

New Directions for Federal Environmental Assessment

Submission to the House of Commons Standing Committee on Environment and Sustainable Development

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Introduction

Canada's federal environmental assessment laws have developed over several decades as a means to achieve sustainable development by providing information about environmental effects of development projects before decisions are made. The 1984 Environmental Assessment and Review Process Guidelines Order in Council, the 1992 *Canadian Environmental Assessment Act* (CEAA), and the amendments since 1992 have generally led to more sustainable projects that are more likely to achieve net benefits for affected communities, regions and Canada.

However, CEAA and its regulations have also become complicated and unwieldy such that they are not adequately addressing Canada's most pressing ecological issues, nor the needs of governments, proponents and the public in the environmental assessment process. CEAA often fails to properly assess projects with critically important environmental effects (such as the GHG emissions of oil sands projects) but also legally requires assessments of hundreds of small projects (such as scientific permits to study birds) whose well-understood effects either are minimal or can be mitigated.

The CEAA Seven-year Review provides an opportunity for the House of Commons Environment and Sustainable Development Committee to reconsider how the Government of Canada gathers information about, consults the public on, and makes decisions with respect to development projects that fall within federal purview and that may have adverse environmental, economic or social effects.

This submission suggests several new directions for federal environmental assessment as a basis for the Committee to consider as it begins to proceed through the CEAA Seven-year Review. These "new directions" are not necessarily mutually consistent; they are intended to stimulate discussion among Committee members of different types of possible reforms to federal

environmental assessment law and not provide a prescribed set of recommendations for amendments.

Core Elements of a Federal Assessment Process

Whatever new directions may emerge in federal environmental assessment law, the following core elements are essential to any process designed to inform federal decisions relating to projects, policies and programs

- Legislated
- Engages the public effectively
- Accountable
- Avoids duplication

Legally mandated federal environmental assessments of projects are still needed to support environmentally sound decision-making and achieve sustainable development. Public participation in environmental assessment is invaluable in providing important information on project effects, and generating the social licence for developments that may cause major changes in communities and regions. Hence public participation must continue to be legally mandated and financially supported. Reporting on environmental assessments into a public registry must also continue to be legally required; this is an important safeguard to assure accountability on the part of governments, proponents and participants.

Given that federal and provincial environmental assessments may be required for the same project, it is also imperative that administrative measures to avoid duplication—such as those currently in place at the Canadian Environmental Assessment Agency—be continued.

New Directions – Key Questions

The following includes key questions that the Committee may wish to reflect on as it considers new directions for federal environmental assessment legislation in the CEAA Seven-year Review:

- Sustainability assessment as the focus rather than environmental assessment?
- Focus on achieving federal environmental commitments?
- Establish environmental assessment permits?
- Adopt a single agency approach rather than self-assessment by multiple departments and agencies?
- “One Project, One Federal Approval” approach that integrates environmental assessment into federal approvals for major projects?

Sustainability Assessment rather than Environmental Assessment?

Sustainability assessment asks these questions: Does a project or policy provide net benefits for the community, province and nation? Does it advance our economy and society toward a sustainable future?

Sustainability assessment goes beyond environmental assessment, which asks the questions: What are the significant adverse environmental effects of a project? How can they be mitigated? How can the project's effects therefore be made less bad? Sustainability assessment seeks to improve positive elements of a project as well mitigate negative elements. Sustainability assessment asks questions about fairness and justice as well, by emphasizing intergenerational equity as well as intragenerational equity.

Sustainability assessment has emerged as an important refinement to environmental assessment in many joint panel reviews (e.g., Mackenzie Gas Project) and embedded at least partially in federal laws implementing northern aboriginal claims agreements (most notably the Yukon Environmental and Socio-economic Assessment Act, and the Mackenzie Valley Resource Management Act).

As an example, sustainability assessment is a much better approach than conventional EA for addressing and mitigating greenhouse gas emissions from a project. The recently approved Kearl and Joslyn North Oil Sands Projects will each be responsible for releasing millions of tonnes of CO₂ eq. into the atmosphere every year (roughly the equivalent of putting over a million cars on the road). However, both Joint Panel Reviews determined that this huge amount of emissions is not likely to result in significant adverse environmental effects, because of the difficulty in demonstrating a causative effect on the global atmosphere. Likely no single project on Earth (even a project one hundred times larger than Kearl and Joslyn North) could itself generate emissions large enough to cause a significant effect on the global atmosphere.

Sustainability assessment would have led these joint review panels to ask how these projects could become more sustainable by reducing CO₂ emissions towards the desired objective of zero net carbon released.

Achieve Federal Environmental Commitments?

