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Canada's New Federal Environmental Assessment Process

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Penny Becklumb
Tim Williams

Industry, Infrastructure and Resources Division
Parliamentary Information and Research Service

Canada's New Federal Environmental Assessment Process
(Background Paper)

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CANADA'S NEW FEDERAL ENVIRONMENTAL ASSESSMENT PROCESS

1 INTRODUCTION

Building and operating a bridge, mine, pipeline or other such project may cause significant impacts on the environment. In many cases, federal or provincial laws now require that an environmental assessment be carried out before certain projects are allowed to proceed to ensure that environmental factors are considered in the planning.[1]

Before the 1970s, little consideration was given to the environmental consequences of large-scale natural resource developments.[2] In some cases, these older developments left the federal government responsible for hundreds of millions of dollars of clean-up costs for contaminated sites, some of which endure to this day. Such a legacy can be seen as "a testament to poor planning," as Commissioner of the Environment and Sustainable Development Scott Vaughan has noted.[3]

However, as public concerns about environmental matters grew, governments increasingly recognized the need to improve development through appropriate planning. Following the adoption of environmental assessment legislation in the United States in 1970, Canada's Cabinet decided, in 1974, to screen federal decisions "to ensure they do the least possible damage to our natural environment."[4] That policy was codified into an order in council in 1984, and finally a federal law in 1992.[5]

Canadian environmental assessments have evolved over time. Following the influential 1977 Berger Report on the proposed Mackenzie Valley Pipeline in northern Canada, many assessments of large-scale projects have considered likely economic and social impacts as well as environmental effects. As the environment is an area of shared legislative jurisdiction, provinces have also developed environmental assessment regimes, sometimes applicable to the same projects that are subject to federal assessments.

Following a global economic crisis in 2008, Canada's government declared its top priority as being "to support jobs and growth and to sustain Canada's economy."[6] Perceiving inefficiencies in the environmental assessment process as a hindrance to economic development, the government included provisions in its budget implementation bill (Bill C-38) in the spring of 2012 to replace Canada's federal environmental assessment process with a new environmental assessment process set out in the *Canadian Environmental Assessment Act, 2012* (CEAA, 2012).[7] After much debate, Parliament passed the bill in June 2012.

This paper summarizes the new federal environmental assessment process that came into force on 6 July 2012.[8] It provides a limited comparison of the assessment process under the CEAA, 2012 with the assessment process under the former Act, the *Canadian Environmental Assessment Act*, and discusses how projects are being addressed during the transition.

2 DETERMINING WHICH PROJECTS MUST UNDERGO A FEDERAL ENVIRONMENTAL ASSESSMENT

A proposed project may require a federal environmental assessment before it is allowed to proceed if it is a "designated project"; that is, if the project is either of a type listed in the new *Regulations Designating Physical Activities,* or if the Minister of the Environment has made an order designating the project.[9]

2.1 *REGULATIONS DESIGNATING PHYSICAL ACTIVITIES*

Regulations Designating Physical Activities made under the CEAA, 2012 list "designated projects," which are types of projects that are likely to have significant adverse environmental effects and therefore may be subject to a federal environmental assessment.[10] This approach to identifying projects that may be subject to an environmental assessment has been referred to as the "list approach."

The Canadian Environmental Assessment Agency screens most designated projects, which means that the agency reviews a description of the designated project, any public comments and any relevant regional studies before deciding whether the designated project will require an environmental assessment.[11]

The CEAA, 2012 screening step does not apply to designated projects that include activities regulated under the *Nuclear Safety and Control Act*, the *National Energy Board Act* or the *Canada Oil and Gas Operations Act*. Such designated projects are automatically required to undergo a federal environmental assessment.

2.2 MINISTERIAL ORDER

Under the CEAA, 2012, the Minister of the Environment has the power to order that a proposed project that is not of a type listed in the *Regulations Designating Physical Activities* nevertheless be designated and therefore required to undergo a federal environmental assessment. The Minister may make such an order if, in his or her opinion, either the project may cause adverse environmental effects, or public concerns related to those effects may warrant the designation.[12] Note that the Minister's power to make an order hinges on the definition of environmental effects.

2.3 THE DEFINITION OF ENVIRONMENTAL EFFECTS

The CEAA, 2012 states that the environmental effects of a project that are to be taken into account for the purposes of the Act are:

- a change that may be caused to a component of the environment under federal jurisdiction, such as fish or migratory birds;
- a change that may be caused on federal lands or outside the province where the project is to be carried out; and
- an effect on Aboriginal peoples of a change to the environment.

