

Towards a Modern Environment Act:
Preliminary Recommendations

On Behalf of The Coalition:
Public Interest Law Centre
Consumers' Association of Canada (Manitoba Branch)
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The Coalition

The Public Interest Law Centre, the Consumers' Association of Canada (Manitoba Branch) and Dr. Patricia Fitzpatrick (hereafter referred to as 'the Coalition') are pleased to offer these preliminary comments on the pending review of *The Environment Act*.

For over thirty years, the Public Interest Law Centre has represented groups and individuals on matters of broad public interest. Over the past decade, the Centre has become increasingly engaged in environmental assessment matters before Manitoba's Clean Environment Commission. The Centre has worked extensively with experts in adaptive environmental management as well as assessment areas such as cumulative effects, human health risk and sustainability assessment. In addition, staff at the Centre have played an active role in the Law Reform Commission's review of existing Manitoba legislation.

The Consumers' Association of Canada, Manitoba Branch (CAC) is a non profit organization that believes consumers have a right to a safe and healthy environment. Actively representing the interests of Manitoba consumers for more than sixty years, CAC Manitoba has played a lead role in a number of important assessments under *The Environment Act* including Wuskwatim (2004), Bipole III (2012) and Keeyask (2014). Over the past five years, CAC Manitoba has undertaken a number of consultations seeking to better understand the views of northern and rural Manitobans on issues relating to major natural resource developments.

Dr. Fitzpatrick is an expert in environmental assessment and natural resource planning with particular expertise in adaptive environmental management. She has studied environmental assessment processes in both Manitoba and Canada's North. Dr. Fitzpatrick has appeared as an expert witness on adaptive management in two recent Clean Environment proceedings. Her current research interests include social responsibility policies and government regulations for fostering sustainability in the mining industry as well as consideration of the effectiveness of different models of independent oversight.

Over the past two months, the Coalition has engaged in consultations with leading Canadian experts including Dr. Jill Gunn and Dr. Bram Noble (project specific and regional cumulative effects assessment), Dr. Alan Diduck (community participation and adaptive environmental assessment), Dr. Robert Gibson and Dr. Kyrke Gaudreau (sustainability assessment). While these experts have offered important insights, the preliminary recommendations are those of the Coalition members.

A. Executive Summary

When *The Environment Act* was enacted in 1988, Manitoba was considered a leader in environmental assessment and protection. Manitoba is still recognized as a leader in its support for participant funding. However, Manitoba now lags behind a number of Canadian jurisdictions with regard to environmental protection and sustainability.

Independent tribunals such as the Clean Environment Commission have flagged gaps in our current legislation.¹ Nationally recognized experts have noted significant opportunities for improvement in our current legislation and practice.² The need for material, remedial action has become even more compelling given recent changes to the *Canadian Environmental Assessment Act*.

Modernizing the *Environment Act* will not be a simple exercise in streamlining. Rather, the review process should focus on:

- ensuring that the public is fully engaged in the review;
- addressing key gaps in the legislation;
- re-establishing Manitoba's role as a leader in environmental protection and assessment.

The following recommendations are a preliminary response to the Government of Manitoba's consultation paper, *Environment Act Consultation: The Road to Enhancing Environmental Protection in Manitoba*. These preliminary recommendations are intended to promote discussion and assist in focusing the government review. Given the limited nature of public consultation to date, the Coalition strongly recommends that the Government of Manitoba engage in a more extensive consultation focused on including the views of all sectors of Manitoba society including, in particular, those communities which have been historically marginalized in environmental deliberations.

¹See, for example, "Report on Public Hearing: Bipole III Transmission Project", June 2013, pg 130, non-licensing recommendation 13.1:

The Government of Manitoba enhance the practice of environmental assessment in the Province by requiring higher standards of performance. In this regard, the government should:

- *Develop environmental assessment standards by whatever means necessary: legislation, regulation, practice directions, protocols or other policy measures.*
- *Provide comprehensive and clear guidance for proponents, consultants and practitioners.*
- *Establish protocols for best professional practice.*

The new environmental assessment process must, at a minimum, address: use of traditional and local knowledge, selection of appropriate valued environmental components, establishment of baseline conditions, and establishment of thresholds in the conduct of environmental assessments.

