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**Re: Statutory Review of the Canadian Environmental Assessment Act**

Dear Committee,

The Environmental Law Centre (ELC) is an Edmonton-based charitable organization established in 1982 to provide Albertans with an objective source of information about environmental and natural resources law and policy. Its vision is a clean, healthy and diverse environment protected through informed citizen participation and sound law and policy, effectively applied.

The ELC has a long history of involvement with federal and provincial environmental assessment issues, including participation in previous statutory reviews of the *Canadian Environmental Assessment Act*.



## Summary:

There are many serious, entrenched and fundamental problems with federal environmental assessments in Canada under the *Canadian Environmental Assessment Act (CEAA)*.<sup>1</sup> We support a comprehensive review of *CEAA* in this process. We recommend that this committee undertake a serious re-evaluation of *CEAA* and that the Committee ensure that each component of the *Act* meets the stated objectives so that at a minimum:

1. Significance of adverse environmental effects is assessed in relation to cumulative effects, and sustainability using an ecosystem approach;
2. Mitigation, monitoring and follow up are enforceable and transparent;
3. There is a robust mechanism to ensure the integrity of information relied upon in *CEAA* assessments;
4. The federal government role in comprehensive environmental assessment is strengthened;
5. Strategic assessments of policies, plans and programs are carried out in an effective and transparent manner; and
6. Public participation is assured.

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<sup>1</sup> *Canadian Environmental Assessment Act*, S.C. 1992, c. 37



## Why an overhaul of the environmental assessment regime in Canada is necessary

Canada is experiencing serious environmental degradation in a number of areas, some of which is described in the *Canadian biodiversity: ecosystem status and trends 2010* report prepared by the provincial, territorial and federal governments.<sup>2</sup> This report argues that:

A strategy of detecting ecosystem change and acting before thresholds are crossed has the greatest likelihood of preventing biodiversity loss. Examples throughout the assessment demonstrate the excellent return on investment from early response and prevention.<sup>3</sup>

In particular, Canada faces the loss of some of our most productive and most important terrestrial and aquatic ecosystems. Places like terrestrial and intertidal wetlands, eelgrass meadows, and boreal migratory bird nesting grounds are disappearing.<sup>4</sup> The trends report emphasizes that recognizing that rapid, irreversible change can occur when thresholds are reached is extremely important.<sup>5</sup> Once these thresholds are crossed, it may be too late. Thresholds are likely to be crossed when "action is delayed until the evidence of change is clear."<sup>6</sup> When this occurs, interventions are drastic, costly and have a low likelihood of success.

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<sup>2</sup> Federal, Provincial and Territorial Governments of Canada, "Canadian biodiversity: ecosystem status and trends 2010" (Ottawa: Canada, 2010) <[www.biodivcanada.ca/ecosystems](http://www.biodivcanada.ca/ecosystems)>

<sup>3</sup> *Ibid.* at 1.

<sup>4</sup> *Ibid.* 60% of terrestrial birds nest in the boreal forest.

<sup>5</sup> *Ibid.* at 108.

<sup>6</sup> *Ibid.* at 109.



Currently the data indicates that Canada is facing:

- the collapse of the grassland ecosystems from multiple stressors such as habitat loss, habitat degradation, invasive species, fragmentation and agriculture intensification;
- high, continuing losses and degradation of the remaining wetlands in Southern Canada;
- high levels of at risk species of reptiles (43%), amphibians (20%), freshwater fish (93 species) and mussels (24%);
- huge-scale population declines of shorebirds, grassland birds (40% decline) and migratory birds (21-24% decline);
- loss of important breeding bird habitat;
- declining marine fish populations;
- increasing concentrations of contaminants of concern like mercury, PDEs, pesticides and herbicides in wildlife;
- increase in harmful algae blooms in freshwater systems;
- deterioration in quality, quantity, and access to ecosystem services.

