited to participate in the more thorough consultation process under the BC *Environmental Assessment Act*. Nonetheless, federal responsible authorities have felt compelled to conduct consultation at the close of a provincial review due to the wording of provisions of CEAA requiring consultation on a review product as opposed to requiring consultation on a project proposal.

This procedural issue can be seen as a more significant irritant. Federal officials have used the provincially developed recommendations report which forms the core of advice to provincial ministers about a project, as the basis for the late round of public consultation. Public consultation is usually undertaken on

the basis of technical descriptions of the proposal and sometimes agency comments on the project. Because the advisory document is used, this has the potential to appear disrespectful to provincial ministers and, in the federal process, advice to the minister by federal departments would not be released to the public for comment.

There have been problems in reaching agreement on the content required for a Comprehensive Study Report although the bilateral agreement, stipulates that the project report generated by a proponent through the BC process is intended to serve as the Comprehensive Study Report. Federal consultation on this document would be more consistent with provincial expectations that technical documents (as opposed to those provincially developed documents providing advice to ministers) would ordinarily form the basis of public consultations.

Future cooperative reviews can be improved if the federal departments are active participants in the review of drafts of a proponent's project report and identify, clearly and early, any deficiencies that need to be addressed. This will allow for issues to be identified and resolved before a project report is formally submitted for review and will increase the likelihood that a project report prepared under the BC *Environmental Assessment Act* can also serve as a Comprehensive Study Report.

(iii) Issues Anticipated to be Addressed through Bilateral Agreements

Alberta's experience with the bilateral agreement has been limited since their agreement was just signed in June 1999. Past experience has shown that the federal agencies consider issues that are beyond the scope of the federal area of responsibility, e.g. fisheries authorizations. The bilateral agreement addresses this, stating that the parties will focus their participation on their areas of expertise and areas of primary environmental management responsibility of their agency or department. It is anticipated that increased use of their agreement will eliminate the occurrence of incidences where the scope of assessment is broadened beyond jurisdictional and legislative responsibilities where joint assessments are conducted.

The clause should also assist in circumstances where the federal government has no legal responsibility for EA.

Alberta's bilateral agreement ensures as much coordination of timing as possible. However, the provisions cannot completely deliver the single, lead party process expected from the EA Sub-Agreement. Issues still remain regarding cooperation and coordination between federal departments in determining who is the lead responsible authority.

The bilateral agreement provides the framework for governments to work together cooperatively. Common federal-provincial project advisory review teams will contribute to better use of federal resources for assessments. However, legislative changes are needed to fully achieve the goal of one project – one assessment. Successful implementation will require a positive and informed commitment by officials in both governments.

Saskatchewan signed its bilateral agreement in November 1999. Although the case studies analyzed were conducted prior to the bilateral agreement being in place, Saskatchewan has cooperated informally with the federal agencies and departments since CEAA came into force. Even though the spirit of harmonization was followed in conducting the joint assessments, many challenges persisted.

The degree of clarity that Saskatchewan achieved in its agreement was limited by the unpredictability of CEAA's process. Since CEAA is a self-assessment exercise directed by the responsible authority, its predictability varies depending on the responsible authority and their level of experience. The early notification procedure is likely to result in a significant exchange of paper and increased administration costs for the relatively small number of times that the federal government actually triggers when an environmental impact assessment is required provincially. In addition, the bilateral may hinder the use of environmental impact assessment as a planning tool by allowing the need for regulatory detail (law list triggers) to undermine the consideration of alternatives within the planning nature of provincial EA..

Saskatchewan has also found in its experience that CEAA does not acknowledge the existing phased environmental management process whereby an overall EA is conducted first, then after a project is

approved, the detailed regulatory licensing process manages development, operations and decommissioning and reclamation. Although providing a basis for cooperation, it is probable that changes to CEAA will be required to fully resolve these issues.

Manitoba's new bilateral agreement is awaiting ministerial signing. The Government of Manitoba anticipates that this new bilateral agreement will ensure that proposed projects undergo a single, cooperative assessment that meets the legal requirements of both governments while maintaining their respective powers and responsibilities.

