GUIDE FOR REVIEWING THE ENVIRONMENTAL ASSESSMENT BILL:

ESSENTIAL ELEMENTS OF NEXT GENERATION EA

Environmental assessment (EA) is an essential tool for ensuring that projects like pipelines, mines and dams contribute to lasting and fairly-distributed environmental, social and economic wellbeing. But it is clear that the current *Canadian Environmental Assessment Act, 2012* is not working for nature, communities or the economy. On the campaign trail and in a mandate to a number of Cabinet Ministers, the federal government promised to fix Canada's EA law by introducing new, fair processes that would win back public confidence. After more than 18 months of discussion and review, including strong recommendations by a government-appointed expert panel, the federal government will introduce its EA bill this year.

This brief sets out what to look for in the government's EA bill to ensure that a new EA law promotes environmental, social and economic sustainability, allows the public a meaningful say in decisions that affect them, advances reconciliation with Indigenous peoples, and achieves Canada's climate change and biodiversity conservation obligations. These essential elements are based on the leading edge thinking of experts across the country, the collective recommendations of its authors, and the conclusions of the expert panel appointed to review Canada's EA processes and which solicited the views of hundreds of concerned Canadians on how to fix EA.[1]

In summary, the new law should:

> **Achieve sustainability:** The law should do more than avoid or mitigate adverse effects. It should help us choose the best options for our long-term social, economic and ecological wellbeing. To do that, it must contain a clear sustainability purpose along with rules and criteria for how decisions are made.

[1] In particular, the essential elements are based on:

- Anna Johnston, *Federal Environmental Assessment Reform Summit Proceedings* (West Coast Environmental Law: 2016): https://www.wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf.
- Environmental Planning and Assessment Caucus, Achieving a Next Generation of Environmental Assessment: Submission to the Expert Review of Federal Environmental Assessment Processes (14 December 2016): http://rcen.ca/sites/default/files/epa_caucus_submission_to_expert_panel_2016-12-14.pdf.
- Lisa Gue *et al*, *Getting it Right: Strong Laws for Healthy Communities and a Resilient Environment* (2017): https://www.wcel.org/sites/default/files/publications/2017-11-gettingitright-envlawsbriefingnote_final.pdf.
- Expert Panel, *Building Common Ground: A New Vision for Impact Assessment in Canada* (2017), online: https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf.

Emphasize use of regional and strategic assessments: EA should go beyond a project-by-project approach and examine whole regions and government policies. That way, individual projects can be assessed based on a strategic and informed view of the long term needs of people and the environment, while avoiding undue burdens on proponents.

Take cumulative effects seriously: The law should require a hard look at historic, current and future impacts and identify limits that ensure a healthy environment.

Collaborate and harmonize: The law should require the federal government to collaborate with willing provincial and Indigenous governments to avoid duplication and keep the key players at the table, from the earliest stages through decision making and follow-up.

Co-govern with Indigenous Nations: Reconciliation should be a stated purpose of the law, which should further Canada's commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Achieve Canada's climate goals: The law should mandate assessment of all proposals' climate implications and set out clear requirements and guidance for considering climate in order to ensure Canada meets its international goals and obligations.

Be credible and transparent: Canada needs a single, independent assessment authority to ensure that all EAs are conducted according to consistent standards. Regulators, such as the NEB, CNSC or offshore petroleum boards, should not lead environmental assessments, and decisions of the Minister should be subject to appeal.

Enable meaningful participation for the people: The public should be involved at the earliest stages of an assessment, be part of designing the process, and have access to funding. Participation should have the ability to affect decisions: comment periods and public hearings are not enough.

Provide access to information: All assessment and follow-up information should be made permanently available on an open, accessible and searchable database.

Ensure ongoing sustainability: The legislation should mandate follow-up, monitoring, compliance and enforcement measures in order to ensure sustainability after the assessment.

