HOUSE OF COMMONS
CANADA

SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL ASSESSMENT: Beyond Bill C-9

Report of the Standing Committee on Environment and Sustainable Development

June 2003

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… FOR A STRONGER AND LARGER ROLE IN THE ASSESSMENT OF ENVIRONMENTAL IMPACTS, FOR THE BENEFIT OF CANADIANS AND THE PUBLIC GOOD …

SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL ASSESSMENT: Beyond Bill C-9

OTTAWA, June 2003, 37th Parliament of Canada

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THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

has the honour to present its

SECOND REPORT

In accordance with its permanent mandate under Standing Order 108(2), your Committee undertook, beginning in January 2003, a study of a draft report entitled "Beyond Bill C-9: Toward a New Vision for Environmental Assessment".

The Committee adopted the report on Thursday, May 1, 2003, with three dissenting opinions.

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WHY THIS REPORT?

Members of the House of Commons Standing Committee on Environment and Sustainable Development dedicate this report to people who take to heart the public interest, think beyond the next election, and appreciate the fact that a healthy economy, in order to last, requires careful management and an appreciation of environmental and social values.

This report is for parliamentarians, policy makers, policy advisors and anyone interested in environmental assessment. Its aim is to give a clear sense of direction for environmental assessment through its recommendations. The report was made possible by the valuable testimony of witnesses on Bill C-9 before the Committee, consultations with knowledgeable people in the field of environmental assessment and, in particular, by Stephen Hazell. The technical and practical experience provided by him and numerous witnesses was considerable and provided the substance of the recommendations contained in this document.

This report is triggered by the narrow scope of Bill C-9, *An Act to amend the Canadian Environmental Assessment Act*. We felt an effort was needed to address the broader scope of environmental assessment in Canada. True, within the rules of procedure, it was possible to make some 76 amendments to Bill C-9 at the Committee stage, including the placing of Crown corporations under the Act (not a minor feat), and including a parliamentary review of the Act seven years after proclamation. But all this was not enough. Something was needed for the next review of the Act, scheduled to take place around the year 2010. It is our hope officials in the Privy Council Office, Environment Canada, the Canadian Environmental Agency and interested parliamentarians will examine this report and its recommendations before drafting the next bill.

The Canadian Environmental Assessment Act was first enacted by Parliament over 10 years ago in the hope it would make a significant contribution to sustainable development and the protection of the environment. If implemented, this report, which addresses the current shortcomings of federal law, could give momentum towards a stronger federal role in achieving sustainable development, for the benefit of Canadians and the public good.

June 2003

The Hon. Charles Caccia
Member of Parliament for Davenport
Committee Chair

INTRODUCTION: SOME REFLECTIONS ABOUT THE PAST AND THE FUTURE

For the last 30 years, governments have been rethinking their approach to decision making, recognizing that the well-being of people is intimately dependent on the well-being of the environment. Economic development and its benefits can no longer be viewed in isolation from the obvious damage that this development has caused to the environment, and the limitations that it has imposed on the capacity of future generations to meet their needs. Through many international meetings and studies, from Stockholm in 1972 to Johannesburg in 2002, the response to this new reality has become clear: decisions can be made and, more than this, *must* be made, that can meet the economic needs of people without damaging their equally important social and environmental needs. Indeed, the damage to the environment that has already occurred requires that decisions now be sought that may well put environmental and social needs ahead of those that are primarily economic. This is the challenge of sustainable development.

Governments in Canada, and around the world, have agreed to take on the responsibility to govern with sustainable development as a core principle in decision making. A well-designed and implemented system for assessing the environmental consequences of policies, decisions and projects is an absolute requirement in meeting this responsibility. A decade ago, the Government and Parliament of Canada declared their commitment to sustainable development and a healthy environment by enacting the *Canadian Environmental Assessment Act* (CEAA).

Further to CEAA, in 1998, the federal, provincial and territorial governments (with the exception of Québec which declined to sign in the absence of recognition of the distinct nature of its procedure for the examination and assessment of environmental impacts) signed the Canada-Wide Accord on Environmental Harmonization which, in part, addresses the issues of cooperation, uncertainty and duplication of effort associated with the environmental assessment of proposed projects.[1]

Environmental assessment (EA) is declared in CEAA to be,

> an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development.

Almost a decade later, the central question is whether federal EA is making a significant contribution to sustainable development and being used to make decisions that benefit the environment. If the answer to this question is no, then changing the EA process must be given the highest priority; if EA is not functioning properly, a central tool in achieving sustainable development is lost. The world and the well-being of its inhabitants cannot afford any more delays.

[1] The Sub-Agreement on Environmental Assessment to the Canada-Wide Accord.

CHAPTER 1: ARE WE ON THE RIGHT TRACK?

Canada's federal EA process developed over the last 30 years as a policy to improve planning and decision making related to development projects by providing information about likely environmental effects and mitigation measures. The Environmental Assessment and Review Process (EARP) was established by the federal Cabinet in 1973 and strengthened in 1984 when an order-in-council was issued. EARP was replaced by CEAA, which was enacted by Parliament in June 1992 and came into force in January 1995.

In January 2000, the Canadian Environmental Assessment Agency (Agency) commenced the required five-year review of CEAA, which included extensive consultations with the public, stakeholders, Aboriginal communities and governments, and provincial and territorial governments. In March 2001, at the conclusion of the five-year review, the government tabled Bill C-19, *An Act to Amend the Canadian Environmental Assessment Act*. On December 4, 2001, the House of Commons Standing Committee on Environment and Sustainable Development (the Committee) began its study of this bill.[2]

The Committee felt that the goals of Bill C-9[3] were laudable, and that the bill should improve CEAA and federal EA as a whole. The amendments made to the bill by the Committee, particularly with regard to improving meaningful public participation, would have helped to achieve these goals. Four government motions at report stage, however, have undone some of the Committee's work in this regard. The Committee voted — twice (first in Motion KS-20, then in the government's omnibus, amended Motion G-23) — for a 30-day comment period after the posting of information including screening reports. The screening report is the pivotal document in screening-level assessments (over 99% of all EAs) because it contains the basis for the government's decision about whether, and on what terms, to allow a project to proceed. Instead, the government has limited the effect of KS-20 by eliminating screening reports from its ambit and reducing the comment period to 15 days. Therefore, public input in decisions in the vast majority of these environmental assessments will be limited.

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[2] The bill was originally introduced in the 1st session of the 37th Parliament as Bill C-19, but died on the *Order Paper* when Parliament was prorogued on September 16, 2002. By a motion adopted on October 7, 2002, the House of Commons provided for the reintroduction in the 2nd session of legislation that had not received Royal Assent. The bills would be reinstated at the same stage in the legislative process they had reached when the previous session was prorogued. The bill is referred to in the rest of this document as Bill C-9. Bill C-9 was given First Reading in the House of Commons on October 9, 2002.

[3] The three stated goals in the Report of the Minister of the Environment to the Parliament of Canada on the Review of the *Canadian Environmental Assessment Act* were: A certain, predictable and timely process; high-quality environmental assessments; and, more meaningful public participation.

Several witnesses, including Jamie Kneen, Co-chair of the Environmental Planning and Assessment Caucus, Canadian Environmental Network, raised the concern that the scope of the five-year review was limited and that Bill C-9, even with amendments, overlooks major issues:

> We welcome the proposed amendments to the *Canadian Environmental Assessment Act* embodied in Bill C-9, but they are modest, and as a whole do not take us further down the road toward sustainability. In fact, the bill is notable as much for what has been left out as for what it contains. It is clear that the whole five-year review has been an exercise in reduced expectations, from the outset of the public consultation process to the wording of the bill in front of you. … Our conclusion is that the five-year review does not allow meaningful time for discussion on these topics, and there's a need for a larger discussion about environmental assessment. (Meeting 64)

Jerry DeMarco, Managing Lawyer and Acting Executive Director, Sierra Legal Defence Fund (Toronto), suggested a number of items that should be included in a consideration of EA issues not addressed by Bill C-9.

> This Committee may also wish to consider doing hearings on environmental assessment broadly, as opposed to just this bill. This bill makes some improvements, but it isn't a very comprehensive look at whether or not we're doing a good job overall in terms of performance indicators in environmental assessment; how good a job environmental assessment is doing on the ground; or if we have done any follow-up to see if mitigation measures are really reducing environmental impacts. (Meeting 60)

The Committee attempted to incorporate some of the concerns expressed by witnesses; even if these were outside the stated goals of Bill C-9. The removal of blanket exemptions for Crown corporations for example, is a significant improvement to the bill. The Committee was, however, restricted by Parliamentary procedure in its capacity to deal with many of the issues that stakeholders raised, such as those described above.

This report is intended to address these concerns as an indispensable supplement to the Committee's reporting of Bill C-9 to the House of Commons. Further, the Committee believes that Parliament and the Government of Canada would welcome a report on what is needed to ensure that projects, policies and programs are environmentally sustainable and protect the integrity of ecosystems, and by reflection, the health and well-being of Canadians.

This report examines areas where the current federal approach has not succeeded, sets out a number of important challenges that remain to be addressed, and provides recommendations on what should be done. The report deals with the basic questions:[4]

1. Is EA leading to tangible benefits to natural ecosystems?
2. Are departments and proponents in compliance with CEAA or are they avoiding the law?
3. Is EA helping proponents improve their projects?
4. Is EA helping the federal government, in cooperation with its provincial and territorial partners, to achieve its environmental commitments and goals?
5. Are Canadian taxpayers benefiting from their investment in the EA process?
6. Is the public being adequately engaged?
7. Are Aboriginal rights and perspectives being respected?
8. Are government policies, programs and plans being assessed for their environmental impacts and consequences?

In short, how can the federal EA process be improved to better meet the goals of sustainable development?

The Committee hopes this report lays the foundation for a subsequent bill to be introduced within the next seven years, in concurrence with the seven-year Committee review as placed in Bill C-9 by the Committee.

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[4] The source of these questions is the testimony that was brought to the Committee by witnesses from across Canada. Examples of quotes relevant to each of the listed questions, cited as to their location in this report, are as follows:

1. Pierre Fortin, page 28.
2. Rodney Northey, page 15, David Coon, page 20.
3. William Borland, page 20, Robert Gibson, page 21.
4. Don Sullivan, page 9, Peter Ewins, page 28.
5. Elizabeth May, page 21.
6. Michelle Campbell, page 30-31.
7. Garry Lipinski, page 31-32, Diom Romeo Saganash, page 32, Paule Halley, page 32-33, Matthew Coon Come, page 33, Natan Obed, page 33.
8. Joan Kuyek, page 35.

CHAPTER 2: IS FEDERAL ENVIRONMENTAL ASSESSMENT MAKING A DIFFERENCE?

The Web site home page for the Agency declares in large font: *Environmental Assessment: Making a Difference*. But is it really?

The Committee believes that EA is, by and large, taken much more seriously by the federal government than it was in the late 1980s; however, tangible benefits to the environment are difficult to identify. Stephen Hazell, former Director of Regulatory Affairs at the Agency and author of *Canada v. The Environment: Federal Environmental Assessment 1984-1998,* observes:

> [CEAA] has clearly spurred the development of a culture of environmental assessment in at least parts of all major federal departments. The CEAA public registry system has greatly increased public access to information about federal environmental assessments, notwithstanding the concerns of the Parliamentary Commissioner for the Environment and Sustainable Development.

Hazell notes that possibly the most important benefit of CEAA has been in proposing measures to mitigate the adverse environmental effects of projects. Bill C-9 amendments regarding follow-up to EAs should help ensure such measures are implemented and are effective.

In March 2000, the Agency published a booklet entitled *Federal Environmental Assessment: Making a Difference*, which describes the benefits of CEAA EAs for 12 projects. How representative these projects are of EA in Canada is difficult to assess given that they are a small proportion of the 30,000 projects completed under CEAA so far, and standardized indicators or measures of success were not explicit. However, the booklet does represent a recognition that EAs must lead to concrete benefits for the environment, and not serve merely as an exercise that may or may not affect actual decisions about how or whether projects should proceed.

To really make a difference, the Committee firmly believes that EA should:

- Lead to projects, policies and programs that benefit the environment;
- Result in ecosystems that retain their integrity; and
- Include opportunities for meaningful public participation.

The Committee asks the following questions to assess whether EA is making a difference:

- Is EA being used to address major environmental issues and projects?

- Is EA resulting in benefits to the environment?
- Is the federal government seriously committed to EA?

2.1 Is Environmental Assessment Being Used to Address Major Environmental Issues and Projects?

One way of determining if EA is making a difference is to ask whether or not and how EA, CEAA in particular, is being applied to key environmental issues and projects, for example:

- Is EA being employed to address overcutting and overharvesting issues, such as the policies which led to the destruction of the Atlantic cod fishery and declines in Pacific salmon stocks?

  The Government of Canada has consistently opposed applying federal EA to the issuance of fishing licences and allocations, even to the most environmentally destructive forms of fishing such as bottom trawling.

- Has EA been used to assess the dangers posed by greenhouse gas emissions?

  The Agency held a workshop in early 2002 on applying EA to climate change issues, but how much attention was paid to that workshop? Otherwise greenhouse gas emissions figure infrequently in federal environmental assessments.

- Is EA being used to deal with continuing fragmentation of wilderness landscapes?

  CEAA (with other EA processes) will almost certainly be applied to the Mackenzie gas pipeline and the Yukon/British Columbia portions of the Alaska Highway pipeline, and has been applied to projects such as new diamond mines in the Northwest Territories, the Voisey's Bay nickel mine in Labrador, and the Cheviot coal mine in Alberta. Massive road building and logging schemes, however, are typically approved in northern regions of many provinces without involving federal or provincial EA. EAs of major projects in intact wilderness areas rarely consider the need to establish networks of protected areas to ensure that wilderness values are sustained.

- Is EA being applied to address biodiversity issues such as threats to endangered species and problems with invasive species (e.g., purple loosestrife, zebra mussel, spiny water flea)?

  Endangered species issues are often considered in federal EAs when information is available to EA practitioners (which is not always the case). Invasive species introductions into Canada are usually accidental so application of EA here is more difficult; however, CEAA could be used to examine activities (e.g., releases of bilge water in Canadian waters) that can result in invasive species being released into Canada.

Witnesses provided many examples of major projects that should have triggered a panel review or comprehensive study but did not. For example, a seriously flawed EA was described by Don Sullivan, Executive Director of Manitoba’s Future Forest Alliance. He explained how the CEAA assessment of the gigantic Tolko logging project in northern Manitoba (11 million hectares) was limited to assessing the environmental impact of two bridges and their abutments. His evidence provides a dramatic example of the way in which narrow project scoping results in major landscape-scale development without any coordinated assessment of the environmental impacts.

