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STATUTORY REVIEW OF THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT*: PROTECTING THE ENVIRONMENT, MANAGING OUR RESOURCES

Report of the Standing Committee on Environment and Sustainable Development

Mark Warawa, M.P.
Chair

MARCH 2012

41st PARLIAMENT, 1st SESSION

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has the honour to present its

FIRST REPORT

Pursuant to the Order of Reference of Wednesday, October 19, 2011, the Committee has proceeded to the statutory review of the *Canadian Environmental Assessment Act* and has agreed to report the following:

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INTRODUCTION

Canadians have a rich environmental heritage that they are justifiably proud of; there is a broad sentiment toward ensuring that development does not irresponsibly degrade that natural heritage for future generations.

This report summarizes the observations of the House of Commons Standing Committee on Environment and Sustainable Development during the statutory seven-year review of the *Canadian Environmental Assessment Act* (CEAA).

While the Committee heard a variety of points of view regarding the provisions and operations of the CEAA, there were a number of areas of convergence. A key area of agreement is that affirmed in the preamble of the CEAA, which states:

> [...] environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development.

The key to the Committee's deliberations was to answer whether these goals of environmental assessment (EA) are being realized by the federal process. While there was a range of views presented, many intervenors expressed a need for significant change.

Participants pointed out that much has changed in Canada regarding EA since the CEAA came into force in 1995. In particular, provinces have put into place their own assessment regimes. As EA has evolved in Canada, the CEAA has remained relatively static, resulting in an outdated Act and an inefficient process that does not always improve outcomes. This can, in fact, stand in the way of sustainable development.

Significant changes are required to enable the CEAA to meet the promise of EA as outlined in the preamble to the Act. Specifically, the federal EA process should be more efficient, and it should lead to improved environmental outcomes and sustainable development.

IMPROVING EFFICIENCY

The overwhelming majority of industry stakeholders the Committee heard from, and many other witnesses, raised issues with the inefficiency of the federal EA process. They said the process is slow, duplicative and complicated. The following are the Committee's observations and recommendations aimed at improving efficiency while ensuring improved environmental outcomes.

A. Improve Timeliness

Time is of the utmost importance to proponents. As one witness succinctly put it:

> ... [A]ny time there's a significant delay, you're adding economic risk, which will heighten the cost of capital, and that has an immediate impact, which can be fairly significant, to say the least.[1]

Clearly time is money, but it may also affect whether or not a project proceeds, the result of a finite investment window for some projects. Proponents need certainty that an EA process will be done in a reasonable and, if possible, defined period of time.

The time currently taken for a federal assessment to be organized and carried out to an ultimate decision is clearly problematic. The Committee was made aware of this early in its hearings when a lawyer who advises clients in the area of EA testified:

> I say to clients that I can't give them a guarantee, that I can't even give them a reasonable likelihood that it's going to be mapped within what I consider to be a reasonable timeframe. Quite frankly, most often the culprit is CEAA. It's not the provincial regimes across the country.[2]

In their submissions to the Committee, various provincial governments indicated how federal EA delays had negatively affected projects within their jurisdictions. For instance, an official of the Government of Saskatchewan gave anecdotal evidence regarding the effect of CEAA delays on project proponents. Referring to an existing project that required modification, the official said:

> Because of the time, amount, and the human resources required to move something through the CEAA process, [some] companies simply say that they decided not to do something because it just wasn't worth entering the approvals process. Time and money

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1 Brenda Kenny, President and Chief Executive Officer, Canadian Energy Pipeline Association, *Evidence*, Meeting No. 7, October 27, 2011.

2 Paul Cassidy, as an individual, *Evidence*, Meeting No. 6, October 25, 2011.

are important. So they just move on or leave things until they absolutely have to change something and it becomes precipitous.[3]

The Government of British Columbia (BC) described how a project proposal meeting the EA requirements in BC for the proposed Storie Molybdenum Mine project was received by the province in July 2011. The federal government, however, asked the proponent further very detailed EA-related questions. The request was so detailed that, as of the time the BC government wrote their submissions, the federal EA review had yet to begin. A further instance of federal EA delay is evident with the Mount Milligan Project. The BC government approved this project on March 16, 2009, yet the federal government did not approve the project until December 11, 2009. The federal government took 270 days longer to approve the project than the province.[4]

Various industry groups also highlighted how long EA delays can significantly harm projects. One company pointed out how delays impeded a project to develop natural gas — a relatively clean source of energy. The natural gas project at issue was located at Canadian Forces Base Suffield National Wildlife Area. A project description was provided to regulatory authorities in March 2005. It took until October 2008 for the project to go to a hearing. In the three intervening years, the investment climate degraded considerably, and the project became less attractive from a financial point of view.[5]

One industry group representative explained how excessive EA delays on one project could lead to losses amounting $15 billion to $20 billion to the Canadian economy. In this case, if the EA process takes too long, it would effectively void international contracts entered by energy companies, as these companies would not be able to deliver on their side of the bargain.[6]

A number of reasons were given to explain why excessive EA delays occur. Chief among them was a lack of in-house federal coordination.

1. Single Federal Agency to Address Federal Coordination

The federal EA process operates on what is known as a “self-assessment” model. This term was used to refer to several different concepts during the Committee’s hearings. However, in the current context, it means that the federal department that triggers an EA - the responsible authority (RA) as set out in section 11(1) – is to perform the assessment (based on the environmental impact statement submitted by the proponent), decide

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3 Mark Wittrup, Assistant Deputy Minister, Environmental Protection and Audit Division, Ministry of Environment, Government of Saskatchewan, *Evidence*, Meeting No. 12, November 22, 2011.

4 Government of British Columbia, written brief, p. 6.

5 Cenovus Energy Inc., written brief, p. 2.

6 Ed Wojczynski, Chair, Board of Directors, Canadian Hydropower Association, *Evidence*, Meeting No. 10, November 15, 2011.

whether the project will be allowed to proceed (in the case of a screening level assessment), and ensure mitigation measures are taken, if appropriate.

However, because there are multiple triggers for assessments, there also may be multiple RAs. For instance, one project may need permits under the *Fisheries Act* and the *Navigable Waters Protection Act,* which would make both Fisheries and Oceans Canada and Transport Canada RAs. Stakeholders repeatedly blamed the time taken for multiple RAs to make decisions regarding their various roles in an EA process as causing unnecessary delays and uncertainty in the federal EA process.

The government attempted to address this problem in 2003 through amendments to the CEAA that created the role of the federal environmental assessment coordinator (section 12.1). As well, it created the Major Projects Management Office to help large resource projects navigate the federal regulatory process. However, it was clear from the testimony that these efforts had not addressed the issue sufficiently.

In 2010, the Canadian Environmental Assessment Agency (CEA Agency) was made the RA for all comprehensive study EAs (except those implicating the Canadian Nuclear Safety Commission (CNSC) or the National Energy Board (NEB)) up to the point where the Minister is provided with the comprehensive study report (section 11.01), at which point the RAs responsible for triggering the EA become responsible for all further steps in the EA. This change to the CEAA, with few exceptions, was welcomed by all. Clearly, in this instance, centralizing the EA process was a success.

Numerous intervenors suggested that creating a single federal agency responsible for all federal EAs was necessary. Other jurisdictions have a "single point source" to do EAs that has brought consistency to the process.[7]

While many intervenors believed that the CEA Agency should be the single point source for federal EAs, others felt that the "best-placed regulator" should be the body responsible for EA.

Responsible authorities often also have roles to play in permitting. Permitting processes, such as those of the NEB and the CNSC, include aspects of EA. The government has clearly signalled that it wishes to use the permitting processes of both the CNSC and the NEB as substitutes for review panel EAs when either of those bodies are involved in an EA. Project proponents who appeared before the Committee and who have been involved with these bodies were clearly pleased with this, as they think that these bodies are the best placed to make decisions. Not only do they have the expertise, but substitution would eliminate possible duplication between the EA and permitting processes.

7 Mark Wittrup, Assistant Deputy Minister, Environmental Protection and Audit Division, Ministry of Environment, Government of Saskatchewan, *Evidence*, Meeting No. 12, November 22, 2011.

Recommendation 1

The Committee recommends that the federal government ensure that the Canadian Environmental Assessment Agency be made responsible for exercising the powers and performing the duties and functions of the responsible authority in relation to environmental assessments carried out under the Act, unless it is determined that another regulator — the "best-placed regulator" — is better suited to perform the role of the responsible authority.

