133

ENVIRONMENTAL ASSESSMENT IN CANADA

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ABSTRACT

The Canadian federal Environmental Assessment and Review Process (EARP) and the Environmental Assessment Act of the province of Ontario represent two very different approaches to evaluating the potential environmental consequences of proposed undertakings. The flexibility of the policy-based federal process has permitted a generally positive and adaptive evolution but has left the process vulnerable to inconsistency and compromise. Ontario's process, defined in law, is more formal and consistently demanding but is considered unwieldy and unnecessarily expensive and suffers from excessive use of exemption provisions.

Despite their differences, both approaches have been criticised for unfairness, unjustifiably limited application and excessive time and cost. Both have also been recently subjected to government reviews focussing chiefly on needs for greater efficiency. The two processes have spurred more effective consideration of project impacts and better overall evaluation of proposals. Further improvements will depend on the two governments' commitment to enhance not just the efficiency but also the effectiveness and fairness of environmental assessment.

1. INTRODUCTION

Environmental assessment is a relatively new process with which governments, industry, and the public are gradually becoming familiar. This paper, written from the perspective of environmentalists who have watched several versions of the process develop, discusses the nature, evolution and effectiveness of environmental assessment as an environmental protection tool in Canada. Two very different approaches to environmental assessment are embodied in the federal government's non-legislated Environmental Assessment and Review Process, and the Ontario Environmental Assessment Act.[1]
These will be described, discussed and, in the final section, compared.

2. THE FEDERAL PROCESS

The Canadian federal government has adopted a policy-based approach to environmental assessment. In response to a December 1973 Cabinet decision, the federal Environmental Assessment and Review Process (EARP) was developed to provide for evaluation of environmentally significant undertakings subject to federal control. The main outlines of the process were approved by Cabinet in April 1974. Minor revisions were made, again by Cabinet directive, in 1977.[2]

Since 1979, the federal Minister of the Environment's statutory duties have included a responsibility

> to ensure that new federal projects, programs and activities are assessed early in the planning process for potential adverse effects on the quality of the natural environment and that a further review is carried out of those projects, programs and activities that are found to have probable significant adverse effects...[3]

This description of the Minister's environmental assessment duties outlines the two main stages of the EARP approach. It does not, however, provide a firm statutory base for the process. The main lines of EARP design, application and implementation continue to be directed by policy and administrative decision rather than by

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[1] For a description of how the environmental assessment process is developing in other provinces, see Couch (1983) and Rennick (1984).
[2] To the delight of its detractors, EARP was approved by Cabinet on April 1 (Fool's Day).
[3] These responsibilities are set out in the Government Organization Act, 1979. See FEARO (1979).

law.

2.1 Application

EARP is officially intended to "ensure that the environmental consequences of all federal projects, programs and activities are assessed before final decisions are made and to incorporate the results of these arrangements into planning, decision-making and implementation" (Couch, 1983, p. 9). All departments and agencies of the federal government are subject to the process, and application extends not only to proposals of these departments and agencies but also to proposals from outside the federal government involving federal funds or federal lands.[4]

Federal regulatory bodies and crown corporations, including some which undertake or support projects of considerable environmental consequence (e.g. CN Rail, Atomic Energy of Canada Limited, and Eldorado Nuclear Limited) are merely "invited" to participate. Actions of federal agencies, including the Canadian International Development Agency and the Export Development Corporation, which may have major environment consequences outside of Canada are presently exempt from EARP. Finally, federal undertakings which are subject to provincial environmental assessment procedures are not considered under EARP if the provincial review efforts are expected to be reasonably adequate.

2.2 Initial Assessment

The first stages of EARP are characterized by heavy reliance on self-assessment and voluntary cooperation by subject departments and agencies in the preliminary evaluation and screening of proposals. These project initiators are expected to act on their own to consider the environmental implications of all new undertakings proposed under their jurisdictions and to identify those which may pose significant environmental threats, including both bio-physical and socio-economic effects, or raise important public concerns. Guidelines for environmental screening have been prepared to assist departments initiating new actions. The Departments of Environment and Fisheries and Oceans have established regional screening and coordinating committees which the initiating departments are encouraged to inform, and seek comment from, potentially interested parties and the general public as part of their preliminary evaluations and screening deliberations.

If, after that screening, doubt remains about the importance of a project's potential consequences, the initiating department

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[4] Federal "lands" include especially the Yukon and Northwest Territories and offshore waters within Canadian jurisdiction.

is required to subject the proposal to a more detailed Initial Environmental Evaluation.

2.3 Formal Review

After screening or initial environmental evaluation, a proposed undertaking, judged by an initiating department to pose potentially significant environmental consequences, must be referred to the Minister of the Environment for formal review. Until this review is completed and a decision on project acceptability is reached by the relevant ministers, the initiating department may not proceed with the project.

