November 15, 2016

Attn: Expert Panel on the Review of Environmental Assessment Processes

Re: Recommendations on provisions to consider for CEAA 2012 review

Enclosed is a brief on the recommendations made to the Expert Panel on the review of the *Canadian Environmental Assessment Act, 2012* (CEAA 2012). The authors of this brief are a group of concerned environmental engineering students at the University of Northern British Columbia: Leah MacGillivray, Alexander Altmann, and Danielle Gutwillinger.

Recommendations for the Review of *CEAA 2012*

In 2012, Bill C-38 enacted the new *Canadian Environmental Assessment Act, 2012* Ch. 19 s.52 (*CEAA 2012*), which contains many revisions from the original. These provisions acted to weaken the environmental assessment (EA) process overall. The newly elected Liberal federal government has committed to review the changes made to *CEAA 2012* with the goal to "develop new, fair processes that are robust, incorporate scientific evidence, protect our environment, respect the rights of Indigenous peoples, and support economic growth" (Government of Canada, 2016). This is to be done by establishing an Expert Panel by the Minister of Environment and Climate Change. This panel will consult key groups and develop recommendations for the Minister. Upon reviewing the changes made to this Act, several recommendations can be made regarding the advancements of the aforementioned goals. These recommendations include the reassessment of the project list approach outlined by new regulations, EA timelines, the definition of environmental effects as well as participation status in the EA process.

With the enactment of the *CEAA 2012* came the *Regulations Designating Physical Activities (RPDA),* the *Prescribed Information for the Description of a Designated Project Regulations,* and the *Cost Recovery Regulations,* all of which came into effect on July 6, 2012 (Heelan Powell, 2013). Projects that are listed under the *RPDA* are considered to be "reviewable projects" and as such, *may* be subject to an environmental assessment. There are some concerns with this approach, as many projects that are listed will not face an EA if the associated risks are deemed acceptable by the Canadian Environmental Assessment Agency. Additionally, there are projects that are not listed under this regulation, including forestry, road building, and oil and gas exploration (drilling). These types of projects underwent screenings under the old *Canadian Environmental Assessment Act (CEAA)* (IAIA, 2016) and are worth assessing. Another way a thorough assessment can be

circumvented by proponents is by means of project splitting: the proposal of a part of a project as being independent. This allows proponents to potentially avoid triggering an environmental assessment by remaining below *RPDA* thresholds, which can result in a project proceeding with no consideration of cumulative effects. It is recommended that this project list based approach be reconsidered by the Government of Canada, and a more inclusive approach be taken in order to "ensure that projects that may cause significant adverse impacts receive due consideration" (IAIA, 2016).

Another noteworthy change that has been made under *CEAA 2012* is the addition of legislated timelines for the completion of an environmental assessment (s.s. 38(3); s.s. 43(2)). These timelines are set for the parties participating in the assessment, but not for proponents (IAIA, 2016). The timelines being faced by parties are as follows: a standard EA is to be completed within 365 days, an EA by the National Energy Board (NEB) is to be completed within 18 months, and an EA conducted by a review panel has 24 months (Heelan Powell, 2013). By doing this, it introduces the risk of being unfair to under-resourced parties that are being consulted by the process. Such parties could include Aboriginal groups, non-government organizations (NGOs), or any other group that finds themselves "having inadequate time to review large amounts of technical information, while the developer is not subject to timelines" (IAIA, 2016). It is recommended that the determination of a fair timeline is better left to the body conducting the review as opposed to stringent legislative timelines.

The enactment of *CEAA 2012* has redefined the scope of what is considered to be an environmental effect. As stated in section 5(1) of the *Act*, the environmental effects that are to be taken under consideration "in relation to an act or thing, a physical activity, a designated project or a project" are the components of the environment that fall under federal heads of power. These heads of

power include: fish as defined under the *Fisheries Act*, aquatic species defined under the *Species at Risk Act*, migratory birds as defined under the *Migratory Birds Convention Act, 1994*, any other component as set out in Schedule 2, as well as resulting effects on aboriginal peoples. *CEAA* defined environmental effects to include "'any change that the project may cause the environment' and 'effects of this change on people' (par. 2(1)(a))" (IAIA, 2016). When comparing the amended definitions with the ones used by *CEAA*, it can be seen that the latter used a more comprehensive definition of environmental effects. It is recommended that the definition of environmental effects be reconsidered or reverted to the previous definition, as this enables environmental assessments to be evaluated from a systems perspective, as opposed to only considering effects that fit the definition under *CEAA 2012*.

