Next Generation Impact Assessment: Toward Sustainability

Submission to the Expert Panel on Environmental Assessment

October 31, 2016

Summary of Recommendations

Recommendation 1: A next-generation federal impact assessment law should establish the legislative framework for assessing the sustainability of proposed projects that require a federal decision or that are significant to the national interest, and of proposed federal policies, programs and plans.

Recommendation 2: A next-generation law should entrench the following legal test for proposed projects, policies, programs and plan: Does the project, policy, program or plan provide a net contribution to lasting environmental, social and economic well-being without demanding trade-offs that entail significant adverse effects?

Recommendation 3: The following categories of projects should be triggered for federal impact assessment under the next-generation law:

- *Proposed projects that require a federal regulatory decision (such as authorizations, permits or licences under such statutes as the Fisheries Act, Navigation Protection Act, National Energy Board Act, Nuclear Safety and Control Act, Canada Wildlife Act, and Species at Risk Act) and that may have adverse effects on the natural environment;*
- *Major proposed projects that are federally funded, require a disposition of federal land, or that are proposed by a federal department, agency or federal Crown corporation;*
- *Proposed projects to be sited in any federal protected area or other natural area recognized to be of international significance; and*
- *Other proposed "national interest" projects (such as high-carbon projects) identified by regulation or Ministerial order.*

Recommendation 4: A next-generation law should require assessment of a comprehensive set of factors affecting sustainability in project assessments, including environmental, economic and social factors, as well as require a worst-case scenario assessment.

Recommendation 5: A next-generation law should include a legislative framework for the preparation of strategic environmental assessments applicable to all proposed federal policies, programs and plans that have implications for the natural environment
Recommendation 6: Strategic environmental assessments should be required to be prepared and published for all federal budgets, with initiation of an assessment to commence following release of a budget and results to be incorporated into budgets to be presented two years hence.

Recommendation 7: A next-generation law should establish the Canadian Environmental Assessment Agency as the sole responsible authority for the conduct of project and regional impact assessments. The National Energy Board and Canadian Nuclear Safety Commission would not conduct such impact assessments but would be required to incorporate the determinations of such impact assessments into their regulatory decision-making processes.

Recommendation 8: A next-generation law should incorporate mechanisms that ensure that Indigenous peoples are consulted in good faith on impact assessments and accommodated for any impacts on their rights or interests after they have provided their free, prior, and informed consent.

Recommendation 9: A next-generation law should provide for adoption of co-governance models for environmental assessment and resource management as part of nation-to-nation negotiations along the lines of the legally entrenched comprehensive claims agreements with Inuit and First Nations.

1. Introduction

The 1992 *Canadian Environmental Assessment Act* (CEAA) and 1990 *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* (Cabinet Directive)) were intended to serve as means to achieve sustainable development in Canada. Despite numerous amendments (and the repeal of CEAA and enactment of the *Canadian Environmental Assessment Act 2012* that year), neither has made a major contribution since that time in reversing the ongoing trends toward greater unsustainability in Canada—whether measured in terms of reducing greenhouse gas emissions, protecting biodiversity, greening the economy, improving the health of communities, or advancing reconciliation with Indigenous people.

Nature Canada is confident that a reformed federal impact assessment regime can be a critical tool to achieving ecological, economic and social sustainability. Nature Canada is also confident that these reforms can deliver sustainability gains efficiently, within constitutional constraints on federal legislative authority, and in collaboration with provincial, territorial and Indigenous governments and stakeholders.

This submission to the Experts Panel on Environmental Assessment supports, and builds on, the twelve pillars of a next-generation impact assessment regime outlined in the *Federal Environmental Assessment Reform Summit Executive Summary* by focusing on the legislative and policy issues to be addressed in devising a next-generation federal impact assessment law to replace CEAA 2012, and establishing a legislative framework for the Cabinet Directive.

2. Nature Canada

Nature Canada is the oldest national conservation charity in Canada. Since our founding in 1939, we've been working to protect habitats and the species that depend on them, as well as connecting Canadians to nature. Nature Canada is the national voice for nature representing 45,000 members and supporters and a network of provincial and local nature organizations across Canada.