Loss of any species means the loss of the whole web of ecological relationships between species in that ecosystem. It means the loss of the ecosystem services those species provide. Change in one ecosystem brings with it widespread consequences. Thresholds are influenced by both environmental sensitivity and the severity of the threat.

Environmental assessment is key to addressing the issue of sustainability in Canada. Properly administered, environmental assessment is the tool that facilitates a precautionary, ecosystem approach that allows us to avoid reaching ecological



thresholds. Properly structured and administered, environmental assessment is the core tool we should be using to ensure a sustainable future.

So far, *CEAA* has not prevented further contributions to the degradation of Canadian ecosystems. It has also failed to address major planning issues and prevent Canada from reaching ecological scale thresholds. Radical improvements are needed to environmental assessment in Canada to ensure the sustainability of this country for future generations.

The current *CEAA* regime asks a simplistic question: does a “project” subject to assessment result in “significant adverse environmental effects” and if so are those effects “justified in the circumstances”? This is determined by responsible authorities under the Act (federal decision-makers).<sup>7</sup> While there is some limited policy guidance regarding what types of effects might be “significant” there is no standardized practice for establishing significance or explaining significance in the *CEAA* decision. There is no explicit role for sustainability or cumulative effects in the determination of significance.

Each year, thousands of projects including large projects with serious, unmitigated and irreversible impacts are determined to be not likely to cause significant adverse environmental effects under *CEAA*. Most years only a handful of projects, if any, are deemed “likely to cause significant adverse environmental effects” under *CEAA*.<sup>8</sup>

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<sup>7</sup> *CEAA*, *supra* note 1, s.37.

<sup>8</sup> Statistics from Teri Cherkewich, “Getting to “no” though YESAA? A look at an Alternative Federal Assessment Model Based on the Principle of Independence” (2010) 21 *J. Env. L. and Practice* 247, at 251.



## **1) Significance of adverse environmental effects must be assessed in relation to cumulative effects and sustainability using an ecosystem approach.**

The current approach to significance tends to ignore regional and cumulative impacts, and make light of large scale impacts. It further severs the project from the surrounding environment including the bigger-scale ecological pressures and management issues that need to be addressed.

The concepts of cumulative effects and sustainability need to be part of the legal understanding of what constitutes a "significant adverse environmental effect". In this way, where the wider environmental problems are serious, such as climate change, growing levels of toxic pollution or biodiversity loss the project's contribution can be addressed. The contribution to that problem from a particular project should not be assessed in isolation. A project's contribution to wider environmental degradation should be considered significant where the wider problem is itself significant and the project contributes to rather than reduces that wider problem. Where there is an absence of broader planning and policy strategies to address a larger environmental problem, this is a further indication that an incremental adverse effect could be significant. It must be recognized that incremental effects will often lead to significant impacts on the environment. This rarely is reflected in cumulative effects assessment under *CEAA*.

Such an approach is best described as an ecosystem approach. This is the approach used in Ontario and is described by the Ontario Divisional Court as follows:



[60] Under an ecosystem approach, decisions are made by measuring the effects on the system as a whole, rather than on their constituent parts in isolation from each other.<sup>9</sup>

The ecosystem approach requires a determination of whether a project meets all applicable laws and guidelines but also an evaluation of the cumulative and site-specific impacts of that project.<sup>10</sup> This approach should guide and constrain decision-makers in the determination of whether a project has significant adverse environmental effects and whether those effects are justified in the circumstances under *CEAA*.

In Alberta major cumulative effects issues are becoming apparent. Nowhere is this more significant than in the oilsands region. Although the Alberta government has in place the Cumulative Effects Management Association (CEMA) there are several major issues related to cumulative effects that are not being addressed:

- wildlife management issues – loss of breeding bird and boreal wetland and forest habitat, tailings pond deaths. Impacts on species at risk from large energy developments;
- regional air quality (including trans-boundary effects);
- water quality and quantity (including trans-boundary effects);
- large GHG emissions.

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<sup>9</sup> *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, 2008 CanLII 30290 (ON S.C.D.C.)

