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Starting off on the right foot:

Recommended Criteria for Triggering Regional Strategic Environmental Assessments under a new *Canadian Environmental Assessment Act*

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Note: The submission below is made as a supplementary submission to the October 31, 2016 Nature Canada submission to the Panel, *Next Generation Impact Assessment: Toward Sustainability*. This additional submission was developed because Nature Canada concluded that further research and analysis was required to develop a set of more detailed recommendations on the critically important issue of when the law should trigger Regional Strategic Environmental Assessments. We hope that the recommendations below lead to reform that optimizes the implementation of this key sustainability tool.

Starting off on the right foot: Recommended Criteria for Triggering Regional Strategic Environmental Assessments under a new *Canadian Environmental Assessment Act*

Summary of Recommendations

Recommendation 1: Federal environmental assessment legislation should require that the federal government conduct strategic environmental assessments (SEAs) for all plans, programs, and policies that are likely to significantly affect the environment.

Recommendation 2: Federal environmental assessment legislation should enable the responsible agency for environmental assessment to initiate regional strategic environmental assessments (R-SEA) for regions where there are significant current or potential cumulative adverse environmental effects from development, and where the federal government has authority over either the proposed activities or potentially affected environmental values in the region.

Recommendation 3: Federal environmental assessment legislation should require an R-SEA where a new type of development or a significantly increased intensity of industrial development is proposed in a region.

Recommendation 4: Federal environmental assessment legislation should require an R-SEA where a region has shown a significant decline in key ecological values or environmental health benchmarks and where there is federal jurisdiction over further development activity in the region, a potentially affected environmental value, or where the decline in the environmental benchmark is a matter of national concern.

Recommendation 5: The Canadian Environmental Assessment Agency (CEA Agency) as the agency responsible for reviewing project-level environmental assessments should be able to initiate and facilitate an "off-ramp" procedure from a project-level environmental assessment. This process would suspend the project-level assessment and move to an R-SEA, which would allow for stakeholders to raise higher-level issues regarding regional cumulative effects and for these issues to be assessed on a regional scale.

Recommendation 6: Federal environmental assessment legislation should have a clear and transparent process to accept and respond to petitions for an R-SEA from the public.

Recommendation 7: Federal environmental assessment legislation should establish a transparent collaborative R-SEA process with Indigenous and provincial governments where these levels of government submit a request for an R-SEA.

Introduction

A new environmental assessment regime in Canada must include regional strategic environmental assessments (R-SEA). Federal government commissioned reports have raised regional strategic environmental assessments as an important issue multiple times.[1] The move from project-level

[1] Canadian Council of Ministers of the Environment, *Regional Strategic Environmental Assessment in Canada: Principles and Guidance* (Winnipeg; Canadian Council of Ministers of the Environment, 2009); Canada, Parliament, House of Commons, Standing Committee on Environment and Sustainable Development, S*tatutory Review of the*

assessments to strategic and sustainability-focussed environmental assessments is a current trend in environmental assessment legislation.[2]

The Canadian Council of Ministers of the Environment (CCME) has defined R-SEAs as processes "designed to systematically assess the potential environmental effects, including cumulative effects, of alternative strategic initiatives, policies, plans, or programs for a particular region."[3] Currently, Canada does not have any statutorily mandatory regional or strategic environmental assessments. However, the Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals establishes an expectation that departments or agencies will conduct strategic environmental assessments (SEAs) for policy, plan or program proposals. Under the Directive, agencies and departments are supposed to complete SEAs for proposals that they submit to a minister or to Cabinet for approval, where implementation of the proposal may result in important environmental effects. This policy-based approach places the initiation and scoping of a SEA in the hands of the department or agency that developed the proposal. In addition, the process has no public participation requirement and limited impact on ministerial or Cabinet decision-making.[4]

The *Canadian Environmental Assessment Act, 2012* also has a provision that allows for the Minister of the Environment to establish a committee to conduct a regional study on an area that is entirely on federal lands.[5] However, the provision does not provide guidance to the Minister as to when to conduct regional studies -- and narrows the scope of regional studies by only allowing the Minister to unilaterally initiate studies on solely federal lands or in agreement with other jurisdictions.

