



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

**LEGAL ANALYSIS OF THE REPORT OF THE STANDING COMMITTEE ON
ENVIRONMENT AND SUSTAINABLE DEVELOPMENT REGARDING
THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT***

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March 27, 2012

PART I - INTRODUCTION

On March 13, 2012, the Standing Committee on Environment and Sustainable Development (“the Committee”) released its Report¹ on the statutory review of the *Canadian Environmental Assessment Act* (“CEAA”). This Report was prepared after the Committee held a limited number of public hearings during the CEAA Review. The Canadian Environmental Law Association (“CELA”) appeared as a witness before the Committee in October 2011.²

The Committee’s Report contains 20 recommendations for CEAA reform which have been endorsed by the Conservative members of the Committee. The Report also contains strong dissenting opinions from the Liberal and New Democratic Party members of the Committee. It is anticipated that the federal government will shortly release its formal response to the Committee Report and recommendations.

The purpose of this legal analysis is to:

- review procedural concerns about the conduct of the CEAA Review by the Committee;
- review substantive concerns about the Committee’s recommendations for CEAA reform; and
- identify the next steps which are necessary to resolve the procedural and substantive concerns outlined in this legal analysis.

It is CELA’s overall conclusion that the Committee’s review of the CEAA was inadequate and fundamentally flawed, and it predictably resulted in ill-conceived and highly retrogressive recommendations which do not safeguard the public interest. To the contrary, the Committee’s recommendations, if implemented, will effectively eviscerate the CEAA by rewriting or removing the Act’s provisions which currently ensure that the ecological and socio-economic

¹ House of Commons Standing Committee on Environment and Sustainable Development, “Statutory Review of the *Canadian Environmental Assessment Act: Protecting the Environment, Managing Our Resources*” (March 2012) [“Committee Report”].

² Meeting No.7, October 27, 2011.

effects of environmentally significant projects are carefully considered in a precautionary and public manner across Canada.

Accordingly, CELA recommends that the federal government should not accept or act upon any of the Committee's 20 recommendations. Instead, the federal government should undertake the following actions:

1. Direct the Committee to reconvene and continue its public hearings on the CEAA Review, and ensure that the Committee hears from all interested agencies and departments, and all stakeholders who request an opportunity to participate in the hearings.
2. Ensure that the Minister of the Environment appears before the Committee to provide the government's perspective on CEAA reform, and, more importantly, to fully describe the rationale for, and detailed content of, all CEAA reforms that the federal government is currently considering or will be proposing in the near future.
3. Direct the Committee to prepare a supplementary report summarizing the views, opinions and recommendations provided by stakeholders and governmental officials in relation to the CEAA Review, and to provide a proper rationale for any specific CEAA changes which may be recommended by the Committee's supplementary report.
4. Delay the introduction of any new bill to amend the CEAA until the Committee's supplementary report has been filed and duly responded to by the federal government. If the federal government ultimately introduces a bill to amend the CEAA, then the bill should be referred back to the Committee for further public hearings and clause-by-clause review, and the Committee should report back to the House of Commons on whether the proposed bill should be enacted, amended and enacted, or withdrawn.
5. Ensure that any statutory amendments to the CEAA proposed by the federal government are not contained within a larger budget bill since such amendments would not receive proper public or parliamentary consideration in the context of budget issues, and should be considered by the Committee rather than the Standing Committee on Finance.

PART II - BACKGROUND

Founded in 1970, CELA is a public interest law group that has long advocated the need for federal environmental assessment ("EA") legislation that is effective, efficient and equitable.

For example, CELA was involved in the original development of the CEAA and the underlying regulations during the early 1990s, and CELA participated in the previous Parliamentary reviews of the CEAA. As noted above, CELA also appeared before the Committee on October 27, 2011 to provide recommendations regarding the conduct and content of the CEAA Review.

CELA has intervened in Supreme Court of Canada appeals involving the federal EA regime and its relationship to provincial EA processes (e.g. the *Oldman River*³ and *MiningWatch*⁴ cases). Over the years, CELA has also initiated legal proceedings in the Federal Court of Canada regarding the interpretation and application of the CEAA. In addition, CELA represents or advises individuals and groups who participate in project-specific EA processes under the CEAA, including screenings, comprehensive studies, and review panels.

Since its enactment and proclamation into force, the CEAA has proven to be one the most important environmental planning statutes in Canada, particularly since the CEAA often provides more detailed environmental scrutiny, and greater public participation opportunities, than may be available under provincial EA laws. Moreover, for those projects and activities which are not subject to provincial EA requirements, only the CEAA provides the procedural rights and substantive safeguards that are necessary to carefully scrutinize the direct, indirect and cumulative environmental effects of such projects and activities.

Nevertheless, CELA recognizes that there is room for improvement in the CEAA and its implementation, which is why CELA eagerly anticipated the commencement of the current CEAA Review. To date, however, the efficacy and credibility of the Committee's review of the CEAA has been undermined by several serious procedural deficiencies, as described below.

PART III – PROCEDURAL CONCERNS ABOUT THE CONDUCT OF THE CEAA REVIEW

When the CEAA was amended in 2003, Parliament clearly intended that the 7 year review of the CEAA would be a “comprehensive review of the provisions and operations” of the Act.⁵ However, it appears that the Committee's statutory review of the CEAA has been rushed, poorly implemented, and anything but “comprehensive” in nature.

(a) Insufficient Evidence and Lack of Clarity in the CEAA Review

Having closely followed the Committee's proceedings from the outset, CELA respectfully concludes that the CEAA Review to date has been ineffectual, unduly limited by arbitrary timing constraints, and largely driven by ideology rather than rational, evidence-based analysis. Instead of providing an important public forum for the exchange of informed views about CEAA reform, the Committee hearings seemed largely designed to solicit or foster anti-CEAA sentiment among certain industrial sectors whose projects trigger federal EA requirements at the present time.

The fundamental inadequacy of the current CEAA Review stands in stark contrast to the previous CEAA Reviews in which CELA has participated. For example, these earlier exercises featured: appropriate review timeframes; inclusive and balanced witness lists; clear upfront indications of the Review parameters; careful consideration of potential CEAA amendments; and meaningful public participation opportunities.

³ *Friends of the Old Man River Society v. Canada*, [1992] 1 S.C.R. 3.

⁴ *MiningWatch Canada v. Canada*, 2010 SCC 2.

⁵ S.C. 2003, c.9, section 32(1).

Unfortunately, the current CEAA Review has been marred by short notice periods, insufficient public consultation, and considerable uncertainty about the Committee’s focus, mandate or overall process in relation to the CEAA Review. For example, CELA was provided inadequate notice of its scheduled appearance before the Committee, and was given a perfunctory 10 minutes to present our views on CEAA reform. While testifying before the Committee in late October 2011, CELA undertook to subsequently provide the Committee with a comprehensive and more detailed analysis of the priorities for CEAA reform. However, the Committee hearings were unexpectedly stopped in November 2011 before the CELA brief could be submitted.

(b) Premature and Unjustified Termination of the Committee Hearings

The abrupt termination of the Committee’s public hearings on the CEAA is objectionable for various reasons. For example, this manoeuvre prevented numerous public interest stakeholders from making presentations to the Committee, and it also precluded appearances by the National Energy Board (“NEB”), Canadian Nuclear Safety Commission (“CNSC”), Department of Fisheries and Oceans, Major Projects Management Office, and other key agencies, departments and ministries involved in CEAA implementation. Given their extensive operational experience under the CEAA, it would have been highly instructive for the Committee to hear directly from these stakeholders and governmental entities before the Committee purported to craft recommendations aimed at “streamlining” the current CEAA regime.

The failure or refusal of the Committee to hold any public hearings in communities other than Ottawa only compounded this evidentiary gap, and undoubtedly deprived the Committee of the full range of views, opinions and perspectives about CEAA reform. For example, holding Committee hearings in other provinces or territories would have allowed the Committee to hear directly from more citizens, community groups, and First Nations involved in project-specific processes under the CEAA, and would have facilitated presentations from provincial environmental assessment administrators.⁶

(c) Non-Attendance by the Minister of the Environment

More alarmingly, the truncated nature of the Committee’s review of the CEAA meant that the Minister of the Environment did not attend to present any of his government’s proposals for CEAA reform. This omission is especially unsatisfactory since it is readily apparent that the federal government intends to make sweeping changes to the CEAA, particularly in relation to energy projects such as pipelines and oilsands development. However, the Minister did not appear before the Committee to publicly disclose or discuss any information on how the federal government proposes to amend the CEAA.

