THE FEDERAL ENVIRONMENTAL ASSESSMENT PROCESS

A Guide and Critique

Meinhard Doelle

LexisNexis®

The Federal Environmental Assessment Process: A Guide and Critique

April 2008

Members of the LexisNexis Group worldwide

Canada	LexisNexis Canada Inc, 123 Commerce Valley Dr. E. Suite 700, MARKHAM, Ontario
Australia	Butterworths, a Division of Reed International Books Australia Pty Ltd, CHATSWOOD, New South Wales
Austria	ARD Betriebsdienst and Verlag Orac, VIENNA
Czech Republic	Orac, sro, PRAGUE
France	Éditions du Juris-Classeur SA, PARIS
Hong Kong	Butterworths Asia (Hong Kong), HONG KONG
Hungary	Hvg Orac, BUDAPEST
India	Butterworths India, NEW DELHI
Ireland	Butterworths (Ireland) Ltd, DUBLIN
Italy	Giuffré, MILAN
Malaysia	Malayan Law Journal Sdn Bhd, KUALA LUMPUR
New Zealand	Butterworths of New Zealand, WELLINGTON
Poland	Wydawnictwa Prawnicze PWN, WARSAW
Singapore	Butterworths Asia, SINGAPORE
South Africa	Butterworth Publishers (Pty) Ltd, DURBAN
Switzerland	Stämpfli Verlag AG, BERNE
United Kingdom	Butterworths Tolley, a Division of Reed Elsevier (UK), LONDON, WC2A
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

An issue considered further in the next chapter is the role of the public in scoping. Public involvement in the scoping process will vary from project to project. Minimum requirements vary greatly depending on whether the EA is carried out by way of a screening, comprehensive study, panel review or mediation. There is also an important link between scope and effective public participation in the substance of the EA process. If the scope is narrowed to issues of a technical and scientific nature, this will in many cases exclude effective participation of members of the public. If the scope is broadened to include issues that embrace the consideration of values, community and traditional knowledge, members of the public are much more likely to be able to play a constructive role in the EA process.

Within the context of the narrower scope, where the focus is on the likely significant test, there are still unresolved questions about the ability of decision-makers to limit the scope. A reasonable approach would be that the scoping process should not eliminate any likely significant effects of the project from consideration.[117] Case law so far has focused on establishing the basic principle that federal decision-makers have broad discretion to determine the scope of the project and the scope of assessment. Courts have yet to turn their attention to a more sophisticated analysis of the boundaries of that discretion.[118]

L. FINAL EA TESTS AND PROJECT DECISIONS

One of the critical issues in any environmental assessment is how the information gathered will affect the decisions made at its conclusion. It is critical for the final decision-maker to understand how to make appropriate use of the results of the EA. It is also important for those responsible for the EA process to have a good appreciation of how the results are to be used by the final decision-maker and to communicate the results in a way that ensures their effective use. This is particularly the case for comprehensive studies, mediation and panel reviews, all of which involve some separation in responsibilities between process and final project decision. Even for screenings, however, there is no guarantee that

---

[117] For useful fact scenarios to test this approach, see *Manitoba's Future Forest Alliance v. Canada (Minister of the Environment)*, [1999] F.C.J. No. 903 (F.C.T.D.); and *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [1999] F.C.J. No. 1515 (F.C.A.).

[118] The recent decision of the Federal Court involving the Red Chris mining project is perhaps the first indication that the courts may be ready to tackle this issue. The case certainly invites courts in future cases to carefully consider both minimum and maximum thresholds for the scope of projects in light of the 2003 amendments to the Act.

the individual tasked with making the final project decision will have been involved actively in the EA process.

Procedurally, the transition from EA to the final decision is fairly straightforward. The results of the EA process are gathered and provided to project decision-makers in the form of the EA report.[119] The report is then used by any federal decision-maker with decision-making responsibility for the project assessed.[120] The EA report serves the function of gathering information and presenting it to the final decision-maker, usually in combination with overall recommendations and proposed conditions if the project is to be allowed to proceed. The EA report itself is not binding; it merely informs the final project decisions made in light of the outcome of the EA.

