

# **Environmental Assessment for a Sustainable Future**

A proposal of the Environmental Assessment Reform Caucus  
of the New Brunswick Environmental Network

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# **INDEX**

## **1. Key Findings and Recommendations**

Assessment process .....	3
Schedules .....	5
Public Consultation .....	6
Compliance and Follow-up .....	7
Public Policy Assessment .....	8

## **2. Recommended Components of an EIA Act**

Purposes & Definitions .....	9
Environmental Assessment Commissioners .....	9
Registration .....	10
Environmental Impact Assessment .....	10
Minister's Decision on EIA .....	11
Mediation .....	12
Panel Review .....	12
Minister's Decision .....	12
Enforcement .....	12
Participant Funding .....	13
Regular Review .....	13

## **3. Flowchart**

Components of an EIA Act for N.B. ....	14
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## **Key Findings and Recommendations**

Environmental groups in New Brunswick have identified the following elements as essential to a good environmental assessment process in New Brunswick.

- Projects would be assessed according to sustainability criteria
- All scheduled projects would undergo an EIA
- Public consultation to develop the list of undertakings for the schedules would occur
- Mandatory and consistent components would be established for every environmental impact study
- Panel reviews would be conducted on projects that pose serious environmental or sustainability concerns
- An Environmental Assessment Commission would be established to conduct panel reviews and mediation
- Information would be provided to the public in an easily accessible and timely manner
- Citizens would be notified at the time of registration and invited to provide public input on draft terms of reference and on the draft EA report
- Participant funding would be provided to cover the costs of participating in meetings, mediation and hearings and to assist public interest groups in accessing technical experts
- Penalties would be established for proponents whose projects are not complying with the conditions of approval
- Environmental impact assessment would be governed by its own statute

### ***Assessment process***

New Brunswick environmental groups are seriously concerned with the current EIA process in New Brunswick. They believe the process lacks a clear purpose, is not carried out in a consistent and transparent manner and is overly subject to political discretion. Their recommendations address these broad concerns through a number of suggested changes to the EIA process. The entire suite of recommendations can best be understood through a review of the section of this report “Recommended Components of an EIA Act” and the accompanying flowchart.

### **Statute**

In order to strengthen the process, environmental groups believe that environmental assessment should be under a statute instead of a regulation.

### **Purpose**

The groups identify 3 cornerstone purposes for environmental assessment:

1. To contribute positively to sustainability and the public good,
2. To ensure an equitable, fair and transparent environmental assessment process,
3. To support and promote the protection, restoration and enhancement of the environment.

These purposes would be the foundation of the act and the basis upon which environmental assessment process is evaluated and to which decisions would be accountable. To achieve this, all of the necessary components of an EIA would be listed within the statute, including specific criteria to meet these purposes. This measure will provide all stakeholders with a predictable methodology and enhance the accountability of the process.

### **Assessment Triggers and Mechanisms**

Under the model recommended by environmental groups, projects would no longer be “screened out”. All scheduled projects must register and go through an EIA. Projects that have a positive or benign environmental impact and raise little public concern can go quickly through the process. If there is more environmental impact or public interest, these projects would be required to have an independently facilitated public meeting if requested by 2 citizens. For the larger projects that have a high public profile, the recommendations provide for panel hearings (as per the Inquiries Act).

### **Technical Review Committee**

As in the current process, a Technical Review Committee composed of experts from government departments would be responsible for the EIA. In the environmental group’s model, the Technical Review Committee would include a member of the Educational Services Branch and would develop the draft terms of reference which would be posted on a public registry for public input. The draft assessment, prepared by the proponent, would be posted on the public registry for comment as well as the Technical Review Committee’s report and recommendations.

### **Mediation**

The model also provides for a mediation process to resolve conflicts between a limited number of parties.

### **Public Consultation**

Another key recommendation of environmental groups is that the Department of Environment and Local Government would be fully responsible for carrying out the public consultation component of an EIA. All documents ordered through the EIA process are posted on a public registry and adequate time provided for public comment.

