

## Submission to Manitoba consultation on strengthening *The Environment Act*

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### *Preface*

Environmental assessment has the great strength of a foundation in stewardship of the biophysical environment. At the same time, environmental assessment in Manitoba and elsewhere often provides the most visible, open and potentially comprehensive public process for planning and reviewing proposals for significant new or renewed undertakings. It is consequently often the best available vehicle for requiring and ensuring that these undertakings are aimed, selected, designed, approved and implemented in ways that serve the public interest in the long as well as short term.

This submission assumes that the fundamental role of environmental assessment in Manitoba is to enhance prospects for lasting wellbeing (which for the present purposes is synonymous with the current review's intent of "facilitate a positive contribution to sustainability"<sup>2</sup>). It considers the context in which that task must be defined and pursued and in that light discusses some of the basic issues and options for renewal of Manitoba's environmental assessment legislation. Many of the implications and recommendations relate to particulars addressed in the *Environment Act Consultation* document – especially those concerning environmental assessment guidelines, classes of development, and public engagement.<sup>3</sup> However, serious improvements are likely to require the province to make changes in law and policy that address elements fundamental to the design of best practice environmental assessment regimes. As outlined below, these more fundamental steps are consistent with current commitments and not far from current best practice in Manitoba. They should also deliver important efficiencies as well as enhanced effectiveness.

### *Context*

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<sup>1</sup> Robert B. Gibson has been involved in environmental assessment, other environmental policy issues and broader sustainability imperatives since the mid 1970s. This involvement includes work in various capacities in most provinces and all three territories. He recently participated on behalf of the Manitoba branch of the Consumers Association of Canada in the Clean Environment Commission hearings on the Keyask Generation Project and the Public Utilities Board hearings on Manitoba Hydro's Preferred Development Plan.

<sup>2</sup> See the penultimate bullet point on page 2 of Province of Manitoba, *Environment Act Consultation: the road to enhancing environmental protection in Manitoba*, July 2014, <http://www.gov.mb.ca/conservation/eal/registries/5711/environment.act.strategy2014.pdf>

<sup>3</sup> *Ibid.*, pp.4-11.

*The Environment Act* is legislation from the 1980s. The law has been amended over the years and its present application, as represented for example by the recent Keeyask hearings, incorporates many elements of advanced environmental thinking and best practice. However, the law's core components reflect the context of its origins and are not well designed to address key changes over the past quarter century.

The first generation of environmental assessment law was essentially a more anticipatory approach to pollution control law. It gave integrated attention to air, water, land and other forms of pollution from particular undertakings prior to licencing. Relative to the old pollution control regimes, early environmental assessment was also more open to public scrutiny and engagement. But it remained a glorified licencing regime. Early environmental assessment was applied as a review at the project approval stage. It considered individual projects by themselves rather than addressing the cumulative effects that are the most serious concerns for ecosystems and communities. It aimed at mitigating significant adverse environmental effects rather than demanding lasting contributions to wellbeing. And it addressed projects as proposed rather than requiring comparative evaluation of potentially alternatives that might serve the public interest better.

Over the intervening years, environmental assessment theory, expectations and established best practices have evolved in response to learning from experience and new understandings from science, and changes in the global, national and regional circumstances. Among the most significant of these contextual shifts have been the following:

- increasing evidence of the unsustainability of key global trends, especially the demands on a single biosphere of increasing energy and material extraction, use and waste generation, and the destabilizing effects of rising greenhouse gas emissions on atmospheric chemistry – which has pointed to the importance of focusing on meeting the material requirements of those most in need, decoupling improved wellbeing from material expansion, and requiring new undertakings to contribute positively to sustainability;
- much expanded understanding of the nature and importance of the dynamic, interactive and non-linear behaviour of complex socio-ecological systems – which has pointed to the importance of integrating attention to social, economic and ecological factors and their interrelations, and adopting precautionary approaches to potentially risky technologies and initiatives;
- growing pressures on the administrative and fiscal capacities of public governments – which have pointed to the importance of more effective public interest engagement of non-government stakeholders, mobilization of more diverse tools and motivations, and fundamental rethinking of how to achieve efficiencies;
- new forms of global uncertainties and regional vulnerabilities resulting from rapid changes in technological capacities (communications, etc.), continuing economic integration despite unsteady financial governance, tendencies towards deepening inequities of wealth and opportunity, climate change, groundwater overconsumption and other stresses on key resources and biospheric systems –

which have pointed to the importance of being selective about what innovations to adopt, protecting valued existing qualities (traditions of mutual aid, local knowledge, cultures of foresight, etc.), and strengthening regional diversity and self-reliance while also contributing to global understandings, capacities and best practice.