The final project decision, in all federal EAs, is the decision whether to exercise a power, or perform a duty of function under section 5 to allow the project to proceed in full or in part. In case of a screening, this decision is made by the responsible authority after it satisfies itself that it has met the EA process requirements under CEAA. In case of a comprehensive study, the responsible authority makes the final project decision after the Minister of the Environment has signed off on the EA process. In case of a panel review, the RA can only make the final project decision with the approval of the Governor in Council.

The more difficult question is how the EA process, the information gathered and the conclusions reached, relate to the RA's final project decision. An answer to this question requires a careful look at key provisions of the Act. They include the preamble, the purpose section, the definition of environmental effects, section 16 dealing with the scope of the assessment, the final decision tests set out in sections 20 and 37, and the regulation-making powers in sections 58 and 59.

The preamble and purpose sections set the overall context for the interpretation of the provisions of the Act, and particularly for the exercise of discretion. The overall goals established in the preamble include achieving sustainable development, encouraging economic development that conserves and enhances environmental quality, and integrating environmental factors into planning and decision-making.[121] In short, the preamble clearly suggests that the process is about more than a

---

[119] Depending on the process used, this will be the screening report, the comprehensive study report, the mediation report or the panel report.

[120] Primarily responsible authorities with decision-making responsibilities under section 5, but potentially also federal authorities with decision-making responsibilities that did not trigger the EA.

[121] CEAA, preamble.

consideration of biophysical environment, what is expected is that the EA process will result in integrated decision-making, considering environmental, social and economic consequences of projects.

The purposes of the Act are similarly broad. RAs are to be encouraged to take actions in line with sustainable development, again suggesting that the EA process is to prepare the federal decision-maker to make integrated decisions. Projects are to be considered in a precautionary manner to ensure that projects do not cause significant adverse effects. Of particular interest here is that the term "likely" is missing, suggesting again that the recommendations resulting from the EA process will go beyond identifying likely significant adverse environmental effects. The definition of environmental effect is clearly too narrow to achieve the purpose of the EA process of encouraging decisions consistent with sustainable development. By limiting environmental effects to biophysical and socio-economic impacts linked to biophysical changes, it becomes clear that the purposes of the Act can only be met if decision-makers consider more than whether the project is likely to cause significant environmental effects. It is reasonable to conclude therefore that final project decisions should not be based solely on a finding of likely or no likely significant adverse effects.

Section 16 reinforces the view that the scope of the EA process is much broader than likely significant adverse environmental effects. The reference to accidents and malfunctions suggests that the EA process has to go beyond likely effects, as accidents and malfunctions generally would not meet the likely threshold. The reference to concerns of the public, while relevant to the biophysical consequences of a project, also strongly hints at the consideration of social and economic factors. The references to the purpose, need for, and alternatives to a project all point to the need for the EA under CEAA to look beyond environmental effects as defined in the Act.

This leaves the decision-making provisions themselves. Do they accommodate decisions based on broader consideration of a project's contribution to sustainable development?[122] Section 20 offers three choices, which can be summarized as follows:

- Where the project is not likely to cause significant adverse environmental effects, the RA *may exercise* any power or perform any duty or function that would permit the project to be carried out.

---

[122] For a discussion of the "net contribution to sustainability" test, see R.B. Gibson, "Favouring the Higher Test: Contribution to Sustainability as the Central Criterion for Reviews and Decisions under the Canadian Environmental Assessment Act" (2000) 10 J. Envtl. L. & Prac. 39.

- Where the project is likely to cause significant adverse environmental effects, the RA *can either refer the project to a panel or refuse to exercise* its section 5 power, duty or function.
- If effects are uncertain, or if public concern justifies, the RA *shall refer* the project to review panel.

