CANADIAN ENVIRONMENTAL ASSESSMENT ACT FIVE YEAR REVIEW

PROVINCIAL AND TERRITORIAL INPUT

BACKGROUND REPORT

POLICY OPTIONS

APRIL 2000

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POLICY OPTIONS

Introduction

The Policy Options paper is the fourth in a series of papers authored by the provinces and territories in response to the *Canadian Environmental Assessment Act* (CEAA) Five Year Review. It was prepared specifically for discussion as part of the provincial /territorial process and gave rise to the recommendations for changes to CEAA contained in the *Recommendations Report of Provinces and Territories: Changes to the Provisions and Implementation of the Canadian Environmental Assessment Act* (Recommendations Report). The paper outlines some policy options for responding to the CEAA Five Year Review based on the findings from the case studies and theme papers.[1]

The provinces and territories prepared a series of case studies based on their experiences with CEAA to assist them in identifying the issues of greatest concern. What the case studies clearly indicate is that the provinces and territories have experienced similar difficulties with the application of CEAA. Although the details of these experiences are different, the case studies have also served to identify common concerns on the part of the provinces and territories. These common concerns, in turn, have led to the development of a number of proposed revisions to CEAA and its application.

The provinces and territories have concluded that the integrated option is the preferred direction for responding to the CEAA Five Year Review with the greatest potential to result in improvements to CEAA.

[1] The lead author of this paper was Dr. Peter Meekison

The Policy Options

The objective behind the provincial and territorial initiative was to undertake a more extensive approach to the CEAA Five Year Review than is presented in the federal discussion paper. There are essentially three options for consideration by the provinces and territories:

- the provincial/territorial option: respond only to provincial/territorial concerns not addressed in the federal discussion paper, such as historical concerns and those emanating from the case studies, leaving the response to the federal discussion paper to be driven by the Regulatory Advisory Committee and the national consultation process;
- the integrated option: integrate the response to comprise elements of the federal discussion paper and provincial/territorial option; and
- the combined option: linking the CEAA Five Year Review and the review of the *Canada-Wide Accord on Environmental Harmonization* (Accord) together, but sequentially, to maximize the scope of the review.[2]

The Integrated Option

The integrated option incorporates elements from the federal discussion paper and the provincial/territorial option (discussed below). Some, but not all, of the provincial/territorial concerns are reflected in a number of the options detailed in the federal discussion paper. The case studies suggest that protection and recognition of provincial/territorial jurisdiction are of concern. Equivalency is a concern of long standing. Litigation, or the threat of litigation, during the process is a concern. The "Law List" and its application is a recurring theme in the case studies. While these matters may be implicit in some of the federal options, the objective of the integrated option is not a detailed provincial/territorial response to all federal options but rather identification of those specific options which correlate to the provincial/territorial concerns.

[2] A review of the Accord is being undertaken by the ***Canadian Council of Ministers of the Environment***

The introductory section to Part 3, of the federal paper "Review of the Canadian Environmental Assessment Act: A Discussion Paper for Public Consultation" (federal discussion paper) presents a detailed list called "Concerns of Canadians." A useful exercise is to compare this list with the options which follow to ascertain those which have been clearly addressed, those which have been partially addressed and those which have been set aside. The question is whether or not all of the identified concerns should be addressed during the CEAA review.

For example, one of the concerns identified is "the impact of, and prospect for, litigation during the process". Of the projects requiring federal-provincial review noted in the federal discussion paper, litigation occurred in the Sunpine, Suncor, Cheviot and Maritime and Northeast Pipeline Projects. It was threatened in the Voisey's Bay and the Trans Labrador Highway Projects and was raised as a possibility in New Brunswick Petitcodiac River Project. A case has been filed in Ontario on the Red Hill Creek Expressway. Accordingly, how should the review tackle this subject? Alberta has suggested consideration of a privative clause in the legislation.

CEAA already contains a number of provisions which directly apply to federal-provincial/territorial relations. These sections make it clear that the provinces/territories are more than simply stakeholders when it comes to environmental assessment (EA). The key provisions include:

- section 12, which permits the responsible authority, where a screening or comprehensive study is to be conducted, to cooperate with the province "respecting the environmental assessment of the project".