Objectives of Regional Strategic Environmental Assessments (R-SEA)

The broad objective of conducting a R-SEA is "to inform the preparation of a preferred development strategy and environmental management framework(s) for a region."[6] R-SEA is expected to improve cumulative environmental effects management, increase the efficiency and effectiveness of project-level environmental assessments, and identify the preferred directions, strategies, and priorities for the future management and development of a region.[7]

An effective R-SEA regime should be able to:

- protect ecosystems and the environment from degradation from the cumulative effects of development by assessing all development affecting a region, even where individual projects may not trigger project-level assessments;

Canadian Environmental Assessment Act: Protecting the Environment, Managing Our Resources, 41st Parl, 1st Sess, No 1 (2 June 2011 and 13 September 2013) (Chair: Mark Warawa).

[2] Mark Haddock, *Environmental Assessment in British Columbia* (Victoria: Environmental Law Centre, 2010) at page 23.

[3] Canadian Council of Ministers of the Environment, *Regional Strategic Environmental Assessment in Canada: Principles and Guidance* (Winnipeg; Canadian Council of Ministers of the Environment, 2009) at page 6.

[4] Canada, Privy Council Office and Canadian Environmental Assessment Agency, *Strategic Environmental Assessment: Guidelines for Implementing the Cabinet Directive* (Ottawa: Privy Council Office and the Canadian Environmental Assessment Agency, 2010).

[5] *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19, ss 73-77.

[6] Canadian Council of Ministers of the Environment, *Regional Strategic Environmental Assessment in Canada: Principles and Guidance* (Winnipeg; Canadian Council of Ministers of the Environment, 2009) at page 7.

[7] Canadian Council of Ministers of the Environment, *Regional Strategic Environmental Assessment in Canada: Principles and Guidance* (Winnipeg; Canadian Council of Ministers of the Environment, 2009) at page 7.

- support planning decisions for regions by assessing development alternatives in a transparent and sustainable way;
- ensure that the public, municipal governments, and other stakeholders are involved in higher-level strategic decisions about regional environmental issues;
- integrate sustainability and land use targets such as greenhouse gas emission targets into decision-making; and
- support collaborative decision-making with provincial and Indigenous governments regarding regional environmental issues and land use.[8]

The First Step: Identifying Mandatory Triggers

In moving towards a more robust approach to assessing regional environmental effects, the first step is to determine when and how legislation would trigger an R-SEA. Triggers for mandatory R-SEA cannot be so broad that the process becomes prohibitively expensive or ineffective because of the number of assessments that must be completed. A trigger that is too broad or general may also rely too heavily on the discretion of a decision-maker, which would create a system similar to the current system of policy-based SEAs and regional studies. In addition, R-SEA triggers should prioritize and ensure assessment for regions with the most potential for adverse cumulative environmental effects from development. Having clear criteria can ensure that the R-SEA process begins with transparency, which will help other jurisdictions, the public, and proponents engage with the process.[9]

Establishing legislative requirements for R-SEA under a federal statute can raise constitutional division of powers issues. The focus in developing an R-SEA framework should be to support a collaborative and cooperative assessment process with the provinces. This type of collaborative approach means working together with other jurisdictions to develop approaches and scoping for R-SEAs -- as well as collaborating to achieve the objectives and targets flowing from an R-SEA.

However, a strong federal legislative framework for R-SEA is still necessary to provide a basis for initiating collaborative regional assessments with other jurisdictions and to ensure that R-SEAs are conducted where necessary. In determining the federal government’s jurisdiction to conduct a unilateral R-SEA if needed, it is important to differentiate the jurisdictional issues that can arise in *triggering* a mandatory R-SEA compared to those that may arise in *implementing* decisions arising from the R-SEA. For triggering a mandatory R-SEA process, the R-SEA likely just needs to arise from projects or developments with a real potential to affect an area of federal jurisdiction.[10] In addition, the federal government should be able to initiate an R-SEA process where needed to address an issue of national concern.

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[8] Canadian Council of Ministers of the Environment, *Regional Strategic Environmental Assessment in Canada: Principles and Guidance* (Winnipeg; Canadian Council of Ministers of the Environment, 2009) at page 11.

[9] Hugh Benevides et al, *Law and Policy Options for Strategic Environmental Assessment in Canada,* (Ottawa: Report prepared for the Canadian Environmental Assessment Agency, 2009) at page 15.

[10] Jason MacLean, Meinhard Doelle, and Chris Tollefson, “Polyjural and Polycentric Sustainability Assessment: a Once-In-A Generation Law Reform Opportunity”(2016) 30:1 J Envtl L & Prac, Forthcoming. Available at SSRN: https://ssrn.com/abstract=2839617.