All this suggests that likely significance is a possible red light and a tool for process decision, but not necessarily a green light. It is certainly clear from these provisions that the RA does not simply decide to approve the project if there are no likely significant effects or refuse to take action to allow the project to proceed if there are likely significant effects. Likely significance is an important process threshold, but not the sole basis for the final project decision.

Under section 37, subject to approval from the Governor in Council, the RAs options may be paraphrased as follows:

- Where the project is not likely to cause significant adverse environmental effects, the RA *may exercise* any power or perform any duty or function that would permit the project to be carried out.
- Where the project is likely to cause significant adverse environmental effects that can be justified, the RA *may exercise* any power or perform any duty or function that would permit the project to be carried out.
- Where the project is likely to cause significant adverse environmental effects that cannot be justified, the RA *may not exercise* any power or perform any duty or function that would permit the project to be carried out.

The bottom line in sections 20 and 37 is that regardless of whether the project is likely to cause significant adverse environmental effects, RAs have considerable discretion to decide whether or not to exercise powers, duties or functions to allow the project to proceed. This discretion can be found in the phrases "can be justified in the circumstances" and "may exercise any power". The extent of the discretion clearly differs for the two phrases, but in either case, the discretion can only be fully understood in the context of the preamble, purpose section and section 16. In that context, it is clear that the RA's final decision is expected to be made in light of whether the project is expected to make a net positive contribution to sustainable development. The key difference between the two is that in one case there is a likely significant effect which raises a red flag, in the other there is no such red flag.

What do these provisions collectively say about the relationship between the EA process and the final project decision? What is the connection between the purpose section, the preamble, the factors in

section 16 and the final decision tests in sections 20 and 37? The short answer is that section 37 determines the nature and extent of discretion granted to RAs and FAs on whether to exercise their power, duty or function to allow the project to proceed. Section 37 does not itself direct the RA or FA on whether to exercise those powers, duties or functions.

If the project is likely to cause a significant adverse environmental effect, taking into account mitigation measures, then the RA and FA can only exercise its power, duty or function if the significant effects can be justified under section 37. If the project is not likely to cause significant adverse environmental effect, the RA/FA can exercise its power, duty or function, and then has to decide whether to exercise its power, duty or function. Section 37 therefore leads the RA to two possible outcomes, either it is permitted to exercise its duty, power or function, or it is not. If it is permitted to exercise its duty, power or function, the nature and extent of its discretion would depend on whether it is in the more limited context of justified in the circumstances or in the broader context of making decisions in light of the purposes of the federal EA process as well as its own mandate. In either case, the federal decision-maker will have to consider its mandate, the information gathered as a result of the EA process, and the recommendations made in the EA report in deciding whether to exercise its duty, power or function to allow the project to proceed.

The point here is that there are two important functions the panel report will have for federal decision-makers. One is to help with the determination whether the project is likely to cause significant adverse environmental effects. The other is to more generally help federal decision-makers decide whether to exercise their discretion to make a decision that allows the project to proceed. The second function will usually require the RA/FA to make an integrated decision taking account of the full range of environmental, social and economic factors.

The perception by some that the RA simply applies the "likely significance" formula to decide whether to allow the project to proceed is clearly a fallacy. From a practical point of view, while the identification of significant adverse effects is important, it is never the final determinant of whether the project can proceed. The ultimate question envisaged in CEAA is whether the project is going to make a net positive contribution to sustainable development either in the form of general discretion to decide whether to allow the project to proceed or in the form of "justified in the circumstances". "Likely significance" is merely a step on the way.

If the project does make a net positive contribution to sustainable development, then presumably that contribution may under some circumstances be enough to justify even significant adverse effects.[123] Such circumstances would include an overall conclusion that the project meets an important need and that there are no alternative ways of meeting the need without the significant adverse effect. A precondition for "justified in the circumstances" would reasonably be that opportunities for an integrated solution involving net gains from environmental, social and economic perspectives are explored first. If no such opportunities are identified, "justified in the circumstances" would then be used as the basis for a balancing approach to determine whether a particular significant adverse effect can be justified in light of the overall net contribution of the project to sustainable development.

