Note: working draft, subject to revision

What would remain?

Notes on the key substantive changes to federal environmental assessment in the proposed *Canadian Environmental Assessment Act 2012* included in the omnibus budget implementation Bill C-38

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Overview

The proposed new federal environmental assessment legislation has been presented by Natural Resources Minister Joe Oliver and other advocates as a means of ensuring more timely assessments focused properly on the most significant projects.[1] In contrast, the actual provisions of the *Canadian Environmental Assessment Act 2012* (CEAA 2012), included in Bill C-38, would virtually eliminate federal level environmental assessment, except insofar as it might continue under other legislation, and what would remain could not deliver efficient or effective assessment.

Under CEAA 2012, federal environmental assessments would be few, fragmentary, inconsistent and late. Key decision making would be discretionary and consequently unpredictable. Much of it would also be cloaked in secrecy.

Most projects now automatically covered by the current CEAA would be exempt from assessment under CEAA 2012. Most of the rest could be exempted after screening. Assessments done under the new law would be limited to consideration of a select number of environmental factors within exclusive federal jurisdiction.

Decisions on the application of assessment requirements to particular projects, and on the scope of required assessments, would be discretionary and determined after the projects had been planned and designed. Instead of encouraging incorporation of environmental considerations from the beginning of project planning, CEAA 2012 would add unpredictable requirements at the project approval stage.

[1] "Mr. Speaker, the whole point of this exercise is to ensure that we have a robust environmental review of major projects." – Joe Oliver, Minister of Natural Resources, speaking in the House of Commons, 2 May 2012, 41st Parliament, 1st Session, Hansard 115, http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5543442&Language=E&Mode=1#OOB-7552319

As proposed, CEAA 2012 does not encourage the development of projects to serve the broad public interest. It does not require critical examination of options that might deliver lasting social, economic and biophysical gains. It does not even aim to examine all adverse biophysical effects or to ensure that projects avoid significant adverse effects on the few factors that are examined. The final decision makers, at the political level, would be empowered to declare any significant adverse effect "justifiable in the circumstances." The decisions would be discretionary and the evidence and reasoning behind trade-offs in these decisions would be subject to Cabinet secrecy.

CEAA 2012 would replace comprehensive environmental assessment at the federal level with information gathering on a narrow range of factors for particular regulatory decisions and other specific federal responsibilities. Usefully broad assessments would depend on other legislation, including the highly diverse and uneven laws supporting provincial environmental assessment regimes, and on the untested capacities of provincial authorities to take over assessment responsibilities downloaded from the federal government.

Some key matters of application and scope are not addressed in the proposed legislation and some of the most retrograde aspects of process design could be softened through creative use of discretionary openings or through application of requirements retained in other legislation. But the fundamental structure and substance of CEAA 2012 as proposed in Bill C-38 would reduce federal environmental assessment to a highly inefficient, rushed, and minimally accountable process, centred on discretionary late stage requirements, covering only a few narrow considerations. It would no longer qualify as environmental assessment.

Specifics

1. Few assessments

• Although important details about what projects may be assessed have been left for regulations not yet been announced, the design of the law as well as the expressed intentions of the government indicate that most projects now automatically covered by the current CEAA would be exempt from assessment under CEAA 2012, and most of the rest could be exempted after screening. While much attention has been focused on implications for private sector resource projects, a major effect of the new law would be to exempt many, perhaps almost all, of the federal government's own projects from environmental assessment.

• The approach in the current CEAA was generally "all in unless exempted out." The new approach is to be "all out unless specifically included" – that is, only undertakings on the project list or specially designated by the Minister will be potentially subject to assessment. Moreover, listed projects may be screened out of the process at the outset. The project list regulation (anticipated under section 84(a)) has not been announced, but is expected to be constrained by the current government's repeated commitments to carrying out only a few hundred assessments a year instead of the few thousand annually

in the past, and by the proposed restriction to attention to specified matters of federal jurisdiction.

