

Scoping: A Comparative Review of Legal Requirements & Public Expectations Under NEPA, CEAA, and the Ontario EAA



David Estrin

Senior Environmental Law Specialist

Gowling Lafleur Henderson LLP

IAIA Conference 2004

GOWLINGS



Overview

- “Scoping” defined
- Ontario’s approach & the *Sutcliffe* decision
- Canadian federal caselaw
 - Scope of Project
 - Scope of Assessment
- U.S. practice under *NEPA*
- Critique of narrow scoping



Scoping Defined

- Describing the project to be assessed
- Defining the assessment: what is included?
 - To scope a pulp mill expansion project:
 - Do we consider resource use / deforestation?
 - Expansion of the mill itself?
 - Construction of roads to supply the mill?
 - Construction of a bridge to connect the roads?



Ontario's *Environmental Assessment Act*

- s.6.1(2) Subject to subsection(3), the EA must include:
 - A description of the purpose of the undertaking;
 - A description of and statement of **rationale for the undertaking, alternatives to the undertaking**, and alternative methods
 - A description of the environment to be affected and the effects that will or might reasonably be caused
 - Actions necessary to prevent, change, mitigate or remedy expected effects upon the environment of the undertaking or alternatives
 - An evaluation of the advantages and disadvantages to the environment
 - A description of any consultation carried out by the proponent and the results of such consultation
- 6.1(3) The approved terms of reference may provide that the environmental assessment consist of information other than that required by subsection (2)



Ontario & *Sutcliffe*

- Proposed expansion of a landfill site in Napanee, Ontario
- EA did not consider the need for the project or alternatives to the project
- Proponent relied upon s. 6.1(3) and the words “other than”
- Approval quashed – appeal will be heard June 28, 2004



Canadian Environmental Assessment Act

- Scope of project to be determined by government (RA or Minister)
- RA may assess two related projects as one
- S. 15(3) – EA must be conducted for “every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to the physical work” likely to be carried out



Canadian Environmental Assessment Act

- Scope of Assessment – EAs must consider:
 - Environmental effects of project/ malfunctions
 - Likely cumulative effects from the project in combination with other projects / activities
 - Significance of those effects
 - Mitigation measures
 - “Any other matter relevant to the screening...**such as the need for the project and alternatives to...**” as determined by the government
- Comp. studies & panels must also consider
 - Purpose of the project
 - Alternative means technically and economically feasible – and their environmental effects
 - Need for, and requirements of, follow-up program
 - Capacity of renewable resources



Federal Scoping of Projects

- Scope of these factors at the discretion of RA
- Scope of Project is the locus of debate:
 - Courts have affirmed that s. 15(3) requires analysis of a project's "life cycle"
 - However, "project" can be very narrowly scoped so as to exclude contentious issues
- In the pulp mill example, project is scoped as construction of a bridge vs. expansion of a pulp mill (to avoid forestry issues, road construction)



National Environmental Policy Act

- By regulation, scope must include
 - Cumulative actions
 - Connected actions
 - Does one automatically trigger the other?
 - Will one not proceed without the other?
 - Are they both interdependent parts of a larger action?
 - Similar actions (timing, geography)
- Direct, indirect & cumulative impacts
- Reasonable range of alternatives



National Environmental Policy Act

- Alternatives are the “heart” of the EIS
- Agencies must “rigorously explore & objectively evaluate”
 - All reasonable alternatives / those representing a reasonable range
 - Including the “no action” alternative
 - Give reasons for elimination of alternatives
- Emphasis is on technical & economic reasonableness, not on agency’s jurisdiction



Why Scoping Matters

From Proponent's Perspective:

- Scoping must be practical
- EA should not consider matters beyond proponent's jurisdiction or ability to implement

From Public Perspective:

- If a project is too narrowly scoped, EA can become an exercise in project-level mitigation
- Opportunity to analyze & make choices between “big picture” alternatives is lost



Why Scoping Matters

- Input should feed into “big picture” analysis
 - Road vs. transit; landfill vs. diversion, etc.
- At best, an EA gives decision-makers & public “full cost accounting” for proposed options
 - Environmental + social + economic impact



Conclusions

- EA tends to be project-focused
- Tensions over scoping linked to non-use of SEA
- More use of EA for Plans and Programs would result in less conflict over scoping
- Agencies must be more sensitive in scoping, re:
 - Expectations of the public
 - What is realistic (within jurisdiction / mandate) of the proponent
- More meaningful consultation on scoping is required – especially at federal level in Canada



We welcome your questions:

David Estrin

Senior Environmental Law Specialist
Gowling Lafleur Henderson, LLP
Scotia Plaza Suite 5800
40 King St. W, M5H 3Z7

Direct line: (416) 862-4301
david.estrin@gowlings.com

GOWLINGS