> The federal government has exclusive authority over several environmental issues not addressed by any of the provincial regulatory review processes, including fisheries and migratory birds. … It also bears noting that the federal government was the first signatory to the Biodiversity Convention which was subsequently ratified in 1992 and the Canadian Environmental Assessment Agency has published a guide to assessing biodiversity impacts. Nevertheless, there was no consideration of biodiversity impacts even for an assessment limited to a bridge and the physical effects of other bridges. For years leading up to the proponent’s *Navigable Waters Protection Act* bridge application, the Alliance sought to trigger federal panel reviews under section 46 of the CEAA due to the transboundary effects of forest harvesting from the proposed Repap/Tolko and LP projects. Each of these requests was denied. Thus, the interprovincial and international effects of mill expansion discharging into interprovincial waters and forest harvesting destroying internationally significant bird habitat and millions of hectares of high quality fish habitat were never considered by the Minister. (Meeting 73)

The Committee also heard about the proposed Bruce nuclear waste storage facility, which was not referred to a panel review. Normand de la Chevrotiere, President of the Inverhuron and District Ratepayers Association, spoke in highly emotional terms about the potential health consequences of the proposed storage facility, for which there was no panel review even though it would be the world’s largest nuclear waste storage facility.

Other witnesses complained about the November 1996 decision by the Minister of International Trade and the Minister of Finance not to conduct an EA with respect to the sale of two CANDU reactors to China supported by a $1.5 billion loan by the Government of Canada.

The Committee concludes that although thousands of small projects are assessed more or less effectively under CEAA each year, many large, potentially environmentally damaging projects avoid assessment or are scoped so narrowly as to make the EA of questionable value.

2.2 Is Environmental Assessment Resulting in Benefits to the Environment?

With the exception of limited anecdotal evidence, the benefits of EA to the sustainability of projects and the protection of ecosystems has not been monitored in a systematic manner. The Committee notes that in 1998 the Commissioner of the Environment and Sustainable Development observed that "[t]he federal government is not gathering the information needed to let Canadians know whether or not environmental assessment is achieving expected results." (Paragraph 6.5, Chapter 6, 1998 Report)

The Committee believes that the provisions in Bill C-9 that require follow-up for project EAs should result in better information about how EAs are benefiting the environment. However, determining whether or not EAs will generate environmental benefits is difficult until adequate ecological baseline studies are in place. Some federal authorities, such as Parks Canada Agency, are currently preparing such studies within the framework of national park management plans and the ecological integrity program.

2.3 Is the Federal Government Committed to Environmental Assessment?

Many witnesses were not convinced that senior levels of government are committed to EA. One indicator of low levels of commitment is the cuts to funding and personnel for EA in recent years. An Agency study estimated that total federal spending on EA was roughly $40-$45 million in 1995, the first year of CEAA's implementation. The Green Plan provided about $32 million of that total. With the termination of the Green Plan in March 1997, funding for EA was sharply reduced with little public debate. Exact spending figures are difficult to extract from government documents, as EA spending is spread across government. Some of that Green Plan funding has been rolled into the permanent budgets of the Agency and departments, but the shortfall is still dramatic. Further, Treasury Board funding for the Agency's public participation program ($1.2 million/year) ended on March 31, 1998, and was replaced by funding for public participation in review panels directly related to the overall level of panel review activity in a given year. Although the Agency established a planned level of $1 million in participant funding, actual 2001-2002 participant funding costs are expected to be less than $100,000. According to the Minister of the Environment, David Anderson, the government is committed to providing an additional $51 million over the next five years to implement the revised EA process.

A second indicator is that none of the four most recent ministers of the Environment have used their authority to order panel reviews under sections 26, and 46 to 48 for a project that may cause significant adverse transboundary environmental effects. Panel reviews have been requested for the proposed Greenwich commercial resort adjacent to Prince Edward Island National Park, the Diavik diamond mine in Northwest Territories, the Bruce nuclear waste storage facility, the Vancouver Port Corporation's Deltaport container terminal project in the Fraser River delta, and for the

Louisiana-Pacific oriented strand board mill and Tolko projects in Manitoba, among others. The failure to use these powers has not occurred because of any reluctance on the part of environmental and Aboriginal groups to request such referrals.

A third indicator of low levels of commitment to EA at senior levels is that little progress is being made in assessing the environmental impact of proposed policies, programs and plans that need Cabinet approval (a 1990 Cabinet directive requires that such a “strategic environmental assessment” be undertaken). In this respect Canada lags behind many countries, particularly in the European Union, which have already put into practice strategic environmental assessment regimes. In addition, implementation of the Cabinet directive is sporadic and, to make matters worse, it was weakened in 1999. In 1998 the Commissioner of the Environment and Sustainable Development found that “Departments have been slow to implement EA of programs and policies as required by a 1990 Cabinet directive.” The Commissioner recommended that, “The Canadian Environmental Assessment Agency should work with other federal departments and agencies to improve compliance with the Cabinet directive on the environmental assessment of policies and programs.” (Chapter 6, 1998 Report)

The Committee sees grounds for cautious optimism in the improvements made to federal EA by Bill C-9, as amended. However, the historical reality is that the commitment of Cabinet and Privy Council Office to EA has been sporadic to non-existent in recent years.

CHAPTER 3: THE WAY TO GO

Clearly there are key challenges facing federal EA that have not been addressed, or only partially, by Bill C-9. In this report the Committee makes recommendations to address them, in the hope that the Government of Canada will act upon them. The key challenges could be described as follows:

- Providing a clear vision for federal EA;
- Effectively enforcing EA responsibilities;
- Employing EA as a constructive tool to improve projects;
- Conducting panel review of major projects;
- Assessing cumulative environmental effects;
- Achieving federal environmental commitments through EA;
- Promoting meaningful public participation;
- Incorporating Aboriginal perspectives;
- Improving of strategic environmental assessment.

3.1 A Clear Vision for Federal Environmental Assessment

As noted, Bill C-9 is important in the short-term. Over the longer term, further government and parliamentary attention is required to ensure that projects, policies and programs are environmentally sound, and the integrity of ecosystems is protected.

In 1999, prior to starting the five-year review, the government determined that the review would be undertaken by the Agency (and not a parliamentary committee) and that the scope of the review would be narrowly defined. When Environment Minister David Anderson directed the Agency to prepare amendments for tabling in Parliament in the autumn of 2000, the tight timing clearly precluded an in-depth review of CEAA.

It is important to note that although CEAA has been in force for seven years, the essential structure (e.g., screenings, panel reviews with oversight, as well as panel administration by a federal agency) and features (e.g., assessments of projects to determine adverse environmental effects and their significance) differ little from the EARP Guidelines approved by Cabinet in early 1984. Thus, in 18 years the core structures and features of the federal approach to project EA have not changed substantially. The five-year review could have undertaken an analysis of federal EAs and identified new ways, where appropriate, to conduct them; in large measure, this was not done.

The Committee's view is that the current emphasis on *process* must be matched by an emphasis on *results* on the ground. In addition to providing information to decision makers about adverse effects of projects, EA must deliver *results*, i.e. provide projects, policies and programs that benefit the environment, and ensure the integrity of ecosystems. Furthermore, the EA *process* must offer opportunities for meaningful public participation.

During hearings, the Committee noted that neither CEAA nor Bill C-9 clearly articulates the expected results of federal EA, nor how these results are to be measured. The preamble to CEAA describes the government's intention "to achieve sustainable development by conserving and enhancing environmental quality." The legislated purposes of CEAA as it stands[5] are to "ensure that the environmental effects of projects receive careful consideration"; "encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy"; "ensure that projects … do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out"; and "ensure that there be an opportunity for public participation in the environmental assessment process". These four purposes are important. In addition, the Committee believes that another important purpose of the Act should be to ensure that alternatives to the proposed project be considered. Yet, the level of achievement for the original four purposes has not been measured systematically, and evidence as to how well federal EA is achieving results is largely anecdotal. One of the consequences and problems arising from the lack of information about the success of EA in achieving environmental benefits is public confusion. According to Paul Muldoon of the Canadian Environmental Law Association, this confusion can lead to a distrust of EA in Canada.

> I think it's fair to say there is a crisis in credibility with environmental assessment in Canada. I think the public is very confused. They are often given the impression that a project undergoes a thorough, fair, and environmentally comprehensive assessment, but we find that the process was used to legitimate unsustainable and environmentally harmful activities. As a result, they are both confused and frustrated with the process, but more importantly, with the result. Process is not good enough if the result is a project that is or becomes unsustainable. (Meeting 70)

In addition to the lack of reliable analysis of environmental results achieved under CEAA, Peter Duck, President of the Bow Valley Naturalists, noted that each EA needs to follow criteria that would ensure consistency among assessments so that the public can understand how a determination is made.

[5] Bill C-9, as amended by the Committee, would change the purposes of the Act to, among other things, ensure that a precautionary approach is taken so as to ensure that projects do not cause significant adverse effects.

> If we're to achieve consistency and transparency, we need to establish and use criteria for making these decisions. It's important for the public to know how that determination is being made. It may change over time, and it may change from one assessment to another, but we need to have those frameworks out there, so that the public understands how those decisions are being made. (Meeting 66)

But so far, federal resources have largely been devoted to implementing the prescribed process. Little attention has been paid to achieving concrete results that benefit the environment and enhance the sustainability of projects. The Committee believes that in future, federal EA must include the achievement of results measured in terms of project sustainability, integrity of ecosystems and improved decision making through public involvement; the mere completion of EA activities is not enough. Therefore, the Committee urges the Government of Canada to develop specific goals, targets, and performance measures for CEAA as argued by Lucien Cattrysse, Chair of the Technical Advisory Group for the Canadian Environment Industry Association. (Meeting 64)

This discussion would be incomplete without examining another crucial issue: the meaning of the terms "significance" and "significant adverse environmental effect." In his testimony, Rodney Northey, Counsel for Environmental Defence Canada, pointed out that the crux of CEAA and the performance of an EA rely on the interpretation of the term "significant environmental effect":

> To me the whole test of this act is: What is a significant effect? … There is no definition of "significance" anywhere. The Canadian Environmental Assessment Agency is reluctant to provide a definition. In the 30,000 assessments that have gone on to date, there's only one where I think there's been a finding of significance. … I would say that there is a massive bureaucratic imperative against a finding of significance because then you've got to go fund the panel review. So how does one create some independent means of assessing whether an effect is significant? … I don't think right now there are requirements that the standards be articulated in an assessment and I think this committee should demand that an assessment include reference to the relevant standards, and an assessment of significance in relation to those. (Meeting 73)

The term "significance" appears to have lost much of its meaning, and hence its utility. Under CEAA, the environmental quality goal — the standard applied to EAs conducted under the legislation — is the avoidance or minimization of significant adverse environmental effects. In Canada's national parks, however, a different, and much clearer, standard prevails. Under the "ecological integrity" standard used by Parks Canada, the result to be achieved is the maintenance of parks unimpaired for future generations.

In future, CEAA should apply a different standard when assessing potential environmental impacts within national parks to ensure that the result of maintaining ecological integrity is achieved, rather than the avoidance of "significant" adverse

environmental effect. Even outside national parks, the Committee questions the value of the "significance" test as it is currently being applied, and urges the government to develop more positive, measurable standards for all CEAA EAs.

THE COMMITTEE RECOMMENDS THAT THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT* BE AMENDED TO INCORPORATE AN EFFECTIVE APPROACH THAT WOULD ACHIEVE TANGIBLE RESULTS IN ENVIRONMENTAL ASSESSMENTS, BOTH IN TERMS OF PROJECT SUSTAINABILITY AND ECOSYSTEM INTEGRITY. THE COMMITTEE FURTHER RECOMMENDS THAT SPECIFIC TARGETS, PERFORMANCE MEASURES AND PROCESS STANDARDS BE DEVELOPED IN ORDER TO ACHIEVE THESE RESULTS.

THE COMMITTEE FURTHER RECOMMENDS THAT THE TERM "SIGNIFICANT," IN THE PHRASE "SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECT," BE DEFINED IN THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT* TO INCLUDE AT LEAST THE FOLLOWING FACTORS:

- **AN EFFECT THAT EXCEEDS ANY REGULATED FEDERAL OR PROVINCIAL ENVIRONMENTAL QUALITY STANDARD OR TARGET;**
- **AN EFFECT THAT IS INCONSISTENT WITH ANY INTERNATIONAL COMMITMENT OF THE GOVERNMENT OF CANADA; AND**
- **AN EFFECT THAT EXTENDS INTO ANY TERRITORY THAT IS WITHIN THE JURISDICTION OF A GOVERNMENT OTHER THAN THE FEDERAL GOVERNMENT, AND WHICH HAS BEEN THE SUBJECT OF A PUBLICLY STATED CONCERN OF THE GOVERNMENT OF THAT JURISDICTION.**

IN ADDITION, BECAUSE OF THE IMPORTANCE, IN LAW AND PRACTICE, OF THE TERM "SIGNIFICANCE," ITS DEFINITION SHOULD CONTINUE TO BE STUDIED IN ORDER TO ENSURE THAT ITS STATUTORY DEFINITION DOES NOT LIMIT THE MINISTER'S POWER TO ACT WHEN NECESSARY.

3.2 Effective Enforcement of Environmental Assessment Responsibilities

Self-assessment, which means that the federal department empowered to make a project decision is also the authority that conducts the EA (except for panel reviews and mediations), is a key CEAA principle. A major benefit of self-assessment is that federal departments are engaged in the work of understanding for themselves the environmental effects of projects over which they have decision-making authority. The five-year review did not consider whether the system of self-assessment itself is a major factor limiting the quality and effectiveness of EAs under CEAA, but many witnesses suggested that is indeed the case.

For example, Paul Muldoon criticized the self-assessment system on the grounds of a lack of an independent, arm's-length relationship between the body conducting the EA and the ultimate decision maker.

> The Canadian Environmental Law Association has been long critical on something that goes to the root of the Act, the self-assessment process. We have government agencies assessing their own projects. We realize the Commissioner of the Environment and Sustainable Development has also been very critical of this aspect. We've been saying it for some 20 years, and we feel compelled to say it again: the self-assessment process must be replaced by a binding process administered by independent central agencies with the power to compel compliance with the Act. (Meeting 70)

The Committee also heard from Ed Whittingham, Director of the Banff Environmental Action and Research Society, who provided a clear example of where the self-assessment system brings about an apparent conflict of interest involving Parks Canada that could lead to potential bias in EA decisions.

> Parks Canada is both proponent and responsible authority in 25% of EAs in Banff National Park. As you can imagine, being RA proponent can lead to a certain degree of conflict of interest. Secondly, Parks Canada, after it had its budget slashed by about 25% in 1996, has been faced with other means of raising revenue. Two of those means are keeping people in the park longer, and also bringing people into the park during the shoulder seasons, i.e., the fall and the spring, when normally they wouldn't be coming to the park. We think this lends bias of approval to projects that do exactly that. (Meeting 61)

The Commissioner of the Environment and Sustainable Development, in 1998, examined the compliance of federal departments with CEAA process requirements. Based on a study of 187 EAs, the Commissioner found that "screenings may not consider all of the elements of a project or all of its potentially significant environmental impacts" and that "monitoring of mitigation measures and follow-up of environmental results are insufficient." The Commissioner also reported that, "there are significant deficiencies in the quality and usefulness of public information about federal environmental assessment, particularly information on screenings." (Chapter 6, 1998 Report)

Not only has departmental compliance with CEAA requirements been unimpressive, but also there is no enforcement power under the Act that would allow the Agency to improve matters. The Act grants no powers to make enforceable decisions or impose penalties for non-compliance. Bill C-9 would provide additional duties to the Agency to promote and monitor compliance, and, as amended by the Committee, would require the Agency to ensure compliance by federal authorities, responsible authorities and proponents, but even the new provisions do not include penalties for non-compliance. Even expanding the Agency's duties may be of little value, as the new duties are unaccompanied by powers that would permit those duties to be effectively fulfilled. According to Robert Gibson, visiting scholar at the Sustainable Development Research Institute at the University of British Columbia, the lack of enforcement provisions has made the achievement of CEAA's objectives difficult.