<sup>10</sup> Mistakis Institute, "Sustainable Development a Review of Current Literature" (February 2004) at 78. <<http://www.rockies.ca/files/reports/Sustainable%20Development%20A%20Review%20of%20Current%20Literature.pdf>>



The Royal Society of Canada (RSC) report on the oilsands reviewed the environmental assessment process (which is usually by way of Joint Panel Review) and commented that:

Although individual components of an ecosystem to be developed for oil sands operations have been documented and quantified, few EIAs have provided any focus on the ecological capacity in the region to identify limits that need to apply to individual project approvals. For example, some studies have identified critical faunal movement patterns but have failed to address them in the overall regional context.<sup>11</sup>

Although not identified specifically in the RSC report, the limitations of the process under *CEAA* are partly to blame for these problems. *CEAA* assessments have not provided clarity around ecological capacity or provided responsible authorities with clear powers to set limits or thresholds for development. The ELC submits that the scale and often trans-boundary nature of effects from large projects or from many smaller impacts cannot be dealt with solely by the provincial government, practically or constitutionally.

The Alberta government created the CEMA in 2000 to implement a regional sustainable development strategy. However there are still large gaps in many critical areas of environmental management including the absence of an approved land use plan, absence of important at risk species management plans and regional ecosystem plans, no flow limits for water withdrawals from the Athabasca River, and

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<sup>11</sup> Royal Society of Canada, "Environmental and Health Impacts of Canada's Oil Sands Industry" (December 2010) at 258. <<http://www.rsc-src.ca/documents/expert/RSC%20report%20complete%20secured%209Mb.pdf>>



the lack of a wetlands management plan or common standards for oilsands reclamation. The existing trend indicates that the Alberta government is unlikely to set ecological thresholds in the development of a cumulative effects framework for this region.

In any event, there are key areas of federal responsibility and regulation in the oilsands region such as trans-boundary waterways and air-sheds, migratory bird habitat issues, species at risk and fisheries protection. These issues should be dealt with by federal policies and plans and these policies and plans should be subject to a transparent, open environmental assessment process.

There are also serious issues with the role of *CEAA* in protecting the integrity of national parks in Alberta. Despite the mandate of Parks Canada to protect the ecological integrity of national parks under the *National Parks Act*<sup>12</sup> and despite the use of public consultations on park management plans, the decision to increase the number of visitors in Banff and Jasper national parks and develop further ski and hiking trails is likely to: "cause serious and irreversible harm to Banff National Park's ecological integrity and its value as a national park."<sup>13</sup> In particular protection of sensitive species like caribou and grizzlies in these parks has failed.<sup>14</sup> The ELC suggests that degradation continues because key management issues in the parks are not addressed under *CEAA* and the parks are not effectively managed in their broader regional context. Environmental assessment is the tool for exerting federal authority to address broader ecological issues affecting parks. We ask the

<sup>12</sup> *Canada National Parks Act*, S.C. 2000, c. 32, s.8(2)

<sup>13</sup> Banff-Bow Valley Study, Banff-Bow Valley: At the Crossroads. Summary report of the Banff-Bow Valley Task Force (Ottawa, Heritage Canada, 1996) at 4 <  
<http://www.whyte.org/time/riveroflife/bveng.pdf>>

<sup>14</sup> Parks Canada, State of Banff National Park (May 2008) at 4-6, 16-19. <  
[http://www.pc.gc.ca/eng/docs/bib-lib/~media/pn-np/ab/banff/REP\\_SPR\\_e.ashx](http://www.pc.gc.ca/eng/docs/bib-lib/~media/pn-np/ab/banff/REP_SPR_e.ashx)>



committee to take a long-term view and consider how federal assessments have contributed to degradation in these parks. For example, the Trans-Canada Highway is known to represent one of the biggest ecological integrity issues in Banff. While environmental assessments such as those conducted in 1979 and 2004 have consistently recommended strong mitigation measures for this highway in Banff, all have recommended that the highway be incrementally expanded over time and in the latter case federal authorities found that there were no significant adverse environmental effects to expansion despite finding numerous potential impacts to wildlife.<sup>15</sup>