If the project does not make a net positive contribution to sustainability, any debate over whether the environmental impacts meet some artificial threshold of significance is rendered immaterial as a result of the RA/FA's responsibility to look beyond significance to make a decision on whether to exercise its duty, power or function to allow the project to proceed. The significance of the impacts may, however, still be relevant in some circumstances, such as where the effect of the project on an area of federal jurisdiction is the sole constitutional basis for a federal project decision.[124]

This dual function of the panel review process is clear from and consistent with the preamble, the purpose section and section 16. It is important to keep in mind that while the section 37 test of "likely significant adverse environmental effect" is somewhat narrow with respect to socio-economic effects, there is no such limitation when it comes to either "justified in the circumstances" or the broader decision to be made by the RA/FA on whether to exercise its power, duty or function with respect to the project. In this way CEAA delivers on its promise of encouraging integration of social, economic and environmental considerations into federal decision-making.

The main point here is that the exercise of discretion as to whether or not to perform powers, duties or functions to allow the project to proceed is much more likely to be based on integration than a decision that a significant adverse effect is "justified in the circumstances". If it is a given that, in most cases, projects are initiated because of their actual or perceived social or economic benefits, and the consideration of

---

[123] This is subject to issues of equity in terms of the distribution of benefits and burdens.

[124] See Chapter 4 for a full discussion of the constitutional relevance of identifying project impacts on areas of federal jurisdiction.

environmental effects is often an afterthought, then there is real opportunity for integration of all three if there are no significant adverse environmental effects. At the same time, it does not mean that the project should be approved in all cases, rather, the question remains whether the project will make a net positive contribution to sustainability. Ideally, that means there are net social, net economic and net environmental benefits in allowing the project to proceed.

While the "likely significant adverse environmental effect" test does not play the central role in the final decision it may appear to play on a first read of sections 20 and 37, its role is still important to the final decision. The meaning of likely significant adverse environmental effect is therefore worth a closer look. The term "significant" is clearly at the heart of this test in sections 20 and 37. To fully appreciate this term, it is instructive to consider the different ways in which significance is used throughout the Act, and to consider to what extent interpretations are usefully transferable from one use to another.

A close look reveals that the way significance is used in the Act suggests a range of thresholds. In some cases, the question is whether the concerns about a project are sufficiently significant to justify a full environmental assessment in the form of a comprehensive study or a panel review.[125] In other instances, it appears to be used to consider whether there are sufficient impacts on areas of federal jurisdiction to justify a federal process or a federal decision. As discussed, it can also be used to determine whether the analysis of net positive contribution to sustainable development is moving from an integrated approach to one involving trade-offs.[126]

The point here is that the use of significance in the context of whether the Act applies in the first place and what level of environmental assessment is required has resulted in a threshold for significance that is driven by concerns about the efficiency of the EA process. Unfortunately, these process concerns have also resulted in a high threshold for significance in the sections 20 and 37 test, which has resulted in an overall approach to the final decision process that has emphasized the significance test over the process of determining whether allowing the project to proceed is in the best interest of sustainable development.

Significance is used in the United States EA process to determine whether a full EA is required. Criteria in the United States include a range

---

[125] In other words, to determine whether a screening, comprehensive study, panel review or mediation is appropriate.

[126] This then relates to issues such as "justified" constitutional considerations and discretion in the section 5 decision that triggered the EA in the first place.

of issues. The starting point is a determination of whether the anticipated effects are adverse or beneficial. Whether there is an effect on public health and safety is considered next. Uniqueness of the area affected and the public reaction to the impact are included in the criteria for significance, as are the level of certainty and the nature and degree of risk. Cumulative effects, compliance with environmental laws, and impacts on endangered species are also included.[127] Canadian criteria are more general, including criteria such as the nature of the effect, the trend, magnitude, probability, rate, timing, duration, area, reversibility, scope for amelioration compliance and unknown factors.[128] Given the range of applications of significance in CEAA, it is not surprising that the Canadian criteria are more general. It leaves it to decision-makers to identify the appropriate criteria depending on the use.

