

Submission to the House of Commons Standing
Committee on Environment and Sustainable
Development

Regarding Bill C-19 (a Bill to Amend the Canadian
Environmental Assessment Act)

by the Environmental Planning and Assessment
Caucus of the Canadian Environmental Network

March 19, 2002

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INTRODUCTION

Good morning Mr. Chair, honourable members. Thank you for the opportunity to speak to you today. I'm Jamie Kneen, and this is John Sinclair, and we are co-chairs of the Environmental Planning and Assessment Caucus of the Canadian Environmental Network, known to many by its initials as the CEN. With us today is Jannis Klein, Caucus Coordinator. We would also like to specifically thank Peter Duck of the Bow Valley Naturalists for doing much of the groundwork for this submission.

The Environmental Planning and Assessment (EPA) Caucus is composed of environmental assessment practitioners, community-based educators, academics, activists, lawyers, policy analysts, private consultants and other concerned citizens. All of these individuals have first-hand experience with environmental assessment (EA) in Canada and they share a common vision of truly effective environmental assessment in this country. Their energy, knowledge and on the ground experience make the Caucus the most substantive and dynamic network of environmental assessment expertise in Canada today. We have attached a list of Caucus members and a variety of other Caucus documents related to our work and the present Bill.

We would note that several Caucus members have testified or will be testifying to this Committee, and we would like to unequivocally support and affirm the work that they have presented or will be presenting to you, including Dr. Bob Gibson, the Canadian Environmental Law Association, the West Coast Environmental Law Association, and the Environmental Law Centre. A huge amount of important work has been done in trying to bring some reality to this discussion of an often arcane process, as well as elaborating some very specific recommendations with respect to the drafting of the legislation itself. As the name of the Caucus implies, we see environmental assessment as part of a rational, ethical and sustainable planning and development process. But it is a crucial part, and it deserves far more emphasis than it has received either in policy or in implementation.

We welcome the proposed amendments to the Canadian Environmental Assessment Act (CEAA) embodied in Bill C-19, but they are modest and as a whole do not take us further down the road toward sustainability. In fact, the Bill is notable as much for what has been left out as for what it contains. It is clear that the whole five-year review has been an exercise in reduced expectations, from the outset of the public consultation process to the wording of the Bill in front of you. We are working in a context of aggressively un-sustainable development and timidity in environmental protection, whether we look at energy policy, endangered species, dangerous toxic chemicals, or federal departments' efforts to interfere as little as possible in corporations' ability to extract profit from our common natural heritage. So it is not surprising that this Bill as drafted presents little net improvement over the status quo. It is not just improved legislation that we need, it is the political will for the federal government to exercise the authority that it already has, to use the legal tools at its disposal, and to fulfill the legitimate role that ordinary Canadians expect it to.

The Caucus has been promoting eight key elements required for good EA for about thirteen years now. You will find these at the end of this document. In the documents we have appended

to our submission, you will see that we identified twelve priority issues at the outset of the five year review process. Given how far down this road we have come, we will not address some of the more general fundamental principles. We have included six priority areas in this submission, but in the interests of time we will focus only on the first three. Of course, we will be pleased to answer any questions on anything in this submission. The written submission contains cross-references to relevant sections of the key Five Year Review documents.

KEY ISSUES

The following six issues were found to be common concerns among delegates to the December 2001 Caucus meeting:

1. Public involvement.
2. Environmental assessment tracks.
3. Policy EA/strategic EA.
4. Criteria for determinations under the CEAA.
5. Including federal bodies under the Act.
6. Enforcement of the Act and decisions under the Act.

CROSS REFERENCE LEGEND

C19-10 = Clause 10 of Bill C-19.

MR-9.1 = The Minister's Report to Parliament, proposed initiative 9.1.

RAC - 23 = Report of the Regulatory Advisory Committee Issue 23.

CEAA -17 = Section 17 of the existing CEAA.

1. PUBLIC INVOLVEMENT

There are two problems relating to public involvement raised by C-19. First, public involvement remains discretionary for most environmental assessments ñ those completed at the screening level. Second, the proposals for the electronic registry system leave it weaker than the existing registry.

Problem 1 - Discretionary Public Involvement in Screenings.

Public involvement remains discretionary for screenings. The result is that public involvement is not included in most screenings (i.e. most assessments). When public involvement occurs, it is usually controlled by the proponent with no clear direction on how to conduct meaningful public participation. Public involvement is often poorly done with no evaluation of quality. While the public are the only participants with an interest in ensuring public involvement occurs, the public have no power to ensure that their concerns are incorporated into the EA process.

