



A Quick Start for Federal Environmental Assessment

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Summary

The new Liberal government can make a quick start in improving environmental assessment early in its term of office through policy and regulatory changes that do not require amendment of the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) by Parliament.

A quick start is needed, first of all, to sort out the procedural mess that is the National Energy Board's assessment hearings for the Trans Mountain Pipeline Project and ensure a sound process for the upcoming NEB hearings for the Energy East Pipeline Project.

A quick start would also demonstrate the new government's early commitment to:

- Ensure that the potentially catastrophic environmental effects of unlikely accidents such as worst case scenario spills from oil tankers, pipelines and tailings ponds are properly assessed;
- Reduce greenhouse gas emissions from proposed carbon-intensive development (in advance of the December 2015 Paris climate change talks);
- Achieve ecological as well as economic and social sustainability;
- Conserve nature and biodiversity to meet Biodiversity Convention targets;
- Collaborate with provincial and aboriginal governments on regional planning for, as well as project assessment of, natural resource developments; and
- Promote public participation in decision-making for natural resource development.

A quick start at best represents a partial reform. Comprehensive reform must await the outcome of the "immediate public review of Canada's environmental assessment processes" promised in the Liberal election platform.

Introduction

Many federal environmental laws were repealed or weakened by the former Conservative government, most notably in the 2012 Omnibus Budget Bill. Among the prominent laws to be repealed was the *Canadian Environmental Assessment Act*,

replaced by a much weaker discretionary statute, the *Canadian Environmental Assessment Act 2012* (CEAA 2012).

This paper proposes a quick start for the new Liberal government. The proposed policy and regulatory changes are intended to address the most egregious problems with CEAA 2012, but would need to be followed up by a broader, transformative set of legislative proposals to advance sustainability, collaboration with provinces and aboriginal governments on regional planning and project assessment, and public participation in federal decision-making. Such legislation should only be brought forward for Parliamentary debate following serious consultations with provincial governments, aboriginal governments and organizations, and stakeholders. It is noteworthy that the Liberal election platform commits the new government to “an immediate public review of Canada’s environmental assessment processes”.

The proposed policies and regulations would ensure that the federal government is better able to make good decisions about development projects that affect key federal environmental priorities such as avoiding catastrophic spills from oil tankers, pipelines and mine tailing dams, reducing greenhouse gas emissions, and protecting species at risk, National Parks and National Wildlife Areas.

The proposed policy and regulatory changes are as follows:

- Issue a regulation under s.83.(f) and (g) of CEAA 2012 requiring “worst case scenario assessment” of the environmental effects of accidents (including spills from oil tankers, pipelines and tailings dams) that are unlikely to occur, but could have significant adverse environmental effects if they do;
- Amend the *Regulations Designating Physical Activities* to include new categories of projects such as those that propose to generate large quantities of greenhouse gas emissions;
- Issue an order under s. 5.(3) of CEAA 2012 adding components of the environment, such as greenhouse gases and federally listed species at risk, to Schedule 2;
- Issue guidance to the Canadian Environmental Assessment Agency, National Energy Board and Canadian Nuclear Safety Commission that ecological, economic and social sustainability of proposed natural resource development projects will be key factors that guide federal decision-making;
- Issue statement that the federal government seeks to collaborate actively with provincial and aboriginal governments in planning processes for regions facing major natural resource development; and
- Issue a regulation under s. 84.(c) of CEAA 2012 clarifying the rights of Canadians to participate in federal environmental assessment processes.

Issue Regulation Ensuring Worst Case Scenario Assessment of Potential Accidents such as Spills from Oil Tankers, Pipelines and Tailing Ponds

A singular failure of CEAA joint panel reviews and the National Energy Board (NEB) for decades has been the failure to assess the potentially catastrophic environmental effects of spills from proposed oil sands and oil pipeline/tanker projects. Typically, joint federal-provincial panels and the NEB review panels accept the declaration of proponents that the likelihood of a catastrophic spill occasioned by an oil tanker accident (e.g., Exxon Valdez), a bursting oil pipeline (e.g., Kalamazoo), or a tailings dam failure (e.g., Mount Polley) is remote, and therefore that the environmental effects need not be assessed.

