



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

CELA Submission on the National Energy Board's
November 2010 Draft Update of the Environmental
and Socio-economic Assessment Section of Filing Manual

Submitted to:

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Introduction

CELA is a public interest law group that was founded in 1970, and since 1978 has been funded by Legal Aid Ontario as a specialty legal aid clinic. Our mandate is to use and improve environmental laws in order to protect the environment and to protect public health and safety. We represent citizens and public interest groups before the courts and tribunals in order to protect the environment and human health.

As part of its mandate, CELA has long advocated for effective, enforceable and equitable environmental assessment (EA) legislation at the federal level, as well as in Ontario. CELA staff and counsel have appeared before parliamentary committees advocating for over twenty years, including during the first legislative review of the *Canadian Environmental Assessment Act (CEAA)* in 2001-2002 and most recently, before the House of Commons Finance Committee on the subject of the changes to the CEAA made in the 2010 federal budget.

CELA has also intervened in the Supreme Court of Canada in various cases involving federal EA requirements. For example, CELA was counsel for the six environmental groups that intervened in the *MiningWatch Canada* case decided by the Supreme Court of Canada in 2010.¹

CELA has commented over the years on the challenges that federal environmental assessment has faced, and made recommendations on the reform of federal EA law and policy. Consequently, this submission includes recommendations for necessary reform to the CEAA and federal EA generally, as well as the more specific comments on the Filing Manual.

CELA was pleased to participate, along with other Canadian Environmental Network member groups, in the NEB's one-day consultation meeting held at the Board's offices in Calgary on January 14, 2011, on the draft changes to the Environmental and Socio-economic Assessment Section of the Board's Filing Manual. We found this consultation a useful complement to the exercise of considering the draft Section.

While CELA understands the importance of the Filing Manual to the applications considered by the National Energy Board, including in those instances where the Board also conducts environmental assessments pursuant to the CEAA, many of our recommendations involve essential legislative and structural changes to federal environmental assessment. CELA recognizes that as a quasi-judicial federal tribunal, it is inappropriate for the NEB to advocate for these changes. This submission is therefore being made to parliamentarians, as well as to the Board.

¹ *MiningWatch Canada v. Canada (Fisheries and Oceans)*, (2010) SCC 2.

General Comments

We are concerned that no further legislative, regulatory or administrative changes be made that will allow the current CEAA to be weakened and indeed, will continue to promote stronger federal environmental assessment.

In particular, CELA looks forward to the legislatively-mandated review of the CEAA by the House of Commons Standing Committee on the Environment and Sustainable Development, expected to begin this winter. The legislative review has the potential of offering the public an opportunity to be involved meaningfully in reviewing the provisions and operation of the CEAA, and to propose improvements. CELA plans to continue its engagement by participating in that review.

Unfortunately, the federal government has made a number of legislative and regulatory changes to the CEAA in the last couple of years; these changes have exempted many types of undertakings from the Act's coverage; enabled substitution of regulatory or licensing proceedings for EA processes; facilitated project-splitting so that environmentally-significant components of contentious projects might escape scrutiny; and diminished or undermined public involvement rights.²

A strengthened federal environmental assessment regime would require undertakings to deliver greater sustainability and societal benefits (make a "positive contribution to sustainability") rather than emphasizing mitigation of further damage and allowing "significant adverse environmental effects" that, taking into account mitigation measures, can be "justified in the circumstances". While the CEAA has been interpreted (in the Voisey's Bay, Kemess, White's Point and Mackenzie Gas Project cases) as requiring the contribution to sustainability test, the more conventional interpretation has been that the Act requires only mitigation of significant adverse effects. The first interpretation is more consistent with the NEB's expressed policies and its concurrent obligations concerning public convenience and necessity than the mere mitigation approach.

While the first interpretation can and ought to be generally applied under the current Act, CELA recommends that the CEAA be amended to require it, in order to ensure both clarity of intention, and greater progress toward sustainability.

In addition, many of the challenges that the current CEAA has failed in overcoming can be addressed by way of a comprehensive regime for strategic environmental

² See Richard D. Lindgren, "Re: Bill C-9: Proposed Changes to the *Canadian Environmental Assessment Act*" (May 13, 2010, Letter to Hon. James Rajotte, Chair, House of Commons Standing Committee on Finance). CELA Publication #721B (online).

assessment (SEA), which would require the application of sustainability criteria farther “upstream” in the policy-making process.³

In this context, while it is encouraging that the NEB’s vision statement⁴ and culture emphasize sustainability, CELA recommends that the Government of Canada do much more in order to ensure that all of the NEB’s operations, as well as its decisions, reflect a sustainable approach.

