



200 - 2006 West 10th Avenue
Vancouver, BC V6J 2B3
www.wcel.org

tel: 604.684.7378
fax: 604.684.1312
toll free: 1.800.330.WCEL (in BC)
email: admin@wcel.org

November 21, 2008

Yves Leboeuf
Vice-President, Policy Development/
Vice-président, Élaboration des politiques
Canadian Environmental Assessment Agency/
Agence canadienne d'évaluation environnementale
Sent via email to: Tamara.Skillen-Haynes@ceaa.gc.ca

Dear Yves,

On behalf of West Coast Environmental Law (West Coast), I thank you for the opportunity given to RAC members to provide comments on the operational guidance of the Canadian Environmental Assessment Agency, entitled *DRAFT Adaptive Management Measures under the Canadian Environmental Assessment Act*.

General Feedback

West Coast supports the goal of providing operational guidance to responsible authorities (RAs) on the issue of adaptive management. We hope that the provision of operational guidance material will lead to greater understanding of adaptive management's relationship to environmental assessment.

While we liked many of the statements made in the section "When Might Adaptive Management Not Be Appropriate?" we are concerned that some of the statements, or lack of clarity, in other parts of the document, may undermine what is there. Our comments below are directed toward making suggestions to strengthen the guidance so that there will be a better understanding of what adaptive management is and isn't, and when it may not be appropriate.

Specific Feedback

1. There is a need to refer to the precautionary principle

In our submission, it is essential that the Agency's operational guidance on adaptive management refer to the precautionary principle, not only because the Act explicitly directs decision-makers to apply the precautionary principle in their exercise of their powers, but also because both the precautionary principle and adaptive management are well-known as approaches for managing uncertainty, and guidance and clarity is needed on what this means for EA practice in the face of uncertainty.

We would suggest that at the very least the guidance needs to note the mandatory direction in section 4(2) of the Act:

"In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle."

In addition to referencing section 4(2), we would suggest that it would be appropriate for the operational guidance to state that because of the precautionary principle, in some cases an adaptive management approach is simply not appropriate because of the risk or uncertainty of significant adverse environmental effects occurring.

For example, if there is a risk that an outcome of an activity may lead to significant, irreversible or unacceptable impacts (e.g. destruction of a pristine environment or habitat, or significant impacts on a species) an adaptive management approach would not be appropriate. In this case, the application of the precautionary principle dictates erring on the side of caution and ensuring the unacceptably risky activity does not take place.

2. Criteria to control and guide decision-making in adaptive management

While the guidance document appears to properly situate adaptive management with follow-up programs, we would suggest that a reminder with respect to duties regarding mitigation might provide important context for understanding. We would suggest the guidance remind RAs and others that mitigation is the legal responsibility of the RA: further to section 20 of the Act, the RA is legally required to itself "ensure" the implementation of mitigation measures, or be satisfied that satisfactory mitigation measures will be implemented by another person or body.

Related to this, because the RA is legally required to *ensure* or *be satisfied* as to the implementation of mitigation measures by itself or others, and given that these mitigation measures must be specific and known by the RA (as is stated in the guidance), there appears to be some inconsistency in the guidance in referring (more than once) to the possibility that adaptive management may lead to the party implementing the adaptive management (including the proponent) determining that a specific mitigation measure is no longer needed. While unfortunately I have not had the time to research this issue further, I am concerned that this may be suggesting a decision point that would appear to be *ultra vires*, undermining the scheme set out in section 20 of the Act.

In addition, we would suggest that the guidance is not currently sufficiently clear that establishing performance criteria, including impact thresholds, are an essential component of any adaptive management strategy. Currently the need for thresholds is expressed as a "should be considered in planning".

3. Reference to "public concern" requires greater explanation of goals

The guidance document lists "the extent of public concern about specific issues" as a factor in deciding whether or not an adaptive management approach is appropriate, but does not offer further explanation or assistance with respect to this point.

Our experience suggests that the public is most concerned first with the exercise of a precautionary approach in decision-making, and second, that sufficient follow-up programs be instituted to ensure that adequate monitoring of impacts and the effectiveness of mitigation measures takes place, provides learning, and leads to subsequent measures being implemented to ensure that mitigation is rendered effective.

Adaptive management presents a clear opportunity to make the monitoring and feedback provided by follow-up programs more effective. Currently, the Act does not explicitly require RAs to improve mitigation measures that discovered, through follow-up programs, to be unsuccessful. We would recommend that this operational guidance is an opportunity to encourage best practices in this regard and to identify how an adaptive management approach could lead to: (1) a plan on how more information will be gathered and accumulated as part of the mitigation and follow-up plan, and (2) a plan on how that learning will lead to ongoing improvements in the effectiveness of the mitigation measures in avoiding impacts.

4. Cumulative effects

We would suggest a slightly more expansive, cautious approach in the guidance document when treating the issue of cumulative effects. The Act is very clear that cumulative effects of the project and the effects of other projects and activities, past and future, are something to be considered in the decision-making of the EA (section 16(1)(a)), not merely something to be addressed and managed later through follow-up and adaptive management processes. We are concerned that the failure to note the primary duty regarding cumulative effects may lead to some misunderstanding in that regard.

From a British Columbia public interest perspective, we also recall that the Deltaport EA was highly controversial on the issue of scoping and cumulative effects. We would therefore caution against the use of the Deltaport EA as an example of best practice.

5. Conclusion

Once again, we thank you very much for the opportunity to provide comments. We look forward to future discussions at RAC on the issue of adaptive management.

Sincerely,

(signed)

Susan Rutherford
Staff Counsel