December 23, 2016

To:
The Expert Panel on the Review of Environmental Assessment Processes
c/o Johanne Gélinas, Chair

From:
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Dear Members of the Expert Panel,

This written submission, Restoring Trust in, and Improving Environmental Assessment, confirms and reiterates my presentation on November 21, 2016, in Calgary. It also expands some of the topics and touches upon others. This submission is informal, more in the nature of speaking notes, than an academic paper. If the Panel has any questions or requires clarification, please contact me.

As mentioned before, I sincerely thank the Panel for the opportunity to participate in this critically important process. I also thank the Panel for the time and attention members are paying to this Government initiative, especially over the holiday season.

This short submission is divided into the following sections:

- My Background and Acknowledgements and Support
- What to Assess
- Harmonization, Substitution, and Equivalency
- Quality Assurance

My Background and Acknowledgments and Support

I am a Professor Emerita of Law, University of Calgary, where I spent 11 years full time Faculty member. Prior to that I was legal counsel with the Environmental Law Centre in Edmonton, Alberta for 11 years, the last two as Executive Director. I have been a member of the RCEN Planning and Environmental Assessment Caucus for about 25 years, and I was a member of the Regulatory Advisory Committee (under the CEAA 1992) for 11 years. I have taught environmental assessment law at many levels, and published numerous articles in the area.

At the outset I wish to relate my support for Sustainability Assessment as articulated by scholars in the area, including Robert Gibson, Meinhard Doelle, and John Sinclair. I would caution, however, that if the Government adopts Sustainability Assessment that it ensures that legislation adheres to a framework and process that proffers greater environmental, social, and economic benefits than current or past federal environmental assessment legislation, as envisioned by Sustainability Assessment scholars.

I also wish to especially commend the submission of the RCEN Environmental and Planning Caucus Submission as well as the posted work of the Multi-Interest Advisory Committee (MIAC). My comments benefit from the advice of the RCEN EPA Caucus and the MIAC, as well as from many of the numerous submissions to the Panel posted on the Panel's website. I have reviewed all submissions and transcripts up to about 4 days ago.

What to Assess

The *Constitution Act, 1867*[1] allocates "heads of legislative power" between the federal and the provincial levels of governments. The framers of the Constitution intended the allocation to be exclusive in the sense that if the Constitution gives one level of government the right to legislate a matter, it excludes the other level from legislating that matter. Although there may be overlap between provincial powers and federal ones when it comes to a project that impacts the environment, that simply is the nature of the division of powers in the Constitution. Accordingly, if a project will impact a Canadian fishery (exclusive federal constitutional jurisdiction) and will impact water quality (mainly provincial constitutional jurisdiction) both levels of government will have regulatory authority over the project and may need to assess its impacts before exercising the authority.

In my view, when it comes to "what to assess" it is critical that the federal government begins with an "all in, unless out" approach. This means, if the federal government needs to exercise constitutional authority over a project for it to go ahead, the project is *potentially* subject to federal environmental assessment (EA). It is not appropriate to simply list types that are subject to federal EA.[2] This is because, except for projects that take place entirely on federal lands, federal constitutional authority does not easily extend to projects *per se,* such as a paper mill, a mine, or a dam. Rather it extends to aspects of projects, such as impacts to a coastal or inland fishery, impacts to migratory birds or nests, transboundary impacts, or an interference with navigation.[3]

Going from over 4000 assessments a year under the *Canadian Environmental Assessment Act* [4](CEAA 1992), which incorporated the all in, unless out approach, to a few dozen under the *Canadian Environmental Assessment Act, 2012,*[5] (CEAA 2012), which incorporated the list approach, hugely diminished trust that the federal government was managing matters under federal jurisdiction in the public interest. In fact it blares out that the federal government has all but retreated from conducting federal EA, notwithstanding the universally recognized benefits of

[1] *Constitution Act, 1867*, formerly the *British North America Act, 1867*, (UK) 30 & 31 Vict, c 3.
[2] See Arlene Kwasniak, "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward," in the Vol. 20, *Journal of Environmental Law and Practice*, Vol. 20, No. 1, (2009) pp. 1-35, at 8-9.
[3] Legislative authority over these impacts is found in the opening and closing clauses of s. 91, and ss. 91(2), (10),(12), and s. 132 of the *Constitution Act, 1867*.
[4] Canadian Environmental Assessment Act, 1992, SC 1992, c-37 [CEAA, 1992].
[5] *Canadian Environmental Assessment Act*, 2012, SC 2012, c-19 [CEAA, 2012].

determining the environmental impacts and risks of a project before deciding whether government will permit it to go ahead.