Wood offers a set of evaluation criteria for decision-making at the end of the EA process. The criteria, reworded to fit the terminology of CEAA are provided with a snapshot response on how CEAA fares on each:[129]

- **Must the findings of the EA report and the review be a central determinant of the decision on the project?**
    - It is hard to say that they must, unless there is a commitment to making decisions based on net contribution to sustainable development.
- **Must the decision be postponed until the EA report has been prepared and reviewed?**
    - In most cases, yes, although some federal decisions can legally be made in case of a screening.
- **Can permission be refused, conditions be imposed, or modifications be demanded at the decision stage?**
    - Yes
- **Is the decision made by a body other than the proponent?**
    - In most cases, yes, though in assessments triggered under section 5(1)(*a*) the proponent is the final decision-maker.

---

[127] See Christopher Wood, *Environmental Impact Assessment: A Comparative Review* (Essex, England: Longman Scientific and Technical, 1995) at 116 (Box 9.1).

[128] See Christopher Wood, *Environmental Impact Assessment: A Comparative Review* (Essex, England: Longman Scientific and Technical, 1995) at 147 (Table 11.1).

[129] See Christopher Wood, *Environmental Impact Assessment: A Comparative Review* (Essex, England: Longman Scientific and Technical, 1995) at 184 (Box 13.1).

- **Is any summary of the evaluation prepared prior to decision-making being made public?**
  - The EA report is required to be made public before the final decision, timing depends on the process involved.
- **Are the decisions, the reasons for it, and the conditions attached published?**
  - Yes
- **Must these reasons include an explanation of how the EA report and its review influenced the decision?**
  - Yes, for panel reviews and mediation.
- **Does published guidance on the factors to be considered in the decision exist?**
  - Yes.[130]
- **Is consultation and participation required in decision-making?**
  - Not for screenings, but for comprehensive studies, panel reviews and mediation.
- **Is there a right of appeal against decisions?**
  - No, the only option is judicial review.
- **Does the decision-making process function effectively and efficiently?**
  - Experience varies, as much depends on the exercise of discretion by individual responsible authorities.

In conclusion, the federal EA process has been falsely labelled as being focused on significant biophysical effects. It not only should be, but clearly is directed to encouraging federal decision-makers to exercise their existing decision-making responsibilities in furtherance of sustainable development. This makes it critical that the final EA report, whether in the form of a screening, comprehensive study, panel review or mediation, present its findings and recommendations in terms of both the project's significant adverse environmental effects and its contribution to sustainable development.

---

[130] For official Agency guidance on significance, see CEAA, *Reference Guide: Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects* (Ottawa: CEAA, 1994), online: CEAA <http://www.ceaa-acee.gc.ca/013/0001/0008/guide_e.htm#adverse>.

Furthermore, the threshold for significance has been artificially skewed through its application to process decisions to avoid comprehensive studies and panel reviews. The threshold for significance has further been affected by a reluctance to apply the sections 20 and 37 tests in the way they were intended. Decision-makers and practitioners have tended to be reluctant to fully acknowledge the significant effects of most projects even after mitigation and by then moving to the crucial step, to see whether those significant effects can be justified in light of the projects expected contribution to sustainable development. In other words, a reluctance to justify environmental effects has resulted in an artificially high significance threshold.

An appropriate threshold for significance for the purposes of sections 20 and 37 would be whether the effect is of sufficient magnitude that we should not be expected to accept the effect without justification, *i.e.*, without demonstrating that the project is nevertheless making a net contribution to sustainable development. The appropriate litmus test for significance is whether society should be expected to accept the impact without first considering the need for the project and its alternatives.

