
**THE FEDERAL
ENVIRONMENTAL
ASSESSMENT PROCESS**
A Guide and Critique

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The Federal Environmental Assessment Process: A Guide and Critique

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April 2008

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USA	LexisNexis, DAYTON, Ohio

Library and Archives Canada Cataloguing in Publication

Doelle, Meinhard. 1964-

The federal environmental assessment process / Meinhard Doelle.

Includes bibliographical references and index.

ISBN 978-0-433-45461-8

1. Canada. Canadian Environmental Assessment Act.
 2. Environmental impact analysis—Law and legislation—Canada.
- I. Title.

KE5110.D64 2008

344.7104'6

C2008-901778-1

Printed in Canada

- What is constitutionally appropriate?
- What is practically appropriate?

The first question would generally suggest broad scoping to ensure the implications of the section 5 decision on sustainable development are fully considered. The second question suggests a sufficient scope to identify all potential adverse environmental effects as defined in the Act to consider their likelihood in relation to the project. The third question would take the broad scope mandated under the first two questions and refine it according to the constitutional boundaries within which the federal government operates. The last question would invite consideration of whether there are practical reasons to further refine or limit the scope. Issues such as the cost and time involved, as well as cooperation with other jurisdictions would be considered here.

In the end, it is the specific provisions of the Act dealing with scoping that are critical in understanding how scope determinations are made. The context offered through the preamble and purpose section becomes relevant particularly in the context of the exercise of discretion granted to decision-makers with respect to scope under the Act. In other words, one might expect that discretion on scoping would be exercised in light of the purposes of the Act and the constitutional boundaries within which the federal government operates. In the following sections, the specific scoping provisions under CEAA, case law interpreting them, as well as efforts by the Canadian Environmental Assessment Agency to offer guidance and direction on the scoping process are considered.

1. Scoping Basics

As set out in the introduction, the scope of an assessment under CEAA can be broadly separated into two components: the scope of the project to be assessed and the scope of the assessment of the project. The scope of the project is about the links between the project as proposed by the proponent, CEAA's definition of project, the triggering process, and section 15. Essentially, the decision to be made in scoping a project is whether the scope of the project to be assessed is as proposed by the proponent, limited to the undertaking or physical activity that triggered the Act, or whether there are other undertakings, activities or physical works that should be included.

It is important to distinguish what physical work or *Inclusion List* physical activity triggered CEAA from what is the scope of the project for the purposes of environmental assessment. The triggering process takes a minimalist approach. The focus is on what is required for the Act to apply. It generally only requires an undertaking in relation to a physical work, or

any activity on the inclusion list that involves a section 5 decision by a federal authority to trigger the Act. The role of the scope of project determination is to make the transition from identifying an undertaking or physical activity sufficient to trigger an assessment to determining how the project should be defined for assessment purposes. Other than the undertaking or physical activity that triggered the assessment, what should be included as part of the project to be assessed?

The key provision for this transition is section 15. It deals with three aspects of the scope of the project to be assessed. Subsection 15(1) assigns responsibility for making the scoping determination. The responsibility to determine the appropriate scope of a project rests with the responsible authority for screenings and comprehensive studies and with the Minister of the Environment for assessments carried out by way of panel review or mediation. Subsection 15(2) grants discretion to the decision-maker to combine projects that are closely related so that they can be considered as one project for purposes of the assessment. Subsection 15(3) sets a minimum standard for the scope of projects that are related to a physical work.

It is the third subsection that has proven most critical and most controversial in the scoping process. It provides that in the case of an undertaking in relation to a physical work, the scope of the project to be assessed shall include all other undertakings in relation to that physical work that are likely to be carried out. The language in subsection 15(3) closely mirrors that of the definition of project. In particular, it specifically lists the same undertakings included in the definition, namely "construction, operation, modification, decommissioning, abandonment or other undertaking".

A number of critical issues arise out of the provisions of section 15. The general issue is about the degree and nature of the discretion granted in this section for the minister or responsible authority to determine the scope of the project. This relates to the relationship between subsections 15(1) and (3). A more specific issue is the relationship required between the undertakings and the physical work in subsection 15(3). There is also some question around the scope of the physical work as distinct from the undertakings to be considered.⁶⁶ A number of these issues have been the

⁶⁶ A practical question is to what extent the scoping process is driven by the undertaking or activity that triggered the process, and to what extent it is driven by what the proponent is proposing. In other words, what should the starting point be? Should we start with what the proponent is proposing to do as the scope of project and add or subtract when appropriate, or should we start with the undertaking or activity that triggered the assessment and add to it as appropriate?