> CEAA contains no means of setting and imposing terms and conditions of approval. Instead it relies on a highly inconsistent set of permitting, contracting and other vehicles many of which are ill designed for the purpose. (Meeting 65)

Bill C-9 responds to this issue obliquely and partially through a proposed amendment to section 20(3) of CEAA, which provides that in determining and implementing mitigation measures, a responsible authority is not limited to the powers, duties and functions laid out in its governing statute.

Several witnesses proposed that the self-assessment system be modified or replaced. They advocated a system of enforceable EA decisions, possibly generated by an independent agency. Elizabeth May, Executive Director of the Sierra Club of Canada, for instance, supported the establishment of an arm's-length agency, stressing that penalties are needed to ensure compliance:

> We, of course, over the years have noted that some of the things about CEAA, and before that the *Guidelines Order*, inherent in the environmental assessment process, create, essentially, a conflict of interest, in that self-assessment means the department that most wants to have a project proceed is responsible for making all the key determinations, in most cases — sometimes it's slightly more arm's-length than that. What changes can you bring to make a difference? Bring in some penalties for failure to observe the Act. Bring in some requirements. (Meeting 61)

The Committee believes the key issue before the government is the fundamental nature of the environmental assessment process. The seven-year review of the Act that is required under Bill C-9 should examine whether changes made under that bill have improved environmental assessment performance or not, and if not, the idea and process of self-assessment should be re-examined.

THE COMMITTEE RECOMMENDS THAT PRIOR TO, AND IN PREPARATION FOR, THE SEVEN-YEAR REVIEW BY THE PARLIAMENTARY COMMITTEE, THE COMMISSIONER OF THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT SHOULD BE ASKED TO REVIEW THE OPERATION OF FEDERAL ENVIRONMENTAL ASSESSMENT UNDER CEAA, AS AMENDED BY BILL C-9.

The Committee considers that a system for issuing enforceable EA permits by federal departments in accordance with guidelines prepared by the Agency would allow retention of the self-assessment approach of CEAA, but with more departmental accountability. Departments' could be given broad authority to set terms and conditions for mitigation and follow-up in an EA permit.

A related improvement would be to make it an offence for a federal department or proponent to proceed with a project without an EA permit, or in breach of the terms and conditions of the permit. Such a permit system would build on the amendments made to the bill by the Committee at report stage to the duties of the Agency and would allow the Agency to scrutinize departmental compliance with the legislation, ensuring that projects do not proceed unless all EA requirements were met.

THE COMMITTEE RECOMMENDS THAT THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT* BE AMENDED TO ESTABLISH A SYSTEM FOR THE ISSUANCE OF ENVIRONMENTAL ASSESSMENT PERMITS BY FEDERAL DEPARTMENTS, IN ACCORDANCE WITH CRITERIA PREPARED BY THE AGENCY, GIVING DEPARTMENTS AUTHORITY TO SET TERMS AND CONDITIONS FOR MITIGATION AND FOLLOW-UP.

THE COMMITTEE FURTHER RECOMMENDS THAT THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT* BE AMENDED TO PROHIBIT, THROUGH THE USE OF PENALTIES, A FEDERAL DEPARTMENT OR PROJECT PROPONENT FROM PROCEEDING WITH A PROJECT WITHOUT A PERMIT, OR IN BREACH OF TERMS OR CONDITIONS OF A PERMIT.

3.3 Use of Environmental Assessment as a Constructive Tool to Improve Projects

Regrettably, CEAA is seldom used as a constructive tool to improve the sustainability of projects. In practice, inside and outside government, CEAA is too often viewed as a problem to be managed, and a burden on the proponents of industrial developments. The commitment to CEAA in many federal departments and industry is grudging, even if this reluctance is not stated publicly. Project decisions are frequently made long before EAs are conducted, making the relevance of EA (other than as a

process for bringing forward mitigation measures) questionable. CEAA appears to assume that responsible authorities are both amenable to, and fully capable of, making environmentally sound decisions once the right information is put before them. The evidence demonstrates that the validity of this assumption is questionable. The information acquired by proponents through the EA process, in the absence of a framework of explicit environmental objectives and targets, seems to be largely wasted, rather than being used to improve the project to the benefit of the environment.

Witnesses appearing before the Committee provided examples of projects that were not assessed because they were determined to fall outside the purview of the Act, yet the projects had potentially environmentally harmful impacts. Based on his assessment of several cases, David Coon suggested that responsible authorities have been trying to avoid EA.

> It would appear to us, based on these kinds of case studies, that the responsible authorities, to the degree possible, are trying to avoid CEAA or minimize its utility. CEAA is a hoop to jump through, and we don't see the bill as addressing this problem particularly. (Meeting 69)

Federal departments have tended to avoid the inclusion of new or revised regulatory regimes in the Law List Regulations, because inclusion would render these processes subject to CEAA. Crown corporations, such as the Export Development Corporation, have made determined efforts to ensure that their operations are not subject to CEAA. To make matters worse, CEAA does not even apply, except in truly extraordinary situations, to projects undertaken in the Mackenzie Valley under a recently enacted federal statute, (the *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25).

Industry representatives, such as William Borland of the New Brunswick Environmental Industry Association, suggested that environmental management choices are being made that will allow proponents to avoid being subject to CEAA. In so doing, proponents may well be able to avoid the perceived burden of EA, but they also may not be making the best environmental decisions.

> My own experience with the federal assessment process has seen development options overlooked to avoid federal land and avoid federal funding in order to avoid a federal assessment process. This has been done because the process was seen as open-ended, seen as a black hole. Once you got into it, you were never quite sure when or whether you'd ever get out. From the point of view of trying to budget a project, and from the point of view of looking at an economic window of opportunity, CEAA has the potential to be a disaster. In each case that I have dealt with, an environmentally acceptable alternative was chosen, but I might question whether the best environmental option was chosen. (Meeting 71)

There are other negative aspects to the current application of CEAA. One concern that the Committee heard repeatedly was that CEAA was being used simply to mitigate negative effects rather than to encourage positive steps in the planning stages

of a project. By focusing on significant adverse environmental effects, the EA system is seen to discourage proponents from including in their projects elements that provide positive benefits to the environment. As Robert Gibson pointed out:

> There should be a requirement under CEAA to take into account positive as well as negative effects. A colleague of mine, who was once the Director of Fish and Wildlife in Prince Edward Island, attempted to persuade the proponents of the fixed link bridge to include some habitat enhancements in the project. It would have been not very difficult. It would have been not very expensive. It would have been of substantial long-term benefit. He was not successful. (Meeting 65)

The Committee was encouraged to learn from Dr. Gibson that in some cases a more positive outlook is being taken. However, such instances appear to be exceptions to the rule.

> The [Voisey's Bay panel] required the proponents, through the guidelines for preparation of an environmental impact statement, to show that the undertaking would in the end leave the communities and ecosystems affected better off than when they began the concept of a net improvement. … the whole idea of sustainable development is premised on the idea that what we're doing now is not sustainable. So it amounts to reversing direction from progressive unsustainability to something that is improving our situation. You can't do that by merely reducing the negative effects. That just makes you go down the hill more slowly; it doesn't move you in a progressive direction toward greater sustainability. The panel, recognizing this tension between the purpose of improving the situation and the normal interpretation of the law, which is to mitigate the most significant adverse effects, chose the higher test. (Meeting 65)

Although CEAA is not generally seen as a constructive management tool, the Committee heard from many witnesses suggesting that CEAA could be a positive force in managing project planning and monitoring. Elizabeth May offered these compelling thoughts:

> The hard political reality is when the powers that want a project, an environmental review is perceived to be an obstacle. Environmental review and the public's participation rights will be trampled. … It's not only the environmental damage that comes from skipping environmental assessment, or doing it incorrectly. There are often economic costs to bad planning. I could give you a whole lot of examples, from the incinerator built in Sydney in the late eighties and early nineties, where they said they didn't need an environmental assessment, except for a preliminary one, because it was an environmental project. They went ahead with it. Good planning would have caught the fact that $55 million was being wasted on something that didn't work. (Meeting 61)

Lucien Cattrysse also stressed that a good EA process is a valuable planning tool for projects as a whole.

> There's the old saying, an ounce of prevention, a pound of cure. The cost of an environmental assessment is typically 1% to 3% of the capital cost of the entire project, and that's a small price to pay, in our opinion, for some pretty effective

> decision-making information to be at hand for a project. … There seems to be a natural way to roll [the information generated by the environmental assessment] into an environmental management plan and then roll that information into an environmental management system that can be used as a framework for the whole organization around the project. (Meeting 64)

The challenge, then, is to determine how EA can be promoted as being a constructive tool with industry, federal departments, and decision makers so as to achieve results that benefit the environment. Ideally, the application of strong EA requirements should be welcomed as a way to enhance project planning, improve environmental protection, and in some cases, reduce costs.

THE COMMITTEE RECOMMENDS THAT THE MINISTER OF THE ENVIRONMENT DEVELOP AND IMPLEMENT MEASURES TO ESTABLISH ENVIRONMENTAL ASSESSMENT AS A CONSTRUCTIVE TOOL THAT ENHANCES PROJECT PLANNING AND IMPROVES ENVIRONMENTAL PROTECTION.

3.4 Panel Review of Major Projects

The bulk of federal EA resources are devoted to conducting screenings (which make up over 99% of all federal EAs) for small projects such as building pit privies in national parks, repairing wharves, and conducting scientific research in migratory bird nesting grounds. At the other end of the spectrum, major development projects that could have catastrophic effects on the environment are often assessed inadequately or not at all because of the limited application of the four CEAA triggers (i.e., federal land disposition, federal funding, federal proponent, federal license or permit included in the Law List Regulations).

The four triggers under CEAA assume narrow limits on federal authority. The Committee believes that this restriction prevents sufficient attention from being given to the assessment of major projects that could have irreversible and harmful effects on the environment. Projects of that order of magnitude should be assessed in a coordinated way by all levels of government involved, and with the full and active participation of the interested public.

Legal issues aside, the federal government is clearly seen by some members of the public as the level of government that should protect the Canadian environment. According to David Coon:

> When Canadians are asked what they believe the federal government's primary responsibilities should be, in addition to questions of national defence, they identify repeatedly defence of the Canadian environment. That's the expectation we have of our federal government, that it play that role through the pieces of legislation it has. There needs to be cooperation in provincial agendas for development and so

> forth in areas of provincial jurisdiction, but when all is said and done, Canadians expect the federal government to represent us in defending the Canadian environment. (Meeting 69)

Elizabeth May told the Committee that the effect of the Projects Outside Canada regulation has been the uneven implementation of EA internationally. While huge federal loan guarantees for nuclear power plants have not triggered federal EAs, much smaller projects have done so.

> The [Projects Outside Canada] regulation was an absurd result, and it still stands. Under the … regulation, minor projects — including such things as a manure management system for an ostrich farm in the same country, China — actually got an EA under CEAA, but nuclear reactors and mega-dams and anything really huge are exempt. (Meeting 61)

Domestically, the latter phase of the assessment of Project Millennium, which will double Suncor's production from oil sands in northeastern Alberta, was improperly turned over to a provincial process. This development is one of eight approved oil sands projects, with seven more currently in the development process. Logging of 11 million hectares (an area larger than New Brunswick) of boreal forest in Manitoba received only a screening that examined the environmental effects of two bridges and their abutments. Placer mining in Yukon rivers and streams is routinely exempted from EA.

The challenge then is how to ensure that the environmental effects of projects of such importance are assessed appropriately. CEAA could, in the regulations, set out a list of projects that would automatically trigger the panel review provisions of the Act, which would mean the full participation of the public. EAs of projects such as dams on rivers that cross international or interprovincial boundaries, open-pit coal mines in close proximity to national parks, and nuclear reactors for export to countries lacking democratically elected governments should not be the sole responsibility of provinces or Crown corporations.

In expressing concerns that the current federal EA regime excludes such major projects from panel review under CEAA, many witnesses also offered a number of ways in which this problem could be resolved. Lucien Cattrysse suggested that a new list could be created under the regulations.

> We would also recommend that CEAA include provision for assessment of projects that affect national interests. This category of projects … could be defined in much the same way as projects that are currently listed in the comprehensive study list. (Meeting 64)

Ed Norrena, Director of the Board of Directors for the Canadian Environment Industry Association, proposed a new federal approach for such major issues.

> One might consider the global issues that are of concern to us, particularly in relation to climate change and persistent organic pollutants that are definitely of national interest, and have them captured. (Meeting 64)

A related challenge is ensuring that federal EAs occur at a timely point in the project development cycle. At present, CEAA assessments are often triggered late in the project development process (e.g., *Fisheries Act* authorizations), which frustrates proponents. Streamlining the process by which major projects are subjected to panel reviews under CEAA would capture some of these projects at an earlier stage to the advantage of proponents, the public, and the environment.

The Committee is of the view that major projects, especially the most potentially environmentally harmful ones, deserve the highest level of assessment that the Act affords — i.e., panel review or joint review panel. Panel reviews allow the public to participate fully and ensure that independent scientific and technical expertise is brought to bear. In addition, joint panel review allows the coordinated participation of interested levels of government. Projects of such importance should be automatically referred to a panel review, as a federal EA or jointly with other jurisdictions, as required.

THE COMMITTEE RECOMMENDS THAT THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT* BE AMENDED TO REQUIRE THAT PROJECTS OF SIGNIFICANCE WOULD AUTOMATICALLY TRIGGER A PANEL REVIEW OR JOINT PANEL REVIEW. REGULATION-MAKING AUTHORITY UNDER CEAA SHOULD BE AMENDED AND REGULATIONS DEVELOPED AS NECESSARY TO ENSURE THAT SUCH PROJECTS ARE ASSESSED BY PANEL REVIEWS.

3.5 Assessment of Cumulative Environmental Effects

A critical challenge in EA is how to address the cumulative adverse effects on ecosystems of many, often small projects. An important innovation under CEAA is to require assessment of “any cumulative environmental effects that are likely to result from a project in combination with other projects or activities that have been or will be carried out.” Unfortunately, the promise of this innovation has not been fully realized. While the Agency has produced excellent guidelines for the conduct of cumulative effects assessments, implementation of the law and the guidelines at the project level has been erratic. Most EAs remain firmly focused on individual projects in isolation from other proposed developments. Bill C-9 does include a modest proposal to allow individual assessments to take into account findings from studies on regional environmental effects, but the Committee is of the view that the assessment of cumulative effects requires further attention and improvement.