CEAA assessments are generally required only in relation to a federal decision (e.g., Law-listed licence, funding decision, land disposition). According to the Committee's 2003 *Beyond Bill C-9* report¹, CEAA has not been used effectively to address major environmental priorities such as climate change. *Beyond Bill C-9* concluded that "although thousands of small projects are assessed more or less effectively under CEAA each year, many large potentially environmentally

1. *Sustainable Development and Environmental Assessment: Beyond Bill C-9* Report of the Standing Committee on Environment and Sustainable Development, June 2003 p. 1.

damaging projects avoid assessment or are scoped so narrowly as to make the EA of questionable value.”²

The Environment Committee could explore amendments or regulatory changes that would ensure that federal resources are expended on environmental assessment activities so as to support achievement of federal environmental commitments and priorities. *Beyond Bill C-9* recommended that: “the Minister of the Environment ensure that national and international environmental legal and policy commitments, objectives and standards are incorporated into the environmental assessment process under CEAA.”³

CEAA could be amended to require environmental assessments for proposed projects identified to be of national environmental significance (as Australia has done), or that address federal environmental priorities such as climate change (e.g., requiring a federal panel review for any proposed project with emissions exceeding certain levels).

Avoidance of environmental and human catastrophes such as the 2011 Fukushima, 2010 Deepwater Horizon and 1984 Ocean Ranger disasters is another federal priority. Worst-case scenarios are not limited to the marine offshore. Failure or collapse of a dam holding back a tar sands tailings reservoir could release huge quantities of highly toxic tailings resulting in contamination and potential destruction of aquatic life in the Athabasca River. A melt-down of a nuclear reactor could be catastrophic for people and ecosystems. Collapse of a hydroelectric dam as a result of an extreme precipitation event or earthquake also could be catastrophic. Such worst-case disasters are rare, but they do happen.

Yet CEAA does not require assessment of worst-case scenarios as is the case under United States federal law.⁴ The 1984 Inuvialuit Final Agreement (IFA) is one example of a Canadian legal requirement to undertake a worst-case scenario assessment.⁵ The Joint Panel Review for the Mackenzie Gas Project carried out a worst-case scenario assessment under the IFA for the Inuvialuit Settlement Region (but not for other regions subject to the panel review). The Joint Review Panel identified five worst-case scenarios including well blowouts of natural gas and natural gas liquids at the three anchor fields, and rupture of two gathering system pipelines and release of natural gas and natural gas liquids. Environmental impacts were then assessed, and proponent mitigation measures and commitments were identified.⁶

² Ibid note 1, 9.

³ Ibid note 1, 41. See Houck, O. *Worst Case and the Deepwater Horizon Blowout: There Ought to Be a Law* 2010 40 Environmental Law Reports 11033 for a discussion of the failures to implement worst-case scenario requirements in the case of the Deepwater Horizon blowout.

⁴ *National Environmental Policy Act* 42 U.S.C. ss4321-4370f (2006), ELR Stat. NEPA ss2-209

⁵ *Foundation for a Sustainable Northern Future: Report of the Joint Review Panel for the Mackenzie Gas Project* December 2009 pp.178-181, 376-378.

⁶ Ibid 180-181.

In carrying out the CEAA Seven-year Review, the Committee may wish to consider other ways in which environmental assessment can be used as a tool to advance the achievement of Canada's environmental commitments.

Establish Environmental Assessment Permits?

In *Beyond Bill C-9*, the House of Commons Environment and Sustainable Development Committee found that "departmental compliance with CEAA requirements [has] been unimpressive". The Environment Committee observed that "there is no enforcement power under the Act that would allow the Agency to improve matters".⁷ The Environment Committee quoted with approval a statement by Dr. Robert Gibson that "CEAA contains no means of setting and imposing terms and conditions of approval. Instead, it relies on a highly inconsistent set of permitting, contracting and other vehicles, many of which are ill- designed for the purpose."⁸

The Environment Committee went on to make two important recommendations. The first recommendation is that CEAA "be amended to establish a system for the issuance of environmental assessment permits by federal departments, in accordance with criteria prepared by the Agency. . ."⁹ The second is that the CEAA "be amended to prohibit, through the use of penalties, a federal departments or project proponent from proceeding with a project without a permit, or in breach of terms or conditions of a permit."¹⁰

Elaine Feldman, president of the Canadian Environmental Assessment Agency, noted in her presentation to the Committee on October 20, 2011 that CEAA continues to lack enforcement mechanisms. In the CEAA Seven-year Review, the Committee may wish to consider such mechanisms.

Adopt a Single Agency Approach?