The protocols should reduce uncertainty, enhance effectiveness and improve predictability of future environmental assessments.

²See, for example, Dr. Robert Gibson & Dr. Kyrke Gaudreau, "Final Report: Framework for Sustainability-based Assessment for the Public Utilities Board's Needs For and Alternatives To (NFAT) Assessment of Manitoba Hydro's Preferred Development Plan and Alternatives", February 3, 2014.

The Coalition's recommendations are guided by 5 core principles:

1. Meaningful Participation and Collaborative Decision- making
2. Prevention and Precaution
3. Flexibility, Adaptive Management, and Cumulative Learning
4. Effectiveness (Follow-up and Enforcement)
5. Sustainability

Through regulatory experience, stakeholder engagement and consultation with leading experts, it has become clear that the 5 core principles must be entrenched in both the review process and *The Environment Act*. These principles should direct present and future reforms to the Act, in particular when addressing the deficiencies in Manitoba's current environmental assessment and licensing regime.

While this submission is largely focused on the Government of Manitoba's review of *The Environment Act*, the interrelations of the Act with other Manitoban and Canadian legislation must also be considered when conducting this review and any future reform.

Consideration of the 5 core principles and the preliminary recommendations in conjunction with a meaningful round of public consultation, can and should lead to an Act which contributes to overall sustainability and which enables Manitoba to take a leadership role in environmental law.

B. Principles and Recommendations for Change

There have been few changes made to *The Environment Act* since its enactment over 25 years ago. The absence of meaningful reform coupled with dramatic changes in our understanding of assessment and significant changes in *the Canadian Environmental Assessment Act* makes it critically important that the government's current review be extensive and involve meaningful public participation and collaboration.

Decision making processes, both within the Act and during the review process, need to be about promoting the public interest, both now and in the future. For this to occur there needs to be a defensible and explicit idea of what the public's interests are. Criteria that articulate the future goals that environmental assessment and licensing should work towards need to be developed and incorporated into the legislative framework.

The following principles and related recommendations provide a framework for the review of *The Environment Act* that aims to address the deficiencies in Manitoba's current environmental assessment and licensing regime. An important part of enhancing the regime will involve establishing linkages between *The Environment Act* and key related legislation such as *The Planning Act* and *The Sustainable Development Act*.

The goal of the Government's current review should be to ensure that *The Environment Act* incorporates the following principles into the environmental assessment and licensing process in order to promote sustainability and strengthen the support of the public and proponents.

1. Meaningful Participation and Collaborative Decision-making

The government of Manitoba must encourage effective collaboration in the development of Manitoba's environmental assessment and licensing process. Collaboration and input should be actively sought out from all Manitobans, in particular those from Northern and rural Manitoba who are often the most likely to be effected by decisions under *The Environment Act*.

Recommendations:

Review of *The Environment Act* and the resulting environmental assessment and licensing framework should involve extensive collaboration with the public at all stages. Detailed information should be easily available, and assistance should be provided to help all citizens in Manitoba understand how a proposed project may impact their lives.

Efforts to reform Manitoba's environmental management system should focus on ensuring that the results of the environmental assessment process are accounted for in the final licence. It should be clear how important decisions are made, including how public input is considered, and reasons must be provided to explain how decision makers came to their ultimate decisions.