Identify the best option, including "no": Assessments should evaluate the reasonable alternatives before selecting or approving proposed projects. Not approving a project should always be on the table.

Emphasize learning: Assessments should learn from previous cases, as well as from monitoring and follow-up, in order to continuously improve processes and decisions.

Essential Elements of a Next Generation EA Bill	Rationale
I. Sustainability as the core objective	
1. Purpose provision stating that sustainability and meeting Canada's international commitments, including those on climate change and biodiversity, are core purposes of the Act.	Sustainability has long been a main purpose of environmental assessment in Canada, and a purpose provision is an important way of maintaining and achieving that goal.
2. Sustainability test requiring the decision-maker to select the option that makes the greatest, fairly-distributed contribution to sustainability.	A substantive sustainability test is required to operationalize sustainability goals.
3. Provisions establishing sustainability-based decision-making criteria and rules to ensure decisions meet the sustainability test and avoid unwanted trade-offs.	Decision criteria that emphasize ecological, social, cultural and health benefits, and rules defining unacceptable trade-offs (such as crossing an ecological limit), are necessary to ensure decisions meet sustainability purposes and the test.
4. Provision enabling regulations setting out detailed decision criteria and rules.	Detailed criteria and rules can assist proponents, decision-makers and the public, ensure consistency and credibility, enhance transparency and accountability, and help achieve sustainability objectives.
5. Factors to consider include environmental, social, health, cultural, gender and economic factors.	Sustainability means lasting social, economic, cultural, health and ecological wellbeing.
6. Effects to consider include direct, indirect, lifetime and lifecycle, inter and intragenerational, cumulative and interactive, positive and adverse effects and their distribution.	Understanding the full range of effects and their implications is crucial to making well-informed decisions that work for the environment, communities and the economy.

7. Legislated project EA triggers, including of: a. Projects identified in a project list, b. Projects with climate implications, c. Projects on federal lands, that have a federal proponent, or that receive federal funds, and d. Projects requiring environmental permits, e.g., under the *Fisheries Act*, *Species at Risk Act* and *Navigation Protection Act*.	The most important effects are cumulative effects. It is important to ensure that a broad range of undertakings within federal jurisdiction are assessed to avoid or mitigate unwanted effects, and encourage and heighten positive ones.
8. Provisions establishing different assessment streams suitable to the size and nature of undertakings, the potential magnitude of effects, and level of public or Indigenous interest or concern.	Different assessment streams recognize that not all projects and effects are equal, and help achieve the dual goals of rigour and efficiency.
9. Requirement that all federally-regulated undertakings be registered on a central federal database.	A registry of all federally-regulated undertakings would help identify potential sources of cumulative effects, ease the burden on proponents conducting cumulative effects assessments, and help identify project types or regions that should be subject to EA.
II. Integrated, tiered assessments starting at the strategic and regional levels	
10. Establishment of a technical advisory committee to, among other things, recommend when to conduct regional (REA) and strategic (SEA) assessments, help determine the scope of assessments, and provide other scientific and technical advice.	In addition to an interest-based committee, a technical advisory committee could provide useful technical and regulatory guidance, including identifying regions and policy gaps in need of REA or SEA.
11. Legislated "triggers" requiring a Ministerial decision as to whether an REA or SEA must go ahead, including: a. Where a development-inducing project is proposed in a relatively undisturbed area, b. When requested by an Indigenous authority, provincial or territorial government, or the public, and c. When recommended by the technical advisory committee.	Strategic and regional assessments are crucial for addressing cumulative effects and big policy issues that cannot be addressed effectively and efficiently by project level assessments alone. Without a legislated trigger for decision, SEA and REA will remain aspirational, unachieved goals. A trigger that requires a Ministerial response retains federal discretion while assisting in the identification of priority regions and policy gaps in need of assessment, and encouraging designation of regions and policy gaps.