(d) Failure to Review the 2010 Amendments to the CEAA

Similarly, it appears that the Committee process did not review the problematic and piecemeal amendments recently made to the CEAA by the federal government’s 2010 budget bill (Bill C-9). The negative implications of these misguided amendments have been well-documented

⁶ Only representatives of Saskatchewan’s provincial government appeared before the Committee.

elsewhere⁷ and need not be repeated here in detail (e.g. exemption of infrastructure projects, expansion of Ministerial scoping powers, etc.). Suffice it to say that if the Committee intended to undertake a thorough and rigorous review of the CEAA, then it was incumbent upon the Committee to consider and report upon these 2010 amendments, particularly since they had not previously received appropriate public or parliamentary scrutiny when buried within budget legislation.

In light of these and other procedural deficiencies, CELA submits that it is imperative that Standing Committee be directed to reconvene and continue its public hearings on the CEAA Review, and thereafter provide a comprehensive Report which properly reflects the input and interests of all stakeholders and governmental entities, not just a sub-set of industrial or business representatives.

PART IV – SUBSTANTIVE CONCERNS ABOUT THE RECOMMENDATIONS FOR CEAA REFORM

(a) Overview of the Committee Recommendations

The Committee Report attempts to characterize the CEAA as an “outdated” statute that establishes an “inefficient process” and “stands in the way of sustainable development.”⁸ According to the Committee, “significant changes” to the CEAA are required in order to make the federal EA process “more efficient” and less “duplicative and complicated.”⁹

However, the reality is that most of the Committee’s recommendations are not aimed at improving the timeliness or quality of the federal EA process. Instead, the Committee’s recommendations, if implemented, will fundamentally – and negatively – alter the basic structure, application, and content requirements of the CEAA. Ironically, the Committee’s recommendations do little to address to resolve potential causes of procedural inefficiency, which is precisely why the Committee should have sought and considered evidence from the various federal agencies and departments involved in the day-to-day implementation of the CEAA.

In addition, many of the Committee’s recommendations are premised upon debatable (if not apocryphal) anecdotes from a handful of witnesses representing resource extraction or development industries, rather than upon cogent evidence or statistical information from reliable and unbiased sources. Similarly, the Committee’s review of witnesses’ testimony appears to be highly selective – only the views of those who support the Committee’s recommendations are quoted in the Report, while contrary views or alternative suggestions made by other witnesses are ignored, glossed over, or discounted without adequate explanation. The result is an unbalanced and superficial Report that is neither persuasive nor comprehensive, and that contains recommendations lacking an adequate evidentiary basis.

⁷ See, for example, Robert B. Gibson, “Three Analyses of the Amendments to the *Canadian Environmental Assessment Act* made through the *Budget Implementation Act, 2010*”, 51 C.E.L.R. (3d) 154.

⁸ Committee Report, pages 1, 3.

⁹ *Ibid.*

More fundamentally, the Committee's recommendations appear to reflect a profound misunderstanding of the societal value and environmental benefits of having strong EA requirements at the federal level in Canada. It further appears that Committee Report pays little or no heed to the constitutional implications of the Committee's recommendations, particularly in relation to the proposed substitution of provincial EA processes for the federal EA process (see below). Thus, the Committee's recommendations are best viewed as a hasty and unwarranted assault on the fundamental underpinnings of the CEAA, which all previous federal governments have supported since the CEAA was enacted.

It should be further noted that the Committee's recommendations appear to dovetail with the larger pattern of environmental law rollbacks undertaken by the current federal government in recent years under the guise of budget legislation. In 2009, for example, key aspects of the *Navigable Waters Protection Act* were weakened by amendments buried within the federal budget bill. In 2010, a number of contentious amendments to CEAA were made by the voluminous federal budget bill. In recent weeks, media reports and governmental speeches suggest that further alarming changes to CEAA and the *Fisheries Act* (i.e. to remove the current habitat protection provisions) will likely be contained in the forthcoming federal budget.

Accordingly, the Committee's recommendations are not an isolated attack upon Canada's environmental planning law. Instead, the recommendations should be regarded as an integral part of a larger systematic attempt to significantly narrow, weaken or dismantle the environmental "safety net" that has been carefully developed at the federal level in recent decades.

Having regard for this legal and political context, CELA's specific analysis of each of the Committee's recommendations is set out below.

(b) Centralizing EA Responsibilities under the CEAA

In Recommendation 1, the Committee proposes that the Canadian Environmental Assessment Agency ("Agency") should become responsible for conducting all EAs under the CEAA, unless there is a "regulator" who is "best placed" to perform the role of the Responsible Authority under the CEAA.¹⁰ Presumably, this recommendation does not extend to review panels or mediations, which are also types of EA available under the CEAA.

In support of Recommendation 1, the Committee refers, *inter alia*, to the 2010 amendments to the CEAA which gave the Agency responsibility for conducting all comprehensive studies under the Act, except for those relating to energy projects (in which case the comprehensive studies would be conducted by the NEB or CNSC). However, since these amendments are relatively new and have not yet generated much operational experience, it is too early to determine whether this is a workable or appropriate centralization model which should be continued or expanded to include all non-energy projects across Canada.

Even if the Agency has the most in-house EA expertise at the federal level, it remains unclear how the Agency would be able to satisfactorily discharge its obligation to henceforth conduct

¹⁰ *Ibid.*, page 6.

every screening and comprehensive study for non-energy projects, as well as perform its other duties and responsibilities under sections 62 and 63 of the CEAA (i.e. research, monitoring, reporting, consultation, policy development, administrative support, Registry maintenance, etc).

This is particularly true in light of the significant budget cuts already experienced by the Agency to date, and likely to experience again in the forthcoming federal budget. In fact, these cuts (and staff reductions) were discussed during the Committee hearings,¹¹ but were not mentioned or acknowledged in the Committee Report. In these circumstances, CELA questions whether it is realistic to expect the Agency to effectively act as the Responsible Authority for all non-energy EAs at a time when the Agency's institutional capacity is being progressively diminished through budget cuts and staffing reductions.

It further appears that the Committee intended Recommendation 1 to address situations where there may be more than one Responsible Authority (e.g. where a large-scale project might require approvals, lands and/or funding from more than one federal department).¹² Under the current CEAA, a number of mechanisms have been developed to address such situations (i.e. federal EA coordinator, Major Project Management Office, the federal coordination regulation (SOR/97-181), etc.). However, the Committee Report simply asserts that such measures “have not addressed the issue sufficiently,”¹³ but the Report fails to cite any specific evidence to substantiate this proposition. Moreover, the Committee Reports provides no evidentiary basis to support its view that consolidating all non-energy EA responsibilities within the Agency will, of necessity, result in faster or better EAs under the CEAA.

Arguably, the most problematic aspect of Recommendation 1 is the vague proposal that instead of the Agency, the “best-placed regulator” should be given responsibility for conducting EAs under the CEAA. However, Recommendation 1 does not: (a) specify who makes the determination that a particular “regulator” is better placed than the Agency to conduct the required EA; (b) specify the criteria to be used in making such a determination; (c) indicate whether this option exists for screenings, comprehensive studies, or both; (d) explain whether this option is to be exercised on a project-by-project basis, or whether it is available for entire classes of projects or industrial sectors; or (e) explain whether this option is limited to federal regulators, or whether it extends to provincial regulators as well. In absence of these and other critical details, it cannot be concluded that this proposal will actually speed up or improve EAs under the CEAA.

