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Review of Federal Environmental Assessment Processes
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Sent via email

December 23, 2016

West Coast Environmental Law Submissions on next generation environmental assessment

Dear Sirs/Mesdames,

Please accept the following submissions on the review of federal environmental assessment (EA) processes.

West Coast Environmental Law is dedicated to safeguarding the environment through law. Since 1974 our staff lawyers have successfully worked with communities, non-governmental organizations, the private sector and all levels of governments, including First Nations governments, to develop proactive legal solutions to protect and sustain the environment. We have represented clients in relation to such environmental assessments as the proposed Site C Clean Energy project, proposed Enbridge Northern Gateway pipelines and tankers project, and proposed Kinder Morgan Trans Mountain pipelines and tankers project (Trans Mountain). For many years we had a seat at the Regulatory Advisory Committee on environmental assessment and currently have a seat at the Multi-Interest Advisory Committee appointed to assist the Expert Panel in this review.

West Coast also organized the Federal Environmental Assessment Reform Summit in May (the EA Summit),[1] at which over 30 experts from across Canada discussed leading-edge solutions to key issues in federal environmental assessment. In addition to the Summit outcomes (which we have provided you), we append to these submissions a paper by West Coast Staff Counsel Anna Johnston on the Summit outcomes, "Imagining EA 2.0: Outcomes of the 2016 Federal

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[1] Anna Johnston, *Federal Environmental Assessment Reform Summit: Proceedings* (West Coast Environmental Law: August 2016): http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf [*EA Summit Proceedings*].

Environmental Assessment Reform Summit," which is forthcoming in the *Journal of Environmental Law and Practice*.[2]

We also endorse the submissions of the Environmental Planning and Assessment Caucus,[3] which West Coast Staff Counsel Anna Johnston co-Chairs along with Jamie Kneen of MiningWatch Canada. These submissions have been prepared in tandem with, and therefore closely reflect, the EPA Caucus submissions.

Introduction

Environmental assessment in Canada is not working as it should. Problems include:

1. A subjective significance test and overall focus of federal environmental assessment on making 'bad things less bad' (i.e., mitigating significant adverse effects);
2. A myopic focus on the project level and lack of an appropriate public forum for questions of broader geographic scope, public importance or policy, such as climate change and the pace and scale of development in a region;
3. Project-level cumulative effects assessments that have allowed unsustainable cumulative effects to occur despite Canada having environmental assessment since the 1970s (see Figure 1);
4. The ability for the federal government to delegate its responsibility for undertaking (and therefore undermine its ability to fully ensure the quality of) environmental assessments;
5. Processes and decision making that do not uphold the Crown's obligations to Indigenous peoples under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[4] or the Canadian Constitution;
6. A demonstrated inability to ensure that Canada meets its international obligations to mitigate climate change under the Paris Agreement;[5]
7. Opaque decision making that undermines credibility and public trust by allowing decision-makers to justify significant effects behind closed doors with no criteria or transparent reasons for decision;
8. Limited public participation processes that begin too late, end too early, do not ensure that the public can meaningfully influence outcomes (or see that influence if it has occurred) and often treat the public more as a nuisance than a potential source of wisdom and information;
9. The lack of a publicly-searchable database of all information related to all federal environmental assessments and flow of that information between assessments;

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[2] Anna Johnston, "Imagining EA 2.0: Outcomes of the 2016 Federal Environmental Assessment Reform Summit" (forthcoming) 30:1 *J Envtl L & Prac*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2843098 [*Imagining EA 2.0*].

[3] Environmental Planning and Assessment Caucus, *Towards a Next Generation of Environmental Assessment: Submission to the Expert Review of Federal Environmental Assessment Processes* (December 2016) [Caucus Submission].

[4] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007).

[5] *Paris Agreement*, being an Annex to the *Report of the Conference of the Parties on its twenty-first session, held in parties from 30 November to 13 December 2015 – Addendum Part two: Action taken by the Conference of the Parties at its twenty-first session*, 29 January 2016, Decision 1/CP.21, CP, 21st Sess., FCCC/CP/2015/10/Add.1 at 21-36, online: UNFCCC http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf.

10. Inadequate follow-up to ensure proponent compliance, assess effects projections and encourage long-term sustainability (including no obvious tracking of proponent commitments or approval conditions, opaque and inadequate monitoring and enforcement, lack of available follow-up reports, and misuse of adaptive management);
11. No requirement to assess alternatives other than alternative means (which greatly undermines EA's function as a planning tool); and
12. An emphasis on project approval rather than learning.

The shortcomings in the application of EA are accentuated differently among the three responsible authorities under the *Canadian Environmental Assessment Act, 2012*[6] (CEAA 2012) – the Canadian Environmental Assessment Agency (the Agency), Canadian Nuclear Safety Commission (CNSC) and National Energy Board (NEB) – which illuminates a further issue: inconsistency in the application of CEAA 2012 among the three authorities. Public participation opportunities demonstrate this inconsistency well: CEAA 2012 only requires review panels to hear from persons who are "directly affected" by the proposed project or who have relevant information or expertise to contribute,[7] and the NEB and Agency appear to have much different interpretations of "directly affected." Whereas NEB guidance states that general interests is not typically sufficient to establish someone as directly affected and that a person seeking to participate before it must establish a personal impact and a measure of proximity or connection with the proposal,[8] the review panel appointed under CEAA 2012 for the proposed New Prosperity Mine applied a broader set of factors to determine whether to grant applicants standing to participate in that EA, and the review panel for the proposed Site C Clean Energy project did not apply a test at all. As a result of these different interpretations, the NEB review panel for the proposed Shell Jackpine Mine Expansion project only granted participatory entitlements to 16 of 852 applicants, the New Prosperity Mine panel granted interested party or intervener status to all 51 applicants, and the Site C panel accepted written and oral comments from every person who submitted or made them.[9]

Many of the shortcomings with federal environmental assessment processes are not new. As Johnston notes, while these problems have been greatly heightened by CEAA 2012:[10]

> "… the previous Canadian Environmental Assessment Act (CEAA) bore its fair share of criticism. In fact, in 2010 a special issue of the Journal of Environmental Law and Practice, based on its environmental law conference, "The Demise of Environmental Assessment in Canada," was dedicated to how CEAA could be improved. According to the editors of that issue, conference attendees concluded that during the CEAA era, "the situation regarding

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6 SC 2012, c 19, s 52 [CEAA, 2012].

7 CEAA 2012, ss 43(1)(c), 2(2).

8 See National Energy Board, "Participation in a Facilities Hearing", online: NEB https://www.neb-one.gc.ca/prtcptn/hrng/prtcptnthrhrnggdncs52_2-eng.pdf#https://www.neb-one.gc.ca/prtcptn/hrng/prtcptnthrhrnggdncs52_2-eng.pdf.

9 See, e.g., Shaun Fluker and Nitin Kumar Srivastava, "Public Participation in Environmental Assessment under the *Canadian Environmental Assessment Act 2012:* Assessing the Impact of 'directly affected'" (2016) 29 *J Envtl L & Prac*, 65 at 67, 79; Meinhard Doelle, "CEAA 2012: The End of Federal EA as We Know It?" (2012), 24 *J Envtl L & Prac* 1, at 9, and Richard D. Lindgren, "Going Back to the Future: How to Reset Federal Environmental Assessment Law – Preliminary Submissions from the Canadian Environmental Law Association to the Expert Panel regarding the *Canadian Environmental Assessment Act, 2012* at 14-16: http://www.cela.ca/sites/cela.ca/files/1083-CELA%20Preliminary%20Submissions%20to%20the%20Expert%20Panel%20(Nov%207,%202016).pdf

10 See, e.g., Anna Johnston, *Canada's Track Record on Environmental Laws 2011-2015* (Vancouver, BC: West Coast Environmental Law and Centre Quebecois du droit de l'environment, 2015) at 4-7.

> EA legislation and practice in Canada is dire." As Gibson, Doelle and Sinclair note, Canada's first generation environmental assessment regimes have made important contributions to the practice of environmental assessment in Canada, but have failed to live up to expectations and achieve their goals. In other words, it is not enough to undo the changes made to environmental assessment law and practice in 2012; Canada must take advantage of this opportunity to implement leading-edge thinking on environmental assessment and build a visionary new environmental assessment framework that works for the environment, Indigenous peoples, the public, democracy and the economy.
>
> "Such a framework will require substantial legislative change."[11]

We therefore recommend the replacement of CEAA 2012 with a new next generation environmental assessment law and accompanying policy guidance. For decades, there has been much written on the state of environmental assessment practices in Canada and beyond and recommendations for reform. This review is a unique opportunity to launch Canada into the next generation of environmental assessment and build a regulatory regime that works for nature, climate and communities.

Next generation environmental assessment, as proposed here as well as by many commentators on EA, is comprised of an integrated package of leading-edge reforms. Unless all its parts are working well, environmental assessment processes and outcomes will not deliver as promised. It is like a car: you may have a powerful engine, but if the transmission is slipping the ride may be less powerful, or even rough. Fix the transmission, but if the fuel injectors are clogged you will still have performance issues. It is the same with EA: for processes that work for the public and Indigenous peoples as well as for industry, and for outcomes that are wise and trusted, the entire package must be reformed.

In these submissions, we build on the 12 Pillars of Next-Generation Environmental Assessment that came out of the EA Summit to provide concrete recommendations for reform, including a proposed governance model for implementing those reforms. Wherever possible and appropriate, we endorse rather than repeat submissions that have already been made to you with which we agree. Thus while we emphasize the need to reform the entire EA package, here we focus on the following areas:

1. Ensuring a strong federal role and encouraging collaborative assessment
2. Implementing UNDRIP and moving down the path of reconciliation
3. Aiming for sustainability, credibility, accountability and fairness
4. Emphasizing regional and strategic EA
5. Triggering regional, strategic and project-level EA
6. Ensuring the best available information throughout all stages
7. Providing meaningful public participation opportunities
8. Decarbonizing in accordance with Canada's climate goals
9. Ensuring sustainability after the assessment
10. The package: a governance model to enable and encourage co-governance and regional and strategic assessment

[11] Johnston, *Imagining EA 2.0*, *supra* note 2 at 3-4.

Note that, in these submissions, “the legislation” refers to the statute(s) that will be used to legally enable and implement an integrated package of next generation EA reforms.

Ensuring a strong federal role and encouraging collaborative assessment

Recommendation 1: That the legislation provide for a strong federal government role in all federal environmental assessments and decisions, and not permit it to substitute provincial processes or decisions for federal ones.

Recommendation 2: That the legislation establish mechanisms for cooperation between federal authorities and decision-makers and provincial and Indigenous governments on processes, decisions and follow-up at all levels.

Recommendation 3: That the legislation establish an independent tribunal and provide for mediation and arbitration where governments are not able to achieve consensus or when there are concerns that the United Nations Declaration on the Rights of Indigenous Peoples has not been appropriately implemented.

Recommendation 4: That the legislation recognize federal authority to conduct regional-scale assessments, produce scenario-based regional and strategic assessment outcomes and tier those outcomes with project-level EA even where collaboration with provincial jurisdictions cannot be achieved.

Guidance should also be developed to support new legislative requirements.