Yet such catastrophes do occur, and the risks and consequences of such catastrophes are top-of-mind concerns of Canadians participating in these panel reviews. Yet these concerns are usually ignored in environmental assessments. Interestingly, the Canadian Nuclear Safety Commission (CNSC) has assessed the environmental effects of unlikely “worst case scenario” malfunctions of accidents for some projects (e.g., storage of nuclear waste, the Deep Geologic Repository Project) but not others (e.g., Fukushima-like reactor failure, Darlington New Reactors Project). The failure of CEAA review panels, the NEB and the CNSC to assess the environmental effects of such unlikely, but potentially catastrophic, accidents is arguably a breach of s.19.(1) of CEAA 2012. Indeed, BC Nature is currently advancing this very argument in its application for judicial review against the federal government in relation to the joint panel review of the Northern Gateway Oil Pipeline/Tanker Project.

A quick regulatory fix is available. The Government of Canada could issue a regulation pursuant to its authority under s.83.(f) and (g) of CEAA 2012 clarifying that a “worst case scenario assessment” of the environmental effects of malfunctions and accidents (including spills from oil tankers, pipelines and tailings dams) that are unlikely to occur, but could have significant adverse environmental effects if they do.

There are two administrative fixes that would be even quicker than a regulation but would lack the benefit of entrenchment in law. First, the Minister of the Environment could issue a guideline or code of practice under s. 86.(1) that would apply to all responsible authorities. Second, the Minister could add an explicit requirement to carry out a worst case scenario analysis in the terms of reference issued to Kinder Morgan for Trans Mountain and include them in terms of reference for other proponents (e.g., Trans Canada) for other projects (e.g., Energy East).

Whether through a regulation, a guideline, or revision of the terms of reference, the government must provide clear, immediate direction to the National Energy Board that it must carry out a “worst case scenario” assessment of the environmental effects of a Trans Mountain oil tanker or pipeline spill.

Amend Regulations Designating Physical Activities

These regulations set out the categories of projects that are subject to environmental assessment under CEAA 2012. However, numerous categories of projects that affect key federal environmental priorities and that may require a federal decision to proceed are not included in these regulations. For example, there is no federal legal requirement to assess the environmental effects of projects that would generate huge GHG emissions or other pollution, new roads in National Parks, aquaculture facilities that may damage wild fish habitat or spread disease to wild fish, steam-assisted gravity drainage oil sands projects that may fragment habitat for threatened caribou, oil or gas fracking projects that may pollute groundwater, and different types of electricity-generating facilities that may damage habitat for fish, migratory birds or species at risk.

The federal government should amend the regulations by including the following categories of projects, among others:

1. Construction or expansion of a facility that is expected to release more than 100,000 tonnes of greenhouse gas (GHG) emissions per year
2. Construction or expansion of a facility or infrastructure in a National Park, National Park Reserve, National Wildlife Area, Marine National Wildlife Area, Migratory Bird Sanctuary, National Marine Conservation Area or Marine Protected Area
3. Construction or expansion of a marine or freshwater aquaculture facility
4. Construction or expansion of an ethanol fuel production facility
5. Construction or expansion of a hydraulic fracturing (fracking) oil or gas development project
6. Construction or expansion of a steam-assisted gravity drainage oil sands project
7. Construction or expansion of a geothermal electricity generation facility
8. Construction or expansion of an offshore wind electricity generation facility or an on-shore electricity-generation facility that includes five or more wind turbines
9. Exploratory offshore oil and gas seismic activities
10. Construction or expansion of a railway terminal or railway line, significant expansion in the rail traffic at a terminal or on a line, proposed initiation of loading or unloading of toxic substances at a railway terminal, or proposed initiation of carriage of toxic substances on a railway line.