However, if the project requires a federal authority to exercise a power or perform a duty or function to proceed (such as issue a permit), then the definition of environmental effects also includes certain changes to the environment directly linked or necessarily incidental to that exercise or performance (such as changes to the environment that result because a permit was issued), as well as socio-economic effects of such a change.[13]

2.4 Changes from the Former Act

The CEAA, 2012 uses the list approach to determine which projects may require an environmental assessment. The approach used under the former Act, the "all in unless excluded" approach, was very different. Under that approach, a project was required to undergo a federal environmental assessment if the federal government was involved in the project in some specified way, including as the proponent, by providing land or financing for the project, or by issuing a permit to allow the project to proceed. However, some such projects were exempted under provisions in the former Act or its regulations. Some people criticized this approach as being too complicated and uncertain.

Another significant difference between the two Acts is that the CEAA, 2012 definition of environmental effects is narrower than the definition in the former Act, where an environmental effect was any change that the project could cause in the environment as well as socio-economic effects of such a change. As a consequence, though socio-economic effects may be considered under certain circumstances, under the CEAA, 2012, fewer likely environmental effects of projects are considered during the federal assessment process than under the former Act. The narrower definition also effectively constrains the Minister in the types of projects he or she may designate for an environmental assessment.

3 FEDERAL ENVIRONMENTAL ASSESSMENTS

3.1 Types of Assessments

Under the CEAA, 2012, there are two levels of environmental assessment: a standard environmental assessment and a panel review.

3.1.1 Standard Environmental Assessment

The standard environmental assessment is the default level of assessment applicable to a designated project under the CEAA, 2012. It takes into account a number of factors, including (but not limited to) the purpose of the designated project, its environmental effects and their significance,[14] measures that would mitigate any significant adverse environmental effects, alternative means of carrying out the designated project, and comments from the public.[15]

The federal authority responsible for carrying out the standard environmental assessment of the designated project and for preparing the final report is termed the "responsible authority." In most cases, the responsible authority is the Canadian

Environmental Assessment Agency. However, for projects involving activities regulated under the *Nuclear Safety and Control Act*, the responsible authority is the Canadian Nuclear Safety Commission (CNSC), and for projects involving activities regulated under the *National Energy Board Act* or the *Canada Oil and Gas Operations Act*, the responsible authority is the National Energy Board (NEB).[16]

In cases where the Canadian Environmental Assessment Agency is the responsible authority, standard environmental assessments have to be completed within 365 days, extendible under certain circumstances.[17]

3.1.1.1 Reducing Duplication

A complaint raised frequently under the former Act was that a single project could require more than one environmental assessment under federal law and provincial law or under an environmental impact assessment regime established under an Aboriginal land claims agreement. Some federal regulatory bodies, such as the NEB, also may require an assessment that includes environmental considerations for a proposed project (for example, the construction of a pipeline). The CEAA, 2012 expands upon mechanisms included in the former Act to reduce such duplication. The CEAA, 2012 includes the following three mechanisms.

- ***Delegation:*** The responsible authority may delegate to another jurisdiction the carrying out of any part of the federal environmental assessment and writing of the report, but it may not delegate the final decision-making.
- ***Substitution:*** If a province requests a substitution of its environmental assessment process for the federal process, the Minister of the Environment must approve the request if he or she judges the substitution to be appropriate.[18] In addition, the Minister may substitute an Aboriginal environmental assessment process for the federal process if he or she judges the substitution to be appropriate. In coming to such a judgment, the Minister must decide whether the factors that would be considered under the federal process and the opportunities for public participation are adequate in the other process.[19] At the end of the substituted environmental assessment, the final decision for the purposes of the CEAA, 2012 is made at the federal level.
- ***Equivalency:*** If the Minister comes to the opinion that a provincial process would be an appropriate substitute, the Governor in Council may,[20] on the recommendation of the Minister, exempt a designated project from the application of the CEAA, 2012 altogether when certain conditions are met.[21] The province then carries out the environmental assessment and makes the final decision about whether the designated project may proceed subject to stipulated mitigation measures, including any measures to protect components of the environment under federal authority, such as fisheries.

3.1.1.2 Special Rules for Certain Pipeline Projects

The CEAA, 2012 provides special rules for the federal environmental assessment of certain oil, gas or other major pipeline projects under the NEB's authority.[22]

Public participation in such environmental assessments is limited to "interested parties," which comprise persons who are directly affected by the pipeline, as well as those with relevant information and expertise.[23]

The NEB submits its environmental assessment report of the proposed pipeline, including recommendations, to the Minister of Natural Resources, who passes it on to the Governor in Council for a final decision. Before that final decision is made, the Governor in Council has the power to order the NEB to reconsider any recommendation it is making, taking into account any factor specified in the order.

