# WEST COAST ENVIRONMENTAL LAW

**NGO OIL AND GAS ROUNDTABLE**
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# Environmental Assessment Primer

This discussion paper summarizes key points of interest or concern with respect to environmental assessment (EA) and how it may relate to oil and gas projects. Environmental assessment law in Canada is complicated, making it difficult to be brief and comprehensive at the same time. The primary focus of this paper is to provide information to identify issues and questions about the federal regime.

Some information on the BC regime is provided as well; however, given that the BC government has completely rewritten the provincial *Environmental Assessment Act*, we believe that federal EA is going to become increasingly important in BC.

# A. Canadian Environmental Assessment Act (CEAA)

## How does CEAA operate?

CEAA establishes 2 levels of federal EA: screenings and comprehensive studies. Under the current Act, either of these can be "bumped up" to a panel review by order of the Minister of the Environment, if there is sufficient public pressure and environmental concern. The Panel Review currently underway for the Georgia Strait Crossing project was bumped up under these provisions.

Screenings account for over 99% of federal EAs; approximately 5000 are conducted per year. Since CEAA came into effect in 1995, only 37 comprehensive studies have been completed, and 25 are underway, for a total of 62 to date. Nine panel reviews have been completed to date; 2 are currently underway.

"Responsible authorities" (i.e., the federal ministry or agency subject to the Act) are responsible for conducting the environmental assessment, but they can, and often do, delegate the preparation of the EA to proponents.

Under the Act, the scope of a screening does not need to be as large as that of a comprehensive study. As noted above, screenings make up the largest portion of federal

Eas. Typically, screenings represent less significant projects; however, there are exceptions. For example, the EA of the fixed link bridge to Prince Edward Island was conducted by way of a screening.

Public consultation is optional in a screening; it is mandatory in a comprehensive study. Canadian Environmental Assessment Agency statistics indicate that public participation only occurs in about 10 to 15% of screenings.

Most of the litigation around CEAA has been focused on section 15 provisions regarding the scope of the project, and the section 16 provisions regarding the factors to be considered in the assessment.

Some of the factors to be considered in all screenings and comprehensive studies include:

- the environmental effects of the project including cumulative effects;
- the significance of these effects;
- any public comments received;
- and mitigation measures.

In addition, comprehensive studies and panel reviews must consider:

- the purpose of the project;
- the need for, and alternatives to the project; and
- the capacity of renewable resources that are likely to be affected by the project to meet the future needs.

In the joint NEB/CEAA hearing for the Georgia Strait Crossing project, the Panel has adjourned the hearing that was originally scheduled for June 2002 in order to consider the combustion of the gas that would be transported in the pipeline and the combustion of the gas at proposed new generation facilities to be built on Vancouver Island.

# How is CEAA triggered?

CEAA is triggered where a federal authority (a federal ministry or agency subject to the Act):

- is the proponent;
- sells or transfers control of land to enable a project to be carried out;
- contributes money or financial assistance to a project; or
- exercises a regulatory duty (such as issuing a license or permit) that is included in the Law List Regulation.

Projects triggered by CEAA will be subjected to a screening, unless they are named expressly on the Comprehensive Study List Regulation, which identifies major projects to be assessed in greater depth.

## When could a comprehensive study be triggered?

In the oil and gas context, some of the projects for which a comprehensive study is required include:

- The construction, decommissioning or abandonment of an offshore platform; a heavy oil or oil sands processing facility with a production capacity of more than 10,000 cubic metres;
- The expansion of a heavy oil or oil sands processing facility over a certain capacity;
- The construction, decommissioning or abandonment or an expansion of an oil refinery, a liquid petroleum production facility from coal, a sour gas processing facility, a liquefied natural gas facility, or a liquefied petroleum gas storage facility over certain production or storage capacities;
- The construction of an oil and gas pipeline more than 75 km in length; and
- An offshore oil and gas pipeline or an offshore exploratory drilling project.

## When could a screening be triggered?

In addition to the federal land and federal funding triggers, the Law List Regulation contains a list of statutory and regulatory approvals that will trigger a screening under CEAA. Some triggers potentially relevant to oil and gas operations include:

- A permit authorizing the destruction of fish habitat under s. 35(2) of the *Fisheries Act;*
- A diversion of a pipeline that must be approved by the National Energy Board (NEB) under s. 46(1) of the *National Energy Board Act;*
- An order of the NEB exempting certain pipelines and related facilities from the regulatory requirements pertaining to construction and operation of pipelines under s. 58(1);
- Permits for the operation, relocation, or abandonment of an international power line issued under s. 58.11(1), s. 58.32(1) or s. 58.34(2) of the *NEB Act;*
- Construction of other facilities across a pipeline for which excavation is required or explosives will be used and for which a permit is required from the NEB under s. 112(1) of the *NEB Act;*
- Licenses issued by the Yukon Territory Water Board for water use or deposit of waste into waters under ss. 14(6)(a) and (b) of the *Yukon Waters Act;*
- Exploratory licenses for oil and gas activity under s. 6(4) of the *Indian Oil and Gas Regulations, 1995,* under the *Indian Oil and Gas Act;*
- Surface leases or rights of way for oil and gas development on Indian lands under s. 27(1) of the *Indian Oil and Gas Regulations, 1995;*
- The construction of liquefied petroleum gas storage facilities under s. 6 of the *Liquefied Petroleum Gases Bulk Storage Regulations* under the *Canada Transportation Act;* and
- Where a permit is to be granted for the deposit of oil or other substances harmful to migratory birds or their habitat and the work is being done for scientific

purposes under s. 35(2)(b) of the *Migratory Birds Regulations* under the *Migratory Birds Convention Act*.