First, there is no evidence that the Government of Canada is actually pursuing “a sustainable energy future”.⁵ From Canada’s climate change policies and failure to reduce emissions to anywhere near the amount committed to under the *Kyoto Protocols*, as well as other policies including subsidies to conventional oil and gas industries, the contrary appears to be true, rendering the NEB’s vision statement rather hollow. Without a concerted national commitment to sustainability, one regulator’s vision is not likely to have much impact, or is likely to be cancelled out by policies and actions that are unsustainable.

Second, while an individual regulatory decision of the Board might be more or less consistent with a commitment to sustainability, a federal government commitment to achieving a “sustainable energy future” ought to be backed by more specific sustainability-based mandates for agencies and boards, including the NEB. The NEB’s stated Purpose⁶ refers to regulation of “pipelines, energy development and

³ For a recent consideration of the relative merits of law- and policy-based SEA regimes and examples, see Robert B. Gibson et al., “Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options” in (2010) 20 *Journal of Environmental Law and Practice*, 175-211.

⁴ National Energy Board, *Strategic Plan 2010-2013* (<http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/strtgcp1n-eng.html>): “Vision: The NEB is active and effective in Canada’s pursuit of a sustainable energy future.”

⁵ While the Government of Canada recently released its federal sustainable development strategy [see <http://www.ec.gc.ca/dd-sd/default.asp?lang=En&n=F93CD795-1>], it suffers from significant shortcomings, including its failure to identify explicitly the major drivers of *unsustainability*, in various sectors including energy, and its “insistence that sustainability goals and targets be consistent with government priorities rather than the converse”: see C. Scott Findlay et al., “Sustainability Lost: Comments on ‘Planning for a Sustainable Future: A Federal Sustainable Development Strategy for Canada’” in (October 2010), 22 *Journal of Environmental Law & Practice* 77.

⁶ “Purpose: We regulate pipelines, energy development and trade in the Canadian public interest. [The public interest is inclusive of all Canadians and refers to a balance of economic, environmental and social issues that changes as society’s values and preferences evolve over time. The Board weighs the relevant impacts of these impacts when making its decisions.]” From the NEB’s *Strategic Plan*, *ibid*.

trade in the Canadian public interest”, which is not only vague but is also elaborated upon as “... a balance of economic, environmental and social issues ...”.

The sustainability literature, by contrast, indicates a preference for a thorough integration of economic, environmental and social factors, because the conventional “balancing” process usually results in the economic dimension receiving undue weight - and in any event, progress towards sustainability requires advances on all fronts, not the trade-offs implied by balancing. The Board’s “present and future public convenience and necessity” test and other criteria for considering whether to issue certificates, pursuant to s. 52 of the *National Energy Board Act*, are also not adequate guarantees of sustainability.

A related area of concern is how the NEB can simultaneously consider the *NEB Act*’s statutory “present and future public convenience and necessity” criteria while also ensuring that the *CEAA*’s statutory duties and purposes are met.

In particular, the administrative duties provision of the *CEAA* requires that the Government of Canada, in the administration of the *CEAA*, “exercise [its] powers in a manner that protects the environment and human health. ...”⁷, and the first legislative purpose listed in the *CEAA* is

to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects; ...⁸

The *NEB Act* has no similar overarching provisions. Some individual provisions of the *NEB Act* do include more vague criteria for decision-making; for example, s. 52 governs the discretion of the Board, subject to federal cabinet approval, to issue a certificate in respect of a pipeline “... where the Board is satisfied that [a] line [is] and will be required by the present and future public convenience and necessity.” (This rather broad direction is elaborated upon somewhat in paragraphs (a) through (e)). Similarly, subs. 58.16 (1) (international power lines) and s. 119 (oil and gas licences) give the Board the discretion to issue certificates/licences on the basis of “public convenience and necessity.”)

In its decision-making about projects subject to the *Canadian Environmental Assessment Act*, the NEB is obliged to execute the more particular super-added

⁷ *Canadian Environmental Assessment Act*, subs. 4 (2).