Nevertheless, it is unlikely that there are or will be sufficient financial and human resources in the affected sectors (governments, proponents, Aboriginal groups, other communities, public) to return to over 4000 assessments a year and to do an attentive and decent assessment job. Fortunately, it is possible to return to a CEAA 1992 trigger approach without the consequence of thousands of federal assessments every year. There were many tools in CEAA 1992 that could have been better used to reduce assessments or lessen their requirements, and there are newer approaches that can be used to improve environmental assessment overall, while potentially reducing assessment requirements in some instances. These tools and approaches include:

- Making better use of exclusions from federal EA. Although the *Exclusion List Regulation*[6] under CEAA 1992 excluded the assessment of projects with proven insignificant environmental impacts, the potential of the regulation was never fully realized. That said, we must be vigilant not to inappropriately exclude types of projects.[7]
- Making proper use of model class screenings and replacement class screenings.[8]
- Where appropriate, reduce assessment numbers through regulatory legislation, e.g. classes of authorizations under the *Fisheries Act* that would not trigger an assessment under certain conditions.
- Mandate and use strategic environmental assessment (SEA) and regional environmental assessment (REA).
- Institute appropriate assessment tracks, while mandating the main directive of the *Mining Watch Canada v. Canada (*2010 SCC 2) decision - no down-scoping or slicing and dicing projects to reduce assessment requirements.

Although reducing assessment numbers will be important if an all in unless out approach is adopted, government must always be reconsidering and as appropriate adding to what is in. In this regard:

- Government should explore developing a climate change trigger to better enable it to assess climate change effects of projects, and to assist it in carrying out its climate change policies.
- The new EA legislation should provide mechanisms so that excluded projects will require assessment in appropriate circumstances.

[6] *Exclusion List Regulations* (SOR/07-108), under CEAA 1992.

[7] Years ago, after serious consideration, the Regulatory Advisory Committee rejected the idea that the size or cost of a project predictably is related to its environmental effects. A very cheap or a very small project can have disastrous environmental impacts.

[8] Under section 19 of CEAA 1992, a class of projects that systematically had the same impacts that can be mitigated by using standard techniques or technologies, could be assessed by replacement class screening. Being on a replacement class screening list virtually eliminated the need for assessment. A class of project that had the same impacts but needed to be adjusted for location or special conditions could be assessed by a model class screening.

Harmonization, Substitution, and Equivalency

In my 2009 article, "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward"[9] I conclude that in our Canadian federation, federal/provincial or territorial substitution is entirely inappropriate and that harmonization of federal/provincial/territorial processes is the most suitable way to proceed in joint jurisdictional assessment situations. Similarly, in that article I conclude that there can be no true equivalency with respect to federal and provincial/territorial environmental assessment processes and resulting regulatory decisions. In this short submission I will not repeat these arguments.

Instead, I will put forth an observation and then make recommendations:

- An observation is, after reviewing all submissions up to a few days ago, very few expressed a preference for substitution over harmonization. And in those cases, the majority speak of "substitution" in the context and manner as coordination and harmonization. The main concerns in these submissions were that processes were efficient, coordinated, integrated, timely, not overly burdensome on proponents or other participants, and not unduly duplicative. Many submissions reflected serious issues with substitution. These were mainly from environmental or Indigenous sources, but not all. For example, the submission of the *Mining Association of Canada* reflects concern over the disconnect between a provincially substituted EA (British Columbia) and the subsequent federal regulatory decision making.[10]

Recommendations are:

- The CEAA should not permit federal/provincial or territorial substitution; instead it should re-instate harmonization for joint environmental assessments.
- Harmonization must be upward harmonization, that ensures that the constitutional and legislative requirements of both jurisdictions are met.
- The federal government should through legislation and policy improve harmonization. There are numerous ways that federal/provincial/ territorial EA can be better coordinated and be made more efficient. These include:
  - ensuring a one window approach at both jurisdictional levels;
  - ensuring efficient coordination within jurisdictional levels, including through regulatory means; in this regard, the now defunct *Federal Coordination Regulation*[11]under CEAA 1992 could have been developed to better organize the federal family during federal EA processes;[12]

[9] Arlene Kwasniak "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward" (2009) 20 JELP 1. Also see BH Powell, Environmental Assessment & the Canadian Constitution: Substitution and Equivalency, Environmental Law Centre (2014).