Once federal jurisdiction over an issue or decision is established, the scoping of R-SEAs could likely be quite comprehensive to inform federal decision-making.[11] In terms of decision-making coming out of an R-SEA, a unilateral federal R-SEA could still provide enforceable conditions for future federal decisions, which would be especially important in areas of clear federal jurisdiction such as fisheries, Canadian territorial waters, nuclear facilities and interprovincial undertakings. However, for most R-SEA to move from an information gathering process to a land use planning process, it will likely be necessary to have provinces as participating decision-makers in the R-SEA process – since provinces make decisions that could impact R-SEA recommendations (*e.g.*, land use plans and allocation of resources like water and forest licences).

Recommendations

1. Strategic environmental assessments for federal government plans, programs, and policies

Recommendation 1: Federal environmental assessment legislation should require that the federal government conduct strategic environmental assessments (SEAs) for all plans, programs, and policies that are likely to significantly affect the environment.

This recommendation would convert the current Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals (Cabinet Directive) into a legislative requirement for government. As the Commissioner of the Environment and Sustainable Development found that departments and agencies were not applying the Cabinet Directive to most proposals submitted to ministers between 2013 and 2015, a legislative requirement seems necessary to ensure that departments and agencies conduct SEAs consistently.[12] Note that SEAs are legislatively required for agreements under s. 5(2) of the *Farm Income Protection Act,* SC 1991, c 22 -- and they have been shown to be of better quality than SEAs arising from the Cabinet Directive.[13]

The Cabinet Directive expects a department or agency to conduct a SEA when the department or agency submits a proposal to an individual minister or to Cabinet for approval, and when the implementation of the proposal may result in important environmental effects. The Cabinet Directive Guidelines list factors that departments and agencies should consider in determining whether a SEA is necessary. A new legislative requirement for SEA could convert these factors into criteria for requiring a SEA; Table 1 lists these proposed criteria.

Article 4 of the United Nations Economic Commission for Europe's Protocol on Strategic Environmental Assessment signed in 2004 similarly requires SEAs for all signatories in Europe.[14] The Protocol requires

[11] Jason MacLean, Meinhard Doelle, and Chris Tollefson, "Polyjural and Polycentric Sustainability Assessment: a Once-In-A Generation Law Reform Opportunity"(2016) 30:1 J Envtl L & Prac, Forthcoming. Available at SSRN: https://ssrn.com/abstract=2839617.

[12] Commissioner of the Environment and Sustainable Development, *Report 3 – Departmental progress in Implementing Sustainable Development Strategeices,* (Ottawa: Office of the Auditor General of Canada, 2016) http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201610_03_e_41673.html#hd4a.

[13] Stephen Hazell and Hugh Benevides, "Toward a Legal Framework for SEA in Canada," in *Perspectives on Strategic Environmental Assessment* (New York: Lewis Publishers, 2000).

[14] *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context,* United Nations Economic Commission of Europe, 21 May 2003. Available at http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/protocolenglish.pdf.

SEAs for plans and programmes which are prepared for agriculture, forestry, fisheries, energy, industry including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning, and land use and which create a framework for future consent for the development of projects listed in Annexes 1 and 2 of the protocol. Canada's guidelines for the Cabinet Directive closely mirror many of these criteria.

Table 1. Criteria for requiring a SEA of a plan, program or policy proposal from the Cabinet Directive Guidelines.[15]

Criteria for a proposal to require a SEA:

- The proposal has outcomes, either positive or negative, that affect natural resources.
- The proposal has a known direct or a likely indirect outcome that is expected to have considerable positive or negative impacts on the environment.
- The outcomes of the proposal are likely to affect the achievement of the Federal Sustainable Development Strategy's goals and targets (e.g., reduction of greenhouse gas emissions or the protection of an endangered species).
- The proposal is likely to affect the number, location, type and characteristics of sponsored initiatives that would be subject to project-level environmental assessments, as required by the Canadian Environmental Assessment Act or an equivalent process.
- The proposal involves a new process, technology or delivery arrangement with important environmental implications.
- The scale or timing of the proposal could result in significant interactions with the environment.

In certain exigencies, where the plan, program or policy will not have an immediate serious environmental effect, the law could allow departments and agencies to conduct SEAs *after* approval of the proposal. Clear criteria should prescribe when it may be permissible to conduct a SEA after approval. For example, regulations could allow departments or agencies to conduct SEAs for proposals responding to emergencies and federal budgets after their approval. For federal budgets, this would help inform the following year's budget. For emergencies, a SEA after approval would allow the government to address lessons learned -- to be applied to future emergencies as well as to guide any decision-making continuing under the current plan, program or policy.