The Federal Environmental Assessment Review Office (FEARO), a quasi-independent agency reporting to the Minister of the Environment, arranges for the formal environmental review. For each referred proposal, an Environmental Assessment Panel is appointed. Usually chaired by a FEARO official, the panel may include private citizens as well as persons with relevant knowledge or expertise from federal, provincial or territorial government agencies. Panel members are required to be free of any other involvement or interest in the proposed undertaking and its review.

Terms of reference for each panel are issued by the Minister of the Environment, usually after discussions among officials of FEARO, the initiating department and, perhaps, relevant provincial and territorial authorities. Secretariat services are provided by FEARO but the panels are expected to operate at arms length from FEARO and report directly to the Minister of the Environment.

Each panel prepares project-specific guidelines for the proponent to follow in the preparation of a detailed Environmental Impact Statement (EIS) on the undertaking. These guidelines clarify the general EARP expectation that the EIS will discuss "the project, its location, the need for it and any alternative methods of achieving the project other than the one proposed;...the area's existing environment and current patterns of resource use, social factors such as population characteristics, community lifestyle and the economic base of the area;...potential effects of the proposal on the area's environment,...measures the proponent intends to take to reduce those impacts, (and) impacts that might remain after these mitigating measures have been taken." (FEARO, 1979, p. 6). Draft guidelines may be released for public comment and possible revision before being issued to the proponent.

Preparation of the EIS is the responsibility of the proponent. Upon receipt of the EIS, the panel releases the document and seeks comments from relevant government agencies and from the public concerning the general adequacy of the information provided.

The panel may also employ special advisors on various topics raised by the proposed undertaking. If the EIS is judged to be seriously deficient the proponent may be asked to correct the deficiencies.

When it decides the EIS is acceptable, the panel initiates the public review. After allowing time for examination of the EIS and other submitted information, the panel seeks government and public comment on the validity of the proponent's statements and the desirability of the proposed undertaking. Relevant federal, provincial and territorial departments and agencies may be asked for comments on aspects of the EIS or on other matters (policy, regulatory capacity, program implications, etc.) related to the panel's evaluatory task. Comments from non-government bodies are also encouraged. Public meetings, often including both informal community sessions and more formal technical sessions, are held to provide for more direct presentation and clarification of the positions of the proponent, government agencies and other intervenors.

After evaluating the EIS and the views presented to it orally and in writing, the panel prepares a report with conclusions and recommendations on the environmental acceptability of the proposal. The report may also cover terms and conditions under which the desirability of the undertaking may be ensured or increased. The panel submits these findings to the Minister of the Environment who, along with the minister of the initiating department, decides whether and to what extent to accept the panel's conclusions. EARP panels are advisory only and neither minister is obliged to accept or implement panel recommendations.

EARP proceedings and decisions do not supplant any other regulatory processes and panel advice may be but one factor among many regulatory decisions, policy and planning positions, and other advisory recommendations which influence final decision-making. Some coordination of these overlapping deliberations may be arranged on an ad hoc basis. Co-operative assessment activities may also be arranged between federal and provincial authorities where undertakings fall under the jurisdiction of both levels of government.

By July 1984, 20 formal reviews had been completed and 10 reviews were in progress. A number of other proposals were at the formal review stage but listed as "dormant".[5]

2.4 Implementation

EARP was adopted as a flexible instrument which would avoid

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[5] For a somewhat dated listing, see FEARO (1983a).

the perceived problems of a more rigid legal approach usually associated with the assessment requirements in the United States' National Environmental Policy Act, 1969. EARP was also designed to rely on and encourage voluntary acceptance of environmental assessment practices by project proponents. Not surprisingly, progress toward full implementation of EARP in accord with the official policy directives has proved to be gradual and incomplete. Lacking a specific statutory base and adequately firm policy commitments, the process has been vulnerable to inconsistent and compromised application due to case specific political and economic pressures and generally conflicting demands from proponents, public interest intervenors and scientists (among others).[6]

There have been notable improvements in EARP administration and implementation since its introduction in 1974. Most if not all initiating departments have by now designed and adopted screening guidelines and procedures of some kind and have made some attempts to apply them.

There have also been some promising ad hoc attempts to create review mechanisms capable of both competent and comprehensive preliminary evaluations (Rees, 1980). For the small fraction of project proposals eventually referred to FEARO for formal assessment, the quality of review has been improved by steps to increase the independence of panels,[7] the fairness of hearing procedures, and the possibility of effective participation by public interest intervenors. There has been increased willingness in at least some cases to give serious attention to socio-economic factors including local attitudes, and to question overall project desirability.[8] There has also been sporadic recognition of the need for a developed context of regional plans and policies to guide evaluation of proposed projects and their potential effects.[9]

Education of proponents through experience with self-directed

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[6] Proponents have demanded more speed, earlier approvals and less cost. Public intervenors have demanded more breadth, consistency and fairness. Scientists have demanded more competent and relevant research and documentation.