We endorse the EPA Caucus submission on multijurisdictional assessment. The federal government must play a strong role in all aspects of EA processes and decisions at all levels in order to best understand the all the implications of its decisions, ensure that processes are conducted to the highest standards, help the public trust decisions, and ensure that it is upholding its international and constitutional obligations to Indigenous peoples.

Federal jurisdiction

The federal government has broad jurisdiction to require EAs. As the former *Canadian Environmental Assessment Act* reflected, and as the Supreme Court of Canada held in *Friends of the Oldman River Society v Canada (Minister of Transport)*:

> “Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making… As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development…”[12]

Broadly speaking, there are three main phases in environmental assessment: information-gathering, decision-making and follow-up. Once a federal EA is initiated, it is well established that the federal government may gather information on a broader range of effects than those related to the EA trigger or a particular head of power. Moreover, when you consider the cumulative and interactive nature of effects, it is difficult to imagine effects of any significance that do not contribute to cumulative impacts on Indigenous peoples, on navigation, fish and fish habitat, or

[12] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992 CanLII 110 (SCC) at 71, http://canlii.ca/t/1bqn8.

at-risk species, that are transboundary in nature (e.g., climate) or that impact peace, order and good governance. As the EPA Caucus submission notes:

> "[T]here is a significant gap between the perceived and real constitutional constraints on the federal government's ability to base its project, strategic (SEA), and regional (REA) assessment processes and post-assessment decision-making on the principle of sustainability… For REA and SEA, there seems to be an implicit assumption that beyond the assessment of federal policies, plans, and programs, strategic and regional assessments can only be carried out with the cooperation of provinces. What has been missing from the discussion is a clear separation of the information gathering and assessment process from the decision-making process. Assuming that REAs and SEAs are primarily intended to offer appropriate background and context for valid federal policy-making and for project assessments and project decision-making, there is no reason to conclude that even a "federal only" REA or SEA would be challenged successfully on constitutional grounds, as long as the REA and SEA include issues within federal jurisdiction and are ultimately used to inform decisions that are within federal jurisdiction."[13]

Thus while cooperation with all jurisdictions (including provinces) remains the ultimate goal (see below), the federal government should not let lack of provincial cooperation be an impediment to conducting REAs and SEAs beyond those currently covered by the Cabinet Directive.[14] Rather, the legislative framework should recognize federal jurisdiction to conduct regional-scale assessments and, as is discussed in the "Triggering" section below, should set out triggers for REA and SEAs. Absent provincial cooperation, the federal government should still focus its attention more on the regional and strategic levels. In the "Governance" section below, we discuss how.

Multijurisdictional cooperation

In the multijurisdictional context, the goal for all assessments (regional, strategic and project-level) and decisions should be collaboration. The legislation should facilitate and encourage cooperation with provincial and Indigenous governments, and the meaningful engagement of local governments and co-governance boards.

Substitution should not be an option. First, regardless of how detailed an agreement to substitute a provincial EA for a federal one may be, some important details will not be captured. Institutional culture is one obvious example: if the provincial entity does not have the same respect for public participants, Indigenous governments or intervenors as its federal counterpart, for example, there will almost certainly be a difference in the conduct of engagement processes and the incorporation of engagement outcomes into interim and final decisions between federal and provincial processes. In other words, no memorandum of understanding can mitigate a poor institutional culture. Second, federal perspectives and expertise in areas under federal jurisdiction are important for ensuring the due consideration and protection of those areas (such as fisheries, navigation and reconciliation with Indigenous peoples), and federal departments and agencies with relevant expertise are likely to be more deeply engaged when the federal government is a responsible authority for the assessment. Third, a nation-to-nation relationship with Indigenous peoples with

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[13] Caucus Submission, *supra* note 2 at 4-5.

[14] Government of Canada, *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* (Ottawa, 2010): http://www.ceaa.gc.ca/Content/B/3/1/B3186435-E3D0-4671-8F23-2042A82D3F8F/Cabinet_Directive_on_Environmental_Assessment_of_Policy_Plan_and_Program_Proposals.pdf.

regards to environmental assessment is impeded by delegation of process or final results to the provinces.

The proposed Prosperity Gold-Copper Mine (Prosperity) exemplifies how two different assessment processes under different jurisdictions can differ in quality and lead to quite different results. Prosperity triggered an EA under both BC and federal environmental assessment laws, and the assessments were conducted separately from each other: BC's by the Environmental Assessment Office (EAO), and Canada's by a review panel. The BC EA resulted in an approval in 2009, whereas the federal government rejected the proposal in 2010. An analysis of the two EA processes found a number of divergences that account for the different results, including in process, quantity and quality of information considered, expertise of the reviewing bodies, and determination of significance (the report calls the BC EAO significance determinations "highly subjective and malleable").[15]

To safeguard against slipping downward to a less robust standard, the federal government should be engaged in all EAs within its jurisdiction. The next question, then, is how to avoid duplication and strive for a "one project, one assessment" approach while maintaining a strong federal role.

As noted above and as recommended in the EA Summit outcomes, the federal government should seek to harmonize assessments to the highest standard, collaborating on processes and decisions with the other relevant jurisdictions wherever possible.[16] Harmonizing upwards means that where processes are conducted jointly, the highest standard of each process is selected. For example, if BC, Canada and Indigenous governments were to agree to one collaborative assessment, the participation processes that would result in the most meaningful opportunities to have a say and influence decisions from among the collaborating governments should be applied.

Cooperation may take different forms. For example:

1. Jurisdictions collaborate on one process, with consensus-based interim and final decisions (these could include the creation of public consultation and Indigenous engagement processes, developing terms of reference, appointment of review panels and making final decisions). For an example of a collaborative assessment between federal, provincial and Indigenous governments, see the Voisey's Bay Mine and Mill project.[17]
2. Jurisdictions run parallel separate assessments, arranging to have processes occur at the same time and potentially sharing some elements (e.g., deadlines are the same and public participation processes are jointly managed), and collaborate on final decisions, striving to reach consensus.
3. Jurisdictions run parallel separate assessments (with some shared components, as above) or one collaborative assessment, but with each jurisdiction making separate decisions on matters within their jurisdiction.

The last resort should be separate processes, run independently of each other.

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[15] Mark Haddock, *Comparison of the British Columbia and Federal Environmental Assessments for the Prosperity Mine*, (2011: Northwest Institute) at 5: http://northwestinstitute.ca/images/uploads/NWI_EAreport_July2011.pdf.

[16] Johnston, *EA Summit Proceedings, supra* note 1 at 7.

[17] Canadian Environmental Assessment Agency. Ministry of Environment. Voisey's Bay Mine and Mill Environmental Assessment Panel Report. Government of Canada, Jan. 1997: http://www.ceaa.gc.ca/default.asp?lang=En&n=0A571A1A-1.

In general, the first model, collaboration, should be the preferred approach. However, it should be noted that the Crown's constitutional obligations to Indigenous peoples will not permit it to make unilateral decisions that impact Aboriginal title and rights or treaty rights. Thus, even where federal/provincial and Indigenous jurisdictions conduct separate, parallel assessments, a process of government-to-government dialogue to reconcile the outcomes of the respective assessments must occur, and the outcomes must be consistent with the Crown's Constitutional and international legal obligations.

To assist with collaborative efforts, the legislation should establish an independent tribunal to assist with dispute resolution, for example, where jurisdictions are not able to achieve consensus, reach different decisions about whether a project should proceed or conditions to be imposed, or when there are concerns that UNDRIP has not been appropriately implemented. The tribunal should have a range of dispute resolution options available to assist the parties, including mediation services, and expertise in both Indigenous and Canadian law.

Implementing UNDRIP and moving down the path of reconciliation

Recommendation 5: The federal environmental assessment regulatory framework should establish mechanisms for federal government collaboration with Indigenous governments on processes and decisions on a nation-to-nation basis and in a manner that moves Canada down the path of reconciliation with Indigenous peoples. To achieve these goals, the regulatory framework must be flexible and allow for different means of process and decision collaboration.

Related to the above and as stated in Summit Pillar 5 (co-governance with Indigenous nations), next generation environmental assessment must ensure that processes occur and decisions are made on a nation-to-nation basis with Indigenous peoples, in accordance with UNDRIP and in ways that move Canada down the path of reconciliation with Indigenous peoples.[18]

Indigenous jurisdiction and authority over the environment originate from Indigenous peoples' own legal orders.[19] Striving for reconciliation and engaging with Indigenous peoples on a nation-to-nation basis requires actively acknowledging that Indigenous laws and legal orders predate contact with settlers and continue to exist today. The Truth and Reconciliation Commission (TRC) Calls to Action require the recognition of Indigenous laws. Recognizing constitutional space for Indigenous laws and legal orders in environmental decision making is an integral element of nation-to-nation and reconciliation dialogues. This includes the collaborative development of specific legislative proposals that uphold Indigenous laws and jurisdiction in environmental assessment.

Consultation is thus important, but not enough: implementation of the standard of free, prior and informed consent will require the collaborative development of processes and institutions of co-governance that recognize the decision-making authority of Indigenous peoples. Co-governance can take different forms and a new legislative framework may build on models like the ad-hoc

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[18] Johnston, *EA Summit Proceedings*, *supra* note 1 at 8.

[19] The Canadian constitution also recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada", which includes governance and decision-making rights, whether flowing from unextinguished aboriginal rights and title (including inherent title and governance rights), modern (land claims and self-government) treaties, or as an incident of historic treaty rights.

collaborative consent framework proposed by Phare, Miltenberger and Innes,[20] such as that used in the EA of the Voisey's Bay Mine and Mill project pursuant to a Memorandum of Understanding between Canada, Newfoundland and Labrador, the Labrador Innuit Association and the Innu Nation.[21] We also have the benefit of the rich experience of existing co-management arrangements in the north, such as the Mackenzie Valley Impact Review Board and the Nunavut Impact Review Board. Regardless of the form, by requiring agreements with impacted Indigenous peoples about EA processes *and* outcomes to be in place before projects may proceed, new legislation can establish a powerful legal incentive for collaboration and innovation in co-governance of EA..[22]

Indigenous peoples must be able to collaborate both on the *design* of EA and decision-making processes, as well as on the implementation of those processes and decisions. To enable that design collaboration, the federal regulatory framework must be flexible and allow for different means of process and decision collaboration.

Below, we recommend a federal governance model that would allow for the creation of different process and decision-making structures depending on the provincial and Indigenous governments involved.

Aiming for sustainability, credibility, accountability and fairness

Recommendation 6: That the scope of factors to be considered in federal EA be broad and include all impacts, benefits, risks and uncertainties on all environmental factors (not just those within federal jurisdiction) as well as human health and long and short-term socio-economic well-being.

Recommendation 7: That, to help ensure that EA can result in the delivery of the most desired outcomes, legislation requires consideration of alternatives to the project.

Recommendation 8: That the test in EA be: which option from among a range of alternatives is the most likely to result in lasting, equitably distributed net environmental, social and long-term economic benefits?

Recommendation 9: That the legislation set out generic sustainability-based criteria and trade-off rules to guide EA approval and require the development of case-specific criteria during assessments. Guidance should also be developed to assist in the development of specific criteria and their application during assessments.

