Comments on Discussion Paper: Manitoba's Environmental Assessment and Licensing Regime

By

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CHAPTER 3: Environmental Assessment and Sustainable Development

Response to Issue 1:

In order for links to be established between *The Environment Act* and *The Sustainable Development Act*, there would first need to be better linkages between *The Environment Act* and *The Planning Act*. Principles of Sustainability will be challenging to achieve by by-passing other land and resource based pieces of legislation. More work needs to be done at the higher level of planning to allow for a more holistic and balanced approach to development.

It should be noted that in the past, the principles of Sustainability were in some fashion addressed in Environmental Assessments (EAs). Submissions typically included a chapter on Sustainable Development, the purpose of which was to demonstrate how different aspects of sustainability shaped project planning. One form of addressing this was to demonstrate how each mitigation measure (project design-based, operational or regulatory-based) pushed the sustainability agenda. This is not the practice any more and the regulators do not seem to require it. The proponent can be asked to provide this information.

Response to Issue 2:

NFAT is reasonable for a larger public entity but not for privately-owned industry. It strips industry of the competitive advantage. Plus it does not make sense for a wind-power developer to be spending resources justifying wind power or comparing wind power with solar or coal. This level of alternatives analysis should happen on a much higher strategic level of land and resource use planning. At the project level, proponents should be asked to outline alternatives means (alternative routes, sites, options, etc.). This used to be a requirement under the old *Canadian Environmental Assessment Act* but is not the case anymore. With the Provincial legislation in Manitoba not having such a requirement, increasingly the amount of discussion on alternative means is on the decline. Therefore:

- Individual developments should not require a discussion on alternatives to, but should require a discussion on the 'purpose' of the project and 'alternative means'.

- There should be guidelines prescribing whether or not a proponent must seek public input on each alternative means.

CHAPTER 4: Cumulative Effects and Strategic Environmental Assessment

Response to Issue 3:

Yes. However (and the however is important), in order to do a cumulative effects assessment (CEA), the proponent must have access to baseline information (current and historic state of the environment), monitoring data that shows effects being experienced, other projects currently underway, and information on other proposed developments. It is simply not practical to expect proponents to undertake a cumulative effects assessment on their own. If this approach is taken, it will only be a handful of larger proponents in the Province who will be able to afford the exercise. The purpose environmental assessment is to plan every development, not just the bigger ones.

A proper CEA requires a consideration of past, current and foreseeable future projects. This means that someone needs to be able to provide the information to undertake a CEA. For every project that goes through an environmental approvals process, the submission consists of some baseline data (whether it is a desktop review or based on field investigations), maps, an effects assessment, and depending on conditions of the license, might also report data on an ongoing basis through the life of the project. All this data for all proposed developments within a given spatial boundary is what is required for any practitioner, whose project overlaps with those boundaries, to do a proper CEA. Therefore, in order for CEA to be realistic, a data housing department will need to be identified to ensure all data gathered from any new assessment goes into a data base. When a new project comes along, based on the spatial information provided, this department should be able to extract all the data that pertains to a certain spatial boundary and give it to the proponent so that a CEA can be done. Given its current role as recipient of all incoming proposal information, the Environmental Approvals department at Conservation & Water stewardship could take on this role (with appropriate resources, of course).

Response to Issue 4:

Applying Strategic Environmental Assessment (SEA) on a project-level is a risky direction to take. It shifts the responsibility from the Government to proponents, and if legislated, it will set the precedent such that moving forward all strategic initiatives will be thought out by proponents instead of the Government. Therefore, SEA should be legislated at the higher level. SEA should be conducted on policies and plans for different types of development, and project-level EAs could then be required to demonstrate how they tie into or have taken into consideration the results of the SEAs pertaining to that type of development.

Response to Issue 5:

I agree with proponent engagement in the RSEA process, maintaining a database of cumulative regional environmental information (as per my comments in response to Issue #3), and establishing guidelines for consistent collection of data.

