Submission to the Standing Committee on Environment and Sustainable Development concerning the 7 Year Review of the *Canadian Environmental Assessment Act*

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About the submission

This submission largely is to make and substantiate a plea that in this 7 Year Review, for the sake of the public interest and for the sake of Canadian democracy, the federal government reverse its retreat from its role and responsibilities in federal environmental assessment, that it cease reducing or eliminating federal environmental assessment processes, and that it instead it strengthen and improve federal environmental assessment presence, processes, and legislative authority.

To these ends, the submission focusses on the following:

- Why we need strong federal environmental assessment.
- Avoiding the myth and trap of "overlap and duplication" rhetoric as a reason to pare down federal environmental assessment.
- Why a federal project based approach will not work in our federal democracy.

The submission ends with brief comments regarding improving the CEAA in 7 year review.

Why we need strong federal environmental assessment

Good environmental assessment followed by well-crafted permits, regulation, monitoring and follow-up responsive to the assessment, results in better planned projects, fewer environmental impacts, and ideally

[1] **Arlene J. Kwasniak -** I am a professor in the Faculty of Law, University of Calgary. I teach and research mainly in the areas of natural resources, environmental, and sustainability law. I have been involved with legal and policy aspects of environmental assessment for numerous years. I have published many academic and general audience works and materials on environmental assessment, in particular, federal environmental assessment. These include , "Use and Abuse of Adaptive Management in Environmental Assessment Law and Practice: A Canadian Example and General Lessons," 12 (4) *Environmental Assessment Policy and Management*, 2010, 425-4680/11); "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward," 20(1) *Journal of Environmental Law and Practice,* (2009) 1-35; "The Fading Federal Presence in Federal Environmental Assessment and the Muting of the Public Interest Voice," ABlawg, October 2011 << http://ablawg.ca/wp-content/uploads/2011/10/blog_ak_ceaa_oct2011.pdf>>; "The Fading Public Presence in Federal Environmental Assessment," *Wildlands Advocate,* (10-2010), 15-17; "The Eviscerating of Federal Environmental Assessment in Canada," Ablawg, March 2009. As well I served on the federal Regulatory Advisory Committee formed under the *Canadian Environmental Assessment Act*[1] (CEAA) for numerous years including during 5 Year Review. I have been an active member of the Canadian Planning and Environmental Assessment Caucus of the Canadian Environmental Network since the middle 1990's.

I make this submission and presentation as an individual who is an academic who studies legal and policy issues with respect to environmental assessment focusing on a public interest perspective.

net environmental and social sustainability gains. The CEAA and regulations are the basis for federal environmental assessment. The federal government may assess a project when it has constitutional jurisdiction over an area that may be impacted by a project, and, generally, where the federal government has permitting authority over the project or an aspect of it, all as set out in the CEAA and regulations. These areas include fisheries, navigation, migratory birds, federal lands, Aboriginal interests, nuclear facilities, interprovincial and international matters.[2]

Having the exclusive right to regulate in these and other areas, only the federal government can in **fact, law**, and from a **political and moral perspective**, do an effective job in assessing impacts.

In **fact** because only the federal government in fact is in a position to know what information it needs in the environmental assessment process in order to determine whether it should provide the permit for the project when taking into account likely environmental impacts. If the project does go ahead (like most projects do) only the federal government is in a position to know what it needs during the assessment process in order to properly mitigate and regulate impacts, especially on areas within its jurisdiction. Such mitigation and alteration could include project alterations, monitoring, follow up conditions, and adaptive management measures that may require the proponent to change environmental management because of unexpected impacts.

In **law** because only the federal government may regulate directly in areas under its jurisdiction. The environmental assessment of the aspects of a project that fall under federal jurisdiction must be carried out by the federal government since only the federal government is accountable under the constitution of Canada in these areas. This responsibility and accountability cannot be delegated to provinces. To be accountable in law the federal government must be the entity that ensures that potential environmental impacts are properly mitigated, monitored, and regulated.

From a **policy and moral perspective** because only the federal government is politically and morally accountable for how it manages and regulates matters that fall under its jurisdiction. To properly regulate and manage these matters it is critical that the federal government has and adheres to strong federal environmental assessment laws. Inappropriate reduction of the role of the federal government in environmental assessment contributes to the erosion of Canadian democracy as constituted by the division of constitutional powers. If the federal government retreats from fulfilling its constitutional role in addressing environmental impacts in areas of federal jurisdiction, no other level of government can legally or effectively pick up the slack. With federal retreat there is a concomitant loss of the national public interest and concern, an area that only the federal government can effectively represent, having constitutional jurisdiction over peace, order, and good government under section 91 of the Canadian Constitution. In addition there is a loss of the democratic values related to right and opportunities for public participation, including from a non-directly affected public interest perspective, provided for under federal environmental assessment processes.