[7] As a matter of policy, early panels were comprised solely of federal civil servants and each panel included a representative of the initiating department.

[8] Panels recommended against two uranium refining proposals (for Warman, Saskatchewan, in 1980,and for Port Granby, Ontario, in 1978) citing negative socio-economic consequences.

[9] This conclusion, clearly stated by the panel reporting on the proposal for hydrocarbon exploratory drilling in Lancaster Sound in February 1979, was neglected by most subsequent panels.

assessment was one of the design goals of the flexible and largely voluntary federal process, and some of EARP's progress to date reflects gradual recognition that early consideration of environmental factors is worthwhile. At the same time EARP has been the subject of strong and repeated criticisms not only from proponents but also from public interest intervenors (Rees, 1979), government advisory bodies (CEAC, 1979), and independent students of the process (Emond, 1978).[10] Many of the evolutionary improvements to EARP can be seen as responses to these criticisms.

2.5 Deficiencies

Despite improvements in the process and its implementation, serious and evident deficiencies have remained. In 1982 the federal Cabinet ordered a re-evaluation of EARP and its implementation. Thus far, an "independent formal evaluation of the operation of the process within government" and a discussion paper presenting the rationale and options for improvements to EARP have been prepared (FEARO, 1983b).[11]

The authors of the discussion paper note that, while EARP has been an internationally attractive model for a flexible approach to environmental assessment,

> The deficiencies of the present system...cover a number of fronts and collectively have brought the efficiency and credibility of EARP into question both within and outside the federal government.[12]

The discussion paper identifies and describes major deficiencies in the conduct of initial assessments (ad hoc and inconsistent screening systems, limited application of the systems that do exist, "little, if any, provision for public involvement", a general lack of coherence and accountability, and failure to consider the cumulative effects of projects); in the design and

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[10] The deficiencies of EARP at the formal assessment stage were brought into especially sharp relief by the comparatively exemplary approach adopted, despite limiting terms of reference, by Mr. Justice Thomas R. Berger in his Mackenzie Valley Pipeline Inquiry. See D.J. Gamble, "The Berger Inquiry: An Impact Assessment Process" Science Vol. 199, March 1978, pp. 946-952.

[11] This document was officially marked "Restricted" and at least at the time of preparation was intended for interdepartmental review only. It has snce been "leaked" and reported upon in the public press. It has also circulated widely among environmental public interest organizations and other interested parties and is now clearly a public document.

[12] This and subsequent quotes are drawn directly from the FEARO discussion paper noted above.

conduct of formal reviews (unfair and inconsistent procedures, timidity on larger need and alternative issues, uncertainties about the scope of deliberations and about relations with other decision-making processes); in the implementation of assessment recommendations (no procedures for monitoring and follow-up, no provisions for public information about the effects of assessment efforts, no assurance that the efforts had practical effect); concerning application of the process (reliance on voluntary compliance by crown corporations and certain other federal bodies responsible for environmentally significant undertakings, duplication of environmental reviews due to overlapping regulatory and advisory hearings); and concerning FEARO itself (responsibilities and expectations to meet without proper authority and resources).

The discussion paper does not cover all the deficiencies that have been identified by critics of EARP. It fails, for example, to note the extent to which assessment and formal reviews have been rushed and compromised to meet proponent deadlines. Nor does it have much to say about the prevalent doubts concerning the scientific quality, ecological relevance and evaluatory value of EIS research and documentation, especially when adequate baseline data, assessment of systemic impacts, and commitment to specific mitigative measures, are not provided.[13] Nevertheless, the discussion paper provides a reasonably complete overview of the main problems of EARP.

2.6 Reform Proposals

The proposals for improvements to EARP set out in the discussion paper are similarly comprehensive of the reforms advocated by EARP critics. While the authors of the paper are careful to present options rather than firm recommendations, and while retention of current approaches is consistently listed as an option, the needs for significant change are clearly stated.

The main direction of the reforms favoured can be summarized as follows:

1. To provide for coherence and rigour at the initial assessment stage, a reorganization of the system is necessary. Consistent screening guidelines and procedures should be designed and applied. Steps to require provision of public information about, and opportunities for involvement in, screening activities are also needed. Formal moves to promote co-operative intergovernmental project screening are warranted. And an interdepartmental committee is required to

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[13] FEARO has apparently chosen to address these EIS issues separately.

respond to public or government department requests for review of screening decisions.