Nature Canada has been an active intervener in federal environmental assessment reviews since the 1980s including, most recently, the National Energy Board reviews of the Energy East and Trans Mountain projects, and the Joint Panel Reviews of the Northern Gateway, EnCana Shallow Gas Infill Development, and Mackenzie Gas projects.

3. Next Generation Impact Assessment – Challenges and Directions

This submission summarizes Nature Canada's discussion and recommendations for a next-generation federal impact assessment law under the following categories:

- Sustainability assessment

- Triggers for federal assessment
- Scope of assessment and worst-case scenarios
- Strategic environmental assessment
- Regional environmental assessment
- Single agency approach
- Indigenous governments and communities: engagement and co-governance

4. Sustainability Assessment

Sustainability assessment asks the question: Does a project or policy provide a net contribution to lasting environmental, social and economic well-being without demanding trade-offs that entail significant adverse effects?

Sustainability assessment goes beyond environmental assessment, which asks the much narrower questions: What are the significant adverse environmental effects of a project? How can they be mitigated? How can the project's effects therefore be made less bad?

Sustainability assessment seeks to improve positive elements of a project as well mitigate negative elements. Sustainability assessment asks questions about fairness and justice as well, by emphasizing intergenerational equity as well as intragenerational equity.

Sustainability assessment has emerged as an important refinement to environmental assessment in many joint panel reviews (e.g., Mackenzie Gas Project) and embedded at least partially in federal laws implementing northern indigenous claims agreements (most notably the *Yukon Environmental and Socio-economic Assessment Act*, and the *Mackenzie Valley Resource Management Act*).

Sustainability assessment is better than conventional environmental assessment in addressing and mitigating greenhouse gas emissions from a project. For example, the Kearl and Joslyn North Oil Sands Projects will each be responsible for releasing millions of tonnes of greenhouse gas emissions into the atmosphere every year. However, both joint panel reviews for these projects determined that these large amounts of GHG emissions were not likely to result in significant adverse environmental effects due to the difficulty in demonstrating a causative effect on the global atmosphere. Likely no single project on Earth (even a project one hundred times larger than Kearl and Joslyn North) could by itself generate emissions large enough to cause such a demonstrable effect on the global atmosphere. Thus, reliance on the "significant adverse environmental effects" test for assessing GHG emissions of a proposed project is at best unhelpful and at worst specious and deceptive.

A sustainability assessment approach would have led these joint review panels to ask whether these projects could contribute to lasting environmental, economic or social sustainability, such as by reducing GHG emissions to align with Canada's international commitments, or by purchasing carbon offsets.

Legislating sustainability assessment would require entrenching the test of "net contribution to lasting economic, social and environmental well-being without demanding trade-offs that entail significant adverse effects" in law as well as defining terms and setting out trade-off rules along the lines of those proposed by Dr. Robert Gibson.

Finally, Nature Canada asserts that a next-generation impact assessment law should apply a sustainability assessment approach to proposed federal policies, programs and plans as well as to proposed projects that require a federal decision or that are significant to the national interest. Such a law would need to be aligned with other federal sustainability laws such as the *Auditor-General Act* (which requires the preparation of departmental sustainable development strategies) and the *Federal Sustainable Development Act* (which requires the preparation of a federal sustainable development strategy every three years).

Recommendation 1: A next-generation federal impact assessment law should establish the legislative framework for assessing the sustainability of proposed projects that require a federal decision or that are significant to the national interest, and of proposed federal policies, programs and plans.

Recommendation 2: A next-generation law should entrench the following legal test for proposed projects, policies, programs and plan: Does the project, policy, program or plan provide a net contribution to lasting environmental, social and economic well-being without demanding trade-offs that entail significant adverse effects?

5. Triggering Federal Impact Assessments of Projects

5.1 A Hybrid Approach to Project Triggering

Key legislative issues for a next-generation law are to determine which categories of projects could and should be assessed under the provisions of that law. The limited federal legislative authority over environmental issues under Canada's constitution is a key determinant of the categories of projects that could be subject to a federal environmental assessment. The Supreme Court of Canada's 1992 *Friends of the Oldman River* decision remains the leading case, deciding that federal authority to conduct environmental assessments is derived from other heads of federal power.