The government must encourage effective collaboration in Manitoba's environmental

assessment and licensing process by:

- Undertaking extensive public consultation in the review and reform of *The Environment Act* with a transparent process for follow-up and a consideration of public input.
- Continuing to improve electronic access to licensing and assessment information.
- Restructuring licensing and assessment documents to ensure they are easily navigable and understandable by the public.³
- Increasing public education initiatives with a focus on citizens most likely to experience adverse impacts. Such activities should be easily accessible and include aboriginal traditional knowledge and the perspectives of experts independent of proponents.
- Improving public registry files and available data to improve accessibility - for example, an index that identifies all documents that are supposed to be in a particular file; or easily accessible statistics that show the number of licences issued per development class, per year.
- Requiring the submission of an Environment Act Proposal that precedes the completion of an Environment Impact Statement.
- Ensuring notice is provided to the public about new projects as early as possible in the planning process. Notification should be accessible and tailored for each project. The current means of providing notice must be improved to include wider variety of news sources and social media avenues to ensure meaningful distribution. Notice needs to be accessible to persons who do not speak English as a first language, who do not regularly read the newspaper, and who live in rural and remote areas.
- Legislating the use of a scoping document for all project assessments to be circulated for public and independent third party review before the environmental assessment is undertaken.
- Legislating a requirement that decision makers provide reasons for all decisions involved in the environmental assessment and licensing process.
- Recognizing the differences between the projects that fall into the various classes of development. While Class 3 projects should include extensive collaboration with the public, there could be a sliding scale developed (with public consultation) to recognize that some standard small projects may not need the same level of public involvement.
- Developing clear and comprehensive definitions of 'environment' and 'environmental impacts'.
- Encouraging decision-makers and the Clean Environment Commission to increase their use of less formal processes like mediation and open houses throughout the assessment and licensing process.

2. Prevention and Precaution

Manitobans should anticipate and prevent or mitigate significant adverse economic, environmental, human health and social effects of decisions and actions, having particular careful regard to decisions whose impacts are not entirely certain but which,

³ For example, improvements were made to the Keeyask Generating Station Project, such as the use of headings and a consolidated definitions section. A standard format should be developed, with consultation with the public, and applied to all licences going forward.

*on reasonable and well-informed grounds, appear to pose serious threats to the economy, the environment, human health and social well-being.*⁴

Recommendations:

One of the main purposes of environmental assessment is to identify adverse impacts, first and foremost, so they are prevented or at least mitigated. The Government's review and reform of *The Environment Act* should establish a legislative framework for effectively predicting potential impacts of development on the environment (including social, economic and cultural aspects) and for preventing or mitigating adverse impacts and optimizing positive effects.

Where there are uncertainties in baseline data or in potential impacts, steps must be taken and safeguards put into place to reduce or adapt to uncertainties and thereby reduce associated risks to the environment. If there is a risk of serious or irreversible damage to the environment, action must be taken to prevent any such harm in a manner consistent with the precautionary principle. Monitoring and mitigation plans should be put in place to address adverse effects as they arise, and should include attention to the possibility of unpredicted impacts occurring.

If a situation arises during project construction or operations where an unpredicted impact occurs and there is a risk of adverse effects on the environment, decision makers should have the legislative authority to suspend any licenses that have been granted and temporarily or indefinitely halt project activities until the risk of adverse effects have been addressed. There should be mechanisms in place so that such effects can be prevented before development progresses past the point where impacts are irreversible.

The government should promote prevention and precaution in Manitoba's environmental assessment and licensing process by:

- Requiring that decision-makers and proponents meaningfully consider alternatives to development and the impact of those alternatives as compared to the impacts of the proposed project.⁵
- Expanding the purpose of the Act to include concepts of precaution and prevention.⁶
- Including legislated requirements in final licences for detailed management plans and reporting measures.
- Improving guidance documents - For example: expand the information contained in the EAP guidelines, such as examples of follow-up, monitoring and reporting plans;

4 *The Sustainable Development Act*, Schedule A, s. 5

5 See the Public Utilities Board's Final Report on the NFAT Review, 2014, p. 19, 33-37, 91-92, 253. "The Panel Recommends that integrated resource planning become a cornerstone of a new clean energy strategy for the Province of Manitoba" (p. 253) "The Panel recommends that the Government of Manitoba not approve the construction of any generation facilities... unless such facilities are justified through an integrated resource planning process." (p. 253) "The integrated resource planning process must include public consultation" (p. 253)