More fundamentally, Recommendation 1 appears to ignore or overlook the crucial distinction between environmental planning and regulatory activity. It may be well be that a particular agency has experience in regulating particular types of projects, but it does not necessarily follow that such agencies are “best placed” to conduct EAs which critically examine the need for, purpose of, or alternatives to the projects in question. Simply put, these fundamentally important EA questions are not routinely addressed by regulatory agencies in the usual exercise

¹¹ See, for example, *Evidence*, Meeting No.5, October 20, 2011; and *Evidence*, Meeting No.7, October 27, 2011. These meetings involved discussion of a proposed 43% reduction in the Agency's budget for 2012-13, and a 30% reduction in the Agency's staffing.

¹² Committee Report, page 5.

¹³ *Ibid.*

of their administrative or supervisory powers. Therefore, there is no evidentiary basis upon which it can be reasonably concluded that “regulators” are inherently “better” at conducting EAs under the CEAA.

In addition, there is ongoing public concern about the prospect of “agency capture”, viz., that “regulators” can become too closely aligned with the interests of the industry that they regulate, and that they may serve (or be seen to serve) as promoters (or defenders) of the industry, rather than as credible, rigorous and independent entities. This serves as an additional reason to be wary of any proposal that purports to give “regulators” any new or further EA responsibilities that would otherwise be exercised by the Agency in accordance with Recommendation 1.

In summary, Recommendation 1, as drafted, is an ambiguous, unjustified and poorly conceived proposal which should not be accepted or acted upon by the federal government.

(c) Removing “Unnecessary” Steps in the EA Process

In Recommendation 2, the Committee proposes the “consolidation” of the “two-step” EA decision-making process by empowering the Agency and the Minister to make certain decisions that otherwise would be made by Responsible Authorities after completion of EAs under the current CEAA.¹⁴ Recommendation 2 is premised on the Committee’s determination to eliminate “redundant steps” in the EA process which do not “generate measurable environmental outcomes.”¹⁵

Presumably, this recommendation is directed at sections 20, 23 and/or 37 of the CEAA, but the Committee fails to actually mention these particular sections, and further fails to specify exactly how these sections should be amended. Similarly, although the Committee suggests that the Agency should have this new decision-making power over “larger screenings,” Recommendation 2 does not attempt to define this term, nor provide any criteria or indicia for determining what is – or is not – a “larger screening.”

Moreover, it is unclear how Recommendation 2 relates to the Committee’s Recommendation 20, which calls for federal “study” of how EA conditions and commitments should be incorporated into legally enforceable instruments after the EA process has been completed (see below). Similarly, it is unclear how Recommendation 2 fits with Recommendation 1, which proposes that the Agency should assume all powers and responsibilities of Responsible Authorities under the CEAA. However, Recommendation 2 appears to suggest that the Agency would only make the section 20 “course of action” decision in relation to “larger screenings”. Does this mean that course of action decisions for “smaller screenings” will continue to be made by Responsible Authorities rather than the Agency?

Unless such clarification is provided by the Committee, and until the internal inconsistencies within the Report are resolved, Recommendation 2 should not be endorsed or acted upon by the federal government.

¹⁴ *Ibid.*, page 6.

¹⁵ *Ibid.*

(d) Eliminating Consideration of “Alternatives to” the Project

In Recommendation 3, the Committee proposes to eliminate the consideration of “alternatives to” from EAs under the CEAA.¹⁶

However, it appears that Recommendation 3 is not based upon evidence from witnesses, but upon an opinion expressed by a single Committee member.¹⁷ According to this member, assessing “alternative means” is improper during an EA process because it amounts to investigating the proponent’s “business case” for the project, and because it can be “safely assumed” that proponents have considered all alternatives before selecting the project with the “best” business case.¹⁸

In adopting this member’s opinion, it appears that the Committee was unclear on the concept, role and importance of alternatives analysis within an EA process. First, the text of the Committee’s Report refers to the member’s commentary about “alternative means,”¹⁹ which are the different technical methods of carrying out the project selected by the proponent. However, Recommendation 3 refers to “alternatives to”,²⁰ which are the functionally different ways of achieving the stated purpose of the project.

For example, if the purpose of a project is to manage solid waste generated within a community, then the various “alternatives to” which should be examined and compared include 3Rs, landfill, incineration, and export. If landfill is selected as the preferred alternative, then the “alternative means” of carrying out the project (e.g. different site locations; different site design (engineered facility or natural attenuation); different liner technologies (clay or geotextile); and different leachate treatment options, etc.) should be closely examined in order to identify the environmentally preferable manner of carrying out the project. Thus, the terms “alternatives to” and “alternative means” are not synonymous, and the fact that the Committee has apparently failed to appreciate the crucial difference between these fundamentally important EA concepts raises serious questions about the soundness of the CEAA Review conducted to date.

Second, assuming that the Committee did, in fact, mean to refer to “alternatives to” in Recommendation 3, it appears that the Committee was unaware that consideration of “alternatives to” is not mandatory in every EA under the current CEAA. Instead, this is a discretionary matter, insofar as the Minister or Responsible Authority decide, on a case-by-case basis, whether “alternatives to” should be considered within an EA for a particular project.²¹ To date, the assessment of “alternatives to” is generally limited to major projects which are subject to a comprehensive study or review panel under the CEAA. Moreover, the consideration of “alternatives to” in such EAs has not prevented the projects from obtaining approvals from Responsible Authorities, as very few major projects get refused under the CEAA in any event. Thus, if the Committee was concerned that “alternatives to” are being needlessly required in

¹⁶ *Ibid.*, page 7.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ CEAA, section 16(2)(b).

²⁰ CEAA, section 16(1)(e).

²¹ *Ibid.*

every EA under the CEAA, or that “alternatives to” requirements are causing projects to be rejected, then the Committee’s concern is without merit.

Third, it cannot be “safely assumed” that a proponent has already canvassed a reasonable range of “alternatives to” before announcing its “business case” to proceed with a particular project. To the contrary, CELA has been involved in EA processes where the proponent did not assess “alternatives to” adequately or at all before deciding to proceed with a particular project. Such failures pose a significant problem because the CEAA’s overarching objective – sustainable development – cannot be achieved unless it is properly demonstrated that a particular project is the environmentally best (or least bad) alternative for addressing the specific need or opportunity identified by the proponent. After all, the primary purpose of the CEAA is not to guarantee corporate profits or return on investment; instead, it is to promote sustainable development and safeguard the environment for the benefit of present and future generations.²² This is why Parliament originally decided to entrench “alternatives to” analysis in the CEAA, and why the current federal government should leave the current “alternatives to” provisions intact.

Fourth, it is a well-established principle of EA practice that, where applicable, the evaluation of “alternatives to” should occur at the earliest opportunity in the planning process before irrevocable decisions are made, and should include opportunities for public participation. This important timing principle has been codified in section 11 of the CEAA, and section 4 of the Act recognizes the need for timely and meaningful public participation. Therefore, where a proponent can demonstrate that it, in fact, duly considered appropriate “alternatives to” before selecting a particular project, then the supporting documentation should enable the proponent to proceed efficiently through the EA process.

On the other hand, in those instances where a proponent has proposed a particular project without proper upfront consideration of “alternatives to,” then it is in the public interest for the EA process to ensure that the environmental pros and cons of the project are compared with those from other reasonable “alternatives to” which may address the purpose of the project, but with fewer adverse environmental effects or greater socio-economic benefits to the public. In essence, retaining the statutory discretion under the CEAA to require a proper “alternatives to” analysis for major projects will provide an important planning benchmark for evaluating the environmental and societal acceptability of the proponent’s preferred alternative.

For the foregoing reasons, Recommendation 3 should not be accepted or implemented by the federal government. If a proponent has already considered alternatives before selecting the project with the “best” business case, then the proponent can hardly be inconvenienced by revealing its thinking as part of the EA for the project.

(e) Eliminating Consideration of Impacts on Capacity of Renewable Resources

In Recommendation 4, the Committee proposes to eliminate the current CEAA requirement²³ for comprehensive studies and review panels to consider the effects of projects upon the capacity of renewable resources to meet current and future needs.²⁴

²² CEAA, preamble, section 4.

²³ CEAA, section 16(2)(d).