Exceptions for requiring a SEA could include exceptions for proposals that are a subset of a previously assessed proposal. The European SEA Protocol excludes national defence and financial or budget proposals as well as proposals that determine the use of small areas at the local level.[16] However, Canadian legislation should require the government to conduct SEAs for financial budgets, because budgets can have significant environmental impacts and represent some of the highest-level policy decisions made by the federal government. As stated above, conducting SEAs after budget approval would limit timing and confidentiality issues that might arise if the government conducted a public, transparent SEA prior to the release of the budget.

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[15] Canada, Privy Council Office and Canadian Environmental Assessment Agency, *Strategic Environmental Assessment: Guidelines for Implementing the Cabinet Directive* (Ottawa: Privy Council Office and the Canadian Environmental Assessment Agency, 2010) at page 7.

[16] *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context,* United Nations Economic Commission of Europe, 21 May 2003. Available at http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/protocolenglish.pdf.

The CEA Agency should also have formal input into the completion of SEAs, as the Netherlands Commission on Environmental Assessments (NCEA) does. Currently the CEA Agency only provides training and guidance to departments and agency, but has no clear mandatory role in the SEA process. In contrast, the NCEA produces reports on the quality and scoping of the SEA and provides advice to the agency or department responsible for the SEA as a mandatory component of the SEA process.[17]

2. Enable the CEA Agency to initiate regional strategic environmental assessments

Recommendation 2: Federal environmental assessment legislation should enable the CEA Agency to initiate regional strategic environmental assessments (R-SEA) over regions where there are significant current or potential cumulative adverse environmental effects from development and where the federal government has authority either over proposed activities in the region or over potentially affected environmental values.

This enabling provision is necessary to allow the CEA Agency, as the assumed agency responsible for environmental assessments, to initiate R-SEAs. The agency needs flexibility to designate and prioritize R-SEAs in order to respond to the wide range of potential cumulative effects and regional environmental issues that may arise. The Minister could then also initiate R-SEAs in response to broad public concern about environmental effects in a region. However, legislation should also provide specific triggers to indicate when an R-SEA will be mandatory. Recommendations 3 through 7 provide triggers that should begin an R-SEA under new federal environmental assessment legislation.

Sections 73 to 77 of *CEAA 2012* currently enable the Minister to establish a committee to conduct a regional study on federal lands and to enter into agreements with other jurisdictions to conduct a study of a region that is partially or completely outside of federal lands.[18] However, these provisions take a limited view of federal jurisdiction over environmental assessments and provide no guidance as to when to conduct a regional study. An enabling provision in the new federal environmental assessment legislation should allow for the CEA Agency or the Minister to initiate an R-SEA. The CEA Agency should have to initiate an R-SEA where a region is significantly affected by current or potential adverse cumulative effects from development and where the federal government has jurisdiction over the approval of proposed projects in the region or over potentially affected environmental values, such as fisheries or navigable waters.

3. R-SEA for proposed new industrial development in a region

Recommendation 3: Federal environmental assessment legislation should require an R-SEA where a new type of development or a significantly increased intensity of industrial development is proposed in a region.

One of the major issues identified with regional strategic environmental assessments is the struggle to trigger assessments early enough to ensure that all development alternatives and cumulative effects can be assessed prior to making decisions about individual projects. One way to do this is through legislatively required strategic environmental assessments for policy, programme, and plan proposals

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[17] Organization for Economic Co-operation and Development, "Environmental governance and management," *in OECD Environmental Performance Reviews: The Netherlands 2015,* (Paris: OECD Publishing, 2015), http://dx.doi.org/10.1787/9789264240056-9-en.

[18] *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19, ss 73-77.

from the federal government, but this leaves a gap for sudden increases in regional development originating not from a government plan, but from market forces or new technology.

Therefore, environmental assessment legislation should require an R-SEA where there are proposed developments[19] that will use a new technology whose environmental effects in the region are unknown -- or where there are several proposals in a region that collectively will significantly increase industrial development in a region. Development pressure that triggers a R-SEA should include situations where there are several environmental assessment applications for projects in the same region at the same time, applications for permits to use a new technology in a region, or evidence of current or potential resource use conflict because of increasing development in the region.