Again, an even quicker administrative fix is available. The Minister of Environment could use her authority under s.14.(2) of CEAA 2012 to designate the above categories of projects for environmental assessment in advance of regulatory changes.

Issue Order adding Components of the Environment to Schedule 2 CEAA 2012

Under section 5 of CEAA 2012, the sole components of the environment that are required to be assessed in an environmental assessment are as follows: fish and fish habitat; aquatic species at risk; migratory birds; an environmental change on federal lands, in another province, or outside Canada; or an effect of any environmental change on aboriginal peoples' health and socio-economic conditions, heritage, or current use of

land and resources for traditional purposes. As well, broader effects can be assessed under s. 5.(2) depending on the nature of a federal decision about a project. For example, the Site C dam decision statement includes mitigation measures to deal with effects on infrastructure from low water flows, water quality, wetlands, rare plants, and sensitive ecological communities. This is because these effects are linked to federal decisions under the *Fisheries Act* and *Navigation Protection Act* that enable the construction of the dam and creation of a reservoir.

However, the former *Canadian Environmental Assessment Act* required that *all* environmental effects of a project be assessed; this approach was upheld as constitutionally valid in the *Oldman* decision of the Supreme Court of Canada. Thus, environmental assessments under CEAA considered the effects of projects on GHG emissions, species at risk and protected areas, as well as the effects of climate change (e.g., extreme weather events, rising sea levels) on projects.

CEAA 2012 does not explicitly require consideration of GHG emissions as an environmental factor to be assessed in federal environmental assessments. The National Energy Board has explicitly refused to consider GHG emissions in environmental assessments of pipelines and offshore oil and gas projects. The Canadian Environmental Assessment Agency is assessing GHG emissions, such as those to be released by the LNG Canada Export Terminal Project at Kitimat. In this assessment, GHG emissions were considered on the basis that they would cause transboundary effects pursuant to s.5.(1)(b).

Section 79 of the *Species at Risk Act* sets up a complementary assessment requirement in requiring that adverse effects of designated projects under CEAA 2012 on species at risk and their critical habitat be identified, mitigation measures taken, and monitoring carried out. Nonetheless, it is much preferable that species at risk are clearly identified as components of the environment under CEAA 2012.

As an interim measure, the government should issue an order under s. 5.(3) of CEAA 2012 adding the following components of the environment to Schedule 2:

1. Toxic substances listed pursuant to the *Canadian Environmental Protection Act* (including carbon dioxide, methane and other greenhouse gases)
2. Endangered and threatened species and species of special concern listed under the *Species at Risk Act*.

These components of the environment are clearly related to established federal laws and are clear federal environmental priorities. Inclusion of greenhouse gases as components of the environment in Schedule 2, when combined with the regulatory designation of proposed facilities with large proposed GHG emissions, would ensure that the federal government at least has advance notice of these projects (through the project statement) and the option of requiring a CEAA 2012 environmental assessment.

Issue Statement Supporting Regional Planning

Properly conducted regional planning processes have tremendous potential to resolve environmental and sustainability issues and, therefore, to limit the scope of, and efforts devoted to, environmental assessments of individual projects. Unfortunately, the federal government has not made use of the Regional Study provisions (ss. 73-77) of CEAA 2012.

A newly elected federal government should issue a statement indicating its strong intention to collaborate actively with provincial and aboriginal governments in planning processes for regions facing major natural resource development with important federal issues and responsibilities at stake (e.g., Alberta's oil sands, northern British Columbia's oil and gas projects including LNG projects, Ontario's Ring of Fire). The statement could outline federal proposals for modifying federal environmental assessments to reflect regional plans that have been developed.

