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Federal Environmental Assessment: Overview of the Law and Recent Issues

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***Federal Environmental Assessment:
Overview of the Law and Recent Issues
(Background Paper)***

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CONTENTS

1	OVERVIEW OF THE LAW	1
1.1	Introduction	1
1.2	Requirements for Federal Environmental Assessment Under the <i>Canadian Environmental Assessment Act</i>	1
1.2.1	There Must Be a Project	1
1.2.2	There Must Be a Trigger	2
1.2.3	Ministerial Discretion	2
1.3	Environmental Assessments	2
1.3.1	Types of Assessment	2
1.3.2	Factors to Be Assessed	3
1.3.3	Decision	4
1.4	The Canadian Environmental Assessment Agency	4
2	RECENT ISSUES	4
2.1	Coordination of Federal and Provincial Assessments	5
2.2	Coordination of Federal Authorities	5
2.3	Substitution	6
2.4	Scoping	6
2.5	Cumulative Environmental Effects	7
2.6	Follow-Up Programs, Compliance Monitoring and Quality Assurance	7
2.6.1	Follow-Up Programs	7
2.6.2	Compliance Monitoring and Quality Assurance	8
2.7	Strategic Environmental Assessment	8
3	CONCLUSION	8

FEDERAL ENVIRONMENTAL ASSESSMENT: OVERVIEW OF THE LAW AND RECENT ISSUES

1 OVERVIEW OF THE LAW

1.1 INTRODUCTION

Carrying out an environmental assessment early in the planning stages of a project can help ensure that environmental factors, in addition to social and economic factors, are integrated into decision-making. Since environmental risks are also risks to the economic viability and social acceptability of a project, environmental assessments, whether required by law or not, are now considered good business practice.

The *Canadian Environmental Assessment Act*¹ (CEAA) requires that a federal environmental assessment be carried out for projects in which the federal government is involved under specific circumstances described in the Act. If any of these legislative prerequisites are lacking, there is no authority to conduct an environmental assessment under the CEAA, even in what might otherwise be compelling cases.

The CEAA was passed in 1992 and proclaimed in force in 1995. It underwent a five-year ministerial review resulting in a report in 2001 and amendments to the Act in 2003.² The amending Act mandated a parliamentary review of the CEAA, to be undertaken seven years after the amending Act was passed; the review began in June 2010 but was not completed before an election was called in 2011.³

1.2 REQUIREMENTS FOR FEDERAL ENVIRONMENTAL ASSESSMENT UNDER THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

1.2.1 THERE MUST BE A PROJECT

Only proposals that come within the definition of a *project* may be subject to a federal environmental assessment. This definition includes:

- any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to a physical work; or
- any proposed physical activity (not relating to a physical work) that is set out in the *Inclusion List Regulations*.⁴

However, certain projects are excluded from the requirement to conduct an assessment under the CEAA because the environmental effects are deemed insignificant. These projects are specified in the *Exclusion List Regulations*.⁵ As well, projects carried out in response to an emergency are excluded from the requirement to conduct an environmental assessment.

In addition, a number of federally funded infrastructure projects are excluded under changes made to the CEAA by *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 4, 2010 and Other Measures* (short title: *Jobs and Economic Growth Act*).⁶

If the proposal does not meet the definition of a project, or if a project is excluded, there is no authority to carry out an environmental assessment under the CEAA.

1.2.2 THERE MUST BE A TRIGGER

Under the CEAA, an environmental assessment of a project must be carried out before a federal authority exercises certain powers or performs certain duties or functions (known as *triggers*) in relation to the project. Four such circumstances can trigger a mandatory assessment:

- The federal authority is the proponent of the project and does anything that commits the federal authority to carrying out the project in whole or in part (the *proponent trigger*).
- The federal authority provides money or any other form of financial assistance for a project (the *funding trigger*).
- The federal authority sells, leases or otherwise disposes of land or any interests in land to enable the project to be carried out (the *land trigger*).
- The federal authority exercises a regulatory duty (e.g., issues a permit or licence) specified in the *Law List Regulations*⁷ (the *Law List trigger*).

The term *federal authority* includes federal ministers, agencies and departments, as well as parent Crown corporations.