Calls for several R-SEAs of this type have already been made in Canada from a call for a Strategic Environmental and Economic Assessment of Liquefied Natural Gas projects in British Columbia[20] to a call for an R-SEA in the Far North of Ontario due to mining pressure, specifically in the Ring of Fire area.[21]

Offshore oil and gas development in the Beaufort Sea in the Western Arctic also demonstrates the need for further legislated R-SEA requirements. Offshore oil and gas exploration in the Beaufort Sea only recently became more active in 2007. Programs like the Beaufort Regional Environmental Assessment, initiated by the federal government, provided baseline studies in conjunction with other programs that researched at marine planning and climate change. However, none of these programs provided the integrative planning and impact assessment that would be integral to a legislated R-SEA framework.[22] The Western Arctic provides an example of an opportunity to apply a legislative framework for R-SEA -- given that there has already been work done on baseline conditions and there is an opportunity for the federal government to work with the Inuvialuit under the Inuvialuit Final Agreement.

Examples of this type of R-SEA include:

- **Bay of Fundy Tidal Energy Strategic Environmental Assessment**: The Nova Scotia Department of Energy initiated this assessment in 2007 in response to a number of proposals to develop tidal energy projects in the Bay of Fundy. The assessment was to consider whether, where and under what conditions offshore renewable energy developments should be encouraged and approved. The non-profit Ocean Energy and Environment Research Association (OEERA) conducted the assessment. The OEERA created a subcommittee of 15 individuals representing provincial and federal governments, environmental and fisheries interests, and a wide variety of academic backgrounds. The report made 29 recommendations, most of which the provincial government accepted. The province commissioned an update to the SEA in 2013 given the rapid changes in technology. A key limitation noted in the assessment was the lack of a legislative

[19] For unilateral federal environmental assessments, only project proposals with a real potential to affect an area of federal jurisdiction or an issue of national concern would likely be able to trigger an assessment – whether project level or regional strategic environmental assessments.

[20] Calvin Sandborn et al. *Re: Request that Minister Polak order a Strategic Economic and Environmental Assessment of liquid natural gas (LNG) development in British Columbia,* (Environmental Law Centre, 2013).

[21] Cheryl Chetkiewicz and Anastasia M. Lintner, *Getting It Right In Ontario's Far North: The Need for a Regional Strategic Environmental Assessment in the Ring of Fire (Wawangajing)* (Thunder Bay: Wildlife Conservation Society and Ecojustice, 2014).

[22] Courtney Fidler and Bram F. Noble, "Advancing Regional Strategic Environmental Assessment in Canada's Western Arctic: Implementation Opportunities and Challenges," (2013) 15:1 JEAPM.

foundation for the assessment, which meant that the rules, scoping, and impacts on future decision-making were not clear. However, the assessment provides an example of a successful structure for developing an environmentally informed approach to a new industry.[23]

- **Central Namib Uranium Rush Strategic Environmental Assessment:** The Geological Survey of Namibia commissioned this assessment due an increased intensity in uranium mining in Namibia. This assessment focussed solely on the impacts from uranium prospecting and mining and development directly linked to these activities. The assessment resulted in an overarching framework and roadmap for addressing cumulative effects. As there was no government policy, plan or program for the "Uranium Rush," it was critical that the Namibian government could recognize a new expansion of the uranium industry through monitoring the number of licence applications and activities on the land. The limitation of this SEA to a specific sector made the scoping of the SEA more manageable, but also made the results somewhat limited in not being able to address how uranium-mining activities might interact with non-mining developments.[24]

4. Decline in environmental benchmarks or indicators

Recommendation 4: Federal environmental assessment legislation should require an R-SEA where a region has shown a significant decline in key ecological values or environmental health benchmarks and where there is federal jurisdiction over further development activity in the region, a potentially affected environmental value, or where the decline in the environmental benchmark is a matter of national concern.[25]

An R-SEA should be required where a region has demonstrated significant impairment of ecological integrity or environmental health because of cumulative impacts from past and current development. This trigger is necessary to prioritize the assessment of regions that may already have degraded environments. In these areas, the government should assess approvals for further development in a broad context to account for an ecosystem, watershed, or airshed already seriously impacted by development.

For example, this trigger would allow for the federal government to initiate an R-SEA for regions with endangered caribou herds where multiple stressors have resulted in habitat loss, disturbance and altered predator-prey dynamics.[26] In addition, the federal government could also require an R-SEA where an airshed has consistently exceeded air quality objectives and where development is proposed that is expected to further contribute to air pollution.