In order to address this issue, the Minister's Report to Parliament has committed to providing guidelines for public involvement in screenings. In particular, the Minister's Report promises that the guidelines will include a requirement for responsible authorities to document, in each screening report, the basis for the decision relating to the need for public participation. The RAC reached consensus on this issue and even provided wording for a suitable CEAA amendment in their report. Yet, C-19 does not require that such a decision be made. Nor have the promised

guidelines to ensure meaningful participation been placed before the public. Without a chance to see these guidelines and without a legislated requirement to actually decide on the need for public input, it is questionable whether C-19 will actually deliver meaningful public involvement in screenings.

Recommendations:

- _ There should be a participation regulation or, at minimum, an acceptable public participation guideline must be made public as promised.
- _ C-19 should require the responsible authority to document, in screening reports, the basis on which it made the determination of whether or not to consult the public.
- _ C-19 should include a requirement for the responsible authority to evaluate public involvement conducted within individual environmental assessments.
- _ C-19 should include serious consequences if a public involvement process is found to be inadequate.
- _ C-19 should empower the public to ensure appropriate involvement occurs.

Problem 2 - The proposed electronic registry is weaker than the existing system.

C-19 replaces the existing registry provisions with an electronic registry and notification system. Required contents of the registry are specified. However, the existing registry requirements are more comprehensive than the specified items in the new registry proposed by C-19. Many people interested in projects find electronic files inaccessible. In addition, electronic files currently pose problems relating to translation that delays public distribution.

Recommendations:

- _ The registry must be both comprehensive and accessible to all interested parties. Therefore, the existing registry system and its full in requirement must be retained in the Act, with the new electronic requirements being added as an enhancement.
- _ The electronic registry can include notification and a list of documents but, in its initial stages, need not include the text for all documents listed.
- _ The requirement that paper documents be kept in convenient locations must be retained.

<p><u>CROSS REFERENCES</u></p> <p>C-19-26 MR-7 CEAA-55</p>
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- _ C-19 must specify that the responsibility belongs to the Agency to ensure that registries are being properly maintained by responsible authorities.

2. ENVIRONMENTAL ASSESSMENT TRACKS

C-19 includes some modest improvements to the Act that are welcomed by environmental advocates. There are, however, a few exceptions. The most significant of these exceptions is the proposed revisions to the comprehensive study process. C-19 pretends to improve certainty of the assessment track by requiring the Minister to make an early decision on which track (comprehensive study versus panel review) the project will follow. Two key problems arise from this proposal.

Problem 1: No increased certainty of process.

In fact, this requirement offers no increased certainty of process. It simply shifts the uncertainty about the decision from the end of the process to the beginning. This change would require the Minister to make a decision about the significance of environmental effects without being informed by an environmental assessment. This moves dangerously close to the approval in principle, pending the outcome of an environmental assessment tactic which is unacceptable in an EA process that relies on self-assessment.

CROSS REFERENCES

C19(13)
MR-3.1, MR-9.2
RAC-23 to 27
CEAA-21.

Recommendation:

- _ Delete the proposed amendment and keep the existing approach to decisions about environmental assessment tracks.

Problem 2: It is uncertain how the new comprehensive study process will work.

Details such as criteria for making the track decision and the timing of opportunities for public involvement are missing. The RAC consensus specified that public participation should be at the pre-scoping, scoping, during preparation of the Comprehensive Study Review Report and during the time for commenting on the CSR report. The Minister's report promises guidance material is to be developed but there is no commitment to participation at any specific stage in the proposed comprehensive study process.

Some members of the EPAC suggested the following public involvement steps leading up to the Minister's new track decision:

1. When the notice of the project proposal is made available, there should be a request for public input on scope with 30 days to review the project and make comments on the scope.
2. The proponent and the RA should produce a draft scoping document and seek public input through a workshop involving the public. This stage should be completed over 60 days.
3. The final scoping document should be released for public review and comment over a 60 day period.
4. The final draft of the scoping document is sent to the Minister with comments from the public and the responsible authority's report on the recommended assessment track.

Another key problem in the proposal is that once a decision to follow the comprehensive study process is made it cannot be reversed. Yet, it is not possible to know the significance of effects prior to conducting the assessment. The need to account for issues relating to uncertainty about the significance of effects, new information and public concerns arising from the assessment also become overlooked by this proposal.