### **Environmental Assessment Commission**

Although the Quebec model of an independent, permanent bureau responsible for environmental consultation was favoured by some, it was deemed not feasible for a province the size of New Brunswick. As an alternative, environmental groups are recommending that an Environmental Assessment Commission be established. The role of the Commission would be to provide a mediator and/or a panel for environmental assessments, where such are required. Projects requiring a panel hearing would go through the same process as projects on Schedule A up to the point where the draft EIA report is prepared. From here, the projects would proceed to a panel hearing and the panel would examine the EIA report, consider the public input and rule on it. Other components of the public consultation plan would still be conducted by the Department.

The Commission would have 12 commissioners, appointed by Cabinet for a three-year term from a list of publicly nominated individuals. The members of the Commission would be citizens and would not need to have any specific expertise, however expertise would be provided to them to assist with their review. The Commission would select five of its members to sit on a panel and those five panelists would have no direct or indirect interest in the project before the panel.

### **Panel Decisions**

Once a panel has delivered a decision, including any conditions, the Minister, with the approval of Cabinet, would have 30 days to vary this decision on the grounds that the decision does not meet the purposes of the act. If no variance is made, the decision and conditions of the panel stands. Finally, the Minister must table an annual report in the legislature about the success of achieving the goals of EIA in New Brunswick and the act must be reviewed every five years.

## **Recommendations for Assessment Process**

- 1) Establish EIA in New Brunswick as a statute.
- 2) Develop purposes for EIA that include a positive contribution to sustainability and the public good, meaningful consultation and environmental protection.
- 3) All scheduled projects undergo an EIA that contains mandatory and consistent components.
- 4) Draft terms of reference, guidelines and a public consultation plan are developed by the Technical Review Committee and released for public input.
- 5) Draft environmental assessment report is prepared by the proponent and released for public input.
- 6) The Technical Review Committee reviews the report and the public comments and issues recommendations that are posted on a public registry for public input.
- 7) The Minister's decision considers the comments of the public and the Technical Review Committee and is posted on the public registry. The Minister can order mediation if the parties consent.
- 8) Panel hearings, as per the Inquiries Act, would be mandatory for some projects or otherwise ordered by the Minister at any point in the process.
- 9) A standing Environmental Assessment Commission is established to conduct panel hearings and mediations.
- 10) Panel decisions and conditions are released publicly.
- 11) The Minister, with the approval of Cabinet, has 30 days to vary a panel decision on the grounds that the decision does not meet the purposes of the Act.
- 12) The Minister tables an annual report in the legislature about the success of achieving the goals of EIA in New Brunswick and the Act is reviewed every five years.

## ***Schedules***

Environmental groups have identified Schedule A as a major stumbling block. Groups find that projects that should be assessed fall through the cracks. Environmental groups recommend a number of changes to ensure projects that have public concern and environmental impact are assessed.

The recommendations call for the establishment of two schedules. Schedule A would list projects to undergo a regular EIA, and a new schedule, Schedule B, would be established for projects that would require a panel hearing. Benign and routine small scale projects that could be dealt with through other approval mechanisms could be removed from Schedule A. In order to ensure that the schedules are meeting the purposes of the Act, they would be reviewed every five years with an opportunity for public input.

All of the projects on the revised Schedule A and the new Schedule B would be required to undergo an EIA. As well, the Minister could designate any undertaking not on the schedules for an EIA. Citizens can request the Minister to so designate an undertaking.

All projects on Schedule B would be subject to a panel hearing. Following the Quebec model, the Minister would be obliged to order a panel hearing if such a request is made by a citizen, unless the request is deemed frivolous.

Environmental groups agree that there must be further public consultation to identify the undertakings listed on each of the schedules.