Nature Canada's view is that any federal impact assessment law should focus on ensuring that federal decisions that have implications for the natural environment are sustainable. As well, Nature Canada argues that there are categories of projects that are so important to the national interest that they also should be subject to federal environmental assessment even though no federal regulatory or other decision is required, aside from the environmental assessment decision statement itself.

Given this constitutional and policy context, Nature Canada submits that there are at least three approaches available to the federal government to trigger assessments of projects:

- *Comprehensive approach*: require assessment of all proposed physical works requiring a federal decision subject to specific exclusions (as was the case for CEAA);
- *List-based approach*: assess only those proposed projects that fall within limited categories listed by regulation and that are screened for assessment by the Canadian Environmental Assessment Agency, or that are designated for assessment by order of the Minister of Environment and Climate Change (as is the case currently under CEAA 2012); and
- *Hybrid approach*: assess proposed projects that require a federal regulatory decision, federal funding, or a disposition of federal land, that are proposed by a federal department or agency (all subject to thresholds), or that are designated by regulation as being in the national interest.

Nature Canada favours the hybrid approach as explained below.

The sustainability of some projects initiated or funded by federal departments and agencies, or projects that occur on federal lands other than protected areas, could be assessed through strategic environmental assessments, or pursuant to the federal sustainable development strategy or departmental sustainable development strategies (assuming appropriate measures for public engagement, transparency and accountability). For example, a strategic environmental assessment of a federal infrastructure development program, properly conducted, could mean that smaller projects funded under that program would not be subject to an impact assessment.

Nature Canada's view is that sustainability assessments of projects subject to a federal regulatory decision or that are significant to the national interest (such as climate change) should be required as a matter of law. Regrettably, environmental effects too often get short shrift by governments considering approvals of projects for which impact assessments are not legally required.

Sustainability assessments of proposed federal policies, programs or plans requiring a Cabinet or ministerial decision (strategic environmental assessments or SEAs) would be required to be carried out under the legislative framework of the next-generation impact assessment law. Consideration could be given to reducing the level of scrutiny of proposed projects where a sustainability assessment has been carried out for an approved policy, program or plan that leads to a project or where a regional assessment has been conducted.

Nature Canada proposes the following hybrid approach to triggering federal impact assessment of the following categories of projects as a legal requirement:

- Proposed projects that require a federal regulatory decision (such as authorizations, permits or licences under such statutes as the *Fisheries Act, Navigation Protection Act, National Energy Board Act, Nuclear Safety and Control Act, Canada Wildlife Act, Species at Risk Act*) and that may have effects on sustainability;
- Major proposed projects that are federally funded, require a disposition of federal land, or that are proposed by a federal department, agency or federal Crown corporation;
- Proposed projects to be sited in any federal protected area or internationally recognized natural area; and
- Other "national interest" projects (such as high-carbon projects) identified by regulation or Ministerial order.

Projects funded by federal departments or agencies, that require a disposition or federal land, or that are proposed directly by a federal department or agency could be assessed under federal sustainable development strategies subject to rules guaranteeing rights of public engagement, transparency and accountability.

5.2 Projects requiring a Federal Regulatory Decision

Proposed projects that may have effects on sustainability and require a federal regulatory decision (such as authorizations, permits or licences) would be required to be assessed

As for CEAA, regulatory provisions under such statutes as the *Fisheries Act, Navigation Protection Act, National Energy Board Act, Nuclear Safety Act, Species at Risk Act* that trigger sustainability assessments would be identified in a "Law List" type regulation.

Nature Canada proposes that the regulatory triggers under the *Fisheries Act* and *Navigation Protection Act* be revised to ensure that assessments under these triggers are timely and effective. More specifically, Nature Canada proposes that section 35. (2) of the *Fisheries Act* be amended to require permits (rather than authorizations) for projects that harmfully alter, disrupt or damage fish habitat. Under these amendments, proponents would be prohibited from proceeding with a project without such a permit, which is not currently the case under the *Fisheries Act*. However, the range of projects requiring such a permit could be limited to projects likely to have significant sustainability effects or that are proposed for vulnerable watersheds.

5.3 Projects Receiving Federal Funding

Nature Canada proposes that sustainability assessments be required for large one-time federal investments in projects, while requiring strategic environmental assessments with public engagement, transparency and accountability for infrastructure programs that provide federal funding to a wide variety of projects, usually as an economic stimulus measure.