Dispelling the myth and avoiding the trap of "overlap and duplication" rhetoric

Since 5 year review of the CEAA there has been no let up on the claim, made mainly by industry and provinces, that there is unnecessary overlap and duplication between provincial and federal environmental assessment processes and that when both processes apply to a project the provincial process should be *substituted* for the federal processes (and the federal process eliminated). In my "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation,

[2] Primarily under the division of powers under section 91 of the *Constitution Act, 1867*, formerly *the British North America Act, 1867*, (U.K.) 30 & 31 Vict, c 3.

Misinterpretation, and a Path Forward" I discuss these issues at length.[3] The article concludes that federal/provincial overlap is not unnecessary. Federal/provincial overlap is part and parcel of our Canadian democracy as reflected by the constitutional division of powers. Overlap within a jurisdiction though in cases not necessary, is hard to avoid and to be expected. Duplication, on the other hand, of requirements for proponents, sometimes because of overlap, largely may be addressed.

To very briefly summarize those arguments:

- The Canadian Oxford Dictionary (2000) defines "overlap" as "1.lay over. 2. … cover and extend beyond. 3. … partly coincide, extend beyond." In the Canadian federation it is no surprise that there is some overlap – meaning that the interests of both the federal government and the provincial government are the same in some areas with respect to a proposed project. An example of this would be where the federal government is conducting an EA prior to determining whether to issue a permit under the *Fisheries Act*[4] in respect of an oil and gas development project that will destroy fish habitat. The provincial government may conduct an environmental assessment prior to determine whether to authorize a destruction of a bed and bank of a river, which are owned by the province.[5] Both levels of governments may be interested in obtaining some of the same information from the proponent. There is nothing wrong with such overlap. It is perfectly understandable, and necessary, given our constitutional division of powers.
- Overlapping requirements may also occur within a single level of government. Using the example just given, both the federal Minister of Transport, who administers the *Navigable Waters Protection Act*,[6] and the Minister of Fisheries and Oceans, who administer the *Fisheries Act*, may have to approve the project if it is to proceed, and both ministries may require similar information. This type of federal/federal (or in cases it could be provincial/provincial) overlap also is not bad or necessarily inefficient. It is just what would be expected in a level of government complex ministries and mandates.
- Duplication may be contrasted with overlap. Duplication arises when a proponent, often because of overlap, is asked to provide the same information to both levels of government, or different ministries, departments, or agencies, within one level of government. This may or may not be onerous depending on the situation, including the timing of the requests, and the required formats. There may be inefficiencies relating to duplication, but the way to address inefficiencies is to reduce the duplication, not the overlap.

Here are some ways that duplicative requirements and government inefficiencies may be addressed without federal government unduly diminishing its role in environmental assessment:

- There are only seven harmonization agreements between the federal government and provinces/territories. If all provinces and territories would negotiate a harmonization agreement with the federal government there would be less duplication.
- Regarding the federal family, the federal government has not yet revised the *Federal Coordination Regulation*[7] since the 2003 amendments to the CEAA. This regulation sets timelines for federal authorities to determine whether they likely will require an environmental assessment, and timelines

[3] *Supra* note 1.
[4] RSC 1985, c C-14.
[5] For example, in Alberta, the provincial Crown owns the bed and bank of natural watercourses pursuant to s. 4 of the *Public Lands Act,* RSA 2000, c P-30, and a project that would damage a bed or bank would require an approval under the Alberta *Water Act,* RSA 2000, c W-3. Depending upon the nature of the project, the project may require a provincial EA under the *Environmental Protection and Enhancement Act,* RSA, c E-12.
[6] RSC 1985, c N-22.
[7] *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements,* SOR 97/181.

for matters related to an assessment such as notifying the proponent that more information is required, making a determination as to whether an assessment will be required after obtaining information, and reporting on the determination. If this regulation were revised and given some teeth, then there would be fewer inefficiencies within the federal family where more than one federal authority is involved in an EA.[8]