1.2.3 MINISTERIAL DISCRETION

Whereas the foregoing triggers are mandatory, the minister also has discretionary authority to order an environmental assessment of projects that are likely to have significant adverse environmental effects in a province other than the one where the project is carried out, in another country or on specified federal lands. Under these provisions, assessments may take place even if no federal authority is involved in the project.

1.3 ENVIRONMENTAL ASSESSMENTS

1.3.1 TYPES OF ASSESSMENT

The CEAA requires different types of environmental assessments in different circumstances.

- The default assessment, and by far the most common type of assessment, is a *screening*. Both routine projects as well as many larger projects may undergo a screening before proceeding. A *class screening* may be used for a group of

projects that have common characteristics if the Canadian Environmental Assessment Agency (the Agency) believes that such projects are unlikely to cause significant adverse environmental effects when the design standards and mitigation measures described in what the Agency has declared to be a *class screening report* are applied. A class screening may replace a customized screening for a project, or it may serve as a model for streamlining the screening process. Approximately 6,000 screenings are initiated each year, accounting for 99% of all environmental assessments under the CEAA.⁸

- Certain types of projects that are likely to have significant adverse environmental effects must undergo a more extensive *comprehensive study*. The types of projects that require this more in-depth assessment are listed in the *Comprehensive Study List Regulations*.⁹ Approximately eight comprehensive studies are initiated each year. Before the CEAA was amended in 2010, comprehensive studies were carried out by the responsible authority or authorities;¹⁰ however, pursuant to the amendments, comprehensive studies will now be carried out by the Agency, unless the responsible authority is the National Energy Board or the Canadian Nuclear Safety Commission.
- The minister refers a small number of projects to a *review panel* for assessment when, even with mitigation, it is uncertain whether the project will cause significant adverse environmental effects; or it is likely the project will cause significant adverse environmental effects and it must be determined whether those effects are justified in the circumstances; or there is public concern that warrants a referral to a review panel. Projects that may have significant adverse environmental effects across provincial or national boundaries may also be referred to a review panel. On average, review panels account for fewer than five environmental assessments each year.
- As an alternative to a panel review, the minister may refer a project (or part of a project) to a *mediator* if all interested parties are willing to participate in mediation to resolve the issues. Mediation has never been used under the CEAA.

1.3.2 FACTORS TO BE ASSESSED

All environmental assessments must include consideration of

- the project's environmental effects, including its cumulative effects in combination with other projects, past or future;¹¹
- the significance of these effects;
- any comments from the public; and
- any mitigation measures that are technically or economically feasible.

Assessments may also consider the need for the project and alternatives to it, but this factor is discretionary.

The following additional factors must also be considered in relation to a comprehensive study, panel review or mediation:

- the purpose of the project;

- alternative means for carrying out the project that are technically and economically feasible, and the environmental effects of any such alternative means;
- the effects of the project on the capacity of renewable resources to meet current and future needs; and
- the need for, and the requirements of, any follow-up program.

1.3.3 DECISION

If the environmental assessment determines that, with appropriate mitigation, the project is unlikely to cause significant adverse environmental effects, the project may be approved to proceed. However, it will not be allowed to proceed if it is likely to cause significant adverse environmental effects that cannot be justified in the circumstances. Such negative decisions are very rare.

If, following a screening, it is determined that the project meets any of the criteria for a review panel or mediation (discussed above), it may be referred for further consideration under one of these assessment processes.

Following a comprehensive study, panel review or mediation, a project may be allowed to proceed even if it is likely to cause significant adverse environmental effects, if such effects can be justified in the circumstances. The approval of the Governor in Council is required for decisions by a review panel or mediator, as well as for cases in which significant adverse environmental effects are deemed justifiable.

1.4 THE CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY

The Agency serves in an administrative and advisory capacity. Since amendments made to the CEAA in 2010, it also manages the process for most comprehensive studies. However, the Agency does not decide whether a project should proceed following the environmental assessment. This decision is made by the responsible federal authority, and, in cases other than screenings, must be approved by the minister or the Governor in Council.

The Agency is responsible for maintaining the Canadian Environmental Assessment Registry, which facilitates public access to records and notices relating to environmental assessments. The registry includes a public website and project files.