3.1.2 Environmental Assessment by a Review Panel

The second, higher level of environmental assessment is a panel review.[24] The Minister of the Environment may refer the environmental assessment of a designated project to a panel of one or more unbiased and knowledgeable or experienced persons who are free of any conflict of interest. The Minister may only refer an environmental assessment to such a review panel if he or she is of the opinion that to do so is in the public interest, considering various stipulated factors, including whether the designated project may cause significant adverse environmental effects and public concerns related to those effects. As discussed earlier, the definition of environmental effects in the CEAA, 2012 is highly circumscribed, which limits the Minister's power to refer an environmental assessment to a review panel. In addition, the Minister may not refer an environmental assessment to a review panel if either the CNSC or the NEB is the responsible authority.

When a review panel conducts the environmental assessment of a designated project, it must make all relevant information public and hold hearings that offer interested parties an opportunity to participate in the environmental assessment before the panel submits its report with recommendations to the Minister. The entire process is limited to two years, extendible under certain circumstances. If the review panel fails to submit its report within the specified time limit, the Minister must terminate the assessment by the review panel, and the Canadian Environmental Assessment Agency is then responsible for completing the assessment and preparing the report. The Minister also has the power to terminate an assessment by a review panel if he or she is of the opinion that the review panel will not finish within the time limit. Again, the agency would be required to complete the environmental assessment and prepare the report.

In cases where another jurisdiction requires an environmental assessment of the same project, the Minister has the power to establish a joint review panel with that jurisdiction.

3.2 Decision-Making

Following a standard environmental assessment or panel review, the Minister of the Environment considers the environmental assessment report and decides whether the designated project is likely to cause significant adverse environmental effects, taking into account appropriate mitigation measures. In cases where the CNSC or the NEB is the responsible authority, that body makes this decision.[25]

If the Minister of the Environment, CNSC or NEB decides that the designated project is not likely to cause significant adverse environmental effects, the project is allowed to proceed subject to the proponent implementing specified mitigation measures and a follow-up program.[26]

If the Minister, CNSC or NEB decides that the designated project is likely to cause significant adverse environmental effects, the matter is referred to the Governor in Council for a final decision on whether or not those effects are justified in the circumstances, and therefore whether the project will be permitted to proceed, and subject to what conditions.[27]

In either case, the proponent receives a decision statement, which is posted on the Internet, setting out the decision as well as any conditions with which the proponent must comply if it is permitted to carry out the designated project. The conditions set out in the decision statement are legally enforceable.

3.3 CHANGES FROM THE FORMER ACT

The former Act included three levels of review rather than the two available under the CEAA, 2012. The lowest level of review under the former Act, known as a "screening," accounted for the vast majority of environmental assessments carried out under that Act. Because the CEAA, 2012 has dropped that level of review, far fewer projects are now required to undergo a federal environmental assessment. The standard environmental assessment under the CEAA, 2012 is roughly equivalent to the former Act's intermediate level of review, the "comprehensive study."

Under the former Act, any of a number of federal authorities that were involved in a proposed project could potentially be responsible for carrying out the environmental assessment. The CEAA, 2012 changed that, making the Canadian Environmental Assessment Agency responsible for most environmental assessments, unless the designated project falls under the purview of the NEB or the CNSC.

The government's ability to deem a provincial environmental assessment process equivalent to the federal process and, on that basis, exempt a designated project from the application of the CEAA, 2012 is another new feature of the current process. The 365-day and two-year time limits, for standard environmental assessments and panel reviews respectively, are also new.

In the past, almost any member of the public was able to appear before a review panel to give their views on the project. The CEAA, 2012 limits those permitted to participate at hearings to "interested parties," which comprise persons directly affected by the designated project, as well as those with relevant information or expertise. However, any member of the public is still able to submit written comments to the review panel for its consideration.

Finally, the decision statement with enforceable conditions is new under the CEAA, 2012. Under the former Act, enforcing conditions imposed on proponents who were allowed to carry out their projects was problematic at times.

4 THE CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY AND REGISTRY

The Canadian Environmental Assessment Agency and Canadian Environmental Assessment Registry are both continued under the CEAA, 2012. In the past, the agency's role was mainly administrative and advisory. Under the CEAA, 2012, the agency is responsible for carrying out standard environmental assessments. It is also now responsible for initially screening designated projects to determine whether they will require an environmental assessment at all, as well as completing environmental assessments where the Minister of Environment terminated assessment by a review panel, as discussed earlier in this paper.

