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Review of Federal Environmental Assessment Processes
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Sent via email

December 11, 2016

Preliminary submissions on next generation environmental assessment

Dear Sirs/Mesdames,

Please accept our preliminary submissions on the review of federal environmental assessment (EA) processes. We make them in preparation for our presentation to you on December 12, 2016 and intend to follow-up with more fulsome submissions by December 23rd.

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 on such environmental assessments as the proposed Site C Clean Energy project, proposed Enbridge Northern Gateway Pipeline and Tankers project, and proposed Kinder Morgan Trans Mountain Pipeline System. 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. We presented the outcomes, including the 12 Pillars of Next-Generation Environmental Assessment, to you earlier this year. In these submissions, we use the 12 Pillars as a basis for our more concrete recommendations.

We also endorse the submissions of the Environmental Planning and Assessment Caucus,[2] which West Coast Staff Counsel Anna Johnston co-Chairs along with Jamie Kneen of Miningwatch

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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*].

[2] 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].

Canada. These submissions have been prepared in tandem with, and therefore closely reflect, the EPA Caucus submissions.

Next generation environmental assessment 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.

With that acknowledgment, in these preliminary submissions we will focus on three main areas:

1. The need for a strong federal role and collaboration with all other relevant jurisdictions in EA;
2. When an environmental assessment (including of regional and strategic EA) should be required; and
3. A governance model to enable a federal role in all three levels of EA (project, strategic and regional) while encouraging collaboration with other jurisdictions.

The need for a strong federal role and collaborative assessment

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…"[3]

Broadly speaking, there are two main phases in environmental assessment: information-gathering and decision-making. Once a federal EA is initiated the federal government 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 a cumulative impact on navigation, fish and fish habitat, at-risk species or Indigenous peoples, or that are transboundary in nature (e.g., climate) or peace, order and good governance. As the EPA Caucus submission notes:

[3] *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.

> "[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."[4]

Finally, Indigenous nations have jurisdiction over environmental components and systems that within their territories and that affect their Aboriginal rights and title. 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.[5] 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 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.

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[4] Caucus Submission, *supra* note 2. At the time of writing the Caucus Submission was in draft form, rendering a pinpoint difficult to provide with accuracy.

[5] 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.

Third, a nation-to-nation relationship with Indigenous peoples with 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").[6] While substitution under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012)[7]

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.[8] 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.[9]
2. Jurisdictions run parallel separate assessments (as above), but collaborate on final decisions, striving to reach consensus.
3. Jurisdictions run parallel separate assessments, arranging to have processes occur at the same time and share some processes (e.g., deadlines are the same and public participation processes are jointly managed), with each jurisdiction making separate final decisions.

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[6] 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.

[7] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

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

[9] 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.

The first model, collaboration, should be the preferred approach, with the second option reverted to in the event that collaboration cannot be achieved, and the third option the default when neither collaborative nor parallel processes with consensus decisions can be reached. The last resort should be separate processes run independently of each other.

Triggering regional, strategic and project EA

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.[10] 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,"[11] 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.

Therefore, 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.

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 (i.e., receive a red light);
- 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

[10] 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.

[11] *Summit Proceedings, supra* note 1 at 7.

- 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).[12]

Strategic and regional EA

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

- Regional EA: An assessment of a regional scale that is not limited in what it considers. These may also be called regional cumulative effects assessments. In defining a region, we 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 areas divided according to administrative boundaries.[13]
- Strategic EA: Broadly speaking, we consider SEA to be an assessment of a regional scale that is limited in some way. SEA falls into two main categories: SEAs of federal plans, policies and programmes governed by the Cabinet Directive; and proactive strategic assessments of a regional scope that are limited in some regard (e.g., regarding Canada's pursuit of 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 SEAs of plans, policies and programmes currently governed by the Cabinet Directive, 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.[14] 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.

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).
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.

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

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[12] 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.

[13] 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.

[14] 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.

(see below for a discussion of this expert advisory committee). The committee would be 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 various steps to protect those species.

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.

Finally the legislation should also impose periodic (e.g., five year) updates to regional and, in some cases, strategic assessments.

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

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.[15]

There is growing necessity to ensure sustainable decision outcomes, address cumulative environmental impacts and provide fora for policy-level public discourse on contentious issues like climate change and Canada's pursuit of oil to tidewater. 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.

Moreover, as the Expert Panel's Terms of Reference indicate, there is a need to identify means of implementing the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) in federal EA. As discussed above, the preferred approach to multijurisdictional EA is cooperative EA. With regards to implementing UNDRIP, as Summit Pillar 5 notes, "[c]ollaborative assessment and decision-making processes are based on nation-to-nation relationships, reconciliation and the obligation to secure the free, prior and informed consent of Indigenous peoples."[16] What that collaboration looks like will have to be determined on a nation-to-nation basis; therefore the federal architecture must be flexible enough to accommodate different models of co-governance.