12. Firm legislated trigger for SEAs of all federal policies, plans and programs currently subject to SEA under the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*	Numerous reports by the Commissioner of the Environment and Sustainable Development have shown that the *Cabinet Directive* is not being followed. SEA requirements for federal policies, plans and programs should be entrenched in legislation.
13. Basic process requirements for REA and SEA (e.g., early and meaningful public participation, transparent determination of scope and alternatives, and mandatory reasons for decision based on the legislated criteria).	Basic process requirements are important to ensure that REAs and SEAs are conducted according to best practices, gain public credibility, and achieve the greatest sustainability outcomes.
14. Requirement to periodically update REAs.	REAs go out of date as landscapes and stressors change with time. Updating REAs helps maintain their relevance.
15. Provision requiring project EAs to be consistent with the outcomes of SEAs and REAs.	The findings of SEA and REA can give authoritative guidance for project planning and assessment, help avoid project-stage conflicts, and other benefits. If REA and SEA merely "inform" project assessments, outcomes may be ignored.
16. Requirement that REAs and SEAs identify alternative development scenarios, the preferred scenario, pathways to the desired goals, and implications for individual projects.	To provide clear and authoritative guidance, REAs and SEAs cannot be mere information-gathering exercises; they should also help identify desired development and ecological goals, and how to achieve those goals.
17. A provision establishing a fund to finance federal engagement in REAs and SEAs.	REAs and SEAs require resources. A legislated fund would encourage government to ensure sufficient resources to conduct REAs and SEAs as needed.
III. Cumulative effects done regionally	
18. Requirement that cumulative effects assessment include historic, current and reasonably foreseeable future multiple and interactive stressors.	Currently, assessment (such as in the case of the Site C dam) can ignore historic cumulative impacts that have had substantial impacts on the local environment. Without a pre-industrial baseline and an explicit link to project-level decision making, cumulative effects assessments will fail.
19. Requirement that REAs identify ecological and community limits.	Staying within ecological limits is critical to ensuring the maintenance of ecosystem health.

IV. Collaboration and harmonization	
20. Requirement that the federal authority collaborate with willing provincial and Indigenous governments in all levels of assessment.	Multijurisdictional cooperation avoids duplication while ensuring that all necessary decision-makers are at the table, identifying issues, information needs and relevant laws, standards and principles.
21. Provision enabling entering into cooperation agreements with provincial and Indigenous jurisdictions based on upward harmonization principles.	Cooperation agreements help pave the way to coordinated assessments.
22. Provisions requiring the assessment authority to lead an assessment planning phase in all levels of assessment, and to collaborate with relevant jurisdictions in this stage.	A mandatory, government-led assessment planning phase will help facilitate coordination. Coordination in the design stages facilitates nation-to-nation decision-making and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
23. Requirement that collaboration occur to the highest standard of assessment among the jurisdictions.	Harmonization should occur to the highest standards of assessment to ensure that EA contributes as much as possible to meeting sustainability objectives.
24. Provision(s) setting out minimum standards of harmonized assessments, including sustainability, meaningful public participation, and precaution.	Minimum standards in legislation will provide direction to the exercise of harmonizing to the highest standard.
V. Co-governance with Indigenous Nations	
25. Provision enabling the establishment of regional co-governance boards.	Regional co-governance boards can be useful in implementing UNDRIP, conducting REAs and providing ongoing regional management.
26. Purpose provision stating reconciliation with Indigenous peoples is a purpose of the Act.	Reconciliation should be an objective of all federal decisions.
27. Requirement that EA processes and decisions uphold Indigenous jurisdiction, law and rights in accordance with the UNDRIP.	Enshrining UNDRIP standards in EA law will assist with fulfilling Canada's commitment to UNDRIP implementation.