Furthermore, there has been a move to more policy based approaches to management of national parks which further undermines the ecological integrity of the park system and the central principles of legislative public participation, the government acted to remove park development items from the *Comprehensive Study List Regulations*.<sup>16</sup>

The practice of responsible authorities narrowly scoping projects, an issue identified in the past before this committee, exacerbates the limitations of the current approach to addressing the overall sustainability of projects within a regional and policy context. Instead of moving in the direction recommended by this committee in 2003 the Government in 2010 further amended *CEAA* in the *Jobs and Economic*

<sup>15</sup> Golder Associates, "Screening Report For The Transcanada Highway Twinning Project Phase IIIB Banff National Park" Submitted to: Parks Canada Agency (Calgary: November 2004)

<<http://www.ceaa.gc.ca/050/documents/4804/4804E.pdf>>

<sup>16</sup> Canadian Environmental Assessment Agency, Discussion Paper, *Proposed amendments to the Comprehensive study List Regulations under the Canadian Environmental Assessment Act related to ski area developments in national parks*, online: Canadian Environmental Assessment Agency <<http://www.ceaa-acee.gc.ca/default.asp?lang=En&xml=2A83452D-03B7-4210-A15C-687A8319C9FA>>.



*Growth Act* to expand the ability of responsible authorities to narrowly scope projects.

The ELC recommends that the *CEAA* be amended to provide definitions of “significant adverse environmental effects” and provide boundaries to discretion for when a project is “justified in the circumstances.”



## 2) Mitigation, monitoring and follow-up must be enforceable and transparent;

Many serious environmental impacts are found to be “insignificant” based on recommendations that the proponent or other government authorities prepare further studies and plans to be reviewed at a future date by someone other than the responsible authority. These conditions are often in the form of non-binding recommendations and do not themselves identify measures for mitigation or require them to be carried out. The consequence is that there is no assurance that these effects can, are or will be mitigated. Yet the project is approved through the *CEAA* process anyway. Similarly, there is a pattern of over-reliance on mitigation, monitoring and follow up to address uncertain effects that are potentially significant.

In the words of the Mackenzie Gas Pipeline Joint Panel Review there may be no “demonstrable commitment to implement even the intent of the Recommendation.”<sup>17</sup> These recommendations may be fundamental to the determination that a project is unlikely to have significant adverse environmental effects.

For example, in the approval of the Imperial Oil Kearl Oilsands project in 2008 there was indication that the project area contained habitat for the yellow rail, a small wetland bird listed as a “species of concern” under the *Species At Risk Act*. This bird likely had habitat that would be destroyed by the project. It was unknown whether this habitat was critical to species survival. The Joint Panel Review approved the project and recommended Alberta Environment require cumulative effects studies for the yellow rail within two years. These studies were never carried

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<sup>17</sup> Letter from the Joint Review Panel for Mackenzie Gas Project to France Pégeot ADM (October 4, 2010)



out and there are no plans to do so. There is no available mechanism under *CEAA* to enforce this recommendation and there was virtually no protection for the yellow rail in the project plan. Accordingly, the yellow rail went unprotected throughout the *CEAA* process. Decisions like these undermine the federal government's ability to protect species at risk under the *Species at Risk Act* and accordingly undermines Canada's international commitments to biodiversity protection. Instead of addressing the contribution of the single project to the destruction of yellow rail habitat and being able to implement a solution, the *CEAA* process leads decision-makers to rely on uncertainty and lack of information on the bigger issue to approve projects.<sup>18</sup> In cases like these, there was both over-reliance on mitigation and monitoring to address the uncertainty and a lack of implementation of the recommendations for monitoring and follow up.