Recommendation 10: That the legislation provide a right of appeal for interim and final decisions and establish an independent tribunal to hear such appeals.

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[20] Merrell-Ann Phare, Michael Miltenberger and Larry Innes, "Collaborative Consent: Considering a framework for building nation-to-nation relationships in environmental assessment" (Presentation delivered at the Federal Environmental Assessment Reform Summit, 2 May 2016), slide 2, online: https://d3n8a8pro7vhmx.cloudfront.net/envirolawsmatter/pages/290/attachments/original/1461534532/Phare_Miltenberger_Innes_Beyond_EA_Final.pptx.pdf?1461534532.

[21] Joint Environmental Assessment Panel, "Appendix C: Memorandum of Understanding" *Voisey's Bay Mine and Mill Environmental Assessment Panel Report* (1997), online: https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=0A571A1A-1&offset=22&toc=hide.

[22] Johnston, *Imagining EA 2.0, supra* note 2; and Phare, Miltenberger and Innes, *supra* note 19. Note that jurisdictions may retain independent decision-making while adhering to such an approach; Phare, Miltenberger and Innes describe how the Memorandum of Understanding for the Voisey's Bay environmental assessment required each jurisdiction to make its own decision, but only after the jurisdictions consulted with each other with an aim of arriving at consistent decisions: Phare, Miltenberger and Innes, *supra* note 19, slide 19.

In her mandate letter, the Minister of Environment and Climate Change has been directed to:

> … [I]mmediately review Canada's environmental assessment processes to regain public trust and help get resources to market and introduce new, fair processes that will:
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> - restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while also working with provinces and territories to avoid duplication;
> - ensure that decisions are based on science, facts, and evidence, and serve the public's interest;
> - provide ways for Canadians to express their views and opportunities for experts to meaningfully participate; and
> - require project advocates to choose the best technologies available to reduce environmental impacts.[23]

In our view, achieving public trust, robust oversight and thoroughness in EA, ensuring that decisions are based on science, facts and evidence and serve the public's interest, and providing meaningful participation will require a transformation in the objectives and process of decision-making. Currently, the test focuses narrowly on reducing or avoiding biophysical harm and entails both the subjective determination of significance and, where significant impacts are identified, a justification determination by Cabinet behind closed doors. Problems with the test include: 1) the lack of acknowledgement of the interconnectedness of the biophysical environment and human health, social well-being and economic sustainability; 2) the room for great subjectivity in the significance determination; 3) the focus on making bad things less bad, rather than encouraging the greatest number and most equitably distributed of net gains; and 4) that the opaque justification determination can undermine the entire process by through Cabinet's unfettered ability to override sound information and Indigenous and public concerns for any reason, including political considerations.

The test

As Gibson notes and as was formally recognized by the World Commission on Environment and Development in the 1987 Brundtland report, socio-economic factors and the biophysical environment are interdependent, and the well-being of both are required for sustainability to be achieved.[24] Further, the pursuit of sustainability should seek net benefits rather than the avoidance of harms, and those benefits, along with any impacts, risks and uncertainties, should be equitably distributed among geographies (communities) and generations. In other words, sustainability means that one community should not bear a disproportionate burden of development while another enjoys a greater share of the benefits, nor should future generations be made to pay the price of development by which the current generation is enriched.

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[23] Canada, Office of the Prime Minister, "Minister of Environment and Climate Change Mandate Letter", by Rt. Hon. Justin Trudeau, PC, MP, Prime Minister of Canada (Ottawa: November 2015), online: http://pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter [McKenna Letter].

[24] G.H. Brundtland (chair), World Commission on Environment and Development, *Our Common Future* (New York: United Nations, 1987): https://en.wikisource.org/wiki/Brundtland_Report; Robert B. Gibson, "Foundations: Sustainability and the requirements for getting there," in *Sustainability Assessment: Applications and opportunities,* Robert B. Gibson (ed), (New York: Routledge, 2017) at 4-13 [Gibson, *Sustainability Assessment*].

The consideration of alternatives (not just alternative means of carrying out the project) is key. As Gibson notes:

> "We want to act on our best options for progress towards a durable and desirable future. For that we need to identify and compare the possibilities available. Ideally, all sustainability assessment would be about comparing the options in light of well-specified sustainability criteria. In our imperfect world, versions of the approach can and have been applied in evaluations of a single proposal or an existing management regime with no other options on the table. These have been constrained exercises. However, in even these cases there are some choices among options. With the proposed plan or project, the underlying question is whether it is likely to contribute more to sustainability than what would persist without it (the null alternative). With the existing management regime, a useful review would inevitably need to consider, from a sustainability perspective, whether continuing with present structures and practices would be preferable to a comprehensive reconceptualization and rebuilding, or some package of reforms to address gaps and deficiencies, enhance strengths and expand or diminish the scope or scale. The initial assessment of the one undertaking would then point to alternatives for a second stage of deliberations. The principle remains that we should be seeking in all cases to find the best option for moving us toward lasting wellbeing."[25]

Consideration of alternatives is not new: along with environmental effects and their significance, public comments and mitigation measures, the original *Canadian Environmental Assessment Act* (CEAA) required that every environmental assessment consider "any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered."[26] To help ensure that EA can result in the delivery of the most desired outcomes, EA legislation should require consideration of alternatives to the project.

Thus the test in EA should be which option from among a range of alternatives is the most likely to result in lasting, equitably distributed net environmental, social and long-term economic benefits. In addition to aiming for sustainability outcomes, the selection of the option from among a range of alternatives that results in the most gains will help shift the mindset within EA from being about how to convince decision-makers that a proposal will not cause significant harm, but striving for the greatest amount of lasting, equitably distributed benefits, increasing EAs efficacy as a planning tool. In other words, rather than being about demonstrating harm mitigation, EA will encourage a race to the top.

To enable the consideration of net environmental, social and long-term economic benefits, the scope of environmental factors to be considered in assessments should be broad and include all impacts, benefits, risks and uncertainties on all environmental factors (not just those within federal jurisdiction) as well as human health and long and short-term socio-economic well-being.

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[25] Gibson, *Sustainability Assessment, ibid* at 33.

[26] SC 1992, c 37, s 16(1)(e).

Justification

Problems with the justification determination were exemplified by the EA of the proposed Site C project. Site C, a hydroelectric dam in northeast BC that would flood over 100 kms of riverbank (including tributaries), including the already decimated territory of Treaty 8 First Nations (see Figure 1) and require expropriation of private homes and farmlands, was exempted from a deep “need for” analysis by the BC Utilities Commission (BCUC) in 2010 (in 1983, the BCUC had found that Site C would result in significant adverse impacts and that the proponent, BC Hydro, had not demonstrated that its power was necessary in the near future. It recommended that BC Hydro explore BC’s potentially significant geothermal potential and re-propose Site C in a few decades, if and when it still perceived the energy to be necessary). Much like the BCUC before it, in 2014 an EA review panel appointed jointly by the federal and BC governments found that the project would have significant adverse impacts on the environment and Aboriginal peoples that could only be justified in light of an unambiguous need for the power. It further found that BC Hydro had not proven that there was unambiguous need for Site C’s power and recommended that the project go before the BCUC to determine whether there was that need before any approval be issued. Despite the review panel’s recommendations, the federal and provincial governments approved Site C, finding that the significant adverse impacts were “justified in the circumstances.”

It is an understatement to say that the Site C approval undermines the credibility of federal EA processes. Many participants, some of whose homes and lands would be flooded by the reservoir, had spent countless evenings and weekends fundraising and preparing to engage meaningfully in the process in good faith that their participation had the ability to influence the ultimate decision. The ‘black box’ in which Cabinet justified Site C’s significant impacts despite the recommendations of the review panel has demonstrated that decisions need not be based on science, facts and evidence, but on other factors, and may even be pre-determined at the outset.

To help ensure that EA processes and decisions are credible and based on sound information, we recommend that the significance and justification determinations be replaced by sustainability-based criteria and trade-off rules. Such criteria and trade-off rules have been applied in environmental assessments in Canada before and have resulted in both project approvals and rejections.[27] They could appear in the legislation either as decision-making criteria (i.e., as criteria and rules the decision-maker must apply when making his or her decision) or as project approval criteria and rules (i.e., preconditions the undertaking must meet in order to be approved).

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[27] See, e.g., Canadian Environmental Assessment Agency. Ministry of Environment. Joint Review Panel Report: Foundation for a Sustainable Northern Future. Government of Canada, Dec. 2009: http://www.ceaa.gc.ca/155701CE-docs/Mackenzie_Gas_Panel_Report_Vol2-eng.pdf.

Canadian Environmental Assessment Agency. Ministry of Environment. Joint Review Panel Report: Kemess North Copper-Gold Mine Project. Government of Canada, Sept. 2007: http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_3394/24441E.pdf.

Canadian Environmental Assessment Agency. Ministry of Environment. Voisey's Bay Mine and Mill Environmental Assessment Panel Report. Government of Canada, Jan. 1997: http://www.ceaa.gc.ca/default.asp?lang=En&n=0A571A1A-1.

Canadian Environmental Assessment Agency. Ministry of Environment. Lower Churchill Hydroelectric Generation Project: Report of the Joint Review Panel. Government of Canada, Aug. 2011: http://www.ceaa.gc.ca/050/documents/53120/53120E.pdf.

Canadian Environmental Assessment Agency. Ministry of Environment. Joint Review Panel Report: Environmental Assessment of the Whites Point Quarry and Marine Terminal Project. Government of Canada, Oct. 2007: http://www.ceaa.gc.ca/B4777C6B-docs/WP-1837_e.pdf.

We recommend the following generic criteria:[28]

1. **Ecological impacts, benefits, risks and uncertainties:** Biophysical systems should be adequately protected throughout all phases of development, construction, operation and decommissioning.[29]
2. **Economic impacts, benefits, risks and uncertainties:** Proposals should provide net economic benefits to the people in the area surrounding it, in the broader region or province, and in Canada.
3. **Social and cultural impacts, benefits, risks and uncertainties:** Proposals should contribute to community and social well-being of all potentially affected people.
4. **Health impacts, benefits, risks and uncertainties:** Proposals should preserve and enhance the health of all potentially affected people.
5. **Intragenerational equity:** Benefits, effects, risks and uncertainties, as well as choice availability, should be fairly distributed among potentially affected individuals, communities, regions and other interests.
6. **Intergenerational equity:** Proposals should preserve or enhance the ability of future generations to benefit from the environment and natural resources in potentially affected areas.
7. **Resource maintenance and efficiency:** Proposals should reduce threats to socio-ecological integrity by reducing extractive damage, avoiding waste and minimizing overall material and energy use.
8. **Integration:** The principles of sustainability should be applied together, seeking mutually supportive benefits and multiple gains.

It is unlikely that most proposals will result in net gains in all areas. To help achieve progress towards sustainability, next generation environmental assessment therefore must first seek to avoid trade-offs (which Gibson defines as "entwined gains and losses"[30]) and ensure careful attention to unavoidable trade-offs through the application of trade-off rules. As with sustainability criteria, the legislation should establish generic trade-off rules and provide for the development of specific trade-off rules on a case-by-case basis.