The big issue is with respect to EAs triggered by funding related to the infrastructure programs such as the Economic Action Program. Prior to 2006, environmental assessments were done for federally funded infrastructure projects under the large economic stimulus infrastructure

programs with modest environmental results. The Harper government first exempted Economic Action-type programs from CEAA by regulation, then eliminated such assessments altogether when CEAA was repealed and replaced by CEAA 2012 that year.

5.4 Projects Triggered by a Federal Land Disposition

Few environmental assessments were triggered by CEAA 's land disposition trigger partly because of the difficulty in determining whether or not any given land disposition was undertaken for the purposes of enabling a project to be carried out.

Nature Canada proposes that a sustainability assessment be required prior to the sale or transfer of an interest in federal land in any protected area such as a National Park or National Wildlife Area or in internationally recognized natural area whether or not a project has been proposed.

5.5 Projects with a Federal Proponent

If a federal department or a Crown corporation proposes a major development for its own use (e.g., a build a new headquarters in an wetland), that project should be required to be assessed by law. Nature Canada considers that smaller projects proposed by a federal department or Crown corporation perhaps could be addressed through a sustainable development strategy, but bigger projects should be assessed under the next-generation law.

5.6 Projects in Federal Protected Areas

Currently, CEAA 2012 does not legally require assessment of proposed projects in National Parks. As for other federal lands, the federal authority is merely required to determine that the carrying out of the project is not likely to cause significant adverse environmental effects or, that those effects are justifiable in the circumstances if they are significant and adverse (s. 67). Curiously, certain categories of projects to be sited in a National Wildlife Area or Migratory Bird Sanctuary are listed in the Designated Project Regulations, and hence are subject to assessment under CEAA 2012. Projects to be sited in National Parks are not listed in the Regulations, even though the ecological integrity of National Parks is legislated as the first management priority of the federal Environment Minister (the ecological integrity of National Wildlife Areas and Migratory Bird Sanctuaries is not similarly protected under the respective enabling statutes).

Nature Canada's view is that any proposed project to be located in any federal terrestrial or marine protected area must be assessed as a matter of law prior to federal approval of that project. Federal terrestrial protected areas include: National Parks, National Park Reserves, National Wildlife Areas and Migratory Bird Sanctuaries. Federal marine protected areas include: Marine Protected Areas, National Marine Conservation Areas, and Marine National Wildlife Areas. Further, Nature Canada's view is that projects proposed to be sited within the borders of internationally recognized natural areas such as World Heritage Sites, RAMSAR wetlands,

Important Bird Areas and Western Hemisphere Shorebird Reserve Network sites also should be required to be assessed as a matter of law.

5.7 National Interest Projects

Nature Canada also takes the view that the federal government should be empowered to assess the sustainability of proposed major projects likely to have significant adverse effects on the natural environment (so-called national interest projects) even in situations where the federal government may have no decision to take aside from the decision statement issued under the next-generation law. For example, a proposed oil sands project may require no federal regulatory decision but nonetheless may produce greenhouse gas emissions that adversely affect the achievement of Canada's international commitments to reduce such emissions. In such cases, the federal government should be empowered to assess the project to ensure that GHG emissions are assessed and mitigated.

A next-generation law could require environmental assessments for proposed projects identified to be of national interest (as Australia has done), or that address federal environmental priorities such as climate change (e.g., requiring a federal panel review for any proposed project with emissions exceeding certain levels).

Nature Canada proposes that these "national interest" projects be identified by a regulation that would be similar to the current Designated Projects regulation. Nature Canada further proposes that the Multi-Interest Advisory Committee established by Environment and Climate Change Minister Catherine McKenna be authorized to provide advice to the government on the categories of projects that could be included in such a regulation. A key test for inclusion of such categories of projects would be whether or not they fall within federal heads of power, including the Peace, Order and Good Government (POGG) power under section 91 of the *Constitution Act*.