In the context of the oilsands, the federal expert panel report released late last year identified serious issues in monitoring and assessment.<sup>19</sup> Specifically, it noted that "[c]ollectively the monitoring efforts by provincial and federal governments and other stakeholder groups including industry, lack a coherent data management framework where information can be uploaded, organized, and accessed in a standardized and coordinated manner." The panel further noted that "[a] credible, trusted monitoring system must be founded on accepted scientific principles, most

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<sup>18</sup> EUB, Canada, Joint Panel Report, EUB Decision 2007-013, *Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the Fort McMurray Area* (February 27, 2007). See also *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 (CanLII)

<sup>19</sup> *A Foundation for the Future: Building an Environmental Monitoring System for the Oil Sands, a Report Submitted to the Minister of Environment* (December 2010)

<[http://www.ec.gc.ca/pollution/E9ABC93B-A2F4-4D4B-A06D-BF5E0315C7A8/1359\\_Oilsands\\_Advisory\\_Panel\\_report\\_09.pdf](http://www.ec.gc.ca/pollution/E9ABC93B-A2F4-4D4B-A06D-BF5E0315C7A8/1359_Oilsands_Advisory_Panel_report_09.pdf)>



prominently a continuous and independent peer review of results.”<sup>20</sup> The provincial water quality monitoring panel in Alberta also noted that “Participation of local communities is absolutely essential to the long-term viability of the exploitation of the oil sands as a resource. Every effort should be made to involve and communicate with all interested parties and stakeholders”.<sup>21</sup> Currently monitoring and mitigation as the result of *CEAA* assessments are opaque and create data and information that are not easily publicly accessible.

There must be accountability for outcomes related to mitigation measures. Reliance on external processes to mitigate effects must be curtailed. For example, the Cumulative Effects Management Association (CEMA) has been relied upon heavily to drive mitigation responses to oil sands development impacts. In the 2004 Horizon hearings, Environment Canada relied heavily on CEMA, noting:<sup>22</sup>

[T]hat the pace of oil sands development may be exceeding the capacity of CEMA and RSDS to effectively develop management systems so that environmental thresholds and objectives could be established and environmental limits not be exceeded. EC, therefore, recommended the development of interim environmental thresholds and objectives by the CEMA working groups, stating that this would be consistent with applying the precautionary principle.

<sup>20</sup> *Ibid.*

<sup>21</sup> Water monitoring data review committee, “Evaluation of Four Reports on Contamination of the Athabasca River System by Oil Sands Operations” (March 2011) Alberta Environment at 32. online: <[http://environment.alberta.ca/documents/WMDRC\\_-\\_Final\\_Report\\_March\\_7\\_2011.pdf](http://environment.alberta.ca/documents/WMDRC_-_Final_Report_March_7_2011.pdf)>

<sup>22</sup> Joint Panel Established, Canadian Natural Resources Limited Application for an Oil Sands Mine, Bitumen Extraction Plant, and Bitumen Upgrading Plant in the Fort McMurray Area, Joint Panel Report EUB Decision 2004-005, online: Canadian Environmental Assessment Agency, [http://www.ceaa.gc.ca/Content/7/3/E/73E831C7-1781-42F6-AEBB-7F79581E012E/report\\_e.pdf](http://www.ceaa.gc.ca/Content/7/3/E/73E831C7-1781-42F6-AEBB-7F79581E012E/report_e.pdf)



The passage of 7 years has seen no environmental thresholds set, interim or otherwise. The reliance on CEMA processes to derive objectives that are essential to measure the success of any proposed mitigation measure reflects a fundamental flaw in how mitigation has played out under *CEAA* and requires that substantive powers to condition, monitor and evaluate mitigation responses be provided to responsible authorities.

In 2003 this Committee recommended that *CEAA* be amended to include a permitting system. We ask the Committee to repeat this helpful recommendation.