Generic trade-off rules should include:[31]

1. **Maximum net gains:** Trade-offs must deliver net progress towards sustainability, seek mutually reinforcing, cumulative and lasting contributions, and favour achievement of the most positive feasible overall result while avoiding significant adverse effects.

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[28] Adapted from Gibson, *Sustainability Assessment*, *supra* note 22 at 11-12; and Meinhard Doelle, "The Lower Churchill Panel Review: Sustainability Assessment under Legislative Constraints" (August 2014) at 13-15, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480368. An updated version of this paper appears in Robert B. Gibson, *Sustainability Assessment: Applications and opportunities* (Routledge, New York: 2017).

[29] We recommend that measurable management objectives for a valued ecosystem components be identified through REAs or regional-strategic EAs (R-SEAs) and that these be based on low risk benchmarks for the valued components. Trade off analysis should permit these low risk benchmarks to be exceeded only in exceptional circumstances where the net contribution to sustainability from the scenario remains positive, and the likelihood of these benefits being achieved is high. In general, ecological thresholds identified through REAs or R-SEAs must not be exceeded.

[30] Gibson, *ibid* at 34.

[31] Adapted from Gibson, *Sustainability Assessment*, *supra* note 22 at 11-12; and Meinhard Doelle, "The Lower Churchill Panel Review: Sustainability Assessment under Legislative Constraints" (August 2014) at 13-15, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480368. An updated version of this paper appears in Robert B. Gibson, *Sustainability Assessment: Applications and opportunities* (Routledge, New York: 2017).

2. **Avoidance of significant adverse effects:** A significant adverse effect can only be justified if the alternative is the acceptance of a more significant adverse effect on a particular value in a null scenario (i.e., without the proposed undertaking). Trade-offs cannot entail further decline or risk of decline in a major area of existing concern, if it endangers prospects for resolving global, national or local priorities, or if it deepens already significant problems. Incomplete mitigation of significant adverse effects is not acceptable if stronger mitigation efforts are feasible.
3. **Ensuring fairness:** No current or future generation or geographic region or community should bear an unreasonable share of the adverse effects, risks or costs, or be denied a reasonable share of the benefits, and the proposal should make a net positive contribution to environmental, long-term economic and social sustainability.
4. **Explicit justification:** All trade-offs must be accompanied by an explicit justification based on openly identified, context-specific priorities as well as the sustainability decision criteria, trade-off rules and legal tests regarding the justification of infringements of aboriginal title and rights.
5. **Open process:** Compromises and trade-offs must be addressed and justified through open processes that meaningfully engage all jurisdictions, rights-holders and stakeholders.

In conducting trade-off analyses the Crown must act constitutionally. The special constitutional character of Indigenous peoples' title and rights should be taken into account in weighing trade-offs, and infringements of constitutionally protected rights should be avoided rather than justified wherever possible.

Right of appeal

Key to ensuring fairness, credibility and accountability in assessments is the public and Indigenous peoples' ability to hold decision-makers to account, by being able to challenge interim and final decisions before an impartial arbitrator. Ability to challenge decisions means both that there is a proper forum for doing so, and that the forum is accessible. Federal courts can be cost prohibitive, onerous and lengthy, especially when proceeding by judicial review. The right to appeal interim (process) and final decisions, and when a party is able to file such an appeal, should be clearly set out in the legislation to avoid ambiguity, enable access and ensure timely resolution. As Summit pillar 7 recommends, the legislation should establish an impartial adjudicatory body to hear appeals.[32] It should also make obtaining injunctions on any activities (including exploratory) related to undertakings being appealed easily accessible, without onerous requirements for security or proof of irreparable harm.

Emphasizing regional and strategic EA

Recommendation 11: That the legislation and guidance encourage regional and strategic EAs wherever possible and tiering of all levels of EA, emphasize collaborative approaches to regional and strategic assessments, and establish requirements for periodic updates to those assessments.

Recommendation 12: That in addition to legislated criteria and triggers for when a regional or strategic EA is required, the legislation include an "off ramp" in project-level EA, whereby a reviewing body can send regional or policy-scale matters to the Minister for consideration at the regional or strategic level.

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[32] Johnston, *EA Summit Proceedings*, *supra* note 1 at 9.

Recommendation 13: That regional and strategic assessments be conducted by experts appointed by the federal government in collaboration with Indigenous (and provincial, where possible) governments.

Recommendation 14: That the legislation establish a central authority and allow for regional co-governance boards and review panels.

Recommendation 15: That the legislation establish an independent expert advisory committee to provide strategic advice on all levels of EA, and especially on regional and strategic EA.

Recommendation 16: That the legislation allow for cost recovery from proponents either through fees (e.g., "buying" a share of the regional cumulative effects assessment) or taxes.

Environmental assessment is a planning tool. At its best, it is a planning tool for sustainability at the regional and strategic level, and not simply a tool for planning project proposals.

The current focus on project-level EA has significantly contributed to at least two major failings of federal environmental assessment as a planning tool: first, the failure to properly understand and avoid undesirable cumulative effects; and second, the lack of a proper forum for public deliberation of policy-level issues like climate change, the pace and scale of development within a region, or whether Canada ought to be pursuing bringing its oil to tidewater. The first has led to some regions bearing a disproportionate burden of Canada's resource development through unsustainable cumulative effects (see Figure 1, below, for an example), while the second means that bigger-picture questions must be raised in project EAs, where there is not sufficient time or means of properly addressing them.

Planning for sustainability involves two basic steps: first, finding a strategic vision for the future which contains desired economic, social and environmental outcomes (within ecological limits); and second, setting out practical steps or pathways for implementing that vision and achieving those desired outcomes.[33] Once a plan is in place, it is then necessary to ensure that it is applied during project-level decision making. As the Summit Pillars 2 (integrated, tiered assessments starting at the strategic and regional levels) and 3 (cumulative effects assessments done regionally), Canada needs an assessment regime structure that strengthens the focus on strategic and regional level assessment, in addition to improving project assessment. We recommend that the EA regulatory framework create both opportunities and requirements for regional-scale cumulative effects assessments (REAs) and strategic assessments (SEAs) to be conducted (see the triggering section below).

There should also be a means of ensuring that regional and strategic-level issues identified during assessments receive due attention. Of approximately 75 environmental assessments we reviewed that were either on the Agency's registry as of July 2016 or that were in the Registry Archives and which went to a review panel, we found at least thirteen that stated that the assessment at hand was not a suitable forum for consideration of regional or policy issues or recommended that certain issues be addressed at a regional or strategic scale.[34] To help ensure that such regional and

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[33] See, e.g., Government of Western Australia, *Hope for the future: The Western Australian State Sustainability Strategy*, (Perth: Department of the Premier and Cabinet, 2003) at 60.

[34] The EAs found were: the Joint Review Panel Report, Kemess North Copper-Gold Mine Project; Joint Review Panel Report, Lower Churchill Hydroelectric Generation Project; Joint Review Panel Report, Whites Point Quarry and Marine Terminal Project; Joint Review Panel Report, Mackenzie Gas Project; CEAA Comprehensive Study Report, Arnaud Mining Project; Joint Review Panel Report, EnCana Shallow Gas Infill Development Project in the Suffield National Wildlife Area; Joint Review Panel Report, Enbridge Northern Gateway Project; CEAA Comprehensive Study Report, Keeyask Generation Project; National Energy Board Report, North Montney Project; Joint Review Panel Report, Site C

strategic-level issues identified during assessments receive the attention they require at the appropriate forum, there needs to be some form of issues "off ramp" at the project level, a place for those issues to be sent upon the recommendation of reviewing bodies, governments and participants during assessments. Furthermore, the legislative framework should ensure that future projects are consistent with the outcomes of strategic or regional assessments.

Figure 1: Cumulative effects in northeast BC

Eliana Macdonald, *Atlas of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River First Nations, 2016* (2016: Ecostrust Canada), Map 34 at 78: http://www.davidsuzuki.org/publications/Blueberry%20Atlas%20report_final.pdf.

Much has been written on the inadequacy of proponent-led cumulative effects assessments at the project level. For one, proponents and review bodies tend to minimize the scope and application of cumulative effects assessments.[35] Also, proponents often face difficulties in obtaining the information required to conduct a comprehensive cumulative effects assessment, such as sensitive

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Clean Energy Project; Federal Review Panel Report, Eastmain-1-A and Rupert Diversion Project; and CEAA Comprehensive Study Report, NWT Diamonds Project.

[35] P.N. Duinker and L.A. Greig, "The Impotence of Cumulative Effects Assessment in Canada: Ailments, and Ideas for Redeployment" (2006) *Environ Manag* 37 (2), 153–161.

or confidential information on existing or prospective projects that business competitors may not be willing to share,[36] or data from companies or projects that have become inactive.[37]

In these submissions, we apply the following definition of regional and strategic EA:

- Regional EA: An assessment of past, present and foreseeable future impacts on values and rights in a given region, that is not, in theory, limited in what it considers. These may also be called regional cumulative effects assessments. In defining a region, we generally adopt the approach taken by Duinker and Greig, which is that a "region" should be an area that is ecologically meaningful, such as watersheds and ecoregions, instead of simply relying on areas divided according to administrative boundaries.[38]
- Strategic EA: Broadly speaking, we consider SEA to be an assessment at the policy or regional scale that has a particular strategic focus. SEA falls into two main categories: SEAs of proposed federal plans, policies and programmes (currently governed by the Cabinet Directive); and strategic assessments that are directed a resolving particular higher level planning or policy questions affecting one or more regions of the country (e.g., should Canada pursue getting oil to tidewater, or the pace and scale of development in regions with concentrations of mineral deposits, such as the Ring of Fire in Ontario and Golden Triangle in British Columbia). This second form of SEA is also sometimes referred to as regional-strategic environmental assessment (R-SEA).

For cumulative effects assessments to be effective, and to create meaningful opportunities for proactive strategic assessments of major, complex and controversial policy issues, we recommend that:

1. **Cumulative effects assessments be conducted in a tiered manner at the regional as well as project level:** As Duinker and Grieg recommend, 'regional' means an area that is ecologically meaningful, such as a watershed or ecoregion.[39] Requirements for when a regional or strategic EA is conducted should be set out in legislation (see the Triggering section below) and include an "off ramp" in project-level EA, whereby a reviewing body can send regional or policy-scale matters to the Minister for consideration at the regional or strategic level.
2. **Regional and strategic assessments be conducted by experts appointed by the federal government in collaboration with Indigenous (and provincial, where possible) governments:** These experts can be government employees, Indigenous knowledge-holders or technicians, or academics and other outside experts. Strategic EAs currently governed by the Cabinet Directive on Strategic EA may still be conducted by the relevant federal departments and agencies.
3. **The legislation establish a central authority and provide for regional co-governance boards and review panels:** The legislation should establish one federal

[36] E.A Masden et al., "Cumulative Impact Assessments and Bird/Wind Farm Interactions: Developing a Conceptual Framework" (2010) *Environmental Impact Assessment Review* 30, 1–7.