The *Canadian Environmental Assessment Act* continues to be based on the self-assessment approach by responsible authorities (RAs) for screenings, with the Agency managing comprehensive studies and panel reviews. In *Beyond Bill C-9*, the Environment Committee expressed concern about the self-assessment approach under which the federal department empowered to make a project decision is also the authority that conducts the environmental assessment.¹¹ Self-assessment may continue to be effective for some departments (e.g., Parks Canada Agency), but generally has not been effective.

The Environment Committee may wish to consider whether all federal environmental assessments should be conducted by the Canadian Environmental Assessment Agency. A more centralized approach could promote consistency, timeliness, improved public participation, and

⁷ Ibid 18.

⁸ Ibid.

⁹ Ibid 19.

¹⁰ Ibid.

¹¹ Ibid 17.

efficiency, and avoid the squabbling among federal departments that so often has delayed environmental assessments and frustrated proponents and the public alike.

A centralized approach would directly address one of the key irritants for provinces and proponents about CEAA, and that is that there are often multiple federal authorities involved in the environmental assessment of bigger projects, and they often disagree about who should have lead responsibility for the environmental assessment as well on other process issues. Several regulations have been promulgated and Agency guidance documents issued to expedite coordination of CEAA environmental assessments within the federal government to address this irritant, but with limited success.

In the CEAA Seven-year Review, the Committee may wish to consider whether establishing a single federal agency responsible for CEAA assessments would allow easier 'one-stop shopping' for proponents, provinces and participants.

Integrate Environmental Assessments with Environmental Approvals?

This possible new direction goes beyond environmental assessment and proposes that the environmental assessment of a major project be integrated with federal permitting and licensing approvals needed by a proponent to carry out that project. Following completion of a comprehensive study or panel review by the Agency, a designated federal Minister (likely the Environment Minister) would issue one consolidated federal approval with terms and conditions drawn from the environmental assessment, which approval would cover off all federal environmental regulatory requirements and protect proponents from federal compliance action.

This federal approval would be issued with terms and conditions consolidated from *Fisheries Act*, *Species at Risk Act*, *Canadian Environmental Protection Act*, *Migratory Birds Convention Act*, *Navigable Waters Protection Act*, among other statutes depending on the circumstances.

CEAA could be renamed the *Canadian Environmental Assessment and Approval Act* as it would deal with assessment of environmental effects of projects requiring a federal decision and the approvals that would follow those assessments.

The consolidated approval would include terms and conditions reflecting the recommendations of the EA. Such permits would likely be issued on the recommendation of the Canadian Environmental Assessment Agency and would probably only apply to smaller number of major projects and not to projects currently subject to screening assessments.

Such a consolidated approval would afford greater certainty as to mitigation measures that are required, and better tracking of compliance with these measures.

The consolidated approval would be comprehensive, consolidating all federal environmental terms and conditions required for a project to proceed and replace any other required authorizations or permits that would otherwise be required under federal statutes identified above, but not for the quasi-judicial National Energy Board or Canadian Nuclear Safety Commission.

This consolidated approval scheme would provide that projects and proponents in compliance with terms and conditions of the approval would not be subject to federal compliance action such as prosecution so long as the terms and conditions of the approval are met.

Federal departments with an interest in a major project would have an incentive to participate in the environmental assessment to ensure that terms and conditions that they seek (e.g., protection of fish habitat) would be included in the terms and conditions of the consolidated approval.

Having a single consolidated federal environmental approval to focus on should create greater certainty for proponents, and provide greater clarity to the public about what the proponent is being required to do by the federal government.

The value of the CEEA environmental assessment preceding the consolidated approval is that it is the one federal process that has the potential to pull all of the diverse environmental factors together as foundation for a single authoritative approval.

Note that this “new direction” is not new—it is very similar to the approach adopted in the 1985 *Northern Pipeline Act* under which a designated Minister is authorized to exercise powers of other federal departments and agencies relating to the planning and construction of the Canadian portion of the Alaska Highway Pipeline. Environmental assessment and federal approvals are thus integrated under the authority of this Minister, supported by the Northern Pipeline Agency.

Conclusion

Nearly two decades since its enactment, the *Canadian Environmental Assessment Act* needs a comprehensive review. Much has been learned about making use of environmental assessment to improve the sustainability of projects as well as the flaws and inefficiencies of the CEEA regime.

This brief outlines several new directions for the Standing Committee on Environment and Sustainable Development to consider as it reflects on its approach to the CEEA Seven-year Review. These new directions include assessing the sustainability of projects, focusing on achieving federal commitments in assessments, gathering federal assessment authorities under

the aegis of a single agency, and integrating assessment and approval functions for major projects. What is clear is that Parliament and the federal government can and must do a better job in advancing sustainability and protecting ecosystems that support the prosperity and health of Canada.