Recommendation 3: The following categories of projects should be triggered for federal impact assessment under the next-generation law:

- *Proposed projects that require a federal regulatory decision (such as authorizations, permits or licences under such statutes as the Fisheries Act, Navigation Protection Act, National Energy Board Act, Nuclear Safety and Control Act, Canada Wildlife Act, Species at Risk Act) and that may have adverse effects on the natural environment;*
- *Major proposed projects that are federally funded, require a disposition of federal land, or that are proposed by a federal department, agency or federal Crown corporation;*
- *Proposed projects to be sited in any federal protected area or other natural area recognized to be of international significance; and*
- *Other proposed "national interest" projects (such as high-carbon projects) identified by regulation or Ministerial order.*

6. Scope of Assessment and Worst-Case Scenarios

The scope of assessment of project effects subject to a next-generation law should be comprehensive, and include comprehensive set of factors affecting sustainability including environmental, economic and social factors, not just so-called "federal environmental effects" outlined in section 5 of CEAA 2012.

Nature Canada further proposes that the next-generation law require assessment of worst-case scenarios. Avoidance of human and environmental catastrophes such as the 2013 Lac Megantic, 2011 Fukushima, 2010 Deepwater Horizon, 2010 Lake Wabamun and 1984 Ocean Ranger disasters should be a priority in federal impact assessment law. These worst-case scenarios were caused by oil tanker groundings, offshore drilling rig failures, train derailments and nuclear reactor melt-downs. Others can be foreseen even if they may be unlikely to occur. Failure or collapse of a dam holding back an oil sands tailings reservoir could release huge quantities of highly toxic tailings resulting in contamination and potential destruction of aquatic life for hundreds of kilometers downriver. Collapse of a hydroelectric dam as a result of an extreme precipitation event or earthquake also could be catastrophic. Such worst-case disasters are rare, but do happen as the above examples underline

Yet CEAA 2012 does not require assessment of worst-case scenarios as is the case under United States federal law. The 1984 Inuvialuit Final Agreement (IFA) is one example of a Canadian legal requirement to undertake a worst-case scenario assessment. The Joint Panel Review for the Mackenzie Gas Project carried out a worst-case scenario assessment for the Inuvialuit Settlement Region (but not for other regions subject to the panel review). The Joint Review Panel identified five worst-case scenarios including well blowouts of natural gas and natural gas liquids at the three anchor fields, and rupture of two gathering system pipelines and release of natural gas and natural gas liquids. Environmental impacts were then assessed, and proponent mitigation measures and commitments were identified.

Recommendation 4: A next-generation law should require assessment of a comprehensive set of factors affecting sustainability in project assessments, including environmental, economic and social factors, as well as require a worst-case scenario assessment.

7. Strategic Environmental Assessment

Strategic environmental assessment (SEA) refers to assessment of the environmental effects of proposed government policies, programs and plans pursuant to the 1990 Cabinet Directive, as amended. In audits dating back at least to 1998, and as recently as October 2016, the Commissioner of the Environment and Sustainable Development has decried the failure of most federal departments to properly assess the environmental effects of proposed policies, program and plans as required by the Cabinet Directive. Nature Canada takes the view that SEA should

now be legally entrenched in any next-generation law given the ongoing failure over more than two decades of most federal departments to carry out SEAs.

A crucial feature of SEAs that distinguishes them from project assessments is that they can be conducted *after* the program providing financial support has been started. This concept recognizes an important distinction between assessment of projects versus assessments of policies and programs. A dam or a nuclear power plant must be assessed before it is built, because once they are built the environmental harm cannot be undone, or if so, only at great expense and difficulty. Policies and programs rarely are so cut and dried; they develop incrementally over time and can usually be reversed if necessary. In addition, these post-decision SEAs have the advantage of not getting tangled up in Cabinet confidence issues, and allow for development of metrics and more careful analysis. Any SEA law should therefore include a provision providing federal authorities with the option of conducting the SEA following the decision to proceed with the proposal, where the federal authority determines that a post-decision SEA is in the public interest.

There is one federal precedent for post-decision strategic environmental assessments. Subsection 5.(2) of the *Farm Income Protection Act* (FIPA) requires post-decision strategic environmental assessments of programs that provide for protection of farm producer income such as crop insurance, net stabilization accounts and gross revenue insurance. A 1998 published analysis by Stephen Hazell and Hugh Benevides determined that three FIPA SEAs were generally superior in quality to three comparable SEAs conducted under the Cabinet Directive.

Nature Canada takes the view that requiring post-decision strategic environmental assessments of federal budgets would represent perhaps the single most important step toward achieving sustainability that the Experts Panel could recommend, or the federal government could take.