The legislation should establish a clear right of appeal for both process (interim) and final decisions, as well as such matters as whether participation has been meaningful and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) appropriately implemented. It

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[15] 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.

[16] *Summit Proceedings, supra* note 1.

should also provide for mediation and arbitration where governments are not able to achieve consensus.

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 of the details may vary, 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 replaced by regional co-governance boards in provinces and territories upon agreement by the Crown and Indigenous governments.

Strategic EAs currently governed by the Cabinet Directive 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 strategic EAs not captured by the Cabinet Directive, 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." There are two options for the conduct of project EA: i) a proponent-led approach like the one currently in use, or ii) a government-led approach, where the government (or Assessment Councils) conduct EAs and the proponent pays a fee for that service.

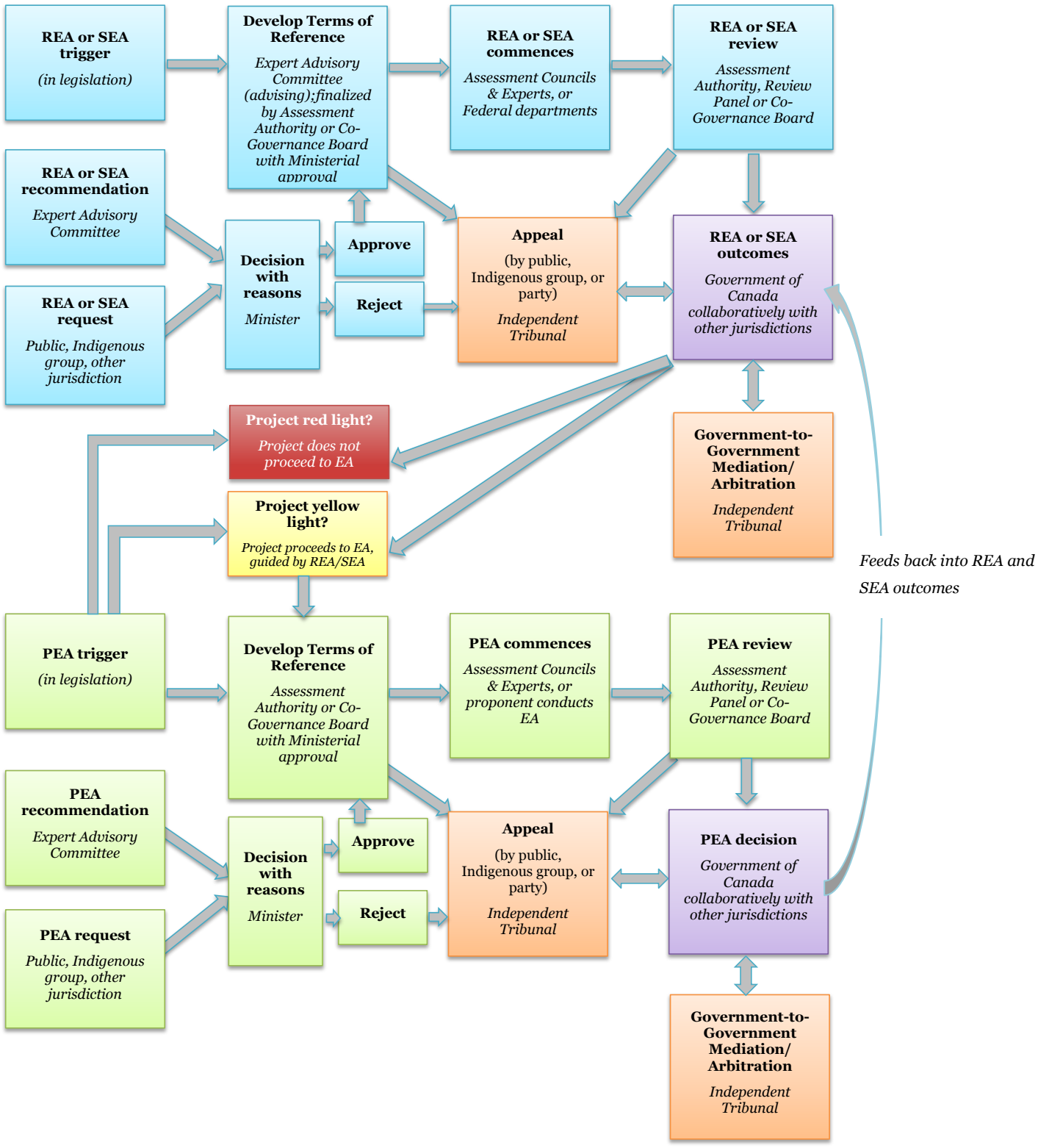
Regional, strategic and project EAs would be subject to review by the Assessment Authority, a review panel or co-governance board. The reviewing bodies would make recommendations to decision-makers, with final decisions made collaboratively by all relevant jurisdictions. Decisions from higher-tier REA 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 or arbitrate 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 1 describes our proposed governance model.