2 RECENT ISSUES

While environmental assessment is considered good business practice, there are different perceptions of what constitutes effective and efficient environmental assessment. This is true at all levels of government, including the federal process, and efforts have been made to examine and improve federal environmental assessments. The following section outlines some of the issues that have arisen at the federal level regarding the application of environmental assessments.

2.1 COORDINATION OF FEDERAL AND PROVINCIAL ASSESSMENTS

In Canada, the environment is an area of shared jurisdiction. In 1992, the Supreme Court of Canada held that both the federal and provincial governments may require environmental assessments in relation to matters within their respective spheres of legislative authority under the Constitution.¹² This means that a project may need to meet requirements of both federal and provincial environmental assessment processes.

In 1998, the federal, provincial and territorial governments (except Quebec) entered into a *Sub-Agreement on Environmental Assessment*¹³ in which they agreed that, when two or more jurisdictions require an environmental assessment of the same project, a single cooperative environmental assessment be designed to meet the legal requirements of both governments. Further, the governments agreed to negotiate bilateral agreements to implement the Sub-Agreement. So far, the federal government has concluded bilateral agreements with Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Ontario, Quebec (outside the Sub-Agreement), Saskatchewan and Yukon.¹⁴

The CEAA contains various sections that provide for cooperation, allowing the federal government to

- cooperate with another jurisdiction to perform a single environmental assessment that satisfies the requirements of both jurisdictions,¹⁵
- delegate any part of a screening or comprehensive study to another jurisdiction,¹⁶ or
- establish a joint review panel with another jurisdiction.¹⁷

In February 2010, the Agency published an operational policy statement¹⁸ on selecting the appropriate option. Despite these efforts, there remains some friction over possible duplication of efforts.

2.2 COORDINATION OF FEDERAL AUTHORITIES

Whenever a project involves more than one federal agency or department, the federal authorities involved must coordinate their environmental assessment processes. For example, a project to build a road and divert a fish-bearing stream may involve Transport Canada and Fisheries and Oceans Canada, which are required to determine together how to perform their duties and functions under the CEAA.¹⁹

Many rules and guidelines for federal coordination have been developed. Regulations were made in 1997,²⁰ and the Agency has published at least two guides.²¹ Following the five-year review, the CEAA was amended in 2003 to create the role of the Federal Environmental Assessment Coordinator,²² and in 2005 a *Cabinet Directive on Implementing the Canadian Environmental Assessment Act* was issued.²³

In addition, the government has taken steps to improve coordination of the federal regulatory system, including the environmental assessment process, specifically for major resource projects. This effort began in 2007 when the government issued a *Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Projects*.²⁴ Pursuant to this directive, the Major Projects Management Office was established within the Department of Natural Resources to help large resource projects navigate the federal regulatory process.²⁵

Still, in 2009, the Commissioner of the Environment and Sustainable Development documented problems and delays associated with federal coordination, especially in relation to the scoping of projects.²⁶

2.3 SUBSTITUTION

The minister has the power to allow a federal authority²⁷ to follow its own process for assessing the environmental effects of projects rather than requiring an environmental assessment by a review panel under the CEAA (called “substitution”), as long as the substituted process meets certain criteria.²⁸ The substitution power was used for the first time in 2006, in connection with the Emera Brunswick Pipeline project, allowing the environmental assessment to be conducted through the National Energy Board process.²⁹

Pursuant to memoranda of understanding concluded with each of the National Energy Board and the Canadian Nuclear Safety Commission in 2011, the government signalled its intent to substitute the processes for assessing the environmental effects of projects of these two bodies for review panels established under the CEAA.

Supporters maintain that substitution eliminates duplication of efforts and reduces project costs and delays without compromising environmental protection. Some critics question whether substituted processes are sufficiently accessible to the public, and whether panel members evaluating a project under the substituted process are sufficiently impartial.³⁰

2.4 SCOPING

Early in the environmental assessment process, the responsible authority must determine the scope of the project for which an environmental assessment is to be conducted.³¹ For example, a project might involve multiple parts, such as building a road, cutting a forest and rerouting a fish-bearing stream. The scope of the project defines which of these parts will be included in the environmental assessment, and may therefore determine whether a screening or a comprehensive study is required.