- section 17, which authorizes a responsible authority to delegate to a jurisdiction (a provincial government or a provincial environmental assessment agency) certain aspects of the assessment process while retaining its decision making authority under sections 20 (1) and 37 (1). Any process delegated must be carried out in accordance with the Act. (At the time that CEAA was being reviewed by the House of Commons' Committee, this provision was considered preferable and was incorporated as an alternative to one on equivalency).

- section 28, which outlines the Minister's broad discretionary power to refer a project to either mediation or a panel. Part of the referral process is "offering to consult with the jurisdiction" (the province).

- sections 40-42, which provide for joint review panels. When a province is involved, the Minister "shall … offer to consult and cooperate with that other jurisdiction respecting the assessment of the environmental effects of the project." There is no discretionary authority here.

- section 46, which provides a process for a review of projects which are considered to have transboundary effects.

- sections 58 (1) (c) & (d), which provides for the Minister to enter into agreements with the provinces "respecting assessments of environmental effects" and "for the purposes of coordination, consultation, exchange of information and the determination of factors to be considered in relation to the assessment of the environmental effects of projects of common interest".

According to the federal discussion paper, "environmental assessment is part of a much broader canvas of federal-provincial relations. Difficulties – or progress – in one policy area can affect other areas" (p.17). Presumably the canvas referred to in this instance is the environment and not the entire range of federal-provincial/territorial issues such as the social union, health care or fiscal federalism. Assuming the more narrow focus to be the correct interpretation, jurisdictional disputes over assessment can spill over into other areas of environmental policy.

One way of addressing the reality of shared responsibility or jurisdiction is to include a separate federal-provincial/territorial relations part in the legislation. Such a section would be an acknowledgment by Parliament that the environment is a matter of shared responsibility. What would such a section include? Matters for consideration would be recognition of a provincial/territorial environmental process, dispute resolution procedures over scoping or cumulative effects, a process for establishing a lead government or

agency to conduct a review, procedures to expedite the "Law List" trigger(s) and a provision for delegation to provinces/territories. The section on delegation should provide for provinces to initiate the delegation process. There should be a provision for agreements building on the section already found in CEAA. A separate section could provide for delegation to federal responsible authorities, proponents and aboriginal governments. The effect of a federal-provincial/territorial relations part would be to codify the Accord.

The agreements section would build on sections 58 (1) (c) & (d) but would be more specific as to possible subject areas where bilateral agreements might be reached. At the same time there should be sufficient flexibility to conclude agreements in other or new areas. These could range from pilot projects to other forms of innovation or experimentation in the area of EA. What needs to be emphasized is that the section on agreements is enabling, or permissive. It authorizes governments to negotiate and conclude agreements. It is a reasonable assumption that agreements would be mutually satisfactory before they are signed. The section does not require governments to be successful in their negotiations. Since CEAA already provides for public comment on any agreements negotiated under section 58(3), it is reasonable to expect a similar requirement in a new part.

The theme paper *Interjurisdictional Cooperation in Environmental Assessment* suggests that not all provinces are interested in pursuing a comprehensive bilateral EA agreement at this time. New developments taking place in the territories such as the Yukon's Development Assessment Process also need to be recognized. The proposed part should be sufficiently flexible to accommodate a variety of possible agreements ranging from comprehensive to project specific. Consideration should be given to a provision where either order of government can request that an agreement be negotiated.

In addition to a new federal-provincial/territorial relations part there may need to be other changes to CEAA. For example, since there is no reference to the territories some means of recognizing the territorial governments needs be considered. Under the discretionary powers of the Minister, section 25 should be amended to require federal-provincial/territorial consultation prior to the Minister making a decision to refer a project to a panel. Section 28 raises concerns because it appears to confer on the Minister unlimited authority to refer projects to a panel where no trigger is involved. The section should be amended to make

it clear that this authority is limited to areas of federal jurisdiction. The scope of the agreement provisions of the Act [section 58. (1) (c)& (d)], needs to be examined to make it compatible with the suggestions included in the integrated option.

When Parliament was considering CEAA, the provinces called for an equivalency provision, an idea which the federal government did not accept. Since then, a number of provinces have revised their legislation. For example, the British Columbia legislation provides for federal participation in the provincial review process. Given the high quality of provincial EA legislation in place, equivalency or alternatives should be considered.