The Commissioner of the Environment and Sustainable Development reached similar conclusions, and reported in 1998 as follows:

> Of the 187 EAs in our sample, 159 were conducted by responsible authorities other than Parks Canada. We found that 48 of these 159 assessments indicated that cumulative environmental effects had been considered. In most of those assessments, however, there was little evidence to indicate the nature of the cumulative effects assessment, including whether there had been an analysis of the ecosystem and its stressors. In practice, only Parks Canada is considering cumulative environmental effects on a regular and rigorous basis.
>
> The Agency should accelerate its work with federal authorities, provincial governments, academics, and other interested parties to encourage the assessment of cumulative effects, where appropriate. (Chapter 6, 1998 Report)

Cumulative effects have been assessed for several major projects, such as Great Whale and Cheviot (the latter only following a Federal Court of Canada decision sought by the Canadian Parks and Wilderness Society and other conservation organizations). The Committee heard from Elizabeth May on the need for a cumulative effects assessment of the Cheviot mine.

> To use the example of the Cheviot Mine, for instance, near Hinton, Alberta, there was concern that with the amount of logging going on in that area, and an open-pit coal mine, and oil and gas activities, a cumulative effect of all of those would be devastating on grizzly bear habitat — more than just looking at that one project alone. In that sense it defines its eco-region; you're looking at habitat of a particular species. (Meeting 61)

The Committee heard from Robert Gibson, however, that a more efficient way to address cumulative effects is through land use planning processes that operate at a landscape scale, and have sustainability and ecological integrity as objectives.

> I have a bunch of grad students who are working at cumulative effects of diamond mining in the Slave geological province in the Northwest Territories. Doing that project-by-project, burdening each individual proponent with the cumulative effects of the whole, is not a very efficient way of doing that, nor particularly fair. If we had something that was more of a programmatic level to look at the overall effects of various development things associated with diamond mining in that area, it would be much more efficient, much more sensible. (Meeting 65)

The constitutional division of powers adds a layer of complexity to the issue. The difficulty with land use planning is that the federal government rarely has the jurisdiction to undertake such planning on its own. Land use planning is typically led by provincial, municipal, Aboriginal or comprehensive claims institutions, and federal involvement is not usually encouraged. One approach to enhance cumulative effects assessment under CEAA would be to identify ways in which federal EAs can be folded into land use planning processes. Another is to build federal authority to participate in regional EAs in areas experiencing multiple projects where some national interest is at stake (e.g., oil

sands developments in northern Alberta, or diamond mining and road construction in the Northwest Territories) and to develop other vehicles that encourage cooperation among jurisdictions to carry out regional EAs.

Sustainable development cannot be achieved without understanding the cumulative effects of the multitude of projects being considered and undertaken across the country. In the absence of landscape-scale land use planning or regional EAs, the rigorous implementation of current CEAA cumulative effects assessment requirements would benefit the environment and facilitate ecological integrity. Also, cumulative effects assessment under CEAA must include a consideration of the impacts of all relevant developments, not just those subject to CEAA. Clearly, adequate resources must be provided to conduct assessments of cumulative effects, which has not typically been the case, and these costs should be split among the federal and other participating governments and proponents.

THE COMMITTEE RECOMMENDS THAT THE MINISTER OF ENVIRONMENT ENSURE THAT CUMULATIVE EFFECTS ASSESSMENT REQUIREMENTS UNDER CEAA ARE CONSIDERED PRIORITIES FOR THE CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY AND FEDERAL DEPARTMENTS.

THE COMMITTEE FURTHER RECOMMENDS THAT THE CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY EXAMINE AND REPORT ON THE USE OF

- **REGIONAL ENVIRONMENTAL ASSESSMENTS[6] AS A TOOL TO EXAMINE CUMULATIVE EFFECTS; AND**
- **APPROACHES TO INCORPORATE FEDERAL ENVIRONMENTAL ASSESSMENTS INTO PROVINCIAL, ABORIGINAL AND COMPREHENSIVE CLAIM LAND USE PLANNING PROCESSES.**

3.6 Achieving Federal Environmental Commitments Through EA

EAs under CEAA focus on identifying the adverse environmental effects of proposed projects, determining whether or not these effects are significant, and identifying measures that would mitigate any adverse effects. Typically, EAs are not linked to achieving Canada's international and other obligations, such as reducing greenhouse gas emissions, protecting biodiversity, and protecting the ecological integrity of national parks or other federally protected areas. For example, assessments

[6] For example, oil sands developments in northern Alberta, or diamond mining and road construction in the Northwest Territories.

of oil sands developments are not linked to meeting Canada's Kyoto Protocol targets, nor do new assessments of mining or forestry projects typically refer back to the *Convention on Biological Diversity* or Canada's Biodiversity Strategy.

Assessments that are carried out with clear environmental objectives and targets (rather than merely to meet the extremely vague CEAA "significance of adverse environmental effects" criterion) generally generate better information and results. The "net gain of fish habitat" policy of the Fisheries and Oceans Canada, and the *Canada National Parks Act* requirement that ecological integrity be the first priority in parks management, are examples of such objectives. EAs conducted by Fisheries and Oceans Canada and the Parks Canada Agency at least have some ecological context and are directed towards achievement of explicit policy objectives. Measurement and monitoring of ecological harm has some concrete application in the policy context, and hence some relevance to decision making.

Take the example of ecological integrity in national parks. Parks Canada attempts to translate the concept of ecological integrity into meaningful goals, objectives, targets and indicators for each national park, providing the overall orientation for the management plan of that park. When undertaking an EA, at both strategic and project levels, these goals become an important reference for determining potential direct and cumulative impact significance for any given park. In other words, ecological integrity goals, objectives, targets and indicators provide a scale against which impacts, either positive or negative, can be measured in the EA process.

The Agency has recognized the challenge of having clear goals and objectives, at least in part, by developing guidelines for determining significance on biodiversity. The Agency also hosted a workshop in January 2002 on the subject of EA and climate change. In practice, many EAs do not examine all environmental effects, but focus of the effects of so-called "valued ecosystem components," which reflects a policy process at a micro-level.

A related issue is that proponents, civil servants, and consultants who prepare EAs, do not necessarily have easy access to information on the government's environmental commitments, policies, goals and standards that are highly relevant to assessing the environmental effects of projects. The Agency could greatly assist these EA practitioners by making such information more easily accessible to them.

Witnesses recognized the value of tying the EA process to Canada's environmental goals and commitments. One such example, where EA may be employed to help the government fulfill its goals, is that of the incomplete commitment to complete Canada's protected areas. Peter Ewins, Director of Arctic Conservation for World Wildlife Fund Canada, described the problem succinctly:

> In 1992 the Canadian Council of Ministers of the Environment, the Canadian Parks' Ministers Council, and the Wildlife Ministers' Council of Canada all signed a statement of commitment to complete Canada's network of protected areas, being representative of Canada's land-based natural regions, by the year 2000; and to accelerate such a network in Canada's marine natural regions. … The job is only one-third complete on land, and it has not started yet in the water. Today, development decisions, with or without environmental assessment, continue to be made across our lands and waters, and these developments incrementally foreclose on the opportunity to complete such a network of representative protected areas. (Meeting 71)

To solve this problem and to help government achieve its commitments, World Wildlife Fund Canada and Canadian Parks and Wilderness Society proposed incorporating the concept of "Conservation First" into CEAA. Conservation First means that no new large-scale industrial projects would be approved in wilderness landscapes in the absence of land use plans developed with local community engagement that have set aside networks of protected areas. No EA permit under CEAA or other federal licence, such as for pipeline construction issued by the National Energy Board, could be issued in the absence of such land use plans.

Ensuring the consideration of Canada's international obligations and commitments in EA would enable the enlargement of the process beyond strictly local, project-based analysis. As Pierre Fortin, Executive Director of the Canadian Hydropower Association argued, the EA process should do a better job of considering large-scale impacts, including those Canada has resolved to address in its national and international environmental commitments.

> The present environmental assessment process places excessive emphasis on local impacts. I think that's an important point. It does not take into consideration large-scale negative impacts on the environment such as acid rain, smog, and climate change, all of which have serious detrimental effects on the health of Canadians as well as our fisheries and forests. (Meeting 64)

A key challenge, therefore, is how to structure EA as a tool to achieve the government's biodiversity, climate change, ecological integrity and other environmental objectives.

THE COMMITTEE RECOMMENDS THAT THE MINISTER OF THE ENVIRONMENT ENSURE THAT CANADA'S NATIONAL AND INTERNATIONAL ENVIRONMENTAL LEGAL AND POLICY COMMITMENTS, OBJECTIVES AND STANDARDS ARE INCORPORATED INTO THE ENVIRONMENTAL ASSESSMENT PROCESS UNDER CEAA.

THE COMMITTEE FURTHER RECOMMENDS THAT THE MINISTER OF ENVIRONMENT MAKE RECOMMENDATIONS TO THE GOVERNMENT OF CANADA FOR INCORPORATING THE “CONSERVATION FIRST” PRINCIPLE INTO CEAA AND OTHER FEDERAL LAWS.

3.7 Panel Reviews and the Promotion of Meaningful Public Participation

Public participation is identified as one of the key purposes of CEAA, yet the Committee heard evidence that the level of public participation was, at least in some respects, higher under the old EARP Guidelines Order than it currently is under CEAA. Panel reviews are a useful indicator of public participation, given that there is no requirement to hold public hearings for comprehensive studies, and no public participation requirement at all in screening. In the late 1980s, up to 14 panel reviews were being conducted simultaneously, whereas in 2002 there are only 2. More than 30,000 projects have gone through a CEAA screening since 1995, yet only one has been referred to a panel review.

Under CEAA, a project is supposed to be referred to a panel from a screening where significant adverse environmental effects have been identified or when there is uncertainty about the significance of these effects. It seems unlikely that all but one of these 30,000 projects have had environmental effects that were insignificant and certain. Given this unlikelihood, why was only one project referred to a panel review from a screening?

The Agency, the courts, and the Commissioner of the Environment and Sustainable Development all have certain accountability functions, yet panel reviews alone have the merit of providing scientific determinations independent of federal departments. The fact that panel reviews have occurred less frequently under CEAA than under its predecessor suggests both a reduction in meaningful public participation and in independent scientific input to EA in Canada. Evidence presented to the Committee by several witnesses suggests that the decision-making process with respect to referrals to panels and mediations is an area that merits consideration by Parliament.

That panel review is a critical part of the EA process was acknowledged by Environment Minister David Anderson, who, in his report to Parliament on the five-year review of CEAA, described panel reviews as being a “core strength” of the federal EA process. Consistent with that description, Rod Northey emphasized both the evolution and the importance of panel reviews in Canada.

> In 1974 this government’s cabinet policy on environment assessment led to something called panel review. Panel review … made Canada a world leader in EA. There is no other country that had Canada’s insight or foresight to do that when Canada did. … Panel reviews occurred in approximately 50 instances prior to CEAA. Now, in terms of accountability, you have heard if you read the Minister’s

> statement, some projection or some estimate that approximately 30,000 projects have been assessed under CEAA over its period. … How many panel reviews have we had? … We have seen 10 panel reviews over the course of CEAA. (Meeting 73)

While an excellent source of scientific advice and public input, federal departments and proponents seek to avoid panel reviews because of the resulting expense and delay to the project. It was suggested to the Committee that panel reviews should not necessarily have to examine all elements or environmental effects of a proposed project. Mr. Northey argued that where a major project has one or two contentious aspects, perhaps those areas might be subjected to panel review, limiting the scope of the assessment, and thereby reducing costs and time involved.

> It is not that a panel review that is comprehensive in scope could be done in three months. It's that a panel review could be used to address specific issues, not a comprehensive project, and that the process could be done in months. Most provinces I'm familiar with have some administrative board proceeding that involves hearings of days or lengthy ones of weeks. All I'm suggesting is that there should not be an all-or-nothing approach to panel reviews, which is what we have now. "All" is all we have: two years and nothing less. (Meeting 79)

The consequences for members of the public of the failure to engage the public in the EA were highlighted in the moving testimony of Normand de la Chevrotiere, President of the Inverhuron & District Ratepayers Association, who described his Association's failed struggle to have the proposed Bruce nuclear waste storage facility subjected to panel review.

> [W]hen our children ask us, "What the hell happened here?" we can look them straight in the eye, hold our heads up high and say, "We did everything humanly possible. We exhausted every regulatory avenue. We exhausted every legal avenue. We did not fail you; the system and the government failed you." This has left us so absolutely disillusioned that we're wondering why we even have a government. Why do we have a regulator? Why do we even have a *Canadian Environmental Assessment Act*? If the world's largest nuclear waste storage facility, housing the most toxic and deadliest of all industrial waste products does not merit a panel review, what would? I am here imploring this committee; I'm begging this committee to please make changes to the Act so no other citizens' group has to go through the ordeal that we went through. Projects of this scope and magnitude should be subject to a panel review and [that] should be mandatory. (Meeting 73)

Michelle Campbell, Coordinator of Environmental Defence Canada's Citizen Support Programme, advanced her organization's view that without more panel reviews, the EA regime under CEAA falls far short of achieving the accountability and environmentally beneficial results that are expected of it.

> More and more, it is becoming clear that CEAA is not a good tool for citizen participation, despite what we believe it was designed to do. Environmental Defence Canada had higher hopes for CEAA. We thought it would be better than

> the old EARPGO system and we still believe that it was designed to do more than it is doing for citizen participation but as it stands right now, it's not working. If it were better than the previous process, how could 11 million hectares of boreal forest be approved for cutting with no more than an environmental assessment of one bridge? How could the world's largest nuclear waste dump be assessed without a panel review? How could the destruction of Ontario's largest wilderness waterfall be approved before citizens could even gain access to the information regarding the environmental assessment? (Meeting 73)

The Committee strongly believes that public participation is a key aspect of the EA process under CEAA. Bill C-9, as amended by Committee, should have lead to improvements in this area but Government motions No. 12 and 21, concerning screenings, have undone important components of these improvements. Public participation could, however, be encouraged through more frequent use of panel reviews. Panel reviews also have the added advantage of encouraging the use of independent scientific and technical expertise. The Committee acknowledges concerns about the length of time that panel reviews can take, but suggests that approaches to ensure more timely reviews by panels are available and feasible, keeping in mind the importance of avoiding duplication of effort with other EA processes.

THE COMMITTEE RECOMMENDS THAT THE MINISTER OF THE ENVIRONMENT AND CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY INCREASE THE LEVEL OF PUBLIC PARTICIPATION IN CEAA, AND THAT THE MINISTER USES HIS EXISTING POWERS UNDER THE ACT TO MAKE PANEL REVIEWS A KEY TOOL OF SUCH PARTICIPATION.

3.8 Incorporation of Aboriginal Perspectives

The five-year review sought to strengthen the incorporation of Aboriginal perspectives into EA. Bill C-9 includes amendments that would establish the promotion of "communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment" as one of the purposes of CEAA, and authorize the consideration of "traditional Aboriginal knowledge" in conducting an EA.