In 2009, the Commissioner of the Environment and Sustainable Development (the Commissioner)³² found that, when there are multiple responsible authorities disputing the scope of a project, delays in the environmental assessment process can occur.³³ These delays may, in turn, impede federal/provincial coordination. Attempts to resolve scoping issues have “mainly added more process,” the Commissioner concluded.

Environmental groups have challenged several scoping decisions in court. In January 2010, the Supreme Court of Canada released a decision clarifying that the project, as proposed by the proponent, determined the assessment track (screening or comprehensive study).³⁴ Once the track was determined, the responsible authority or the minister had the discretion to enlarge but not narrow the scope of the project subject to an environmental assessment. A month after the decision was released, the Agency published an operational policy statement on scoping.³⁵

Later in 2010, Parliament amended the CEAA to modify the scoping procedure, as clarified by the Supreme Court. Newly added section 15.1 gives the minister or the minister's delegate the power to narrow the scope of a project subject to an environmental assessment, if conditions the minister establishes and makes public are met. Other sections were amended or added³⁶ to eliminate some aspects of the responsible authority's duty to ensure public consultation during the planning stages of a comprehensive study, particularly regarding the study's scope.³⁷

2.5 CUMULATIVE ENVIRONMENTAL EFFECTS

The term *cumulative environmental effects* refers to the incremental effects of a project on the environment in combination with the effects from other projects or activities, past and future. While the environmental effects of individual small projects may each be minimal, the cumulative effects of many projects and activities may be significant. The CEAA requires that every environmental assessment include a consideration of any cumulative environmental effects that are likely to result.³⁸ Although the Agency has provided guidance for considering cumulative environmental effects,³⁹ the Commissioner has noted that many responsible authorities still find it challenging to assess cumulative effects.⁴⁰

2.6 FOLLOW-UP PROGRAMS, COMPLIANCE MONITORING AND QUALITY ASSURANCE

2.6.1 FOLLOW-UP PROGRAMS

A follow-up program is "a program for (a) verifying the accuracy of the environmental assessment of a project, and (b) determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the project."⁴¹ Follow-up programs are required for projects that proceed after a comprehensive study, panel review or mediation. By contrast, they are discretionary and rarely required after screenings.⁴² The Agency has issued an operational policy statement to help guide federal authorities and project proponents in designing and carrying out follow-up programs.⁴³

Follow-up programs may be used to improve the quality of future environmental assessments as well as to implement adaptive management measures.⁴⁴ *Adaptive management* means that, during the life of a project, environmental outcomes are monitored so that corrective actions may be taken, if warranted. For example, in response to environmental data emerging while a project is underway, new mitigation measures may be implemented, or existing ones may be modified. The Agency has issued an operational policy statement "to strengthen understanding and application of adaptive management in the federal environmental assessment process."⁴⁵

2.6.2 COMPLIANCE MONITORING AND QUALITY ASSURANCE

Following the five-year review, the CEAA amendments in 2003 gave the Agency a new duty to “establish and lead a quality assurance program for assessments conducted under [the CEAA].”⁴⁶ The Agency has designed its quality assurance program to include both compliance monitoring (to ensure the CEAA requirements are being met) and quality considerations, and it has produced various reports.⁴⁷ However, in 2009, the Commissioner described the Agency’s quality assurance program as “piecemeal” and noted that “[t]here is no clear framework, strategic direction, targets, or performance measures.”⁴⁸ The Agency subsequently committed to follow a more systematic approach and to focus the program on “key practices and implementation issues that will inform the 2010 parliamentary review.”⁴⁹

In terms of compliance, the Commissioner concluded that, although comprehensive studies and panel reviews are meeting requirements, “[it] is unclear how screenings are meeting all the requirements of [the CEAA].”⁵⁰ Further, the Commissioner noted that the quality of screenings is unknown. In response, the Agency committed to developing a framework to determine the quality of screening reports, to analyze a sample of screening reports against the framework continuously, and to report the results annually.⁵¹