The federal budget is arguably the most important federal environmental policy in any given year. Yet strategic environmental assessment of federal budgets has been a non-starter for successive federal governments because of the short timeframe for, and necessarily confidential approach to, their preparation. But given that a federal budget is delivered every year, SEA analyses of a budget in one year could easily be brought to bear in the preparation of budgets in subsequent years. For example, an SEA of the Accelerated Capital Cost Allowance for the Liquified Natural Gas (LNG) sector (introduced in Budget 2015) could be used to inform Department of Finance analysis as to whether this fossil fuel subsidy should be revoked in a future budget.

Suggested principles for provisions entrenching SEA in law could include: requiring that the environmental effects of proposed federal policies, programs and plans be assessed; establishing a public registry of such SEAs; affording a maximum of flexibility to federal departments to integrate the assessment activity into decision-making processes; and employing existing institutions (e.g., Canadian Environmental Assessment Agency, departmental impact assessment teams) to minimize administration costs.

For SEA to achieve its goals, Privy Council Office, which serves as the Prime Minister's department as well as the secretariat for Cabinet, must take a leadership role if SEA is to be effective.

Recommendation 5: A next-generation law should include a legislative framework for the preparation of strategic environmental assessments applicable to all proposed federal policies, programs and plans that have implications for the natural environment

Recommendation 6: Strategic environmental assessments should be required to be prepared and published for all federal budgets, with initiation of an assessment to commence following release of a budget and results to be incorporated into budgets to be presented two years hence.

8. Regional Environmental Assessment

Regional environmental assessment (REA, sometimes termed regional strategic environmental assessment), is intended to improve management of cumulative environmental effects, increase the efficiency and effectiveness of project-level environmental assessments, and identify preferred directions, strategies, and priorities for the future management and development of a region.

Thus, REAs, at least in theory, allow consideration of cumulative impacts of groups of proposed or ongoing projects in a single region providing important information about impacts that beyond those associated with individual projects.

REAs are perhaps most easily applied to regions that have a number of industrial projects likely to be considered for approval in the short to medium term (e.g., mining development in the Circle of Fire region in northern Ontario, oil sands development in northern Alberta, LNG development in coastal British Columbia).

Unfortunately, regional environmental assessments that involve the federal government (acting alone or with other jurisdictions) are rare. CEAA 2012 provides the Minister of Environment and Climate Change with authority to establish a committee to conduct a study of the effects of existing or future physical activities carried out in a region that is composed at least in part of federal lands (ss. 73-77); these provision have apparently never been used. The likely reason is that provincial governments are typically unwilling to participate in joint regional studies with the federal government, given that provincial governments have primary constitutional authority to conduct land use planning and regional studies within respective provincial boundaries other than on federal lands, often they difficult to convince that involving the federal government in an REA would provide net benefits.

For regional environmental assessments (such as for the Circle of Fire or oil sands regions) to be effective and useful to different levels of government, Nature Canada concludes that the

legislative regime for REAs must offer some advantage to these governments as well as proponents for them to agree to participate. One proposal would be to offer a streamlined process for project assessments (such as no cumulative effects assessment requirement) for projects to be located in a region subject to a completed REA. As well, perhaps regulatory requirements under such federal laws as the *Fisheries Act* and *Navigation Protection Act* could be streamlined for proposed projects that are covered by a completed Regional Environmental Assessment.

Nature Canada also takes the view that the next-generation law should authorize the Minister of Environment and Climate Change to establish an REA where she determines that a new type of development or a significantly increased intensity of industrial development is proposed in a region and where the Minister determines that such a regional assessment is in the national interest by virtue of such issues as impacts on Indigenous communities, or greenhouse gas emissions. The Minister also should have authority to initiate and facilitate an "off-ramp" procedure for a project-level impact assessment to move to a REA where higher-level issues regarding regional cumulative effects are raised in the project-level impact assessment process.

The next-generation law should include provision for a clear and transparent process requiring the Minister to consider and respond to requests by Indigenous and provincial governments for a joint collaborative REA. Similarly, a next-generation law should also include provision for a clear and transparent process (perhaps linked to the petition process administered by the Commissioner for the Environment and Sustainable Development) that requires the Minister to consider and respond to petitions for an REA from members of the public.