2. Fairness and clarity of purpose in formal reviews should be ensured. Alternative roles of EARP should be defined allowing for (i) broad scope class or regional assessment of very large or multiple undertakings, with special provisions for coping where appropriate with the absence or inadequacy of relevant policy or planning contexts; (ii) conventional project-specific assessments, perhaps divided into issue identification and detailed consideration stages; and (iii) special "fast track" assessments in cases where previous deliberations or clear Cabinet determination of urgency have removed the issue of project "need. In addition, intervenor funding should be provided for all reviews according to established criteria with funds coming from FEARO, the federal Treasury Board, the initiating department or the proponent.

3. Post assessment implementation needs to be ensured through establishment of systematic monitoring and follow-up procedures, which might include new statutory provisions for translating assessment recommendations into enforceable terms and conditions in permits for approved projects.

4. Compliance with EARP should be made effectively mandatory for all federal proponents of environmentally significant undertakings. Policy changes and cooperative interagency efforts are also needed to rationalize regulatory and advisory review proceedings and avoid duplication of effort.

2.7 Implementation Alternatives

The authors of the discussion paper identify two major approaches to implementation of these changes. The first is a policy centred rationalization effort involving more authority for FEARO, clearer definition of (and commitment to) procedures at all stages, and expansion of mandatory EARP requirements. Statutory changes and initiatives might be required for some purposes but much of the administrative flexibility of the process would be maintained.

The second approach is to establish a firm statutory base for EARP through detailed legislation. While less adaptable and perhaps more costly, this legislative approach would leave EARP less vulnerable to short sighted political and economic pressures and erratic commitments to environmental stewardship.

It is perhaps most likely that if Cabinet can be persuaded to act at all, it will favour steps to provide a statutory base for EARP without seriously compromising administrative options to adjust the process and its implementation.

2.8 Evaluation of Implementation Alternatives

Because EARP is intended to be applied to a variety of undertakings in very different circumstances, some room for administrative adjustments is necessary. Moreover, EARP has evolved, generally for the better, in its first near decade and retention of considerable flexibility may be defensible on the grounds that EARP and environmental assessment may need to evolve further in recognition of new problems and demands.

At the same time, there are plenty of historical bases for suspicions that maintaining options to adjust process and implementation will often in practice mean maintaining options to limit, distort, avoid and otherwise compromise proper assessment. Particularly now that EARP, despite its weaknesses, has demonstrated some ability to influence the nature and acceptance of projects, powerful contradictory demands for "adjustments" are being felt. Public intervenor calls for a deeper, broader and stronger EARP are countered by proponent pressures and for more constrained proceedings and early approvals. In this context, continued reliance on ad hoc responsiveness has resulted, and is likely to continue to result, in a variety of more or less unsuccessful case specific attempts at compromise.[14] A flexible EARP may thus evolve toward greater incoherence and inconsistency rather than toward more effective environmental assessment.

It does not follow, however, that efforts to define EARP clearly in statutory requirements will serve much better. The same conflicting pressures will be present when the legislation is being drafted and debated. If the legislative approach is pursued,[15] supporters of greater environmental stewardship through

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[14] This is clearly demonstrated in the establishment and current proceedings of the Beaufort Sea Environmental Assessment Panel which faced a vaguely defined set of options for producing and transporting hydrocarbons from the western arctic to southern markets. The Panel was assigned to carry out a "preliminary design stage" review but given no assurances (and little reason to anticipate) that a comprehensive public review would be held at the detailed design stage. The Panel was also, in effect, given a multi-region planning task, but not provided the resources or authority to carry it out. In the end the Panel chose to carry out a fairly conventional EARP formal review and to pronounce upon the environmental and socio-economic acceptability of the options before it despite the preliminary nature of the proposals. See FEARO (1984).

[15] This is likely. What is less clear is the extent to which even the initial proposals from FEARO And the Minister of the Environment will advocate enshrining EARP details in the legislation.

assessment will have to fight tendencies toward compromises that will lead to a more firmly established but effectively emasculated process.

A second continuing problem area is that of relations between EARP and its larger context of project evaluation, planning and policy-making. These relations are of crucial importance to both the deliberations of screening and review panels and the implementation of assessment recommendations. Changes are required to ensure a proper place for EARP within a coherent overall approach to project evaluation (which has yet to be established) and to provide for such evaluation a well developed base of open public planning and policy making (which does not exist yet either). EARP centred legislative and policy reforms cannot be expected to accomplish this.

2.9 Conclusions: the federal process

Certainly many of the changes to EARP proposed in the FEARO discussion paper would serve the interests of both proponents and the environment. There are, nonetheless, crucial points of divergence. The fate of EARP will turn, therefore, on the results of political struggles of the kind that have in the past led to inconsistent and incompatible compromises.

From an environmental perspective, environmental assessment at the federal level in Canada would be significantly improved by the limited initiatives set out in the FEARO discussion paper. It is however, reasonable to anticipate countervailing pressures to undermine EARP through, for example, authorization of preliminary stage assessments considering applications for "approvals in principle".