2.7 STRATEGIC ENVIRONMENTAL ASSESSMENT

Pursuant to a Cabinet directive,⁵² government departments and agencies should consider environmental factors when they are developing policy, plan or program proposals. This consideration is known as *strategic environmental assessment* and is required whenever a proposal submitted to a minister or Cabinet for approval may result in important environmental effects, either positive or negative. Failure to conduct a strategic environmental assessment could result in unacceptable environmental damage as well as high cleanup and other costs. A public statement is required whenever a strategic environmental assessment has been conducted for a policy, plan or program that is approved or announced.⁵³

In a 2008 follow-up audit, the Commissioner, while noting some improvements in a few departments, continued to report “poor performance by departments and agencies in conducting strategic environmental assessments when developing policy and program proposals.”⁵⁴ The Commissioner identified “the lack of commitment at senior levels” as the “root cause” of the problem.⁵⁵

3 CONCLUSION

The pending parliamentary review of the CEAA, mandated by the Act, will undoubtedly address some of the issues emerging as the environmental assessment process in Canada matures. Interested parties from all sides are searching for ways to ensure that projects are assessed effectively and in a timely manner without compromising environmental protection.

NOTES

1. [Canadian Environmental Assessment Act](#), S.C. 1992, c. 37 [CEAA].
2. See the archived website on the topic, Canadian Environmental Assessment Agency, [“Year 2000 review of the Canadian Environmental Assessment Act.”](#)
3. [An Act to Amend the Canadian Environmental Assessment Act](#), S.C. 2003, c. 9, s. 32.
4. [Inclusion List Regulations](#), SOR/94-637.
5. [Exclusion List Regulations](#), SOR/2007-108.
6. [Jobs and Economic Growth Act](#), S.C. 2010, c. 12, Part 20. These exclusions are a codification and expansion of the exclusions first introduced through regulatory changes in 2009. See also [Regulations Amending the Exclusion List Regulations, 2007](#), SOR/2009-88.
7. [Law List Regulations](#), SOR/94-636.
8. Office of the Auditor General of Canada, [2009 Fall Report of the Commissioner of the Environment and Sustainable Development](#), November 2009, p. 5.
9. [Comprehensive Study List Regulations](#), SOR/94-638.
10. A “responsible authority” is a federal authority that must ensure that an environmental assessment of a specific project is conducted. CEAA, s. 11(1).
11. Note that the CEAA’s definition of “environmental effects” includes more than just changes in the environment. It also includes related socio-economic, heritage, health and land-use effects, as well as any change to the project that may be caused by the environment. CEAA, s. 2.
12. [Friends of the Oldman River Society v. Canada \(Minister of Transport\)](#), [1992] 1 S.C.R. 3.
13. Canadian Council of Ministers of the Environment, [Sub-agreement on Environmental Assessment](#), 1998. This is a “sub-agreement” because it was concluded under [A Canada-wide Accord on Environmental Harmonization](#), 1998.
14. Canadian Environmental Assessment Agency, [Environmental Assessment Agreements](#).
15. CEAA, ss. 12(4)–12(5).
16. CEAA, s. 17.
17. CEAA, ss. 40–42.
18. Canadian Environmental Assessment Agency, [“Use of Federal-Provincial Cooperation Mechanisms in Environmental Assessments Pursuant to the Canadian Environmental Assessment Act,” Operational Policy Statement](#), February 2010.
19. CEAA, s. 12.
20. [Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements](#), SOR/97-181.
21. Canadian Environmental Assessment Agency, [Canadian Environmental Assessment Act – Federal Coordination: An Overview](#), October 2003; Canadian Environmental Assessment Agency, [Canadian Environmental Assessment Act – Federal Coordination: Identifying Who’s Involved](#), December 2003.
22. CEAA, ss. 12.1–12.5.