### **Recommendations for Schedules**

- 13) Establish two schedules - Schedule A for projects to undergo a regular EIA and Schedule B for projects that require a panel hearing.
- 14) The Minister can designate any undertaking not on the schedules for an EIA and upgrade any Schedule A project to a panel hearing.
- 15) Establish a public consultation process to identify the undertakings listed on the schedules.
- 16) Review the schedules every five years.

### ***Public consultation***

Environmental groups have identified a number of concerns with the current public consultation process. Generally speaking, they do not believe the regulations provide sufficient opportunity for the public to become informed and involved or that the response to public comments is adequate.

In order to address these concerns, the recommendations provide the public with more windows of opportunity to participate. A public registry would be established that would post all information, documents, decisions and conditions in an easily accessible manner and within an adequate time frame to allow for public comment. The registry would also allow for citizens to order a copy of any of the documents or other information. Documents would be posted on the public registry during both an EIA and a panel hearing, including the draft EIA report, the report of the Technical Review Committee and the decisions and conditions of the panel and/ or the Minister.

When a project is registered, the public is informed through a public registry and through local papers, signs or flyers. Following registration, the public would be invited to comment on the draft terms of reference. As in the current regulation, the draft guidelines would continue to be available for public input and would now be posted on the public registry.

For projects on Schedule A, the terms of reference would include a public consultation plan that meets a minimum standard for notification and a mechanism to receive and respond to comments. If two members of the public request an independently facilitated public meeting, one must be held. For projects on Schedule B, a panel hearing would be required. The Minister can decide to upgrade any project to a panel hearing at any time during the EIA. As well, the Minister would also be obliged to provide for a panel hearing if such a request is made by a citizen, unless the request is deemed frivolous. The final report of the Technical Review Committee would indicate how the public comments have been taken into account. The decisions and conditions of the Minister would indicate how both the public comments and the comments of the Technical Review Committee have been considered. The Department must ensure that public comments are addressed before the conclusion of the process.

Recognizing that the government has responsibility for public welfare, and that citizens want to talk to the government about their concerns, the government, rather than the proponent, would be responsible for implementing the public consultation plan. Similar to the Quebec BAPE (Bureau d'audiences publiques sur l'environnement), this would not be handled by the EIA branch, which is responsible for the technical aspects of the project, but instead by a branch, such as the Educational Services Branch, whose mandate is public education and consultation.

Groups also indicated that it was essential that they have access to fiscal resources to enable their participation in independently facilitated public meetings or in panel hearings. This was a major problem previously identified during the 1997 consultation. As stated in 1997 “industry and government have significant resources ... while citizens and public interest groups are unable to effectively research and present their views... this undermines an essential purpose of the EIA process – to use the knowledge and participation of the community to prevent environmental problems from occurring.” In order to address this difficulty, the new recommendations call for participant funding to be provided by the proponent as a percentage of the project costs. This funding would be available for participation costs such as travel and childcare as well as the costs associated with legal and technical expertise. In order to keep the costs as low as possible, citizens would co-ordinate experts and presentations. Duty counsel would be provided to assist citizens during the hearing process.

### **Recommendations for Public Consultation**

- 17) The Department of the Environment and Local Government carries out the public consultation component of an EIA.
- 18) Establish a public registry that would post all information, documents, decisions and conditions and provide information to the public in an easily accessible and with an adequate time frame to allow for public comment. The registry would also allow for citizens to order a copy of any of the documents or other information.
- 19) Establish minimum standards for public consultation that include notification and a mechanism for receiving and responding to comments.
- 20) Provide for public input on the draft terms of reference and the draft EIA report, as well as retaining the opportunity for public input on the draft guidelines.
- 21) Provide an independently facilitated public meeting if requested by two members of the public.
- 22) Provide a panel hearing, if requested by a citizen, unless the Minister deems the request frivolous.
- 23) Proponents provide participant funding to cover the costs of participating in meetings, mediation and hearings and to assist public interest groups in accessing technical experts.