At the end of the day, CEAA is about federal decision-makers making project decisions in furtherance of sustainable development. The job of the panel and the function of the final report of the panel is to inform that decision. The trend in CEAA is for panels to take this responsibility seriously, but there are indications that RAs are not. Court cases such as those involving the True North oil sands project and the Red Chris mining project, and assessments such as those of the Anadarko and Keltic LNG facilities in Nova Scotia[131] provide an indication that RAs are prepared to scope narrowly at the cost of not adequately informing project decisions. In these examples, RAs have sought to avoid having to consider broader implications of the projects under assessment rather than to scope sufficiently broad to be able to reach some reasonable conclusion about the projects' likely net contribution to sustainable development.

There are two additional considerations for the exercise of discretion in the context of the final project decision. First, the RA will have to confirm on a case-by-case basis that it has the constitutional basis to make its decision in light of all environmental, economic and social factors. Legislation that explicitly linked the discretion in all cases could have been subject to constitutional challenge. The second consideration is that

---

[131] *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, [2006] F.C.J. No. 129 (F.C.A.). See *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, [2007] F.C.J. No. 1249, 2007 F.C. 955 (F.C.T.D.). See also the case studies in Chapter 6 on the Anadarko and Keltic LNG facilities.

the discretion may also be influenced by the specific section 5 power the RA is asked to exercise.[132]

M. ENFORCEMENT, COMPLIANCE AND QUALITY CONTROL

The self-assessment approach, which is the foundation of the federal EA process under CEAA, creates unique challenges for quality control, compliance and enforcement. As a starting point, the self-assessment approach under CEAA means that literally thousands of federal officials throughout the federal bureaucracy are tasked with implementing the procedural requirements of the Act and to make appropriate decisions based on the results of the EA process. Much of the work in this area is required long after the project decision is made and the attention of government officials and members of the public have turned away from the project, creating additional compliance and quality control challenges.

In this section, the approach to quality control, compliance and enforcement under CEAA is briefly explored. When considering compliance and enforcement under CEAA, it may be useful to distinguish between government actions to implement the environmental assessment from actions by the project proponent to implement the final project decision. Compliance by government officials generally deals with the EA process,[133] which means that the compliance effort coincides with or closely follows the EA process itself. When it comes to compliance with the conditions imposed as a result of the EA process, the target is the proponent rather than the responsible or federal authority. The timing of the compliance effort is generally well after the EA process is concluded, sometimes years or decades later.

With respect to process compliance, CEAA originally did not contain any legal tools to ensure compliance. During the period from 1995 to 2003, the Agency could do little but make some informal efforts to encourage consistency in the implementation and compliance with the Act. It was left to members of the public to enforce the requirements of the Act upon government decision-makers through judicial review

---

[132] Other provisions of CEAA that use the term "significant" in some form, and therefore may have some influence on its overall interpretation, include the regulation-making provisions for comprehensive studies and exclusions; see s. 58(1)(*i*), and s. 59(*c*)(ii).

[133] Most of the process requirements in CEAA are formally imposed on the RA, not the proponent.

applications.[134] During the five-year review in 2000, which led to the 2003 amendments to CEAA, there was considerable debate over compliance and enforcement.[135]

The amendments took some modest steps to improve compliance by responsible and federal authorities. Most notably, the amendments introduce the EA coordinator to encourage more consistent and better coordinated implementation of the Act.[136] In addition, CEAA now calls for the Agency to establish and lead a quality assurance program.[137]

Compliance with conditions imposed for allowing the project to proceed is left to responsible authorities. More significantly perhaps, the ability to enforce is left to the power under which the power, duty or function is exercised. In case of a federal proponent under section 5(1)(*a*), this means no independent enforcement, as the proponent and the RA are one and the same person. In case of the power, duty or function being exercised in relation to an interest in federal land, the power to enforce may depend upon the contract transferring the interest in land. Similarly, in case of a financial contribution, the funding agreement currently provides the best opportunity to ensure compliance with the mitigation measures and other conditions imposed as a result of the EA. Finally, with respect to regulatory triggers, the ability to ensure compliance largely depends on the legal tools provided in the regulatory provisions.