23. Canadian Environmental Assessment Agency, [*Cabinet Directive on Implementing the Canadian Environmental Assessment Act*](#), November 2005. The Agency and key federal departments then signed a [*Memorandum of Understanding for the Cabinet Directive on Implementing the Canadian Environmental Assessment Act*](#).
24. Government of Canada, [*Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Projects*](#), 2007.
25. Government of Canada, [*Major Projects Management Office*](#) (MPMO). Pursuant to the Cabinet Directive, the MPMO has established the [*MPMO Tracker*](#), a monitoring and tracking system to allow the public to monitor the progress of any specific major resource project through the regulatory system.
26. Office of the Auditor General of Canada (2009), pp. 11–15.
27. Or a body established under a land claims agreement as described in the CEEA, s. 40(1)(d).
28. CEEA, ss. 43–45.
29. Canadian Environmental Assessment Agency, [*“Brunswick Pipeline Project Referred to a Substituted National Energy Board Review Panel”*](#), News release, 4 May 2006.
30. Canadian Environmental Assessment Agency, [*Substitution Under the Canadian Environmental Assessment Act: A Report on the Evaluation of the Substitution of the National Energy Board Review Process for a Canadian Environmental Assessment Act Review Panel for the Emera Brunswick Pipeline Project*](#), February 2009.
31. CEEA, ss. 15–15.1.
32. In 1995, the *Auditor General Act* was amended to create the position of Commissioner of the Environment and Sustainable Development within the Office of the Auditor General to monitor sustainable development and the progress of federal government departments in this regard, including their obligations under the CEEA.
33. Office of the Auditor General of Canada (2009), p. 11.
34. [*MiningWatch Canada v. Canada \(Fisheries and Oceans\)*](#), [2010] 1 S.C.R. 6, 2010 SCC 2. This relates to the proposed Red Chris open pit copper and gold mine in British Columbia.
35. Canadian Environmental Assessment Agency, [*“Establishing the Project Scope and Assessment Type under the Canadian Environmental Assessment Act”*](#), *Operational Policy Statement*, February 2010.
36. Sections 21 to 21.2 were amended, and section 21.3 was added.
37. Note that this latter amendment was made following the analysis that informed the report Canadian Environmental Assessment Agency, [*Effectiveness of the Environmental Assessment Track Process under the Canadian Environmental Assessment Act*](#), August 2010.
38. CEEA, s. 16(1)(a).
39. Canadian Environmental Assessment Agency, [*“Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act”*](#), *Operational Policy Statement*, November 2007; Canadian Environmental Assessment Agency, [*Reference Guide Addressing Cumulative Environmental Effects*](#), November 1994; The Cumulative Effects Assessment Working Group and AXYS Environmental Consulting Ltd., [*Cumulative Effects Assessment Practitioners’ Guide*](#), Canadian Environmental Assessment Agency, February 1999.
40. Office of the Auditor General of Canada (2009), p. 17.

41. CEAA, s. 2(1); Quality Assurance Program for Environmental Assessments under CEAA, Canadian Environmental Assessment Agency, [Federal Screenings: An Analysis Based on Information from the Canadian Environmental Assessment Registry Internet Site](#), December 2007, p. 53.
42. CEAA, ss. 38 and 16.
43. Canadian Environmental Assessment Agency, "[Follow-up Programs Under the Canadian Environmental Assessment Act](#)," *Operational Policy Statement*, November 2007.
44. CEAA, s. 38(5).
45. Canadian Environmental Assessment Agency, "[Adaptive Management Measures Under the Canadian Environmental Assessment Act](#)," *Operational Policy Statement*, March 2009.
46. CEAA, s. 63(1)(d).
47. Canadian Environmental Assessment Agency, [Quality Assurance Program](#).
48. Office of the Auditor General of Canada (2009), p. 24.
49. *Ibid.*, p. 25.
50. *Ibid.*, p. 18.
51. The Agency produced the promised [Framework for Analysis of the Quality of Screening Reports](#) in May 2011.
52. Canadian Environmental Assessment Agency, [Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals](#), 2004. Also see the associated [Guidelines for Implementing the Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals](#), October 2010.
53. Canadian Environmental Assessment Agency, [Public Statements of Strategic Environmental Assessments](#).
54. Office of the Auditor General of Canada, "[The Commissioner's Perspective – 2008](#)," in *2008 March Status Report of the Commissioner of the Environment and Sustainable Development*, p. 2. This was the Commissioner's fourth report on departmental compliance with the Cabinet directive. In previous reports issued in 1998, 2000 and 2004, the Commissioner had noted continuing problems with compliance.
55. *Ibid.* See also the full status report in [Chapter 9](#) of the report.

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———. [*Basics of Environmental Assessment*](#).

———. [*Memorandum of Understanding for the Cabinet Directive on Implementing the Canadian Environmental Assessment Act*](#).

———. [*Quality Assurance Program*](#).