

**Review of Posted Decision:
Federal/Provincial Environmental Assessment Coordination
A Guide for Proponents and the Public**

Decision Information:

Registry Number: PA06E0008
Proposal Posted: October 31, 2006
Decision Posted: June 20, 2007

Comment Period: 90 days
Number of Comments: 9
Decision Implemented: June, 2007

Description

On June 20, 2007, the Ministry of the Environment (MOE) approved the “Federal/Provincial Environmental Assessment Coordination in Ontario: A Guide for Proponents and the Public” (the “Guide”). The purpose of the Guide is to help proponents and the public understand when and how EA processes for projects subject to both the *Canadian Environmental Assessment Act (CEAA)* and the provincial *Environmental Assessment Act (EAA)* should be coordinated. According to the Guide, proponents will be able to prepare one set of documentation and follow one public consultation process, and both governments will agree to follow a similar timeline for decision-making. The Guide assists with the implementation of the Canada-Ontario Agreement on Environment Assessment Cooperation (the “Agreement”) that was signed on November 1, 2004, in which both governments agreed to coordinate their activities on projects that are subject to both *CEAA* and *EAA* requirements.

Background:

EA processes are a means of determining whether certain types of developments or infrastructure projects including roads, waste management and energy projects, which have the potential for environmental impact, should be allowed to proceed, proceed with conditions, or in some cases, not proceed at all. Proponents seeking approvals and some EA practitioners have often complained that complying with both the federal and provincial EA processes was overly burdensome, duplicative and procedurally complicated. Further, there has been a great deal of uncertainty concerning the timing and outcomes of EA processes.

An *EAA* amendment in 1996 granted the Minister of the Environment the authority to “vary or dispense with a requirement imposed under this Act with respect to the undertaking in order to facilitate the effective operation of the requirements of both jurisdictions.” This amendment led to the signing of the 2004 Agreement with the federal government.

In spring 2004, MOE announced that it would establish an advisory panel of expert practitioners of Ontario’s EA processes. The advisory panel was asked to make recommendations on provincial EA processes in general and on how they apply to projects in the waste, transportation/transit and green energy sectors, in particular. EA practitioners advised the panel that there was a “continuing lack of clarity regarding joint assessments under the *EAA* and the *CEAA*” and that “there may still be considerable overlap in jurisdictional authority.” In its final report, the advisory panel recommended that MOE develop guidance material on coordinated EAs, stating that “MOE should develop, with proponent and EA participant input, clear and concise guidelines that explain when and how the *EAA* will be harmonized with *CEAA* in relation to undertakings that are potentially subject to both statutes.”

In addition to this Guide, codes of practice for preparing and reviewing the terms of reference, public consultation and mediation aspects of the provincial *EAA* have been approved. For the ECO’s review of these three codes, refer to Section 4 of this Supplement. Codes of practice for the preparation and review of individual EAs; and preparing, reviewing and using Class EAs, have been posted on the Registry (Number 010-1259) but have not been approved as of May 2008.

Overview of the Guide:

The Guide provides direction to proponents who are planning projects that require a federal screening and a:

- provincial individual EA as stipulated in Part II of the *EAA*; or,
- provincial Class EA process or environmental screening process in accordance with the Electricity Projects Regulation (Ontario Regulation 116/01).” (For the ECO’s review of this regulation, refer to our 2001-2002 Annual Report, pages 89-91.)

Only about 10 per cent of provincial EA projects, i.e., about 10-15 projects per year, follow the provincial individual EA process and only some of these projects are subject to the requirements of the *CEAA*. The Agreement requires that only projects that are subject to both a federal screening and a provincial individual EA follow the coordinated EA process.

Ninety per cent of provincial EA projects follow one of the ten approved Class EA processes that have been developed for projects with known and predictable effects that MOE believes can be managed and mitigated. A Class EA is a self-assessment process that does not normally involve the Environmental Assessment and Approvals Branch (EAAB) of MOE. EA requirements for waste and energy projects are similar to those in Class EAs except that they are outlined in O. Reg. 116/01 and O. Reg. 101/07, respectively. Although the Agreement does not require proponents of these types of EA projects to follow the coordinated EA process, proponents are expected to contact the federal Environmental Assessment Agency to discuss coordination, according to the Guide. The Guide also does not apply to EA projects that are subject to provincial Declaration Orders.

The Guide outlines the coordination roles and responsibilities of the federal and provincial governments. Under the Agreement, the EAAB is responsible for the administration of coordinated EAs for projects on provincial lands.

As described in the proposal notice, the purpose of the Guide is to:

- Help proponents understand and meet the requirements of both federal and provincial environmental assessment legislation.
- Inform the public about environmental assessment process requirements for projects subject to both federal and provincial environmental assessment legislation.
- Assist proponents in avoiding duplication and overlap, costly delays and uncertainty.
- Clarify the roles and responsibilities of parties involved in a coordinated environmental assessment.
- Promote transparency of government involvement and the decision-making process.

The Guide describes “federal-provincial coordination” as:

- a “cooperative, common sense approach to coordinating two EA processes”;
- the application of both governments’ EA legislation;
- an approach to obtaining the type and quality of information needed to meet federal and provincial EA requirements; and
- a process where each government makes its own decisions, but coordinates timing with each other.

The Guide clarifies that “federal-provincial coordination” is not the use of one piece of legislation to satisfy both federal and provincial requirements. It is also not the use of the “lowest common denominator” to meet EA obligations.

For projects that follow the provincial individual EA process as spelled out in Part II of the *EAA* (ss.5-12.4), the Guide provides advice on preparing terms of references, project descriptions, scoping documents, public consultation and EA reports that should result in a “single body of documentation on environmental effects, where appropriate, that satisfies both federal and provincial EA requirements”. Both governments have agreed to review and comment on the documents at the same time, and to

announce their decisions in “roughly the same time frame.” The Guide also includes advice on public consultation and preparing documentation for any other EA projects administered as coordinated EAs.