Some witnesses felt that the incorporation of Aboriginal perspectives in work under CEAA has shown some improvement, but that there are still problem areas. Garry Lipinski, Ontario Co-Chair of the Métis National Council, suggested a number of areas in which the Agency can build on recent improvements to enhance the participation of Aboriginal communities and governments.

> Our recent introduction as a full member to the Regulatory Advisory Committee of CEAA is a step in the right direction towards approving our role in the environmental assessment process. Working in the following areas could enhance this relationship with the federal government in relation to CEAA further, first, as the department applies the consultation mechanisms with Métis, First Nations, and

> Inuit people, such as under the Aboriginal working group on the proposed *Species at Risk Act*; second, in the harmonization of the act with existing aboriginal self-government structure and land claims regimes, in addition to provincial environmental assessment legislation; and in defining the role of aboriginal traditional knowledge as it pertains to the Act and full participation of the MNC and other National Aboriginal organizations in the development of federal guidelines. (Meeting 69)

In the view of the Committee, the Bill C-9 amendments are useful but do not fully reflect the growing role of Aboriginal governments and comprehensive land claims organizations in EA; nor do they recognize that Canadian law increasingly recognizes rights of Aboriginal people to be consulted and be engaged in EAs. Several specific areas of difficulty were identified by witnesses who testified before the Committee.

The Grand Council of the Crees noted that the federal EA regime under the *James Bay and Northern Quebec Agreement* is rarely employed and that Bill C-9 does not address this issue of lack of engagement. Diom Romeo Saganash, Director of Quebec Relations for the Grand Council of the Crees of Quebec (Eeyou Istchee), argued that the EA regime set out in the Agreement should be the one applied in the Cree territory of northern Quebec.

> Section 22 of the *James Bay and Northern Quebec Agreement* calls for an effective federal presence in the formation of policy and in the review of projects that involve matters under federal jurisdiction. We were promised a special status whereby we would be part of the social and environmental impact assessment procedure at all levels and stages and in its interpretation and application. Moreover, in addition to providing that “the environmental and social protection regime applicable in a territory shall be established by and in accordance with the provisions of this section”, we were promised that the regime would not be changed without Cree consent. What do we find today? Today the regime is essentially neglected and rendered non-operative by Canada. That part of it that functions minimally, the James Bay Advisory Committee on the Environment, is not accorded its proper role in policy formation and is underfunded. Canada denies that federal assessment can be triggered under section 22 and instead imposes the *Canadian Environmental Assessment Act* on our territory in violation of the section of the treaty just cited. … We come before you to ask that you seek ways to implement section 22 of our 1975 treaty in a manner that respects the rights of the Cree people and is in keeping with the constitutional priority these rights have over other federal legislation. (Meeting 65)

The *James Bay Northern Quebec Agreement* also applies to the Nunavik region in northern Quebec. Paule Halley, member of the Kativik Environmental Advisory Committee, argued that Canada is failing to properly consult Inuit in that region, and acting outside its own legislation in applying CEAA there.

> [The *James Bay Northern Quebec Agreement*] expressly forbids the implementation of a double federal procedure in the Nunavik territory. … The *Canadian Environmental Assessment Act* is not applicable on the territory of Nunavik. In this regard, I emphasize that outside of cases of double assessment provided for in the agreement, it is not possible to sign harmonization and

> delegation agreements, or to institute joint or substitution panels or as provided for by the *Canadian Environmental Assessment Act*, as these mechanisms do not exist in that agreement. In addition, the organizations which are created by the agreement, such as the Federal Assessment Committee, composed mostly of federal officials, do not have the inherent authority to sign harmonization, delegation and other agreements with the Canadian Agency. The agreement does not give them that power. The only way to change the terms of the agreement is to do so under its provisions. (Meeting 67)

The Assembly of First Nations (AFN) proposed that Section 4 of CEAA be amended to add recognition of Aboriginal governments as equal partners with federal and provincial governments with respect to EA as a purpose of the Act. The AFN also proposed that where Aboriginal or treaty rights may be affected, responsible authorities should "be required to notify appropriate Aboriginal authorities" to ensure their involvement in EA at the earliest possible stages of projects. Further, the AFN proposed that "Aboriginal and treaty rights that are likely to be affected by the project" should be added as a mandatory factor to be considered in an EA under CEAA. National Chief Matthew Coon Come advocated that the time has come to go beyond non-derogation clauses, and to actually reflect in legislation the government to government, nation to nation, relationship between the federal government and Canada's Aboriginal peoples.

> There's always room for improvement. There are references to Aboriginal peoples, but I think we have to go beyond non-derogation clauses and interpretive clauses as if we were a special interest group. We're not a special interest group. The Constitution recognizes that there are three Aboriginal groups in this country: the Métis, the Inuit, and us. Certainly we've signed treaties that are based on a nation-to-nation, government-to-government basis. It is those treaties that establish that relationship. The Royal Commission on Aboriginal Peoples recommended a partnership that is based on fairness and on equitable, real, meaningful participation, government-to-government and nation-to-nation. (Meeting 68)

Natan Obed, of Inuit Tapiriit Kanatami (ITK) joined with other witnesses in suggesting that more work must be done to ensure better integration of these regimes into the federal process for EA in Canada.

> The Inuit feel that the negotiated mechanisms for environmental assessment under each land claim take precedence over CEAA, because these mechanisms are better suited for the Arctic, as they were developed by Inuit for the lands in which Inuit live. Along with the government, we have worked long and hard to develop environmental assessment that is meaningful, comprehensive, and includes Inuit in all decision-making processes. We do not want to lose these established systems. We also do not want to dilute our agreements by agreeing to comply with CEAA provisions when we have perfectly good mechanisms in place. (Meeting 68)

The Standing Committee supports the proposed amendments in Bill C-9 recognizing the importance of communication and cooperation with Aboriginal peoples in EA as well as authorizing consideration of traditional aboriginal knowledge in EAs. The establishment of an Aboriginal advisory committee by the Agency is also to be

commended. However, the Standing Committee is concerned that federal EA is not keeping pace with legal developments relating to Aboriginal and treaty rights, nor has sufficient attention been paid at a policy level to the interaction between CEAA and EA regimes of Aboriginal and comprehensive claims institutions.

> **THE COMMITTEE RECOMMENDS THAT THE CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY WORK WITH ITS ABORIGINAL ADVISORY COMMITTEE TO CARRY OUT A SYSTEMATIC REVIEW OF LEGAL DEVELOPMENTS RELATING TO ABORIGINAL AND TREATY RIGHTS AS THEY APPLY TO ENVIRONMENTAL ASSESSMENT. IN ADDITION IT SHOULD STUDY THE INTERACTION BETWEEN CEAA AND ENVIRONMENTAL ASSESSMENT REGIMES OF ABORIGINAL AND COMPREHENSIVE CLAIMS INSTITUTIONS, WITH A VIEW TO DEVELOPING MORE EFFECTIVE ENVIRONMENTAL ASSESSMENT.**

3.9 Improvement of Strategic Environmental Assessment

Another challenge not addressed in Bill C-9 is strategic environmental assessment (SEA), the assessment of proposed government policies, programs and plans. In 1998, the Commissioner of the Environment and Sustainable Development decried the slowness of federal departments in implementing EA of programs and policies as required by a 1990 Cabinet directive. The Committee has difficulty assessing the current level of compliance with the revised 1999 Cabinet directive given that virtually no information about SEAs is publicly available. At least a few departments (Environment Canada, Foreign Affairs and International Trade, Industry Canada, Transport Canada) have developed guidelines for the conduct of SEAs. Apparently, a number of SEAs have been undertaken for recent Cabinet submissions. As well, national park management plans are subjected to a strategic assessment under the current 1999 Cabinet directive, and subsequent business plans are also assessed under the Cabinet directive, if they contain additional details or proposals not already assessed as part of the park management plan.

A number of witnesses, including Peter Ewins, recommended that CEAA should include a regime for SEA:

> I believe it would be extremely helpful for Bill C-9 to reflect, in very solid terms, this commitment to complete strategic environmental assessments for policies, programs, and plans originating from the federal government. (Meeting 71)

Karen Campbell, Staff Counsel for the West Coast Environmental Law Association, described SEA as “the heart of sustainable development.” She also pointed out that assessing types of projects in this way might reduce the number of individual project EAs being conducted under CEAA, which in turn might reduce costs and streamline the process.

> If we were to do assessments of broad plans, broad policies, and broad directions, it would obviate the need for individual environmental assessments in a number of different circumstances. (Meeting 60)

Joan Kuyek also argued that CEAA should incorporate both project assessment and SEA.

> First, I think it's important to realize that our understanding is that it's the *Canadian Environmental Assessment Act* that is supposed to make it possible to have that kind of open discussion about the values of a project. The information about whether supporting a coal-based industry or a nuclear industry is going to make a difference should be part of a strategic and project-specific environmental assessment. We're here to ask for the government to exercise its responsibility that way properly. … I think it should encompass almost any program or policy that was introduced by the federal government, and there would be a screening program as there is for projects. The fact of the matter is, an awful lot of policy has often much more devastating implications for the environment and for the economy than a project does, and it would obviate a lot of smaller project screening if there were policy screening to start with, too. (Meeting 61)

SEA allows the consideration of cumulative impacts of projects in large regions, and indeed, across Canada. Implications going beyond the impacts of individual projects can be taken into account in policy assessments, and related to Canada's environmental goals, including our international obligations. Martha Kostuch, Vice-President of Friends of the Oldman River, used the example of oil sands development to argue that a legislated SEA regime is necessary to ensure that we understand the overall effect this type of activity has on our environment.

> The federal government, preferably in cooperation with the provincial government, should conduct a strategic EA of oil sands development and look at it in a broader sense. What are the positives, the benefits from it, and what are the impacts? Is oil sands development sustainable? Is it in the interests of Canadians and, more broadly, North Americans, the U.S., or is it not? The reason we will not be able to meet Kyoto is oil sands expansion, very simply. Yet that issue was not even addressed by the federal environmental assessment. … [I]t wasn't Suncor itself and their expansion we're concerned about. It is the totality of the oil sands development and the huge impact it will have on transboundary air quality, on greenhouse gases, and climate change, on the boreal forests, on waterways. The federal government should be conducting a strategic EA. Another question is this. Why is the federal government subsidizing oil sands expansion by favourable tax breaks? You're contributing to our failing to meet Kyoto. … Did you even consider the environmental implications in making the decision to give tax breaks to oil sands development? Did you consider the impacts on our ability to fund health care when you gave those tax breaks? Those are the issues we should be looking at in a strategic EA. (Meeting 66)

A crucial feature of SEAs that distinguishes them from EA of projects is that, as under those conducted under the *Farm Income Protection Act*, they can be conducted *after* the program providing financial support has been started. This concept recognizes an important distinction between assessment of projects versus assessments of

policies and programs. A dam or a nuclear power plant must be assessed before it is built, because once they are built the environmental harm cannot be undone, or if so, only at great expense and difficulty. Policies and programs rarely are so cut and dried; they develop incrementally over time and can usually be reversed if necessary. In addition, these after-the-fact SEAs have the advantage of not getting tangled up in Cabinet confidence issues, and allow for more careful scrutiny. Any SEA law should therefore include a provision providing federal authorities with the option of conducting the SEA following the decision to proceed with the proposal, where the federal authority determines that an after-the-fact SEA is in the public interest.

Suggested principles for any federal SEA statute could include: requiring that the environmental effects of proposed federal policies, programs and plans be assessed; establishing a public registry of such SEAs; affording a maximum of flexibility to federal departments to integrate the EA activity into decision-making processes; and employing existing institutions (e.g., Canadian Environmental Assessment Agency, departmental EA teams) to minimize administration costs.

For SEA to achieve its goals, there must also be a form of compliance that ensures implementation. The 1999 Cabinet directive was issued by the Clerk of the Privy Council, the top federal civil servant. Privy Council Office has declined responsibility for implementing the 1990 and 1999 Cabinet directives, relying on the Agency, which has virtually no authority to ensure that federal departments (let alone ministers) comply. Privy Council Office, which serves as the Prime Minister's department as well as the secretariat for Cabinet, must take a leadership role if SEA is to be effective.

THE COMMITTEE RECOMMENDS THAT THE PRIME MINISTER DIRECT THE PRIVY COUNCIL OFFICE TO DEVELOP LEGISLATION, IN CONSULTATION WITH THE MINISTER OF ENVIRONMENT, AS SOON AS POSSIBLE BEFORE THE SEVEN-YEAR REVIEW, THAT ESTABLISHES A LEGAL FRAMEWORK FOR MANDATORY STRATEGIC ENVIRONMENTAL ASSESSMENT.

CHAPTER 4: THE NEED FOR A NEW VISION

In his September 2, 2002 address to the World Summit on Sustainable Development in Johannesburg, Prime Minister Jean Chrétien observed:

> Since the publication in 1987 of *Our Common Future*, the concept of sustainable development has moved from elite discussion to the centre of the international agenda. The speed of this shift reflects the fact that, in essence, sustainable development is about the very destiny of our planet.
>
> It reflects a rising global awareness that clean air, clean water and safe food are universal needs. And that wise environmental stewardship is a universal obligation.
>
> Canadians are a pragmatic people. We believe that it is not just admirable goals that will ensure a better world for our children. It is concrete results. We prefer action to rhetoric. …
>
> That is why I am pleased to see the many concrete action plans and innovative partnerships emerging from this Summit. This reflects the direction we are moving in Canada.

The Committee submits that EA in Canada must also move from rhetoric and admirable goals to action and concrete results if sustainable development is to be achieved. EA can be a tremendous tool for achieving environmental, economic and social benefits if the opportunity can be fully seized. But even with proposed amendments, Bill C-9 takes only modest steps towards a results-based and action-oriented approach.

The Committee recognizes that implementation of our recommendations would mean deep and far-reaching change. Perhaps many of the historical difficulties in delivering results from the federal EA system are indeed because changes to how decisions are made must be comprehensive. Such change would also help restore Canada's international role in the development of effective environmental assessment, a role which many witnesses testified had been diminished over the years.

The federal EA process must do more than merely identify adverse environmental effects, assess their significance, propose mitigation measures and advise decision makers. In the past, this advice has been too limited, and has often been ignored or manipulated to fit decisions already made. Decision makers must have clearer guidance on the results (e.g., sustainability of projects or policies, benefits to ecosystems) to be achieved from EA, and how these results are to be measured. Such results must cover issues of critical environmental importance, including those set out in the September 30, 2002 Speech from the Throne (e.g., reduction of greenhouse gas emissions, protection of biodiversity, establishment of protected areas). Project EAs must be subject to a system

of enforceable permits that would hold responsible authorities and proponents accountable for ensuring, under threat of penalty, that terms and conditions of approved projects are met.

Federal EA must be engaged earlier in project planning and must be established as a practical and constructive tool. It can no longer be seen as a late-stage burden on development that frustrates proponents, governments and stakeholders but as a positive aspect of project management. Canadians expect that the federal government will play a key role in assessing the environmental effects of projects of significance. Federal leadership is needed to ensure that these important projects are identified early, and properly assessed with substantial participation by the public and in consultation with Aboriginal people and provincial and territorial governments. The goals of EA should be to benefit the environment, maintain ecosystem integrity, and ensure meaningful public participation. In this way EA will not merely avoid significant adverse environmental effects but will become a significant tool in achieving sustainable development.