Three possible approaches include:

- mirror legislation
- mutual recognition
- deeming

Mirror legislation is self explanatory. If the requirements in both federal and provincial/territorial legislation are identical, they can be considered equivalent. It would be difficult, if not impossible, for a revised CEAA to reflect all EA legislation currently in place in the provinces and territories. While individual provinces and territories are in a position to mirror the federal legislation, the reality is they are probably unwilling to lose the flexibility of crafting legislation to meet their own needs. Thus, the other two alternatives are the most fruitful avenues to establish equivalency.

Mutual recognition is a principle by which jurisdictions agree to recognize that processes, practices or certification developed by one are satisfactory for the purposes of another.

Deeming takes place when one jurisdiction thinks or believes that another's processes are equivalent. An example of deeming is found in the *Ontario Environmental Assessment Act*. That Act provides for equivalency as follows:

- section 3.1(b) if the Minister considers the requirement imposed by the other jurisdiction to be **equivalent** to the requirements imposed under this Act.
- section 3.2 the Minister may by order vary or dispense with a requirement imposed under this Act with respect to the undertaking in order to facilitate the effective operation of the requirements of both jurisdictions.

It should be noted that the equivalency in Ontario's legislation is subject to ministerial discretion.

Given the sensitivities associated with equivalency, it is reasonable to assume that recognition of equivalency or an alternative would not be automatic. Nevertheless, a process by which it can be achieved is certainly worth pursuing. Equivalency would presumably involve an intergovernmental agreement, be the subject of public scrutiny and have a fixed term. An agreement may also provide for federal participation in the review, as the British Columbia's legislation does.

One series of options (7.2) contained in the federal discussion paper is entitled, "Assessments of projects with known/inconsequential effects." Four specific methods to accomplish this objective are listed. The objective of this section is to eliminate unnecessary assessments allowing increasingly scarce resources to be applied where they are most needed.

One of the specific options for consideration (7.2.2) is a "minimum federal involvement" regulation. The provinces proposed something along this line in 1990. The problem with implementation of the concept has been with the current wording of CEAA. In several of the case studies, the provinces saw the federal interest as being minimal or "narrow", although the federal responsible authority(ies) may not be of the same opinion. Regulations defining "minimum federal involvement" would be a good start, but there should also be a provision permitting the provinces to request, on a project by project basis, that the federal

contribution be deemed minimal by the Minister or the Agency. The other three ways of approaching this matter are: exclusion by federal departments of small routine projects (7.2.1); expansion of the exclusion list to include smaller, routine categories known to have minimal environmental effects (7.2.3); and streamlining procedures for obtaining a designation of a model class screening report (7.2.4). These four ideas are supported by the provinces/territories.

Another provincial position advanced at the time that CEAA was being drafted was the concept of a cooperative federal-provincial scoping process. As noted in the federal discussion paper, "scoping has emerged as one of the most pressing methodological challenges under CEAA, and a source of uncertainty and unpredictability in the overall process" (p. 49). While the wording of CEAA needs to be clarified (and not by the courts), CEAA should also provide for cooperative scoping and a mechanism to resolve disputes. The nature and design of these processes could be specific to each jurisdiction.

The objectives of a federal-provincial/territorial part in a revised CEAA are to further cooperation, to support the harmonization of processes and to cut down on delays and resulting cost increases. The reality is that the Constitution does not sharply define environmental responsibilities. Cooperation and harmonization are preferable to constant conflict over jurisdictional boundaries. Mechanisms which lead to early identification of differences may lead to early resolution of disputes. While the federal discussion paper addresses the federal-provincial/territorial dimension, it does not really deal with the federal-provincial/territorial perspective in any depth. The integrated option focuses primarily on this theme.

In developing the integrated option, one of the principal sources was the federal discussion paper. The paper contains a number of specific options to improve CEAA, all of which were reviewed in their entirety. The objective of the provincial/territorial initiative was to identify which of the options were directly relevant to the three main provincial/territorial themes: jurisdiction, procedure, and application of CEAA. The next step was a more detailed examination of the options considered to be relevant to this particular undertaking. In some instances, the options as outlined were supported as written. In other instances, they were combined or otherwise modified to reflect the provincial/territorial needs as outlined in the Recommendations Report. The options served as an important catalyst for discussion. The parallel

interests arising from the case studies and the federal discussion paper are very obvious. For those options not specifically referred to in the Recommendations Report, the provinces/territories have, or have had, other opportunities in the CEAA review to express their views.