[37] Business Council of British Columbia, 2012. Cumulative Impact Assessment: Is It Just a Fancy Way of Identifying and Managing Risks? *Environment and Energy Bulletin*, 4(6). See also M.G. Dubé, "Cumulative Effect Assessment in Canada: A Regional Framework For Aquatic Ecosystems" (2003) *Environmental Impact Assessment Review*, 23(6), 723–45; citing R. Therivel et al., *Strategic Environmental Assessment* (London: Earthscan, 1992).

[38] P.N. Duinker and L.A. Greig, "The Impotence of Cumulative Effects Assessment in Canada: Ailments, and Ideas for Redeployment" 2006 *Environ. Manag*. 37 (2), 153–161.

[39] Duinker and Greig, *supra* note 30.

authority with national-level EA responsibilities (such as providing policy guidance), as well as responsibilities regarding regional, strategic and project-level EA (e.g, drafting terms of reference, appointing experts to conduct EAs, and reviewing EAs in collaboration with Indigenous governments, and provincial governments wherever possible). Collaboration among the federal government and other jurisdictions may in some regions be facilitated by regional co-governance boards established by the Crown and Indigenous governments; the legislation should therefore also enable the establishment of co-governance boards and provide for the continuation of existing boards. It should also allow for the appointment of review panels where appropriate.

4. **The legislation establish an independent expert advisory committee:** While the legislation may include triggers for strategic and regional assessments (see below), there should also be a non-partisan, non-interest based committee of experts to provide guidance to the Minister and assessment authority on such matters as when to conduct a regional or strategic assessments and the scope of the assessments (similar to the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) established under the *Species at Risk Act,* which recommends to the Minister the listing of at-risk species, which then triggers a decision to list and, if so, various steps to protect those species).
5. **The legislation allow for cost recovery from proponents:** The government should have the ability to recover costs associated with assessments from proponents. One method would be to "sell" proponents information needed to conduct their CEAs as part of a required project-EA; another would be to impose a tax on undertakings that would be specially earmarked for EA program cost recovery.[40] In considering the "cost" of EA, the resources required to fully enable Indigenous governments' participation in co-governance arrangements and robust participant funding should be included.
6. **There be periodic updates to regional and strategic assessments where appropriate:** The legislation should provide for periodic (e.g., every five years) updates to regional-scale cumulative effects assessments. Both the Northwest Territories Cumulative Impact Management Program (NTW CIMP) and the Nunavut General Monitoring Program (NGMP) established under the Nunavut Land Claims Agreement produce 'state of the environment' reports every five years. In Nunavut, a Summary of Knowledge report is developed every year.[41]
7. **Regional and strategic assessments be collaborative and community-based:** Assessments should be a collaborative effort between the federal government, Indigenous governments, universities, industry actors and government regulators. The NWT CIMP adopts a community-based approach to its work, which means that:

> "[a]ll aspects of NWT CIMP, including the design and execution of monitoring work, the analysis of results, and the interpretation and sharing of what it all means for the 'bigger picture' of the northern environment, are informed by communities that are impacted by changes in the land, air and water. The community-based approach brings together northern residents, co-management boards, government, industry, non-government organizations, and scientists to work together to collect, analyze, and communicate traditional knowledge and scientific monitoring information on topics of high priority to the community.

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[40] Noble, B. F., Skwaruk, J. S. and Patrick, R. J. (2014), Toward cumulative effects assessment and management in the Athabasca watershed, Alberta, Canada. Can. Geogr., 58: 315–328. <doi:10.1111/cag.12063>

[41] NGMP, Northwest Territories Cumulative Impact Monitoring Program and Nunavut General Monitoring Plan: http://www.ngmp.ca/eng/1449176608729/1449176660604.

> Community-based monitoring helps to collectively improve our understanding of changes occurring in the environment and increase the ability of communities to identify, plan and adapt to these changes. At the same time, communities benefit from having community members trained in leading and carrying out monitoring activities"[42].

The NGMP also has community-based collaboration as a key premise; e.g., the Hudson Strait-Foxe Basin Marine Bird Coastal Monitoring Survey, which involves Inuit communities and their elders working alongside western scientists to incorporate and document traditional Inuit knowledge as key component of monitoring research.[43]

8. **Regional, strategic and project-level EAs and regulatory permitting be tiered:** As Summit Pillar 2 states, project assessments should fit within the vision set at the regional and strategic levels, and be informed by and feed back into those processes and their outcomes.[44] Legislation should require project assessments to consider information gathered at the regional and strategic levels and comply with any outcomes of regional and strategic EAs. Information from project EAs should feed back into the strategic and regional levels, for example during periodic REA and SEA updates. Finally, where thresholds or management objectives established through a REA or SEA would preclude a particular type of development (completely, or in a particular geographic area), the legislation should establish a mechanism for screening out proposed undertakings inconsistent with such limits (see below).

Triggering regional, strategic and project-level EA

Recommendation 17: That the legislation set out triggers for EAs of undertakings within federal jurisdiction that have the potential to affect Canada's progress towards sustainability, broadly defined.

Recommendation 18: That a "traffic light" approach be used in conjunction with regional and strategic assessments to screen out proposals that are incompatible with pathways to sustainability, identify appropriate assessments streams for those proposals that might be, and ease the burden on project EAs by identifying mitigation and avoidance measures for classes of projects.

Recommendation 19: That the legislation require the registration of all federally-regulated undertakings with the potential to affect Canada's progress towards sustainability (directly, indirectly or cumulatively) with the federal authority, regardless of whether an assessment is required, in order to ensure any impacts are understood and tracked.

Recommendation 20: That the legislation require strategic environmental assessments of all federal policies, plans and programs; new or revised federal legislation, rules, regulations or guidance; and federal budgets.

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[42] *Ibid.*

[43] Northwest Territories Cumulative Impact Monitoring Program and Nunavut General Monitoring Plan; Highlights for 2012-2013 and 2013-2014: http://sdw.enr.gov.nt.ca/nwtdp_upload/2012-2014%20CIMP-NGMP_ANNUAL_REPORT.DOCX.pdf.

[44] Johnston, *EA Summit Proceedings*, *supra* note 1 at 6.

Recommendation 21: That the legislation include other REA and SEA triggers, such as where a proposed undertaking is development-inducing (e.g., a road or transmission line into a relatively undisturbed area).

Recommendation 22: That the legislation include a mechanism to allow any person, government or EA review panel to trigger a regional or strategic assessment by submitting an application that meets prescribed criteria, and a requirement that the Minister respond with reasons within a prescribed time limit and to proceed with the EA unless prescribed criteria are not met.

Project-level EA

As a result of the shift from a triggering to listing approach in CEAA 2012, thousands of environmental assessments of projects and activities within federal jurisdiction that used to receive some level of federal assessment no longer do.[45] Environmental assessment can help the federal government understand, mitigate and avoid individual and cumulative effects in two important ways: first, by bringing project-level impacts to its attention; and second, by providing a means of avoiding or managing impacts at a local and regional scale. As the Summit outcomes state, "the most important effects are cumulative,"[46] and it is therefore important to understand and avoid even the lower-level effects of smaller projects. Even screening-level assessments can help ensure that proposals receive attention to their potential environmental effects and that proponents are directed to implement measures to avoid adverse effects and strive for positive ones.

We support the Caucus' recommendation that federal legislation reinstate EA triggers for undertakings within federal jurisdiction that affect Canada's progress towards sustainability. This should mean reinstating triggers for when a project requires a federal permit, is located on federal lands, receives federal funding or has a federal proponent. We also recommend a trigger for any undertaking in federal protected areas, as well as a mechanism in the legislation that would allow any person or government to trigger a project assessment by submitting an application that meets prescribed criteria. Potential impacts on aboriginal title and rights should also trigger an assessment.

There are other means of helping avoid EAs of undertakings unlikely to affect progress towards sustainability. One option is use of an exemption list (e.g., in regulations). To limit unnecessary EAs on non-protected federal lands, the triggering provision may contain a threshold (e.g., that a proposed undertaking have a certain-sized footprint before an EA is required). Further, to make the assessment regime more manageable by reducing the number of assessments required, greater use should be made of regional and strategic-level assessments to provide guidance at the project level, and a "traffic light" approach adopted. The traffic light approach essentially involves using strategic (or class) and regional assessments to identify classes of undertakings that should:

- Not proceed due to environmental, social, political or Indigenous unacceptability, either at all or in particular geographic areas (i.e., receive a red light);

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[45] See, e.g., Williams & Shier, *Thousands of screenings cancelled: Ottawa publishes regulations to implement new Canadian Environmental Assessment Act 2012* (July 2012): http://www.willmsshier.com/docs/e-flashes/willms-shier-e-alert--new-ceaa-regs-released-july-2012D027D1014DA0.

[46] Johnston, *EA Summit Proceedings, supra* note 1 at 7.

- Proceed to an identified level of environmental assessment, with any guidance on project siting, design, etc. identified at the strategic or regional level (i.e., receive a yellow light); and
- Should receive approval in principle, subject to registration of proposals with the federal government and implementation of identified mitigation measures (i.e., receive a green light).[47]

Where an assessment is not required, proponents should still be required to register their projects or activities with the federal authority, along with confirmation of the application of any mitigation or avoidance measures, in order to help ensure that any impacts are tracked and their cumulative effects understood. The ability of any person or government to apply to trigger an environmental assessment should be maintained, however, even in "green light" situations in order ensure that local, Indigenous or expert knowledge related to specific proposals is not overlooked.

Strategic and regional EA

For SEAs of plans, policies and programmes currently governed by the Cabinet Directive, as well as other clear law, policy and budgetary matters, we recommend that the federal legislation contain a mandatory trigger. As has been demonstrated by reports of the Commissioner of Environment and Sustainable Development, the vast majority of EAs triggered under the Cabinet Directive are not being done, and where they are, in general they are not being done well.[48] Clearly, a policy-level requirement is not sufficient; these SEAs should be governed by federal legislation, subject to the same requirements of transparency, accountability and oversight by a central agency. Such is the approach in the United States, where the *National Environmental Policy Act* requires environmental assessments of all "major Federal actions significantly affecting the quality of the human environment,"[49] which is defined in regulations as including "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals."[50] We recommend a similar approach in the Canadian legislation, with the inclusion of federal budgets, so that the legislation would require strategic EAs of federal policies, plans and programs; new or revised federal legislation, rules, regulations or guidance; and federal budgets.

For regional and strategic assessments not currently covered by the Cabinet Directive, we recommend a combined triggering approach:

1. Legislated triggers, for example where a proposed undertaking is development-inducing (e.g., a road or transmission line into a relatively undisturbed area).

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[47] For a discussion of the traffic light approach, see Mark Haddock, *Environmental Assessment in British Columbia* (Environmental Law Centre, University of Victoria: 2012) at 27: http://www.elc.uvic.ca/documents/ELC_EA-IN-BC_Nov2010.pdf.

[48] See, e.g., Office of the Auditor General of Canada, *Report 3 – Departmental Progress in Implementing Sustainable Development Strategies* in *Fall 2015 Reports of the Commissioner of the Environment and Sustainable Development* (Fall 2015): http://www.oag-bvg.gc.ca/internet/docs/parl_cesd_201512_03_e.pdf.

[49] *The National Environmental Policy Act of 1969,* 42 USC § 4332 (1970) [*NEPA*].