**The ELC agrees with others that the solution is that mitigation, monitoring and follow up must be enforceable through permitting by the responsible authority under CEAA. Compliance steps and monitoring reporting should be required to be posted on the registry so that the public can understand the effects as a project is carried out.**



### 3) The integrity of information relied upon in the assessment must be assured

The vast majority of environmental impact statements prepared under *CEAA* are put together by consultants. An unregulated consulting industry exists in Canada for the purpose of preparing these documents. It is often unclear who authors environmental impact statements and whether they are qualified to make conclusions, do the research or assess the data. Even if this were solved, the very viability of self-assessments has long been questioned. This issue is best explained as follows:

It likely does not take an expert to understand that for any environmental assessment regime to be perceived as legitimate and credible in the eyes of the public, it should, at least in theory, be built upon a fundamental premise that the objectivity of the assessor and the impartialities of science must rule the day...Although it may be difficult to quantifiably determine the extent of the impact of the self-assessment model on the integrity of the decision-making process under the *CEAA*, it is not difficult to conclude that the adoption of such a model has, at the very least, eroded public confidence given the self-serving nature of such a regime.<sup>23</sup>

The ELC recommends abandoning the self-assessment model while maintaining the principle that those who wish to pursue activities that have the potential for environmental harm must bear the costs of assessing the potential impacts of their activities. *CEAA* needs to incorporate a mechanism to ensure the scientific integrity of claims in the environmental assessment process. Moreover, there is a lack of overall quality assurance being undertaken by either responsible authorities or the

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<sup>23</sup> Teri Cherkewich, *supra* note 8



*CEAA* Agency as noted in the fall 2009 report of the Commissioner of Environment and Sustainable Development:<sup>24</sup>

The Agency does not know whether responsible authorities are conducting good-quality environmental assessments and whether assessments are contributing to the protection the environment, as intended.

The ELC conducts public education and outreach programs on environmental law in Alberta. We receive calls from anonymous members of the public regarding an array of environmental issues. Among these we receive complaints from members of the public about allegedly inaccurate environmental information that is promulgated in environmental assessment and approval documents at both the federal and provincial level. We are often asked, "how can they approve this based on this flawed information and can't I challenge it?"

Unfortunately, the response is that *CEAA* provides no practical mechanism to address flawed, incorrect, mistaken, incomplete, misleading, inaccurate or even fraudulent information that might be contained in assessment documents. There is no critical review of the accuracy or quality of the information in environmental assessments required in the *CEAA* process.

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<sup>24</sup> 2009 Fall Report of the Commissioner of the Environment and Sustainable Development, Chapter 1—Applying the Canadian Environmental Assessment Act (Ottawa: 2009) also see Status Report of the Commissioner of the Environment and Sustainable Development to the House of Commons (March 2008) Chapter 9 - Strategic Environmental Assessment.



The ELC recommends that the solution is to eliminate self-assessment and amend *CEAA* to provide for centralized assessment by the Agency, a mechanism for cost recovery, and ensure the independence of that Agency. Further, *CEAA* must be amended to permit a means of challenging incomplete or inaccurate information to provide credible oversight of scientific integrity.

#### 4) Strategic assessments of policies, plans and programs must be carried out in an effective and transparent manner

Policy-level assessment would be the appropriate level at which to ensure that energy policies and approaches satisfied all applicable federal obligations. It is also the level at which to assess issues like industry-wide standards, best available mitigation techniques and technologies, ecosystem management and regional planning issues. It is also the best way to address the cumulative effects of many projects in a region.

The federal government has essentially abandoned policy-level assessment of environmental effects and sustainability. There is no meaningful federal mechanism to identify ecological thresholds and act on them before they become serious or to plan policies and programs that will address wider environmental problems so that individual projects that are approved do not have significant environmental effects within their environmental contexts.



When *CEAA* was first enacted, the Canadian Bar Association (CBA) commented that the use of a policy rather than a statutory process to assess the environmental impacts of programs and policies has<sup>25</sup>

...some obvious weaknesses: it is not based on statute and therefore can be altered without public knowledge or debate; the criteria for assessment are not known; compliance may be a problem, since there is no legal enforcement mechanism; departmental turf-protection and competition will undermine enthusiasm for the practice...