Given the lack of consistent monitoring of environmental indicators across the country as well as issues of jurisdiction between provincial and federal governments, it may be difficult to determine when significant regional environmental benchmarks have declined to a point to trigger an R-SEA. However,

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[23] Meinhard Doelle, *Offshore Renewable Energy Governance in Nova Scotia: A Case Study of Tidal Energy in the Bay of Fundy* (2014).

[24] Cheryl Chetkiewicz and Anastasia M. Lintner, *Getting It Right In Ontario's Far North: The Need for a Regional Strategic Environmental Assessment in the Ring of Fire (Wawangajing)* (Thunder Bay: Wildlife Conservation Society and Ecojustice, 2014) at page 106.

[25] Canadian Council of Ministers of the Environment, *Regional Strategic Environmental Assessment in Canada: Principles and Guidance* (Winnipeg; Canadian Council of Ministers of the Environment, 2009).

[26] COSEWIC, *Assessment and Status Report on the Caribou Rangifer tarandus in Canada* (Ottawa: COSEWIC, 2014), available from
http://www.sararegistry.gc.ca/virtual_sara/files/cosewic/sr_Caribou_Northern_Central_Southern_2014_e.pdf

this does not mean that an R-SEA should not have to be conducted if and when a situation does arise that meets these conditions.

At a minimum, a recovery strategy under s. 37 of the *Species at Risk Act,* SC 2002, c 29 should be able to trigger an R-SEA where the recovery team finds that multiple stressors are threatening the critical habitat of an endangered species. Given that the federal government already has the ability to make a safety net order to protect the critical habitat of an endangered species on provincial land, the federal government should be able to initiate an R-SEA to integrate regional planning and development decisions with the protection of critical habitat.

Moving forward, Canada could use its current monitoring networks under the Canadian Environmental Sustainability Indicators program, as well as species at risk and fisheries data to monitor and identify regional declines in environmental indicators that should require R-SEA.

The Great Sand Hills Regional Environmental Study provides an example of the benefits of conducting an R-SEA in response to risks to ecological values rather than in response to individual development proposals. The Government of Saskatchewan in 2004 conducted the regional study in recognition of the high ecological value of the Great Sand Hills and increasing levels of proposed and current development. The study was a strategic assessment of human activities affecting the ecological integrity and sustainability of the Great Sand Hills area. The assessment resulted in more than 60 recommendations for future planning, assessment, and monitoring and developed thresholds and objectives for ecological components. This type of study demonstrates the benefits of conducting R-SEAs early to protect sensitive ecological components by allowing for the assessment of multiple alternative development scenarios. The study also noted the need for a regulatory framework for R-SEAs, to make it possible to sustain the outcomes and recommendations from assessments.[27]

5. Off-ramp procedure from project-level environmental assessments

Recommendation 5: The Canadian Environmental Assessment Agency (CEA Agency), as the agency responsible for reviewing project-level environmental assessments, should be able to initiate and facilitate an "off-ramp" procedure for a project-level environmental assessment. This process would suspend the project-level assessment and move to an R-SEA, which would allow for stakeholders to raise higher-level issues about regional cumulative effects and for these issues to be assessed on a regional scale.[28]

Having an off-ramp procedure will allow the CEA Agency to catch up on R-SEAs in situations where:

- industrial development of a region has already begun and
- project-level assessments cannot appropriately address cumulative effects from past development and proposed development.

Both proponents and intervenors should be able to apply to the CEA Agency to initiate the "off-ramp" process. Where another federal agency or tribunal is responsible for granting approvals that

[27] Cheryl Chetkiewicz and Anastasia M. Lintner, *Getting It Right In Ontario's Far North: The Need for a Regional Strategic Environmental Assessment in the Ring of Fire (Wawangajing)* (Thunder Bay: Wildlife Conservation Society and Ecojustice, 2014) at page 119.

[28] Hugh Benevides et al, *Law and Policy Options for Strategic Environmental Assessment in Canada*, (Ottawa: Report prepared for the Canadian Environmental Assessment Agency, 2009) at page 15.

affect regional environmental issues, such as the National Energy Board, the off-ramp option should also apply to these authorities. An “off-ramp” R-SEA should be initiated where:

- an R-SEA has not already been conducted in the region;
- the proposed project will likely cause negative environmental or health impacts that are already, or are expected to be, significantly impacted by current or proposed industrial developments in the region (when compared to the region’s ambient standards for environmental, ecosystem, and human health); and
- the cumulative effects of the proposed project along with the other development in the region affect an issue of national concern (e.g., relationships with Indigenous communities, greenhouse gas emission targets).