I offer the following additional comments:

- Guidelines could specify not just the consistent collection of data, but submission of, and information on use of the data. Currently, proponents are asked to collect data as a part of ongoing monitoring efforts, but not all data that is collected has to be submitted to the regulators. There should be provision to collect, submit and make publicly available the data. While initially this may seem challenging for proponents as any non-compliance will get a lot of negative attention, over time, it will help build accountability, establish trends and improve the standard of information available.
- Application of RSEA to individual projects will again shift the focus from more strategic to individual, and hence shift the responsibility from Government to developers. Strategic initiatives should be led by the Government, with participation from industry and not the other way around.

CHAPTER 5: Public Participation

Response to Issue 6:

Manitoba's approach to public participation is archaic. The legislation itself is rarely seen as a reason to engage. It is really up to the practitioners advising the proponents to push the public participation agenda. In my practice, I have had to rely primarily on reasons other than legislation: being a good neighbor, respecting local communities, improving corporate image, managing potential social risks to the project, being transparent, reducing costs that may be incurred later (blockades, litigation, etc.), etc. While most proponents are receptive, it is an easier sell with proponents who have the financial resources to spend on public engagement. For proponents who do not, they naturally lean towards legislation only - which sadly does not ask for much. There is an archaic mindset out there with respect to public enagagement and the ability of the public to provide any useful input. Manitoba's current legislation fuels this mindset.

The public is typically involved in the pre-filing stage, and sometimes in the scoping stage for bigger projects. However, the lack of prescription through legislation in this regard, leaves it up to the proponent's discretion. Prescribing involvement in the scoping stage will require mandatory notice/filing of a Project Description of some sort to invite comments. If this direction is adopted, consideration will need to be given to what type of information the proponent is asked to provide (see response to Issue 16).

Response to Issue 7:

The ideas proposed are good ideas. Publishing guidelines on effective public engagement is a good idea, however, it must be indicated what <u>the purpose of public engagement</u> is. The current legislation does not specify why proponents should consult. Understanding the why will help proponents to develop better-informed and purposeful public consultation programs. For instance, is the purpose for regulators to gauge public acceptability, or to demonstrate selection of the best alternative? There are reasons for

the proponent to engage for their own benefit but if Manitoba as a province wants public to be more involved, it needs to provide the grounds for it.

Response to Issue 8:

Any legislative reform in this regard will require establishing better linkages between the Section 35 Consultation process and proponent-led engagement activities. The current disconnect between the two processes results in a lot of mistrust, miscommunication and frustration amongst communities, proponents and regulators. The Aboriginal Relations Branch (ARB) (Government of Manitoba) can be equipped to be more effective in this regard. Representatives at the ARB could, for instance, work closely with proponents during the pre-filing/scoping stage to determine which communities might be interested in the project, which communities might be impacted and how best to engage with them. The ARB could be more involved with the proponent in discussing proposed developments with communities.

It must also be noted that any legislative reform should be mindful of the commitments being made by Canada in the international arena with respect to Aboriginal Rights (for instance endorsing the UNDRIP, including the Free, Prior and Informed Consent).

Response to Issue 9:

In my opinion, if public consultation is done properly, there will be no need for a CEC hearing in the form that we know of it today (i.e., confrontational, long, tedious, and expensive).

In order to be more effective, I see an expanded role for the Commission. Additional duties of the CEC may include being available to both the proponent and the general public as a sounding board for technical advice on a proposed development during the environmental assessment process.

A larger variety of CEC proceedings is also another option – this can range from a day-long hearing on a smaller development to a multi-week review of a bigger development.

CHAPTER 6: Balancing Certainty and Flexibility

Response to Issue 10:

With respect to prescription and certainty, I offer the following comments:

- In my view prescription allows for certainty and improves predictability (both for the proponent as well as the general public). While discretion and flexibility are good, building in too much discretion means developments become vulnerable to the political climate at any given time.
- Secondly, there are two pieces to the regulatory review of an application; the regulator themselves and the prescribed process itself. In 2012, Statistics Canada reported the average tenure for the province of Manitoba to be approximately 106 months (or roughly 3.5 years). With this increasing fluidity in the workforce, it is harder to achieve consistency in review of development proposals without increased prescription.