Implications of the Decision

The Guide implements the Agreement made November 2004, that gave legal authority to using a coordinated approach to meeting the requirements of the federal and provincial EA legislation. The Guide clarifies what is meant by a “coordinated approach” and the roles and responsibilities of all participants. Over the next few years, participants in coordinated EAs will have an opportunity to “test” the Guide and determine whether or not the anticipated benefits of coordinated EAs have been achieved.

As a result of the requirement for the federal and provincial governments to review the Agreement in 2008, MOE may be required to revise the Guide.

Public Participation & EBR Process

The proposal was posted on the Registry on October 31, 2006, for a 90 day comment period during which MOE received nine comments from representatives of the federal, provincial and municipal governments, all of whom had experience with EAs. Many of the comments were suggestions on how the Guide should be clarified or were a series of questions for MOE. Some commenters pointed out inconsistencies between the federal and provincial EA requirements, and with current practices that should be reflected in the Guide. In addition, a couple of commenters were concerned about time frames. Although commenters were generally supportive of the proposed Guide, some were concerned that the EA process and advice could vary significantly between one coordinated EA and another.

In response to the comments, MOE made several revisions to the Guide. Text was added to clarify that the more stringent requirements of either jurisdiction would apply in a coordinated EA. In other words, proponents are expressly discouraged from using the “lowest common denominator” approach. This policy was established to clarify which process should be followed when there is duplication between federal and provincial EA processes. MOE also clarified when the coordination of provincial and federal environmental assessments is mandatory and when it is optional. In addition, MOE extended the time frame within which the federal and provincial governments have to review and comment on a proponent’s project description from two weeks to 30 days.

Some of the issues raised by commenters that were not explicitly dealt with through revisions to the Guide included:

- The need for a clearer differentiation of the responsibilities of the EAAB and the federal government;
- Concerns that the definitions of some terms in the Guide were not identical to those in the *EAA*;
- The relationship of these documents to other ministry EA guidance documents;
- Concerns that other EA documents may need to be revised to reflect process descriptions in this Guide;
- The need for more guidance for effective public participation from Aboriginal communities; and
- The need for further clarification on the use of federal EA documentation to backup an elevation request at the provincial level.

SEV

MOE explained that aspects of the decision were compatible with the ministry’s SEV Environmental Protection principle since environmental assessment is an upfront planning tool used to ensure that proponents consider all aspects of the environment during the planning and development of a proposed project. In addition, MOE noted that the Guide informs the public about participating in a coordinated planning process, thereby ensuring that the environment is protected through avoidance and/or appropriate mitigation. For its Ecosystem Approach principle, MOE explained that proponents must identify potential environmental impacts, including the interrelationship among environment, economy and

society in the assessment of alternatives. For its Resource Conservation principle, MOE noted that these issues are taken into account through the proponent's consideration of feasible alternatives during the environmental assessment process.

Other Information

In 1993, the Canadian Council of Ministers of the Environment (CCME) agreed that harmonization of environmental management, including minimization of overlap and duplication of federal and provincial programs, was a top priority. The Canada-Wide Accord on Environmental Harmonization and Sub-Agreement on Environmental Assessment were signed by the CCME (with the exception of Quebec) in January 1998. The Sub-agreement had the following objectives:

- 1.1.1 To ensure that the environmental effects of proposed projects are carefully considered before decisions are taken by governments.
- 1.1.2 To achieve greater efficiency and the most effective use of public and private resources...through a single environmental assessment and review process for each proposed project.
- 1.1.3 To establish accountability and predictability by delineating the roles and responsibilities of the federal, provincial and territorial governments.

The Sub-agreement outlined requirements for the content of the EA, public participation, designation and responsibilities of the lead party for each proposed project. Under the Sub-agreement, proponents were required to consider identifying and evaluating the "direct, indirect, cumulative and transboundary effects of the proposed project" and alternative means of carrying out the project. For public projects, the Sub-agreement required proponents to consider identifying and evaluating "alternatives to the proposed project" and led to the signing of the bilateral agreement "Canada-Ontario Agreement on Environment Assessment Cooperation" on November 1, 2004.

ECO Comment

The ECO regards the idea of the provincial and federal governments coordinating environmental assessment processes as sensible. A coordinated approach to meeting EA documentation and public consultation requirements is a more efficient and potentially more effective approach to meeting EA requirements. Although the federal and provincial EA processes have the same overall goal of promoting good environmental planning and use similar approaches, there are significant differences as well. These make it difficult to truly effect a coordinated approach and to document in a Guide. Regardless, the ECO believes that the Guide is a useful first step towards implementing the coordinated EA process, in the absence of other relevant guidance documentation.

Although EA practitioners were generally supportive of the Guide, they were also confused. The Guide outlined processes that were inconsistent with their experiences or with provincial or federal requirements, or were silent on matters relevant to their projects. They also had many questions and suggestions, many of which were not addressed in the final version of the Guide. The feedback from EA practitioners suggests that the Guide does not provide "clear" guidelines as recommended by the advisory panel. The ECO urges MOE to closely monitor the use of the Guide and to revise it, if necessary, to ensure that the original objectives are achieved.

Although the Guide outlines MOE's expectations related to many aspects of the EA process, it was not intended to address the myriad of concerns regarding provincial EAs. As a result, the Guide does not advance provincial EA reform except within the narrow confines of coordinated EAs. The ECO discusses the need for significant EA reform in Section 2.2 of this year's 2007-2008 Annual Report.