- The role of the federal environment assessment coordinator in the CEAA has not been fully developed or put into motion.
- The Agency's Quality Assurance Program that, amongst other things, is meant to identify inefficiencies, has not been given a chance to complete its work.[9]
- Industry itself could better coordinate and exercise its role in EA. In some instances, industry is to blame for delays.[10]
- If the problem is late triggering by some RAs, then we should address this problem by getting them to trigger earlier.
- Properly funding the Canadian Environmental Assessment Agency would give it ability and more opportunity to better facilitate assessments and address duplication. Yet the Agency`s budget has been drastically cut in 2011.
- The onus is on the party alleging inefficient overlap to substantiate it. The Standing Committee should not support reducing the federal role in EA without substantiation of precisely what the problem is and a determination that limiting the federal role will solve the problem. Moreover the Committee should be satisfied that the federal role in EA, including it federal constitutional role to the public and national interest in environmental assessment, regulation, quality and public participation, will not suffer.

Why a federal project list based approach will not work in our Canadian democracy

I understand that the Committee is being asked to consider changes the CEAA to substitute its current trigger based approach with a project list base approach. This approach had been considered by the Regulatory Advisory Committee in the past, but those discussions were not completed or resolved. This section describes why a project list approach will not work for federal assessment.

Most, but not all, provincial and territorial EA requirements are triggered by proponent proposals to carry out a project that falls under a specific activity description; this may be called the "project list approach." For example, in Alberta, the *Environmental Protection and Enhancement Act* ("EPEA")[11] governs most environmental assessment matters. The schedule to the Act lists projects which may be assessed. A regulation lists which of these projects must be assessed - mainly large-scale projects such as sizeable pulp mills, oil refineries and dams. The same regulation sets out which projects are exempt from assessment.[12] For any assessable project that is not specifically listed as either mandatory or as exempt, a Director appointed under EPEA may determine whether environmental assessment is needed.[13]

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[8] There are, however, new regulations to set timelines for comprehensive studies. See Establishing *Timelines for Comprehensive Studies Regulations,* SOR/2011-139.

[9] The reports of this program are available online at << http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=4431094E-1 >>.

[10] For examples, see A. Kwasniak "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward," *supra* note 1 in Part 5(b) (vi).

[11] RSA 2000, c E-12.

[12] *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/93. Section 47 of the EPEA gives the Environment Minister the right to order an environmental assessment on any proposal to carry out an exempt activity.

[13] Although most provinces and territories adopt a project list approach to EA there are exceptions. For example, the *Saskatchewan Environmental Assessment Act* (SS 1979-80, c. E-10.1) requires a Ministerial review, including an environmental assessment, of any "development," defined under the Act as any "project, operation or activity or any

In contrast to the project list approach, federal environmental assessment under the CEAA adopts what might be called a "category/trigger approach." A project proposal is subject to federal environmental assessment if it falls under a number of categories. There must be a "project" as defined by the CEAA, there must be a federal authority involved, and there must be a trigger.[14] If a proposal fits under the categories, it must be assessed. If a proposal does not fit under the categories, it is not subject to federal environmental assessment (subject to special authority in the CEAA to require an environmental assessment in other circumstances.) [15]

The federal government could not adopt a project list approach and still carry out its constitutional responsibilities under the division of powers. Except for projects that take place entirely on federal lands, federal constitutional authority does not normally extend to projects *per se,* such as a paper mill, a mine, or a dam. Rather it extends to aspects of projects, such as impacts to a coastal or inland fishery, impacts to migratory birds or nests, transboundary impacts, or an interference with navigation.[16] Accordingly, even if the federal government's legislation relied on a project list approach[17] the legislation also would require a federal trigger, such as is now present in section 5 of the CEAA, or a mechanism comparable to a federal trigger.

In conclusion, there is no compelling logic or point in adopting a federal project list approach. First, given the constitutional division of powers the project base approach is not appropriate for federal assessment. Second, a federal project list based approach would require a federal trigger anyway, and so the project list approach would not avoid the need for a trigger.

Improving CEAA in 7 year review

Can federal EA be improved? Certainly. But the federal government reducing or backing off from federal environmental assessment in response to unsubstantiated, biased, and self-interested assertions of overlap, duplication, or inefficiencies, is not aimed at improving federal EA.

There are inefficiencies in CEAA implementation and there can be improvements. Some improvements (some previously alluded to) can be made without substantive changes to the CEAA itself. These include:

- making proper use of the *Exclusion List Regulation*[18] to exclude the assessment of projects with proven no or only insignificant environmental impacts;[19]
- making proper use of CEAA model class screenings and replacement class screenings;[20]

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alteration or expansion of any project, operation or activity which is likely to have an affect on any unique, rare or endangered feature of the environment."[13] Similarly, the Ontario *Environmental Assessment Act* (RSO 1990, Ch E18.) applies to all government projects, plans, and programs, and all private sectors ones unless excluded by regulation.[13]

[14] See discussion in Part 2(b) (i).

[15] Ss 46 and 47 of the CEAA enable the federal Minister of the Environment to require a CEAA environmental assessment of a project where there is no section 5 CEAA trigger, where a project would have transboundary or international environmental effects.

[16] Legislative authority over these impacts is found in the opening and closing clauses of s 91, and ss 91(2), (10),(12), and s 132 of the *Constitution Act, 1867*, formerly *the British North America Act, 1867*, (U.K.) 30 & 31 Vict., c 3.

[17] The CEAA uses a project list approach with respect to level of assessment in the *Comprehensive Study List Regulations* which lists projects that will require a comprehensive study. However this should not be confused with using a project list approach regarding whether a project will be assessed under the Act.

[18] *Exclusion List Regulations* (SOR/07-108)

[19] A very cheap or a very small project can have disastrous environmental impacts.

- all provinces and territories entering into workable harmonization agreements with the federal government;
- revising and updating the *Federal Coordination Regulation* to deal with inefficiencies within the federal family.

With respect to substantive changes to the Act, one change aimed at addressing inefficiencies would be revisiting the principle of self-assessment and adopting a central agency/entity approach to avoid duplication and inefficiencies such as late triggering within the federal family. However prior to making any substantive changes there first should be an objective, non-biased, comprehensive, and thoughtful assessment of the CEAA, its purposes, and its effectiveness -- in particular with respect to whether CEAA is meeting the goals and purposes of effective environmental assessment. Seven year review offers the opportunity for such assessment of the CEAA. There have been such thoughtful and objective assessments, for example (among others) by Dr. Robert Gibson[21]and Dr. John Sinclair[22]

Although not possible in this short submission, I would be happy to discuss substantive changes to the CEAA with the Committee or others in this 7 Year Review process. As stated earlier, the main purposes of this submission are to make and substantiate a plea, for the sake of the public interest and for the sake of Canadian democracy, that the federal government reverse its retreating from its role and responsibilities in federal environmental assessment, that it cease reducing or eliminating federal environmental assessment processes, and that it instead strengthen and improve federal environmental assessment presence and processes.

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[20] A class of projects that systematically have the same impacts that can be mitigated by using standard techniques or technologies can be assessed by replacement class screening. Being on a replacement class screening list virtually eliminates the need for assessment. A class of project that has the same impacts but needs to be adjusted for location or special conditions can be assessed by a model class screening. See CEAA, s 19.

[21] (From Dr. Gibson`s submission to the Committee): Dr. Gibson is a professor of Environment and Resource Studies at the University of Waterloo, Ontario, Canada. His work has covered environmental policy issues and broader sustainability imperatives, with particular attention to how they may be addressed in decision making in environmental planning, assessment and regulation. Over the past decade he has focused on examining the integration of sustainability considerations in decision making in a variety of sectors and jurisdictions. He has been involved in assessment process design and application in most Canadian provinces and territories; has worked for public, private, Aboriginal and civil society clients; has taught two generations of EA practitioners and has published widely on related matters. His book, *Sustainability Assessment: Criteria and Processes* was published by Earthscan in the UK in late 2005.

[22] Dr. Sinclair has been with the Natural Resources Institute at the University of Manitoba since 1991 following the completion of his Ph.D. in the Faculty of Environmental Studies at the University of Waterloo. Among his scholarly writings in the area of environmental assessment are Fitzpatrick P.J. and Sinclair, A.J. 2009. ″Multi-jurisdictional environmental assessment,″ in *Environmental Impact Assessment Process and Practices in Canada*. Second edition, K.S. Hanna (ed). *Toronto*: Oxford University Press, pp 173-192; Sinclair, A.J. and A.P. Diduck. 2009. ″Public participation in Canadian environmental assessment: enduring challenges and future directions″, in *Environmental Impact Assessment Process and Practices in Canada*, Second edition, K.S. Hanna (ed). Toronto: Oxford University Press, pp 56-82; Fitzpatrick, P.J. and Sinclair, A.J. 2009. ″Multi-Jurisdictional Environmental Impact Assessment: Canadian Experiences″. Environmental Impact Assessment Review, 29(4): 252-260.