Again, this recommendation was not based upon evidence from witnesses, but upon the opinion of a single Committee member, who rationalized this change on the grounds that renewable resources are primarily managed by provincial authorities.²⁵ This rationale appears to overlook the fact that renewable resources do not just exist on lands or waters under provincial jurisdiction, but also occur on lands and waters under federal jurisdiction (or, alternatively, concurrent federal/provincial jurisdiction). However, Recommendation 4 would inexplicably eliminate the obligation to consider a project's impacts upon the sustainability of renewable resources, including those under federal ownership, management or control. If implemented, this recommendation may also undermine the consideration of cumulative effects, which is required under section 16(1)(a) of the CEAA.

More fundamentally, Recommendation 4 appears to be premised upon the long-discredited view that the federal EA process should be scoped or limited to those matters within exclusive federal jurisdiction (e.g. fish, migratory birds, navigation, etc.). This view has been rejected by the Supreme Court of Canada,²⁶ the Federal Court of Appeal,²⁷ various commentators,²⁸ and Parliament itself when section 16(2)(d) was enacted. It also appears to overlook the fact that the CEAA empowers the Minister or Responsible Authority to determine the scope of the obligation to examine impacts upon renewable resources, as may be appropriate on a project-by-project basis.²⁹ Accordingly, there is no compelling factual, legal or constitutional reason to implement Recommendation 4.

In summary, if the federal government still intends to rely upon the CEAA as a mechanism for ensuring sustainable development, avoiding or mitigating significant adverse environmental effects, and implementing (at least in part) its international obligations under the 1993 Rio Convention on Biological Diversity, then section 16(2)(d) should not be deleted. Therefore, Recommendation 4 should not be adopted or acted upon by the federal government.

(f) Creating “Binding Timelines” for all EAs

In Recommendation 5, the Committee proposes that the CEAA should be amended to enable or require “binding timelines” for “all” EAs under the Act.³⁰

In support of this recommendation, the Committee refers to the recent “timelines regulation”³¹ which, *inter alia*, now generally obliges the Agency to complete its comprehensive studies within 365 days. Given that this regulation has only been in force for a number of months, it is

²⁴ Committee Report, page 7.

²⁵ *Ibid.*

²⁶ *Friends of Oldman River Society v. Canada*, [1992] 1 S.C.R. 3, at paras. 51-52, 56, 93-94, 99-109; *MiningWatch Canada v. Canada*, 2010 SCC 2, paras.24-25, 41-42; *Moses v. Canada*, [2010] 1 S.C.R. 557, at paras.13, 36, 46-47.

²⁷ *Friends of the West Country Assn. v. Canada*, [2000] 2 F.C. 263, at paras.34, 39-40; leave to appeal to SCC refused 262 N.R. 395n.

²⁸ Stephen Kennet, “*Oldman and Environmental Impact Assessment: An Invitation for Cooperative Federalism*” (1992), 3 *Constitutional Forum* 93; Arlene Kwasniak, “*Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency and Substitution: Interpretation, Misinterpretation and a Path Forward*” (2009), 20 *Journal of Env. Law & Practice* 1.

²⁹ CEAA, section 16(3).

³⁰ Committee Report, page 8.

³¹ SOR/2011-139, section 5.

too early to determine whether this approach has resulted in effective, efficient and equitable comprehensive studies. Nevertheless, the Committee opines that similar timelines should be established not only for all other EAs, but also for all related steps “from the application to public participation to final authorizations.”³²

In principle, there is no objection to ensuring that the federal EA process is conducted in a timely and efficient manner. Like proponents, it is clear that citizens, environmental groups, and First Nations do not benefit from lengthy, unpredictable or meandering EA processes, particular in relation to EAs where participant funding is limited or non-existent. However, it is highly debatable whether setting arbitrary deadlines is the best (or only) way to achieve this objective, especially where proponents themselves are the cause of delay in the EA process (i.e. by submitting incomplete EAs which lack the information required by section 16 of the CEAA or prescribed by project-specific Environmental Impact Statement guidelines). Governmental understaffing, staff turnover, and budgetary constraints can also affect the timeliness of EA planning and decision-making under the CEAA, but imposing deadlines does not necessarily resolve these institutional causes of potential delay.

Not surprisingly, the issue of timelines has also attracted attention within provincial EA programs. For example, Ontario passed a timelines regulation³³ under its *Environmental Assessment Act* to govern certain aspects of the “individual EA” process; however, it appears that the Ministry of Environment has not been able to fully comply with the prescribed deadlines for various reasons.³⁴ Thus, timelines should be viewed as useful administrative targets aimed at keeping the EA process moving along, but EA timelines, if utilized, must be realistic and reasonable, and should not legally bind EA administrators or force them to make hasty or ill-considered decisions about projects subject to the CEAA.

In short, just as courts cannot be compelled to render decisions in civil or criminal matters by arbitrary deadlines fixed by Attorneys General, the Minister and Responsible Authorities under the CEAA should not be forced to fast-track EAs, limit governmental review, reduce technical scrutiny, restrict public participation opportunities, or otherwise cut corners in order to meet inflexible EA timelines. The overall purpose of the CEAA is to safeguard the public interest, and if this takes a bit more time in relation to particularly significant, complex or controversial projects, then this is time well-spent, particularly since this allows informed decisions to be made about such projects.

Accordingly, while the federal EA process should be timely and efficient, the process should also be robust and consultative in nature in order to fairly and fully assess projects and their environmental effects. However, it is not clear that the Committee was mindful of the need to strike a careful balance between a “fast” EA process and a “rigorous” EA process at the federal

³² Committee Report, page 8.

³³ O.Reg.616/98.

³⁴ Minister’s Environmental Assessment Advisory Panel (Executive Group), *Improving Environmental Assessment in Ontario: A Framework for Reform* (March 2005), pages 102-03. See also Alan Levy, “Scoping Issues and Imposing Time Limits by Ontario’s Environment Minister at Environmental Assessment Hearings – A History and Case Study” (2000), 10 *Journal of Env. Law & Practice* 147.

level. Instead, the Committee appears to be fixated on speeding up the EA process by simply imposing “binding timelines.”

In particular, the Committee presented no specific evidence to support its apparent belief that faster EAs are necessarily better EAs, and further failed to provide any particulars on the nature, extent or enforceability of the “binding timelines” envisioned by the Committee. For example, the Committee has declined to specify any deadlines or timeframes for all EAs, and similarly did not address key questions related to what should happen if the EA is incomplete by time that a prescribed timeline expires (e.g. refusal of the project? automatic approval? time extension? if so, who can request an extension, on what grounds, and who decides?).

Unless and until such particulars are developed and publicly disclosed by the Committee, the federal government should refrain from accepting or acting upon Recommendation 5 at this time.

(g) Coordinating Federal EA with Provincial EA

In Recommendation 6, the Committee proposes that federal “trigger” decisions (i.e. upfront determinations whether the CEAA applies to a particular project) should be made at the start of provincial EA processes to ensure coordination between the federal and provincial EA regimes.³⁵

However, it is unclear whether Recommendation 6 is calling for statutory amendments, regulatory reform, administrative arrangements, or policy development in order to implement this objective. Similarly, it is uncertain how this recommendation is consistent with the Committee’s Recommendation 7 (declaration that provincial EA requirements are equivalent to the CEAA), Recommendation 8 (substitution of provincial EA requirements for the CEAA), or Recommendation 11 (elimination of current CEAA triggers in favour of a project list).

In general, measures intended to facilitate earlier integration and coordination of applicable federal and provincial EA requirements would be a welcome step forward. Over the years, some proponents, politicians and other parties have erroneously claimed that there is unnecessary overlap and duplication between federal and provincial EA processes. Unfortunately, this claim appears to have been repeated during the Committee hearings by certain witnesses and adopted by the Committee’s Report.³⁶

However, claims about overlap or duplication between federal and provincial environmental laws do not hold up under close scrutiny, and such claims have been previously rejected by the Standing Committee³⁷ and other commentators,³⁸ who also correctly point out that the CEAA

³⁵ Committee Report, page 9.

³⁶ *Ibid.*, pages 10 to 13.

³⁷ House of Commons Standing Committee on Environment and Sustainable Development, *Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment* (December 1997), wherein the Committee rejected “unsubstantiated claims of overlap and duplication” within Canada’s environmental management regime.

