

Environment Act Consultation 2014 - Comments and Question Response

I would like to preface my responses to the consultation document questions with a general response with respect to the scope of the review in the Consultation Paper based on experience for many years of administrating the licencing process under the current Act, several years of conducting effects assessments, as well as having some knowledge, although limited, with respect to enforcement issues under the current Act.

The current Environment Act developed more than 25 years ago was a front-runner in environmental legislation, but now it is badly dated and not effective.

Accordingly, the scope of the review outlined in the consultation paper is disappointing and is much too narrow and appears to be just another tweaking of the current Act. My view is that it is past time to forget about tweaking and replace the current Environment Act with two new Acts....an Environmental Assessment Act and an Environmental Protection Act. The Assessment Act would focus on the environmental assessment and licencing/approvals process, whereas the Protection Act would focus on regulations and enforcement.

In addition, the consultation paper appears to ignore the extensive government COSDI process in the late 1990's and early 2000's.

COSDI was a very important undertaking of government and involved the appropriate stakeholders in Manitoba respecting sustainable development implementaion including reform to the development assessment and review process.

The June 1999 Report of "The Consultation On Sustainable Development Implementation (COSDI)" sets out the Vision and Attributes for an integrated decision making framework for sustainable development implementation in Manitoba. In June 2000, the current Government of Manitoba announced its Sustainable Development Strategy which included the acceptance of the COSDI recommendations, but nothing has been done to amend legislation to legally implement the COSDI recommendations.

Recommendation 4 of COSDI addresses the Development Assessment and Review Process and recommends that Manitoba broaden the concept of assessment from environmental impact assessment as set out in the current Environment Act to an effects assessment to include the assessment and review of all the sustainability factors (environmental, social, economic) of a development. I support this change and any amendment to the Environment Act, preferably a new Assessment Act, should embrace this concept. Some cross reference to the Sustainable Development Act and its Principles and Guidelines in an amended Environment Act, new Act, would also be helpful.

In September 2001 the current government commissioned a multi-stakeholder consultation process to develop detailed recommendations for amendments to The Environment Act required to implement the more conceptual suggestions set out in COSDI.

A discussion paper entitled "Building a Sustainable Future: Proposed Changes to Manitoba's Environment Act" was prepared for the consultation process. In 2002, following extensive consultation,

the Chair of the Core Group for the process prepared a Report with recommendations outlining proposed amendments to the Act to:

- 1) Implement the recommendations of COSDI;
- 2) Reflect new ideas in implementing sustainable development; and
- 3) Improve the effective administration of the Act.

In addition several other key issues were addressed including linkage of effects assessment to broad area planning, split licencing/related projects, preliminary licencing, caseworkers, early issue resolution, technical advisory committee, category reviews, consultant objectivity, participant assistance, abatement projects, alterations, licence amendments on new evidence/problems, periodic licence reviews, emergency orders, and provincial/federal interface.

The 2002 proposal was not taken forward by government for legislative change.

The June 2009 Environment Amendment Act did little to embrace either COSDI or the 2002 amendment proposal.

With these opening comments, I would respond to the specific questions in the consultation paper as follows:

Questions and Response

1. How can the EIS Guidelines be improved to facilitate thorough environmental assessment of proposed developments?

Response

My view is that it is difficult, perhaps impractical, to legislate a review process where "one shoe fits all development proposals". The legislation should outline the basic framework for the development review and licencing process. The details for the review process for each development should be required by guidance materials from the regulator, some of which are now available, but need to be expanded on.

Guidance materials should be developed by the regulator to outline the framework for the effects assessment for each development or each class of development.

2. How should the content of the existing guidelines be enhanced in ways that provide a clear environmental protection benefit?

Response

Most developments will have a degree of environmental impairment, so I'm not sure that environmental protection benefit is the right parameter to be pursuing in review guidelines. The review guidelines should embrace the three pillars of sustainability (environmental, social, and economic) as well as address the basic framework for the project effects review to ensure that no adverse effects occur as a result of the development implementation.

Scoping of the effects assessment for all developments should include public, proponent and TAC input.