2. Remove Unnecessary Steps

One general proposal put to the Committee witnesses involved further consolidating the authority for EAs beyond that already accomplished in the 2010 *Jobs and Economic Growth Act*. That Act made the CEA Agency responsible for most comprehensive studies. The proposal suggested at Committee involved providing more authority for the CEA Agency to deal with what are now larger screenings, and providing the Minister more authority with respect to major projects. The effect of such a proposal would be to remove the two-step decision-making process after a comprehensive study, which involves the Minister making an EA decision and then the responsible authority making an EA decision. When asked about this proposal, witnesses indicated that they were in favour of removing redundant steps in EA approval. As an official from the Government of Saskatchewan put it:

> I'm all in favour of anything that removes unnecessary process steps. While it's nice to have a lot of sign-offs, they don't actually add anything to the environmental protection, which is the outcome that's being looked after.[8]

The Committee supports removing steps in EA processes that have nothing to do with generating measurable environmental outcomes.

Recommendation 2

The Committee recommends that the federal government further consolidate authority for environmental assessments by providing more authority for the Canadian Environmental Assessment Agency to deal with what are now larger screenings, and more authority to the Minister with respect to major projects, which would remove the two-step decision-making process after a comprehensive study, where the Minister makes an environmental assessment decision and then the responsible authority or authorities make environmental assessment decisions.

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8 Ibid.

It was suggested by a Committee member that an investigation of alternative means for carrying out the project allows the environmental review process to investigate the business case for the project. Reviewing a business case is clearly beyond the competency of the environmental review process. As the member indicated, it can be safely assumed that project proponents have considered all alternatives and are presenting the project alternative with the best business case. The member recommended that the environmental review be restricted to the project as it is presented and not to any hypothetical alternatives.

Recommendation 3

The Committee recommends that the requirement for a consideration of alternatives to the project, which is currently required during *Canadian Environmental Assessment Act* screenings, be eliminated from the Act.

It was further suggested by a Committee member that one section of the CEAA, which requires consideration of the effects of the project on the capacity of renewable resources to meet current and future needs, is unnecessary. The member's specific rationale was that renewable resources are already primarily managed by the provinces. Furthermore, no project proponent would or could submit a project that is either outside the terms and conditions of provincial natural resource management policies, or was outside the realm of the sustainability of the renewable resource base. The member recommended that this section be eliminated.

Recommendation 4

The Committee recommends that, because renewable resource development and management are largely under provincial jurisdiction, the requirement for a consideration of the effects of the project on the capacity of renewable resources to meet current and future needs, which is currently required during *Canadian Environmental Assessment Act* comprehensive studies and review panels, be eliminated from the Act.

3. Legislated Timelines for Federal Environmental Assessments

Another, more prescriptive, method for assuring timeliness would be to regulate timelines for EAs. Various witnesses suggested this as a solution to lengthy federal EAs.

Many provincial governments told the Committee that more needs to be done to improve federal EA timelines. The majority of submissions by provinces to the Committee suggested that the federal government needs to further improve the timeliness of assessments. The Government of Nova Scotia asserted that the Committee "should

consider the application of timelines to all federal assessments".[9] The Government of British Columbia pointed out that the EA timelines in that province mean that it takes on average 200 more days for the federal government to render a decision than it does for BC to do so.[10] In their written submissions to the Committee, the Government of Saskatchewan stated that:

> One of the major complaints against the CEAA processes is the lack of enforced timeliness… There continues to be a need to bring more predictability and consistency to the federal EA process by setting sensible and reasonable timelines that are predictable and, more importantly, enforceable.[11]

This criticism should not take away from the government's recent improvements to EA timelines. In July 2010, the government's amendments to the CEAA included changes that require an earlier start to the process. Since these amendments came into effect, the CEA Agency has started all comprehensive studies in alignment with provincial reviews. Furthermore, timeline regulations (*Establishing Timelines for Comprehensive Studies Regulations*) came into force in June 2011 for these Agency-managed comprehensive studies. These regulations provide 90 days for the CEA Agency to determine whether to commence a comprehensive study and 365 days to provide a completed report for a final public comment period. Many witnesses before the Committee noted their support for these amendments.

It was suggested that timelines should be set not just for the EA itself, but also for related procedural steps from the application through public participation to final authorizations.

Recommendation 5

The Committee recommends that the *Canadian Environmental Assessment Act* be amended to enable or require, where appropriate, binding timelines for all environmental assessments.

4. Early Triggering of Federal Environmental Assessments

A fundamental tenet of EA is that it must occur early in the planning stages of a project. The CEAA framework is designed to ensure that "projects are considered in a careful and precautionary manner before federal authorities take action in connection with them" (section 4(1)(*a*)). Unfortunately, federal action often is required too late in the planning stages of a proposed project. The federal EA process is therefore triggered too late to meet the goal of integrating environmental factors into early planning and decision making.

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9 Government of Nova Scotia, written brief, p. 3.

10 Government of British Columbia, written brief, p. 9.

11 Government of Saskatchewan, written brief, p. 8.

By the time it is clear that federal action is required, many decisions, particularly on conceptual design, may have already been taken and some provincial processes may already be well under way. This is partly the result of multiple agencies being involved, as already discussed.

Another problem, however, is that the CEAA is not very clear as to what projects require an assessment. Projects require a federal EA when they involve the federal government under specific circumstances described in section 5, and when they are not excluded under sections 7 or 7.1 or the regulations. The Committee heard from a lawyer who, when he advised his clients as to where a federal EA applied, said it typically took three times longer to explain than similar advice for provincial EAs.[12] This shows how much more unwieldy the federal triggering process is than the provincial process.

A significant problem is that one of the main triggers for federal EAs is when a project requires a federal permit or licence (as set out in the *Law List Regulations*). Permitting, however, often takes place at the tail end of the project. Late triggering under the law list was consistently identified as a serious problem with the CEAA.

Witnesses also pointed out that, in instances where federal EAs were triggered earlier in the life of a project, federal agencies asked questions about detailed information that may be lacking at the early stages. Such questions about design details are best suited for later permitting stages. As the Committee heard, "[d]etermination of the federal permitting triggers in the federal EA process are sometimes more suited to the stage of detailed design engineering. At that point the decision has already been made and a preferred alternative or option has been selected."[13]

One possible solution to address both uncertainty about the necessity for a federal EA and late triggering would be to create a list of projects that would be subject to federal EA. A list approach would allow proponents to easily see, in advance of proposing a project, what projects require a federal EA. The list approach was the focus of much discussion, and is referred to later in this report.

Recommendation 6

The Committee recommends that the federal government ensure that federal decisions related to triggering are made at the start of the provincial regulatory process to achieve efficient, effective and truly harmonized environmental assessment processes.

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12 Paul Cassidy, as an individual, *Evidence*, Meeting No. 6, October 25, 2011.

13 Jennifer Jackson, Executive Director, Canadian Water and Wastewater Association, *Evidence*, Meeting No. 8, November 1, 2011.

5. Strategic Environmental Assessment to Facilitate Project Assessments

Strategic environmental assessment (SEA) incorporates environmental considerations into the development of public policies and strategic decisions. There are currently no references to SEA in the provisions of the CEAA. Rather, SEA is required under the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals.* The Committee heard considerable evidence regarding the potential for SEA to assist in the operation of the CEAA at the project level.

SEA was referred to in two contexts: the first was its use to assess regions, and the other to assess new project types. In both cases such a review would help set a framework in which project-based assessments could be better performed. In both cases, a SEA could look "at broad environmental issues. This would help to prevent layering onto a proponent the undue burden of trying to answer for future developments that may or may not occur. It would provide a useful baseline of environmental information for proponents to build upon and address."[14] One witness pointed to the introduction of a number of new projects to Nova Scotia, such as fin-fish aquaculture, liquid natural gas facilities and shale gas fracking that would have benefited from SEA.[15]

Clearly many of these SEAs would occur at a multi-jurisdictional level. The federal government could not impose such a process, but it could be able to instigate a cooperative effort.

Many provinces have already taken the lead in this area through land use planning legislation. For instance, the Province of Alberta established a process to develop regional plans through the *Alberta Land Stewardship Act*.[16] In the interest of not intruding on provincial jurisdiction, this Committee does not wish to impose unilateral recommendations regarding regional assessments.

