



Fading Role of Alternatives in Federal EA

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Federal EA has moved away from rigorous review of alternatives to a singular focus on avoiding or minimizing significant adverse environmental effects (SAEEs)

There are legal reasons for this trend

Changes introduced in CEAA/92 altered the role of alternatives and their importance to federal EA

CEAA/92 caselaw has picked up and emphasized this change

A singular focus on SAEEs is a weak form of EA

One way forward is to replace the focus on SAEEs with a focus on sustainability for (a) a new EA screening standard and (b) review of alternatives that do not meeting the screening standard

Part 1: Approach to alternatives at the starting point of EA in the U.S. and Canada during the 1970s

Part 2: Changed approach to alternatives introduced by CEAA/92

Part 3: New approach to federal EA focused on (i) sustainability screening and (ii) reviewing alternatives to maximize sustainability

Part 1.A U.S. NEPA on Alternatives

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| <p>NEPA s.102(2)(C)</p> | <p>CEQ Regulations s.1502.14 “Alternatives including the proposed action”</p> |
| <p>(C) Include in every recommendation or report on ...other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –</p> <p>(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between the short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.</p> | <p>This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (s.1502.15) and the Environmental Consequences (s.1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public. In this section, agencies shall:</p> <p>(a)Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.</p> <p>(b)Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.</p> <p>(c)Include reasonable alternatives not within the jurisdiction of the lead agency.</p> <p>(d)Include the alternative of no action.</p> <p>(e)Identify the agency’s preferred alternative or alternatives, if one or more exists...</p> |

Part 1.B

Canadian federal EA under EARP/ EARPGO

| Guidance | Practice |
|--|--|
| <p><i>EARP Cabinet Policy (1973)</i></p> <p>- No mention of alternatives</p> <p><i>EARPGO (1984)</i></p> <p>- No mention of alternatives</p> | <p>Panel reviews beginning in 1974 and occurring regularly through the rest of the 1970s and into the 1990s routinely evaluated alternatives</p> <p>These panel reviews addressed both</p> <p>- “alternatives to a project” and</p> <p>- “Alternative methods of carrying out the project”</p> |

Ingredients for a rigorous review of alternatives

| Five components of a rigorous review of alternatives | |
|---|--|
| (1) | Starting point of identifying reasonable alternatives |
| (2) | Requirement for evaluation of alternatives |
| (3) | Express regard to trade-offs |
| (4) | Transparent evaluation process using steps and criteria |
| (5) | End point of identifying a preferred alternative |

EA Reform: CEAA/92 References to Alternatives

Part 2

| Provision | Text |
|------------|--|
| s.16(1)(e) | Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors: ... (e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered. |
| s.16(2) | (2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors: ... (b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means; |

Part 2

CEAA/92 Caselaw on Alternatives

Inverhuron & District Ratepayers v. Canada (2001, FCA)

¶ 49 The broadest of the appellant's arguments is an implicit attack upon the use of any significance threshold for radiation effects. The appellant raises the so-called ALARA ("As Low As Reasonably Achievable") principle, arguing that the only appropriate design for the project was the one which caused the least environmental effect at a reasonable cost. For the purposes of the argument before us, it says that the reference design was the appropriate choice since its effects would be less than the final design and they could be achieved at a reasonable cost.

¶ 50 The appellant claims that the spirit of the ALARA principle is incorporated into subs. 16(2)(b) of the Act, which requires that a comprehensive study include a consideration of alternative means of carrying out a project that are technically and economically feasible and of their environmental effects...[T]here is equally no question in my mind that it does not go as far as to mandate that the alternative with the least environmental impact be selected. To do so would be to contrary to the scheme of the legislation. The approach of the Act is to require a finding that the alternative chosen not be likely to cause significant adverse environmental effects in order for it to proceed.

Analysis: No requirement to compare alternatives to select a preferred alternative

Part 2 CEAA/92 Caselaw on Alternatives

Inverhuron (2001, FCA)

¶ 58 It is true that the alternatives which were adopted in the final system design were not subjected to the same detailed radiological calculations that the reference design was....

¶ 60 Even if I were to accept the factual assertions made by the appellant, it is clear that the predicted effective doses caused by the final design would still be well below both the significance threshold set out in the report and the current regulatory limit of 1,000 microsieverts per year. Under these circumstances, I do not believe that the Minister or any of the Agencies advising her was required to conduct any further analysis. The comparisons conducted by the comprehensive study report did provide her with a rational basis for concluding that no significant adverse radiological effects were likely to be caused by the project.

Analysis: No requirement to submit all alternatives to same level of study

Part 2

Different view of significance under CEAA/92

Lower Churchill EA Panel Review (2011)

¶ The Panel notes that there has been a tendency for proponents to view the significance determination as a pass-fail test, with the goal being to demonstrate that project design and mitigation measures would result in no significant adverse environmental effects. The assumption seems to be that a single significance finding could potentially be a “show-stopper”, preventing a project from proceeding, and that the absence of a significance finding would be an automatic green light

¶ ...In setting thresholds for significance, the Panel has aimed for middle ground on the continuum of possible approaches to significance....

¶ On the one hand, the Panel has not assumed in its approach to significance that a single significant adverse effect would necessarily be a “show stopper”; on the other, the Panel has not declared all adverse effects to be significant even though they should all be factored into the overall Project decision. Rather the Panel has identified as significant those adverse effects of the Project that stand out as serious concerns in light of the criteria set out in the Canadian Environmental Assessment Agency’s guidance document. It is the role of government decision makers to weigh all effects, risks and uncertainties in deciding whether the Project should be permitted to proceed in light of these concerns. (pp.13-14)

Part 2 CEAA/12 & Significant effects

(1) Preamble

An Act respecting the environmental assessment of certain activities and the prevention of significant adverse environmental effects

(2) Purposes:

(a) to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project;

(b) to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;

Analysis: New emphasis on significance for interpretation of the substantive requirements in sections 19(1)(b) (factors of assessment) and 52 (decisions)

Status quo:

Focus EA on the avoidance of significant adverse environmental effects and authorize any alternative that meets this test (CEAA/92 and CEAA/12 approach)

Other existing options:

Option (1): Focus EA on benefits and adverse effects but leave EA as process of identifying such effects, with no test for approval (NEPA approach)

Option (2): Focus EA on benefits and adverse effects and seek to identify a preferred alternative (EARP/ EARPGO/ Ontario EA approach)

New options:

Option (1): Focus EA solely on negative effects and select the alternative with the least negative effects

Option (2): Focus EA on sustainability benefits and impacts and trigger review of alternatives to identify options that are the most sustainable among alternatives, with cabinet review of preferred option.

Two – Step EA Process

Step 1 - Screen projects for sustainability: if project passes test, no further EA required; if project does not pass screening test, then EA is required

Step 2 - Review project alternatives for sustainability and identify alternatives that maximize sustainability

Decision making: review EA and its identification of preferred alternative; make decision on project/ make decision consistent with EA



Thank you.

Comments and questions welcome.

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