³⁸ See, for example, Arlene Kwasniak, “Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency and Substitution: Interpretation, Misinterpretation and a Path Forward” (2009), 20 *Journal of Env. Law & Practice* 1. The author of this article appeared before the Committee and filed a written brief which debunks the myth of “overlap and duplication” in the Canadian EA context: *Evidence*, Meeting No.10, November 15, 2011.

contains specific – but underutilized – provisions designed to permit harmonized federal/provincial EA processes for projects subject to both regimes. The existence of such provisions has also been recognized by the Supreme Court of Canada.³⁹ In this regard, Recommendation 6 may be viewed as somewhat redundant since “one project, one process” harmonization can already occur under the current CEAA without any further reforms.

It should be further noted that Recommendation 6 does not address the problem of “late triggering” of the CEAA in situations where the project is not subject to provincial EA requirements. For example, the federal EA process may not get triggered until the project has been sufficiently developed to the point that it is known that a permit or approval on the CEAA Law List Regulation⁴⁰ is required. By this time, many key planning decisions about the location, design, or operation of the project may have already been made in the absence of EA requirements or public participation. There appears to be nothing in Recommendation 6 that acknowledges or addresses such instances of “late triggering” of the CEAA.

Accordingly, the federal government should not accept or act upon Recommendation 6 until the Committee provides further clarification about this recommendation, and also addresses the pressing issue of “late triggering” of the CEAA where provincial EA requirements are not applicable to a project.

(h) Substituting Provincial EA for Federal EA

In Recommendation 7, the Committee proposes that the CEAA should be amended to empower the Agency to determine whether a province’s EA process fulfills the requirements of the federal process; if so, then the provincial EA process is deemed to be “equivalent” to the CEAA.⁴¹

In Recommendation 8, the Committee proposes that that the CEAA should be amended to exempt certain projects from the Act on the grounds that they are subject to provincial EA legislation.⁴²

In Recommendation 9, the Committee proposes that the federal government “work towards improved coordination of permitting by federal and provincial authorities.”⁴³

Individually and collectively, these three recommendations are objectionable in principle, unworkable in practice, or based on insufficient evidence. First, on the issue of equivalency, the Committee fails to explain why the Agency – rather than the Minister or Governor in Council – is the appropriate entity for making determinations whether a provincial EA process is “equivalent” to the CEAA. This determination appears to be intended to result in the non-application of the CEAA to projects that are subject to “equivalent” provincial EA processes (assuming that the equivalency declaration in Recommendation 7 is supposed to identify the provincial EA statutes listed for CEAA exemption purposes under Recommendation 8).

³⁹ *Mining Watch Canada v. Canada*, 2010 SCC 2, paras. 25, 41-42.

⁴⁰ SOR/94-636.

⁴¹ Committee Report, page 12.

⁴² *Ibid.*, pages 12 to 13.

⁴³ *Ibid.*, page 13.

Therefore, at the very least, this important determination should be made by an elected official who can be held politically accountable.

By way of comparison, under the federal *Species at Risk Act*, the determination of whether a province's legislation adequately protects species at risk (or their residences) is made by the Minister (not civil servants), who must comply with certain consultation requirements before this determination can be made.⁴⁴ Similarly, the determination of whether a province has a toxics regulation that is equivalent to a regulation under the *Canadian Environmental Protection Act, 1999* is made by the Minister (not civil servants), and is subject to public notice, comment, formal objections, and annual reporting obligations to Parliament.⁴⁵ None of these important safeguards are reflected in the Committee's Recommendation 7. Thus, the Committee's proposal to empower the Agency to privately make "equivalency" determinations under the CEAA is not only unacceptable, but is also clearly inconsistent with the approach utilized in other federal environmental laws.

Second, regardless of whether the "equivalency" determination is made under the CEAA by the Minister or the Agency, it is noteworthy that the Committee failed to specify any criteria for evaluating equivalency. This is problematic because there is no single or "correct" model of how to enact and implement EA legislation,⁴⁶ and provincial EA processes therefore vary considerably in terms of their applicability, procedural aspects, substantive requirements, public participation rights, and decision-making criteria. In short, provincial EA processes significantly differ from each other as well as from the CEAA, thereby making "equivalency" determinations very difficult if not impossible in the absence of appropriate evaluation criteria.

Third, the Committee Report is unclear as to when the "equivalency" determination is to be made, or whether it is to be made on a project-by-project basis, or on a generic basis without reference to any particular projects (or classes of projects). For example, if the EA processes within New Brunswick, Quebec and Ontario are deemed to be "equivalent" to the CEAA, then presumably the future establishment, expansion or modification of nuclear facilities in those provinces would still require licences under the federal *Nuclear Safety and Control Act*, but would, in theory, only be subject to provincial EA requirements rather than the CEAA. However, Ontario has recently taken the position that its *Environmental Assessment Act* is inapplicable to its nuclear projects in the province. If the Committee's Recommendations 7 and 8 are implemented as drafted, it thus appears possible that a nuclear facility in Quebec or New Brunswick would be subject only to provincial EA requirements, but the same type of facility in Ontario would only be subject to the CEAA. Such inconsistencies will likely lead to a patchwork of different EA requirements for the same projects across Canada, and defeats the overall purpose of ensuring a uniform national EA approach that applies equally to projects which engage federal decision-making, regardless of which particular province the project happens to be located.

⁴⁴ *Species at Risk Act*, S.C. 2007, c.29, section 34.

⁴⁵ *Canadian Environmental Protection Act, 1999*, S.C.1992, c.37, section 10.

⁴⁶ Paul Muldoon et al., *An Introduction to Environmental Law and Policy in Canada* (Toronto: Emond-Montgomery, 2009), page 127.

Fourth, it appears that these recommendations are premised upon the Committee’s mistaken view that there is unnecessary overlap and inefficient duplication between the CEAA and provincial EA processes. As explained above, this is a continuing myth that lacks any credible basis in law or fact,⁴⁷ and as the Committee itself notes, the current CEAA already contains provisions intended to facilitate harmonized federal/provincial EA exercises.⁴⁸ It may well be that these existing mechanisms need to be finetuned or expanded to ensure that joint federal/provincial EA processes occur more frequently, or are better coordinated from the outset of EA planning to the final EA decision-making. But this observation does not justify creating unprecedented and wide-ranging exemptions to the CEAA based upon subjective perceptions that provincial EA processes are somehow “equivalent” to the CEAA.

Fifth, the Committee’s recommendations appear oblivious to the underlying constitutional reasons why the CEAA exists in the first place. As discussed above, the Supreme Court of Canada, in cases such as *Oldman River* and *MiningWatch*, has affirmed that it is constitutionally valid for the federal government to establish and implement an EA process in relation to federal decision-making (e.g. whether to issue a federal permit to allow a particular project to proceed). Moreover, the Court has held that it is open to the federal government to specify that environmental impacts should be considered as part of the decision-making process to grant or refuse federal permits. Simply put, the CEAA is not an unwarranted or impermissible intrusion into matters that otherwise fall under the exclusive jurisdiction of the provinces. Accordingly, the Committee’s oft-stated concerns about overlap and duplication between the CEAA and provincial EA processes are entirely misplaced, and have no legal or jurisdictional basis in the constitutional context.

In light of the foregoing analysis, the federal government should not accept or act upon the Committee’s Recommendations 7, 8 and 9.

(i) Using a Projects List rather than Triggers under the CEAA

In Recommendation 10, the Committee proposes that the Agency should “focus” the application of the CEAA on “projects of environmental significance.”⁴⁹

In Recommendation 11, the Committee proposes that the federal government should “modify” the CEAA so that EAs are triggered by a project list instead of the current “all in unless excluded” approach in the Act.⁵⁰

In Recommendation 12, the Committee proposes that the CEAA should be amended to include one or both of the following approaches: (a) confer a discretionary power upon the Agency or Minister to require EAs of projects not on the list; and (b) create a “catch-all” mechanism that requires EAs for non-listed projects which meet certain criteria.⁵¹

⁴⁷ Arlene Kwasniak, “Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency and Substitution: Interpretation, Misinterpretation and a Path Forward” (2009), 20 *Journal of Env. Law & Practice* 1.