⁸ *Canadian Environmental Assessment Act*, para. 4 (1)(a). While CELA recommends that the Act be amended to require a “higher test” of sustainability, the current purpose in para. 4 (1)(a) does provide some context and content for better environmental decision-making.

duties and obligations imposed by *CEAA*, in addition to the obligations assigned to the Board under the *NEB Act*.

None of this is to be understood as claiming that *CEAA* is a better, more sustainability-focused regime. Indeed, when an undertaking is considered pursuant to the *NEB Act*, the *CEAA*, or both, without a sustainability mandate and criteria in place, there is no guarantee that undertakings will make a positive contribution to sustainability.

Public involvement and the NEB as federal / responsible authority

The NEB can be a “responsible authority” in respect of a “project”, as both terms are defined by the *CEAA*, making the NEB responsible for the conduct of an EA, by virtue of a wide range of *Law List Regulations* triggers.⁹

Public involvement in the assessment is a key feature of good EA. Public involvement can result in better planning and decision-making.

The following table gives a picture of the EAs conducted by the NEB in fiscal year 2009-2010:¹⁰

Screenings in Fiscal Year 2009-2010

Fiscal Year: 2009-2010			EA Decisions this fiscal year		
Responsible / Regulated Authority	In progress on April 1, 2009	Initiated this fiscal year	Not likely to cause significant adverse environmental effects	Likely to cause significant adverse environmental effects	Terminated
National Energy Board	11	28	25	0	3

Comprehensive studies – National Energy Board: none listed

Review panels – National Energy Board: 1 in progress on April 1, 2009; no others during fiscal year

Where a project for which the NEB is a responsible authority is included in the *Comprehensive Study List Regulations*, additional obligations arise; for example, the obligation to provide the public with an opportunity, within ten days of the notice of commencement of the EA appearing on the *CEAA*'s Internet registry of projects, to comment on “the project and the conduct of the comprehensive study” (the changes made in the 2010 federal budget bill removed the former opportunity for the public

⁹ See list in Schedule I, Part I, s. 8 of the *Law List Regulations*.

¹⁰ Source: Canadian Environmental Assessment Agency, *Statistical Summary 2009-2010* (<http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=23124ED4-1>, accessed 24 Jan 2011).

to comment on the proposed scope of the project and scope of the assessment). The *CEAA* also requires the RA to provide an opportunity to be involved in the comprehensive study.¹¹

CEAA assessments can also be conducted by way of a review panel, a joint review panel with the NEB or, where the Minister of the Environment determines at her complete discretion that the “environmental effects” assessment of a federal authority such as the NEB is an appropriate substitute, the NEB process may be “substituted” for a review panel.¹² The federal government signaled in the 2010 budget that it intended to make greater use of substitution, rather than appointing joint NEB/*CEAA* review panels.

Although the number of *CEAA* assessments is relatively small compared to the total number of assessments conducted each year, the NEB nevertheless plays an important role in federal EA that could increase.

At the consultation, NEB staff assured delegates that public involvement in NEB processes is “better than *CEAA*”, even at the screening level. As we understand it from the consultation meeting, once a project description and proposed scope of project is announced, an opportunity to comment on issues raised by the proposed project and on the proposed scope will be provided, along with an announcement of the availability of participant funding. *These steps would all precede the submission by the proponent of its actual application.* This would occur even in the case of EAs to be conducted by way of screenings. It would be preferable, once the upcoming consultation on and update of chapter 3.3 (“Consultation”) of the Filing Manual has been conducted, if the rules and procedures for consultation were set out and easily accessible. CELA looks forward to an opportunity to participate in the consultation.

Delegates at the January 14 consultation meeting gave constructive comments on the conduct of public involvement, including the possibility of including the public in meaningful design of processes, provision of baseline data, assembly of information requirements, etc.; in short, public involvement goes far beyond opportunities to comment. As Josh Paterson of West Coast Environmental Law articulated so well at the meeting, many if not all of these public involvement-enhancing measures can be implemented in a quasi-judicial tribunal process such as the NEB’s.