6 See CEAA 2012 s. 4(1)(g) and s. 4(2) as an example

- create more project specific guidelines⁷ and development specifications⁸.
- Expanding the legislated requirements for Environment Act Proposals and the creation of similar legislated requirements for the Environmental Impact Assessment.⁹
 - Identifying and establishing common indicators for effects-based monitoring at the project level and on a regional basis.
 - Designating timelines for review of guidance documents and Environment Act Licenses.
 - Formalizing the requirement of a scoping document for Environmental Impact Assessments.
 - Incorporating licensing mechanisms that allow for periodic review and suspension or cancellation of licences if unforeseen adverse environmental impacts occur during construction and initial project activities.

3. Flexibility, Adaptive Management, and Cumulative Learning

Environmental assessment and licensing in Manitoba needs to consider the past and the future. Proponents, decision makers, and the public must have knowledge of the potential cumulative impacts of a project and such knowledge should be used during the development of project plans and mitigation measures.

Environmental assessment and licensing should be able to adapt to changing conditions in the environment and acknowledge past successes and failures. By learning from experience, policy, legislation and management can be adjusted to reflect the best possible means of predicting environmental impacts, preventing or mitigating negative effects, and optimizing the positive effects.

Recommendations:

Reforms to *The Environment Act* should be adaptive, create the opportunity for flexibility when needed, and utilize experiences from the past to help create a system that ensures optimal environmental protection and contributes to Manitoba's overall sustainability.

The Environment Act should include:

- Mandatory Environmental Assessments for all Class 3 developments which trigger:
 - Mandatory Regional Environmental and Sustainability Assessments that are reviewed by the public, independent third parties, and include Aboriginal Traditional Knowledge.
 - Effects monitoring requirements that are incorporated into approvals and

⁷ For example current guidelines produced by the Department for municipal water supply systems, crop protection chemical warehouses, wastewater treatment facilities. It might also be useful to develop specific guidance for the common monitoring components suggested in the project specific guidelines so that consistent effects-based information is available across multiple projects.

⁸ See the Department's Lagoon Design Guidelines

⁹ See COSDI Recommendation 4B

- licensing decisions.
 - Mandatory consideration of cumulative effects in Environmental Impact Statements and Environment Act Proposals.
- Transparent and consistent criteria for Environmental Impact Statements and Environment Act Proposals.
- Both mandatory and adaptable licensing requirements that require licence review, data collection, participation in regional studies, and could allow for the reversibility of licensing decisions.
- Discretion for the Minister to require environmental assessments and/or public review of past projects and licence alterations in situations where environmental conditions have changed.
- The creation of central environmental assessment data storage and convenient electronic access to such information for proponents, the public, and regulators.
- Provide guidance on the type of data that should be gathered, how it should be formatted, and how it should be stored.
- Legislative requirements for regular review of the environmental assessment and licensing provisions of the Act.¹⁰

4. Effectiveness (Follow-up and Enforcement)

*[T]he effectiveness of environmental assessment is the extent to which it identifies, assesses, and finds ways to mitigate or eliminate the potential negative impacts of development, and importantly how well environmental assessment helps or improves environmental management and ultimately the state of the environment.*¹¹

In order to ensure that the legislative framework set out in *The Environment Act* is contributing to effective protection of the environment from project related impacts, post-licensing activities such as monitoring and enforcement need to be recognized as integral components of the environmental assessment process.¹² Enforcement also has an important role in ensuring effective environmental protection since “without enforcement measures, environmental assessment and licensing processes cannot be relied upon.... to protect the environment.”¹³ A full range of compliance and enforcement mechanisms need to be incorporated into Manitoba’s Act including clear administrative penalty provisions and the ability to have an injunction or stop work order issued.¹⁴

10 See s. 72 of the Canadian Environmental Assessment Act, S.C. 1992, c. 37

11 Kevin Hanna and Bram Noble, *A Brief to House of Commons Committee on the Environment and Sustainable Development on the Canadian Environmental Assessment Act*, P.3

12 As discussed in previous sections, follow-up mechanisms are not only a critical aspect of effectiveness, but are also important in prevention and precaution and adaptive management and learning.

