last saved Jan 12/05

Analysis of AECL "Scenarios"

These nine scenarios were presented by AECL on January 23, 2004 as "a selection of abstracted circumstances that could inadvertently or at least be forceful argued to trigger an environmental assessment under CEAA. My comments appear below each item, as well as any clarifications on each scenario obtained ay my December 13 meeting with Greg Sayer of AECL.

1. AECL proposes a project to another entity to provide goods and/or services.
Clarification: AECL is concerned that in proposing (in their view, "marketing") a good or service, it could be argued that they are the proponent.

Analysis: Greg Sayer was asked if a "good" could ever include a project as defined by CEAA. He thought that it might, and is attempting to confirm this. If the "good" in question was a project under CEAA, and AECL was the proponent, AECL would be expected to conduct an environmental assessment (unless it was captured by ss. 8(3)).

In our view, the proponent is that person who applies for the licence from either the domestic or international regulator.

2. AECL successfully bids on a project and provides goods and/or services.
Clarification: AECL is concerned that in bidding on or providing a good or service, it could be argued that they are the proponent (assuming that "good" includes a project under CEAA—see below).

Analysis: Again, this hinges on whether the "good" qualifies as a project under the Act.

3. AECL makes a proposal to provide its services to an entity and agrees to take deferred payments with respect to the project.

Clarification: AECL believes it could be argued that deferred payments or "hold backs" mean that AECL is providing financial assistance to the owner.

Analysis: Notice the absence of "goods" here. "Services" wold likely not qualify as projects under the Act, and therefore the fact that AECL is accepting deferred payments is irrelevant—no EA would be required.

4. AECL agrees to provide goods and services to an entity and agrees to take compensation in the form of actual or contingent equity in, or provide performance guarantees, incentives, refunds to the project if pre-established performance targets are missed, or otherwise.
Clarification: AECL does not presently enter into equity relationships with an owner, as it is prohibited from doing so under the *Financial Administration Act*. However, AECL is concerned that in the event that it is permitted to do so, and does, such a relationship might be argued to trigger 5(1)(b) of the *Canadian Environmental Assessment Act*.

Performance guarantees could mean that AECL promises that a facility will produce x megawatts of power. If this is not achieved, AECL would be provided time to remedy to situation. If it is unable to do so, the contract would require them to make one-time payments of so much per megawatt that the facility was unable to produce. AECL is concerned that such payments could be argued to trigger 5(1)(b) of the *Canadian Environmental Assessment Act.*

Analysis: Given that this scenario is currently prohibited by law, it is not necessary to address it in the current regulatory exercise.

5. **AECL approaches an entity with a proposal respecting an existing or future plant that may ultimately be owned or operated by another entity.**

Clarification: Unclear what this scenario described. AECL noted it is not concerned about this scenario, and asked that it be dropped from the list...

6. **AECL provides services to an entity and takes compensation only if there is a return on the investment.**

Clarification: AECL does not presently enter into this type of contract. It appears to resemble a performance guarantee—e.g., if AECL promises that a facility will produce a certain capacity (A), and the facility meets this promise, the price will be x. However, if the facility produces less or more than A, x will vary accordingly, as per:

capacity A	price X
capacity A-	price X-
capacity A+	price X+

Again, AECL is concerned that if it ever does enter into such a contract, such a relationship might be argued to trigger 5(1)(b) of the *Canadian Environmental Assessment Act.*

Analysis: Given that this scenario is currently prohibited by law, it is not necessary to address it in the current regulatory exercise.

7. **AECL proposes to provide services to an entity and agrees to provide credit to further the completion of the project.**

Clarification: AECL does not presently enter into this type of contract, as it is prohibited from doing so under the *Financial Administration Act.* However, AECL is concerned that in the event that it is permitted to do so, and does, such a relationship might be argued to trigger 5(1)(b) of the *Canadian Environmental Assessment Act.*

Such a contract differs from a deferred payment in that in this case AECL would actually be arranging financing or loaning money to the owner. AECL believes that they may someday be providing this service to customers.

AECL confirmed that this scenario might include "goods," and that "goods" might include a project under the *Canadian Environmental Assessment Act*. AECL agreed to look into this further, to confirm if "goods" in the past has ever included a CEAA project.

Analysis: Given that this scenario is currently prohibited by law, it is not necessary to address it in the current regulatory exercise.