### ***Compliance and follow-up***

Environmental groups also found that the process to ensure compliance and follow-up is weak. In particular, groups were concerned that conditions applied to a project’s approval were not always being met. As well, the public has little opportunity to find out the status of these measures. They also state that projects change after the EIA is completed, without proper consideration of the impacts of the changes.

The recommendations address these concerns through a number of avenues. The approval and all of the conditions would be posted on the public registry. There would be penalties for non-compliance with the approval conditions.

The proponent must not begin construction until the environmental assessment process is completed and EIA approval is obtained. If there are changes in the project, after the EIA is completed it must be re-registered for an EIA.

The proponent would be required to file an annual report on their compliance with the conditions, environmental effects and the adequacy of the mitigation measures. Additionally, the Minister must inspect the undertaking annually. Both these reports would be posted on the public registry.

In order to provide citizens with a strong voice, a citizen who believes that the conditions are being contravened could request an investigation and the Minister would be obliged to investigate. The statute would provide for whistle blower protection.

### **Recommendations for Compliance and Follow-up**

- 24) Approval conditions are posted on the public registry.
- 25) Penalties for non-compliance with the approval conditions.
- 26) Ensure construction does not begin until a final decision is rendered.
- 27) Changes to the project must be re-registered.
- 28) Proponents must file a publicly available annual report on their compliance with the conditions, environmental effects and the adequacy of the mitigation measures which is posted on the public registry.
- 29) Minister inspects the undertaking annually and posts the inspection report on the public registry.
- 30) Citizens can request an investigation if they believe that the conditions are not being met and the Minister will investigate.
- 31) Provide for whistle blower protection.

### ***Public policy assessment***

Again, as in 1997, groups indicated that there should be assessment of public policy. From the 1997 report “policy...determines the development path taken by the province. Assessing physical undertakings or activities but not government policy is like treating the symptoms and not the cause of a disease.” The list of policies that should be assessed includes policy in transportation, energy, fiscal, waste management, (including the import and export of waste for treatment), industrial development or resource extraction. The new recommendations require the registration and assessment of all government policies, programs and initiatives with the potential to impact the environment.

### **Recommendations for Public Policy Assessment**

- 32) Register and assess all government policies, programs and initiatives with the potential to impact the environment.



## **Recommended Components of an EIA Act**

The outline below provides components for an EIA Act. These components are not exhaustive, but provide the general approach. Environmental groups recommend that the components be set out in an Act rather than a regulation because an Act requires involvement of the legislature to amend, and can provide for regular public review. It is customary to put the framework of a legal process in an Act, with technical details that may require regular amendment by cabinet in regulations.

### **PURPOSES AND DEFINITIONS**

1. The Act will set out purposes of EIA, including:
  - a. to contribute positively to sustainability and the public good
  - b. to ensure an equitable fair and transparent environmental assessment process
  - c. to support and promote the protection, restoration, enhancement of the environment
  
2. The Act will define “sustainability” to mean:
  - a. ensuring that the capacity of renewable resources that are likely to be significantly affected by the undertaking to meet the needs of present and future generations is preserved
  - b. the preservation of ecosystem integrity
  - c. application of the precautionary principle
  - d. the attainment of durable social and economic benefits (Source: Voiseys’ Bay and Red Hill Creek environmental assessments)
  
3. The Act will define “environment” to mean the components of the earth and their interrelations including:
  - a. Biophysical components:
    - i. Land, water, and air, including all layers of the atmosphere
    - ii. All organic and inorganic matter and living organisms
  - b. Human components:
    - i. Archaeological remains, historic buildings or any other physical characteristic of the human or natural environment valued for cultural or spiritual reasons
    - ii. Land use or resource exploitation patterns
    - iii. Landscapes or visual resources
    - iv. Public health and health determinants
    - v. Economic, social and cultural attributes. (source: Canada Standards Association Draft Standard for Environmental Assessment)
  
4. The Act will define “precautionary principle” to mean where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. (source: Rio Declaration, 1992)