The agency also continues to be responsible for maintaining the Canadian Environmental Assessment Registry (an Internet site and project files) to facilitate public access to records and notices relating to environmental assessments.

5 TRANSITIONAL PROVISIONS

When the CEAA, 2012 came into force on 6 July 2012, many environmental assessments were underway under the former Act. The CEAA, 2012 includes provisions explaining how these assessments are to be dealt with in light of the new Act.

Screenings underway under the former Act must be completed under the former Act and a final decision made by 6 July 2013 for projects that are designated under the *Regulations Designating Physical Activities* or by order of the Minister.

Comprehensive studies in progress on 6 July 2012 must be completed under the former Act.[28] The *Establishing Timelines for Comprehensive Studies Regulations* made under the former Act continue to impose a one-year time limit to complete these comprehensive studies, unless the comprehensive study began before 12 July 2010. In those cases, the CEAA, 2012 requires that the comprehensive study be completed within six months of 6 July 2012.[29]

Under the CEAA, 2012, the Minister of the Environment may refer a screening or comprehensive study that is continuing under the former Act to a review panel. In such a case, the environmental assessment continues by way of review panel following the new process under the CEAA, 2012.

Panel reviews underway on 6 July 2012 when the CEAA, 2012 came into force are being completed under the CEAA, 2012, subject to time limits established by the Minister.

The CEAA, 2012 does not apply to a designated project that was a "project" under the former Act if one of the following conditions applies:[30]

- Under the former Act, it was determined that a federal environmental assessment of the project was likely not required.

- The responsible authority already exercised a power or performed a function or duty (such as issued a permit) that would allow the project to be carried out in whole or in part.
- The proponent initiated construction of the project before 6 July 2012.
- The Minister of the Environment issued an order excluding a project from the application of the CEAA, 2012. The Minister may only make such an order if he or she is of the opinion that the project was not subject to the former Act and that another jurisdiction (such as a province) commenced an environmental assessment of the project.

6 CONCLUSION

While the CEAA, 2012 includes many aspects of the former federal environmental assessment process, the following list identifies some of the principal changes that occurred when the CEAA, 2012 came into force on 6 July 2012.

- Screenings were the lowest level of review and comprised the vast majority of assessments under the former Act. They have been eliminated under the CEAA, 2012, with the result that far fewer projects are required to undergo a federal environmental assessment.
- Responsibility for carrying out federal environmental assessments is concentrated in three government bodies – the Canadian Environmental Assessment Agency, the NEB and the CNSC – rather than spread across many federal authorities as before.
- Environmental assessments focus on federal aspects of designated projects, as the definition of environmental effects is now largely limited to federal matters.
- The CEAA, 2012 imposes time limits for environmental assessments. Most standard environmental assessments must be completed in one year, while panel reviews are limited to two years.[31]
- The CEAA, 2012 gives greater authority, which the federal government likely intends to use, to defer to provincial environmental assessment processes.

NOTES

1. For the most part, environmental assessment requirements applicable in the territories have been established through comprehensive land claim agreements that are codified in federal law, with some exceptions.
2. For a list of milestones in the history of federal environmental assessments, see Canadian Environmental Assessment Agency [CEA Agency], "Frequently Asked Questions."
3. House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 1st Session, 41st Parliament, 8 May 2012 (Scott Vaughan, Commissioner of the Environment and Sustainable Development, Office of the Auditor General of Canada). The Commissioner was discussing his 2012 Spring Report, which includes a chapter on "Federal Contaminated Sites and Their Impacts," as well as "The Commissioner's Perspective."

4. United States President Richard Nixon signed that country's *National Environmental Policy Act of 1969* into law on 1 January 1970. The quotation is taken from CEA Agency, "Cabinet Policy," *Frequently Asked Questions*.

5. The Environmental Assessment and Review Process Guidelines Order was made under the *Government Organization Act* in 1984. In January 1995, the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 came into force.

6. House of Commons, Standing Committee on Finance, Subcommittee on Bill C-38 (Part III), *Evidence*, 1st Session, 41st Parliament, 17 May 2012 (The Honourable Joe Oliver, Minister of Natural Resources). Minister Oliver was speaking in support of the proposed budget implementation bill, Bill C-38, which repealed the *Canadian Environmental Assessment Act* [the former Act] and replaced it with a new federal environmental assessment regime set out in the *Canadian Environmental Assessment Act, 2012* [CEAA, 2012].