Finally, EARP cannot be addressed properly as an isolated process. Improvement of environmental assessment also requires parallel improvements in related policy making and planning practices so that a strengthened EARP can be implemented in a reasonably coherent and benign decision-making environment.

3. THE ONTARIO ENVIRONMENTAL ASSESSMENT PROCESS

The Environmental Assessment Act arose out of a "Green Paper" on environmental assessment prepared by the Ontario Ministry of the Environment, and responses to it, including detailed proposals by the Canadian Environmental Law Association (CELA) in October, 1973 (CELA, 1973). Recommendations made by CELA can be summarized as follows:

1) Legislation must require social and environmental assessment studies and cost-benefit analyses prior to project development approval for projects likely to have significant environmental impact.

2) An independent environmental review board should be established as a prerequisite to proving public confidence in the new procedures.

3) Any person should be able to require the Board to consider whether a proposed project should undergo assessment and whether an assessment document adequately explains expected environmental effects.

4) Public access to all information about proposed projects must be guaranteed.

5) A firm timetable must be established for implementation of the legislation in both the public and private sectors.

6) Public and private funds should be available to objectors acting in the public interest.

Procedural minimums were also expressed, including requirements that the document contain all feasible alternatives (including the null option), that the proponent prepare and pay for its assessment, that the Board should coordinate preparation and review of the document and that early notice of the proposed project must reach all those interested and likely to be affected (CELA, 1973, p. 5).

Aside from the failure of the Ontario government to apply the Act to the private sector, to provide funds to objectors acting in the public interest, and to give the Board jurisdiction to coordinate preparation of the assessment and review, basic tenets of the proposal were included in legislation passed in 1975 (Ontario, 1975). However, its implementation has created problems which will be discussed later in this paper. One of the major battles before passage of the Act involved the question of whether all projects should be subject to the Act unless exempted, or whether only those projects designated by the government would be required to meet the Act's specification. After extensive lobbying and debate, the legislation was passed on the former basis.

3.1 Application

The Environmental Assessment Act for Ontario was passed in 1975 but proclaimed into force in 1976. The purpose of the Act, stated in section 2, is

> ...the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment.

In the Act (s.1 (c)), "environment" is given a wide

definition, including, in addition to the natural environment, "the social, economic and cultural conditions that influence the life of man or a community" and "any building, structure, machine or other device or thing made by man".

An environmental assessment (EA) is required where there is an undertaking for which approval is sought. An undertaking includes an enterprise, activity, proposal, plan or program (s.1(0)). However, not all undertakings are required to be assessed under the Act. The first proponents made subject to the Act were provincial ministries and agencies. Municipalities became subject in 1980,[16] and the private sector has yet to be included, except by designation.[17]

The number of exemptions processed by the government has caused public concern and criticism from the Act's inception. Originally, many projects were "grandfathered in". They were allowed to be completed because they had been planned or begun before the Act came into force. There was also a large number of projects considered too minor to require assessment. Large projects have since been exempted from the Act on the basis that the exemptions were in the public interest.[18]

3.2 Assessment Requirements

The Act (s.5) requires a proponent to submit an environmental assessment document. In addition to describing the predicted impacts and mitigative measures, the document must describe alternatives to the undertaking and alternative methods of carrying out the undertaking, along with their predicted impacts. It is this feature that sets the Environmental Assessment Act apart from other environmental statutes in Ontario such as the Environmental Protection Act and the Ontario Water Resources Act.

3.3 Administration

The Minister of the Environment, through the Environmental Assessment Branch, administers the Act. To date, planners within the Ministry have received environmental assessment documents, passed them to interested ministries and agencies for their

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[16] See Revised Regulations of Ontario 293/1980 as amended by Ontario Regulation (O. Reg.) 383/81, O. Reg. 841/81, O. Reg. 140/82, O. Reg. 462/82 and O. Reg 775/82 (the "Consolidated Municipal Regulations").

[17] According to Rennick (1984, p. 14), only 4 private undertakings have been designated.

[18] Examples include the Darlington nuclear generating station and the proposed South Cayuga waste management facilities.

comments, and prepared what is known as the "Review".[19]

During the recent Ontario Hydro Plan stage hearings, the Joint Board composed of members of both the Environmental Assessment Board (EAB) and the Ontario Municipal Board (OMB), suggested that the Review Coordinator should not draw conclusions about whether or not an environmental assessment document fulfills the requirements of the Act, or whether the undertaking should be approved. This responsibility, it said, rests with the tribunal or, where a public hearing is not required, with the Minister. The Review Coordinator may, however, prepare conclusions and recommendations for the approval and final decision of the Minister (Joint Board, 1982).