### **ENVIRONMENTAL ASSESSMENT COMMISSIONERS**

1. Cabinet shall appoint 12 Environmental Assessment Commissioners to an Environmental Assessment Commission from a list of people identified through a public nomination process. The commissioners will be members of the public. The Commissioners will be appointed for 3 year terms. (precedent for panels: Ontario *Environmental Assessment Act*, Quebec *Environmental Quality Act*)

2. The office of the Environmental Commissioner office will have legal counsel on staff to serve as duty counsel to support participants.
3. Five commissioners will constitute a Panel appointed as needed, with the mandate to consider the environment and the public interest.
4. A Commissioner may not participate in any business of the office for which he or she has a material conflict of interest (including direct or indirect financial interest).
5. Commissioners will have all the powers and privileges of commissioners under the *Inquiries Act* and regulations.

### **REGISTRATION**

1. Schedule A specifies public and private projects and activities (“undertakings”) that must be registered, and will undergo the EIA process without a Panel review.
2. Schedule B specifies undertakings that must be registered and will undergo the EIA process with a Panel review.
3. Schedules A and B will be developed through a consultation process and will include new and emerging undertakings that could cause an adverse effect on the environment but were not contemplated when the existing Schedule A was developed.
4. All proposed new and revised government policies, programmes, initiatives with potential to effect the environment must be registered with the Minister, and undergo the EIA process.
5. Any two unrelated people may request that an undertaking not listed on the Schedules be registered for EIA.
6. Within 30 days the Minister must decide whether the undertaking must be registered, and explain how his decision furthers the goals of the Act.
7. The Minister may designate any additional undertaking for registration which is not on Schedule A or B.
8. All registered undertakings and policies must be posted on a public registry, managed by the Educational Services Branch.
9. Residents within the local area will be notified that an undertaking has been registered through local papers, signs or flyers in addition to the public registry.
10. The schedules will be reviewed every five years, with the opportunity for public comment.

### **ENVIRONMENTAL IMPACT ASSESSMENT**

1. Legislation will set out components for an environmental impact assessment, including:
  - description of project,
  - purpose of the project,
  - effects of a project on the environment including cumulative effects,
  - significance of these effects,
  - comments from the public,
  - measures to mitigate the effects,
  - alternatives to (including the “do nothing” alternative) and alternative means of carrying out the project,

- identification and quantification of full costs of the project,
  - contribution to sustainability:
  - capacity of resources that are likely to be affected to meet the needs of the present and the future,
  - the preservation of ecosystem integrity
  - the attainment of durable social and economic benefits
  - need for the project,
  - other matters that the Minister considers important
2. The Technical Review Committee is composed of experts from government departments including a member from the Educational Services Branch.
  3. Technical Review Committee drafts the Terms of Reference and the Public Consultation Plan.
  4. The Terms of Reference provide that the EIA will be carried out in accordance with the required components, and sets out the methodology for doing so.
  5. The Public Consultation Plan, overseen by the Educational Services Branch, will include at least:
    - local notification in addition to the public registry;
    - a mechanism to receive and respond to comments;
    - one public meeting facilitated by an independent third party if requested by at least two persons (precedent for two persons is the Ontario *Environmental Bill of Rights* s. 61 application for review of government policies).
  6. The draft Terms of Reference and Public Consultation Plan are posted on the public registry and are provided for public comment either in writing or at a meeting.
  7. The Technical Review Committee revises the Terms of Reference and the Public Consultation Plan taking into account public comment. The Terms of Reference are approved by the Minister.
  8. The Department of Environment and Local Government ensures that the Public Consultation Plan is implemented.
  9. The proponent will prepare an EIA report including the mandatory components, and explain how the public comment was considered. The report is provided to the Technical Review Committee. The Technical Review Committee reviews the report and prepares comments on the report.
  10. The EIA report and Technical Review Committee's comments are posted on the public registry for a 30-day comment period.
  11. Following the 30 day comment period, the Technical Review Committee prepares and submits recommendations to the Minister taking into account the public comment.
  12. The recommendations of the Technical Review Committee are posted on the public registry.
  13. At any time before the Minister's decision about the EIA, a person may request the Minister upgrade the project to a Panel review. The Minister shall order the Panel hearing unless the request is frivolous (precedent: Quebec *Environmental Quality Act*)