[50] *CEQ Regulations for Implementing NEPA,* 40 CFR § 1508.18(a) [*CEQ Regulations*].

2. As with project EA above, a mechanism in the legislation that would allow any person, government or EA review panel to trigger a regional or strategic assessment by submitting an application that meets prescribed criteria.

As noted above, we also recommend the establishment of an expert advisory committee that would, among other things, be empowered to recommend to the Minister that regional or strategic EAs be conducted (see below for a discussion of this expert advisory committee).

Where an EA request has been made, the legislation should require the Minister of Environment and Climate Change (the Minister) to respond with reasons within a prescribed time limit and to proceed with the EA unless prescribed criteria are not met.

Ensuring the best available information throughout all stages

Recommendation 23: That the legislation establish a permanent, searchable, public registry and require all information considered or provided at all stages of assessments at all levels to be made available on the registry.

Recommendation 24: That the legislation impose disclosure requirements on private entities and data-collection information on government agencies, and facilitate collaboration with Indigenous and public experts and academia.

Information is key to effective EA at all levels and throughout all stages. Next generation environmental assessment requires that "[a]ll relevant information is easily accessible to the public, is shared between different levels of assessment and remains available for future use,"[51] and emphasizes learning rather than jumping regulatory hurdles.[52] It will therefore be important to plug data gaps, especially about the biophysical environment and systems, and to ensure the accessibility of available information. First, there needs to be a public, searchable registry of all information related to all assessments, including raw data, EA reports, tracking of commitments and conditions, monitoring and follow-up reports, and any non-compliance. The information on the registry should be maintained in an available state (rather than archived) for future use.[53]

The only exception would be sensitive or confidential Indigenous knowledge. The legislation and co-governance agreements relating to the conduct of EA should ensuring that Indigenous peoples retain ownership and control over their intellectual and cultural property throughout.

To help fill gaps in government science, collaborations between government scientists and those working with not-for-profits, academic institutions or Indigenous peoples, as well as with Indigenous and local knowledge-holders and others, should be encouraged. The legislation should allow for partnerships with, and enable the provision of ongoing funding to support Indigenous peoples' and other groups' regional-scale data collection and monitoring. It should also establish

[51] Johnston, *EA Summit Proceedings, supra* note 1 at 10.

[52] *Ibid*, Pillar 12 at 12.

[53] *Ibid* at 10; Johnston, *Imagining EA 2.0, supra* note 2 at 20; Robert B. Gibson, M. Doelle and A.J. Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016) *J. Environ. Law Pract.* 29:1, 251–76; A.J. Sinclair and A.P. Diduck, "Reconceptualizing public participation in environmental assessment as EA civics" (forthcoming) *Environ Impact Assess Rev* at 3.

clear legal obligations on federal agencies to fill gaps in knowledge about existing and future influences or stressors on the target environment where it is within the agency's power to do so.[54]

Also, cumulative effects assessments may require sensitive or proprietary information from proponents who are sometimes reluctant to provide that information. To ensure the greatest availability and public accessibility of relevant information, the legislation should require private entities to disclose all information relevant to the assessment.[55]

Providing meaningful public participation

We fully endorse the EPA Caucus submission on public participation. As meaningful public participation is essential for effective EA, we adopt the EPA Caucus's summary recommendation here:

Recommendation 25: EA law and policy must be updated to apply the following ten overarching principles to ensure meaningful public participation actually occurs through EA processes:

1. *Participation begins early in the planning and decision making processes, is meaningful and builds public confidence;*
2. *Public input can influence or change the outcome/project being considered;*
3. *Opportunities for public comment are open to all interested parties, are varied, flexible, include openings for face to face discussions and involve the public in the actual design of an appropriate participation program;*
4. *Formal processes of engagement, such as hearings and various forums of dispute resolution, are specified and principles of natural justice and procedural fairness are considered in formal processes;*
5. *Adequate and appropriate notice is provided;*
6. *Ready access to the information and the decisions at hand is available and in local languages spoken, read and understood in affected areas;*
7. *Participant assistance and capacity building is available for informed dialogue and discussion;*
8. *Participation programs are learning oriented to ensure outcomes for all participants, governments, proponents and participants;*
9. *Programs recognize the knowledge and acumen of the public; and,*
10. *Processes are fair and open in order for the public to be able to understand and accept decisions.*[56]

Meaningful public participation results in multiple and mutually reinforcing gains. We will not go into detailed recommendations on how to achieve meaningful public participation here, as we believe the Caucus submission has covered the issue well. Rather, we wish to emphasize that

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[54] A.J. Sinclair et al., "Looking Up, Down, and Sideways: Reconceiving Cumulative Effects Assessment as a Mindset," (2016) *Environ Impact Asses Rev*: http://dx.doi.org/10.1016/j.eiar.2016.04.007 ["Looking Up, Down and Sideways"].

[55] Jake Piper, "Experience of cumulative effects assessment in the UK," (2004) *Spatium* 10 at 41–46.

[56] Caucus Submission, *supra* note 3 at 55.

meaningful public participation should not be, or be perceived to be, a burden on proponents. Use of regional and strategic assessments can help focus the issues discussed in project-level EAs, and deliberative (i.e., two-way) dialogue and the meaningful ability to influence outcomes will help provide public trust in processes, which in turn will encourage the public to focus on relevant matters.

In all levels of assessment, the involvement of a broad range of interested individuals and groups as early as possible is essential for EA effectiveness.[57] Identifying social and ecosystem objectives through a consensus process helps establish desired visions of the future and the framework for assessments.[58] Meaningful engagement facilitates mutual learning and affords the opportunity for all actors to understand the value placed on the target environment in light of local and traditional knowledge.[59] Individuals and organizations with local and Indigenous knowledge of biophysical and social conditions should be engaged in monitoring effects and evaluating effects predictions.

Merely allowing people to offer comments passively (e.g., through a letter or survey) is not enough to make the sorts of judgements related to cumulative effects and environmental and social conditions, which relate to public policy, public values and priorities. Rather, engagement should be ongoing and deliberative, using such fora as workshops, task forces, advisory committees and mediation.[60]

In short, next generation environmental assessment deeply values public participation as an opportunity and input, rather than treats it as an obligation or hurdle to cross.

Decarbonizing in accordance with Canada's climate goals

Recommendation 26: That next generation climate tests should use Canada's climate commitments and goals as a proxy for effects by first identifying carbon budgets and decarbonisation pathways at the strategic level, and ensuring that project approvals are in accordance with those budgets and pathways.

Recommendation 27: That the legislation establish a broad scope of assessment, including connected, cumulative and related actions, and the upstream and downstream emissions of connected actions.

Recommendation 28: That economic modelling include the social cost of carbon and be consistent with the world achieving decarbonisation by no later than 2050 as per the Paris Agreement.

We endorse both the EPA Caucus submission and the Multi-Interest Advisory Committee submission on assessing climate. Here we do not provide recommendations on each detail that we agree are essential elements of a next generation climate test, but focus our attention on key elements.

Climate change, which has been called the most important environmental issue of our time, is a cumulative effects issue. Indeed, some say it is the ultimate cumulative effects issue. The test

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[57] Sinclair, "Looking Up, Down and Sideways," *supra* note 51.

[58] B.P. Hooper and R. D. Margerum, "Integrated watershed management for river conservation: perspectives from experiences in Australia and the United States," in: P. J. Boon, B. R. Davies & G. E. Petts (eds), *Global Perspectives on River Conservation Science Policy and Practice*, (Toronto: John Wiley and Sons, Ltd, 2000) at 509–517.

[59] Sinclair, "Looking Up, Down and Sideways," *supra* note 51.

[60] *Ibid.*

currently used in federal EA, which seeks to understand the significance of climate impacts of individual projects, has failed to ensure that Canada will do its share in the global fight against climate change and stay on track to achieving its obligations under the Paris Agreement.[61] As Summit Pillar 6 stresses, next generation EA uses Canada's climate goals as a proxy for climate effects and "seeks to understand whether and how far the greenhouse gas emissions of a proposal will move Canada towards or away from its climate goals and its international commitments."[62]

For a climate test to be effective, pathways to achieving Canada's climate obligations (e.g., decarbonisation by no later than 2050) must first be identified at the strategic level (e.g., through a climate plan). Federal, regional (i.e., provincial and territorial) and sectoral carbon budgets and pathways should be identified through strategic environmental assessments and updated regularly (see above on regional and strategic assessments).

Once those pathways and budgets are in place, at the project level the sustainability-based climate test should ask which option from among a range of alternatives (including the null) is the most likely to take Canada the furthest down the pathway and keep it within the identified budgets. As a threshold test, proposals that would make meeting Canada's climate goals impossible or unlikely should be denied. Any net increase in GHG emissions should be considered an adverse environmental effect.

The legislation should set out a broad scope of assessment and include direct and indirect upstream and downstream emissions. In the U.S., regulations require federal agencies to consider direct,[63] indirect,[64] and cumulative[65] environmental effects of proposed actions, and to conduct a coordinated environmental review of connected,[66] cumulative,[67] and similar actions.[68] Guidance issued by the Council on Environmental Quality clarifies that these requirements impose an obligation to assess upstream and downstream emissions, subject to reasonable limits. The guidance states that climate analyses should include consideration of "connected actions – subject to reasonable limits based on feasibility and practicality", including activities "that have a reasonably close causal relationship to the Federal action, such as those that may occur as a

[61] *Paris Agreement*, being an Annex to the *Report of the Conference of the Parties on its twenty-first session, held in parties from 30 November to 13 December 2015 – Addendum Part two: Action taken by the Conference of the Parties at its twenty-first session*, 29 January 2016, Decision 1/CP.21, CP, 21st Sess., FCCC/CP/2015/10/Add.1 at 21-36, online: UNFCCC http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf.

[62] Johnston, *EA Summit Proceedings*, *supra* note 1 at 8.

[63] Defined as those that are "caused by the action and occur at the same time and place." 43 FR 56003, Nov. 29, 1978, sec. 1508.8 (a).

[64] Defined as those that are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," and which may include "growth inducing effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 43 FR 56003, Nov. 29, 1978, sec. 1508.8 (b).

[65] Defined as those that result from "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions." 43 FR 56003, Nov. 29, 1978, sec. 1508.7.

[66] Defined as actions that are «closely related and therefore should be discussed in the same impact statements.» 43 FR 56003, Nov. 29, 1978, sec. 1508.25 (a) 1.

[67] Defined as actions that "have cumulatively significant impacts and should therefore be discussed in the same impact statement." 43 FR 56003, Nov. 29, 1978, sec. 1508.25 (a) 2.

[68] Defined as "have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." 43 FR 56003, Nov. 29, 1978, sec. 1508.25 (a) 3.

predicate for a proposed agency action or as a consequence of a proposed agency action (including land clearing, access roads, extraction, transport, refining, processing, using the resource, disassembly, disposal, and reclamation)".[69] We recommend a similar approach in Canada, with the scope of assessment specifically including the full lifecycle of emissions wherever possible.