The CBA recommended at that time that *CEAA* be amended to provide that policy decisions be subject to environmental assessment. This recommendation was not implemented. The *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* (issued in 1990 and revised in 1999 and 2004), made it mandatory for all departments and agencies to assess the environmental impact of proposals.

The CBA's predictions have proven true in numerous evaluations. Most recently, in March 2008 the Commissioner of the Environment and Sustainable Development issued a report that repeated the criticisms.<sup>26</sup> The Commissioner found that there was a weak accountability structure, the Privy Council Office did not ask whether the directive had been complied with when submissions to Cabinet were delivered, and the assessments were not transparent. The Commissioner commented:<sup>27</sup>

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<sup>25</sup> Canadian Bar Association, "Submission on Bill C-18 Canadian Environmental Assessment Act" (November 1990) at 7.

<sup>26</sup> Status Report of the Commissioner of the Environment and Sustainable Development to the House of Commons (March 2008) Chapter 9 - Strategic Environmental Assessment.

<sup>27</sup> *Ibid.* at 2.



Most of the departments we examined are not preparing public statements of their detailed environmental assessments, as required by the Cabinet directive. When public statements are released, they are generally difficult to locate and often do not contain sufficient information to assure stakeholders and the public that environmental factors have been integrated into the decision-making process—the stated objective of the requirement.

In Alberta the lack of strategic assessment leaves the oilsands region without a federal management approach or plan. The ELC notes that this region is of federal and international importance. The ELC believes that the federal government's policies, plans and approaches towards the enforcement of the *Migratory Birds Convention Act*, regulation of trans-boundary air pollution and the protection of fisheries in the oilsands region would benefit from a federal environmental assessment using an ecosystem approach. It is through strategic assessment that the federal government can best address these major regional issues.

**This Committee recommended that strategic assessments be legislated in its report *Beyond C-9* in 2003. We ask that the Committee repeat this helpful recommendation.**

#### **5) The federal government role in comprehensive environmental assessment should be strengthened.**

The federal environmental assessment process is a necessity, created by disparate department mandates and the reality of the Canadian Constitution. There is a lack of



compelling evidence that a dual federal-provincial role is problematic or that there is a problem with duplication. Project activities may result in significant adverse effects on either a provincial or federal constitutional head of power, notwithstanding the type of project.

The importance of the federal role in environmental assessment is accentuated where provincial processes have failed to adequately address the environmental impacts of an activity. The RSC has recently noted in relation to the environmental impacts of oil sands development that provincial authorities are lacking.<sup>28</sup> The RSC noted that the “capacity of AENV, SRD, and the ERCB to respond to the technical demands of issuing approvals for the large number of new oil sands developments has been a concern” and cited the 2006 Radke Report that noted “Departments lack capacity to complete Environmental Impact Assessments (EIAs), to complete technical studies such as those involving instream flows, to focus on cumulative effects and to develop policy in a timely fashion.”

This passage citing in-stream flows and cumulative effects has direct bearing on the jurisdiction of the federal government and its role in environmental assessment processes. It indicates that the federal government participation is not duplicative but is in fact filling a significant and environmentally important gap.

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<sup>28</sup> Royal Society of Canada, *supra* note 11.



The ELC recommends that a renewed *CEAA* be amended to recognize the federal role in comprehensive environmental assessments. The ELC recommends repealing amendments that provide the Minister the discretion to limit the scope of environmental assessments. We also recommend legislating a positive duty on the federal government to evaluate and identify gaps in provincial capacity and environmental assessment processes.



## 6) Public participation must be assured

Public participation in environmental assessment is part of Canada's international commitments to sustainable development. The ELC believes that participation in environmental assessments has become increasingly difficult. The size and complexity of major projects has grown and the scale of the impacts that need to be addressed in projects like major hydroelectric developments, large mines, nuclear power facilities, oilsands and the building of new highways into remote areas are virtually impossible for the public to address without funding. Such exercises may also be a waste of time if there is no meaningful opportunity to test the information provided in the assessment before an objective decision-maker.