In Canada, major contextual shifts over the life of *The Environment Act* are also numerous and significant, even when grouped in big categories. They include the following:

- growing dependence on industries exploiting non-renewable resources (hydrocarbons, minerals, etc.);
- still increasing GHG emissions;
- increasingly inequitable distribution of income and wealth (inter-regionally, aboriginal/non-aboriginal, etc.);
- dependency on a US market and economy that is losing global position;
- continuing weakness in establishing inter-governmental collaboration on matters of overlapping responsibility;
- growing understanding of Constitutionally entrenched Aboriginal rights through court rulings, but continuing uncertainties, non-transparent dealings, and government failures to act on responsibilities;
- ideological tensions between advocates of small government and advocates of active government with little attention to smarter governance (integrated use of available tools and resources, multi-stakeholder mobilization, emphasis on motivation, etc.);
- continuing weakness in attention to long term needs/initiatives (climate change, energy transition, mining legacies, infrastructure renewal, etc.); and
- significantly increased needs for integrated approaches to enhancing effectiveness, efficiency and fairness and for means of addressing social, economic and ecological imperatives together so that the results deliver mutually supporting gains rather than trade-offs.

Taken together, these changes in context point to significant new challenges and opportunities in environmental assessment law and process renewal. Many characteristics and components of best practice in first generation environmental assessments remain appropriate today. Anticipatory planning and review, attention to needs and purposes, prediction of potential effects, and comparative evaluation of alternatives, and effects and compliance monitoring are all still crucial. So are process openness, public engagement and iterative learning. Assessments will also always have to combine firm core principles and rules with different tiers, streams and other mechanisms to accommodate a great diversity of cases and contexts. But we are now a long way from the days when mitigating the significant adverse pollution effects of major undertakings might be enough to ensure lasting wellbeing.

### ***Major implications for environmental assessment in Manitoba***

In the present context, including what we can reasonably expect to face in coming years, environmental assessment needs to be both more ambitious and more efficient in delivering key benefits by focusing on opportunities for greatest contributions. Setting out the full set of important considerations and process design features is beyond the practical possibilities for this submission.<sup>4</sup> However, the following six points address some of the most crucial components and illustrate the approach involved.

*1. The purpose of environmental assessment should be to enhance prospects for lasting wellbeing.*

The purpose of environmental assessment law and the law's application in particular cases should be to foster the conception and implementation of undertakings that maximize positive contributions to sustainability – preferably through multiple, mutually reinforcing, fairly distributed and lasting gains – while also avoiding significant adverse effects and risks. Manitoba, with an established commitment to sustainability elaborated in legislation and accompanied by sustainability principles and guidelines, has an admirable foundation for clarifying and applying such a purpose.<sup>5</sup>

Sustainability assessment is now practiced globally under various names, forms and venues, including private sector and public sector governance.<sup>6</sup> It has also been used in Canada including in major environmental assessment reviews.<sup>7</sup> Adoption of a sustainability-based approach to environmental assessment in Manitoba would address

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<sup>4</sup> For a more comprehensive discussion of the essential components of best practice environmental assessment regime design, see Robert B. Gibson, with Selma Hassan, Susan Holtz, James Tansey and Graham Whitelaw, *Sustainability Assessment: Criteria and Processes* (London: Earthscan, 2005), chapter 7.

<sup>5</sup> Manitoba has a substantial advantage over many other Canadian jurisdictions in having sustainable development legislation with principles and guidelines already in place. See the Principles of Sustainable Development and Guidelines for Sustainable Development in schedules A and B of the Manitoba *Sustainable Development Act* (1998), CCSM, c.S270, available at <http://web2.gov.mb.ca/laws/statutes/ccsm/s270e.php>.