Recommendations:

Complex problems are created by the Agency's C-19 proposal. Four approaches to addressing these problems have been discussed.

1. The simplest approach would be to delete the proposed amendment and retain the existing process. That is, the responsible authority ensures a complete comprehensive study report is prepared and submitted to the Agency and the Minister. Public comment on the report is solicited by, and submitted to, the Agency and the Minister is required to decide on whether the project warrants referral to panel review or mediation.
2. The Comprehensive Study List should be changed to become a Panel Review List, completely eliminating the comprehensive study track.
3. Keep the comprehensive study process as proposed in C-19 but with improved wording that specifies requirements for meaningful public involvement, timing of public involvement and criteria for making the track decision. Also, the early decision on which track the assessment will follow would have to be reversible pending the results of the comprehensive study process.

CROSS REFERENCES

C19 - 13
MR - 3.1, MR - 9.2,
RAC - 23 to 27
CEAA - 21

4. As a last resort, if the proposed amendment is retained with an irreversible track decision, there must be requirements for meaningful public involvement, acceptable timing of public involvement and criteria for making track decision.

3. POLICY EA/STRATEGIC EA

Problem: C-19 does not address the limitations of CEAA's project-specific focus.

Assessment of needs and alternatives issues is best held at the strategic level of policies, plans and programmes. However, the project-based nature of the CEAA causes public frustration due to limited discussion of broader policy or programme issues relating to alternative ways of achieving sustainable development. This is especially frustrating since some federal agencies, such as the Canadian International Development Agency, are largely involved in delivering programmes with widespread environmental implications at the project level.

Even early consideration of need and alternatives issues have limited usefulness at the project level because the proponent involved usually lacks the mandate or has restricted capacity and authority to pursue more desirable alternatives. In turn, proponents become frustrated when interested parties wish to discuss the broader issues as part of a single project assessment. Yet, the public has no other venue for engaging in discussion of the environmental implications of broad programmes and policies. The RAC reached consensus that there needs to be a mechanism to provide the public with opportunities for participation in discussion of these broader issues.

Recommendations:

- C-19 should ensure that programmes and policies trigger environmental assessments.
- As a minimum, C-19 should require that the Agency monitor and report on compliance with the Cabinet directive on strategic environmental assessment.

CROSS REFERENCES

MR - 6
RAC - 9 and 31
CEAA - 2 and 5

4. CRITERIA FOR DETERMINATIONS UNDER THE CEAA

Problem: Decisions under the Act do not address environmental sustainability.

The CEAA must be amended to consistently require decisions to be based on the identification and selection of the best options that respond to legitimate needs or purposes. Consideration of sustainability criteria, such as alternatives to the project and alternative ways of designing the project, is currently discretionary for CEAA screenings. In addition, the CEAA currently focuses on the mitigation of adverse environmental effects and allows for significant adverse effects if

they are justified by circumstances that remain undefined by the Act. This is inconsistent with the stated purposes of the Act - to contribute to sustainable development. This situation does not change with the C-19 amendments. C-19 also fails to recognize Canada's international sustainability commitments.

There was consensus within the RAC that there needs to be consideration of how the Act should be better utilized as a sustainable development decision-making Act.

Recommendations:

- Require the evaluation of purposes and alternatives in all assessments (screenings, comprehensive studies and panel or mediation cases.
- Require the consideration of the full range of potentially significant effects, that is, provide a comprehensive definition of environment and environmental effects.
- C-19 should require attention to environmental enhancements in section 20 and 37 of the current CEAA.
- Specify in the CEAA that justification in the circumstances must be consistent with the principles of the Act, including the purposes of contributing to sustainable development.

<p><u>CROSS REFERENCES</u></p> <p>RAC - 9, 16 and 33 CEAA - 4 and preamble</p>
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5. INCLUDING ALL FEDERAL BODIES (DOMESTIC AND INTERNATIONAL) UNDER THE ACT

Problem: Not all federal bodies are included under the current Act or allowance is made for regulations that change the EA process for each body.

C-19 proposes to include more federal bodies, such as crown corporations and airport authorities, under the CEAA. Unfortunately, the amendments continue to specify, and are contingent upon, the development of companion regulations. Federal bodies argue that their special circumstances demand special EA regulations. This results in the development of regulations that may alter the CEAA triggers and vary the process for conducting EAs. This makes the EA process confusing and inconsistent from one federal body to the next.