Figure 1: Regional, strategic and project EA processes



Institutional Structure

The model we suggest includes the following institutions:

Assessment Authority

This proposed permanent body, housed within the federal government, would 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:

a) Establishing guidance for implementing Indigenous and public engagement in all levels of EA;

b) 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;

c) 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;

d) Serving as a secretariat to support review panels;

e) Managing contracts with external experts;

f) Serving as a secretariat to representatives of the Government of Canada in government-to-government negotiations with Indigenous Peoples[17] on mutually agreeable processes, decisions, guidance and agreements, such as:

   i) Government-to-government agreements to conduct collaborative or parallel assessments;

   ii) Terms of reference for regional, strategic and project EAs;

   iii) Measurable management objectives for valued components and systems, and their spatial application within each Indigenous Nation's territory and broader region, where applicable; and

   iv) Decisions regarding whether a project or undertaking should be allowed to proceed and under what conditions.

g) Implementing follow-up obligations, such as:

   i) Tracking of predictions, commitments, obligations, conditions and processes, and initiating changes as appropriate;

   ii) Evaluating prediction accuracy, monitoring sufficiency and efficacy, mitigation effectiveness and adaptive management plans;

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

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

iv) Investigating and remedying non-compliance.

h) 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 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. It will 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:

a) 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;

b) For all levels of EA that do not go to a review panel, appointing and directing Assessment Councils and reviewing the EA;

c) Serving as a secretariat to support review panels;

d) Managing contracts with external experts;

e) Implementing follow-up obligations; and

f) Developing terms of reference; and

g) 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:

a) Reviewing project EAs, scenario-based strategic assessment reports and the results of regional cumulative effects assessments;

b) Identifying any information gaps and commissioning outside expert assistance as needed;

c) Conducting public and Indigenous engagement; and

d) Making recommendations, based on the above and on sustainability criteria (see the EPA Caucus submissions for a discussion of the application of sustainability criteria and trade-off rules), for the consideration of federal, provincial, territorial and Indigenous governments and land claims and treaty-based EA processes as applicable.

Assessment Councils

For strategic EAs of plans, policies and programs (those currently governed by the Cabinet Directive), assessments would be conducted by the relevant federal departments and agencies and sent to the Assessment Authority for review.

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 by the Assessment Authority, co-governance board or review panel. 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.[18] Their responsibilities would include:

a) 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;

b) Undertaking periodic broad-scale assessments of the condition of valued components and systems in regions;

c) 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,[19] and

d) Producing scenario-based regional and strategic assessment reports for consideration by the reviewing body.

At the project level, assessments could be either proponent-led or government-led; i.e., either: i) proponents conduct the EA (through the retention of consultants) as is currently done under CEAA 2012, or ii) Assessment Councils conduct EAs and the governing jurisdictions charge proponents a fee. The latter option would help to deal with issues of trust in assessment-related documents.

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[18] 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.

[19] 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.[20]

Its responsibilities would include such activities as the following:

a) Recommending criteria for when strategic and regional assessments that are not already required under federal legislation should be undertaken;

b) Considering requests from the public, Indigenous peoples, provincial, and local governments and industry to conduct strategic and regional assessments;

c) 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;

d) Providing guidance to decision-makers and review authorities on strategic and regional EA terms of reference;

e) Helping draft sectoral template terms of reference;

f) Providing recommendations on scientific standards for various stages of EA

g) Recommending strategic and regional EA review panel members or commissioners;

h) Identifying and recommending experts for the Assessment Council to conduct regional and strategic EAs;

i) Reviewing and providing advice on regional and strategic EAs; and

j) Providing additional advice and expertise to the Minister and Indigenous and provincial (where appropriate) governments as needed.

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

Independent Tribunal[21]

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

a) Mediating and, where necessary, arbitrating where consensus cannot be reached between federal, provincial, territorial or Indigenous governments on any of the above;[22]

b) Hearing appeals from any interested party;

c) Conducting investigations and audits to ensure compliance with any provision of the Act or the regulations, and for other overall quality assurance; and

d) 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. The federal institutional structure must therefore permit and encourage collaborative EA processes. Given the Canadian constitutional framework, as well as inherent Indigenous jurisdiction and the federal government's obligations under UNDRIP, our model facilitates and encourages collaboration with provincial and Indigenous jurisdictions, land claims and treaty-based authorities and local governments. All parties (governments, the public, proponents and the environment) stand to benefit when jurisdictions collaborate.

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.

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[21] 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*.

[22] 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.

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 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 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).

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.