<sup>6</sup> See Barry Dalal-Clayton and Barry Sadler, *Sustainability Appraisal: A Sourcebook and Reference Guide to International Experience* (London: Earthscan, 2014).

<sup>7</sup> See Voisey's Bay Joint Environmental Assessment Panel (VBJEAP), *Report on the Proposed Voisey's Bay Mine and Mill Project* (Ottawa: Canadian Environmental Assessment Agency, 1999), available at <https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=0A571A1A-1>; 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](http://www.ceaa-acee.gc.ca/B4777C6B-docs/WP-1837_e.pdf); Kemess North Joint Review Panel (KNJRP), *Panel Report: Kemess North Copper-Gold Mine Project* (Ottawa: Canadian Environmental Assessment Agency, 2007), available at <http://www.acee-ceaa.gc.ca/052/details-eng.cfm?pid=3394#report>; Mackenzie Gas Project Joint Review Panel, *Foundation for a Sustainable Northern Future: report of the Joint Review Panel for the Mackenzie Gas Project*. (Ottawa: Canadian Environmental Assessment Agency, 2009), available at <http://www.acee-ceaa.gc.ca/default.asp?lang=En&n=155701CE-1>; and Lower Churchill Joint Review Panel, *Lower Churchill Hydroelectric Generation Project: Report of the Joint Review Panel*. (Ottawa: Canadian Environmental Assessment Agency, 2011), available at <http://www.ceaa.gc.ca/052/details-eng.cfm?pid=26178>.

reasonable public expectations that new undertakings should enhance lasting wellbeing, respect the reality of interactive socio-economic and biophysical systems, and confront global trends towards deeper unsustainability. It would also address the evident inefficiencies of multiple fragmented processes for different considerations and provide a public venue for attention to options, issues and trade-offs. The comprehensive agenda involved is already effectively mandatory where Aboriginal interests are involved and it is difficult to see why it should not be applied equally elsewhere in the province.

Consequential recommendations for amendments/guidance:

(i) The “contribution to sustainability” purpose as summarized above should be incorporated as purpose of *The Environment Act*. For particular applications, the law should require from the proponent(s) in each assessment case an explicit statement of the proposed undertaking’s public interest purpose related to anticipated contribution(s) to lasting wellbeing.

(ii) The law and associated regulations and policy guidance materials should set out provincially recognized requirements for progress towards sustainability as the basic criteria for judging contributions to sustainability, beginning with the current provisions of the Manitoba *Sustainable Development Act*, schedules A and B.<sup>8</sup> The law should also require that the criteria be specified for each case and context in ways that retain respect for all of the generic criteria but recognize the particular conditions and trends, concerns and aspirations, priorities, possibilities and barriers involved.

(iii) To provide a sufficiently comprehensive foundation for sustainability-based assessment, the law should define “environmental effects” broadly to cover social-economic and cultural as well as biophysical effects and their interactions, including attention to long term or legacy effects, risks and potentials.

Adoption of a comprehensive sustainability agenda and a broad definition of “environmental effects” sometimes raises fears that attention to biophysical considerations might be submerged under economic priorities that have traditionally dominated decision making. That prospect may be realistic, even though adoption of a comprehensive definition of environment and environmental effects did not lead to an obscuring of biophysical considerations under the United States *National Environmental Policy Act* (passed in 1969) or Ontario’s *Environmental Assessment Act* (passed in 1975). Certainly after so many decades of effort to win some special recognition of the biophysical environment in public processes, sustainability-based assessment processes need to be designed carefully to preclude loss of focus on the biophysical foundations for wellbeing.

In theory, sustainability-based assessment processes ought to serve the biophysical environment more effectively – by establishing explicit criteria, seeking positive contributions and enhancements instead of mere mitigation, recognizing feedback effects in entwined economic and biophysical systems, ensuring open identification and public evaluation of trade-offs, and requiring selection of the best option after comparative

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<sup>8</sup> See note 5 above.

evaluation of alternatives. But careful wording will be needed to ensure that the law's explicit sustainability-based criteria for evaluations and decision making strengthen barriers to approval of undertakings with significant adverse biophysical effects.