13 Manitoba, *Environment Act Consultation: The Road to Enhancing Environmental Protection in Manitoba*, 2014, p. 9

14 For an example of criteria for effective environmental assessment see - Kevin Hanna and Bram Noble, *A Brief to House of Commons Committee on the Environment and Sustainable Development on*

Recommendations:

There needs to be a thorough review of the monitoring and follow-up activities used to support Manitoba's environmental assessment process. Baseline data should be gathered and stored for use by proponents in order to assist with the prediction of cumulative effects of future projects and for comparative purposes so there is a clear picture of the actual impacts of licensed developments. Such data should be independently reviewed and must consider Aboriginal Traditional Knowledge.

Recommended Reforms:

- Establish enforceable timelines and procedures for review of the effectiveness of monitoring and follow-up activities.¹⁵
- Establish baseline environmental conditions for comparative purposes that are independently reviewed and include Aboriginal Traditional Knowledge.
- Reform the Act to require detailed plans for environmental protection and management in all environment act proposals and environmental impact statements.
- Require mitigation and monitoring plans, along with the budget allocated for such plans, to be outlined in the final licence.
- Legislate reporting requirements for the data accumulated during monitoring activities and ensure such information is easily accessible to the public and other proponents.
- Ensure monitoring and mitigation measures (as mentioned in the above two points) are reviewable by the public and supported by enforcement provisions.
- Formalize the ability of the public to request investigations of possible offences.

5. Sustainability

Sustainable Development is a journey not a destination - we need to be imaginative - think in ways we have not before and be willing to take some risks¹⁶

Recommendations:

The current review of the environmental assessment and licensing regime provides an important opportunity for Manitoba to take the next step and incorporate the principles of sustainable development into the processes required by *The Environment Act*.

There has already been extensive consideration of how such incorporation could take place in Manitoba, including the transition towards a system of sustainability assessment.¹⁷ As well,

the Canadian Environmental Assessment Act, P.4-6

15 The larger the project and the more risk of adverse environmental impacts, the shorter the timeline should be – for example Class 3 projects should have to undergo review every five years.

16 Sinclair and Quinn, "From Idea to Practice: Sustainable Development Efforts in Manitoba" 35(1) 2012 p. 47

17 See the White Paper on the Sustainable Development Act (Winnipeg: Sustainable Development

there are several examples of successful sustainability assessments which have been undertaken in Canada.¹⁸ These examples and previously suggested reforms should be given serious consideration when reviewing *The Environment Act* to ensure that Manitoba's environmental assessment and licensing process optimally contributes to Manitoba's overall sustainability.

Manitoba's environment should be managed for the benefit of present and future generations by ensuring the long-term productive capability, quality and capacity of natural ecosystems is enhanced by environmental assessment and licensing processes and that important projects and undertakings in Manitoba make positive contributions to its lasting wellbeing. This will entail considering the full suite of socio-economic and biophysical factors that affect progress towards sustainability and seeking multiple, mutually-reinforcing, fairly distributed and lasting positive effects while also avoiding significant adverse effects and risks.

In order to ensure such benefits are produced, the economic, social, and environmental impacts of existing and proposed developments and alternatives, and the interaction among these impacts, must be taken into consideration throughout Manitoba's environmental assessment and licensing regime. An intergenerational perspective of future environmental needs and consequences should also be adopted throughout the process. In order to maximize *The Environment Act's* contribution to Manitoba's overall sustainability, it is necessary to incorporate sustainable assessment into Manitoba's licensing and assessment regime.¹⁹

Coordination Unit, 1996), section 7

18 For example, the Mackenzie Valley Gas Project, the Whites Point Quarry and Marine Terminal Project and the Kemess North Copper-Gold Mine Project

19 For a more specific discussion of sustainability assessment principles, generic criteria, related process design requirements see: Gibson, R. B., et al. (2005). *Sustainability Assessment: Criteria and Processes*. London, UK, Earthscan; or the condensed version in Gibson, R. B. (2006). "Sustainability assessment: basic components of a practical approach." *Impact Assessment and Project Appraisal* 24(3): 13.