### **MINISTER'S DECISION ON EIA**

1. The Minister must ensure that the EIA report includes all of the components required by the Act, must explain how he or she considered and applied the comments of the public and Technical Review Committee and may:

- require that the project be submitted to a panel hearing
  - require mediation with consent of the parties
  - approve the undertaking
  - approve the undertaking with conditions, or
  - refuse to approve the undertaking.
2. The Minister provides his or her decision to the proponent and posts it on the public registry.
  3. If mediation takes place, the Minister considers the mediator's report and makes a decision to approve the undertaking, approve with conditions, refuse the undertaking or submit it to full EIA.
  4. As part of the existing legal process, a person who has commented on the EIA or the proponent may apply to the court for judicial review of the Minister's EIA decision on the grounds that the Minister failed to comply with any of the requirements of the Regulation.

### **MEDIATION**

1. The Parties may request mediation at any time during the EIA process.
2. The Minister appoints a Commissioner to act as the mediator.
3. Mediation does not preclude a Panel review.
4. The topics discussed and efforts to settle during mediation are confidential and cannot be raised at any future Panel hearing.

### **PANEL REVIEW**

1. If the Minister decides that an undertaking should be subject to Panel Review, or if it is on Schedule B, the Commission selects five Commissioners to form a Panel.
2. The Panel conducts the hearing with witnesses under oath, cross examination and final argument
3. The Panel issues a decision which may be to refuse the project, proceed with the project, or proceed with the project with conditions. The Panel decision is made public.

### **MINISTER'S DECISION**

1. Where the Minister receives a Panel decision and conditions, the Minister may within 30 days, with the approval of the Cabinet, vary the decision on the grounds that the decision does not meet the purposes of the Act (precedent: Ontario Environmental Assessment Act).
2. After 30 days, if no decision is taken by the Minister, the Panel decision and conditions is adopted by the Minister as the approval or refusal of the project.
3. As part of the legal process, a person who has commented on the EIA or the proponent may apply to the court for judicial review of the Minister's decision on the grounds that the Minister failed to comply with the requirements of the Act.

### **ENFORCEMENT**

1. The Minister's decision and conditions for approval will be placed on the public registry.
2. The proponent cannot construct, develop or operate an undertaking without EIA approval or out of compliance with approval conditions. The Act will provide penalties for non-compliance.

3. The proponent must register for an EIA for any proposed modification of the project.
4. The proponent must report annually to the Minister on how compliance with the approval, environmental effects and adequacy of required mitigation measures. The report is posted on the public registry.
5. The Minister must inspect the undertaking annually to ensure compliance with the approval and post its inspection report on the public registry.
6. Any person who believes that an approval or this Act is being contravened may request the Minister to investigate the alleged contravention.
7. The Minister shall investigate all matters related to the alleged contravention.
8. The Act will provide protection against employer reprisals against people who have requested an investigation, or participated in the EIA process.

### **PARTICIPANT FUNDING**

1. Participant funding will be available for legal and expert costs and reasonable expenses of participants to prepare for and engage in: mediation, hearings, and facilitated meetings.
2. Participants may apply for participant funding by way of an application that sets out a budget and work plan.
3. Funding will be awarded based on criteria that include need.
4. Participant funding will be provided by the proponent as a percentage of the costs of the project.
5. Citizens will, as much as possible, co-ordinate experts and presentations.

### **REGULAR REVIEW**

1. The Minister shall table a written report in the Legislative Assembly annually respecting the success at achieving the purposes of EIA in New Brunswick.
2. The EIA Act will be reviewed in five years to identify amendments that would better achieve its purposes.