B. Decrease Duplication and Target Significant Projects

A frequent complaint the Committee heard about the CEAA is that it requires work to be performed that has already been done for another jurisdiction's EA. Duplication delays approvals, multiplies costs, frustrates stakeholders and does not lead to improved environmental outcomes. Duplication must be minimized or, if possible, eliminated. The Committee heard the message from many stakeholders, loud and clear: "one project, one assessment."

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14 Pierre Gratton, President and Chief Executive Officer, Mining Association of Canada, *Evidence*, Meeting No. 11, November 17, 2011.

15 Meinhard Doelle, Schulich School of Law, Dalhousie University, as an individual, *Evidence*, Meeting No. 12, November 22, 2011.

16 Canadian Association of Petroleum Producers, written brief, p. 4.

1. Coordination with Provincial Regimes

Both the provinces and Parliament have enacted laws requiring EA. The result, as the Committee heard time and again, is what one witness described as "hopeless duplication,"[17] when one project is subject to more than one EA considering the same factors.

The CEAA currently includes various provisions aimed at addressing duplication. If a federal screening or comprehensive study of a project is required, the federal government may "cooperate" with another jurisdiction (sections 12(4) and 12(5)), and it may "delegate" any part of the screening or comprehensive study to another jurisdiction; but, it may not delegate its ultimate decision-making (section 17). Where an EA will proceed by panel review, the CEAA allows for the Minister of the Environment to form a joint review panel with another jurisdiction to review the project (sections 40 to 42). However, the CEAA does not provide for federal-provincial substitution, which would allow the EA process of one jurisdiction to replace the process of another.

In addition, the federal, provincial and territorial governments (except Quebec) entered into a *Sub-Agreement on Environmental Assessment*[18] in 1998, in which they agreed that, when two or more jurisdictions require an EA of the same project, a single cooperative EA would be designed to meet the legal requirements of both governments. Further, the governments agreed to negotiate bilateral agreements to implement the Sub-Agreement. So far, the federal government has concluded bilateral agreements with seven provinces and one territory.

The Committee heard various suggestions about how the CEAA should be amended to address duplication. One suggestion raised repeatedly is that the CEAA should make provision for the federal government to deem another jurisdiction's EA process equivalent to the federal process. Witnesses used various terms to advance the same idea: equivalency, substitution, delegation, reciprocity, deferral. They all amount to the same proposition — that the "CEAA is not the only process capable of delivering a robust EA."[19] The federal government should be able to rely, to a limited extent or entirely, on a provincial EA, provided that process meets the main objectives of the CEAA. Each jurisdiction should retain its decision-making powers.

Witnesses noted that federal EAs could be scoped to focus only on components of the process within federal jurisdiction, such as fisheries, leaving the rest of the project components to be assessed by provincial or other EA regimes. Other witnesses suggested that robust provincial regulatory systems make federal screening level

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17 Paul Cassidy, as an individual, *Evidence*, Meeting No. 6, October 25, 2011.

18 It is a "sub-agreement" because it was concluded under *A Canada-wide Accord on Environmental Harmonization*.

19 Ed Wojczynski, Chair, Board of Directors, Canadian Hydropower Association, *Evidence*, Meeting No. 10, November 15, 2011.

assessments unnecessary, except for projects with federal proponents or on federal lands. Federal officials would take part in another jurisdiction's EA in order to ensure that federal obligations were being met.

Some witnesses were of the opinion that provincial EA regimes were not properly suited to take the place of federal EA regimes. Provincial and other EA regimes may consider different factors than the federal EA process; the processes themselves may be different and triggered at different times. Witnesses noted that the government should "set a high fundamental standard for best practice assessment in federal law as a basis for collaborations and joint assessments with other regimes…"[20]

However, proponents and other stakeholders need immediate solutions to address the duplication problem. As suggested by a number of witnesses, the Committee is of the opinion that the CEAA should be amended to empower the CEA Agency to determine that another jurisdiction's EA process fulfils the requirements of the federal process, and therefore that an EA carried out under that jurisdiction is equivalent to an EA required under the CEAA.

The Government of British Columbia suggested that the federal government amend the CEAA to acknowledge provincial EA as equivalent, eliminating the need for a federal EA and decision where a provincial EA is being conducted. Specifically, British Columbia proposed that the CEAA be amended to include the following section:

> A project is exempt from the requirement to conduct an assessment under this Act where an environmental assessment is required to be conducted, with respect to the project, under the legislation of a province listed in Schedule XX.[21]

Recommendation 7

The Committee recommends that the *Canadian Environmental Assessment Act* be amended to empower the Canadian Environmental Assessment Agency to determine that another jurisdiction's environmental assessment process fulfils the requirements of the federal process, and therefore that an environmental assessment carried out under that jurisdiction is equivalent to an environmental assessment required under the *Canadian Environmental Assessment Act*.

Recommendation 8

The Committee recommends that the *Canadian Environmental Assessment Act* be amended, such that the following specific language be inserted into the Act to exempt certain provincial projects from federal assessments: "A project is exempt from the requirement to conduct an assessment under

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20 Robert Gibson, written brief, p. 8.

21 Government of British Columbia, written brief, p. 6.

this Act where an environmental assessment is required to be conducted, with respect to the project, under the legislation of a province listed in Schedule XX".

Permitting coordination by the federal and provincial governments could help avoid duplication and increase timeliness. The Canadian Association of Petroleum Producers (CAPP) gave an example of the type of measures the federal government could take to improve permitting coordination. CAPP pointed out that some jurisdictions include provisions for concurrent permitting and timelines for permitting after completion of an EA. In British Columbia, for instance, proponents may request that an EA review and provincial permit applications occur concurrently. That ensures that crossover issues are addressed just once.[22]

Recommendation 9

The Committee recommends that the federal government work towards improved coordination of permitting by federal and provincial authorities.

2. Target Projects of Environmental Significance

Another frequent complaint witnesses raised against the CEAA related to the vast number of small projects with insignificant environmental effects that trigger a federal EA, diverting resources from reviewing the major projects that may significantly impact the environment.

The CEA Agency gave two examples of small projects that currently require a federal EA: upgrades to small craft harbours and the expansion of maple syrup operations.[23] In 2007, the CEA Agency concluded that approximately 94% of screenings were for small projects that have only minimal or minor potential for adverse environmental effects. In 2009, the Commissioner of the Environment and Sustainable Development confirmed this finding, based on the sample of projects audited for his report. One witness summed it up: "At the federal level, I think we do need to focus on the big stuff and not sweat the small stuff so much..."[24]

The Committee heard further examples of very small projects that currently require a federal EA. As one witness explained:

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22 Canadian Association of Petroleum Producers, written brief, p. 6.

23 Elaine Feldman, President, Canadian Environmental Assessment Agency, *Evidence*, Meeting No. 5, October 20, 2011.

24 Stephen Hazell, as an individual, *Evidence*, Meeting No. 6, October 25, 2011.

> Allocating scarce resources to assess the impact of a new park bench in a national park does not seem like a good use of resources. I used this example not frivolously. These park benches do trigger EAs.[25]

The Committee believes that the CEAA should deal with matters of environmental significance, not park benches.

The CEA Agency explained that the CEAA's "all in unless excluded" approach (sections 5, 7 and 7.1, and the *Exclusion List Regulations, 2007*) is the reason so many small, routine projects are captured by the CEAA.

The Committee agrees that the application of the CEAA should be focused on projects that are more likely to have a significant adverse environmental effect. It should not be triggered for projects with minor effects that can be effectively addressed through provincial assessments and through federal and provincial permitting and regulation.

Witnesses suggested various means of changing the federal EA process to focus on the types of projects where an EA can add most value.

Some witnesses suggested eliminating screenings for all projects except those with a federal proponent or on federal land, or even eliminating screenings entirely. However, we note that based on the CEA Agency's statistics, approximately 6% of projects currently subject to screenings have more than a minor potential for significant adverse environmental effects. One witness gave the example of 147 kilometres of pipeline looping through Jasper National Park, which was "rated as a screening under the definition of CEAA, but by any measure was clearly a critically important project."[26]

A variation of the above suggestion that at least one witness suggested is to set a higher threshold for triggers. In other words, projects would only require a federal EA if they were triggered by the CEAA and were of a certain size, or had the potential to create a significant impact.

Note, however, that under the CEAA's current structure, distinguishing between large and small projects does not address the problem of the CEAA's late triggering, discussed earlier in this report.

Another solution suggested by several witnesses is to make better use of the *Exclusion List Regulations, 2007* to exempt projects with minimal impact. One witness recommended excluding projects "that are similar in nature to projects described in the *Exclusion List Regulations*."[27] However, an issue with simply expanding the exclusion list

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25 Pierre Gratton, President and Chief Executive Officer, Mining Association of Canada, *Evidence*, Meeting No. 11, November 17, 2011.