Panel reviews are essential as a way to engage the public in project assessments, and to commission and consider objective scientific evidence, and must be used more frequently. In order to ensure that more panel reviews take place, new approaches for short and issue-specific panel reviews need to be developed.

The assessment of cumulative effects is another critical issue which must be addressed and requires the devotion of more resources. More emphasis on the assessment of cumulative effects is required at the level of individual projects but also regionally, where a number of projects are being considered at a given time or where industrial development is proposed for a relatively intact ecosystem.

The relationships with respect to EA between federal authorities, provinces, territories and, in particular, Aboriginal and comprehensive claims institutions, needs systematic review. As Aboriginal and comprehensive claims institutions take up primary responsibilities with respect to federal EA of projects, federal roles under CEAA may need to be reconsidered or harmonized.

Finally, the assessment of proposed federal policies, programs and plans (“strategic environmental assessment”) requires a legal framework to ensure compliance with requirements, as well as accountability and transparency in the conduct of such assessments.

The Committee concludes that EA must reach beyond Bill C-9 and embrace a new vision that has measurable benefits to ecosystems and enhances the sustainability of projects and policies. The federal government has a key leadership role in pursuing this new vision of EA — a role that Canadians demand, and the protection of our natural environment requires.

RECOMMENDATIONS

3.1 A Clear Vision for Federal Environmental Assessment

THE COMMITTEE RECOMMENDS THAT THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT* BE AMENDED TO INCORPORATE AN EFFECTIVE APPROACH THAT WOULD ACHIEVE TANGIBLE RESULTS IN ENVIRONMENTAL ASSESSMENTS, BOTH IN TERMS OF PROJECT SUSTAINABILITY AND ECOSYSTEM INTEGRITY. THE COMMITTEE FURTHER RECOMMENDS THAT SPECIFIC TARGETS, PERFORMANCE MEASURES AND PROCESS STANDARDS BE DEVELOPED IN ORDER TO ACHIEVE THESE RESULTS. ....p. 16

THE COMMITTEE FURTHER RECOMMENDS THAT THE TERM “SIGNIFICANT,” IN THE PHRASE “SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECT,” BE DEFINED IN THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT* TO INCLUDE AT LEAST THE FOLLOWING FACTORS:

- **AN EFFECT THAT EXCEEDS ANY REGULATED FEDERAL OR PROVINCIAL ENVIRONMENTAL QUALITY STANDARD OR TARGET;**
- **AN EFFECT THAT IS INCONSISTENT WITH ANY INTERNATIONAL COMMITMENT OF THE GOVERNMENT OF CANADA; AND**
- **AN EFFECT THAT EXTENDS INTO ANY TERRITORY THAT IS WITHIN THE JURISDICTION OF A GOVERNMENT OTHER THAN THE FEDERAL GOVERNMENT, AND WHICH HAS BEEN THE SUBJECT OF A PUBLICLY STATED CONCERN OF THE GOVERNMENT OF THAT JURISDICTION.**

IN ADDITION, BECAUSE OF THE IMPORTANCE, IN LAW AND PRACTICE, OF THE TERM “SIGNIFICANCE,” ITS DEFINITION SHOULD CONTINUE TO BE STUDIED IN ORDER TO ENSURE THAT ITS STATUTORY DEFINITION DOES NOT LIMIT THE MINISTER’S POWER TO ACT WHEN NECESSARY. ....p. 16

3.2 Effective Enforcement of Environmental Assessment Responsibilities

THE COMMITTEE RECOMMENDS THAT PRIOR TO, AND IN PREPARATION FOR, THE SEVEN-YEAR REVIEW BY THE PARLIAMENTARY COMMITTEE, THE COMMISSIONER OF THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT SHOULD BE ASKED TO REVIEW THE OPERATION OF FEDERAL ENVIRONMENTAL ASSESSMENT UNDER CEAA, AS AMENDED BY BILL C-9. .... p. 19

THE COMMITTEE RECOMMENDS THAT THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT* BE AMENDED TO ESTABLISH A SYSTEM FOR THE ISSUANCE OF ENVIRONMENTAL ASSESSMENT PERMITS BY FEDERAL DEPARTMENTS, IN ACCORDANCE WITH CRITERIA PREPARED BY THE AGENCY, GIVING DEPARTMENTS AUTHORITY TO SET TERMS AND CONDITIONS FOR MITIGATION AND FOLLOW-UP. .... p. 19

THE COMMITTEE FURTHER RECOMMENDS THAT THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT* BE AMENDED TO PROHIBIT, THROUGH THE USE OF PENALTIES, A FEDERAL DEPARTMENT OR PROJECT PROPONENT FROM PROCEEDING WITH A PROJECT WITHOUT A PERMIT, OR IN BREACH OF TERMS OR CONDITIONS OF A PERMIT. .... p. 19

3.3 Use of Environmental Assessment as a Constructive Tool to Improve Projects

THE COMMITTEE RECOMMENDS THAT THE MINISTER OF THE ENVIRONMENT DEVELOP AND IMPLEMENT MEASURES TO ESTABLISH ENVIRONMENTAL ASSESSMENT AS A CONSTRUCTIVE TOOL THAT ENHANCES PROJECT PLANNING AND IMPROVES ENVIRONMENTAL PROTECTION. .... p. 22

3.4 Panel Review of Major Projects

THE COMMITTEE RECOMMENDS THAT THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT* BE AMENDED TO REQUIRE THAT PROJECTS OF SIGNIFICANCE WOULD AUTOMATICALLY TRIGGER A PANEL REVIEW OR JOINT PANEL REVIEW. REGULATION-MAKING AUTHORITY UNDER CEAA SHOULD BE AMENDED AND REGULATIONS DEVELOPED AS NECESSARY TO ENSURE THAT SUCH PROJECTS ARE ASSESSED BY PANEL REVIEWS. .... p. 24

3.5 Assessment of Cumulative Environmental Effects

THE COMMITTEE RECOMMENDS THAT THE MINISTER OF ENVIRONMENT ENSURE THAT CUMULATIVE EFFECTS ASSESSMENT REQUIREMENTS UNDER CEAA ARE CONSIDERED PRIORITIES FOR THE CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY AND FEDERAL DEPARTMENTS. .... p. 26

THE COMMITTEE FURTHER RECOMMENDS THAT THE CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY EXAMINE AND REPORT ON THE USE OF

- **REGIONAL ENVIRONMENTAL ASSESSMENTS AS A TOOL TO EXAMINE CUMULATIVE EFFECTS; AND**
- **APPROACHES TO INCORPORATE FEDERAL ENVIRONMENTAL ASSESSMENTS INTO PROVINCIAL, ABORIGINAL AND COMPREHENSIVE CLAIM LAND USE PLANNING PROCESSES.** .... p. 26

3.6 Achieving Federal Environmental Commitments Through EA

THE COMMITTEE RECOMMENDS THAT THE MINISTER OF THE ENVIRONMENT ENSURE THAT CANADA'S NATIONAL AND INTERNATIONAL ENVIRONMENTAL LEGAL AND POLICY COMMITMENTS, OBJECTIVES AND STANDARDS ARE INCORPORATED INTO THE ENVIRONMENTAL ASSESSMENT PROCESS UNDER CEAA. .... p. 28

THE COMMITTEE FURTHER RECOMMENDS THAT THE MINISTER OF ENVIRONMENT MAKE RECOMMENDATIONS TO THE GOVERNMENT OF CANADA FOR INCORPORATING THE "CONSERVATION FIRST" PRINCIPLE INTO CEAA AND OTHER FEDERAL LAWS. .... p. 29

3.7 Panel Reviews and the Promotion of Meaningful Public Participation

THE COMMITTEE RECOMMENDS THAT THE MINISTER OF THE ENVIRONMENT AND CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY INCREASE THE LEVEL OF PUBLIC PARTICIPATION IN CEAA, AND THAT THE MINISTER USES HIS EXISTING POWERS UNDER THE ACT TO MAKE PANEL REVIEWS A KEY TOOL OF SUCH PARTICIPATION. .... p. 31

3.8 Incorporation of Aboriginal Perspectives

THE COMMITTEE RECOMMENDS THAT THE CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY WORK WITH ITS ABORIGINAL ADVISORY COMMITTEE TO CARRY OUT A SYSTEMATIC REVIEW OF LEGAL DEVELOPMENTS RELATING TO ABORIGINAL AND TREATY RIGHTS AS THEY APPLY TO ENVIRONMENTAL ASSESSMENT. IN ADDITION IT SHOULD STUDY THE INTERACTION BETWEEN CEAA AND ENVIRONMENTAL ASSESSMENT REGIMES OF ABORIGINAL AND COMPREHENSIVE CLAIMS INSTITUTIONS, WITH A VIEW TO DEVELOPING MORE EFFECTIVE ENVIRONMENTAL ASSESSMENT. .... p. 34

3.9 Improvement of Strategic Environmental Assessment

THE COMMITTEE RECOMMENDS THAT THE PRIME MINISTER DIRECT THE PRIVY COUNCIL OFFICE TO DEVELOP LEGISLATION, IN CONSULTATION WITH THE MINISTER OF ENVIRONMENT, AS SOON AS POSSIBLE BEFORE THE SEVEN-YEAR REVIEW, THAT ESTABLISHES A LEGAL FRAMEWORK FOR MANDATORY STRATEGIC ENVIRONMENTAL ASSESSMENT. .... p. 36

APPENDIX 1: ENVIRONMENTAL ASSESSMENT CHRONOLOGY

1973 — Cabinet directive establishes first federal environmental assessment process, *Environmental Assessment Review Process*, administered by Federal Environmental Assessment Review Office (FEARO)

1984 June (in *CEA Act*) — Environmental Assessment Review Process (EARP) Guidelines Order approved by Cabinet

1989 December — Rafferty-Alameda Decision — *Canadian Wildlife Federation et al. v. Minister of the Environment and Saskatchewan Water Corporation* (No. 1), 99 N.R. 72, 27 F.T.R. 159 nt. [1990] 2 W.W.R. 69 (Fed. CA).

1992 January — Oldman Decision — *Friends of the Oldman River v. Canada (Minister of Transport)*, [1992] S.C.R. 3, 132 N.R. 321, [1992] 2 W.W.R. 193 (S.C.C.).

1992 June — Canadian Environmental Assessment Act (CEAA) gets Royal Assent

1995 January — *Canadian Environmental Assessment Act* (CEAA) proclaimed in force, administered by Canadian Environmental Assessment Agency

1998 January — *Canada-Wide Accord on Environmental Harmonization* and Sub-Agreement on Environmental Assessment signed by Canadian Council of Ministers of Environment (except Québec)

2001 March — Minister's Report on five-year review of CEAA — *Strengthening Environmental Assessment for Canadians*

2001 March — Bill C-19, An Act to Amend the *Canadian Environmental Assessment Act*, given First Reading

2001 June — Bill C-19 referred to House of Commons Standing Committee on Environment and Sustainable Development

2001 December — Committee begins study of Bill C-9

2002 October — Committee starts working this report

2003 January — Bill C-9 reported to the House of Commons with amendments

2003 May — Bill C-9 given third reading and passed by the House of Commons

2003 May — Committee adopts this report

REQUEST FOR GOVERNMENT RESPONSE

In accordance with Standing Order 109, the Committee requests that the Government provide a comprehensive response to the Report within 150 days.

A copy of the relevant Minutes of Proceedings of the Standing Committee on Environment and Sustainable Development (*Meeting Nos. 12, 13, 14, 15, 16 and 22 which includes this report*) is tabled.

Respectfully submitted,

The Hon. Charles Caccia, M.P.
Chair

DISSENTING OPINION
HER MAJESTY'S LOYAL OPPOSITION
BEYOND BILL C-9

The C-9 Process:

Interference from the Prime Minister's Office, and the Privy Council Office made the review of Bill C-9, particularly at committee stage, far less effective than it could have otherwise been. Despite this, C-9 does represent an improvement over the existing Act.

During the committee process the bill's transparency was improved, both in the defining of timelines for each stage of the Assessment Process, and the provision of documentation to affected parties well in advance of decisions being taken. These measures provided greater surety for all affected groups, and represent a step forward.

The seven-year review provision has been drafted in such a way as to ensure the entire Canadian Environmental Assessment Act (CEAA) can be re-examined at that time, rather than only specific sections of interest to the government. C-9 was hampered by its inability to amend sections of the original CEAA that were not already opened up for discussion within the context of C-9. The review mechanism included in C-9 recognizes this fact, and will ensure a more complete review of the legislation, likely in 2010.

Given this reality, the Official Opposition questions the need for a report that focuses on *Beyond C-9* at this time. On the contrary, the report from the Standing Committee seems a thinly veiled attempt to counter decisions taken at committee in a number of areas, and represents a serious attack on the integrity of the work done by committee members over the past year. It is biased, undemocratic, and in many places fundamentally out of scope, even within the context of the CEAA as a whole.

Positives Resulting From C-9:

A number of positives were achieved at Committee Stage regarding C-9, including:

- A requirement that the environmental assessment process include 'scoping' early on. This would provide both the proponent of a project, and any interested groups in the public a better understanding of the full scope of the project prior to submissions or objections being made, increasing trust in the process.

- Provisions regarding the on-line Registry have been amended to include a printed copy of information to be made available to interested parties on request. This is a significant increase in transparency. Any Motions to amend this section by government would have to explicitly state that printed versions would be available on request.

- The inclusion of reasonable time limits for the release of documentation. Alliance amendments were accepted to ensure that information posted on the Registry is timely, and available to answer any concerns before significant issues develop.

- The seven year review provision will allow the whole Act to be opened for improvement, not just sections the government deems important, as occurred in this round.

Negatives Resulting from C-9:

Negatives resulting from C-9 include:

- Crown Corporations have been exempted from coverage under CEAA, and will be allowed over the next three years to create separate regulations governing environmental assessment. Government did not adequately explain why separate regulatory regimes should be needed for any but a handful of Crown Corporations. Equally distressing, Committee members voted in a democratic fashion to ensure Crown Corporations would be included in CEAA provisions. As a result of interference from the PMO and PCO, this democratic decision was subverted, and exemptions for Crown Corporations were included.

- C-9 amends s.23(2) of the Act to allow the Minister of the Environment to revisit an Environmental Assessment and return to the public for further consultation prior to issuing a decision statement. This could allow the Minister to delay issuance of a decision statement simply because an issue is politically sensitive. Such discretionary power is open to abuse, and appears to have very little function beyond political expediency.

- The Alliance lobbied to provide Municipal and Local Land Use Authorities equal input into the assessment process as will be enjoyed by First Nations bands. It is only reasonable that local governments be consulted on decisions affecting them directly. These amendments were defeated at committee, and local governments continue to receive little protection under CEAA.

Specific Response to *Beyond C-9*

The Official Opposition believes that the seven-year review mechanism built into the bill at committee stage will adequately address CEAA in future. The preparation of Beyond C-9 in this context appears unnecessary, and chiefly designed to revisit decisions made in the committee process.