7. The budget implementation Act for 2012 is the *Jobs, Growth and Long-term Prosperity Act* (Bill C-38), S.C. 2012, c. 19, Royal Assent on 29 June 2012, which, under s. 52, enacted the CEAA, 2012.

8. "Order Fixing July 6, 2012 as the Day on which Certain Sections of the Act Come into Force," S.I./2012-56, *Canada Gazette*, Vol. 146, No. 15, 2012, p. 1810.

9. For the purposes of the CEAA, 2012, a project means a physical activity. Examples of physical activities include the construction of a mine, a pipeline or an industrial facility. By contrast, a policy change is not a physical activity and therefore is not subject to an environmental assessment under the CEAA, 2012.

10. *Regulations Designating Physical Activities*, SOR/2012-147.

11. Note that the term "screening" is used differently in the CEAA, 2012 than it was under the former Act, where it referred to the lowest of three possible levels of review for a federal environmental assessment.

12. The Minister is not permitted to make such a designation if the project has already begun and, as a result, the environment has been altered, or if a federal authority has already exercised a power or performed a duty or function (such as issued a permit) that allows the project to be carried out. See CEAA, 2012, s. 14(5).

13. CEAA, 2012, s. 5. It is interesting to note that the socio-economic effects included in the last part of the definition of environmental effects include only those that stem from a change to a component of the environment that is *not* under the legislative authority of Parliament and that is *not* on federal lands or outside the province where the project is to be carried out. It is unclear why the legislation was drafted with this limitation. See s. 5(2)(*b*).

14. This includes "the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out" (CEAA, 2012, s. 19(1)(*a*)).

15. CEAA, 2012, s. 19.

16. Ibid., s. 15.

17. Ibid., s. 27(2).

18. Note, however, that substitution cannot be used for federal environmental assessments for which either the National Energy Board (NEB) or the Canadian Nuclear Safety Commission (CNSC) is the responsible authority, or for environmental assessments that the Minister has referred to a review panel (CEAA, 2012, s. 33).

19. The full list of conditions that must be met before the Minister may approve the substitution is set out in the CEAA, 2012, s. 34.

20. The Governor in Council is the Governor General acting on the advice of the federal Cabinet.

21. The conditions that must be met before the Minister may approve the substitution are that the Governor in Council is satisfied that:

    - after completion of the assessment, the provincial government will determine whether the designated project is likely to cause significant adverse environmental effects, taking into account appropriate mitigation measures;
    - the provincial government will ensure that mitigation measures and a follow-up program are implemented; and
    - any other conditions that the Minister of the Environment establishes will be met (CEAA, 2012, s. 37).

22. CEAA, 2012, ss. 28–31. In general, pipelines fall under the NEB's authority when they cross a provincial border or the international border with the United States. The term "major pipeline projects" in the text refers to pipelines that exceed 40 kilometres in length and therefore are not eligible for an exemption from many of the requirements relating to pipelines set out in the *National Energy Board Act*, R.S.C. 1985, c. N-7. See s. 58 of that Act.

23. CEAA, 2012, ss. 2(2) and 28.

24. Ibid., ss. 38–51.

25. An exception to this statement is in respect of certain major pipeline projects under the NEB's authority. In these cases, following an environmental assessment, the NEB submits its report and recommendations through the Minister of Natural Resources to the Governor in Council for a final decision. See section 3.1.1.2 of this paper.

26. The designated project may be subject to other regulatory requirements that must be met before it is allowed to proceed. For example, a pipeline project may require a *Certificate of Public Convenience and Necessity* from the NEB before it may go ahead. A follow-up program is "a program for (*a*) verifying the accuracy of the environmental assessment of a designated project; and (*b*) determining the effectiveness of any mitigation measures" (CEAA, 2012, s. 2(1)).

27. CEAA, 2012, ss. 52–53.

28. Note that the CEAA, 2012 provides the Minister with a discretionary power to order that a comprehensive study underway when the CEAA, 2012 came into force be completed under the CEAA, 2012 rather than under the former Act. See CEAA, 2012, s. 125(7).

29. This six-month time limit does not apply if the CNSC is the responsible authority for the comprehensive study. See CEAA, 2012, s. 125(3).

30. A "project" under the former Act was the construction, operation, modification, decommissioning, abandonment or other undertaking in relation to a physical work.

31. Corresponding changes that the *Jobs, Growth and Long-term Prosperity Act* made to the *National Energy Board Act* limit the time to complete an environmental assessment of certain pipeline projects to 15 months, plus three months for the Governor in Council to make a decision based on the environmental assessment report.