26 Brenda Kenny, President and Chief Executive Officer, Canadian Energy Pipeline Association, *Evidence*, Meeting No. 7, October 27, 2011.

27 Government of Saskatchewan, written brief, p. 9.

or setting a higher threshold for triggers is that these changes would not address the CEAA's late triggering problem. One consideration that needs to go into a list approach is determining what goes on the list.

Perhaps the most popular suggestion was that the application of the CEAA should move away from a triggering approach (section 5), towards a project list approach. This is an appealing suggestion, as it would ensure that proponents knew with certainty and early on in the process whether a specific project would require a federal EA. A legal expert described to the Committee how the triggering approach was out of date and led to much legal uncertainty. The expert described how difficult it is to interpret when the triggering approach applies, stating "It's a much more complicated piece of legislation... than it needs to be in 2011."[28] As the legal expert explained in his testimony, the CEAA "was enacted in a time in which there were debates about the jurisdiction of the federal level of government over the environment."[29] Since the creation of the Act, a lot has changed in the legal world. Courts have consistently held that it is within the jurisdiction of the federal government to regulate environmental matters. The triggering mechanism in the CEAA relates to a jurisdiction debate which is no longer a live issue. A list approach would be an efficient improvement over the antiquated trigger approach.

While adopting a list approach may involve challenges, effective implementation is possible. Other governments have successfully adopted list approaches. As the President of the CEA Agency pointed out, "[many jurisdictions] have a list where they list the type of projects that require assessment."[30] Witnesses provided suggestions, including dollar value of a project, its footprint, its potential for significant adverse environmental outcome, its national environmental significance, or whether it addresses federal environmental priorities.

Perhaps a greater challenge with a list approach would be to keep it up to date. Some new types of projects are difficult to anticipate, yet novel undertakings may be the very ones most in need of a thorough EA. Accordingly, a list approach would require some sort of discretionary power to require an EA for a project not on the list (or exclude a specific project that is on the list), or a "catch-all" item that would require an EA for a project not specifically listed but that meets certain criteria. These are possible ways of managing a list approach, although they all would add some level of uncertainty to the process.

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28 Paul Cassidy, as an individual, *Evidence*, Meeting No. 6, October 25, 2011.

29 Ibid.

30 Elaine Feldman, President, Canadian Environmental Assessment Agency, *Evidence*, Meeting No. 5, October 20, 2011.

Recommendation 10

The Committee recommends that the Canadian Environmental Assessment Agency focus the application of the *Canadian Environmental Assessment Act* on projects of environmental significance.

Recommendation 11

The Committee recommends that the federal government modify the *Canadian Environmental Assessment Act* so that assessments under the Act are triggered via a project list instead of the current "all in unless excluded" approach taken by the Act.

Recommendation 12

The Committee recommends that the *Canadian Environmental Assessment Act* be amended to include one or both of the following: (1) a discretionary power for the Minister or the Canadian Environmental Assessment Agency to require an environmental assessment for a project that is not on the aforementioned "project list", or (2) a 'catch-all' item that would require an environmental assessment for a project not on the list that meets certain requirements.

Several witnesses suggested amending or otherwise qualifying section 5(1)(*d*) of the CEAA so that regulatory decisions relating to minor approvals under an existing licence or permit would not trigger an EA under CEAA. "Administrative decisions should not trigger an EA,"[31] wrote one witness. The Committee agrees with these witnesses. A change of this nature would go some way to focusing EAs where they are needed.

Recommendation 13

The Committee recommends that section 5(1)(*d*) of the *Canadian Environmental Assessment Act* be amended or qualified so that regulatory decisions relating to minor approvals under an existing licence or permit would not trigger an environmental assessment under the *Canadian Environmental Assessment Act.*

3. Class Screenings and Use of Previously Conducted Environmental Assessments

Several witnesses pointed out existing provisions in the CEAA that they felt are not being used to their full potential to avoid duplication. They urged better use of class screening reports under section 19, as well as previously conducted EAs under section 24.

31 Cameco, written brief, p. 8.

Specifically with regards to section 24, which provides for the use of a previously conducted EA, a witness wrote:

> Proponents should be able to rely on past EA submissions, and data from follow-up studies and monitoring, when fundamentally similar projects are undergoing EAs. Unfortunately, section 24 of the CEAA limits the precedent value of an EA to projects that replace the original project for which an EA was completed.[32]

The Committee agrees that the CEAA should permit the use of such submissions and data, if still valid and applicable, in subsequent processes. It should not limit the use of such information to EAs for projects that replace the original project.

Recommendation 14

The Committee recommends that section 24 of the *Canadian Environmental Assessment Act* be amended to allow a proponent to use the information gathered in a previously conducted environmental assessment in the screening or comprehensive study of a similar project it proposes.

C. Aboriginal Consultation

In recent years, Canadian law has been evolving to recognize the Crown's duty to consult and, when appropriate, to accommodate when the Crown is contemplating conduct that could adversely affect potential or established Aboriginal or treaty rights.

According to the CEA Agency, "the government has chosen to integrate the legal duty to consult Aboriginal groups, to the extent possible, into the EA process. The EA process is well suited to delivering this responsibility as the views and knowledge of Aboriginal groups can be used to ensure that potential changes to the environment that may affect Aboriginal or treaty rights are fully examined."[33] The Committee notes that this is consistent with the government's recently published *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*[34] (the Consultation Guidelines).

The Committee heard from the Assembly of First Nations (AFN) and the James Bay Advisory Committee on the Environment. One AFN witness described the CEAA as the "main legislative vehicle for reconciliation of Aboriginal and treaty rights with development projects."[35] Under the terms of the CEAA, every federal EA must consider

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32 Canadian Nuclear Association, written brief, p. 6.

33 Elaine Feldman, President, Canadian Environmental Assessment Agency, *Evidence*, Meeting No. 5, October 20, 2011.

34 Minister of the Department of Indian Affairs and Northern Development, *Aboriginal Consultation and Accommodation — Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, March 2011.

35 Roger Jones, Senior Strategist, Assembly of First Nations, *Evidence*, Meeting No. 11, November 17, 2011.

any effect environmental changes that may be caused by the project would have on “the current use of lands and resources for traditional purposes by Aboriginal persons” (definition of “environmental effect” in section 2(1), and section 16(1)). In addition, one of the stated purposes of the CEAA is “to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to EA” (section 4(1)(*b.3*)).

1. Fulfilling the Duty Effectively

The AFN stated that, “[i]n too many circumstances, First Nations are forced to resort to litigation because the environmental assessment process does not adequately consider Aboriginal and treaty rights.”[36]

One aspect of effectively fulfilling the duty involves considering input from relevant Aboriginal groups early in the process in order to integrate it into decision making. As one group stated, “if our input is simply an afterthought, or a political expedient, our input will not be useful and the integrity of the environmental assessment process will be at risk.”[37] The Committee agrees with this statement. Part of the problem is the late triggering of the CEAA, which is discussed in other parts of this report. However, the problem also stems from the nature and implementation of consultations in specific cases.

Industry witnesses also expressed dissatisfaction with the Aboriginal consultation process. They suggested that the Consultation Guidelines “need to be complemented by guidelines applicable to projects subject to the federal EA process.”[38] Another witness called for “a more consistent, time-limited process and better definition of the government’s responsibilities around consultation.”[39]

The Committee believes that a clearer description of consultation requirements would help the government to fulfill its duty more effectively and bring more predictability and certainty to the EA process. More importantly, it would facilitate integrating input from Aboriginal peoples into decision-making and better respect potential and established Aboriginal and treaty rights.

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36 Assembly of First Nations, written brief, p. 1.

37 Ibid.

38 Canadian Electricity Association/Canadian Hydropower Association, joint written brief, p. XVII.

39 David Collyer, President, Canadian Association of Petroleum Producers, *Evidence*, Meeting No. 11, November 17, 2011.

2. Fulfilling the Duty Efficiently

Witnesses also voiced complaints about inefficiencies in the consultation process. When multiple parties (e.g., the federal government, the provincial government, and proponents) engage in uncoordinated consultation, the result is duplication, delays, confusion and, for the groups being consulted, fatigue.