Is Federal Environmental Assessment Making a Difference?

The Official Opposition supports the report's contention that there is a greater consciousness for EA. We also agree EA should result in strong ecosystems and public participation. However the report also lists 'benefit' the environment' as a purpose under the Act. CEAA's preamble lists the legislation's intention is to "**achieve sustainable development by conserving and enhancing environmental quality"** and **"to ensure that environmental effects of projects receive careful consideration."** (pg 10)These are the goals of CEAA, which are in keeping with the Alliance belief in balancing development with environmental protection. While 'benefiting the environment' is a laudable goal, it is excessively vague and could be interpreted as exceeding the mandate of C-9 and CEAA, we reject *Beyond C-9's* claims to the contrary.

Use of EA to Address Major Environmental Issues:

The attempt to turn CEAA into a mechanism to assess the 'dangers of greenhouse gas emissions' is wholly inappropriate. The Official Opposition opposes the Kyoto Protocol in the strongest possible terms, and will not be party to a report attempting to link this fatally flawed treaty with domestic Environmental Assessment. This is a typical example of the frittering away of important environmental resources in the ill-considered fight against global warming represented by Kyoto.

Is Environmental Assessment Resulting in Benefits to the Environment?

The Official Opposition agrees with the reports observance of the 1998 Commissioner of the Environment and Sustainable Development where the Commissioner stated "the federal government is not gathering the information needed to let Canadians know whether or not environmental assessment is achieving expected results (Para 6.5, Ch. 6, 1998 Report). The federal government has a poor track record in measuring results, as evidenced recently by the gun registry, and the GST audit.

A Clear Vision for Environmental Assessment:

Beyond C-9 emphasizes that the focus on process must translate into results on the ground. (pg 10) We agree that process must translate into results. However, this is a matter best taken up at the seven-year review of CEAA, not just following a review of the legislation.

<u>Effective Enforcement of Environmental Responsibilities</u>:

Beyond C-9 calls for the creation of an arms-length agency that will establish a permit system and regulate mitigation measures. We are concerned that such an agency represents little more than just another level of bureaucracy. Until it has been clearly demonstrated that such an agency would not just add expense, this measure is premature.

<u>Use of Environmental Assessment as a Constructive Tool to Improve Projects</u>:

We support the Report's recommendation to use CEAA as a constructive tool to improve the sustainability of a project, and avoid cost overruns in future. However, prior to tabling in the House, the relevant recommendation was inappropriately amended to remove the promotion of cost reduction. Part of turning CEAA into a constructive tool should include focusing on costs to proponents.

<u>Public Review of Projects of Canada-Wide Importance</u>:

Beyond C-9's attempts in s.4.4 to apply CEAA to areas of purely provincial jurisdiction is completely unconstitutional. The use of a loaded term such as "Canada Wide Importance" seems more designed to access areas outside the scope of CEAA, than to ensure proper review mechanisms are employed.

Attempts to create automatic panel review or joint panel review on projects outside the federal purview are a subversion of the historic responsibilities and divisions of power under the Constitution Acts of 1867 and 1982. Section 92A(1) of the 1867 Constitution (BNA) Act reads:

> *In each province, the legislature may exclusively make laws in relation to:*
>
> *(a) Exploration for non-renewable natural resources in the province.*
>
> *(b) Development,* ***conservation, and management*** *of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and*
>
> *(c) Development,* ***conservation and management*** *of sites and facilities in the province for the generation and production of electrical energy.*

The proposals in *<u>Beyond C-9</u>* exceed federal authority into provincial jurisdiction. Further, they create unnecessary duplication of government.

Assessment of Cumulative Environmental Effects:

Beyond C-9 expresses concern that multiple but separate projects can have cumulative effects not covered by each single EA. It proposes to link up with or fold into other levels of government, when a trigger is met, and to do regional assessments of cumulative effects. While the Official Opposition supports reducing duplication, we are concerned that these measures could allow federal authority to interfere with provincial or local environmental assessment.

Achieving Federal Environmental Commitments through EA:

Beyond C-9 seeks to link Canada's international obligations, like the Kyoto Protocol to our domestic EA laws, and uses the Athabasca Oil Sands greenhouse gas issues as an example. It also suggest the pushing of a 'conservation first' agenda (pg 21-22). This is wholly out of scope of the CEAA and should remain so.

The balance that exists now in CEAA and C-9's amendments to it are appropriate and need to be given an opportunity to work. Again, conservation is an important goal, but *Beyond C-9*'s inflammatory, 'conservation first' language could result in an unreasonable bias against any new development

Promotion of Meaningful Public Participation:

The Official Opposition agrees that stronger mechanisms are required for public consultation. However, Beyond C-9 places inordinate focus on panel reviews as the tool to accomplish this. This is simply too narrow a perspective. Public participation has been enhanced through the amendments in C-9. While more can always be done, panel reviews should be initiated where a projects scope warrants, not simply to enhance public input.

Incorporation of Aboriginal Perspectives:

During committee, the Alliance argued for the inclusion of local land use authorities in the same way as was proposed for First Nations. Any proposed changes to the Act should reflect the need for equal treatment of other local communities in Canada on the subject of environmental assessment. This discussion has been ignored in *Beyond C-9.*

Improvement of Strategic Environmental Assessment:

The Official Opposition supports improvements to Strategic Environmental Assessment, provided these improvements are not reflective of the abuse of federal power so evident in other areas of *Beyond C-9*.

Conclusions

C-9 represents small but real steps toward cooperation between industry and environmental groups. It also takes significant steps to ensure public involvement in this process and to reduce litigation and lack of trust from all sides. As detailed earlier, it is far from perfect. Nevertheless, it is a positive step that allows a second review in seven years' time.

By contrast, the Summary Report is biased, one sided and completely contrary to the spirit of cooperation built at the Committee level.

Environmental organizations, government officials, industry representatives and individual Canadians all provided valuable testimony on the subject of environmental assessment. Despite this, not a single industry representative is quoted in *Beyond C-9*.

Instead, *Beyond C-9* is a report that is out of scope, unbalanced and advocates obstruction of the Constitution of Canada. Although it has some proposals and observations that merit further review, and even (in some cases) support, it is fundamentally flawed and wholly lacking any spirit of consensus — either among committee members, or among the various presenters committee heard during the review of C-9.

On these grounds, the Official Opposition strongly suggests the government reject *Beyond C-9* as ill-timed, out of scope and excessively biased.

Recommendations:

1. **THE OFFICIAL OPPOSITION RECOMMENDS THAT WITHIN 12 MONTHS FOLLOWING THE PASSAGE OF BILL C-9 INTO LAW, THAT THE GOVERNMENT PROVIDE A LIST OF CROWN CORPORATIONS THAT REQUIRE SPECIAL EXEMPTION FROM FEDERAL ENVIRONMENTAL ASSESSMENT REGULATORY MEASURES, WITH ATTENDANT REASONS WHY SPECIAL EXEMPTIONS ARE REQUIRED.**

1.1 **THE OFFICIAL OPPOSITION FURTHER RECOMMENDS THAT ANY CROWN CORPORATION NOT SO NAMED BE GOVERNED BY STANDARD FEDERAL ENVIRONMENTAL ASSESSMENT REGULATIONS.**

2. **THE OFFICIAL OPPOSITION RECOMMENDS THAT THE SEVEN YEAR REVIEW OF CEAA PAY PARTICULAR ATTENTION TO THE USE OF MINISTERIAL DISCRETION UNDER S.23(2) OF THE ACT, AND DETERMINE WHETHER SUCH DISCRETIONARY POWER IS NECESSARY TO A FAIR AND EFFICIENT ENVIRONMENTAL ASSESSMENT PROCESS.**

3. **THE OFFICIAL OPPOSITION RECOMMENDS THAT THE SEVEN YEAR REVIEW OF CEAA PAY PARTICULAR ATTENTION TO THE ABILITY OF LOCAL LAND USE AUTHORITIES TO HAVE INPUT INTO ENVIRONMENTAL ASSESSMENT DECISIONS DIRECTLY AFFECTING THEIR JURISDICTIONS.**

Respectfully submitted,

Gary Lunn, MP
Saanich—Gulf Islands

Dissenting opinion of the Bloc Québécois

to the report of the Standing Committee
on Environment
and Sustainable Development:

"BEYOND BILL C-9: TOWARD A NEW VISION FOR ENVIRONMENTAL ASSESSMENT"

Quebec has always rejected any process pursuant to which the federal government would decide whether or not to approve projects with a potential environmental impact.

On February 28, 1992, the Quebec Minister of Environment wrote a letter to the federal Minister of Environment of the day, stating his opposition to proposed federal environmental assessment legislation. In this letter, the Quebec Minister stated, "[TRANSLATION] We believe that the existing provisions of the proposed legislation are far from adequate in terms of eliminating all possible duplication and paving the way for concrete agreements on the terms and conditions of our respective procedures."

In fact, in 1992, the Quebec National Assembly passed a unanimous resolution opposing the federal government approach, which constitutes a direct interference into Quebec's jurisdiction. The motion read as follows: "That the National Assembly strongly disapproves of the federal government bill, an act to establish a federal environmental assessment process, because it is contrary to the higher interests of Quebec, and that the National Assembly opposes its passage by the federal Parliament." Since that time, the government of Quebec has not taken part in any discussion on this question.

More recently, the Quebec Liberals promised that, if elected — which was the case — they would conclude an agreement with the federal government, as quickly as possible, to harmonize and, in fact, delegate responsibility for the environmental assessment process to province of Quebec.

In 2001, federal mismanagement of the hydroelectric plant project on the Toulnoustouc River delayed the project, which was of significant importance to the region, by several months. In June 2001, following an environmental assessment, public consultations in Baie-Comeau and Betsiamites, 13 public hearings and the participation of some 650 individuals in the work of the Commission, the Bureau d'audiences publiques sur l'environnement (BAPE) approved this extensive project. The hydroelectric plant was expected to generate up to 800 jobs a year at the peak of construction, as well as economic benefits of approximately $1.2 million a year. However, after waiting for the provincial public consultations to end, the federal Department of Environment decided to implement its own assessment process, thus duplicating the analysis already carried out by Quebec.

Quebec wants all projects in its territory to be subjected to its own environmental assessment process carried out by the Bureau d'audiences publiques sur l'environnement (BAPE), regardless of whether there is federal involvement in the project.

This provincial process:

- is more transparent in terms of public participation;
- is independent, compared with the federal government's self-assessment philosophy;
- excludes fewer projects at the outset and therefore provides broader environmental protection;
- is less complicated than the federal process;
- is more homogeneous, given that it is managed by a single entity rather than several federal departments; and
- has clearly established deadlines, compared with the federal process, which never provides very precise timeframes.

The Standing Committee on Environment and Sustainable Development has proposed a new vision for environmental assessment. Fundamentally, however, it continues to reject the fact that environmental assessment of projects carried out in Quebec falls under the province's exclusive jurisdiction. This failure to recognize the provincial environmental assessment process denies legitimate claims of Quebec's interests in this area.

Although the Environmental Quality Act already exempts the Cree people from the federal environmental assessment process pursuant to the provisions of the James Bay and Northern Quebec Agreement, which already provides for environmental assessments, the Committee refuses to follow suit. In this regard, we support the claim of the Grand Council of the Cree that the Cree have special status under section 22 of the JBNQA.

In closing, it is the right and duty of Quebec to evaluate the environmental impact of projects in its territory. All duplication of effort burdens the assessment structures and wastes resources that could be used more effectively to better serve the environment.

* * *

DISSENTING OPINION ON BILL C-9

Joe Comartin, MP (Windsor—St. Clair)

Background

Bill C-9 and its precursor, Bill C-19 came about as a result of the requirements of the mandatory statutory review requirements set out in the *Canadian Environmental Assessment Act* (CEAA). CEAA or C-13 was proclaimed in 1992 and came into force in Jan 1995. Section 72 of the current Act required that the Minister undertake a comprehensive review of the provisions and operation of the Act five years after its coming into force. It also required that within one year after the review, the Minister submit a report on the review to Parliament, including a statement of any recommended changes. Discussions and consultations took place between, December 1999 and March 2000 and Bill C-19, the precursor to C-9, was tabled March 20, 2001.

At the outset the review was fundamentally flawed. The Minister's report failed to address significant deficiencies revealed over the five year history of CEAA. Although participants indicated some progress in improving environmental planning, there remained significant deficiencies in a variety of areas including sustainability, regional planning and policy coordination, alternative development options, traditional land use and aboriginal participation, devolution to other jurisdictions and perhaps most significantly the lack of practical enforcement measures.

New Democrats had reservations about the bill as it was introduced because it did not adequately address these and other severe problems associated with the Act. Our initial opposition was based on the assertion that the bill failed to address three principal criteria:

- The current CEAA did not go far enough to protect our environment and the changes proposed in C-9 would further weaken the legislation.

- C-9 attempted to streamline and speed up the environmental assessment and review process seemingly to the benefit of developers and industry instead of protecting the environment and the public.

- The bill did not substantively address the measures needed to strengthen and improve safeguards to protect the environment.

During debate of the bill and throughout Committee hearings we raised these and other concerns over the lack of effectiveness, transparency and efficiency in the EA process.

After reviewing the legislation and in consultation with a variety of environmental, aboriginal and legal experts, the NDP submitted more than 50 amendments to bill C-9. These amendments attempted to address some of the identified shortcomings of the Act. While there was some success in getting several amendments passed, many more were defeated. Although we had initial reservations about the bill, throughout the course of the hearings we worked with stakeholders in an attempt to improve what we felt was a very limited piece of legislation.

In introducing the bill the Minister's stated three goals for renewing the federal environmental assessment process, namely to; provide a greater measure of certainty, predictability and timeliness to all participants in the process; enhance the quality of assessments; and ensure more meaningful public participation.

Although the bill and the amendments partially address some of the concerns relating to the efficiency of the process it is not clear how the effectiveness or transparency of the EA process will be improved through C-9.

Many groups and individuals commented on the need to review the entire environmental assessment (EA) process. In fact, the Canadian Environmental Law Association in its submission to the Standing Committee on Environment and Sustainable Development commented on the need for review of the entire EA process and not simply limit the scope to amendments made by C-9; "in its current form, CEAA will continue to be applied to fewer projects, with little on no opportunity for meaningful public involvement"[1]

Committee Report

While there are some recommendations and issues within the report that we support in principle, we do not endorse the complete document as it fails to adequately address the concerns New Democrats clearly laid out.

Unfortunately, the final report has been "watered down" over the course of numerous revisions. It appears that many of the concessions made during the drafting of the report were aimed at appeasing the Privy Council and the Prime Ministers Office and not at forcefully addressing the inadequacies of the environmental assessment process. We maintain that the changes proposed in the bill and report will move environmental assessment towards the "lowest common denominator".

[1] Submission of the Canadian Environmental Law Association on Bill C-19: *An Act to Amend the Canadian Environmental Assessment Act*. Jan 2002.

It is also regrettable that the report, which contains some strong wording in the text lacks similarly forceful wording in its recommendations. Additionally, the recommendations are just that, recommendations and there is nothing compelling the government to act upon them.