⁴⁸ Committee Report, page 11.

⁴⁹ *Ibid.*, page 16.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

In Recommendation 13, the Committee proposes that section 5(1)(d) of the CEAA should be amended to ensure that regulatory decisions on “minor approvals” under an existing permit or licence would not trigger an EA.⁵²

Read together, these four recommendations represent an ill-advised and unjustified attempt to restructure the application of the CEAA by restricting federal EA requirements to a sub-set of projects deemed to be environmentally significant. If implemented in conjunction with the above-noted Committee recommendations to exempt projects subject to an “equivalent” provincial EA process, then these recommendations will greatly reduce the number of EAs which will be conducted under the CEAA. While this approach may indeed make the restructured federal EA process more timely and efficient (e.g. by having just a handful of EAs to conduct), it is highly problematic and fundamentally unacceptable for several reasons.

First, Recommendation 10 reflects a profound misunderstanding of the Agency’s role regarding the application of the CEAA. In essence, the applicability of the CEAA to projects and activities is not a matter that has been assigned to the Agency to decide on a case-by-case basis. Instead, the applicability of the CEAA has been statutorily determined by Parliament itself, which incorporated mandatory triggers (section 5) and discretionary triggers (sections 46, 47 and 48) in the Act. These triggers are further refined by various regulations under the CEAA which, *inter alia*, prescribe which federal permits trigger EA, which projects require comprehensive study, and which projects or activities are specifically included or excluded under the Act. Therefore, the initial decision as to which types of projects are “in” or “out” of the CEAA process has not been decided by the Agency, but by Parliament and the federal Cabinet.

Second, if, as asserted by the Committee, too many small or inconsequential projects have been subject to the federal EA process, then the appropriate policy response is to review and revise the thresholds or criteria in the implementing regulations (particularly the Exclusion List Regulation), rather than fundamentally altering the applicability of the Act. In addition, consideration should be given to expanding the use of class screenings under section 19 of the CEAA in relation to “small” recurring projects whose impacts may be avoided or minimized through well-understood and readily available mitigation measures.

Third, contrary to the opinion of the Committee, it cannot be automatically assumed that a “small” project is inherently incapable of causing any adverse environmental effects. In short, the determination of whether a project may cause environmental harm is best made at the end of the EA process, not at the beginning of the EA process (or in the absence of the EA process). Simply put, the risk of environmental impacts from a small project is largely site-specific and highly dependent upon various factors (e.g. project design, timing of construction, etc.). For example, a relatively minor project undertaken in one location (e.g. extension of a road or sewer line in a downtown location) may be unlikely to create significant environmental risks, but undertaking the same project in a different location (e.g. extension of a road or sewer line near or through a significant wetland complex) may be an entirely different story. Thus, the Committee’s *a priori* assumption that small projects are always environmentally benign defies common sense and is unsupported by evidence.

⁵² *Ibid.*

Fourth, the Committee's insistence that small projects have no environmental significance overlooks the potential for cumulative effects where a large number of projects are carried out in the same geographic area or over the same timeframe. However, the Committee makes no recommendations on how to strengthen or improve cumulative effects analysis under section 16(1)(a) of the CEAA. On this point, it should be noted that some provincial EA laws (e.g. British Columbia and Ontario) have no express requirements regarding cumulative effects analysis, which raises the question of how such laws could be deemed to be "equivalent" to the CEAA. In addition, the Committee acknowledges the value of strategic environmental assessment ("SEA"), which could be used as a mechanism for evaluating the cumulative effects of small projects in a given area. Unfortunately, the Committee declined to make any recommendations on SEA on the specious grounds that the Committee did not want to intrude on provincial jurisdiction.⁵³ This represents a clear missed opportunity by the Committee to advance SEA under the CEAA, and reflects a remarkable misunderstanding of the constitutional dimensions of EA in Canada.

Fifth, in advocating the elimination of current CEAA triggers in favour of a project list, the Committee has failed to offer any illustrative examples of what projects should be included in the list, or which criteria should be used to make this determination. Similarly, Recommendation 10 fails to define what the Committee means by "projects of environmental significance." Indeed, the Committee Report does not mention that there is already a list of environmentally significant projects called the Comprehensive Study List Regulations, and it is unclear whether the Committee's Recommendation 11 is suggesting the development of a second projects list, or the merger of the projects list with the Comprehensive Study List, or some other as-yet undefined listing approach.

Sixth, the Committee's recommendations appear to be predicated on its view that the "all in unless excluded" approach under the CEAA is too inclusive or unworkable in practice. In this regard, it should be noted that since 1975, Ontario's *Environmental Assessment Act* has generally used an "all in unless excluded" approach for public sector undertakings, rather than a specific projects list.⁵⁴ In effect, this means that an Ontario proponent who wishes its undertaking to be exempt from the Act must apply for and receive a "declaration order," which can be made subject to binding terms and conditions.⁵⁵ Thus, while the Committee criticizes the "all in unless excluded" concept, the fact remains that this approach has been utilized within the CEAA and Ontario's Act for decades. In recommending the abolition of this well-established approach, it was incumbent upon the Committee to demonstrate that the approach is fundamentally flawed, or that the listing approach is better suited to meet the public interest purposes of the CEAA. However, the Committee failed to do either in its Report.

Seventh, there is a paucity of detail in Recommendation 12, where the Committee proposes that the Agency or the Minister should have residual discretion to require EAs of non-listed projects. For example, the Committee has provided no information on whether this power is to be

⁵³ Committee Report, page 10. See also the testimony of Professor Meinhard Doelle on SEA: *Evidence*, Meeting No.12, November 22, 2011.

⁵⁴ *Environmental Assessment Act*, R.S.O 1990, c.E.18, section 3(a).

⁵⁵ *Ibid.*, section 3.2.

exercised on the Minister’s or Agency’s own initiative, or whether interested persons must apply to have a non-listed project undergo federal EA. Similarly, the Committee declined to suggest what criteria should be used to structure the exercise of this discretionary power, and it is unclear whether this power (if exercised) will require the issuance of a regulation, Ministerial order, or some other statutory instrument. In addition, the Committee has not specified any timelines to govern the process for determining whether the CEAA should apply to a non-listed project. In the result, it is likely that this proposal will create more – not less – delay, uncertainty and unpredictability within the federal EA process. Moreover, since the current federal government appears highly determined to exclude large numbers of projects from the CEAA, it seems incongruous and unrealistic to expect that the same government will readily re-subject projects to federal EA requirements. Accordingly, CELA draws no comfort from the Committee’s proposal to create a mechanism to bring exempted or non-listed projects back under the CEAA.

Eighth, the Committee’s preference for a simplistic listing approach is at odds with the constitutional context of the CEAA. As one commentator has succinctly noted, the applicability of the CEAA is not predicated on the project *per se*, but on the aspects of the project which engage federal decision-making:

I mention the List v. Category approach since the federal government has toyed with switching from a Category to a List Approach in its quest to reduce the overall number of federal assessments. However, it is not clear whether the federal government could adopt a List Approach without also including a Category type trigger. This is because, except for projects that take place entirely on federal lands, federal constitutional authority does not easily extend to projects *per se*, such as a paper mill, a mine, or a dam. Rather it extends to aspects of projects, such as impacts to a coastal or inland fishery, impacts to migratory birds or nests, transboundary impacts, or an interference with navigation. Accordingly, even if the federal government’s legislation relied on a List Approach, the legislation also would require a federal trigger, such as is now present in section 5 of the CEAA, or a mechanism comparable to a federal trigger. Because of this core difference between federal and provincial or territorial EA, there could never be complete harmonization in the sense of there being uniform EA legislation that could be adopted by the federal, provincial, and territorial governments.⁵⁶

Ninth, the Committee’s Recommendation 13 is devoid of any details about the proposed amendment to the current “law list” trigger under section 5(1)(d) of the CEAA. For example, the Committee has not defined what it means by “minor approvals” which should evade federal EA requirements. It is also unclear whether the Committee fully understood that section 24 of the Act already exists to focus or expedite EA requirements where a proponent is proposing post-approval changes in the project. In any event, assuming that there is a demonstrable need to address this matter, then the more appropriate solution may be to adjust the Law List Regulation itself, rather than statutorily amend section 5(1)(d) of the Act.