The Committee notes that the Consultation Guidelines prescribe a "whole-of-government approach to Crown consultation." For major natural resource projects, the federal government has established the Major Projects Management Office to coordinate Crown consultation. In addition, the Consultation Guidelines provide for the government to take proponents' engagement with Aboriginal groups into account when considering what the duty entails in specific cases. Accordingly, the government has already gone some distance to coordinate consultation and make it more efficient; the Committee heard that it has not gone far enough.

One industry group described what they believe needs to be done:

> Sufficient flexibility should be provided in the consultation requirements of the CEAA to facilitate harmonization with other consultation processes. There needs to be a clear delineation of the role and responsibilities of proponents and government with respect to constitutionally mandated and statutory consultation. The proponent's engagement with Aboriginal groups should be more fully taken into account by the federal departments that consult these groups. There should be full coordination between all federal departments involved, not only during the EA process, but also throughout the EA and authorization phases. The federal government should initiate its consultations early and ensure better continuity and coordination throughout the consultation process. Consultations between the federal and the provincial governments should be carried out jointly or be fully coordinated. ...[40]

Recommendation 15

The Committee recommends that the federal government modify its environmental assessment process to better incorporate, coordinate and streamline Aboriginal consultation during the environmental assessment process.

Recommendation 16

The Committee recommends that the federal government work with Aboriginal groups, the provinces, and the territories to define the roles and responsibilities of parties in consultation, and to outline the consultation process in general. The end result should be a single consultation process that minimizes duplication.

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40 Canadian Electricity Association/Canadian Hydropower Association, joint written brief, p. XVI–XVII.

D. Enhance Public Participation

Obtaining permits and meeting regulatory requirements are often not sufficient for a project proposal to succeed. As one intervenor noted:

> We cannot successfully develop and operate our projects without a social licence to operate. It's more than getting a legal permit. We need a social licence. This needs to be earned and maintained through hard work with the First Nations, local communities and a wide range of stakeholders.[41]

Without exception, industrial stakeholders appearing at Committee understood this requirement for project proposals. Public participation during EAs was widely acknowledged as a part of the process for achieving a social licence to operate. Public participation in EA is therefore a necessary tool in enabling projects.

Public participation in EAs is fundamental. The CEAA declares as one of its purposes:

> [T]o ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process. (section 4(1)(*d*))

There is a clear intent and need to increase the efficiency of EAs. Great care must be taken in amending the CEAA and changing its operation so that public participation remains meaningful.

Some witnesses indicated a concern regarding a perceived lack of transparency in some EAs during the public participation phase. To help increase the timeliness of projects, one group of proponents recommended establishing new guidelines for the selection of EA panel members.[42] The Committee is of the position that such guidelines could also increase transparency and predictability of EA panels.

Recommendation 17

The Committee recommends that the federal government develop guidelines for the selection of panel members.

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41 Ed Wojczynski, Chair, Board of Directors, Canadian Hydropower Association, *Evidence*, Meeting No. 10, November 15, 2011.

42 Canadian Electrical Association / Canadian Hydropower Association, joint written brief, p. XVII.

IMPROVING OUTCOMES: FILLING THE GAPS

Increasing the efficiency of the CEAA is clearly a priority, particularly for project proponents. However, there was also wide-spread agreement that the CEAA should be modernized to effectively yield positive, measurable outcomes. As the Committee heard:

> ...you have to be focused on outcomes rather than process. Process is important, but outcomes matter most.[43]

The following are the Committee's observations and recommendations aimed at improving the outcomes of the application of the CEAA.

A. Ensure Early Application of the Act

EAs should be incorporated early in the process. This has two benefits. One, which has already been discussed, is that it facilitates cooperation with other jurisdictions and thereby reduces duplication and delays. The other benefit of an early EA is that it can inform decision-making during the planning stage when a wide range of options and possibilities for the project can still be considered to optimize the project's outcomes.

The main reason for the CEAA's late triggering, as discussed in previous sections of this report, is the law list trigger of section 5(1)(*d*). The solution witnesses suggested most frequently is to replace the law list trigger with a list of projects that require a federal EA. Whether the government ultimately adopts a list approach or some other mechanism to focus EAs where they are needed, it must ensure that the CEAA is triggered at an earlier stage of project planning.

B. Positive Environmental Aspects of Projects

One of the main purposes of the CEAA is to ensure "that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects" (section 4(1)(*a*)). This focus is reflected in the decision-making powers of the CEAA, which hinge on whether or not a project "is likely to cause significant adverse environmental effects" (sections 20 and 37).

Many intervenors thought that this focus on negative environmental effects is too narrow. A number of witnesses suggested that the CEAA process should not look simply

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43 Brenda Kenny, President and Chief Executive Officer, Canadian Energy Pipeline Association, *Evidence*, Meeting No. 7, October 27, 2011.

at the negative environmental effects of a project, but should also consider positive environmental effects.

In order for EA to promote sustainable development, federal EAs must move beyond assessing adverse environmental effects to include the positive environmental impact of a project.

Recommendation 18

The Committee recommends that the *Canadian Environmental Assessment Act* be amended to require environmental assessments to include a consideration of positive environmental effects of a project.

C. Economic Impacts of Projects

The Committee has already recommended that the CEAA be focused on projects of environmental significance. In most cases, this will likely mean that the potential economic impacts of these projects will also be substantial. As several witnesses noted, the economic impact of projects are weighed by the proponents during the application development process.

There is currently room to take into account economic benefits, as significant environmental effects may be allowed if "justified in the circumstances" (sections 20 and 37). There was a range of opinions as to the extent to which this should happen. Some were hesitant, stating that economic or other benefits should be included in the discussion, but that EA should not include a full socio-economic impact statement.[44]

D. Learn from Past Assessments to Improve Future Assessments

Other less significant changes to the way the CEAA is implemented could yield substantial improvements in environmental outcomes. Specifically, the Committee heard testimony about the importance of follow-up programs. Some witnesses also raised concerns with enforcement.

1. Follow-up Programs

A follow-up program is a program for:

a) verifying the accuracy of the environmental assessment of a project, and

44 David Collyer, President, Canadian Association of Petroleum Producers, *Evidence*, Meeting No. 11, November 17, 2011.

b) determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the project (section 2(1)).

One witness in particular stressed the importance of monitoring and follow-up to ensure "impact predictions are verified; prescribed mitigations are implemented and effective; unanticipated adverse effects are detected and addressed; and there exists a prescribed course of action to correct for significant adverse effects as they occur [...] preferably triggered by agreed thresholds."[45] The information gained from follow-up programs may also be used to improve the quality of future EAs.

The CEAA already requires follow-up programs for projects that proceed after a comprehensive study or panel review, but they are discretionary and rarely required after screenings (sections 16 and 38).

The Committee heard that follow-up programs are not necessarily being implemented to their full potential. In the context of a single project, information gleaned from follow-up programs is not routinely being fed back into the process to revise approval conditions or prompt other actions to address unanticipated issues. The CEA Agency refers to this as "adaptive management." In the broader context, lessons learned from EAs are not being applied to future projects. One witness cited the Lower Churchill Project as an example:

> It was very difficult to get information about predictions and mitigation measures that were made for the many hydro projects that had been proposed before the Lower Churchill Project. We really didn't have a good sense to what extent the predictions that were made in our process and the mitigation measures that were being proposed had proven successful and proven accurate as a result of previous environmental assessments.[46]

Recommendation 19

The Committee recommends that the federal government explore means of ensuring follow-up programs are being implemented effectively and making information from such programs accessible to inform future environmental assessments.

45 Peter Usher, written brief, p. 7.

46 Meinhard Doelle, Schulich School of Law, Dalhousie University, as an individual, *Evidence*, Meeting No. 12, November 22, 2011.