The process of developing regulations is made difficult because not being included under the Act, or due to inconsistent application of the Act, many federal bodies do not have EA experience. Thus, it is impossible to demonstrate why, or which, special regulations are necessary. As a result, the development of regulations can take several years, effectively eliminating the benefit of the proposed C-19 amendments for some time to come.

The most recent outstanding example of these problems is manifested in the exemption of the Export Development Corporation (EDC) from the CEAA. Instead, EDC has been allowed to rely on its own legislation and environmental review framework. The RAC believes that this framework is inadequate. Other examples include the protracted airport authorities regulation process and the Canadian International Development Agency regulations. CIDA has promised to table a set of regulations that relate to its operations. These regulations have not been developed in advance of the Committee hearings. It is impossible to accept the C-19 CIDA amendment without knowing what will be proposed and how long it will take to gain public acceptance of the CIDA regulations.

Recommendations:

- C-19 must ensure that all federal bodies are included under the Act now to ensure that EA is being done. Allowance for the development of regulations specific to individual federal bodies may be made as these bodies develop experience with the Act and publicly document the need for special regulations.
- C-19 must ensure that the triggers for conducting environmental assessments are consistent from one federal body to the next.

CROSS REFERENCES

C19 - 5 and 6
MR - 1.4 and 1.5
RAC 32 to 36

6. ENFORCEMENT OF THE ACT AND DECISIONS UNDER THE ACT

Problem: The proposed improvements in C-19 do not go far enough.

C-19 includes amendments to the CEAA that improve enforcement of the Act. These improvements include the proposed quality assurance programme as well as mandatory follow-up for comprehensive studies and panel reviews. The Minister is also given power to stop projects where work proceeds before an environmental assessment determination is made. These enforcement measures are insufficient because they give no opportunity for public intervention to ensure compliance with the Act.

CROSS REFERENCES

C19 - 7, 19, and 28
RAC - 7 and 8

Recommendation:

- C-19 should authorize the public to seek court action to stop work on projects that do not comply with the Act.

CONCLUSION

The Five Year Review did not allow time for meaningful discussions on the topics that would lead Canada, through CEAA, further down the path towards environmentally sustainable development. Those discussions are required to move towards planning more sustainable projects and activities that are consistent with the purposes of the Act. This need for more thorough discussion relating to sustainability was also recognized by the RAC in their consideration of cumulative effects and the meaning of terms used within CEAA.

For now it is hoped that the final C-19 proposals, along with the promised funding and recommendations for administrative commitments, will nurture a stronger trend towards a sustainability culture in the implementation of federal projects and activities.

The Caucus recommends that C-19 include a renewed requirement to review the Canadian Environmental Assessment Act in five years.

BASIC PRINCIPLES OF ENVIRONMENTAL ASSESSMENT

The Environmental Planning and Assessment Caucus of the Canadian Environmental Network has worked since the late 1980s on various elements of the development of federal EA. In 1988, the caucus produced a list of eight "core elements" of Environmental Assessment:

1. Legislation must be utilized to establish a mandatory EA process that is reviewed by an independent agency, and which results in a final and binding decision.
2. The legislation must contain a broad definition of environment, and the EA process must apply universally to a variety of initiatives, including governmental policy-making.
3. The legislation must minimize the amount of discretionary decision-making within the EA process, and must establish clear criteria to guide the planning and review of proposals in order to ensure accountability of decision-makers.
4. The legislation must ensure that proponents justify proposed undertakings by demonstrating:
 - _ That the purpose of the undertaking is legitimate;
 - _ That there is an environmentally acceptable need for the undertaking; and
 - _ That the preferred undertaking is the best of the "alternatives to" and "alternative means" considered by the proponent.
5. The legislation must provide for a significant public role early and often in the planning process, and thus, must contain provisions relating to public notice and comment, access to information, participant funding, and related procedural matters.
6. The legislation must establish an environmental assessment process that results in a decision that can be implemented, is enforceable, and is subject to terms and conditions where necessary.
7. The legislation must specifically address monitoring and other post-approval [follow-up] activities, and must ensure that the environmental impacts of abandoning or discontinuing the undertaking in the future are considered as part of the EA process.
8. The legislation must establish an efficient EA process, and must provide for joint federal-provincial reviews where necessary.