(iv) The law should require attention to enhancement of positive effects as well as mitigation of adverse effects.

(v) To maximize positive contributions, the law should require the planning of undertakings and reporting in assessments to include comparative evaluation of potentially desirable alternatives. The availability and nature of potentially desirable alternatives will vary widely, and as will be discussed below, significantly different alternatives may often be identified and assessed more effectively and efficiently at the strategic level of policies, plans and programmes than at the level of individual projects. But mandatory consideration of alternatives has often been an important means of encouraging positive innovation and comparative evaluation of options in light of explicit criteria offers a considerably more defensible method of judgment than project application reviews that must assume the existence of an identifiable line between acceptable and unacceptable.

*2. The law's approach to environmental effects (broadly defined) should emphasize attention to cumulative effects.*

For ecosystems and communities as well as for the global climate system, the effects that matter in the end are the cumulative ones. This is inconvenient because cumulative effects involve even more interactive factors, influences and feedbacks than individual effects, but there are no real efficiencies to be gained by focusing on easier considerations if they are not what is crucial. Cumulative effects have been addressed under the current law and the standard of cumulative effects assessment in Manitoba has risen significantly.<sup>9</sup> Nevertheless, inclusion of clear requirements in law is desirable.

The most significant limitation of cumulative effects assessment in current practice is reliance on project-centred assessments as the main venue for attention to cumulative effects. While cumulative effects should certainly be addressed in project level assessments, effective and efficient attention to cumulative effects is more likely in strategic level assessments or the equivalent (e.g. regional strategic assessments or regional planning that incorporates cumulative effects studies). See the discussion re point #3, below.

Needs for regional scale cumulative effects assessment have already been recognized in Manitoba, notably in the current joint initiative by Manitoba Hydro and the Government of Manitoba concerning hydropower developments in the Churchill, Burntwood and Nelson watersheds.<sup>10</sup> However, further steps are required to establish clear links between

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<sup>9</sup> See the favourable comparison of cumulative effects assessment work in the Keeyask case relative to past assessments including Bipole III: Clean Environment Commission, *Report on Public Hearing: the Keeyask Generation Project* (CEC, April 2014), pp.137-138.

<sup>10</sup> See [https://www.hydro.mb.ca/regulatory\\_affairs/rcea/index.shtml](https://www.hydro.mb.ca/regulatory_affairs/rcea/index.shtml).

assessment studies and their relation to actual undertakings at the strategic (e.g. regional plans) and project levels, to provide a measure of certainty about how strategic level work will guide project level decision making, and to ensure that regional cumulative assessments are properly open to multi-stakeholder involvement and rigorously reviewed so that the results are well-informed and credible.

Consequential recommendations for amendments/guidance:

(i) The law should include an explicit requirement for consideration of cumulative and interactive effects in all assessments.

(ii) The legislated requirement should be accompanied by best practice guidance that incorporates attention to expanding understanding of complex systems behaviour as well as recognition of continuing uncertainties and implications for precautionary approaches.

(iii) Where cumulative effects assessment is meant to provide guidance for project planning and review, the cumulative effects work should be clearly linked to strategic level undertakings subject to appropriate process requirements for participation, review and approval.

*3. The law should apply to undertakings at the strategic as well as project levels.*

As a means of enhancing efficiency as well as effectiveness, Manitoba's environmental assessment requirements ought to apply to the strategic level of policies, plans and programmes that have broad influence in guiding the character and consequently the effects of many more specific undertakings, including projects subject to individual assessments. As noted above, attention to broad alternatives and cumulative effects is crucial if environmental assessment is to encourage sustainability-enhancing innovation, address the most important effects and identify best options in the public interest. But in many instances, neither broad alternatives nor cumulative effects are most effectively or most efficiently addressed in individual project assessments.

Considerable enhancement of project level assessment efficiencies would be possible if good planning and assessment were done at the strategic level and credibly established conclusions (concerning, for example, preferable alternatives, key opportunities and concerns, and standard mitigation and enhancement methods) were provided for proponents and other stakeholders at the project level. Such an approach to tiered decision making and guidance would follow the model of overall policies and tiered plans guiding individual developments that is already well established in urban and regional planning.