8. AECL provides goods and services on a turnkey basis and retains title until completion or otherwise.

Clarification: AECL is concerned that in providing a turnkey good or service, it could be argued that they are the proponent (assuming that "good" includes a project under CEAA).

Analysis:

9. AECL arranges financing or offers assistance in arranging financing or possibly guarantees.

Clarification: AECL is concerned that in the event that it (e.g.) arranges a financing deal between EDC and proponent, such a relationship might be argued to trigger 5(1)(b) of the *Canadian Environmental Assessment Act.*

Analysis: Arranging financial assistance or arranging guarantees (rather than providing either) would not trigger 5(1)(b) of the Act.

last saved Jan 12/05

Analysis Of Most Recent AECL Concerns

This most recent summation of AECL's concerns is drawn from my meeting with Greg Sayer on December 13, 2004. My comments appear below each item.

Concern #1:
A project (in the broadest sense), within or outside of Canada, should not be subject, or be argued to be subject, to an EA under CEAA solely based on AECL's participation as a bidder / provider of goods or services.

Agreed, if:

- "project" does not include a project as defined by the *Canadian Environmental Assessment Act*; or
- "Solely based on AECL's participation as a bidder/provider" means AECL is not the proponent of the project; or
- "goods" does not include a project as defined under the Act.

"Argued to be subject"—if AECL is referring to parties other than the Government of Canada, obviously we can lend no assurance that arguments will not be made.

Concern #2:
A project (in the broadest sense), within or outside of Canada, should not be subject or argued to be subject to an EA where such a project would not be subject to an EA under CEAA if another provider of goods or services were the bidder or contractor (foreign projects, and projects in Canada where no other trigger (e.g. CNSC license).

Agreed, if:

- "project" does not include a project as defined by the *Canadian Environmental Assessment Act*; or
- AECL is not the proponent of the project; or
- "goods" does not include a project as defined under the Act.

"Argued to be subject"—if AECL is referring to parties other than the Government of Canada, obviously we can lend no assurance that arguments will not be made.

If the "good" or "project" qualifies as a "project" under the Act, and is not excluded, and AECL is the proponent, then AECL is expected to conduct an environmental assessment of that project, regardless of whether a competitor would have similar obligations.

Concern #3
A project (in the broadest sense), within or outside of Canada, should not be subject or argued to be subject to an EA where (in Canada) it would be subject to

an EA under CEAA at a more appropriate stage by a more appropriate RA (i.e. CNSC following license application).

Agreed, assuming:

- "project" means a project as defined by the *Canadian Environmental Assessment Act.*

"Argued to be subject"—if AECL is referring to parties other than the Government of Canada, obviously we can lend no assurance that arguments will not be made.

In the event that AECL is the proponent of a project under CEAA, s. 8(3) ensures that CNSC would assume responsibility for the EA. If AECL is not the proponent, it would have no EA obligations under the Act.

Concern #4

Uncertain definitions of "project," "proponent," "financial assistance" leave AECL open to legal challenge that AECL's bidding for or contracting for a project could trigger an EA when AECL makes a bid or signs a contract, or even earlier (e.g. in situations where AECL performs feasibility studies, makes unsolicited proposals for a utility's or government's consideration). N.B. AECL does not believe it would be triggering as a "proponent", or providing "financial assistance", but because of legal uncertainty over these terms, it is open to being challenged

AECL is subjected to no more legal uncertainty than any other department or agency.

Concern #5

"timing issue" - s. 8(3) of CEAA – in AECL's view not an answer, or a complete answer, because typically CNSC not RA at time a bid made or contract entered into – 8(3) not effective at time an owner solicits proposals, receives unsolicited proposals, or signs contracts.

Concern #6

s.21(1)(b)
s.21(1)(c)

"Argued to be required"—if AECL is referring to parties other than the Government of Canada, obviously we can lend no assurance that arguments will not be made.

Concern #7

s.21(1)(b)
s.21(1)(c)

"legal challenge"—if AECL is referring to parties other than the Government of Canada, obviously we can lend no assurance that challenges will not arise.

Concern #8

s.21(1)(b)
s.21(1)(c)

General
AECL accepts application of CEAA to projects where it is clearly the proponent (i.e projects at its own facilities).

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AECL/NRCan/CEAA Meeting
Friday, January 21, 2004
CEAA Offices

Agenda

5. Next steps

s.21(1)(b)