3. What should be included in the roles and responsibilities of TAC?

Response

TAC should be mandated and recognized in legislation. Roles and responsibilities should be as are in place now; however, some TAC representatives need to take their responsibilities in a more serious manner.

(See COSDI recommendation 5 N), O), P) for further guidance on this issue)

4. Are there any other agencies that should be included as representatives on TAC?

Response

Federal environmental, the municipality and local planning district in which the development will be located and Aboriginal organizations would be other agencies that should be invited to participate on TAC.

5. Should we maintain the current Classes of Development? If not, what other system should be considered.

Response

In reality the basic framework and steps undertaken for the current development review process is essentially the same for all three Classes of Development.

The reference to "classes of development" should be repealed and replaced with a single list of developments requiring assessment and approval under the Act. Different detail of review, contained in guidance materials as determined by the regulator, should apply to developments so that the appropriate degree of rigour is applied to each review.

The Director should be the licencing decision maker for all developments.

6. Should there be flexibility as to how developments are categorized to allow for the inclusion of new developments that are the result of emerging technological advancements? If yes, how can this be accomplished?

Response

See response to Questions 5 and 8.

7. Which activities should be included in the licencing process?

Response

I'm not sure I understand this question with respect to the activities you are referencing. If you mean development activities to be included in the licencing process, they should be construction, operation and decommissioning.

8. Under which circumstances should a licence be reviewed, renewed or altered? Should the circumstances be related to time, changing conditions or other factors?

Response

Factors to review a licence would include ongoing non-compliance with licence conditions even after enforcement actions, expansion more than 20%, occurrence of adverse environmental effects even though complying with the licence, emerging technological advancements, and/or significant public concern.

9. How do we ensure that the appeals process remains effective for the greater benefit of society?

Response

I don't understand the question. Appeals are usual made by participants that are not satisfied with the licencing process and/or the terms of the licence. What do you mean by "greater benefit of society"? All developments will have a degree of environmental effect and, so I'm not sure where the benefit would be unless you might be referring to the economy of Manitoba.

Appeals to licences should be made to the Minister. There should be no appeal to cabinet on licence decisions nor any standing or ad hoc appeal panels. The time frame for ministerial decision making on appeals should be defined and legislated and the ministers decision on the appeal should be made public and be final.

10. How can Manitoba more effectively enforce the provisions of The Environment Act?

Response

Enforcement and compliance is an important issue and should be addressed in a separate Environmental Protection Act. Effective enforcement requires good legislation, penalties, political will to enforce and adequate and trained staffing.

11. What do you think about the expansion of the penalty provisions in the Act? Please explain.

Response

See response for Question 10 above.

12. Are current forms of communication (e.g. local newspaper advertisements and public registry) effective at conveying information to the majority of Manitobans? Are there any other effective forms of communication?

Response

Public participation is an important element for project assessment. Currently public participation occurs in review of Environment Act Proposals, scoping/guidelines for the assessment and the environmental impact statements/reports although all of these consultation steps are not a requirement of the current legislation.

Amended or new legislation should include the appropriate public participation requirements.

Licences when issued are available for review by the public. The public/interested parties can participate in CEC public hearings when they are held; however, this element could be improved (see Other Comments below).

Public participation in pre-filing is under the control of the proponent and the regulator currently encourages this to happen. Making this step mandatory could improve the public participation component. Where Licences require further investigation/study and reports are prepared and filed, those reports are available for public review and comment. Inspection and enforcement actions on licences are available to the public on request. These documents should continue to be readily accessible by the public.

Written reasons should be required and made public for not accepting advice received for licence conditions by participants, appeal decisions, and not accepting CEC advice and recommendations.

See COSDI recommendation 5 on Public Participation reform for further information on this issue.

13. Are there any other ways to enhance public engagement? Please explain.

Response

See response to Question 12 above.

Other Comments

Needs and Alternatives (NFAT)

NFAT in Manitoba is more associated with the Public Utilities Board process related to utility operations. It was first referenced and used in the Environment Act review process for the Manitoba Hydro Wuskwatim projects where a combined PUB/Environment Act process was utilized with limited success. NFAT might be seen by some as a strategic or planning process rather than an environmental assessment process.