Issue Sustainability Guidance

The Liberal government could issue guidance to the Canadian Environmental Assessment Agency, National Energy Board and Canadian Nuclear Safety Commission that ecological, economic and social sustainability of proposed natural resource development projects will be key factors that guide federal decision-making.

For example, s. 4.1.(h) of CEAA 2012 states that one of its purposes is to encourage federal authorities to take actions that promote sustainable development. The government should state in a guidance document that its decision-making relating to projects subject to CEAA 2012 would include consideration of the sustainability of a project beyond the narrower question as to whether the project is likely to result in significant adverse environmental effects. For example, evidence as to sustainability would be a factor in deciding whether or not to refer a project for environmental assessment or to a panel review, and whether a project likely to cause significant adverse environmental effects is otherwise justifiable.

Further, the government should issue a letter of expectations to the National Energy Board advising the NEB that it considers sustainability to be a guiding principle and key factor in determining whether or not a pipeline project is in the public interest under s. 52 of the *National Energy Board Act*. The government should further advise the NEB that sustainability would be an important factor in making its decisions under s. 53 and 54 of the *National Energy Board Act*. This legislation itself needs substantial reforms to return the National Energy Board to its status as a quasi-judicial decision-making body, and to provide for and respect the rights of interested individuals or groups to intervene as parties in NEB hearings. Discussion of these reforms is beyond the scope of this paper.

Issue Regulation Relating to Public Participation in Environmental Assessment

CEAA 2012 restricts and creates uncertainty about public participation in environmental assessment hearings through the imposition of the “interested party” test under ss. 2(1) and (2). The National Energy Board has also taken the extraordinary and possibly unlawful decision to restrict intervenor participation in the Trans Mountain Pipeline Project hearings by eliminating the right of intervenors to question witnesses. Together, these and other changes imposed by CEAA 2012 have led to widespread public skepticism and mistrust of federal environmental assessment.

The government should issue a regulation under s. 84.(c) of CEAA 2012 to clarify the rights of Canadians to participate in federal environmental assessment processes. This regulation would apply to all of the responsible authorities that conduct CEAA 2012 assessments: the Canadian Environmental Assessment Agency, CEAA 2012 panel reviews, the National Energy Board, and the Canadian Nuclear Safety Commission.

With respect to the determination of “interested party”, the regulation would provide that the responsible authority or proponent would bear the burden of bringing forward evidence to support a determination that a person seeking to participate in a panel review is not directly affected by the carrying out of the project and does not have relevant information or expertise. In the absence of such evidence, a person seeking to participate in the panel review would be deemed to be an interested party.

Second, the regulation would provide that intervenors and other participants in hearings (whether a CEAA 2012 review panel or panel of the NEB or CNSC) have a right to put questions to proponent and government witnesses, subject to the overarching authority of the panel to control its hearing process. The regulation may also entrench other participant rights to be determined.

Such a regulation (or possibly a letter of expectations) must be issued immediately to the National Energy Board to ensure fairness to participants and rigorous testing of evidence presented at the Trans Mountain Pipeline Project hearings, scheduled for December 2015 to February 2016.

Why a Quick Start?

- Modernize and rebuild public trust in the environmental assessments (especially the hearings) for the Trans Mountain and Energy East Pipeline Projects
- Ensure appropriate assessment of potentially catastrophic environmental effects of spills from oil tankers, pipelines and tailing ponds
- Demonstrate early commitment to reducing greenhouse gas emissions
- Demonstrate early commitment to protecting species at risk and the ecological integrity of national parks and national wildlife areas
- Advance sustainability as a key factor in federal decision-making
- Regain public trust in the federal environmental assessment process
- Reduce political discretion and reassert the role of law
- Contribute to robust collaborative intergovernmental efforts to develop regional plans for natural resource development
- Recognize that a comprehensive solution to climate and environmental challenges will take time—starting with the promised public review

Drafted in collaboration with Ecojustice and West Coast Environmental Law staff. The views expressed are those of the author and do not necessarily represent the policy of any of the above organizations.