In some other sectors as well, requirements and processes for planning, review and approval of strategic level undertakings may exist under other legislation. Examples include the Public Utilities Board's recent review of the need for and alternatives to Manitoba Hydro's Preferred Development Plan.<sup>11</sup> Where such requirements and processes are already available they can be consolidated with strategic assessment

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<sup>11</sup> See <http://www.pub.gov.mb.ca/nfat.html>.

requirements and processes under *The Environment Act* (e.g. with joint hearings) to avoid duplication and make use of shared expertise. For other sectors, the Clean Environment Commission will need an expanded role to address strategic as well as project level undertakings.

Consequential recommendations for amendments/guidance:

(i) The law should apply to plans, programmes and policies that may have significant direct or indirect effects on the biophysical environment and prospects for progress towards sustainability.

(ii) Application to strategic level undertakings should emphasize coverage of initiatives that could provide for effective and efficient attention to broad alternatives and cumulative effects.

(iii) To ensure clarity for all stakeholders, rules for applications to strategic level undertakings should establish criteria for identifying what strategic undertakings are subject to assessment, include a schedule for review of existing policies, plans and programmes ordered by potential significance and potential for strengthening, and include a process for consideration of proposals from the public or other interests requesting new strategic initiatives to address emerging concerns and opportunities, including strategic issues identified in project level assessments.<sup>12</sup>

*4. The law's rules identifying undertakings that are subject to assessment should be designed to ensure proponents and other stakeholders know what is required from the outset of planning*

In determining what strategic and project-level undertakings are subject to assessment requirements, the most important consideration is that assessment requirements will be most effective and most efficiently addressed if proponents and other stakeholders know the assessment expectations from the outset of planning. Late determination of assessment requirements typically means attention to assessment expectation comes well after the proponent has made the key decisions on what to propose. As a result the relevant thinking and studies are late, adjustments are more difficult and process completion is slowed.

Clear and automatic application can be assisted by suitable lists, but these are more effective at identifying easily expected undertakings than significant innovations. For the later, a criteria-based approach (covering all new undertakings with potential effects on specified factors or potential raising specified issues) will help. Generally, it is better to err on the side of inclusion and provide open and impartial processes for exemption, than to rely on late designation processes to capture otherwise neglected undertakings.

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<sup>12</sup> Details on suitable approaches to assessment of strategic level undertakings are provided in Robert B. Gibson, Hugh Benevides, Meinhard Doelle and Denis Kirchhoff, "Strengthening strategic environmental assessment in Canada: an evaluation of three basic options," *Journal of Environmental Law and Practice* 20:3 (2010), pp.175-211, available at <https://uwaterloo.ca/next-generation-environmental-assessment/research-contributions/published-papers>.



Designation options should be included only as last resort to ensure coverage of wholly unanticipated undertakings or normally benign undertakings that raise concerns for unanticipated reasons.

Application rules are complicated by the common and usually appropriate establishment of two or more assessment streams, typically distinguished by more or less demanding documentation and review requirements. Assessment streams can include, for example, ones for especially significant and/or controversial cases destined for detailed examination in public hearings, for important but more usual cases needing thorough open review but not hearings, and for more common and conventional cases where open processes with careful public scrutiny and consultation with appropriate interests and authorities may be sufficient.

The basic principles discussed above apply to determining what undertakings are subject to assessment in each stream. But in addition there is need for a credibly open and impartial mechanism for considering transfer of particular undertakings from one stream to another (often called bump-up and bump-down).

Consequential recommendations for amendments/guidance:

(i) Environmental assessment in Manitoba should feature clear anticipatory identification of strategic and project level undertakings to be assessed in the identified streams. Tools for anticipatory identification should combine use of lists for evident categories of undertakings with criteria sets and other means of identifying less predictable needs.

(ii) The pre-identification processes should err on the side of inclusion but include provision for open consideration of exemption, designation and bump-up and bump-down requests.

(iii) The province should establish a small advisory body to review and recommend responses to designation and exemption requests and applications for bump-up and bump-down.