If this advice is followed, MOE expertise will be largely wasted. The EA branch staff are the only government officials who look at all aspects of the undertaking. The reviewing Ministries have specific, relatively narrow perspectives. Also, conclusions which would inevitably be drawn by Ministry staff will not be part of the public process. This is an inherent danger when those conclusions may be part of the Minister's final decision (Shrybman, 1982).

Two major decisions are required under the Act:

(1) whether the EA is acceptable,

(2) whether the undertaking should be approved.

Even when the Minister has accepted the environmental assessment document, the Environmental Assessment Board can, at a hearing, re-evaluate the question of the document's acceptability. After that initial question is determined, the Board will decide whether or not to approve the project. If the document is deficient, the Board may send it back for amendment rather than rejecting the proposal entirely.[20]

3.4 Hearings

The proponent or any member of the public can seek a hearing which the Minister must provide unless the request is frivolous or vexatious, or the hearing is unnecessary or may cause undue delay. The hearing provided by the legislation is to be held by the Environmental Assessment Board. However, since the passage of the

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[19] The coordinator's role arises out of s.7 (i) of the Act which provides that the Minister, after submission of an environmental assessment, shall cause a review of the environmental assessment to be prepared.

[20] This process is set out in s.12 (2) of the Act.

Consolidated Hearings Act in 1981, hearings may be held jointly by Ontario Municipal Board and EAB members where more than one hearing is required or may be required (Ontario, 1981).

Parties to a hearing include the proponent, any person other than the Minister who required the hearing, and any other persons whom the Board specifies.

3.5 Compliance

The Act (s.39) provides a general offence provision which states that where the Act, regulations, or any condition or term of approval is breached, an offence has been committed which is subject to a fine. Although this provision has been used successfully by a private complainant against the Minister of Transportation and Communications for proceeding with a roads project before approval under the Act was given,[21] and private prosecutions have proven extremely useful when breaches of legislation are committeed by government agencies, the Minister's powers under section 28 provide more potential for the avoidance of environmental damage. Under that provision, the Minister may apply to the Divisional Court for an order enjoining any act to proceed with an undertaking, or invalidating an approval given under another authority, before the required permission under the Act is given. However, this provision has not, to the authors' knowledge, been used.

3.6 Exemptions

The Minister may, with the approval of the Lieutenant Governor in Council, exempt an undertaking or proponent from the requirements of the Act or the regulations. The test prescribed in the Act (s. 29) is that the Minister be of the opinion

> that the exemption is in the public interest having regard to the purpose of this Act and weighing the same against the injury, damage or interference that might be caused to any person or property by the application of this Act to any undertaking.

Criticism has often been levelled at the use of the exemption provision. As of June, 1983, 267 exemptions had been granted. Many of these were minor, but the number and significance of exemptions has caused the Act to be dubbed "the Environmental Exemption Act".[22] Exemptions have also been given in order to

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[21] The case, Regina v. James Snow and Harold Gilbert (1982), is described in the Canadian Environmental Law Reports 11 (15).
[22] A relatively recent editorial to that effect was published in the Kitchener-Waterloo Record, August 2, 1983.

foreclose action against breaches of the Act by government departments, and to legitimize projects which had been improperly commenced.[23]

Because of the large number and questionable use of exemptions, environmental groups such as CELA and the Federation of Ontario Naturalists lobbied for a committee to review exemption requests. Finally, in July 1983, the Environmental Assessment Advisory Committee was established. It is to review exemption and designation requests. However, its mandate is limited. It merely responds to requests by the Minister for comments, rather than determining on its own volition which matters require its input. The Committee is a hopeful step in that it seeks public comment in at least some of the instances where its advice is sought (Ontario, 1983).

3.7 Concept Assessments

"Concept" or "Plan Stage" assessment has been allowed by the Ministry of the Environment as it appears to offer a staged resolution of issues. Usually, it involves an "approval in principle" at an early planning stage and a later, more detailed assessment. It does introduce problems, however. Ontario Hydro received approval for both its Southeastern and Southwestern transmission systems at the Plan Stage (Joint Board 1982a; 1982b).[24] Further hearings are required before the actual routes are chosen and the line built but a major planning decision is being made before sufficient detail is known about the end product.

There are several problems with concept assessments from the perspective of public interest groups and intervenors. These, discussed below, will require solution before the process is considered acceptable.

(i) Lack of Immediacy, Substance and Detail

Despite notice requirements and attempts to receive public

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[23] In the Snow case, see note 22 above, the construction of a highway in Southern Ontario was exempted after it became evident that the Act had been breached by the hasty commencement of construction. The Detour Lake Road, constructed for access to a gold-mining property in Northern Ontario, was also exempted after construction had begun.