The CEA Agency should have the final decision in determining whether a project-level EA should be upgraded to an R-SEA -- based on the agency’s knowledge of the project, current environmental state of the region, demonstrated environmental trends, and public concern.

In addition, the determination by the CEA Agency to upgrade the project-level environmental assessment to an R-SEA should suspend the project-level assessment. In order to incentivize this process and ensure it still supports efficient decision-making, Canada could adopt a system similar to Western Australia. The Western Australia system categorizes projects falling within the scope of a previous strategic assessment as derived proposals.[29] These derived proposals go through an easier process for project-level environmental assessments, with a reduced cumulative effects assessment because cumulative effects should have already been assessed at a regional level. In this framework, the Minister retains the authority to require that the proponent of a derived proposal conducts further studies where the previous strategic assessment is inadequate or where a critical assumption of the strategic assessment has changed.

6. Petition process from the public

Recommendation 6: Federal environmental assessment legislation should have a clear and transparent process to accept and respond to petitions for an R-SEA from the public.

Given the possibility of unforeseen situations where an R-SEA should be conducted, new environmental assessment legislation should also have a process that allows for an R-SEA to be initiated based on petitions from the public.[30]

Petition processes can be structured in a number of different ways. For example, public petition processes already exist in Canada under the *Auditor General Act* and the *Canadian Environmental Protection Act.* Section 22(1) of the *Auditor General Act* requires that, upon receiving an environmental petition regarding a relevant sustainable development issue, the Commissioner of the Environment and Sustainable Development must record and forward the petition to the relevant department.[31] Under this system, the responsible Minister must consider the petition and respond to it by sending a reply to

[29] Government of Western Australia, Environmental Protection Authority, Environmental Protection Bulletin No. 17: Strategic and derived proposals (Environmental Protection Act, 2012). Available from http://edit.epa.wa.gov.au/EPADocLib/32148%20EPA%20EPB%2017.pdf

[30] Canadian Council of Ministers of the Environment, *Regional Strategic Environmental Assessment in Canada: Principles and Guidance* (Winnipeg; Canadian Council of Ministers of the Environment, 2009) at page 6.

[31] *Auditor General Act*, RSC 1985, c A-17, s 22.

the petitioner as well as the Auditor General within 120 days unless the Minister notifies the petitioner of a need to extend the response time. This framework provides a clear, transparent way to approach and consider petitions. By involving the Commissioner of the Environment and Sustainable Development, an independent office reviews the petition in addition to the Minister, which ensures that departments will stay accountable to the petition process. The *Canadian Environmental Protection Act* allows for any person to request an investigation of an offence, listing of a substance on the priority substances list, or the formation of a Board of Review to review specified regulations.[32]

In Ontario, s. 61 of the *Environmental Bill of Rights* allows for two Ontario residents to apply to the Environment Commissioner for a review of a policy or legislative instrument. The *Environmental Bill of Rights* sets out a relatively detailed procedure including the factors a Minister must consider when considering whether to conduct the review.[33] However, this process does not include an independent review from an arms-length body, which should be included in a new R-SEA public petition process.[34]

Outside of Canada, the United States of America has a petition process under the *Endangered Species Act*, which has contributed to the effective listing and reviewing endangered species.[35] In a public petition process like this, the government can take advantage of the level of local expertise that can come forward through a public petition process.[36] The Commission for Environmental Cooperation (CEC) established under the North American Agreement on Environmental Cooperation also has a petition process for creating a factual record regarding the failure of member countries to enforce environmental laws. This process sets out minimum information requirements for the CEC to review a submission. Although the CEC has issues with the timeliness of its ability to respond to submissions, a petition system for the R-SEA process should have a similar minimum information requirement -- tailored to the objectives of R-SEA and transparently set out in regulations to guide the Minister in determining his or her response to submitted petitions.[37]

A petition for an R-SEA from the public should demonstrate evidence of a gap in the regional management of cumulative impacts in an area where further development is proposed including:

- demonstrated degradation of an environmental, ecological, or human health value caused by cumulative development in the region;
- a failure of the region to meet established ambient environmental quality objectives or emission targets where additional development that would negatively impact the ability of the region to meet targets is proposed;
- conflicts in the allocation of resources resulting from several proposals for development;
- a rapid increase in industrial pressure in the region; or
- a proposed program, policy, plan or series of proposed projects that will affect a sensitive or critically important ecosystem.