Another source of concern with *CEAA 2012* is how a person or party can qualify to participate in the EA process. In order to be involved in the consultation process of an environmental assessment, a person has to be deemed an interested party by the appropriate responsible authority. Section 2 of the *Act* defines an interested party to be a person who is "directly affected by the carrying out of the designated project" or having "relevant information or expertise" (S.s. 2(2)). Again, *CEAA* uses a broader, more inclusive definition of the concept. Section 2(1) of *CEAA* defines an interested party as "Any party having an interest in the EA outcome…". The new definition limits public participation in the EA process, which does not speak true to the goal of developing fair and robust processes. For these reasons, it is recommended that the Government re-work Section 2 of the *Act* to make EA processes more participatory.

In conclusion, there are several recommendations that should be taken under consideration by the Expert Panel. The use of the project list approach should be reassessed in order to increase the robustness of the environmental assessment process, and limit the use of project splitting to

undermine regulatory thresholds. Environmental assessment timelines put a strain on already under sourced parties such as Aboriginal groups or NGOs, and as such should be reevaluated in order to ensure fairness to all involved. It is also recommended that the definition of "environmental effects" be reverted to the previous *CEAA* definition, which was more comprehensive. Participation status in the environmental assessment process has been limited by *CEAA 2012* to individuals and/or parties who are deemed to be an "interested party". Again, previous EA legislation used a more holistic approach, and is worth reinstating. In taking these recommendations under consideration, the Panel will be working toward achieving the goals set out by the federal government.

Recommendations on the use of Environmental Legislation equivalency provisions

There is significant overlap in jurisdiction between the federal and provincial governments when it comes to the environment. In the 1970s and 80s, Canadian provinces began implementing their own environmental assessment processes (Environmental Law Centre, n.d.). The use of substitution and equivalency agreements is a way that the federal government can delegate authority with the purpose of "minimiz[ing] the duplication of environmental regulations" (Equivalency Agreements, n.d.). It is understood that the use of delegation works to streamline proceedings as well as lighten administrative loads. However, with regards to equivalency agreements, the federal government adopts the resulting decision of the authoritative body to which a process has been delegated. In terms of the environmental assessment process, this can be a cause for concern when considering the fact that provincial and federal governments need different sets of information for their decision making, based on their respective heads of power under the Constitution. This point is exemplified by the ruling of the *Friends of the Oldman River Society v. Canada* (SCC, 1992), that both governments have good authority to regulate matters concerning the environment under their heads of power. As such, "in the course of carrying out its regulatory functions, either government may conduct environmental assessments as part of its own decision-making process" (Environmental Law Centre, n.d.). When looking at the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), it is noted that "the Agency has not yet developed practices or identified conditions that would qualify another jurisdiction's process as equivalent to that under *CEAA 2012*" (Commissioner of the Environment and Sustainable Development, 2014). The multi-jurisdictional nature of the environment indicates the requirement of a collaborative approach to decision making. The use of equivalency agreements "will decrease the federal presence in Canadian environmental decision making" (Environmental Law Centre,

n.d.) and may result in oversights during the evaluation of proposed projects. Therefore, it is for these reasons that, although equivalency agreements aid in reducing redundancies in environmental regulations, it is recommended that provisions for equivalencies in Environmental Legislation not be included in the environmental assessment process, in order to ensure robustness in decision making.

There are some cases however, in which provincial regulatory standards are more stringent and quantitative than federal ones. An example of this can be seen in section 36(3) of the *Fisheries Act* (*FA*), a federal piece of legislation, which prohibits "the deposit of a deleterious substance of any type in water frequented by fish…". This statement could be considered somewhat vague. In the case of British Columbia, there are acts in place which more specifically regulate matters referred to by section 36(3) of the *Fisheries Act.* For example, the *Environmental Management Act* (*EMA*) "enables the use of permits, regulations, and code of practice to authorize discharges to the environment…" (Waste Management, n.d.). In cases such as this one, when provincial laws are more quantitatively based (i.e. regulatory), it would be acceptable to have an equivalency agreement in place to allow the federal government to "stand down".

The completion of an environmental assessment will require a different set of information depending on the government performing it, as jurisdiction is shared federally and provincially under their respective constitutional heads of power. For this reason, it is recommended that provisions for equivalency not be included under *CEAA 2012*. However, when provincial legislation proves to be more stringently regulatory, like when comparing the *EMA* with the *FA*, then it would be more appropriate to have an equivalency agreement in place.

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