2. Enforcement

Several witnesses raised enforcement as another issue that needs to be addressed to improve the federal EA process. Currently, the CEAA does not include any enforcement mechanisms; it relies on enforcement mechanisms in other laws, such as the *Fisheries Act.* The President of the CEA Agency explained that other bodies, such as Fisheries and Oceans Canada, may enforce conditions attached to permits:

> We rely on the responsible authorities. That's the short answer. The reason they're the responsible authorities is that they're issuing the necessary authorization, which may or may not have conditions attached to it. We rely on them to ensure that the conditions are met.[47]

The Committee heard that this approach does not ensure that proponents meet all their conditions. A representative of the CEA Agency described the limited authority that RAs have. He suggested that requiring one federal department to enforce conditions relating to matters within another department's mandate "may not be the most appropriate tool to ensure enforcement."[48]

A number of witnesses suggested integrating the EA process with permitting. Conditions and requirements consolidated from the various federal statutes (such as the *Fisheries Act,* the *Navigable Waters Protection Act,* the *Migratory Birds Convention Act, 1994*) could be consolidated in one, global EA permit issued by the CEA Agency, which would be given the authority to enforce the conditions and requirements. In addition to simplifying enforcement, this would eliminate the possibility of inconsistency between the EA and conditions attached to subsequent permits. It would raise challenges as well, as stated by one stakeholder:

> Attention could be distracted from the "early planning" aspect of environmental assessments. Inconsistencies could be introduced into the discharge of federal functions under other acts, if some of the requirements were delivered directly by responsible departments and agencies, while a few were delivered by the Agency with respect to new projects.[49]

Other witnesses disagreed with consolidating requirements in one EA permit. They advocated for "making other acts work the way they should."[50] One stakeholder wrote:

> CEAA is assessment legislation. Other federal environmental acts have their own objectives as articulated by Parliament, and need to ensure compliance by many

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47 Elaine Feldman, President, Canadian Environmental Assessment Agency, *Evidence*, Meeting No. 5, October 20, 2011.

48 Yves Leboeuf, Vice-President, Operations, Canadian Environmental Assessment Agency, *Evidence*, Meeting No. 5, October 20, 2011.

49 Mining Association of Canada, written brief, p. 5.

50 Pierre Gratton, President and Chief Executive Officer, Mining Association of Canada, *Evidence*, Meeting No. 11, November 17, 2011.

activities beyond the projects that may be assessed by CEAA. To the extent that these federal Acts lack compliance mechanisms, it would be preferable for the responsible department to address the gap.[51]

The example of the *Migratory Birds Convention Act, 1994* (MBCA) was given. This statute sets out absolute prohibitions, and lacks permitting or other compliance processes. Some witnesses called for the MBCA, as well as other federal statutes, such as the *Species at Risk Act,* to be amended to include compliance mechanisms, which would then be enforceable.

It is not clear which approach represents the best balance between competing interests of certainty, simplicity, practicality, and consistency. A compromise might see EA requirements consolidated in a single EA certificate or statement, prepared by the CEA Agency, and implemented through permitting by the RAs under the authority of other federal statutes that are amended to include compliance mechanisms.

Recommendation 20

The Committee recommends that the federal government study alternative approaches for ensuring conditions and requirements stemming from environmental assessments are enforceable, and that the federal government subsequently introduce statutory changes necessary to implement its conclusions.

51 Mining Association of Canada, written brief, p. 5.

CONCLUSION

The federal EA process needs to be streamlined and improved; proponents need less process, and everybody wants it to produce better outcomes. Many adjustments are needed, and they may have to be implemented incrementally. While resources will be needed to make these changes and to sustain an effective process, savings will be realized through process efficiencies. Improving the EA process should be regarded as an investment in promoting sustainable development. An efficient and effective EA process is vital to Canada's environmental and economic well-being.

The Committee emphasizes that reforming EAs and the CEAA is a good start when it comes to environmental law reform. However, there is much more to be done when it comes to environmental law reform. As one witness pointed out:

> [I]mprovements to the federal environmental assessment and review process should not be undertaken in isolation from the overall federal regulatory regime. Fixing the problems with the federal EA process... requires changes not only to the CEAA and its implementation, but also to other federal legislation or its implementation, such as the Species at Risk Act (SARA), the Fisheries Act (FA)…[52]

Reforming the CEAA is a good start. The Committee encourages the federal government to implement the aforementioned reforms, and to consider potential reforms to other environmental laws.

52 Canadian Electricity Association / Canadian Hydropower Association, joint written brief, p. 2.

LIST OF RECOMMENDATIONS

Recommendation 1

The Committee recommends that the federal government ensure that the Canadian Environmental Assessment Agency be made responsible for exercising the powers and performing the duties and functions of the responsible authority in relation to environmental assessments carried out under the Act, unless it is determined that another regulator — the "best-placed regulator" — is better suited to perform the role of the responsible authority. 6

Recommendation 2

The Committee recommends that the federal government further consolidate authority for environmental assessments by providing more authority for the Canadian Environmental Assessment Agency to deal with what are now larger screenings, and more authority to the Minister with respect to major projects, which would remove the two-step decision-making process after a comprehensive study, where the Minister makes an environmental assessment decision and then the responsible authority or authorities make environmental assessment decisions. 6

Recommendation 3

The Committee recommends that the requirement for a consideration of alternatives to the project, which is currently required during *Canadian Environmental Assessment Act* screenings, be eliminated from the Act. 7

Recommendation 4

The Committee recommends that, because renewable resource development and management are largely under provincial jurisdiction, the requirement for a consideration of the effects of the project on the capacity of renewable resources to meet current and future needs, which is currently required during *Canadian Environmental Assessment Act* comprehensive studies and review panels, be eliminated from the Act. 7

Recommendation 5

The Committee recommends that the *Canadian Environmental Assessment Act* be amended to enable or require, where appropriate, binding timelines for all environmental assessments. 8

Recommendation 6

The Committee recommends that the federal government ensure that federal decisions related to triggering are made at the start of the provincial regulatory process to achieve efficient, effective and truly harmonized environmental assessment processes. 9

Recommendation 7

The Committee recommends that the *Canadian Environmental Assessment Act* be amended to empower the Canadian Environmental Assessment Agency to determine that another jurisdiction's environmental assessment process fulfils the requirements of the federal process, and therefore that an environmental assessment carried out under that jurisdiction is equivalent to an environmental assessment required under the *Canadian Environmental Assessment Act*. 12

Recommendation 8

The Committee recommends that the *Canadian Environmental Assessment Act* be amended, such that the following specific language be inserted into the Act to exempt certain provincial projects from federal assessments: "A project is exempt from the requirement to conduct an assessment under this Act where an environmental assessment is required to be conducted, with respect to the project, under the legislation of a province listed in Schedule XX". 12

Recommendation 9

The Committee recommends that the federal government work towards improved coordination of permitting by federal and provincial authorities. 13

Recommendation 10

The Committee recommends that the Canadian Environmental Assessment Agency focus the application of the *Canadian Environmental Assessment Act* on projects of environmental significance. 16

Recommendation 11

The Committee recommends that the federal government modify the *Canadian Environmental Assessment Act* so that assessments under the Act are triggered via a project list instead of the current "all in unless excluded" approach taken by the Act. 16

Recommendation 12

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The Committee recommends that the federal government work with Aboriginal groups, the provinces, and the territories to define the roles and responsibilities of parties in consultation, and to outline the consultation process in general. The end result should be a single consultation process that minimizes duplication. 19

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The Committee recommends that the federal government develop guidelines for the selection of panel members. 20

Recommendation 18

The Committee recommends that the *Canadian Environmental Assessment Act* be amended to require environmental assessments to include a consideration of positive environmental effects of a project. 22

Recommendation 19

The Committee recommends that the federal government explore means of ensuring follow-up programs are being implemented effectively and making information from such programs accessible to inform future environmental assessments. 23

Recommendation 20

The Committee recommends that the federal government study alternative approaches for ensuring conditions and requirements stemming from environmental assessments are enforceable, and that the federal government subsequently introduce statutory changes necessary to implement its conclusions. 25

APPENDIX A
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
Canadian Environmental Assessment Agency	2011/10/20	5
Elaine Feldman, President		
Helen Cutts, Vice-President Policy Development Sector		
Yves Leboeuf, Vice-President Operations		
John McCauley, Director Legislative and Regulatory Affairs Division		
As individuals	2011/10/25	6
Paul R. Cassidy		
Stephen Hazell		
Canadian Environmental Assessment Agency	2011/10/27	7
Yves Leboeuf, Vice-President Operations		
John McCauley, Director Legislative and Regulatory Affairs Division		
Canadian Energy Pipeline Association		
Brenda Kenny, President and Chief Executive Officer		
Canadian Environmental Law Association		
Richard D. Lindgren, Counsel		
Canadian Electricity Association	2011/11/01	8
Sandra Schwartz, Vice-President Policy Advocacy		
Terry Toner, Representative Director, Environmental Services, Nova Scotia Power Inc.		
Canadian Water and Wastewater Association		
Jennifer Jackson, Executive Director		
Sierra Club of Canada		
John Bennett, Executive Director		
As individuals	2011/11/03	9
Robert B. Gibson, Professor Environment and Resource Studies, University of Waterloo		
John Sinclair, Professor Natural Resources Institute, University of Manitoba		

Organizations and Individuals	Date	Meeting
Saskatchewan Mining Association	2011/11/03	9
Pamela Schwann, Executive Director		
R. Liam Mooney, Member Vice-President, Safety, Health, Environment and Quality Regulatory Relations, Cameco Corporation		
Tammy Van Lambalgen, Member Vice-President, Regulatory Affairs and Legal Counsel, AREVA Resources Canada Inc.		
As individuals	2011/11/15	10
Arlene J. Kwasniak, Professor Faculty of Law, University of Calgary		
Peter Usher P.J. Usher Consulting Services		
Canadian Construction Association		
Michael Atkinson, President		
Jeff Barnes, Member Board of Directors		
Canadian Hydropower Association		
Jacob Irving, President		
Ed Wojczynski, Chair Board of Directors		
Assembly of First Nations	2011/11/17	11
Roger Jones, Senior Strategist		
William David, Senior Policy Analyst Environmental Stewardship		
Canadian Association of Petroleum Producers		
David Collyer, President		
James Bay Advisory Committee on the Environment		
Chantal Otter Tétreault, Member Cree Regional Authority		
Graeme Morin, Environmental Analyst		
Mining Association of Canada		
Pierre Gratton, President and Chief Executive Officer		
Justyna Laurie-Lean, Vice-President Environment and Health		
As an individual	2011/11/22	12
Meinhard Doelle, Professor Dalhousie University		
Canadian Association of Oilwell Drilling Contractors		
Nancy Malone, Vice-President Operations		

Organizations and Individuals	Date	Meeting
Government of Saskatchewan	2011/11/22	12
Mark Wittrup, Assistant Deputy Minister Environmental Protection and Audit Division, Ministry of Environment		
Tareq Al-Zabet, Director Environmental Assessment, Ministry of Environment		
Cameco Corporation	2011/11/24	13
R. Liam Mooney, Vice-President Safety, Health, Environment and Quality, Regulatory Relations		
Jeff Hryhoriw, Manager Government Relations		
Canadian Nuclear Association		
Denise Carpenter, President and Chief Executive Officer		
Heather Kleb, Director Regulatory Affairs		
MiningWatch Canada		
Jamie Kneen, Co-Manager Communications and Outreach, Environmental Assessment and Africa Programs		

APPENDIX B
LIST OF BRIEFS

Organizations and individuals

Alliance Pipeline

Assembly of First Nations

Bruce Power

Calgary Chamber of Commerce

Cameco Corporation

Campbell, Dave

Canadian Association of Petroleum Producers

Canadian Construction Association

Canadian Electricity Association

Canadian Energy Pipeline Association

Canadian Environmental Assessment Agency

Canadian Environmental Network

Canadian Hydropower Association

Canadian Nuclear Association

Canadian Nuclear Workers Council

Canadian Water and Wastewater Association

Cenovus Energy Inc.

ConocoPhillips Canada

Conseil patronal de l’environnement du Québec

Devon Canada Corporation

Doelle, Meinhard

Ecojustice Canada

Organizations and individuals
Encanto Resources Ltd
Environmental Law Centre
Gibson, Robert
Government of Alberta
Government of British Columbia
Government of Nova Scotia
Government of Saskatchewan
Government of the Northwest Territories
Grand Council of the Crees (Eeyou Istchee)
Hanna, Kevin
Hazell, Stephen
Imperial Oil Resources Limited
James Bay Advisory Committee on the Environment
Kwasniak, Arlene
Mining Association of Canada
MiningWatch Canada
Minor, Ryan
Noble, Bram
Nunatsiavut Government
Ontario Association for Impact Assessment
Quebec Association for Impact Assessment
Quicksilver Resources Canada Inc.
Riordan, James
Saskatchewan Mining Association

Organizations and individuals

Shell Canada Limited

Sinclair, John

TransCanada PipeLines

Usher, Peter

West Coast Environmental Law Association

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant Minutes of Proceedings (Meetings Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 18, 19, 20, 21, 22, 23 and 24) is tabled.

Respectfully submitted,

Mark Warawa, M.P.

Chair

Dissenting Report from the Official Opposition New Democratic Party on the Seven-year review of CEAA.

Summary

The New Democratic Party of Canada would like to thank all those witnesses who appeared before the Standing Committee on Environment and Sustainable development and who submitted written briefs as part of the Committee's statutory seven-year review of the *Canadian Environmental Assessment Act* (CEAA). We would also like to thank those individuals and groups who requested to testify, but who were not allowed to appear before the Committee.

In spite of publicly stating that the Federal Government intends to make sweeping and substantial changes to the regulatory approvals system for major resource projects, no details were brought forward to the Committee as part of the review of this Act, under which these projects are currently regulated. We are concerned that this is a major oversight, given the reported significance and potential impacts these changes could have, and would have expected the government to provide details as part of a thorough and credible review.

The statutory review of the *Canadian Environmental Assessment Act* provides the Committee with an opportunity to reflect on the goals of environmental assessment in promoting sustainable development, the expectations of the public, and the needs of project proponents. The review should be a context for evaluating the current environmental assessment practices, identifying shortcomings and proposing improvements, and ultimately determining whether the current rules effectively tackle the public policy and environmental protection issues the law is intended to address.

Parliamentarians should not abrogate their duty to conduct fulsome and comprehensive studies of legislation, as failure to do so diminishes the accuracy and comprehensiveness of the Committee's report to the House of Commons. This ultimately affects the ability for policy makers to ensure that a piece of legislation serves in the best interest of Canadians.

New Democrats believe that the study of CEAA undertaken by the Committee failed to meet standards that would make it, and any ensuing recommendations, credible and comprehensive. The lack of clarity on process and scope have lead to a significant and highly concerning lack of evidence on which to base the conclusions and recommendations of the report.

Furthermore, the federal government's Omnibus Budget Implementation Act 2010 made significant amendments to the CEAA, including introducing additional exemptions for certain projects and provisions granting the Minister of Environment power to limit the scope of assessments, changes made with no public consultation or Parliamentary

review. However, these changes were not considered during the Committee's review of the Act.

New Democrats believe the federal government should delay any changes to the CEAA until it has conducted a proper, Canada-wide consultation, which includes key stakeholders, including affected communities, First Nations, provincial and territorial governments, and the key departments and agencies with the responsibility of conducting environmental assessments.

CEAA is a key safeguard for Canada's environment and the health of Canadians. It sets out fundamental requirements for how resources are developed and projects are designed and carried out, while protecting the interests of Canadians and the rights of First Nations peoples. It is a piece of legislation that warranted significant study, which it did not receive.

With Canada's international reputation and trade relationships being increasingly tarnished by government inaction and delay on environmental regulation, we must ensure we carry out credible reviews of the legislation that protects our environment and frames the way we develop our natural resources. The Committee's statutory seven-year review of CEAA did not meet that standard.

Lack of Clarity on Process

For witnesses to provide relevant and cogent testimony, they must be given adequate time to prepare written and oral submissions and an idea of the scope and objectives of the legislative review. Neither of these fundamental procedural steps was taken by this Committee.

No public statement was made respecting the commencement of the review. Further, the Committee allowed the evidentiary focus of the study to remain ambiguous and vague, meaning it was left unclear what aspects of the environmental assessment regime the committee aimed to study. This contributed directly to the paucity of evidence collected by the committee, and rendered the study incomplete.

Given the complexity of CEAA it behoved the Committee to have some kind of focus for its review, and guidelines on the testimony it expected to collect. If the purpose was to gain a general understanding of the successes and failures of the legislation, that should have been stated at the very least; however, it is the opinion of New Democrats that a high-level cursory examination of the legislation would have been inadequate and that such a review should only have been used to help steer Committee members to further in-depth and targeted study.

Lack of Evidence

Because of the truncated, unfocused hearing process, testimony from important stakeholders and experts was curtailed or absent from the study. Numerous government departments and agencies were not heard from during the review. This list includes, but is not limited to:

- the National Energy Board
- the Canadian Nuclear Safety Commission
- the Commissioner of the Environment and Sustainable Development
- Parks Canada
- Department of Fisheries and Oceans
- Canadian International Development Agency
- The Major Projects Management Office
- The Ontario Association for Impact Assessment
- Canadian Environmental Network's Environmental Planning and Assessment Caucus.
- The Regulatory Advisory Committee (RAC)

It is concerning that while ostensibly studying how the government could ensure the protection of First Nations rights through CEAA, the committee did not hear from any Métis and Inuit representatives. The Committee heard only from the Assembly of First Nations, choosing not to consult regional Councils or individual First Nations.

Except for the province of Saskatchewan, provincial environmental administrators did not attend the review as witnesses, despite extensive discussion from other witnesses of federal responsibility, duplication of processes at the provincial and federal levels and the topic of harmonization of provincial and federal assessment regimes.

The Regulatory Advisory Committee (RAC), a multi-stakeholder committee established in 1992 to advise the Minister on the regulations and to provide guidance on the implementation of the CEAA was not invited. The RAC has significant experience in environmental assessment policy in Canada, and has undertaken valuable, periodic reviews of CEAA and its regulations. As a multi-stakeholder forum, it has used consensus among a diverse group of key stakeholders to advance the practice of environmental assessment in Canada.

There were no representatives from communities affected currently or in the past by environmental assessment, nor were there representatives from labour. New Democrats would also like to note that there were significant regional, linguistic and gender imbalances with respect to the witnesses who appeared.

Furthermore compounding the problems posed by limited evidence received by the Committee was the fact that the Committee did not undertake any travel as a means of collecting additional evidence during public hearings around the country, as was done during the 2000 study of CEAA.

Fundamental Flaws in the Report

The report as it has been drafted contains fundamental flaws with respect to its findings and recommendations. Despite discussion at Committee of crucial environmental assessment tools such as strategic and regional assessments, the need for cumulative impact assessment, meaningful public participation, participant funding, and the importance of and duty to consult First Nations, these topics are not raised in the findings of the report.

Committee members also heard repeatedly about the need for adequate funding for the Canadian Environmental Assessment Agency, including from industry representatives. This fact appears nowhere in the report.

Moreover, industry witnesses also testified that proper, early environmental assessment, including public participation on the long-term social impacts of a project, assures that projects have the social licence needed to move forward in the best interests of Canadians. Yet this concept is absent from the report.

Nor is evidence of the concerns expressed by witnesses regarding recent changes which were made to the federal environmental assessment rules contained in the omnibus budget bill (mentioned above) included.

The report cites "testimony" and recommendations made by a government member of the Committee during the questioning of a witness. The NDP feels it is highly inappropriate to cite, as justification for conclusions, statements made by Committee members during the public hearings, in lieu of actual testimony from experts on the issue. Committee members may have opinions, but as Members of the Committee, they are not testifying, and there is no opportunity for other Members to question the validity or relevance of their statements. New Democrats find this to be highly concerning as it flies in the face of any recognizable purpose of a legislative review that engages experts from around the country and stands as an affront to the testimony presented and to the Parliamentary process.

In light of the concerns outlined above, the NDP recommends that:

The Committee call on the Government to delay any changes to the Canadian Environmental Assessment Act until a thorough and comprehensive review that addresses the concerns detailed above is concluded and reported.

Prior to any changes to the act, the government conduct robust, national, meaningful public consultations and the government fulfill its constitutional duty to consult First Nations communities.

The Committee continue the study of CEAA, with revised objectives in terms of goals and evidentiary expectations;

The witnesses listed above be invited to appear;

The Committee present in the House a supplementary report based on the findings and conclusions of this revised study.

Dissenting Opinion by the Liberal Party of Canada on the Report of the Statutory Review of the Canadian Environmental Assessment Act (CEAA)

The Liberal Party of Canada presents this opinion regarding the recent study on the Statutory Review of the Canadian Environmental Assessment Act (CEAA) by the Standing Committee on Environment and Sustainable Development, as, in our opinion:

(1) a framework was not developed using a systematic method from the testimony heard (i.e. the process was not an evidence-based approach);

(2) testimony was limited;

(3) the report does not accurately reflect all views presented by witnesses, and we fear will be used to weaken (CEAA) (e.g. ``Remove Unnecessary Steps`` is the title of a heading on page 8, and Recommendation 3 says, ``the requirement for a consideration of alternatives to the project, which is currently required during the Canadian Environmental Assessment Act screenings, be eliminated from the Act``); and

(4) mere wordsmithing (e.g. title: ``*Protecting the Environment, Managing our Resources*`` and ``Canadians have a rich environmental heritage that we are justifiably proud of; there is a broad sentiment toward ensuring development does not irresponsibly degrade that natural heritage for future generations.``) will not hide the fact that testimony regarding the environment and the need for better protection is largely not included in the report.

The Statutory Review of the Canadian Environmental Assessment Act offered the Standing Committee on Environment and Sustainable Development the opportunity to assess whether or not there needed to be changes to the current Act in order to help meets its goals. All witnesses agreed changes were necessary; unfortunately, not all views were included in the Committee`s report, but rather those that focussed on efficiency and reduced timelines. It therefore appears that this report will be used to justify changes to CEAA that in our opinion will weaken environmental assessment legislation (e.g. Recommendation 10 says ``that the Canadian Environmental Assessment Agency focus the application of the Canadian Environmental Assessment Act on projects of significance.`` How will `significance` be defined?), which should, in fact, promote sustainable development, and thereby achieve or maintain a healthy environment and a healthy economy.

A meaningful and serious review of CEAA would have, after having heard from witnesses, developed a framework of the stakeholders who had presented, the concerns and recommendations they made, and then determined what the main themes were, were there any gaps in the testimony heard, and were further witnesses required to address any such gaps? Unfortunately, an evidence-based approach was not used, and hence, the scope of the study, and stakeholders from whom we heard, were limited. We think it is extremely unfortunate that witnesses who took the time and effort to prepare testimony, and appear before Committee may not see their concerns and recommendations reflected in the Committee`s report.

As it is impossible to address all concerns regarding the report in a limited dissenting report, let us draw attention to three specific concerns: (1) possible reduced public participation in any environmental assessment, which we would see as undemocratic, unfortunate, and poor for the economy, environment, and society; (2) possible reduced Aboriginal consultation (e.g. Recommendation 15 says, ``streamline aboriginal consultation``), which we would consider a breach of duty to consult, and completely unacceptable; and (3) possible increased ministerial powers (e.g. Recommendation 2 says, ``and more authority to the Minister with respect to major projects, which would remove the two-step decision making process after a comprehensive study, where the Minister makes an environmental assessment decision and then the responsible authority or authorities make environmental assessment decisions.``) which we would see as potentially disrespectful of stakeholders` legitimate concerns, with the possibility of over-riding scientific evidence.

Major gaps of the Committee`s report are its failure to address cumulative impacts, an issue which the Commissioner of the Environment and Sustainable Development drew attention to in his October, 2011 Report, and strategic environmental assessments in a significant way.

From the lack of framework, limited testimony, and the failure to include testimony on all sides of the issue, it appears that the government is intent on weakening CEAA. Should the government adopt such a course of action-under the guise of streamlining the

process--we run the risk of loss of natural life support systems and other ecosystem failures. We also run the risk of slowing down the process through possible conflicts and lawsuits, especially where constitutional rights and public concerns are not adequately addressed.

We therefore recommend that:

> the government affirm a strong role in environmental protection and assessment;
>
> environmental assessment processes be standardised among jurisdictions, and strengthened to promote sustainable development, and to leave a positive environmental and economic legacy;
>
> the Canadian Environmental Assessment Agency be the responsible authority in relation to the majority of assessments, and that its funding be increased;
>
> ambiguity in the current CEAA legislation be clarified, so long as it enhances the effectiveness and fairness of the environmental assessment process;
>
> the federal government work with relevant jurisdictions to enable regional cumulative effects assessment frameworks that can efficiently manage provincial and federal responsibilities;
>
> aboriginal people`s constitutionally-protected rights are honourably and meaningfully addressed in the environmental assessment process;

applicants be required to disclose all possible options available for a project, based on cultural, economic, environmental, and social considerations; and

the federal government, in cooperation with any relevant jurisdiction, put in place regional monitoring programs to address cumulative impacts.

Our hope is that Canada have the most comprehensive environmental assessment system process in the world: namely, allowing all stakeholders to feel that their voices have been heard and respected; ensuring environmental protection and sustainability; promoting projects that contribute to our economic well-being, while conserving the environment and protecting human health; and allowing development that meets the needs of today without compromising the needs of future generations.

Unfortunately, the government appears intent on allowing the ``pendulum to swing too far`` in the direction of economic interests, and in so doing, potentially puts our one, and only environment, which we bequeath to our children and grandchildren, at risk. We must remember that, ``We do not inherit the Earth from our ancestors, we borrow it from our children."