Recommendation 7: A next-generation law should provide for establishment of regional impact assessments by the Minister of Environment and Climate Change on the request of Indigenous and provincial governments, on the basis of a petition from members of the public, or acting alone where she determines that a new type of development or a significantly increased intensity of industrial development is proposed in a region, and that such a regional impact assessment is in the national interest by virtue of such issues as impacts on Indigenous communities or greenhouse gas emissions.

9. Single Agency Approach

The *Canadian Environmental Assessment Act 2012* reduced the number of responsible authorities that carry out environmental assessments to three: Canadian Environmental Assessment Agency (CEA Agency), National Energy Board (NEB), and Canadian Nuclear Safety Commission (CNSC).

Based on the weak performance of NEB and CNSC as responsible authorities and the effective work of CEA Agency since 2012, Nature Canada recommends that all federal impact assessments

of projects should be conducted under the auspices of the CEA Agency. A centralized approach would promote consistency, timeliness, improved public participation and efficiency, and avoid conflicts of interest and problems of regulatory capture that plague NEB and CNSC. While sustainability assessments would be conducted by the CEA Agency or review panels, the NEB and CNSC would presumably continue to exercise their other regulatory functions.

Recommendation 7: A next-generation law should establish the Canadian Environmental Assessment Agency as the sole responsible authority for the conduct of project and regional impact assessments. The National Energy Board and Canadian Nuclear Safety Commission would not conduct such impact assessments but would be required to incorporate the determinations of such impact assessments into their regulatory decision-making processes.

10. Indigenous Governments and Communities: Engagement and Co-governance

The Minister of Indigenous and Northern Affairs, Carolyn Bennett, declared at the United Nations Permanent Forum on Indigenous Issues on 9 May 2016 that Canada will "fully adopt and work to implement" the terms of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and that Canada is in full support of UNDRIP "without qualification".

Nature Canada affirms that environmental assessment legislation should engage Indigenous communities either as partners in impact assessment or pursuant to a co-governance regime in order for the Government of Canada to meet its commitment to implementing the UNDRIP.

UNDRIP recognizes the entitlement of Indigenous peoples to fundamental freedoms set out in the UN Charter, the Universal Declaration of Human Rights, and international human rights law. There are a number of key Indigenous and human rights at international law relevant to environmental assessment law in Canada. Particularly important are the rights to self-determination, self-government, and the right to give or withhold their free, prior, and informed consent to measures that may affect them.

The Government of Canada's declaration that it will adopt and implement the UNDRIP creates an added obligation when making decisions that may impact Indigenous rights or interests. The obligations to consult and accommodate as set out by the Supreme Court of Canada in *Haida Nation* require that the government consult in good faith and accommodate as necessary. The duty to consult and accommodate based on the honor of the Crown must be distinguished from the Indigenous right at international law to give or withhold free, prior, and informed consent.

In order to respect domestic law and fulfill its international commitments, a next-generation law must incorporate mechanisms that ensure that Indigenous peoples are consulted in good faith and accommodated for any impacts on their rights or interests after they have provided their free, prior, and informed consent.

Balancing the interests and issues of fairness between the right to withhold consent and the socio-economic needs and interests of Canadians is a titanic challenge. The next-generation law must strike a balance between the extremes of Indigenous veto and minimal consultation and accommodation.

Further, Nature Canada supports the adoption of co-governance models for environmental assessment and resource management in a next-generation law along the lines of the legally entrenched comprehensive claims agreements with Inuit and First Nations, mainly in northern Canada. By including Indigenous communities and governments in the very governance infrastructure of environmental assessment, the federal government would be promoting nation-to-nation relationships and the Indigenous right to self-government. By respecting the rights of Indigenous peoples to be at the decision-making table for matters impacting their rights and interests, the right to give or withhold free, prior, and informed consent would also be more likely to be respected.

Recommendation 8: A next-generation law should incorporate mechanisms that ensure that Indigenous peoples are consulted in good faith on impact assessments and accommodated for any impacts on their rights or interests after they have provided their free, prior, and informed consent.

Recommendation 9: A next-generation law should provide for adoption of co-governance models for environmental assessment and resource management as part of nation-to-nation negotiations along the lines of the legally entrenched comprehensive claims agreements with Inuit and First Nations.