The Recommendations Report makes reference to the following options which are identified by their corresponding number found in the federal discussion paper.

- OPTION 7: Making the process more predictable, consistent and timely.

  7.1 Coordination and harmonization (recommendation 15, options 2 & 4 combined)

  7.2 Assessment of projects with known/inconsequential effects (recommendation 6, options 1, 2, 3 & 4)

  7.3 Timeliness (recommendation 10, options 1 & 3 combined)

  7.4 Scoping (Recommendation 17, parts of option 1 preferred; parts of option 2 as a second best alternative)

  7.6 The discretionary powers of the Minister of the Environment (recommendation 18, option 2, modified)

- OPTION 8: Improving the quality of environmental assessments.

  8.1 Coverage of the Act (recommendation 7, option 3)

  8.2 Cumulative effects (recommendation 17, option 1 preferred; option 3 as a second best alternative)

- OPTION 9: Strengthening opportunities for public participation.

  9.1 Public participation in environmental assessments (recommendation 13, options 1 & 2)

Before leaving the integrated option, a brief comment on similar approaches in other federal legislation might be useful. The federal-provincial/territorial part or section is not a new or novel idea. It, or something similar in principle, can be found in a number of federal statutes covering a diverse range of subjects including food inspection, extra provincial trucking, crude oil and natural gas pricing, the Northern (Alaska gas) Pipeline, water resource management and wildlife. In some instances, the focus is narrow, in others, it is not. They build on the reality that Canada is a federation.

Perhaps the best example is the recent *Canadian Environmental Protection Act* (CEPA), passed by Parliament last September. The reality of shared jurisdiction is found in a number of its provisions such as the recitals, the duties of the Government of Canada, an agreements section and a section entitled "Agreements respecting equivalent provisions". In the Act, "province" is defined to include a territory. It is worth noting that these provisions are at the beginning of the Act. The CEPA provisions provide a starting point for comparison. It is difficult to see why recognition of shared responsibility and the principles of inter-governmental cooperation cannot be developed in CEAA.

The final paragraph of the federal discussion paper outlines the vision of simplicity, quality and integrity. In order to achieve the vision, among other things, "a renewed commitment to cooperation and coordination within and across all jurisdictions… " is needed (p. 70). That comment certainly applies to the integrated option and the recommendations made by the provinces and territories.

The Provincial/Territorial Option

This option would make no reference to the federal discussion paper. It would consist of two components. The first component is the provincial historical perspective as outlined in the two provincial presentations to the House of Commons Committees in 1990 and 1991 respectively. While the legislation addressed some of the provincial concerns, others were rejected. Among them were equivalency, cooperative scoping, exclusion of projects with minimum federal involvement, and the "need for and alternatives to" provision in section 16 of CEAA. To a considerable extent, the historical concerns focus on jurisdictional matters.

The second component would consist of changes based on the conclusions of the case studies. Here, one would focus on procedural aspects, the "Law List" trigger and scoping. To some extent there is a degree of overlap between issues identified in the case studies and concerns outlined in the federal discussion paper, the difference being in their framing. An obvious example is the issue of scoping.

The Combined Option

The combined option would require reviewing CEAA and the Accord concurrently. Obviously, the two review processes are different, one being pointed to legislative action, and the other to possible revision of an intergovernmental agreement. There is sufficient experience with the agreements negotiated to this point under the Accord that some of the principles contained in the agreements could be reflected in the revised legislation. If CEAA is amended to clearly codify aspects of the Accord and to respond to provincial/territorial recommendations, then there is considerable overlap between the two, at least as far as EA is concerned.

Two of the objectives of the Accord are:

- Using a cooperative approach, to develop and implement consistent environmental measures in all jurisdictions, including policies, standards, objectives, legislation and regulations.

- Preventing overlapping activities and interjurisdictional disputes.

One of the principles governing the Accord is particularly relevant at this point:

- Legislation, regulations, policies and existing agreements should accommodate the implementation of this Accord.

This commitment will be best served following the implementation of changes to CEAA as a result of the CEAA Five Year Review.