[24] The Southwestern Plan Stage undertaking approval was overturned by the Divisional Court because of inadequate notice to those who would be affected by the Joint Board's chosen corridor. See Central Ontario Coalition, et. al. v. Ontario Hydro et. al. Unreported, Ontario Divisional Court, June 25, 1984.

input from residents of broad geographic areas or sectors to be affected, participation has not been as broad and involved as it should be. For example, at the Plan Stage for Ontario Hydro's Southwestern transmission corridor, potential parties did not receive and/or accept notice because their definition of what comprised Southwestern Ontario did not coincide with Hydro's definition. Thus, when the Route Stage notices were given, a new group of persons found they were affected but had had no opportunity to participate in the first process because they did not realize they were involved. The rulings of the Joint Board under the Consolidated Hearings Act allowed for reconsideration of issues determined at the Plan Stage, or at least a cumulative decision, because of the recognition that its decision at this stage should not preclude any opportunity to take advantage of better alternatives which might be discovered at a later date. The Joint Board stated that in its decision at any phase of the hearing it would consider all evidence which had been previously introduced, and might find it necessary to modify, alter or revoke conclusions which were reached at an earlier phase of the hearing.

The Board, dealing with one of the first EA hearings under the Consolidated Hearings Act, was keeping its options open. This will perhaps mitigate, to some extent, the problems created by the lack of an education program which would promote greater and more effective public involvement at the concept stage of the assessment.

It is possible that Hydro could have completed its analysis in a way which would have made public involvement more worthwhile. For example, if they had assessed several but chosen two preferred corridors within the western part of the province and then assessed several routes within each corridor, choosing one or two, the issues to be determined would have been clearer to interested members of the public, Hydro's assessment would arguably have been comparable financially, and a more streamlined decision-making process would have resulted.

Instead, the complexity of the process, the remoteness of the Plan Stage assessment from everyday life, the lack of public knowledge about when intervenors should become involved, and the public's lack of trust in the government and Hydro has, it appears, created a bad precedent for environmental assessment in Ontario.

(ii) Funding

The disparity in resources of the various parties to the process has become evident in fact as well as prediction. Proponents in the Ontario Hydro cases, for example, have legions of people preparing and presenting their position, while opponents and intervenors are working with scarce and insufficient resources which might almost be adequate when dealing with a later, more

specific stage of a proposal, but generally cannot hope to compete on the large-scale issues such as the need for the particular project. The common attempt by proponents to establish that citizens are interested only when a project will be in their "back-yards" is aided by the inability of groups to marshall adequate resources before the battle becomes limited to a specific geographic area. Under the Consolidated Hearings Act (s. 7(4)), the Joint Board has the power to award costs to groups participating in hearings before them, and has exercised the prerogative even when the proponent "wins". This does not, however, assist groups which need to be sure of funding before the hearing is over.

3.8 Class Environmental Assessments

Although class environmental assessments are not specifically described in the EA Act, the Lieutenant Governor in Council has been given the power to define, by regulation, enterprises or activities as classes of major commercial or business enterprises or activities. It can then designate these classes or a class of proposals, plans or programs with respect to them. Exemptions of classes of persons or undertakings, or designations, notwithstanding exemptions under the class, are also included.[25]

The class environmental assessment concept arose out of the idea that projects judged to have minor impacts, which were likely to produce an administrative burden, should be assessed as a group. If specific projects under the class warranted an individual assessment, they could be "bumped-up" to an individual assessment. Provincial and municipal roads projects are the major groups for which Class EAs have been approved. The Ministry of Natural Resources, however, has produced a Class EA for solid waste disposal in unorganized territories; a Forest Management Class EA is now in the pre-submission consultation stage; and the Ministry of the Environment, in what they describe as their "Blueprint for Waste Management" has suggested that a Class EA might be appropriate for small landfills in southern Ontario. The trend to Class EAs for these significant undertakings has arosed serious concerns among public interest environmental and conservation groups.

The Forest Management Class EA is a good example of the problems arising out of the concept of class assessments. Forest management, which is carried out by the Ministry of Natural Resources (MNR) under the Crown Timber Act, is considered as a class of activities despite its environmental significance. MNR enters into management plans (20 yr. plans), operating plans (5 year plans) and annual plans. The apparent benefit of using the

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[25] See s.40 (b) (d) (e) and (f) of the Act.

EA Act is that public input will be allowed into that planning process as part of the EA Act requirements. However, the first and most important step in the process, that of allocating land uses, has been determined without environmental assessment under a land-use planning process which provided for some public input, but did not provide for public hearings at which an arms-length adjudication could be made. This has resulted in a very limited type of decision-making for the Class EA, focussing only on provision for sustained yield timber production. This limited scope is further complicated by the fact that the EA document is largely process oriented, providing for public input into decision-making under the Crown Timber Act, rather than detail-oriented in terms of actual forest management. A further step after the EA, the provision of detailed manuals, will not be part of the assessment either.