The majority of developments in Manitoba are privately driven and the need for the development is a business decision of that private enterprise. The purpose for, rather than the need for, the development is an important element of an effects assessment and should be included. An analysis of the alternatives to the development, including the do-nothing alternative, should be included in the effects assessment.

Cumulative Effects

Cumulative effects is an important element of a good environmental assessment. To make it mandatory for the Manitoba scene; however, may be problematic due to the wide diversity of the projects that the environmental assessment process applies to. COSDI recommends that the new effects assessment process includes the element of cumulative and interdependent effects. I can support this COSDI recommendation, but I believe there needs to be some flexibility and guidance from the regulator in terms of what developments the element would apply to and when it does apply what boundaries are to be addressed in terms of areal and spatial extent, past projects and future projects. You are likely aware that this topic has been actively debated at recent hearings of the Clean Environment Commission with a wide divergence of views as to how it can best be addressed for a project development assessment.

Strategic Environmental Assessment

Manitoba's environmental assessment and licencing regime should remain focussed on project effects assessment. Strategic environmental assessment, if deemed useful by Manitoba, should be a responsibility of Manitoba. If strategic environmental assessment is undertaken, then the outcome of those assessments could be incorporated into project effects assessment as appropriate. COSDI Recommendations 1-3, provides information on Provincial Plans, Planning at the Municipal Level and Planning at the Large Area Level all which might be seen by some as a form of strategic assessment, especially if the planning addresses environmental issues and carrying capacity of the receiving environment. In my view, the more information that is available from a planning perspective can be most helpful for a project effects assessment.

Aboriginal Involvement/Consultation

A sensitive but important issue. There are three issues that one needs to address with respect to consultation with Aboriginal peoples:

- 1) Consultation as part of the environmental assessment and licencing process;

- 2) The duty of fairness owed by officials of the crown; and
- 3) The constitutional rights of Aboriginal peoples.

Aboriginal peoples, like any other participant, are free to involve themselves in the environmental assessment and licencing process and make their issues and concerns known to the regulator for consideration in decision making. This however, rarely happens as Aboriginal peoples insist on being dealt with in a different manner than other participants. COSDI Recommendation 7 outlines a process for developing a consultation strategy and protocol for involvement of Aboriginal peoples in land and resource use planning, significant resource allocation, development assessment and review and regulatory mechanisms. The COSDI recommended process should be pursued.

Clean Environment Commission

Another sensitive but important issue. The intended role of the CEC in the assessment and licencing process should be to hold public hearings when requested by the Minister and provide advice and recommendations to the minister based on the information gained through participants at the hearing. Presumably public participation would be a key component in CEC public hearings. Recent CEC hearing procedures appear to be almost a clone of the Public Utilities Process with a legal format with interrogatories, strict time-lines and funded participant groups led by legal counsel the focus of evidence presentation. There also appears to be a full repetition of technical document review at the hearings and the use of funded experts for this purpose rather than a focus on issues participants don't agree on. These procedures may be desirable, but in my view have led to a deterioration of participation at CEC hearings by the general 'joe' public that might be affected by the development under review. Where the general public do participate in current hearings they usually lead off with the comment that they are somewhat intimidated by the hearing process. COSDI Recommendation 5 addresses the issue of effective and efficient function of hearing panels and that recommendation and other measures should be pursued to ensure that the hearing process provides for a comfortable setting for the general public to present their issues and concerns to the hearing panel.

Other Issues

Please see the 'Report From The Chair Environment Act Amendment Core Group 2002 Proposed Environment Act Amendments' for recommendations on addressing: Staged Licencing, Split Licencing/Related Projects, Preliminary Licencing, Caseworker, Early Issue Resolution, Category Reviews, Consultant Objectivity, Consistency with Plans, Participant Assistance, Public Registries, Section 16 Clarification, Negotiated Agreement, Abatement Projects as well as a number of enforcement issues.

Conclusion

Forget about further tweaking of the current Environment Act. Throw out the baby and the bath water and start anew. Using the COSDI Reports as a framework and starting point let's develop

modern, broad new environmental assessment and protection legislation that will be a model for other jurisdictions in Canada and elsewhere.

Thank you for the opportunity to comment.

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