As for substituted federal EAs, the powers in s. 43 ought to be subject to greater control or limitations in order for the public to ensure, from the perspective of transparency that, as the Government has committed,

The NEB will continue to work closely with its federal partners in the scoping and delivery of environmental assessments. The process will remain subject

¹¹ See new sections 21, 21.1, 21.2, and 21.3, *CEAA*.

¹² Subsection 43 (1), *CEAA*.

to the requirements set out in the *CEA Act* and approval will still be required from Cabinet.¹³

The only substitution conducted to date pursuant to s. 43 was the Emera pipeline project, conducted by the National Energy Board. As delegates to the ESA section of the Filing Manual consultation discussed with National Energy Board staff, significant public concerns were raised about the conduct of this assessment, which should be addressed before the discretion to conduct substituted processes for review panels is exercised again.¹⁴

Participant funding

CELA is cautiously optimistic that the NEB now has a participant funding programme. The effectiveness of participant funding depends on how much real public involvement is provided; the frequency early and throughout the assessment (and NEB application and regulatory process); how much money is provided, etc.¹⁵

Comments on draft ESA Section of Filing Manual

General comments

CELA supports the comments made by delegates at the January 14, 2011 ENGO consultation meeting on the draft ESA section of the filing manual, and offers these complementary remarks.

The filing manual (if not the governing legislation) ought to provide:¹⁶

¹³ See <http://www.neb-one.gc.ca/clf-nsi/rsftyndthnvrnmnt/nvrnmnt/nvrnmntq-eng.html#s2> (accessed 24 January 2011; see “What is the new role of the NEB in assessing a project?”)

¹⁴ See Gary Schneider, John Sinclair and Lisa Mitchell, *EA Process Substitution: A Participant’s View*: <http://www.cenrce.org/eng/caucuses/assessment/docs/Final%20Substitution%20Paper%20March29.pdf>

¹⁵ For an example of concerns that have arisen with a discretionary participant funding program under the *CEAA*, see Hugh Benevides, “Real Reform Deferred: Analysis of recent amendments to the *Canadian Environmental Assessment Act* in (2004) 13 *Journal of Environmental Law & Practice* 2, pp. 195-226 (“Extension of participant funding to comprehensive study”).

¹⁶ The suggestions in the following bullets were made by Professor Robert Gibson, University of Waterloo, when CELA consulted with him prior to the Filing Manual meeting.

- clearer guidance as to the criteria that proponents should consider in their planning and assessment work (including expectations for the evaluation of trade-offs and alternatives), and that the NEB will apply in its evaluations;
- clear requirements to address positive as well as adverse effects, and enhancement of positive effects as well as mitigation of adverse effects; and
- guidance on expectations for consideration of legacy effects, beyond specific residual effects on particular environmental and socio-economic and cultural parameters (especially where the proposed undertaking centres on depleting a non-renewable resource).
- In keeping with the basic objectives of assessment, the filing manual should be designed as part of a process that expects and encourages early integration of environmental and socio-economic impact considerations in planning. The draft manual appears to assume that the process involves only regulatory licensing, despite some reference to consideration of alternatives and reference to NEB involvement in pre-submission scoping deliberations. Serious attention to alternatives is feasible and efficient only if initiated at the outset of planning, and certainly well before the regulatory licensing stage, where a detailed project proposal has already been prepared. The filing manual, and the NEB's larger process, should include much clearer guidance for proponents on how the requirements to consider alternatives will be specified from the outset of planning new undertakings. (This is one place where the need for credible strategic level environmental assessment is evident so that proponents, decision makers and other participants at the project level have early guidance on reasonable alternatives.)
- The draft filing manual properly devotes explicit attention to cumulative effects and recognizes the utility of scenario-based assessment and attention to induced effects, but is inconsistent and unclear on key cumulative effects matters, and risks confusing proponents and/or tempting them to attempt minimalist approaches. The effects that matter in the end are the cumulative ones. They should therefore be at the centre of assessments. The structure of the filing manual (with separate sections on effects assessment and cumulative effects assessment) obscures the central role of cumulative effects in the process and in the anticipated decision-making. The draft is also less clear than it ought to be in ensuring that the scope of cumulative effects includes "reasonably foreseeable" future undertakings (projects and activities) that will contribute to overall sustainability effects in the region, sector and global scale, not merely the undertakings that we know for certain will occur. (This is another place where the need for credible strategic level environmental assessment is evident – in this context, so that proponents and others at the project level have better grounds for judging what undertakings may contribute to cumulative effects.)