28. Provision(s) recognizing Indigenous ownership of Indigenous knowledge, requiring respectful consideration of Indigenous knowledge, and allowing for the maintenance of confidentiality of Indigenous knowledge where requested, in accordance with Indigenous law.	Indigenous knowledge plays a critical role in EA. The law should set out principles, protections and assurances that Indigenous knowledge will be respected, considered and, where required, kept confidential.
VI. Climate assessments to achieve Canada's climate goals	
29. Purpose provision stating that a purpose of the Act is to contribute to maintaining a healthy and stable climate for future generations.	EA is a key tool for ensuring that Canada meets its climate commitments, and that goal should be explicitly articulated as a purpose of the Act.
30. Requirement to consider all undertakings that may affect Canada's chances of meeting international climate change mitigation commitments, including projects that have direct or indirect lifetime implications for GHG emissions or GHG sinks, and projects that may hinder or delay the transition to a clean economy.	In order to ensure that Canada meets its international climate obligations, it is imperative that all projects and strategic undertakings with climate implications are assessed to ensure their consistency with GHG reductions goals.
31. Factors to consider should include implications for meeting Canada's international climate change mitigation commitments over the life of the project or other undertaking.	The legislation should set out clear requirements and guidance for considering climate, in order to help ensure Canada meets its international goals and obligations.
32. Provision prohibiting the approval of projects that would foreseeably hinder Canada's ability to meet international climate commitments.	A rule against approval of projects that would impede Canada's climate obligations will provide clarity and help ensure climate goals are met.
33. Factors to consider should include direct and reasonably foreseeable indirect lifecycle emissions over the lifetime of a project.	The full spectrum of climate implications must be assessed in order to help avoid catastrophic climate change. In the context of fossil fuel projects, this includes upstream, direct and downstream sources of greenhouse gas emissions associated with projects.
34. Provision enabling regulations specifying or clarifying climate-related requirements.	It is anticipated that the understanding of what is needed for Canada to meet its international climate obligations will evolve over time, and the legislation should reflect the flexibility required to ensure that assessments adapt to evolving information.

35. Provision requiring regular review of climate regulations to ensure they reflect best available information and practices.	Climate science and policy is evolving, and regulations should likewise evolve.
VII. Credibility, transparency and accountability throughout	
36. Assessment authority is an independent, impartial body appointed with the objective of achieving sustainability goals – regulators like the National Energy Board are not established as sole or joint responsible authorities.	A single assessment authority will best ensure that all EAs are conducted according to consistent standards, that EA processes and outcomes meet EA objectives, and that the public trusts assessments and decisions.
37. Provisions make clear that the assessment authority, not a regulator, leads the assessment and that EA processes are distinct from regulatory processes.	EA is a planning tool, not a regulatory tool. Attempts to merge EA and regulatory processes have failed, resulting in weaker, restricted assessments and compromised credibility. Regulatory processes should be kept distinct from planning-based assessment processes.
38. Provision designating the Minister of Environment and Climate Change as the final decision-maker in project assessments.	Decisions made in the "black box" of Cabinet secrecy have contributed greatly to the lack of trust in EA. To help build public trust, legislation should require that the Minister apply decision criteria and rules, and provide detailed reasons for decision.
39. Requirement that decisions be based on best available scientific, community and Indigenous evidence and knowledge, and the precautionary principle.	Decisions should be based on science and Indigenous knowledge, not political considerations.
40. Requirement that the Minister provide detailed reasons for decision, including how s/he applied decision-making criteria and trade-off rules, the scientific and Indigenous evidentiary basis for decisions, and explicit justification of any trade-offs.	Reasons for decision are crucial for public trust, accountability, and achieving sustainability objectives.
41. Right of appeal of process (interim) and final decisions.	Without a right of appeal, it is much more difficult for the public, Indigenous peoples and parties to hold decision-makers to account, and ensure processes are fair and decisions promote sustainability.