It is predicted that Class EAs will continue to be problematic insofar as the government continues its attempts to deal with major undertakings rather than minor ones.

3.9 Cabinet Approvals

Under the EA Act (s. 23) the Minister, with the agreement of Cabinet or designated Ministers, may vary the whole on any part of the Environmental Assessment Board's decision, substitute his own decision, or require the Board to hold a new hearing. Also, under the Consolidated Hearings Act (s.13), the Cabinet may confirm, vary or rescind the decision or part of a decision of the Joint Board, substitute its decision or require a new hearing.

The involvement of Cabinet in the process after the Environmental Assessment Board or the Joint Board has made a decision is a standard part of the administrative decision-making process in Ontario. However, the recent over-turning of the Joint Board's rejection of the County of Oxford's application for approvals of a landfill site has caused a loss of faith in the decision-making process. The Cabinet decision came after an extensive and technical public hearing which lasted 59 days.

Citizens' groups and municipalities may consider their involvement in the process worthless and refuse to participate if this over-riding power of the cabinet continues to exist and to be used in this way.

3.10 Conclusions: The Ontario Process

The Environmental Assessment Act process in Ontario is still subject to growing pains. Despite 8 years of operation, many important and controversial projects have been either exempted or have just recently reached a stage of the process where public input is allowed.

The future of environmental assessment as seen by provincial government administrators involves streamlining mechanisms including screening of projects which will be subject to the EA Act, focusing a more concise EA document on key issues, building in more effective public consultation early in the process and reducing the time spent on the review and approval process (Rennick, 1984, pp. 19-20). These are all aimed at increasing efficiency while decreasing costs.

These same administrators recognize the need to build monitoring requirements into environmental assessment, to better assess social and economic factors, to better understand cumulative impacts, and to gradually subject major private sector proponents to the Act's requirements. These will provide some progress toward the better application and implementation of the Act.

4. COMPARISON OF THE FEDERAL AND ONTARIO ENVIRONMENTAL ASSESSMENT PROCESSES

The federal Environmental Assessment and Review Process and the Ontario approach under the Environmental Assessment Act are different in many aspects. The federal EARP, lacking a firm legislative basis, is relatively flexible and has evolved generally toward greater effectiveness from a weak beginning. But its application and credibility have been seriously undermined by inconsistencies and compromises allowed, if not encouraged, by the ad hoc nature of the process. In contrast the Ontario process, based from its inception in exemplary though not flawless legislation, is considered unwieldly and unnecessarily expensive, and suffers from excessive use of exemption provisions. Both approaches allow proponents considerable discretion at the early stages of project development and assessment, but the Ontario process as a whole is more clearly defined. Unlike the federal process, it has specified notice and approval requirements at each major step in the decision-making. The Ontario approach is also more formal, especially at the hearing stage where most parties are represented by counsel. EARP panels impose some rigour on proponents of projects that reach the formal hearing stage. For example, most panels issue project specific guidelines for the proponent to follow in the preparation of an environmental impact statement. But at hearings the panels seek informality and despite the inherently adversarial nature of the proceedings, they discourage cross-examination and representation by counsel.

Despite their differences, both approaches have been criticized by various parties for unfairness, unjustifiably limited application, and excessive time and cost. The unfairness results in part from the universal inadequacy and general absence of provisions for funding public interest participants, but public groups have also often felt unduly constrained by decisions concerning the legitimate scope and focus of assessment

proceedings. Limited application is in the federal sphere due to failure to designate certain activities, and in the provincial sphere due to the granting of exemptions, but in both cases projects of considerable environmental consequence have escaped assessment.

The two approaches are currently under re-examination by the respective governments. Given the extent and nature of the differences, it is not surprising that the federal and Ontario processes are being subjected to pressures that could make them more similar. The federal government is considering a firmer legislative basis for EARP and the Ontario government is considering reforms that would address some of the complexities and inflexibilities of the provincial scheme.

In both cases, the most pervasive government priority seems to be achieving greater efficiency through streamlining. Ontario has already developed "class assessments" to serve this purpose and both governments are now experimenting with plan or concept stage assessments to give proponents early, though perhaps somewhat qualified, approvals. These may not be wholly negative developments, but as noted above, they do pose problems that threaten the effectiveness and fairness of environmental assessment proceedings.

A second common area of government concern is inadequate post-assessment monitoring and enforcement. Both governments have expressed determination to improve follow-up not only to ensure compliance with conditions of project approval but also to gain a basis for judging the accuracy of impact prediction.

There is no doubt that the workings of the federal and Ontario systems have spurred more effective assessment of potential environmental impacts and better overall evaluation of project suitability for approval. If current government efforts to improve the efficiency of assessment processes are properly integrated with efforts to increase effectiveness and fairness as well, continued improvements can be expected. What is needed, however, is a strong indication of renewed commitment at both levels of government.

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