In general, the system should be based not on the fairly low threshold of “no significant adverse environmental effects” but rather, should ask a proponent to make clear how its proposal would make a “net positive contribution to sustainability.”

Cumulative effects

The “legacy effects” of projects may entail resource depletion and the impacts on communities, not to mention the impacts of the changes on communities during the construction, operation and other stages of projects.

Specific comments on the draft ESA Section of the Filing Manual

CELA supports the following further comments offered by Bob Gibson:

A.2.1 Introduction

“the list of required contents of EAs omit

- comparative consideration of alternatives (despite some suggestion that attention to alternatives may be required – see pages 9-10)
- enhancement of positive effects
- contribution to sustainability
- the more general implication is that [this] is a narrowly regulatory project approval and licensing approach, not a planning approach, and therefore inconsistent with the essential character of good EA”

Table A1

- setting is just that of the project (the need to assess the effects of alternatives seems not to be recognized here)
- effects assessment includes attention to interactive effects (good), but neglects enhancement of positive effects, alternatives, sustainability effects, or how to deal with uncertainties (beyond merely noting them)
- cumulative effects scoping is too narrow, fails to recognize that what residual effects result from an undertaking may be influenced significantly by interactions with the effects of other undertakings
- cumulative effects discussion does not mention what other projects and activities are included; should include attention to effects of reasonably foreseeable future undertakings (also cumulative effects discussion on page 31 ff)”

p. 4: the “four distinct phases” have been omitted here (NEB staff acknowledged this omission and said that it will be corrected)

p. 7: “other activities and physical works that are *likely to occur ...*”: this threshold is too high and should instead capture what is “reasonably foreseeable” (e.g. induced development effects)

p. 7: “ancillary” is misspelled

p. 7: what to include in the scope of the project (final points on page 7): suggests NEB will not consider aspects not in federal jurisdiction, even though these aspects may have significant implications for whether the overall project should be approved; again this appears to reflect a narrow licensing focus rather than consideration of whether the undertaking is desirable

p. 7: final bullet: mitigation measures and follow-up activities should be broken out (“are mitigation measures enforceable ...?”; new bullet: “are follow-up activities enforceable ...?”)

pp. 9-10: Alternatives: some indication that consideration of alternatives (alternatives to and alternative means) may be required, but language is fuzzy and the consideration of alternatives is not integrated into the larger discussion or clearly established as an expectation of the proponents; is therefore not likely to be incorporated effectively in the planning process.

bottom p. 9/top p. 10: Proponents should, in explaining alternatives and describing “the process used to determine that the project-as-proposed is viable and is the preferred alternative (i.e. technically, economically and environmentally). ...” (current version reads “or”).

Bottom p. 10: “FYI – Reminder ...” box: suggest that text read “... are in the present and future public interest of convenience and necessity. ...”

Table A-3: p. 19: no attention to boom-bust effects or legacy effects (of depleting a non-renewable resource)

top p. 21 (“GHG emissions”): A bullet reading “There is outstanding concern ... not been resolved through consultation” is omitted from this Biophysical and socio-economic element, and this is the only element that lacks this bullet. We suspect that this omission is merely inadvertent.

pp. 31 *ff*: cumulative effects: not clear on what other projects and activities are to be included; but there is hopeful recognition of scenario-based assessment and induced development, and apparent inclusion of reasonably foreseeable undertakings (page 33)

- still a focus only on mitigation (versus also enhancements)

- the old CEAA guides included at the end of the filing manual in chapter 7 include the obsolete and narrow cumulative effects guidance from 1994 that contradicts the better guidance from 1999

p. 33 (“Other Physical Works or Activities”): remove reference to “likely to take place” and replace with “reasonably foreseeable”. The thresholds in the “at a minimum” bullets at the top of p. 34 are very good and should be maintained.

Table A-4: Greenhouse gas emissions (p. 47) and other elements limit considerations to compliance, rather than extending them to enhancements or positive contribution to sustainability.

p. 59: Adjustments to wording of Part 4.2 “Economic Feasibility, Options and Justification”: we are unsure of the meaning of the guidance that reads “... the greater the potential impact a project may have on third parties ...”.

p. 60: FYI box: should read “... alternative means” (not “alternatives means”).