With respect to areas requiring more prescription, I believe these could include:

- Public consultation, including purpose of the consultation exercise and its direct relevance to any proposal.
- Aboriginal engagement, including purpose (to support Section 35 consultation or not), and its relevance to any proposal.
- Clarity on extent of consideration of socio-economic factors. The current legislation only requires a consideration of socio-economic components of the environment if there is a residual environmental effect. Some practitioners take this to mean a significant residual environmental effect.
- Extent to which cumulative effects are to be or not to be considered.

With respect to significance determination, I offer the following:

- The current legislation does not require determination of significance. This was a requirement for projects that triggered the previous *Canadian Environmental Assessment Act*. Significance should only be applied to post-mitigation effects. This is because one of the key features of environmental planning is to mitigate potential environmental effects through project design changes, where feasible. Technically these pre-mitigation effects might be significant, but through appropriate design controls and other mechanisms, the effects are managed to a substantial degree. Assessing significance on these 'what would have happened' effects does not add any value to the assessment of the overall effects of a proposed project.

Response to Issue 12:

No comments.

CHAPTER 7: Specific Procedural Steps

Response to Issue 13:

No comments

Response to Issue 14:

- If the proposed direction is taken, it will require a carefully planned process to bring all historical activities under *The Environment Act*. Some things to consider in this regard:
    - Conservation and Water Stewardship has received several Notices of Alterations over the years – regulators and proponents use this opportunity to bring operations up to speed with current legislation.
    - Further, proponents are typically bound by other pieces of legislation or international voluntary reporting mechanisms (for reasons of better corporate social image or requirement to maintain certain memberships etc.). Is this seems to be the case for a

majority of the proponents then the exercise of transferring over may be unnecessary and redundant.
    - What was environmentally acceptable in the 70s and 80s might not necessarily be acceptable today. If applicable, in granting new licenses to these historic operations, consideration must be given to allow these historic operations to continue but with manageable environmental implications.
    - If the current piece of legislation is to undergo reform, then a transfer from past to current regulatory regime should wait till the new one is in place.
- In addition to activities under *The Dangerous Goods Handling and Transportation Act*, *The Mines and Minerals Act* and Crown resource allocation decisions under various provincial natural resource management statutes, activities under *The Planning Act*, *The Municipal Act*, *and The City of Winnipeg Act* should also be taken into consideration.

Response to Issue 15:

The recommendation on this issue provided in the COSDI report is appropriate, provided there is sufficient prescription on how to determine the significance of potential effects.

Response to Issue 16:

Filing a Project Description to determine the level of assessment required could be one approach. However, it is extremely important that if this approach is used, the project description should specifically stay away from providing any determination of effects. This is because as soon as the proponents are expected to provide some indication of potential impacts of the project, in reality that means conducting an environmental assessment, which in turn means that the proponent may be reluctant to share project information till they are confident that potential implications can be managed – which will be counter-productive to the transparency agenda.

Response to Issue 17:

No comments

Response to Issue 18:

Licenses issued under *The Environment Act* require the proponent to collect certain data, but not necessarily report on it. Proponents can be asked to report the data. The public could be given the option to request for access to the data, if they wish to do so. However, the process for access to the data should be prescribed and made as user-friendly as possible. While initially making monitoring data publicly accessible will seem challenging for proponents and might get the public excited about non-compliances, in the long run, it will prove beneficial for the proponent to improve their operational procedures, for the regulators to gauge the effectiveness of licensing conditions and mitigation measures and for the general public for education and accountability.

Additional Comments

The Discussion Paper indicates that the "Methodological, operational and technical considerations are generally beyond the project's scope". While this is understandable, the approach is problematic. This is

primarily because as noted in the Discussion Paper itself, there are aspects of the legislation, which while exist do not apply in practice, or are not practiced as intended. Similarly, as noted in my comments on Cumulative Effects Assessment, if an entity to manage all the environmental data cannot be identified, then legislation for cumulative effects will not achieve its desired intent. While matters of practically are somewhat challenging to predict, it is important for any reform to consider, to the extent possible, the feasibility of the proposed changes.