As indicated earlier one of the NDP's principal concerns about the bill and amendments was with the "streamlining" or harmonization of EA process. Our concerns about harmonization seem to have been justified as the report includes section 1.3 which cites a provincial and federal harmonization agreement as an example of addressing "the issues of cooperation, uncertainty and duplication of effort"

In fact, when the NDP introduced amendments to create greater certainty and less duplication of effort they were defeated by the government majority on the Committee.

Section 1.5 states that: "the central question is whether federal EA is making a significant contribution to sustainable development and being used to make decisions that benefit the environment. If the answer to this question is no, then changing the EA process must be given the highest priority."

The Committee heard considerable evidence to suggest that federal EA is indeed not "making a significant contribution to sustainable development". However, the report contains no meaningful recommendations for immediate changes to the EA process or for ensuring that changing the EA process be given the "highest priority" in subsequent reviews of CEAA.

Another example of where we dissent from the findings of the report is in section 2.3 that states that, "the Committee felt that the goals of Bill C-9 were laudable, and that the bill should improve CEAA and federal EA as a whole."

We remain unconvinced that the bill will make meaningful improvements to the stated objectives of the EA process. In fact the bill does not even adequately address the three goals outlined by the Minister when it was first introduced.

Still another case where we disagree with the report is in section 2.8 that states, "This report examines areas where the current federal approach has not succeeded, sets out a number of important challenges that remain to be addressed, and provides recommendations on what should be done. The report deals with the basic questions. In short, how can the federal EA process be improved to better meet the goals of sustainable development?"

The report, however, does not deal with the entire EA process and meeting the goals of sustainable development. Nothing in the report or the bill provides consequential reassurances that deficiencies within CEAA and the environmental assessment process will be remedied.

Throughout the examination of C-9 the Committee also heard witnesses discuss problems with “self-assessments”, the failure of the regulatory authority (RA) to trigger an EA in a timely fashion, and the lack of meaningful, timely public participation. These problems are not adequately addressed in the bill nor in the recommendations contained in the report. As well, the report also lacks meaningful recommendations requiring enforcement or oversight mechanisms to ensure that federal authorities comply with the Act.

These are just some illustrations of how the report and bill fail to deal with the New Democrats’ stated concerns.

Recommendations

It is disappointing that so much time and hard work has been dedicated to a meagre piece of legislation. The Committee heard from numerous witnesses on the need to simplify the process and the Act. In the final analysis C-9 does little to meet these objectives and Canadians are left with a complex and inaccessible piece of legislation. Given the shortcomings of the Act and the amending legislation, the NDP recommends that an entirely new *Environmental Assessment Act* be introduced — an Act that would create an environmental assessment process that is succinct and straightforward while providing for proper government transparency and meaningful public participation.

From the outset and throughout the process, the government has maintained that the existing CEAA is the only choice available for Canada. This is simply not the case. Other options have been presented and several other pieces of legislation have been suggested. We have presented one such model EA (Appendix A) to provide an example of what can be enacted. The model legislation clearly and succinctly addresses six key failings of the current legislation while adhering to a CEAA-like model; (1) proper scope of the project to be assessed; (2) defining what constitutes a “significant adverse environmental effect”; (3) meaningful and timely provision of project information; (4) meaningful and timely public participation; (5) increased use of “streamlined” panel reviews; and 6) penalties for failure to comply with the legislation.

In conclusion, we cannot fully support C-9 or the recommendations of the Report of the Standing Committee on Environment and Sustainable Development. It must be made clear that the NDP supports the goal of improving the environmental assessment process to make it more accountable, more transparent and to strengthen protection for our environment. Therefore it is with regret that because of the inadequacies of CEAA that were not meaningfully addressed in C-9 or in the recommendations of the report we are forced to dissent from the majority of the Committee.

APPENIX A: MODEL — *CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

1. The purpose of this regime is to plan projects so as to avoid or minimize significant adverse effects upon the environment.
2. For this regime:

"Agency" means the Canadian Environmental Assessment Agency;

"assessment" includes the following steps:
(a) scoping the assessment to ensure that all aspects of the project receive assessment for all adverse effects on the environment which may be significant;
(b) describing the existing environment prior to the project;
(c) predicting, consistent with (a) and (b), the adverse effects of the project, and their likelihood;
(d) predicting, consistent with (c), the cumulative adverse effects that are likely to arise from the project in combination with other projects and activities that have occurred, are occurring or are reasonable foreseeable in the future;
(e) determining, consistent with (a), (b), (c) and (d), the significance of predicted effects, without regard to mitigation;
(f) determining, consistent with (e), the significance of predicted effects, including regard to proven mitigation;

"consult" or "consultation" means to provide to the person or organization to be consulted:
(a) notice of a matter to be decided in sufficient form and detail to allow the preparation of views on the matter, consistent with any regulations passed on this topic;
(b) a reasonable period of time to prepare such views;
(c) an opportunity to submit such views; and
(d) fair consideration of submitted views by the Federal government;

"environment" means the components of the Earth and includes:
(a) air, land, and water;
(b) all layers of the atmosphere;
(c) all organic and inorganic matter and living organisms,
(d) the interacting natural systems that include the above components,
(e) social, economic, cultural and heritage features or conditions affecting the lives of individuals or communities;

"Federal government" means the Crown in Right of Canada and includes:
(a) all ministers appointed to the Governor in Council and their departments and agencies, and
(b) Crown corporations and other corporate bodies established in Canada whose board members are appointed by the Crown in Right of Canada or ministers of the Governor in Council;

"project" means a proposed physical work or activity, or a proposed change to an existing physical work or activity, and includes any other proposed physical work or activity which is (i) interdependent in its purpose, function or scale; or (ii) planned or designed in common;

"significant" means, in relation to a project, an adverse effect on the environment that
(a) occurs in more than one jurisdiction, including provincial, territorial and international jurisdictions;
(b) results from a source of emissions that is expected to produce emissions for more than one human generation;
(c) fails to comply with an applicable standard of Canadian domestic law or of any domestic or international agreement executed by the Federal government; or
(d) by regulation is prescribed as significant.

PART ONE: APPLICATION

3. This regime directs that, to the fullest extent possible, there shall be
(a) timely, expert and impartial assessment of any project that, in whole or in part, involves a decision by the Government of Canada, including any decision to propose, fund, provide land for, or approve the project; and
(b) coordination of any required Federal government assessment or decision with other jurisdictions asserting a regulatory power over the project, in whole or in part.
4. Notwithstanding section 3, the Governor in Council may, by regulation, direct that a project or a class of projects
(a) be excluded from assessment on the basis of no potential to cause adverse effects on the environment or
(b) receive modified assessment to the extent necessary to avoid:
(1) duplication with the assessment or process of another jurisdiction; or
(2) conflict with Canada's international relations.
5. (1) Where the whole or part of a project subject to assessment under this Act will or may trigger multiple Federal government decisions, there shall be coordination to ensure that to the fullest extent possible there is one assessment.
(2) Where a project may require a Federal decision and thus assessment under this Act, the Federal government decision-maker shall commence the required assessment as soon as possible to permit the assessment to coincide with the earliest phases of project planning, beginning with pre-feasibility study.

6. For greater certainty:
   (a) where, following assessment under this Act, the proponent proposes a change to a project that was not part of the assessment, the Federal government shall require assessment of this changed project and any decisions necessary to give effect to such assessment under any other Act unless the change is exempt from assessment under this Act;
   (b) where a project is subject to assessment under this Act, no Federal government decision shall be made respecting the project until the completion of any assessment required under this Act.

PART TWO
ASSESSMENT PROCESS

7. Where assessment is required, assessment shall consist of screening, panel review or both.

8. (1) In determining the significance of adverse effects on the environment from a project, every assessment shall use the following categorization for each required effect:
   (a) not significant, without any mitigation;
   (b) not significant, on the basis of identified, proven mitigation;
   (c) significant; or
   (d) uncertain.
   (2) Where an assessment concludes that each potentially significant effect of a project on the environment is not significant, the Federal government decision-maker may, subject to full compliance with this Act, make a decision on the project.
   (3) Where an assessment concludes that at least one assessed effect of the project on the environment is significant or uncertain, the Federal government decision-maker may not make a decision on the project before a panel review is completed.

Screening

9. (1) Screening consists of:
   (i) an assessment process to plan a project to avoid or minimize adverse effects on the environment, whether direct, indirect or cumulative, particularly effects which may be significant;
   (ii) every record required to trace the planning process used for the screening, from the outset of planning through to screening conclusions, including all gathered or produced data, studies and memoranda;
   (iii) a report which documents each step of the screening and sets out the monitoring program designed to measure the predicted effects of the project.
   (2) The screening report shall be no more than 25 pages, unless there are special circumstances.

Panel Review

10. (1) Subject to subsection (2), a panel review shall consist of:
   (i) decisions by the Minister to:
   (a) appoint expert and impartial panel members and a Chair from persons outside government;
   (b) set out appropriate terms of reference for the panel, following careful consideration of the nature of the project, its potential effects, and the potential for alternatives to avoid or lessen potential effects of the project;
   (c) determine the type of review as either
   (1) abridged review: less than 60 days in total;
   (2) standard review: between 60 and 180 days; or
   (3) comprehensive review: between 180 and 365 days,
   unless there are special circumstances requiring more time;
   (ii) consistent with the Minister's decisions, a public process by the panel and administered by the Agency which consists of:
   (a) direction to the proponent on the required assessment of the project and the timeframe for submitting such assessment to the panel;
   (b) as required, direction to Federal government agencies with relevant expertise to prepare and submit additional studies or reports by specified dates;
   (c) public hearings involving sworn evidence to review the submitted assessment and any additional documents received by the panel which are relevant to the project assessment;
   (iii) every record required to trace the hearings process;
   (iv) on the basis of the records, input and evidence before the panel, a hearing report by the panel of no more than 100 pages, which provides its conclusions with reasons on the assessment of the project;
   (2) Where another jurisdiction has an interest in a project, and proposes an alternative public hearings process to assess the project, the Minister may, in consultation with the Agency, authorize a joint process that is consistent with the requirements of this Act to the fullest extent possible.

11. (1) Following completion of a panel review, the assessment shall be forwarded to the Governor in Council to determine a response to the panel review and the approach to Federal government decisions on the project.
   (2) The decision by the Governor in Council shall be consistent with the panel hearing report unless, on the basis of written reasons, the Governor in Council decides to depart from the panel report.

12. Where a project triggering assessment involves more than one decision by the Federal government, all Federal government decision makers shall ensure that their decisions and any conditions of approval are, to the fullest extent possible, consistent with the assessment carried out under this Act and coordinated so that there are not gaps or duplication.

PART THREE
INFORMATION AND PARTICIPATION

13. (1) For any project triggering assessment under this Act:
(a) the Federal government decision-maker triggering assessment shall immediately establish and maintain a registry of all assessment records and a complete index of such records;
(c) any Canadian resident expressing an interest in the project or its assessment may, upon request, obtain public access to any record in the registry, subject to paragraphs (e) and (f);
(d) upon request and agreement to pay reasonable copying and delivery fees, any person entitled to access to assessment records is also entitled to expeditiously receive a copy of any assessment record;
(e) where a person or body that has provided or is subject to a duty to provide a record forming part of an assessment under this Act reasonably believes that the record could not, under any circumstances, be disclosed under the *Access to Information Act*, as amended, the person or body may, at the time of providing the record to the Federal government decision-maker, request that the Agency determine access to such record;
(f) following receipt of a request under paragraph (e) and the applicable record, the Agency shall within 15 days permit the disclosure of the record under this Act, unless it determines that the record could not be disclosed under the *Access to Information Act*, as amended, with concise reasons for any determination.

14. (1) Every Federal government decision-maker triggering assessment under this Act shall, during the assessment and in a timely way, consult on all projects subject to assessment.
(2) The time for consultation shall be extended to cover the full period of delay where, following a request which complies with section 12 of this Act, a person or body does not obtain a record or records which should be on the registry within one week of the request and agreement to pay reasonable fees.

PART FOUR
ADMINISTRATION

15. The Governor in Council may make regulations:
(a) excluding a project or a class of projects from assessment or varying assessment consistent with section 4;
(b) identifying the kinds of investigations or pre-feasibility actions which may be taken by a project proponent in advance of approval under this regime;
(d) designating certain classes of project for an abridged screening and assessment where the projects are small in scale, and have a predictable range of adverse effects and comply with the terms of the regulation;
(e) designating certain classes of project for immediate panel review;
(f) providing a system of electronic registries to supplement existing registries required to be established under this Act;
(g) prescribing the timing, form or content of notices required under this Act, with power to direct the use of different classes of notice for different classes of projects;
(h) prescribing the administration of the Agency, including the form, extent and timely provision of Agency assistance to panels or Agency decisions on access to assessment records;
(i) prescribing, in relation to a project or a class of projects, additional adverse effects on the environment which are significant;
(j) prescribing any other matter required under this regime.

16. The Minister may, in consultation with the Agency, issue:
(a) guidance setting out procedures for different assessments, including
(i) screenings; or
(ii) panel reviews;
(b) any other document assisting the implementation of this Act according to its purpose.

PART FIVE
ENFORCEMENT

17. Any wilful failure by any person or body to comply with any requirement of this Act or legal instrument issued pursuant to this Act is guilty of an offence and on conviction may be subject to
(a) imprisonment for up to six months,
(b) a fine to a maximum of $100,000 for individuals or $1,000,000 for the Federal government or other government or corporate bodies;
(c) a penalty or reduction of Federal government income or benefits equal to the extent of financial gain or time spent resulting from the failure to comply;
(d) any combination of the above.

MINUTES OF PROCEEDINGS

Thursday, May 1, 2003
(*Meeting No. 22*)

The Standing Committee on Environment and Sustainable Development met at 11:10 a.m. this day, in Room 371, West Block, the Chair, Hon. Charles L. Caccia, presiding.

Members of the Committee present: Roy Bailey, Bernard Bigras, Hon. Charles L. Caccia, Joe Comartin, Gary Lunn, Bob Mills, Andy Savoy, Paul Szabo, Alan Tonks.

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas and Tim Williams, analysts.

Pursuant to Standing Order 108(2), consideration of a draft report entitled "Beyond Bill C-9: Toward a New Vision for Environmental Assessment".

Paul Szabo moved, — That the Committee adopt the draft report, as amended, as its 2nd Report to the House and the Report be entitled: "Beyond Bill C-9: Toward a New Vision for Environmental Assessment".

The question being put on the motion, it was agreed to on division.

It was agreed, — That the Chair be authorized to make such editorial and typographical changes as necessary without changing the substance of the Report.

It was agreed, — That, pursuant to Standing Order 108(1)(*a*), the Committee authorize the printing of brief dissenting opinions, to be submitted in the two official languages to the Clerk.

It was agreed, — That the Committee request a government response to the Report pursuant to Standing Order 109.

Paul Szabo moved, — That the Chair be authorized to present the Report to the House.

The question being put on the motion, it was agreed to on division.

At 11:55 a.m., the Committee adjourned to the call of the Chair.

Eugene Morawski
Clerk of the Committee