Economic analyses should also reflect both the full spectrum of the costs associated with climate emissions, as well as global efforts to achieve carbon neutrality. Economic effects (e.g., assumed economic benefits flowing from future demand for resources or products produced as a result of a project) should be assessed using modelling that is consistent with the world achieving decarbonisation by mid-century and discount based on the social cost of carbon (i.e., the measure of financial cost of damages resulting from climate change) per tonne that would result from the proposal.[70]

Ensuring sustainability after the assessment

We also endorse the Caucus recommendations on post-assessment decision tracking, reporting, and compliance. We do not provide detailed recommendations or analysis here, but rather make summary recommendations based on the Caucus submission.

Recommendation 29: That there be meaningful tracking, reporting and compliance assurance of commitments and obligations arising from EA processes, and that project-based and regional monitoring be standardized to the extent feasible to ensure temporal and geographic consistency and integration.

Recommendation 30: That the legislation require the assessment authority to maintain a registry of commitments made and obligations imposed during an EA, including responsible government departments or agencies.

Recommendation 31: That the legislation establish a mechanism to allow individuals, federal authorities, the assessment authority and an independent tribunal to initiate specific tracking and reporting measures where there appear to be issues of non-compliance.

Recommendation 32: That EA authorizations be specific and revocable (e.g., certificates) with commitments and conditions expressed in a clear and enforceable manner.

Recommendation 33: Adaptive management and mitigation measures must be entrenched in a formal system of monitoring, evaluation, and have the ability to result in a change to management and regulatory responses. Adaptive management should be clearly defined and only applied in the case of reversible harm.

Recommendation 34: That the legislation outlines prescribed and discretionary responses to EA non-compliance, including discretion to issue an administrative order (including the ability to order additional information or study and directions to alter project management), issue a fine, augment conditions as deemed necessary, or pursue a prosecution.

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[69] Council on Environmental Quality, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews* at 13-14: https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.

[70] Environment and Climate Change Canada has produced guidance on the social cost of carbon, which could be a useful starting place for accounting for it in EA: ECCC, *Technical Update to Environment and Climate Change Canada's Social Cost of Greenhouse Gas Estimates* (March 2016): http://ec.gc.ca/cc/default.asp?lang=En&n=BE705779-1.

Recommendation 35: That the legislation requires an independent tribunal (i.e., not the assessment authority) to conduct periodic reviews of the EA regime, and authorize it to make orders and recommendations to remedy any non-compliance by a federal department or agency or to ensure that the federal EA regime is achieving identified principles and goals.

Recommendation 36: That the legislation prescribes a time limit on EA approvals, wherein a project must be substantially started or the proposal will require an additional EA.

A governance model to enable and encourage co-governance and regional and strategic assessment

Recommendation 37: That the legislation establishes one responsible authority for reviewing all levels of assessment (regional, strategic and project-level).

Recommendation 38: That decision-makers receive recommendations from reviewing bodies, with final EA decisions made by all relevant jurisdictions collaboratively.

Recommendation 39: That the legislation establish an independent tribunal to handle disputes, facilitate government-to-government negotiations, and conduct periodic reviews of the federal EA regime and processes overall.

Recommendation 40: That the legislation establish an independent expert committee (modelled after COSEWIC) to provide strategic advice and assistance on all levels of EA, including when regional and strategic EAs should be conducted.

To date, in spite of successful ad hoc efforts, systematic incorporation of strategic and regional processes into EA, as well as collaborative assessments with all relevant jurisdictions (federal, Indigenous and provincial), remain elusive. Moreover, the vesting of authority for some EA reviews in the National Energy Board (NEB) and Canadian Nuclear Safety Commission (CNSC) has proven problematic in fundamental ways that in our view cannot be fixed by improving those institutions. For one, there are great inconsistencies in the processes used by the three responsible authorities. Perhaps more importantly, the NEB and CNSC are regulators without the relevant mandate or impartiality to undertake the sort of fair, public, planning-based process that good EA requires.[71]

Below, we propose a federal institutional governance model to encourage and enable strategic and regional assessment and facilitate collaboration on all levels of assessment. The discussion assumes at the very least cooperative EA with Indigenous governments, with the aspiration to cooperate with the provinces, as well.

Overview

While some additional details are provided, the architecture of this model is the same as that proposed by the EPA Caucus. At its core is one central federal authority that is responsible for initiating and reviewing all EAs at all levels (regional, strategic and project EAs), including those currently conducted by the NEB and CNSC. It would also provide secretariat support for review panels, and support for government-to-government collaborations. This authority could be

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[71] See, e.g., Meinhard Doelle, "CEAA 2012: The End of Federal EA as We Know It?" (2012), 24 JELP 1, at 9, and Richard D. Lindgren, "Going Back to the Future: How to Reset Federal Environmental Assessment Law – Preliminary Submissions from the Canadian Environmental Law Association to the Expert Panel regarding the *Canadian Environmental Assessment Act, 2012* at 14-16: http://www.cela.ca/sites/cela.ca/files/1083-CELA%20Preliminary%20Submissions%20to%20the%20Expert%20Panel%20(Nov%207,%202016).pdf.

replaced by regional co-governance boards in provinces and territories upon agreement by the Crown and Indigenous governments, or where existing co-management structures for EA are already in place.

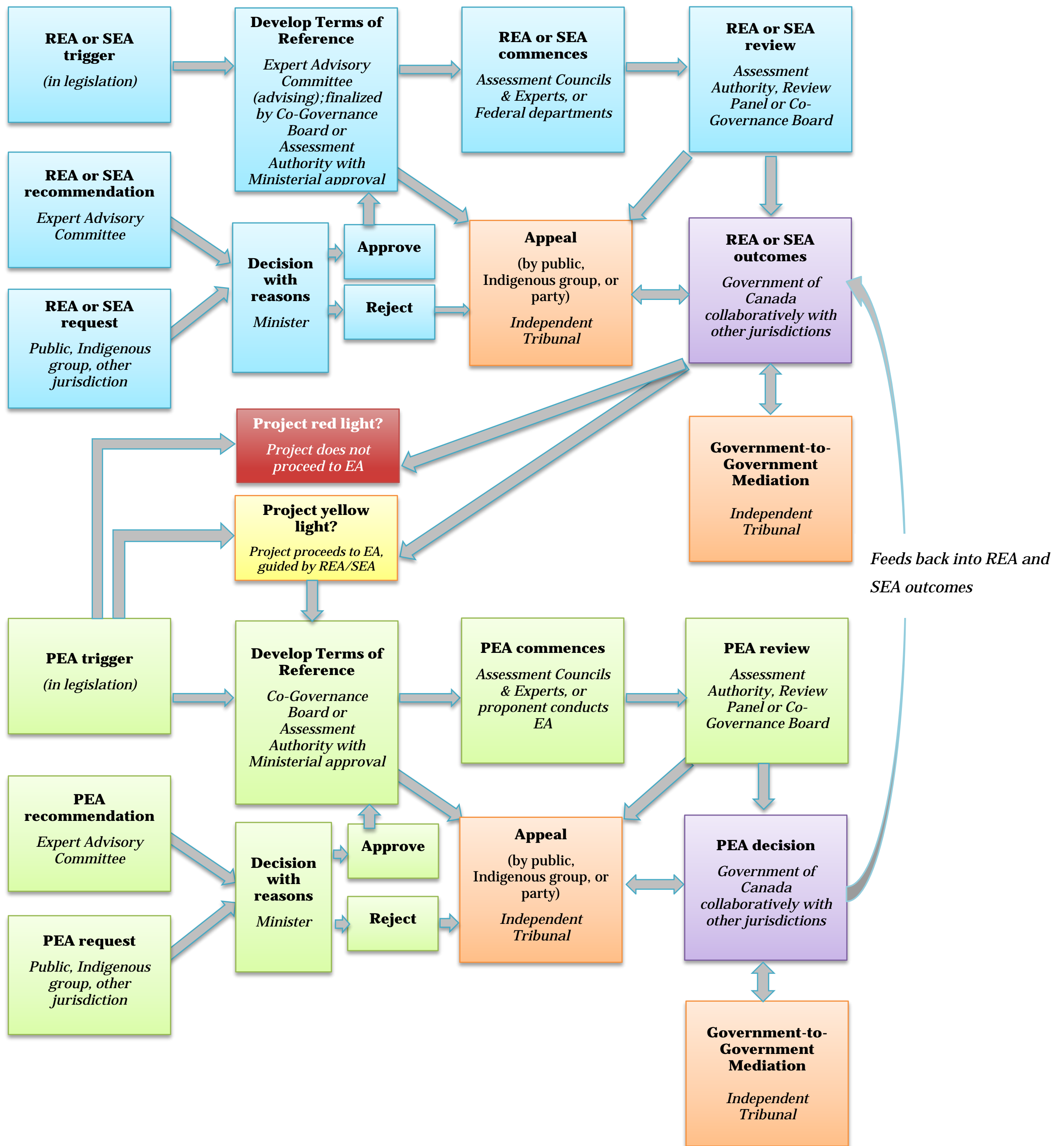
Strategic EAs of a purely federal policy nature (e.g., of plans, programs, policies, budgets, legislation, regulations and rules) would still be conducted by the relevant federal departments or agencies, but would then be reviewed by the federal authority. In the case of regional assessments and remaining strategic EAs, assessments would be conducted by experts appointed from the collaborating governments (including Indigenous) as well as outside experts (e.g., from academia, consultancies and NGOs) on a case-by-case basis by all involved jurisdictions collaboratively. We call these ad-hoc expert bodies “Assessment Councils.” We also recommend that project EAs be conducted by Assessment Councils or, if proponent-led EA is retained, that greater safeguards be put into place to ensure the credibility and trustworthiness of the information relied upon.

Regional, strategic and project EAs would be subject to review by the Assessment Authority, a review panel or co-governance board. The reviewing bodies would make recommendations to decision-makers, with final EA decisions made collaboratively by all relevant jurisdictions. Decisions from higher-tier REA and SEA would filter down to project EA, and project EA decisions would feed back up to the regional and strategic levels.

We recommend the establishment of an independent tribunal to hear appeals of all interim and final EA decisions. The tribunal should also be authorized to mediate government-to-government negotiations where governments are not able to come to consensus on process or final decisions. It should also conduct periodic reviews of federal EA institutions and governance, and be empowered to make orders accordingly, to ensure the quality of federal EA generally.

Finally, we recommend the establishment of an independent expert committee to provide strategic advice and assistance on all aspects and levels of EA, including when REA and SEA should occur, on sector terms of reference, and on federal policy and guidance.