For a discussion of how to specify sustainability-based evaluation and decision criteria for particular applications, see: Gibson, Robert B., *Sustainability-based assessment criteria and associated frameworks for evaluations and decisions: theory, practice and implications for the Mackenzie Gas Project Review, a report prepared for the Joint Review Panel for the Mackenzie Gas Project*, final report 26 January 2006b; , available at <http://www.acee-ceaa.gc.ca/default.asp?lang=En&n=155701CE-1>

For examples of previous Canadian EA joint panel reviews applying "a contribution to sustainability test" and/or setting out such a test for application by government decision makers, see:

- Whites Point Joint Review Panel (WPJRP), Joint Review Panel Report on the Whites Point Quarry and Marine Terminal Project (Ottawa: Canadian Environmental Assessment Agency, 2007) Available at: http://www.ceaa-acee.gc.ca/B4777C6B-docs/WP-1837_e.pdf [Accessed 16 June 2014]
- Kemess North Joint Review Panel (KNJRP), Panel Report: Kemess North Copper-Gold Mine Project. 2007, Available at <http://www.acee-ceaa.gc.ca/052/details-eng.cfm?pid=3394>
<http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=65713>
- Mackenzie Gas Project Joint Review Panel, Foundation for a Sustainable Northern Future:

Sustainability and the incorporation of the principles of sustainable development²⁰ should be the main focus of review and incorporated into all aspects of Manitoba's environmental assessment and licensing process including, but not limited to:

- EIS guidelines and criteria;
- The considerations made by the TAC;
- Opportunities for public participation; and,
- Assessment and licensing decisions made by Government.

C. Conclusion

The Coalition, through regulatory experience, stakeholder engagement and consultation with leading experts, has identified 5 core principles that must be entrenched in both *The Environment Act* review process and the Act itself:

1. Meaningful Participation and Collaborative Decision- making
2. Prevention and Precaution
3. Flexibility, Adaptive Management, and Cumulative Learning
4. Effectiveness (Follow-up and Enforcement)
5. Sustainability

These principles should direct present and future reforms to the Act, in particular, when addressing the deficiencies in Manitoba's current environmental assessment and licensing regime, including:

- A lack of transparency and clarity;
- A need for effective and efficient enforcement; and
- A need for clear guidance on the purpose and direction of the Act.

This review process provides a unique opportunity to meaningfully engage the Manitoban

report of the Joint Review Panel for the Mackenzie Gas Project. 2009, Available at:

<http://www.acee-ceaa.gc.ca/default.asp?lang=En&n=155701CE-1>

- Lower Churchill Joint Review Panel, 2011. Lower Churchill Hydroelectric Generation Project: Report of the Joint Review Panel. Available at: <http://www.ceaa.gc.ca/052/details-eng.cfm?pid=26178>

For other examples of sustainable assessment applications in Canadian cases see:

- Kyrke Gaudreau and Robert Gibson, *Framework for Sustainability-based Assessment for the Keeyask Hydro Project*, 2013

- Kyrke Gaudreau and Robert B. Gibson, *Framework for Sustainability-based Assessment for the Public Utilities Board's Needs For and Alternatives To (NFAT) Assessment of Manitoba Hydro's Preferred Development Plan and Alternatives*, February 2014

- Winfield, Mark, Robert B. Gibson, Tanya Markvart, Kyrke Gaudreau and Jenny Taylor, "Implications of sustainability assessment for electricity system design: the case of the Ontario Power Authority's Integrated Power System Plan," *Energy Policy* 38 (2010), pp.4115-4126

²⁰ Such as those set out in *The Sustainable Development Act* in Schedule A. The Guidelines for Sustainable Development as set out in Schedule B of this Act should also be considered.

public in addressing key gaps in *The Environment Act*, with the goal of re-establishing Manitoba's role as a leader in environmental protection and assessment.