In *Suncor*,[138] the federal court confirmed with respect to the original provisions of CEAA that the responsible authority could only consider a mitigation measure if it can control its implementation. In that case, the RA relied on mitigation measures based on assurances from the provinces that it would implement them in a manner that avoided significant adverse effects. The decision would appear to have been reversed through the 2003 CEAA amendments. Section 20(1.1), for example, still provides that the RA has to ensure the implementation of the mitigation measures, but it

---

134 See for example, *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [1999] F.C.J. No. 1515 (F.C.A.); *Manitoba's Future Forest Alliance v. Canada (Minister of the Environment)*, [1999] F.C.J. No. 903 (F.C.T.D.); and *Environmental Resource Centre v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1937 (F.C.T.D.).

135 See Hugh J. Benevides, "Real Reform Deferred: Analysis of Recent Amendments to the Canadian Environmental Assessment Act" (2004) 13 J. Envtl. L. & Prac. 195 at 217, 224.

136 CEAA, ss. 12.1-12.5. See also discussion on the role of the coordinator above.

137 CEAA, s. 63(1)(*d*).

138 *Environmental Resource Centre v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1937 (F.C.T.D.).

grants new discretion to the responsible authority to determine how to ensure this.[139]

One might expect the follow-up program provided for in CEAA to be an important mechanism to monitor compliance with conditions imposed and mitigation measures required as a result of the EA process. Interestingly, a follow-up program is not defined in the Act to include compliance monitoring; rather its purpose is to verify the accuracy of predictions made in the environmental assessment and to determine the effectiveness of mitigation measures.[140] Furthermore, the follow-up program provisions under CEAA do not specifically require proponents and regulators to adjust mitigation measures of the approved project if the follow-up program points to serious unanticipated consequences. The Act also does not require that the results be used to improve the prediction of effects and design of mitigation measures in future assessments. CEAA essentially leaves it open as to whether the results of follow-up are to be used for project management purposes, future assessments, both, or neither.

Section 38(5) does provide for the possibility that the results of follow-up be used for adaptive management and to improve the quality of future assessments. One of the challenges in using the results of follow-up in the past has been that when the proponent has been required to carry out the follow-up program, it has not been required to make the data collected publicly available.[141] Follow-up programs of some form are mandatory for projects subject to comprehensive studies, panel reviews and mediation, but are discretionary for projects that undergo a screening level assessment.[142]

The quality assurance program has been slow to get off the ground. Much of the resistance to it has come from a few responsible authorities, mainly in the form of opposition to the release of the results or the data collected. Only as a result of ongoing pressure from non-governmental members of the Regulatory Advisory Committee (RAC) was a subcommittee on quality assurance struck in 2004. The subcommittee, made up of federal and provincial government representatives, as well as

---

139 See also CEAA, s. 37(2.1)(*b*).

140 CEAA, s. 2(1).

141 Under section 53(2)(*e*) of CEAA, the results of any follow-up program now have to be made public, however, it is still not clear whether this includes the data collected. Before the 2003 amendments, it was common for the results of follow-up programs to be kept from the public, as was the case for the Sable Offshore Energy Project. See Canada, Joint Public Review of the Proposed Sable Gas Projects, *The Joint Public Review Panel Report: Sable Gas Projects* (Ottawa: the Panel, 1997).

142 CEAA, s. 38.

industry, environmental and aboriginal interests, issued its final report to RAC in May 2006. The report dealt with 17 issues under the following six categories:

1. Public participation
2. Registry Internet site
3. Process effectiveness and efficiency
4. Compliance with the Act
5. Exercise of discretion
6. Quality and consistency of assessments.

There is one further important quality control and compliance tool in CEAA, the requirement to give reasons for failing to follow the recommendations in an EA report. Specifically, in case of an EA report by a mediator or a review panel, the responsible authority has to advise the public on the extent to which recommendations were followed, and provide reasons for not following recommendations of the mediator or review panel.[143]

As previously indicated, in the absence of other effective tools to ensure compliance and to control the quality of EAs under CEAA, judicial review has been resorted to time and time again. In particular, judicial review has been used by intervenors displeased with the implementation of the Act to challenge process and substantive decisions of responsible authorities. Decisions challenged range from access to information issues to scoping and choice of EA process. The judicial review process has been successful in enforcing firm legal obligations in the Act, ranging from public access to information to consideration of cumulative effects and alternatives in the EA process.