42. Establishment of an independent and impartial appeals tribunal to hear appeals.	Tribunals like Ontario's Environmental Review Tribunal provide specialized expertise in the resolution of environmental disputes without the time and expense of resorting to the courts.
VIII. Participation for the people	
43. Requirement to provide meaningful public participation processes at the earliest possible stages, beginning in the assessment planning phase.	Public participation is invaluable in assessments and should allow the public to have a meaningful say. Early engagement allows the public to help design leading-edge, effective processes.
44. Requirement that participation processes are designed according to the key principles of meaningful public participation and are deliberative in orientation.	To be meaningful, public participation must be more than a check-box exercise. Public comment periods and public hearings are not enough – the legislation should require the assessment authority to design deliberative options to suit processes and participant needs.
45. Provision requiring public engagement in the design of participation processes in the assessment planning phase.	Consulting the public on participation process design helps ensure processes work best for communities and includes the meaningful consideration of public knowledge, aspirations and concerns.
46. Requirement to provide robust participant funding to support participation.	Funding is essential to enabling meaningful participation, including funding to retain experts.
47. Requirement to show how process and final decisions have considered public input.	The public should be able to see how participation has informed decisions.
48. Lack of any restriction on who is allowed to participate in EA processes, and in particular, the repeal of the "directly affected" provisions in *CEAA 2012*.	All members of the public should be allowed and enabled to participate in assessment processes, in the interest of democracy, fostering learning, and optimizing results.
IX. Transparent and accessible information flows	
49. Requirement that all assessment information be made permanently available on an open, accessible and searchable database.	Understandable and accessible information is a cornerstone of next-generation assessment.

50. Provision(s) regarding peer review of proponent information by government and independent experts.	Peer review by government and independent experts would provide rigour, oversight and public confidence in information.
X. Ensuring sustainability after the assessment	
51. Requirements respecting follow-up and monitoring, including that follow-up and monitoring conditions be attached to approvals.	Follow-up, monitoring, compliance and enforcement should be robust, well defined and mandatory, in order to ensure sustainability after the assessment.
52. Provision respecting clear identification of follow-up and monitoring responsibilities and resources in assessment decisions.	Identification helps achieve monitoring and follow-up objectives.
53. Provision stating that adaptive management should not be relied upon where there is risk of irreversible or irreparable harms.	Adaptive management has been greatly misused in EA and cannot be a replacement for application of the precautionary principle. Legislation should specify its appropriate uses.
54. Requirement that follow-up information be made publicly available.	Currently, follow-up information is not made public. Without that information, the public cannot assess whether and how follow-up is occurring.
55. Legal mechanisms for public and Indigenous involvement in follow-up and enforcement, including ability to establish monitoring and follow-up committees.	Public and Indigenous involvement in follow-up and monitoring has successfully occurred in EAs in Canada. It draws on local knowledge, fosters industry-community relationships, and contributes to learning.
56. Provisions allowing revocation of authorizations in extreme cases where adverse effects are greater than predicted, and allowing conditions of approval to be adjusted.	There should be legislated means of suspending, cancelling and decommissioning projects that are unacceptably harming the environment or communities and for adjusting conditions of approval where unexpected changes warrant.
XI. Consideration of the best option from among a range of alternatives	
57. Provision requiring all EAs to assess alternative means of designing and undertaking the project.	Consideration of alternatives is an essential element of selecting the best option.
58. Requirement that reasonable alternatives to the proposed undertaking be identified in the early planning stage.	Assessment process questions such as alternatives to consider should be identified in the earliest possible stages, before strategic decisions have been made.

59. Provision requiring project EA to assess the "no project" alternative and any other reasonable alternatives.	The "no" should always be on the table, as should any reasonable alternatives to the project that exist.
XII. Emphasis on learning	
60. Purpose provision stating that fostering learning is a purpose of the Act.	Fostering learning within and among assessments is a central tenet of next-generation EA.
61. Requirement that EAs consider relevant monitoring and follow-up data and lessons from adaptive management.	Assessments should learn from previous assessments, monitoring and follow-up, in order to continuously improve processes and decisions.

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