⁵⁶ Arlene Kwasniak, “Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency and Substitution: Interpretation, Misinterpretation and a Path Forward” (2009), 20 *Journal of Env. Law & Practice* 1 [footnotes omitted].

For these and other reasons, the federal government should not accept or act upon the Committee’s Recommendations 10, 11, 12 or 13.

(j) Using Previous EA Information for Other Projects

In Recommendation 14, the Committee proposes that section 24 of the CEAA should be amended to allow proponents to use information gathered in previous EAs where proponents are now proposing “similar” projects subject to a screening or comprehensive study.⁵⁷

This recommendation was apparently premised on a suggestion from a proponent that section 24 restricts the “precedent value” of EA work undertaken, or data collected, for previously assessed projects.⁵⁸ In adopting this suggestion, the Committee appears to have misconstrued the purpose of section 24, which is intended to allow proponents to assess material changes to a previously assessed project without necessarily having to re-do the original EA in its entirety. In other words, this common sense provision is intended to make the subsequent EA process more focused, timely and efficient, but it was not intended to confer “precedent value” on the initial EA documentation so that it can be “recycled” by proponents for different projects at different locations at different timeframes potentially affecting different ecosystems or communities.

More fundamentally, the likelihood, significance or duration of a project’s environmental effects is inherently site-specific and wholly dependent on the existence, sensitivity or proximity of receptors or natural resources, either on-site or off-site. The mere fact that an EA concludes that a particular project will not cause adverse effects at the proposed location (e.g. urbanized area) does not necessarily mean that the same project will not cause harm if undertaken at a different location (ecologically sensitive area or habitat for species at risk). This is precisely why the CEAA correctly requires a project-specific assessment of the various considerations set out in section 16 of the Act. This is particularly true in relation to the major industrial projects prescribed by the Comprehensive Study List Regulation.⁵⁹ To the extent that there may be a need to aggregate and rely upon EA work for recurring projects, then more extensive use of the CEAA’s existing class screening provisions may be advisable.⁶⁰

Accordingly, Recommendation 14 should not be accepted or acted upon by the federal government.

(k) Improving Aboriginal Consultation

In Recommendation 15, the Committee proposes that the federal government should “modify” the CEAA process to “better incorporate, coordinate and streamline Aboriginal consultation.”⁶¹ Similarly, in Recommendation 16, the Committee proposes that the federal government should

⁵⁷ Committee Report, page 17.

⁵⁸ *Ibid.*

⁵⁹ SOR/94-638.

⁶⁰ CEAA, section 19.

⁶¹ Committee Report, page 19.

“work with” Aboriginal groups, provinces and territories to clarify consultation roles and responsibilities in order to “minimize duplication.”⁶²

On the issue of whether these modest recommendations are sufficiently responsive to long-standing concerns about aboriginal consultation under the CEAA, CELA defers to the views of aboriginal organizations and First Nations communities across Canada.

(1) Selecting Review Panel Members

In Recommendation 17, the Committee proposes that the federal government develop guidelines for the appointment of members to review panels under the CEAA.⁶³

While this recommendation is unobjectionable in and of itself, it is ironic that the Committee saw fit to make this suggestion despite making numerous other recommendations which, if implemented, will significantly reduce the number of EAs (including review panels) under the CEAA. It should be further noted that the CEAA already stipulates the required qualifications of review panel appointees (e.g. unbiased, no conflict of interest, knowledge/experience relevant to the project’s anticipated environmental effects).⁶⁴ However, the Committee does not cite any evidence suggesting that these requirements are not working properly, nor does the Committee indicate what the proposed guidelines should contain or address in relation to the appointment of review panel members.

In addition, it is noteworthy that Recommendation 17 is found under the sub-heading of “Enhance Public Participation,” and was apparently prompted by a suggestion from a proponents’ association rather than members of the public.⁶⁵ In any event, if the Committee was serious about enhancing public participation in review panels, then the Committee should have reviewed and reported upon a variety of issues, including:

- the timing and adequacy of participant funding awards in review panel hearings;
- the timing and adequacy of public comment periods on Environmental Impact Statement guidelines proposed by federal authorities, and on the Environmental Impact Statements filed and/or amended by proponents;
- the procedures for submitting, answering and tracking Information Requests prior to review panel hearings; and
- the need for additional procedural safeguards to improve the rigor of review panel hearings (e.g. evidence taken under oath; right to cross-examine witnesses; production and disclosure of documents; exchange of expert reports, etc.).

⁶² *Ibid.*

⁶³ Committee Report, page 20.

⁶⁴ CEAA, section 33.

⁶⁵ Committee Report, page 20.

In summary, Recommendation 17 is a solution in search of a problem, and the federal government should not prioritize this recommendation for implementation when there are a number of more important reforms that are required to effectively enhance public participation under the CEAA.

(m) Considering Positive Environmental Effects

In Recommendation 18, the Committee proposes that the CEAA should be amended to require EAs to include “consideration of the positive environmental effects of a project.”⁶⁶

In CELA’s experience, proponents and Responsible Authorities do not require any further statutory direction or encouragement to address “positive” environmental effects that may be attributable to proposed projects. In fact, EAs conducted under the CEAA already routinely include broad claims about the positive ecological, social, and economic benefits that will arise from proposed projects if they are permitted to proceed. In this regard, Recommendation 18 is redundant and requires no further action from the federal government.

However, the Committee’s textual discussion which precedes Recommendation 18 appears to be aimed more at the need to re-direct EAs from their traditional focus on adverse effects to the long-term, sustainable and equitable provision of positive societal and environmental benefits. This concept, commonly known as “sustainability assessment”, has been recommended by a number of stakeholders and commentators, including Professor Robert Gibson, who appeared before the Committee and filed a written brief on this very matter.⁶⁷ CELA’s presentation to the Committee also emphasized the need for, and importance of, sustainability assessments.⁶⁸

However, if the Committee intended Recommendation 18 to address or require sustainability assessments under the CEAA, then it falls considerably short of the mark. Sustainability assessments are more than a collection of simplistic claims about the number of jobs, or the types of economic growth or development, that may be associated with a particular project. Instead, sustainability assessments are far more comprehensive and far-reaching in their scope, and generally require a number of iterative steps and essential components which, in turn, will likely require various amendments to the CEAA, including (but not necessarily limited to):⁶⁹

1. Redrafting of the CEAA purposes section to include commitments to:
 - ensuring every assessed undertaking makes a positive contribution to sustainability;
 - avoiding significant adverse environmental effects;
 - effective integration of environmental considerations from the outset of deliberations that may lead to an undertaking with significant implications for sustainability;
 - effective public engagement in assessments;
 - precaution; and

⁶⁶ *Ibid.*, page 22.

⁶⁷ *Evidence*, Meeting No. 9, November 3, 2011.

⁶⁸ *Evidence*, Meeting No. 7, October 27, 2011.

⁶⁹ Adapted from Robert B. Gibson, “Three Analyses of the Amendments to the *Canadian Environmental Assessment Act* made through the *Budget Implementation Act, 2010*”, 51 C.E.L.R. (3d) 154

- explicit sustainability-based rules governing trade-offs, including mandatory open justification and prohibition of displacement of significant adverse effects to future generations.
2. Redesign of the CEAA regime as a sustainability-focused national standard:
 - emphasize upward harmonization as a basis for inter- and multi-jurisdictional process cooperation or consolidation;
 3. Redefinition of “environment” and “environmental effects” to include social, economic, cultural and ecological/biophysical factors and the interrelations, and to include attention to cumulative effects.
 4. Refocusing basic assessment process requirements to include:
 - mandatory early announcement and consideration of purposes and the range of alternatives to be examined;
 - attention to full lifecycle of alternatives and proposed undertakings;
 - comparative evaluation of alternatives in light of sustainability-based criteria;
 - emphasis on use of strategic level assessments to address broad alternatives and cumulative effects;
 - inter- and multi-jurisdictional process cooperation or consolidation to ensure integrated attention across jurisdictional boundaries; and
 - emphasis on coordination with provincial, territorial and Aboriginal assessment regimes and harmonization upwards through consolidated processes.
 5. Establishing an overall CEAA goal: selection of the option offering best promise of multiple, mutually-reinforcing, fairly-distributed and lasting benefits, while avoiding significant adverse effects, guided by evaluation and decision criteria section setting out:
 - essential considerations for all judgments about sustainability effects;
 - provisions for case- and context-specific elaboration of sustainability-based criteria; and
 - explicit rules for decisions on trade-offs.