The ELC considers that "participation" must mean more than a right to complain in writing or make a presentation. Inherently determining if an environmental effect is "significant" or "justified" must be done in relation to the values of the public that are engaged in the process. It must provide the public with meaningful rights to information, and to test that information on reasonable timelines.

Currently public participation for screenings is not assured and there are no rights to appeal substantive determinations by the decision-maker about environmental effects. At every level of assessment except panel reviews, the public is relegated to the role of nitpicking about the information contained in what are sometimes poor quality assessments before a decision maker with limited access to information. The public are rarely given an opportunity to engage in the broader policy issues involved in project approvals through the *CEAA* process and a wide variety of issues are scoped out of the assessment.



The ELC recommends that public participation requirements be provided for screenings and that there be a review mechanism to resolve differences in opinion between the decision-maker and those who participate in an environmental assessment related to environmental findings. This will provide for more meaningful public participation and quality assurance.

## Conclusion

The ELC thanks the Committee for the opportunity to provide this submission. Unfortunately the problems with federal assessment are far-reaching and the ELC cannot highlight the full extent of the problems that environmental assessment reform should address. We are pleased to provide you with some of the recommendations we feel would partially address the problems in federal assessment.

The ELC would be pleased to present to the committee in Alberta or through videoconference.

Yours truly,

A handwritten signature in black ink, appearing to read "L. Bowman", with a long horizontal flourish extending to the right.

Laura Bowman  
Staff Counsel  
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## Recommendations

### CEAA be amended to:

- Ensure that broader policy issues related to climate change, pollution, ecosystem protection, species at risk and sustainability are assessed prior to project proposals being put forward.
- Provide for strategic level assessment of policies and approaches, including energy and resource policies at the federal level.
- Expressly require both strategic and project level assessments to demonstrate compliance with all federal laws and policies.
- Include the test of *positive contribution to sustainability* for the approval of each project.
  - Include definitions as follows:
    - “significant adverse environmental effect” means any adverse environmental effect that, objectively and based on the best available information alone or together with other reasonably foreseeable or existing activities, trends, policies or approaches may:
      - (a) contribute to the degradation in the quality or quantity of any renewable or non-renewable resources for future generations,
      - (b) impede the restoration of healthy populations of a listed species under the *Species at Risk Act*,
      - (c) contribute to the overall degradation trend of an ecosystem or one of its components,
      - (d) contribute to adverse physical, geological, chemical, radiological, atmospheric or other changes that may be irreversible,
      - (e) contribute to water or air pollution that may directly or indirectly adversely impact on human health,



- (f) contribute to, temporarily or otherwise, to degradation of water supplies, fisheries, air or agricultural lands or ecological services, or
  - (g) any other significance criteria provided for in the regulations.
- “justified in the circumstances” means that the project, policy, or approach complies with all federal laws and international obligations, is necessary to meet an important need and, objectively, based on the best available information is more likely than not to:
    - (a) create significant adverse environmental effects that are temporary or substantially reversible through known means;
    - (b) provide substantial economic and social benefits for the region and the country as a whole through employment, economic activity and enhanced well-being;
    - (c) taken as a whole, provide a positive contribution to sustainability that could not be achieved through any identifiable less harmful means.
  - Mitigation definition should be removed and replaced with:
 

“mitigation” means, the elimination of a likely adverse environmental effect of a project, through physical or operational technically feasible means to a point where it is no longer likely or no longer significant, but does not include monitoring, follow-up programs, adaptive management or future plans to determine courses of action.
- Eliminate self-assessment and provide for independent assessment.
  - Ensure that the best available information on potential impacts is before the decision-maker by providing review opportunities.



- Ensure that monitoring, follow up and mitigation measures are enforceable through permits and included in the registry.