• Listed projects are not necessarily to be assessed. Instead, each is to be screened and may be exempted from assessment if the Agency concludes that the project, with promised mitigation actions, is not likely to cause adverse environmental effects (CEAA 2012, s.10). Given the limited ability for the Agency or public commentators to perform detailed evaluation of submitted project information in the period allowed (45 days or less overall; 20 days for public comments), and the likely proponent insistence that mitigation efforts will eliminate adverse effects, it is possible that many listed projects will be screened out of assessment.

• The vast majority of federal assessments in the past have been of small projects in a highly streamlined and often ineffective process. Because the project list is not expected to cover small projects, these assessment requirements would be simply eliminated by CEAA 2012. The proposed law includes no other means of enabling and motivating relevant federal authorities to give serious attention of environmental considerations in their decision making, or of providing generic environmental guidance for categories of small projects, or of establishing mechanisms to consider the cumulative effects of multiple small undertakings.

2. Fragmentary assessments

• Only effects on a tightly restricted range of "environmental components" under federal legislative authority are to be considered – biophysical effects on fish,[2] aquatic life and migratory birds, effects on federal lands and Aboriginal communities, and transboundary effects – plus whatever additional components may be recognized in a Schedule 2 (which is promised by CEAA 2012, s.5, but not provided in C-38). The list in CEAA 2012 (s.5) covers a small fraction of the interconnected biophysical effects that are included in the minimum usual scope of environmental assessments globally. The list is remarkably narrow even in the context of important matters clearly in federal jurisdiction. Effects on climate, for example, are not on the list. Without expansion of this agenda, CEAA 2012 would cease to be an environmental assessment law – it would be little more than an information gathering exercise for permitting and other decisions in a limited set of areas where the current federal government chooses to act.

• CEAA 2012 would also eliminate mention of possible requirements to assess "alternatives to" the proposed project and focus narrowly on biophysical effects and certain consequential socio-economic effects to the exclusion of direct social, economic and cultural effects and their interrelation with biophysical effects. Although CEAA 2012 could allow both "alternatives to" and the broader range of social, economic, cultural and interactive effects to added to the listed factors to be considered, on a case-by-case basis (under s.19(1)(j)), unless such additions were announced before project conception, they would come too late for effective incorporation in proponent's decision making about options and designs.

[2] Or perhaps only fisheries, given the proposed *Fisheries Act* changes, also included in Bill C-38.

3. Late assessments, with unpredictable requirements:

• The C-38 changes would delay application decisions, introduce late specification of assessment requirements and introduce greater inconsistency and unpredictability. The old process, which at least aims to encourage attention to environmental considerations early and throughout project planning, is accordingly reasonably clear about what projects are subject to assessment obligations, and what the assessment expectations are. Proponents are therefore encouraged to begin environmental assessment work at the outset of project development and integrate the results with other considerations. The proposed new law would discourage early initiation by ensuring that most application decisions come only after quite detailed project planning has already been done. In particular, the new law would

> (i) for listed projects, provide a screening process (CEAA 2012, s.8-12) that begins only after the proponent notifies the Minister and provides a sufficiently detailed description of the already planned project and its potential environmental effects to allow the Canadian Environmental Assessment Agency to make an informed decision (after a maximum 45 day review) on whether an environmental assessment is to be required;[3]
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> (ii) for non-listed projects, introduce a designation process (CEAA 2012, s.14) that is designed to begin only after the Minister is persuaded, by evidence including public controversy, that a proposed and (presumably) already planned physical activity "may cause adverse environmental effects or public concerns"; and
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> (iii) for all projects, for which assessment is eventually required, give considerable discretionary power to the Minister or other authority to define the scope of assessment requirements (CEAA 2012, s.19(2)).

• Because of the late notice and screening, and the even later specification of assessment requirements (subject to case-by-case exercise of ministerial discretion), assessment under the new law would begin after significant changes could be accommodated efficiently. CEAA 2012 would not encourage incorporation of environmental considerations in project planning. Instead, it would position assessment as a post-planning regulatory hoop inevitably under pressure for speedy decisions that do not require substantial changes to the established plans.

• Because these late stage assessment requirements are to be subject to ministerial discretion, the new law would also add to process uncertainties for proponents, who would have little basis for anticipating what requirements must be met. Rather than

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[3] An indication of the level of detail to be expected is provided in the Canadian Environmental Assessment Agency, "Consultation Document: Regulations Required to Implement the Proposed *Canadian Environmental Assessment Act 2012,"* (May 2012), http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=2E147EB4-1.

beginning early to address clear expectations for assessing relevant environmental considerations, proponents would be tempted to put their energy into pressuring decision makers to use their discretionary powers to minimize requirements. Late starting, post-planning assessments would entail delay even with the shortened review deadlines. In other words, the new law is likely to make federal assessment less efficient as well as less effective.

4. Assessments with more limited opportunities for effective public participation

• Public participants have historically been the actors most motivated and often most effective in ensuring careful critical review of project proposals and associated environmental assessment work. CEAA 2012 provisions that would restrict public participation opportunities include the following:

(i) The reduction in numbers of assessed projects would limit the opportunities for public contributions.

(ii) The narrowing of the scope of assessment considerations would limit the potential range of public contributions, likely excluding the most significant public concerns.

(iii) The tight timelines introduced for assessment steps, and within those timed steps the narrower windows for public engagement, would limit opportunities for effective public involvement (CEAA 2012, s.10, 27, 38).

(iv) For public hearing cases before the NEB (CEAA 2012, s.19(1)(c)) and CEAA panels (CEAA 2012, s.43(1)(c)), the restriction of hearing participation to "interested parties" would likely reduce public assess to the review processes for the most significant cases. The term "interested party" is defined (CEAA 2012, s.2(2)) as a person who is "directly affected by the carrying out of the designated project or if, in its opinion, the person has relevant information or expertise". The evident intent is to exclude at least some members of the public and public interest organizations. Depending on interpretation of the term in practice, perhaps only a very narrow range of public participants would be allowed to engage in the hearings.

(v) While provisions for substitution of a provincial process for a federal process require some assurance of public opportunity to participate, including with access to "records" (CEAA 2012, s.34(1)(b) and (c)), the process equivalency requirements are few and vague. Permitted substitutions to the highly diverse provincial processes would almost certainly introduce great unevenness in participation opportunities. Moreover, requirements for participant funding are apparently not to apply to substituted processes (CEAA 2012, s.58(2)).

5. Assessments that aim low

• CEAA 2012 would narrow assessment to a small range of federal mandate considerations and is apparently meant to focus only on mitigating adverse effects in these areas. In other words, it aims only for less bad effects on a select number of receptors. The normal scope of assessments under CEAA 2012 would not ensure a reasonably comprehensive review even of potential biophysical effects, much less consider the interactions among social, economic and biophysical effects. CEAA 2012 includes no mention of enhancing positive environmental effects. It would not provide a basis for comparing project options or for weighing positive against negative implications. It would not even provide a basis for overall judgments about whether a proposed project could have significantly adverse biophysical effects, since only a few topics of federal interest are to be considered.

• Even in its least ambitious applications, the current CEAA has aimed generally to avoid significant adverse environmental effects. In its most ambitious applications, the current CEAA, usually in combination with the authorities of other jurisdictions, has provided a base for assessment reviews requiring "positive contribution to sustainability" as well as avoidance of significant adverse environmental effects. In these cases, the proponents were expected to establish that their proposed project would serve the long and well as near term public interest, considering the full range of environmental effects (social, economic and cultural as well as biophysical) and the relative merits of alternatives. So far, five joint review panels established under the federal (CEAA) and other provincial, territorial and/or Aboriginal authorities, have adopted and applied the "positive contribution to sustainability" test.[4] Theoretically this would also be possible under CEAA 2012, which like the current CEAA includes a legislated purpose to "promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy" (CEAA, s.4(1)(b); CEAA 2012 s.4(1)(h)), but it would require discretionary insertion of additional factors for consideration far beyond the normal scope of the new law.