Since the Committee did not appear to direct its attention to these and related matters, it is necessary to reconvene the Committee and request it to specifically review and report upon the changes required to facilitate sustainability assessments under the CEAA. Until such advice is received from the Committee in a supplementary report, the federal government should refrain from accepting or acting upon Recommendation 18.

(n) Ensuring that Follow-Up Programs are Effectively Implemented

In Recommendation 19, the Committee proposes that the federal government should “explore” means to ensure that follow-up programs are being effectively implemented, and that the information obtained through such programs are available to inform future EA exercises.⁷⁰

Under the CEAA, follow-up programs are defined as initiatives designed to verify the accuracy of EA predictions, and to determine the effectiveness of measures intended to mitigate

⁷⁰ Committee Report, page 23.

environmental effects.⁷¹ If a project subject to the CEAA is permitted to proceed, then it is critically important to ensure that a sufficiently robust follow-up program is designed, reviewed, and actually implemented in order to assess whether any unanticipated environmental effects are occurring, or whether the environmental effects are greater than previously predicted within the EA documentation. Similarly, it is important to determine whether mitigation measures are as effective as originally predicted in the EA; if not, then further or better mitigation measures or corrective action may be necessary.

The intent underlying Recommendation 19 may be laudable, but the actual wording of the recommendation requires the federal government to merely “explore” the improvement of follow-up programs under the CEAA. However, the recommendation provides no further details or suggested options on how this can be achieved, nor does the recommendation specify any statutory, regulatory or administrative reforms which may be necessary to address this matter. Given that the statutory review of the CEAA was the appropriate public forum for “exploring”, developing and proposing options regarding follow-up programs, it is unclear why the Committee has opted to simply pass this important matter back to the federal government without any further guidance or direction. It is also unclear how this recommendation fits with the Committee’s preceding recommendations aimed at substantially reducing the applicability and content requirements of the CEAA, as discussed above.

If the sudden termination of the public hearings in November 2011 prevented the Committee from adequately addressing follow-up programs, then this presents an excellent reason for reconvening the Committee, and directing the Committee to develop and consult upon specific means of improving follow-up programs under the CEAA. Until the Committee’s advice is provided in a supplementary report, the federal government should take no further steps in relation to Recommendation 19.

(o) Enforcing EA Conditions and Commitments

In Recommendation 20, the Committee proposes that the federal government should “study” alternative approaches for ensuring that EA-related conditions and requirements are enforceable, and that “statutory changes” should be introduced to implement the federal government’s conclusions about this matter.

After the previous statutory review of the CEAA, the Standing Committee strongly endorsed the creation of enforceable EA permits under the CEAA for accountability and environmental protection purposes.⁷² In recent years, other commentators have advocated the creation of a specific EA permit or certificate which contains binding and enforceable terms and conditions,⁷³

⁷¹ CEAA, section 2(1), definition of “follow-up program.”

⁷² House of Commons Standing Committee on Environment and Sustainable Development, *Sustainable Development and Environmental Assessment: Beyond Bill C-9* (June 2003) at page 19.

⁷³ See, for example, Robert B. Gibson, “Three Analyses of the Amendments to the *Canadian Environmental Assessment Act* made through the *Budget Implementation Act, 2010*”, 51 C.E.L.R. (3d) 154, at page 209; CELA, *Submissions to the Senate Finance Committee re Bill C-9* (July 6, 2010) at page 3; CELA, *Submissions to the House of Commons Finance Committee re Bill C-9* (May 13, 2010) at page 2; Ecojustice, *Towards Sustainability: The Seven-Year Review of the CEAA – Submissions to the Standing Committee on Environment and Sustainable Development* (March 14, 2011) at page 10.

and CELA made this specific suggestion during our presentation to the Committee in October 2011.⁷⁴ However, despite receiving evidence from various stakeholders on this matter, the Committee declined to make any specific recommendations about EA enforceability, and instead preferred to make a vague and open-ended recommendation which effectively gives the federal government wide-ranging latitude to address this matter as it sees fit.

As noted above, the current statutory review of the CEAA was the appropriate public forum for identifying and evaluating proposed reforms of the CEAA, including provisions related to enforcement. Thus, the Committee's refusal to make any specific recommendations on EA enforceability represents another failure by the Committee to properly discharge its mandate to conduct a "comprehensive" review of the CEAA.

Again, if the Committee was unable to formulate precise recommendations due to the termination of the public hearings, then this problem can be easily rectified by directing the Committee to reconvene and to further consider and report upon the issue of EA enforceability and other key matters. Until such advice is provided in the form of a supplementary report by the Committee, the federal government should take no further steps in relation to Recommendation 20.

PART V – CONCLUSIONS AND NEXT STEPS

While the Committee's statutory mandate required a "comprehensive" review of the CEAA, the Committee undertook a hasty, narrowly focused and essentially incomplete review of the Act. Not surprisingly, the Committee's flawed hearings and unpersuasive Report produced a series of ill-conceived, fragmented and somewhat inconsistent recommendations which are primarily aimed at eliminating federal EA requirements for most projects currently caught by the Act.

From a public interest perspective, the most objectionable recommendations from the Committee are as follows:

- significantly reducing the number of projects subject to federal EA requirements by eliminating current "triggers" and using an undefined projects list (Recommendations 10 and 11);
- removing federal EA requirements where a project is subject to allegedly "equivalent" provincial EA requirements (Recommendations 7 and 8);
- reducing the number of key EA considerations that are currently required in comprehensive studies and review panels (Recommendations 3 and 4); and
- imposing unspecified "binding timelines" for the conduct of EAs under the CEAA and related steps (Recommendation 5);

If implemented, these and other recommendations would seriously impair the ability of the CEAA to effectively assess environmental effects, safeguard ecosystem and public health, and

⁷⁴ Evidence, Meeting No. 7, October 27, 2011.

promote sustainable development across Canada. The Committee's recommendations would also result in fewer opportunities for the public to participate in EA planning and decision-making processes in relation to projects currently caught by the CEAA.

Accordingly, CELA recommends that the federal government should not accept or act upon any of the Committee's 20 recommendations. Instead, the federal government should undertake the following steps in relation to the CEAA Review:

1. Direct the Committee to reconvene and continue its public hearings on the CEAA Review, and ensure that the Committee hears from all interested agencies and departments, and all stakeholders who request an opportunity to participate in the hearings.
2. Ensure that the Minister of the Environment appears before the Committee to provide the government's perspective on CEAA reform, and, more importantly, to fully describe the rationale for, and detailed content of, all CEAA reforms that the federal government is currently considering or will be proposing in the near future.
3. Direct the Committee to prepare a supplementary report summarizing the views, opinions and recommendations provided by stakeholders and governmental officials in relation to the CEAA Review, and to provide a proper rationale for any specific CEAA changes which may be recommended by the Committee's supplementary report.
4. Delay the introduction of any new bill to amend the CEAA until the Committee's supplementary report has been filed and duly responded to by the federal government. If the federal government ultimately introduces a bill to amend the CEAA, then the bill should be referred back to the Committee for further public hearings and clause-by-clause review, and the Committee should report back to the House of Commons on whether the proposed bill should be enacted, amended and enacted, or withdrawn.
5. Ensure that any statutory amendments to the CEAA proposed by the federal government are not contained within a larger budget bill since such amendments would not receive proper public or parliamentary consideration in the context of budget issues, and should be considered by the Committee rather than the Standing Committee on Finance.



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March 27, 2012