Figure 2: Next generation environmental assessment governance model



Institutional Structure

The model we suggest includes the following institutions:

Assessment Authority

This proposed permanent body, housed within the federal government, would, in collaboration with Indigenous governments, and provinces and territories wherever possible, review regional, strategic and project-level assessments that do not go to a review panel and where co-governance boards have not been established (see below). It could also provide secretariat support for the Expert Advisory Committee (see below), review panels and Assessment Councils, and facilitate government to government collaboration on environmental assessments. Specifically, its functions could include:

1. Establishing guidance for implementing Indigenous and public engagement in all levels of EA;
2. Informing and engaging the public, Indigenous peoples, local governments and industry in regional and strategic assessments, and facilitating that engagement in assessments reviewed by review panels or commissioners;
3. For all levels of EA that do not go to a review panel, appointing and directing Assessment Councils, and reviewing the EA in collaboration with other jurisdictions;
4. Serving as a secretariat to support review panels;
5. Managing contracts with external experts;
6. Serving as a secretariat to representatives of the Government of Canada in government-to-government negotiations with Indigenous Peoples[72] on mutually agreeable processes, decisions, guidance and agreements, such as:
    a) Government-to-government agreements to conduct collaborative or parallel assessments;
    b) Terms of reference for regional, strategic and project EAs;
    c) Measurable management objectives for valued components and systems, and their spatial application within each Indigenous people's territory and broader region, where applicable; and
    d) Decisions regarding whether a project or undertaking should be allowed to proceed and under what conditions.
7. Implementing follow-up obligations, such as:
    a) Tracking of predictions, commitments, obligations, conditions and processes, and initiating changes as appropriate;
    b) Evaluating prediction accuracy, monitoring sufficiency and efficacy, mitigation effectiveness and adaptive management plans;

[72] Could be expanded to be tri-partite involving provincial or territorial governments so as to include matters of under their jurisdiction.

c) Tracking, collecting and reporting all data and evaluations relevant to EAs and follow-up; and

d) Investigating and remedying non-compliance.

8. Supporting the Minister under enabling legislative provisions to enact federal regulations and develop policy to further the purposes and goals of federal EA.

Co-Governance Boards

To facilitate jointly-managed assessment, the legislation should enable and encourage the establishment of regional co-governance boards in each province and territory (while providing for the continuation of existing co-governance bodies). Such boards would be empowered through federal and ideally, provincial or territorial legislation and be served by an equal number of commissioners nominated by Indigenous peoples' organizations and the Crown (federal, provincial and territorial), with one of each serving in a co-chair role. Co-governance boards would also require staff to help carry out its functions.

The boards would be explicitly empowered to seek and implement solutions that uphold the respective jurisdiction, authority and laws of all levels of government including Indigenous governments. They would also be empowered to serve the functions of the Assessment Authority that are not national in scale, such as:

1. Informing and engaging the public, Indigenous peoples, local governments and industry in regional and strategic assessments, and facilitating that engagement in assessments reviewed by review panels or commissioners;
2. For all levels of EA that do not go to a review panel, appointing and directing Assessment Councils and reviewing the EA;
3. Serving as a secretariat to support review panels;
4. Managing contracts with external experts;
5. Implementing follow-up obligations; and
6. Developing terms of reference; and
7. Providing secretariat support to the involved governments in collaborating on decisions.

Review Panels

As has been the experience with project-level EA, regional and strategic assessments will vary in size and degree of public interest. The legislation should allow for the appointment of review panels at all levels of EA, especially or larger-scale, more complex or more controversial assessments. Appointments should be made by the Minister in collaboration with other relevant jurisdictions (Indigenous, provincial and territorial), with the advice and support of the Assessment Authority or co-governance board. The responsibilities of the review panels would be similar to those of panels under the current legislation, and would include:

1. Reviewing project EAs, scenario-based regional-strategic assessment reports and the results of other SEAs, and the results of regional cumulative effects assessments;
2. Identifying any information gaps and commissioning outside expert assistance as needed;

3. Conducting public and Indigenous engagement; and
4. Making recommendations, based on the above and on sustainability criteria, for the consideration of federal, provincial, territorial and Indigenous governments and land claims and treaty-based EA processes as applicable.

Assessment Councils

For regional EAs and some strategic EAs (e.g., the more proactive strategic assessments of major, complex and controversial policy issues), we recommend the assembly of temporary, ad-hoc Assessment Councils. Each Committee would be comprised of leading scientific and Indigenous experts with experience relevant to the assessment(s) from the federal government, Indigenous governments, provincial governments (where applicable), as well as any outside experts necessary to fill knowledge gaps and provide the best available information.[73] Their responsibilities would include:

1. Compiling and, where necessary, conducting research to establish baseline scenarios that reflect the historic range of variability in ecosystem conditions for valued components and systems based on best available scientific and Indigenous knowledge;
2. Undertaking periodic broad-scale assessments of the condition of valued components and systems in regions;
3. Conducting technical aspects of regional and strategic environmental assessment, including independent assessments of multiple scenarios for the protection of valued components and systems and the pace and scale of development in a region, including a comparative evaluation of the net contribution to sustainability of each scenario,[74] and
4. Producing scenario-based regional and strategic assessment reports for consideration by the reviewing body.

We also recommend that project EAs be conducted by Assessment Councils. If proponent-led EA is retained, there need to be greater safeguards in place to ensure the credibility and trustworthiness of the information relied upon. For example:

- The public and Indigenous groups should be provided adequate resources and time to produce additional analysis and information.
- The legislation should place the burden of proof on the proponent to prove the credibility of the information provided.
- The legislation should direct reviewing bodies to favour the more credible information, even if this is not that of the proponent.

[73] To facilitate the retention of experts and prevent delays, bureaucratic requirements (such as the need for Treasury Board approval) should be addressed and mitigated at the outset.

[74] A more complete list of legislative requirements for such an assessment might include: a) recommended actions to mitigate negative effects on valued components from past, present and reasonably foreseeable future development; b) an analysis of how different climate change scenarios are anticipated to affect valued components; c) an analysis of uncertainties in knowledge and how the precautionary principle has been applied in the face of such uncertainties; d) an explicit analysis of interactions among impacts and trade-offs between valued components in each scenario; e) a comparative evaluation of the net contribution to regional sustainability of each scenario.

Expert Advisory Committee

To encourage the best available expertise to guide SEAs and REAs and ensure that the learning and knowledge gained through these is reflected in project EA, a legislated national advisory body comprised of leading scientific and Indigenous experts should be appointed to provide strategic and expert guidance to the Minister. In order to help ensure that it is comprised of the top experts from a spectrum of subject-matters, this body should be a legislated independent committee modelled after COSEWIC, with members appointed by the Minister for four-year terms. Like COSEWIC, it would elect a chair, govern its operations and procedures, meet periodically, and between meetings its members would undertake work identified as needed. Importantly, this Committee would not be an interest or stakeholder-based Committee (the Minister may wish to separately appoint an interest-based committee, such as the former Regulatory Advisory Committee, to serve in an advisory role on some matters where it is important to have interest-based perspectives). Membership, expertise, and terms of appointments governing such a committee would be detailed in the legislation, similar to COSEWIC.[75]

Its responsibilities would include such activities as the following:

1. Recommending criteria for when strategic and regional assessments that are not already required under federal legislation should be undertaken;
2. Considering requests from the public, Indigenous peoples, provincial, and local governments and industry to conduct strategic and regional assessments;
3. Identifying, based on information and their own knowledge and expertise, the need for strategic-level EAs not required under the legislation, and to advise the Minister of Environment and Climate Change on the need for strategic and regional EAs and their scope;
4. Providing guidance to decision-makers and review authorities on strategic and regional EA terms of reference;
5. Helping draft sectoral template terms of reference;
6. Providing recommendations on scientific standards for various stages of EA
7. Recommending strategic and regional EA review panel members or commissioners;
8. Identifying and recommending experts for the Assessment Council to conduct regional and strategic EAs;
9. Reviewing and providing advice on regional and strategic EAs; and
10. Providing additional advice and expertise to the Minister and Indigenous and provincial (where appropriate) governments as needed.

Independent Tribunal[76]

This tribunal would be a dispute resolution body for regional, strategic and project-level environmental assessments. The functions of the tribunal could include:

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[75] *Species at Risk Act,* SC 2002, c 29, s 16.

[76] This tribunal could potentially have a broader mandate than just environmental assessment; e.g., it may also be tasked with handling appeals and disputes under the *Fisheries Act* and *Navigation Protection Act.*

1. Mediating where consensus cannot be reached between federal, provincial, territorial or Indigenous governments on any of the above;[77]
2. Hearing appeals from any interested party;
3. Conducting investigations and audits to ensure compliance with any provision of the Act or the regulations, and for other overall quality assurance; and
4. Making related remedial or enforcement orders binding any party, including the Crown.

Summary

The federal government should play a strong role in all EAs within its jurisdiction, with the goal of cooperative assessment with all relevant jurisdictions. It is also imperative that EA processes and decisions comply with UNDRIP and move Canada down the path of reconciliation. The federal institutional structure must therefore permit and encourage collaborative EA processes. All parties (governments, the public, proponents and the environment) stand to benefit when jurisdictions collaborate.

Next generation environmental assessment takes a sustainability-based approach, with the application of sustainability-based criteria and trade-off rules and legislated rights of appeal. The regulatory framework also needs to ensure the application and public availability of information during and after assessments, and meaningfully engage the public throughout all stages of the assessment. It applies a climate test that ensures that Canada meets its climate obligations, ensures sustainability after the assessment and provides quality assurance mechanisms at the project and regulatory levels.

The shift from a triggering-based approach to a listing approach for when an environmental assessment is required in CEAA 2012 has resulted in thousands fewer environmental assessments being conducted federally. In order to understand, avoid and mitigate adverse direct, cumulative and interactive effects and better ensure equitably distributed net environmental, social and long-term economic gains, attention should be paid to even the smaller projects.

The growing necessity to address cumulative environmental impacts in EA and to proactively seek out sustainable outcomes calls for a strengthened focus on the strategic and regional levels. Under our proposed model, strategic and regional assessments would not only provide a forum for policy-level discussions to take place at appropriate scales, but should at the same time provide guidance to subsequent project-level EAs (including to project proponents) and better enable EA to serve as a planning tool.

Canada needs one central, independent and trustworthy authority to govern all EAs it undertakes at all levels, but have the power to appoint regional co-governance boards where possible with provincial and Indigenous governments. Additionally, establishment of an independent tribunal would help adjudicate disputes, facilitate government-to-government relations, and provide quality assurance reviews of the federal EA regime and bodies.

An independent expert body should be established to provide strategic guidance on such matters as when regional and strategic EAs should be conducted (in addition to legislative triggers for REAs

[77] Outcomes must be consistent with both Canadian and Indigenous law, and in government mediation and arbitration, all parties must agree to go before the Tribunal.

and SEAs), terms of reference, appointing review bodies, scientific standards, conduct of EAs, and more. Finally, ad-hoc “Assessment Councils” comprised of federal and Indigenous (as well as provincial, where applicable) experts, as well as experts from outside government, can be appointed on a case-by-case basis to conduct (do the data-gathering and analysis on) regional and strategic EAs.

Thank you for considering these recommendations. If you have any questions or would like to discuss these or other matters further, please do not hesitate to contact us.

Regards,

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APPENDIX A - ATTACHMENTS

Meinhard Doelle, "The Lower Churchill Panel Review: Sustainability Assessment under Legislative Constraints" (August 2014), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480368. An updated version of this paper appears in Robert B. Gibson, *Sustainability Assessment: Applications and opportunities* (Routledge, New York: 2017).

Mark Haddock, *Comparison of the British Columbia and Federal Environmental Assessments for the Prosperity Mine* (2011: Northwest Institute).

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Anna Johnston, *Federal Environmental Assessment Reform Summit: Proceedings* (West Coast Environmental Law: August 2016): http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf.