

The Canadian Environmental Assessment Act (CEAA) 2012: A Plain Language Summary

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The old Canadian Environmental Assessment Act

The *Canadian Environmental Assessment Act* SC 1992, c. 37 (CEAA) set out a process for assessing the environmental effects of projects requiring a federal decision. Under it, federal authorities identified possible adverse environmental effects of projects as well as measures to mitigate adverse environmental effects before projects are carried out. The purpose was to minimize or avoid environmental effects before they occur and incorporate environmental factors into project decision-making so as to achieve sustainable development.

The environmental assessment (EA) process determined: if an EA was required, who was involved, how the EA should be conducted, whether the environmental effects of a proposed project were likely to be significant, if/how the project should proceed, and what mitigation measures should be considered. The process required public participation, and encouraged collaboration between federal and provincial/territorial governments in carrying out EAs.

In April 2012, the federal government tabled Bill C-38 to implement the 2012 Budget, which repeals CEAA in its entirety and enacts a new law establishing a new greatly truncated EA process. As well as introducing a whole new environmental assessment law, Bill C-38 made amendments to the *Fisheries Act*, *Species at Risk Act*, *Navigable Waters Protection Act*, *Canadian Environmental Protection Act*, the *Nuclear Safety and Control Act* and the *National Energy Board Act*.

Government's Key Themes

According to Natural Resources Minister Joe Oliver, these changes are intended to provide quicker reviews in order to reduce regulatory uncertainty and thereby create more jobs and investment in Canada's resource sector.² Minister Oliver claims that a streamlined EA process would incentivize investment in Canadian natural resource projects.

According to the Economic Action Plan 2012 the purpose of revising CEAA is to:

1. Make the reviewing process for major projects predictable and timely
2. Reduce duplication in the review process
3. Strengthen environmental protection
4. Enhance consultation with aboriginal people

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² Shawn McCarthy, "Ottawa elbows regulators in quest for final word on pipeline approvals" (*The Globe and Mail*, April 17, 2012); Standing Committee on Nature Resource, *House of Commons* 41st Parliament, 1st Session, Tuesday, March 27, 2012.

Summary of CEAA 2012 Process

Under CEAA 2012, physical activities subject to an EA are either designated by regulation (the “Project List Regulation”) or designated in an order by the Minister on the basis that carrying out the activity may have adverse environmental effects or there is public concern related to those effects.

The Canadian Environmental Assessment Agency, the Canadian Nuclear Safety Commission (CNSC), or the National Energy Board (NEB) will be responsible for conducting EAs depending on the type of designated project. If the project is to be assessed by the CNSC or the NEB, the assessment begins automatically once the proponent has provided a project description. Projects occurring on federal lands such as National Parks require no EA unless the physical activity is designated on the Project list Regulation.

If the project is to be assessed by the Canadian Environmental Assessment Agency there is a “screening” process to determine whether an EA is required. The proponent provides the Agency with a detailed description of the project. If the Agency deems the description adequate, the description is posted online allowing the public 20 days to provide comments regarding the project. The Agency has to decide whether an EA of the project is required within 45 days. Thus even designated projects may not be subject to an assessment.

CEAA 2012 includes two kinds of reviews: a “standard environmental assessment” or a review panel assessment. The Minister has discretion to decide whether to refer a designated project to a review panel for assessment.

Timelines (apply to government/public, not to project proponents)

- Standard environmental assessment by the Agency: **365 days**
- Panel Review assessments by the Agency: **24 months**
- Panel Review assessment under the National Energy Board Act: **18 months**

These timelines can be extended at the discretion of the Minister.

Following completion of the EA, the relevant body (the Agency, the CNSC, or the NEB) is required to produce an EA report based on a list of considerations and determine whether the project is likely to cause significant environmental effects. If it is, Cabinet must make a decision as to whether the project is nevertheless justified under the circumstances. A decision will be issued informing the proponent that the project may proceed, may not proceed, or may proceed with modifications.

Substitution

A provincial government may request to substitute its process for the federal process and the Minister must accept this substitution. However, the Minister must first be satisfied that the substitution will consider the environmental factors set out in CEAA 2012, that the public will have an opportunity to participate, and that the report will be made available to the public.

Compliance and Enforcement

CEAA 2012 includes compliance and enforcement measures that will require the proponent to mitigate environmental effects. CEAA 2012 further authorizes inspectors to examine whether mitigation

measures are being implemented following completion of the environmental assessment. Violations are subject to prosecution.

CEAA 2012 applies to many EA processes that have already commenced; comprehensive studies are to be completed as if the old Act still applied, but screenings of projects that are not designated for assessment under CEAA 2012 are discontinued and panel reviews must modify their schedules and work plans to meet the CEAA 2012 requirements.

Implications of the New Act

The primary impact of the new legislation will be to dramatically reduce federal EA and not merely to streamline these efforts. CEAA 2012 will likely lead to inadequate investigation of the environmental effects of projects and failure to consider the perspective of Canadians, in particular those who may be adversely affected by projects. Additionally, the broad discretion afforded to the Minister in the EA process may politicize a process intended to be based on science and public input.

Number of Projects

CEAA 2012 dramatically reduces the number of projects to be assessed, as projects to be assessed are limited to those included on the Project List Regulation or designated by the Minister. Although the purpose is to avoid conducting an assessment for routine projects or projects that would have little environmental impact, many projects that should be assessed for their potentially adverse environmental impacts may be excluded from the process.

Departmental Participation

The number of departments responsible for EAs has been narrowed to three: the Canadian Environmental Assessment Agency; the NEB; and the CNSC. The responsibility of other departments to carry out EAs has been eliminated, and other roles and involvement has been reduced. As a result, the EA process may lack perspective that other departments could provide when examining the adverse environmental effects of a project.

Timelines

CEAA 2012 proposes strict time limits for conducting an EA, although they do not apply to proponents, who can take as long as they wish to submit information or respond to information requests. Stricter timelines may truncate valuable aspects of an EA. The timeline may make it challenging for regulators to conduct proper assessments that encompass adequate information to make well-formed determinations as to the effects the project will have. The result may be a less comprehensive assessment that fails to take important perspectives or facts into consideration. A more thorough EA may be beneficial in the future as time spent during the EA identifying potential issues or problems will be time saved later trying to identify and rectify issues. This approach may be beneficial to proponents, communities, and the natural environment.

Public Participation

There are fewer avenues for members of the public to participate in the review of proposed projects. Participation in most circumstances is limited to so-called *interested parties*. An interested party is defined as a person who is directly affected by the carrying out of the designated project or a person with relevant information or expertise. Depending on how the definition is interpreted, this may affect who is entitled to participate. Concerned members of the broader Canadian community could be

excluded altogether from making submissions expressing their concerns. Additionally, project proponents may lose the opportunity to gain greater social licence by meaningfully engaging the public at various stages of development.

Discretion

CEAA 2012 affords tremendous discretion to the Minister throughout the assessment process. It is at the Minister's discretion to decide whether projects not on the Project List Regulation will be subject to an EA, whether to refer the EA to a review panel, whether to accept a provincial EA process as a substitute for the federal one, whether the time limit can be extended, which members of the public may participate in the process, under what conditions the project will or will not proceed, and what requirements project proponents will be forced to comply with. The strong discretionary aspect of the new Act may lead to politicization of the EA process. Ample discretion may also lead to uncertainty and unpredictability in the EA process as many aspects of the process would rely on the predilections of the Minister of the day rather than application of known rules. Additionally, the Minister's decisions at various steps of the project may be subject to judicial review, therefore further delaying the EA process.

Conclusion

Environmental assessment is critical to protecting the natural environment and achieving sustainable development. Environmental assessment provides an opportunity for the public, industry and government to understand the potentially adverse environmental effects of a project and tries to assess the issue before it occurs. CEAA 2012 represents a major weakening of federal environmental assessment law by dramatically reducing the number of required EAs, constraining public participation, hurrying up EAs through compressed timelines leading to hasty and inadequate reviews, and weakening of the process by substituting federal EAs for provincial EAs. The degeneration of such a vital process may lead to the miscalculation of significant adverse environmental effects including the possibility of catastrophes such as BP's Deepwater Horizon oil well blowout and spill or the Fukushima nuclear reactor meltdown, not to mention strained relations between proponents and communities.