In *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)* for example, the court found that any federal decision that allows a project to proceed can be challenged based on its reliance on a legally deficient environmental assessment under CEAA.[144] Furthermore, the EA report itself can be challenged on the basis that it is legally deficient, even before a federal decision is made based on that report. In essence, the EA report and the federal decision are two separate steps that can each be challenged. If the EA report is deficient, there is nothing in the federal decision that can remedy that deficiency. In *Citizens' Mining Council of*

---

[143] CEAA, s. 53(2)(*c*).

[144] *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1998] F.C.J. No. 1746 (F.C.A.).

Newfoundland and Labrador Inc. v. Canada (Minister of the Environment) the Federal Court confirms that the scoping decision is subject to judicial review.[145]

The effect and effectiveness of the judicial review process to ensure decisions are consistent with the goals of the Act, however, ends there. When it comes to the many discretionary provisions in CEAA, dealing with crucial issues such as scope of the project, scope of the assessment, and referral of a project to a review panel or mediation, courts have been reluctant to interfere with the exercise of discretion, showing a high degree of deference to responsible authorities.[146] This is interesting because the federal EA process is concerned with imposing obligations on responsible authorities to consider issues that are outside their regular mandate and expertise.

The standard of review most commonly applied in judicial review applications involving CEAA is that of reasonableness *simpliciter*.[147] The effect of applying this level of deference to decisions of responsible authorities on the scope of the project, the scope of the assessment and the role of the public in the EA process has resulted in a considerable gap between compliance and effective EA under CEAA. Whether or not the EA process as implemented by a responsible authority is effective at meeting the objectives and purposes of the Act is not a matter of compliance, but a matter of discretion.[148]

If the responsible authority is interested in making the EA process effective, it will make reasonable decisions on scope, process and public engagement, leading to an effective EA process. If not, the EA process can easily become a paper exercise to justify decisions made long before the EA process is triggered. Given the courts' deference to responsible authorities, the choice is left almost completely in the hands of RAs.[149]

---

[145] *Citizens' Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of the Environment)*, [1999] F.C.J. No. 273 (F.C.T.D.).

[146] For a critique of the discretionary nature of CEAA, see A. Green, "Discretion, Judicial Review, and the Canadian Environmental Assessment Act" (2002) 27 Queen's L. J. 785.

[147] A. Green, "Discretion, Judicial Review, and the Canadian Environmental Assessment Act" (2002) 27 Queen's L. J. 785 at 785. See also *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)*, [2000] F.C.J. No. 682 (F.C.T.D.), at para. 44; *Vancouver Island Peace Society v. Canada (Minister of National Defence)*, [1992] F.C.J. No. 324 (F.C.T.D.), at 48, and *Sierra Club of Canada v. Canada (Minister of Fisheries and Oceans)*, [2003] F.C.J. No. 366 (F.C.T.D.), at para. 58.

[148] For a discussion of the early EARP cases which set the tone for this approach, see J. Benidickson, "Environmental Law Survey (1980-1992), Part I" (1992) 24 Ottawa L. Rev. 733 at Part III.

[149] For a recent challenge to the exercise of discretion under CEAA, see *Pembina Institute for Appropriate Development v. Canada (Minister of the Environment)*, unreported, March 29, 2007, Vancouver T-535-07 (F.C.T.D.) (s. 18.1 Application for Judicial Review).

This leaves the EA process in the hands of responsible authorities who are often considered to be inclined and motivated to consider certain predicted consequences of a proposed activity over others. There are limited corrective opportunities built into the process to address this concern. For the credibility of the EA process, this needs to be addressed regardless of whether the perception is justified and regardless of whether the unequal treatment of consequences is intentional or simply a product of the particular responsible authority's core mandate and expertise.