Summary

The concerns of the provinces/territories revolve around the following three issues:

I. Jurisdiction
II. Procedure
III. Application of CEAA

The recommendations for change to the provisions and application of CEAA therefore address policy, regulatory and legislative issues, and have evolved from a number of sources. The purpose of the recommendations is to achieve:

- recognition and respect for the constitutional position of provinces and territories as owners and managers of their natural resources with shared jurisdiction for the environment;
- recognition and respect for the expertise and capability that provinces and territories contribute as the lead parties to EA on provincial and territorial lands and as full partners generally in the field of EA;

- capability to accommodate results of broader provincial or territorial planning processes, innovation in technology and decision making, and research and feasibility projects;
- optimum use of scarce public resources in conducting and managing EA through the reduction of duplication and overlap and the introduction of process efficiencies; and
- certainty in the application of the federal law so that provinces and territories can accurately predict federal process expectations and outcomes.

In developing recommendations based on consideration of the policy options discussed above, the following questions and answers were considered.

1) What are the principal provincial/territorial concerns?

The case studies have identified the following subjects as the major concerns. Note that some of these broad classifications can be broken down into more specific components. There may also be some degree of overlap between the various categories. The three principal concerns emanating from the case studies are:

- jurisdiction
- procedural concerns
  - timelines & timeliness
  - duplication
  - lack of coordination within the federal government
- application of CEAA
  - scoping and cumulative effects
  - timing of the "Law List" trigger

The common denominator of these three concerns is that each has led to intergovernmental disputes and, in some instances, court challenges. Thus, a fourth concern needs to be added. That concern is:

- dispute resolution/avoidance
  - early identification of issues
  - legal challenges

2) How are the above concerns likely to be resolved?

The provinces and territories should make every effort to have their policy concerns addressed through amendments to CEAA. This approach provides the most certainty. Some provincial/territorial concerns may be accommodated by changes to CEAA regulations. Since the Accord is also under review, the inter-relationship between the two reviews should not be overlooked. Accordingly, resolution of provincial/territorial concerns could include any or all of the following:

- amendments to CEAA
- amendments to the regulations
- new policy directives
- amendment to the Accord and sub-agreements
- all of the above

3) How should the provinces and territories treat the questions and policy options contained in the federal discussion paper?

Should they venture an opinion on all of them or only on those which fall within their expressed concerns? Should their response be limited to an expression of the provincial/territorial thinking on the options presented in the federal discussion paper?

4) *Alternatively, should the provincial/territorial response combine those issues of concern to them found in the federal discussion paper with other matters of concern that are not specifically raised in the federal discussion paper?*

In considering this question, the recent work on case studies will be of considerable importance. But should historical provincial and territorial views, such as those presented to the House of Commons in 1990 and 1991, also be considered?

5) *What linkage exists or should be established between the CEAA Five Year Review now underway and the required review of the Accord by the Canadian Council of Ministers of the Environment which started on January 2000? Is a consecutive review preferable to a simultaneous review?*

The Way Ahead

Completion of the Recommendations Report and supporting documents is the end of the first phase of this particular endeavour. The next phase is entering into further discussions with the federal government as the legislation is being drafted. The June 5/6 Canadian Council of Ministers of the Environment (CCME) meeting provides an opportunity for feedback on the Recommendations Report from Minister Anderson. It should not be seen as an isolated event. Clearly, drafting is to continue throughout the summer which provides an opportunity for further dialogue and for course corrections. The second phase ends when the legislation is tabled in Parliament some time this fall.

The third phase begins when the legislation is tabled in Parliament. Firstly, the provinces and territories will need to examine the bill to determine the extent to which their concerns have been addressed. They may choose to undertake this assessment collectively or individually. Secondly, regardless of the outcome of this analysis, they will also need to decide whether or not they wish to make a joint submission to the Parliamentary committees which are likely to review the bill. Some provinces and territories may prefer to work on a government to government basis. Others may choose to make their views known collectively to

Parliament. If there is a decision to make a presentation, this submission could be either in support of the bill as drafted or in support of specific amendments to the bill as was done in 1990 and 1991.

In 1990 and 1991, submissions were made by provincial ministers under the aegis of CCME. That was ten years ago. Today, CCME may feel that, as a federal-provincial/territorial organization, it should remain neutral in the public debate over amendments to CEAA. While it may be premature to second guess any outcomes of the June 5/6 CCME meeting, it is not too early to begin consideration of whether, how and by whom the provinces/territories will see the review through to its conclusion.