The bilateral agreement is anticipated to achieve a high level of EA harmonization and advance each jurisdiction's commitment to work in partnership on environmental protection matters. Furthermore, the bilateral agreement will ensure a more efficient and effective process for those projects requiring EA by both governments.

While Ontario does not have a bilateral agreement as yet, Ontario and the federal government are engaged in negotiations to finalize their latest draft. Based on the latest draft, it is anticipated that components of this agreement will help address the issues of federal responsible authority participation in the early stages of the assessment and encourage the timely provision of comment. The agreement would formally recognize jurisdictional legislative and administrative process constraints such as timelines and the local regulatory environment, while ensuring an efficient shared process through which to protect the environment.

A federal-provincial harmonized approach to EA will improve the regulatory EA process for projects in Ontario subject to both governments' legislative regimes. An effective, coordinated EA process will only be achieved through flexibility, recognition and respect of EA legislation and process of other governments, and open and direct communication.

(iv) Issues Identified Under Informal Arrangements

Those jurisdictions with informal arrangements have also experienced their share of problems with the implementation of CEAA. Newfoundland experienced delays in decision making with several projects. In some cases, the federal departments did not meet Newfoundland *Environmental Assessment Act* timelines and consultation with the public was not coordinated.

New Brunswick has also experienced delays, a lack of coordination and communication, and a conflict in determining the scope of assessment for projects.

Nova Scotia has experienced how interjurisdictional overlap can add confusion and complexity to the EA process and serve to delay the project's progress, although it did not compromise the quality of the EA.

Prince Edward Island has experienced problems with federal departments declaring their level of involvement in a project. This inability of federal departments to declare whether a trigger under CEAA resulted in delays in the provincial EA process.

(v) Outstanding Issues to be considered in the CEAA Five Year Review Process

There are a number of areas where true harmonization cannot exist because the bilateral agreement is based on the existing CEAA legislation. This legislation permits situations where the scope of federal requirements is out of proportion to the specific responsibility(ies) of the responsible authority triggering an assessment. For instance Ontario's Red Hill Creek Expressway project triggered CEAA under the *Fisheries Act*. It was determined that the issues associated with the project could not be adequately addressed through a screening and the federal review of the project was referred to a panel review under CEAA. This occurred despite the fact that the project had already received approval by the Ontario Ministry of the Environment. The terms of reference for the CEAA panel review focused on questions of need and

alternatives to the project, issues that had already been approved by municipal and provincial governments.

Another key concern voiced by a number of jurisdictions is the issue of legal uncertainty. Provincial governments have experienced instances where a proponent applied the CEAA process to a project in a rigorous and committed manner, but the ambiguities in the interpretation of CEAA still resulted in a federal court challenge. This occurs regardless of whether a bilateral agreement is in place or not.

Another significant issue for the provinces is that while the provincial legislation provides for staged environmental management processes, CEAA focuses on an EA process that requires more detailed information. CEAA's process functions at the regulatory stage of the approval process that occurs at the end of the planning stage of the project when irrevocable decisions have often been taken. Therefore CEAA's law list triggers cannot be used as an effective planning tool.

A fundamental flaw in CEAA is that it can trigger multiple assessments throughout the regulatory phase of a project after both the federal and provincial governments have completed comprehensive environmental assessment reviews. Under provincial EA processes, an approved project implies that the potential environmental impacts have been identified and that the impacts of the project can be managed by regulatory activity. The application of CEAA to projects that have already received provincial review and approval adds another series of bureaucratic procedures that do not enhance the technical merit of an EA of a project. In these cases, CEAA does not contribute to the technical assessment and its bureaucratic procedures often interfere with the technical EA process.

Generally, many federal and provincial officials view CEAA as an unnecessary activity that serves as an audit function rather than promoting EA.

At the heart of federal–provincial/territorial cooperation has been the belief that CEAA needs to recognize that existing provincial/territorial EA regimes are vital to the integrity of environmental harmonization. The

role of the CEAA process is to complement and bridge gaps between the federal and provincial/territorial EA legislation rather than to supersede or replace the provincial/territorial EA legislation. These principles need to be reaffirmed and incorporated in a meaningful way into the review of CEAA.

Options and recommendations to improve the interface between CEAA and existing provincial/territorial EA processes are discussed in the Options Paper.

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