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[32] *Canadian Environmental Protection Act,* SC 1999, c 33, ss 17, 76, 333.
[33] *Environmental Bill of Rights,* SO 1993, c 28.
[34] Mark S. Winfield, "A Political and Legal Analysis of Ontario's Environmental Bill of Rights," (1998) 47 U.N.B.L.J. 325.
[35] Eric Biber and Berry Brosi, "Officious Intermeddlers or Citizen Experts?" (2010) 58 UCLA L. Rev. 321.
[36] Eric Biber and Berry Brosi, "Officious Intermeddlers or Citizen Experts?" (2010) 58 UCLA L. Rev. 321.
[37] John H. Knox and David L. Markell, "Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission," (2011) 47 Tex. Int'l L. J. 505.

An R-SEA petition process should have an independent body, like the Commissioner of the Environment and Sustainable Development, transparently accepting and forwarding the petitions to the Minister with required timelines for a response from the Minister. The process should also include clear minimum information requirements for accepting petitions.

In addition, having a certain number of signatures on the petition should raise the likelihood of conducting an R-SEA. For example, having 10% of voters in an affected region signing a petition that meets minimum information requirements should trigger an R-SEA, unless narrow exceptions are met. These narrow exceptions could include situations where an R-SEA with the same scope was conducted in the last five years with no significant change in cumulative impacts; or where the federal government does not have jurisdiction over any relevant decision making for proposed development or over any affected environmental values in the region.

In addition, it may be wise to specifically extend to R-SEAs the current power of the Minister (under s. 14(2) of *CEAA 2012*) to designate assessments whenever "public concerns" about adverse environmental effects warrant designation. In this way, the Minister can appropriately respond to less formal expressions of public concern about regional developments.

7. Petition process for a collaborative R-SEA with other jurisdictions

Recommendation 7: Federal environmental assessment legislation should establish a transparent collaborative R-SEA process with Indigenous and provincial governments where these levels of government submit a request for an R-SEA.

Given the constitutional status of provincial and Indigenous governments, the federal government should only be able to decline to conduct joint R-SEAs with provincial or Indigenous governments in a narrow set of circumstances. Ideally, another part of environmental assessment legislation will address federal and provincial environmental assessment collaboration and nation-to-nation relationships with Indigenous governments more directly. However, in situations where a government does not have a negotiated mechanism for conducting R-SEA with Canada, it should still be able to request a collaborative R-SEA by applying to the CEA Agency.[38]

The application should require that the non-federal government demonstrates a gap in the regional management over the cumulative impacts in an area impacted by federal decision-making, which may include:

- demonstrated degradation of an environmental, ecological, or human health value caused by cumulative development in the region;
- a consistent failure of the region to meet established ambient environmental quality objectives or emission targets where additional development that would negatively impact the ability of the region to meet targets is proposed;
- conflicts in the allocation of resources resulting from several proposals for development;
- a rapid increase in industrial pressure in the region; or

[38] Anna Johnston, *Federal Environmental Assessment Reform Summit Proceedings,* (West Coast Environmental Law, 2016) at page 62.

- a proposed program, policy, plan or series of proposed projects that will affect a sensitive or critically important ecosystem.

Where the petitioning government demonstrates a gap in decision-making or information, the Minister should only be able to decline to initiate a joint R-SEA process where there is no federal jurisdiction over decision making in the area or where there has already been an R-SEA conducted in the region in the last five years. Where there has already been an R-SEA, the agency should still consider whether circumstances have changed in a way that requires an updated R-SEA.

One option might be to have the CEA Agency assess the request from the other jurisdiction to ensure that it fits with the criteria to conduct an R-SEA. The CEA Agency could then make a recommendation to the Minister whether to conduct an R-SEA. The Minister would have a certain amount of time to reject the recommendation with reasons similar to the process for listing endangered species under the *Species at Risk Act.*[39] If the Minister does not reject the recommendation in this time, then the CEA Agency would begin working on a collaborative R-SEA with the other jurisdiction.

Conclusion – Related Issues

These recommendations rely considerably on other improvements to the environmental assessment regime -- including broad regional and multi-sectoral scoping of any R-SEA and effective mechanisms for ensuring that planning decisions from a R-SEA process are applied to project-level decision-making.

Requiring adequate regional and multi-sectoral scoping of R-SEA and requiring application of R-SEA recommendations to project-level decisions will also be necessary for an effective R-SEA program to address cumulative effects. Establishing clear criteria for triggering R-SEA is merely a first step.

[39] *Species at Risk Act,* SC 2002, c 29, s 27.