• Under CEAA 2012, a proposed project could be rejected on the grounds of "significant adverse environmental effects" but apparently only if these effects involved the particular areas of federal concerns recognized in the law or the promised Schedule 2. The anticipated evaluations of significance are affected by changes that would allow restitution and compensation to qualify as mitigation measures (CEAA 2012, s.2(1)). And projects threatening to cause significant adverse environmental effects may be approved nonetheless if the decision making authority determines that the effects are "justified in the circumstances" (CEAA 2012, s.52-53).

6. Assessment with invisible trade-offs and cloaked exercise of discretion

• CEAA 2012 would introduce a much heavier reliance on discretionary decision making throughout the assessment process from decisions on what undertakings are subject to

[4] The five cases are the joint reviews of the Voisey's Bay Nickel Mine and Mill, Whites Point Quarry and Marine Terminal, Kemess North Copper-Gold Mine, Mackenzie Gas Project and Lower Churchill Hydroelectric Generation Project.

assessment and how assessment requirements will be scoped, to whether project approvals will be granted and with what terms and conditions. The discretionary powers would be vested in the Minister and in Cabinet, whose deliberations are cloaked in confidentiality. CEAA 2012 would impose little if any constraint on the discretionary authority granted to the decision makers, would not ensure that decisions on key matters will be informed by tested public evidence, would not provide or require explicit criteria for the decision making, and would not require public rationales for the decisions made.

• CEAA 2012 would treat environmental considerations as a side consideration in project planning and approval. The narrow definition of "environmental effects" and the narrow focus on particular matters of federal mandate mean that even in a case where significant adverse environmental effects were identified, these effects would represent only a fraction of the overall biophysical implications of the proposed project. The environmental assessment would provide no basis for considering the interrelations between the positive and negative aspects or the socio-economic and ecological aspects.

• Nevertheless, the proposed law would allows Cabinet to approve projects that have been found likely to have significant adverse effects, where these effects are "justified in the circumstances" (CEAA 2012, s.52-53). The term is not defined and no criteria for justifications are provided. Presumably, the potential justifications would have to involve countervailing positive effects. But examination of positive effects is not included in the expected contents of assessments under CEAA 2012. The proposed new law provides no indication of what information sources may be used to provide the basis for comparative evaluation of the positives and negatives, and provides no route for public contributions to the deliberations. Moreover, CEAA 2012 would require no public explanation or justification of the reasons for a decision to declare a project's expected significant adverse effects to be justified in the circumstances. The nature of the trade-offs considered, the quality of the information relied upon, and adequacy of the analysis done would all be invisible, cloaked in Cabinet secrecy.

7. Greater disparity and inconsistency in assessment requirements

• CEAA 2012 would eliminate a significant portion of federal assessment responsibilities in part through substitution of provincial assessment processes (sections 32-37). Unfortunately, the existing provincial (and territorial and Aboriginal) processes are wildly divergent – in their basic purposes, their rules and processes for application, the scope of their assessment requirements, their provisions for public engagement, their capacities for enforcement of decisions, etc. No two are the same and there have been no evident recent efforts to foster even rough consistency among the provincial processes, much less effective harmonization.

• The vaguely stated equivalency requirements to be met by substituted provincial processes (CEAA 2012, s.34) would not be likely ensure federal-provincial equivalency in individual cases, much less encourage national equivalency at a credibly high level. Proponents operating across Canada would still face an unhelpful diversity of assessment

requirements to the detriment of overall efficiencies, and the public interest would still suffer from inter-jurisdictional disparity in assessment.

8. Reliance on other laws and jurisdictions to address basic obligations abandoned in environmental assessment law.

• Under the proposed CEAA 2012, assessments would normally cover only a few biophysical effects, and mostly ignore the interactions of effects on the social, economic and biophysical environments. While ministerial action to expand the scope of matters to be addressed would be possible, the drafters' decision to leaving such expansions to special intervention initiatives suggests that such expansions are not expected to be common. More comprehensive attention to the range of key considerations would therefore depend on assessment requirements imposed under other legislation, including the legislation of other jurisdictions.

• Within federal jurisdiction, the main other legislated foundations for reviews would be those of industry sector regulators who would take over assessment responsibilities in their mandate areas under CEAA 2012 – the *Nuclear Safety and Control Act,* which is applied by the Canadian Nuclear Safety Commission (CNSC), and the *National Energy Board Act* and the *Canada Oil and Gas Operations Act,* which are applied by the National Energy Board (NEB). The potential adequacy of assessment requirements and reviews by the CNSC and the NEB would depend on several considerations:

> (i) Neither the CNSC nor the NEB has a history of environmental assessment capability. Consequently, cases with significant environmental concerns have been and are now handled either through concurrent assessment reviews and regulatory hearings (e.g. in the case of the Mackenzie Gas Project) or joint panel hearings (e.g. in the case of the joint CEAA/NEB panel for the Northern Gateway pipeline and the joint CEAA/CNSC panel for the Deep Geological Repository project). Under the proposed CEAA 2012, the CNSC and NEB would inherit sole responsibility for environmental assessment reviews under their mandates. Joint reviews with the Canadian Environmental Assessment Agency would end.
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> (ii) While the NEB and CNSC have expertise in the sectors they cover, their focus has been narrowly regulatory (in contrast to capacity for attention to broader options and cumulative effects); they have traditionally been close to the industries they regulate, and their proceedings are generally more formal and less friendly to public engagement.
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> (iii) Because of the exceptionally narrow focus of CEAA 2012 on selected matters of exclusive federal jurisdiction, usefully comprehensive CNSC and NEB reviews would depend on provisions in the *Nuclear Safety and Control Act,* the *National Energy Board Act* and the *Canada Oil and Gas Operations Act* for broader coverage of environmental considerations. The National Energy Board, for example, is required to consider the "public convenience and necessity" of proposed projects (NEB Act, s.52, 58.16) and this opening to consider the broad

public interest would seem to be at least potentially more comprehensive than CEAA 2012's narrow restriction to listed matters of exclusive federal jurisdiction.

• Beyond federal jurisdiction, the main other legislated foundations for reviews would be those of provincial assessment processes, processes established under land claim agreements and processes of other countries. CEAA 2012 (s.32-36) would facilitate substitution of provincial assessment processes where these are judged to be equivalent to the federal process. Joint review panels are also possible (CEAA 2012, s.40). Prospects for credibly comprehensive assessment by or with these other authorities are difficult to determine, in part because of the great diversity of provincial environmental assessment laws and practices, and the uneven capacities for provincial authorities to address matters of exclusive federal jurisdiction in addition to matters of shared or solely provincial jurisdiction. In the absence of careful inquiry and compelling evidence, it would seem injudicious to assume that provincial capacities would be adequate to ensure reasonably comprehensive and integrated assessment of federal and provincial environmental effects.

9. No application to the strategic level of policies, plans and programmes

• Under CEAA 2012 law-based federal assessment would remain focused exclusively at the project level. A legislated base for strategic level assessments has been recommended by multistakeholder bodies in Canada and elsewhere for several reasons:

(i) the main cumulative effects of human undertakings including multiple projects are best recognized and addressed at the strategic level;

(ii) policy, planning and programme development processes typically offer a more appropriate scale than project assessments for examining broad options for bringing significant biophysical and socio-economic improvements; and

(iii) rigorous and open strategic level assessments can provide a credible base for authoritative guidance and greater efficiencies at the project assessment level.

As proposed, CEAA 2012 does not even include a discretionary opening for strategic level assessments.

• CEAA 2012 would empower the Minister of Environment to establish a committee to study cumulative effects "of existing or future physical activities" in a region (CEAA 2012, s.73-77). The report of any such committee would be public and could, presumably, be used to illuminate subsequent project assessments. But the proposed law includes no provisions to ensure that a committee's work would involve an open process, or to allow for an agenda beyond studying potential effects (e.g. to consider implications for the development of new policies, plans or programmes), or to design committee processes to provide credibly authoritative guidance for future project level assessment processes.