# What will the changes proposed in Bill C-19 mean for federal EA?

Bill C-19 will amend CEAA in a number of ways. It is a package of legislative changes proposed by the federal government as a result of a 5 Year Legislative Review of CEAA. Throughout this review, a multistakeholder committee (of which West Coast Environmental Law is a member) worked to develop amendments that would result in more efficient and meaningful federal EA. While some of the changes will be helpful, we are disappointed with the bill overall. We have chosen to mention 3 changes in this discussion paper; a full brief on Bill C-19 is available on our website.

## 1. Irrevocable Track Determination and Increased Public Participation

Perhaps the most significant change proposed by Bill C-19 from a practical perspective is the irrevocable track determination, whereby once a project has commenced on the comprehensive study track, it will no longer be able to be "bumped up" or referred to a mediator or to a panel review by the Minister. This change has been proposed primarily because industry maintains that the possibility of a panel review after a comprehensive study is too onerous and provides little certainty. West Coast Environmental Law is advocating that this change be deleted, or, if it is kept, that the associated public consultation provisions be strengthened.

The *quid pro quo* for this change is that Bill C-19 proposes a participant funding program for comprehensive studies, and work is underway to prepare a Ministerial Guideline intended to strengthen public participation in screenings. West Coast Environmental Law is advocating that this guideline be converted to a binding regulation.

The irrevocable track determination change means that people concerned about a project will have to have a very clear sense of the possible environmental impacts early in the process. Currently, there is no guarantee that public consultation will occur before the scope of the project is determined and the factors to be considered in the assessment are identified. The result is that an irrevocable track determination could be made before the public has a clear understanding of the severity of the impacts of the proposed project. Once this determination is made, it would be too late for the minister to appoint a panel for a project, even if serious potential impacts come to light.

## 2. Strategic Environmental Assessment

Bill C-19 introduces a new provision that states that the results of a regional environmental effects study may be taken into account in the conduct of an EA. This

appears to be an initial attempt to address concerns that, because EA is project specific, broader environmental concerns (such as the cumulative effect of many projects) are neglected in the EA process. At this time, the only way that these "strategic environmental effects" or broader concerns can be considered is through the 1999 Cabinet Directive on the environmental Assessment of Policy, Plan and Program Proposals, which is discretionary, not binding, and not transparent.

### 3. Follow up Programs

Follow-up and monitoring is vital to determining if the predictions made in an EA were, in fact, accurate, and if the specified mitigation measures were carried out and are having the predicted effect. Follow up is an important process if we are to ensure that the EA is meaningful, and we would encourage those involved in an EA to push for, and participate in, meaningful follow up.

Bill C-19 strengthens the follow up provisions of CEAA by introducing a requirement that follow-up programs be mandatory upon completion of a comprehensive study and discretionary for screenings, provided that regulations are enacted to facilitate follow up. As part of this, the Canadian Environmental Assessment Agency has indicated that it is developing a quality assurance program, which will hopefully strengthen the implementation of CEAA.

## Specific Concerns about the Offshore

Section 24 of CEAA states that an earlier environmental assessment can be used for a subsequent project where the original project did not proceed. There is no time limit on the applicability of this section. This means that, depending on how the study area is defined, it is possible that the federal government could seek to rely on the recommendations of the 1986 panel report regarding the lifting of the offshore moratorium, which contained 92 recommendations that would need to be met before the moratorium could be lifted. In our view, it is highly unlikely that the federal government would permit offshore oil and gas activity without another EA, but the prospect does exist.

The oil and gas industry is seeking additional regulatory changes to CEAA that would see certain offshore oil activities subjected to a screening instead of a comprehensive study.

# B. British Columbia Environmental Assessment Act

On May 9th, the BC Government introduced Bill 38, a completely rewritten Environmental Assessment Act. The state of provincial EA is clearly in flux; please refer to West Coast's Backgrounder on Bill 38 to provide some indication of how EA could be applied in the future.

While the BC legislation is changing dramatically, the triggers for considering whether an EA will be conducted are not being altered. Currently in BC, onshore oil and gas drilling activities and wells are not subjected to the EA regime. (This also means that coal bed methane activities will not be subjected to an EA.) The current EA triggers for energy projects include:

- electric transmission lines and substations, or modifications where the rebuilt facility will have a voltage of 500kV or more;
- energy storage facilities that can yield 3PJ or more of energy;
- energy use, conversion or processing facilities;
- natural gas processing plants that process natural gas at a rate of less than 5.634 million cubic metres/day and result in sulphur emission of 2 tonnes or more per day; or that process natural gas at a rate of more than 5.634 million cubic metres/day;
- transmission pipelines of 60 km or more where the diameter is $\leq$114.3 mm; 50 km or more where the diameter is >114.3 and $\leq$323.9 mm; and 40 km or more where the diameter is >323.9 mm; or modifications to these pipelines in some circumstances;
- hydroelectric, thermal or other power plants that will have capacity of 50 MW or more of electricity; and
- platforms, artificial islands or facilities associated with exploration for and production of oil and natural gas from the foreshore or offshore.

Since the current BC Act came into effect in 1996, just over 40 project approval certificates have been granted. The EA Office hasn't rejected any projects to date.