*5. The law should anticipate increasing needs for collaboration with other jurisdictions in ways that let Manitoba set the standard.*

Environmental assessment in Canada has always involved divided and overlapping federal and provincial jurisdiction. The results have included advantages, for example the expertise and authority of multiple agencies. But there have also been challenges in achieving effective coordination and avoiding confusions and inefficiencies. Effective collaboration is now becoming more crucial because of the rising importance of big overlapping issues including cumulative effects and strategic level initiatives, shared obligations to meet the duty to consult and accommodate Aboriginal interests, and demands for efficiency in the application of substantive and procedural requirements. At the same time, recent federal steps to reduce engagement in environmental assessment indicate that counting on effective federal participation is not prudent.

In this context, provincial environmental assessment processes should be designed for comprehensive attention to all matters relevant to lasting wellbeing while also providing a strong foundation for inter-jurisdictional collaboration. Assessment requirements will often need to be harmonized and the most successful processes will be the ones best equipped with clear, comprehensive and consistent expectations, effective early guidance and processes that ensure both credibility and timeliness. Also, collaboration with other jurisdictions will be needed in the development strategic and project level undertakings as well as in assessment reviews at both levels.

Consequential recommendations for amendments/guidance:

- (i) Manitoba's environmental assessment process should incorporate best practice substantive requirements covering the full suite of broadly environmental factors affecting lasting wellbeing and covering all undertakings that may have significant environmental effects, individually or cumulatively.
- (ii) If Manitoba's standards reflect best practice, they should prevail in any joint assessments and assessment reviews.
- (iii) The legislation should include provisions clarifying approaches to and generic arrangements for collaborative assessments with other jurisdictions, including other provinces, territories and the federal government.

*6. The law should place greater emphasis on public engagement throughout the assessment process*

Environmental assessment, like many other fields requiring the exercise of government responsibility, is challenged by rising demands on limited government resources. In environmental assessment, effective engagement of potentially affected residents and public interest stakeholders is a key means of establishing the credibility of decisions and decision making processes – meeting expectations for effective attention to long standing process weaknesses (e.g. monitoring of effects and compliance) as well as major new concerns (e.g. cumulative effects, strategic level issues, broad alternatives and desirable futures). Government neglect such expectations at their peril. At the same time, governments cannot extend their resources infinitely.

In that context, it is important to recognize that public engagement is a resource as much as an expectation. Public participants are often the stakeholders with the strongest motivations for effective review and monitoring. Moreover, effective public engagement is increasingly an important means of expanding citizen understanding of important issues and options and building citizen awareness of governance challenges.

Public engagement is likely to be more valuable if initiated at the outset of planning new undertakings, when there is greater flexibility to refine initial purposes and consider further options. And benefits from public engagement are likely to be especially significant in monitoring during the implementation of approved undertakings.

Consequential recommendations for amendments/guidance:

(i) For each undertaking subject to assessment, the first mandatory formal step should be a public announcement of intent to initiate planning. The notice should report the public interest purpose(s) of the anticipated undertaking and the nature of the alternative options to be considered. The notice should also identify any sources for further information and set out a reasonable period for responses.<sup>13</sup>

(ii) Openings for public engagement should also be ensured at the point when initial alternatives have been compared but before a preferred alternative has been selected.

(iii) Proponents of project and strategic undertakings should be required to engage in public consultations throughout their planning process and should be guided to adopt best practices in public engagement. However, it is a government responsibility

- to ensure that proponents prepare announcements related to points (i) and (ii) above, and to ensure that these announcements and associated invitations to comment are posted officially and are accessible to potentially interested parties,
- to keep a public registry with all official documents and all comment submissions received from members of the public and other stakeholders, including comments during the initial planning and assessment period.

(iv) The law should require proponents to include in the environmental assessment documents submitted for formal review, reports on public and other stakeholder engagement efforts, comments received and steps taken to address these comments

(v) The process should include means of encouraging and facilitate the use of citizen monitors where appropriate in environmental assessment follow-up activities.

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<sup>13</sup> Such notices at the early stage of identification of purpose and potential alternatives have been required in cases in Ontario's class assessment stream (applied to projects of modest environmental significance) since the early 1980s.