[10] Mining Association of Canada, Submission to the Expert Panel, November 8, 2016, p 43.

[11] *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR 97/181.

[12] This regulation set timelines for federal authorities to determine whether they likely will require an environmental assessment, and timeline for matters related to an assessment such as notifying the proponent that more information

- securing harmonization agreements with all provinces/territories;
- ensuring the new CEAA provides for flexibility when the federal government is involved in joint jurisdictional EAs;
- making a single body (e.g. the CEA Agency) the RA for all joint EAs;
- developing best practice EA standards for potential adoption and use by the federal government and provinces;[13]
- conducting an audit and review of joint assessment processes to identify issues or problems and to create and implement solutions.

Quality Assurance

EA involves predictions of impacts and effects taking into account mitigation measures. Project approvals contain conditions to incorporate mitigation requirements, and may include monitoring, follow up, reporting, and adaptive management provisions. In joint-jurisdictional situations regulatory requirements may be imposed by a province or territory.

How do we know that these systems work, that federal EA actually results in approved projects not having significant environmental impacts, that mitigation measures are carried out and are effective, that adaptive management requirements are triggered and effective, and so on? How do we know that other EA processes work, e.g. coordinated EA reviews, and how can we improve them?

New EA legislation should require the tracking of information to inform whether EA processes and predictions work, and provide for a feedback loop into the system to improve future EA.

Here are recommendations for new EA legislation with respect to quality assurance:

- Require that quality assurance programs (QAPs) be developed and implemented. There should be QAP programs relating to:
  - the accuracy of predictions in environmental assessment processes;
  - the effectiveness of mitigation measures imposed by Decision Statements or regulatory approvals;
  - the accuracy of findings of no significant adverse environmental effects and of significant environmental effects that were determined to be justified in the circumstances;
  - the effectiveness of monitoring conditions and monitoring activities;
  - the effectiveness of mitigation when relying on conditions imposed by non-federal jurisdictions in joint jurisdictional environmental assessments;

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is required, making a determination as to whether an assessment will be required after obtaining information, and reporting on the determination.

[13] EA "best practice" standards have already been developed by several organizations. For example, the International Association for Impact Assessment develops best practices standards for EA processes such as what should be included in an environmental impact assessment and how the steps of an environmental assessment should be carried out. Information is available through the Association online: << http://www.iaia.org/>>. In years past, the Regulatory Advisory Committee was involved in the development of a Canadian Standards Association (CSA) standard for EA processes, though the project was abandoned.

    - the effectiveness of follow up programs;
    - the effectiveness of adaptive management programs.
- To avoid conflict of interest, or the appearance of conflict of interest, require that the above QAP programs be overseen and conducted by an entity other than an RA. Therefore the Agency should not oversee or conduct these programs. For the purpose of this paper we call the independent body that would do these the "Quality Assurance Agency" or "QAA").
- Establish the QAA and provide it with the powers necessary to carry out its functions.
- Give the QAA investigatory, audit, and publically accessible ombudsperson functions.
- Include mandatory requirements for RAs and federal regulators to ensure that appropriate reporting requirements are put in Decision Statements and regulatory approvals so the QAA can carry out its functions.
- Set out under what circumstances it is appropriate to rely on another jurisdiction's mitigation conditions in Decision Statements and regulatory approvals.
- Include provisions to require feedback and improvement mechanisms to avoid repeating mistakes or undue reliance on methodologies or approaches that have been determined to be unreliable.
- Require federal authorities to comply with QAA directions for improvement of elements of future environmental assessments, monitoring, follow-up, and adaptive management.
- Include QAA public reporting requirements on its tracking decisions, predictions, mitigation, monitoring, follow-up, adaptive management, and compliance and on enforcement actions.
- Bring proponents into the implementation of QAA by requiring them to participate in and comply with relevant QAPs in Decision Statements and regulatory authorizations.
- Develop QAPs for other environmental assessment elements, such as:
    - the effectiveness of public participation and funding mechanisms;
    - the effectiveness of Aboriginal participation policies or practices;
    - the effectiveness of harmonization or other joint jurisdictional processes.

Once again, thank you for the opportunity to make a submission in the federal EA review process. If you have any questions, please do not hesitate to contact me.

Yours truly,

Arlene Kwasniak